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OF

THE SUPREME COURT

MARCH 26 THROUGH MAY 24, 2019

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 587 (Pp. 1–390; 901–1024)
UNITED STATES REPORTS
Part 1

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.
NEIL M. GORSUCH, ASSOCIATE JUSTICE.
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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 October 19, 2018, viz.:

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

For the First Circuit, STEPHEN BREYER, Associate Justice.

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

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

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

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

For the Sixth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Seventh Circuit, BRETT M. KAVANAUGH, Associate Justice.

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

For the Ninth Circuit, ELENA KAGAN, Associate Justice.

For the Tenth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

October 19, 2018.

(For next previous allotment, see 586 U. S., Pt. 1, p. III.)

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This volume provides the permanent United States Reports citation for all reported cases. Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Although the Table of Cases Reported does not capture orders denying a petition for writ of certiorari, such orders are included chronologically in this volume.

The syllabus in a case constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906).

A list of counsel who argued or filed briefs in a reported case, and who were members of the Court's Bar at the time the case was argued, are included in the United States Reports along with the Court's opinion in the case.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2018

REPUBLIC OF SUDAN *v.* HARRISON ET AL.

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

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

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

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

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

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

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

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

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

Syllabus

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

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

802 F. 3d 399, reversed and remanded.

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

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

Erica L. Ross argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, *Sharon Swingle*, *Lewis S. Yelin*, and *Jennifer G. Newstead.*

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

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

JUSTICE ALITO delivered the opinion of the Court.

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

I

A

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

II

A

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

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

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

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

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

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

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

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

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

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

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

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

B

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

1

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

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

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

This argument runs up against two well-settled principles of statutory interpretation. First, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security* v. *MacLean*, 574 U. S. 383, 391 (2015). Because Congress included the "reasonably calculated to give actual notice" language only in § 1608(b), and not in § 1608(a), we resist the suggestion to read that language into § 1608(a). Second, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Here, respondents encounter a superfluity problem when they argue that the "addressed and dispatched" clause in § 1608(a)(3) gives effect to the *Mullane* due process standard. They fail to account for the fact that § 1608(b)(3)(B) contains *both* the "addressed and dispatched" and "reasonably calculated to give actual notice" requirements. If respondents were correct that "addressed and dispatched" means "reasonably calculated to give notice," then the phrase "reasonably calculated to give actual notice" in § 1608(b)(3) would be superfluous. Thus, as the dissent agrees, § 1608(a)(3) "does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice." *Post*, at 2 (opinion of THOMAS, J.).

2

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

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

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

3

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

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

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

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

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

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

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

C

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

1

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

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

2

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

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

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

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

III

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

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

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

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

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

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

* * *

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

It is so ordered.

JUSTICE THOMAS, dissenting.

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

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

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

I

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

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

II

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

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

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

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

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

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

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

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

III

A

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

* * *

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

Syllabus

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

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

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

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

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

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

Held:

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

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

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

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

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

872 F. 3d 927, reversed and remanded.

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

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

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

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

JUSTICE KAGAN delivered the opinion of the Court.

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

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

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

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

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

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

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

I

A

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

Section 103(c) provides in full:

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

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

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

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

C

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

enactment, unless and until bought by the Federal Government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

V

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

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

II

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

A

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

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

B

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

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

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

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

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

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

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

C

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

1

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

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

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

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

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

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

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

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

2

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

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

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

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

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

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

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

* * *

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

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

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

Syllabus

LORENZO *v.* SECURITIES AND EXCHANGE COMMISSION

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

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

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

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

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

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

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

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

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

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

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

872 F. 3d 578, affirmed.

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

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

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

JUSTICE BREYER delivered the opinion of the Court.

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

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

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

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

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

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

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

I

A

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

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

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

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

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

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

B

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

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

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

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

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

II

A

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

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

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

B

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

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

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

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

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

C

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

* * *

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

So ordered.

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

APPENDIX

17 CFR § 240.10b–5

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

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

"in connection with the purchase or sale of any security."

15 U. S. C. § 78j

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

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

* * *

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

15 U. S. C. § 77q

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

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

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

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

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

15 U. S. C. § 78t

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

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

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

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

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

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

I

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

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

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

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

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

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

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

II

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

* * *

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

Syllabus

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

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

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

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

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

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

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

880 F. 3d 778, affirmed.

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

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

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

JUSTICE KAGAN delivered the opinion of the Court.

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

And no more is it so today.

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

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

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

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

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

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

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

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

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

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I respectfully dissent.

Syllabus

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

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

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

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

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

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

Held:

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

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

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

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

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

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

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

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

883 F. 3d 1087, affirmed.

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

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

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

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

JUSTICE GORSUCH delivered the opinion of the Court.

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

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

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

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

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

I

A

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

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

B

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

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

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

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

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

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

C

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

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

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

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

D

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

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

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

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

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

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

II

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

III

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

A

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

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

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

*

The judgment of the court of appeals is

Affirmed.

JUSTICE THOMAS, concurring.

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

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

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

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

JUSTICE KAVANAUGH, concurring.

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

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

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

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

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

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

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

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

I

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

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

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

II

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

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

A

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

C

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

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

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

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

III

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

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

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

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

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

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

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

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

* * *

I respectfully dissent.

JUSTICE SOTOMAYOR, dissenting.

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

I

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Syllabus

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

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

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

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

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

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

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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

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

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

Syllabus

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

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

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

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

Held:

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

Syllabus

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

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

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

701 Fed. Appx. 670, reversed and remanded.

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

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

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

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

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

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

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

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

I

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

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

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

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

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

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

II

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

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

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

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

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

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

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

III

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

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

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

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

A

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

* * *

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

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

It is so ordered.

JUSTICE THOMAS, concurring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER, dissenting.

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

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

I

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR, dissenting.

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

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

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

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

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

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

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

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

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

biguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here. See *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 247, 376 P. 3d 506, 514 (2016). The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration. That holding has no basis in the Act—or in any of our decisions relating to it (including the heavily relied-on *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 686 (2010)). Today's opinion is rooted instead in the majority's belief that class arbitration "undermine[s] the central benefits of arbitration itself." *Ante*, at 9. But that policy view—of a piece with the majority's ideas about class litigation—cannot justify displacing generally applicable state law about how to interpret ambiguous contracts. I respectfully dissent.

I

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Syllabus

THACKER ET UX. *v.* TENNESSEE VALLEY AUTHORITY

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

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

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

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

Held:

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

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

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

868 F. 3d 979, reversed and remanded.

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

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

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

JUSTICE KAGAN delivered the opinion of the Court.

Federal law provides that the Tennessee Valley Authority (TVA), a Government-owned corporation supplying electric

power to millions of Americans, "[m]ay sue and be sued in its corporate name." Tennessee Valley Authority Act of 1933 (TVA Act), 48 Stat. 60, 16 U. S. C. § 831c(b). That provision serves to waive sovereign immunity from suit. Today, we consider how far the waiver goes. We reject the view, adopted below and pressed by the Government, that the TVA remains immune from all tort suits arising from its performance of so-called discretionary functions. The TVA's sue-and-be-sued clause is broad and contains no such limit. Under the clause—and consistent with our precedents construing similar ones—the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties. We remand this case for consideration of whether that limited immunity could apply here.

I

Congress created the TVA—a "wholly owned public corporation of the United States"—in the throes of the Great Depression to promote the Tennessee Valley's economic development. *TVA* v. *Hill*, 437 U. S. 153, 157 (1978). In its early decades, the TVA focused on reforesting the countryside, improving farmers' fertilization practices, and building dams on the Tennessee River. See Brief for Respondent 3. The corporation also soon began constructing new power plants for the region. And over the years, as it completed other projects, the TVA devoted more and more of its efforts to producing and selling electric power. Today, the TVA operates around 60 power plants and provides electricity to more than nine million people in seven States. See *id.*, at 3–4. The rates it charges (along with the bonds it issues) bring in over $10 billion in annual revenues, making federal appropriations unnecessary. See *ibid.*; GAO, FY 2018 Financial Report of the United States Government 53 (GAO–19–294R, 2019).

As even that short description may suggest, the TVA is something of a hybrid, combining traditionally governmental functions with typically commercial ones. On the one hand, the TVA possesses powers and responsibilities reserved to sovereign actors. It may, for example, "exercise the right of eminent domain" and "condemn all property" necessary to carry out its goals. 16 U. S. C. §§ 831c(h), (i). Similarly, it may appoint employees as "law enforcement agents" with powers to investigate crimes and make arrests. § 831c–3(a); see § 831c–3(b)(2). But on the other hand, much of what the TVA does could be done—no, *is* done routinely—by non-governmental parties. Just as the TVA produces and sells electricity in its region, privately owned power companies (*e. g.*, Con Edison, Dominion Energy) do so in theirs. As to those commonplace commercial functions, the emphasis in the oft-used label "public corporation" rests heavily on the latter word. *Hill*, 437 U. S., at 157.

In establishing this mixed entity, Congress decided (as it had for similar government businesses) that the TVA could "sue and be sued in its corporate name." § 831c(b); see, *e. g.*, Reconstruction Finance Corporation Act, § 4, 47 Stat. 6; Federal Home Loan Bank Act, § 12, 47 Stat. 735. Without such a clause, the TVA (as an entity of the Federal Government) would have enjoyed sovereign immunity from suit. See *Loeffler* v. *Frank*, 486 U. S. 549, 554 (1988). By instead providing that the TVA could "be sued," Congress waived at least some of the corporation's immunity. (Just how much is the question here.) Slightly more than a decade after creating the TVA, Congress enacted the Federal Tort Claims Act of 1946 (FTCA), 28 U. S. C. §§ 1346(b), 2671 *et seq.*, to waive immunity from tort suits involving agencies across the Government. See § 1346(b)(1) (waiving immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government"). That statute carved out an exception for claims based on a federal employee's performance of a "discretionary function." § 2680(a). But Congress specifically excluded from all the

FTCA's provisions—including the discretionary function exception—"[a]ny claim arising from the activities of the [TVA]." § 2680(*l*).

This case involves such a claim. See App. 22–33 (Complaint). One summer day, TVA employees embarked on work to replace a power line over the Tennessee River. When a cable they were using failed, the power line fell into the water. The TVA informed the Coast Guard, which announced that it was closing part of the river; and the TVA itself positioned two patrol boats near the downed line. But several hours later, just as the TVA workers began to raise the line, petitioner Gary Thacker drove his boat into the area at high speed. The boat and line collided, seriously injuring Thacker and killing a passenger. Thacker sued for negligence, alleging that the TVA had failed to "exercise reasonable care" in "assembl[ing] and install[ing] power lines" and in "warning boaters" like him "of the hazards it created." *Id.*, at 31.

The TVA moved to dismiss the suit, claiming sovereign immunity. The District Court granted the motion. It reasoned that the TVA, no less than other government agencies, is entitled to immunity from any suit based on an employee's exercise of discretionary functions. See 188 F. Supp. 3d 1243, 1245 (ND Ala. 2016). And it thought that the TVA's actions surrounding the boating accident were discretionary because "they involve[d] some judgment and choice." *Ibid.* The Court of Appeals for the Eleventh Circuit affirmed on the same ground. According to the circuit court, the TVA has immunity for discretionary functions even when they are part of the "TVA's commercial, power-generating activities." 868 F. 3d 979, 981 (2017) (*per curiam*). In deciding whether a suit implicates those functions, the court explained that it "use[s] the same test that applies when the government invokes the discretionary-function exception to the [FTCA]." *Id.*, at 982. And that test, the court agreed,

foreclosed Thacker's suit because the challenged actions were "a matter of choice." *Ibid.* (internal quotation marks omitted).

We granted certiorari to decide whether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary function exception, of the kind in the FTCA. 585 U. S. 1057 (2018). We hold it is not.

II

Nothing in the statute establishing the TVA (again, the TVA Act for short) expressly recognizes immunity for discretionary functions. As noted above, that law provides simply that the TVA "[m]ay sue and be sued." 16 U. S. C. § 831c(b); see *supra*, at 221. Such a sue-and-be-sued clause serves to waive sovereign immunity otherwise belonging to an agency of the Federal Government. See *Loeffler*, 486 U. S., at 554. By the TVA Act's terms, that waiver is subject to "[e]xcept[ions]" as "specifically provided in" the statute itself. § 831c. But the TVA Act contains no exceptions relevant to tort claims, let alone one turning on whether the challenged conduct is discretionary.

Nor does the FTCA's exception for discretionary functions apply to the TVA. As described earlier, see *supra*, at 221, the FTCA retained the Federal Government's immunity from tort suits challenging discretionary conduct, even while allowing other tort claims to go forward. See 28 U. S. C. §§ 1346(b), 2680(a); *United States* v. *Gaubert*, 499 U. S. 315, 322–325 (1991) (describing the discretionary function exception's scope). But Congress made clear that the FTCA does "not apply to[ ] [a]ny claim arising from the activities of the [TVA]." § 2680(*l*). That means the FTCA's discretionary function provision has no relevance to this case. Even the Government concedes as much. It acknowledges that the FTCA's discretionary function exception "does not govern [Thacker's] suit." Brief for Respondent 15. Rather, it

says, the TVA Act's sue-and-be-sued clause does so. See *id.*, at 6. And that is the very clause we have just described as containing no express exception for discretionary functions.

But that is not quite the end of the story because in *Federal Housing Administration* v. *Burr*, 309 U. S. 242 (1940), this Court recognized that a sue-and-be-sued clause might contain "implied exceptions." *Id.*, at 245. The Court in that case permitted a suit to proceed against a government entity (providing mortgage insurance) whose organic statute had a sue-and-be-sued clause much like the TVA Act's. And the Court made clear that in green-lighting the suit, it was doing what courts normally should. Sue-and-be-sued clauses, the Court explained, "should be liberally construed." *Ibid.*; see *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994) (similarly calling such clauses "broad"). Those words "in their usual and ordinary sense," the Court noted, "embrace all civil process incident to the commencement or continuance of legal proceedings." *Burr*, 309 U. S., at 245–246. And Congress generally "intend[s] the full consequences of what it sa[ys]"—even if "inconvenient, costly, and inefficient." *Id.*, at 249 (quotation modified). But not quite always, the Court continued. And when not—when Congress meant to use the words "sue and be sued" in a more "narrow sense"—a court should recognize "an implied restriction." *Id.*, at 245. In particular, *Burr* stated, a court should take that route if one of the following circumstances is "clearly shown": either the "type[ ] of suit[ ]" at issue is "not consistent with the statutory or constitutional scheme" or the restriction is "necessary to avoid grave interference with the performance of a governmental function." *Ibid.*

Although the courts below never considered *Burr*, the Government tries to use its framework to defend their decisions. See Brief for Respondent 17–40. According to the Government, we should establish a limit on the TVA's sue-and-be-sued clause—like the one in the FTCA—for all suits challenging discretionary functions. That is for two reasons, tracking *Burr*'s statement of when to recognize an

"implied exception[ ]" to a sue-and-be-sued clause. 309 U. S., at 245. First, the Government argues that allowing those suits would conflict with the "constitutional scheme"—more precisely, with "separation-of-powers principles"—by subjecting the TVA's discretionary conduct to "judicial second-guessing." Brief for Respondent 19, 21 (internal quotation marks omitted). Second, the Government maintains that permitting those suits would necessarily "interfere[ ] with important governmental functions." *Id.*, at 36; see *id.*, at 39–40; Tr. of Oral Arg. 39–41. We disagree.

At the outset, we balk at using *Burr* to provide a government entity excluded from the FTCA with a replica of that statute's discretionary function exception. Congress made a considered decision *not* to apply the FTCA to the TVA (even as Congress applied that legislation to some other public corporations, see 28 U. S. C. § 2679(a)). See *supra*, at 221–222. The Government effectively asks us to negate that legislative choice. Or otherwise put, it asks us to let the FTCA in through the back door, when Congress has locked the front one. We have once before rejected such a maneuver. In *FDIC* v. *Meyer*, a plaintiff brought a constitutional tort claim against a government agency with another broad sue-and-be-sued clause. The agency claimed immunity, stressing that the claim would have fallen outside the FTCA's immunity waiver (which extends only to conventional torts). We dismissed the argument. "In essence," we observed, the "FDIC asks us to engraft" a part of the FTCA "onto [the agency's] sue-and-be-sued clause." 510 U. S., at 480. But that would mean doing what Congress had not. See *id.*, at 483. And so too here, if we were to bestow the FTCA's discretionary function exception on the TVA through the conduit of *Burr*. Indeed, the Government's proposal would make the TVA's tort liability largely coextensive with that of all the agencies the FTCA governs. See Tr. of Oral Arg. 33–34. Far from acting to achieve such parity, Congress did everything possible to avoid it.

In any event, the Government is wrong to think that waiving the TVA's immunity from suits based on discretionary functions would offend the separation of powers. As this Court explained in *Burr*, the scope of immunity that federal corporations enjoy is up to Congress. That body "has full power to endow [such an entity] with the government's immunity from suit." 309 U. S., at 244. And equally, it has full power to "waive [that] immunity" and "subject [the entity] to the judicial process" to whatever extent it wishes. *Ibid.* When Congress takes the latter route—even when it goes so far as to waive the corporation's immunity for discretionary functions—its action raises no separation of powers problems. The right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment. Indeed, the Government itself conceded at oral argument that Congress, when creating a public corporation, may constitutionally waive its "immunity [for] discretionary functions." Tr. of Oral Arg. 37. But once that is acknowledged, the Government's argument from "separation-of-powers principles" collapses. Brief for Respondent 19. Those principles can offer no reason to limit a statutory waiver that even without any emendation complies with the constitutional scheme.

Finally, the Government overreaches when it says that all suits based on the TVA's discretionary conduct will "grave[ly] interfere[ ]" with "governmental function[s]." *Burr*, 309 U. S., at 245. That is so, at the least, because the discretionary acts of hybrid entities like the TVA may be not governmental but commercial in nature. And a suit challenging a commercial act will not "grave[ly]"—or, indeed, at all—interfere with the "governmental functions" *Burr* cared about protecting. The Government contests that point, arguing that this Court has not meant to distinguish between the governmental and the commercial in construing sue-and-be-sued clauses. See Brief for Respondent 39–40. But

both *Burr* and later decisions do so explicitly. *Burr* took as its "premise" that an agency "launched [with such a clause] into the commercial world" and "authorize[d] to engage" in "business transactions with the public" should have the same "amenab[ility] to judicial process [as] a private enterprise under like circumstances." 309 U. S., at 245. *Meyer* also made clear that such an agency "could not escape the liability a private enterprise would face in similar circumstances." 510 U. S., at 482; see *ibid.* ("[T]he liability of a private enterprise [is] a *floor* below which the agency's liability [may] not fall"). And twice the Court held that the liability of the Postal Service (another sue-and-be-sued agency) should be "similar[ ] to [that of] other self-sustaining commercial ventures." *Franchise Tax Bd. of Cal.* v. *Postal Service*, 467 U. S. 512, 525 (1984); see *Loeffler*, 486 U. S., at 556. The point of those decisions, contra the Government, is that (barring special constitutional or statutory issues not present here) suits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's *governmental* activity may run into an implied limit on its sue-and-be-sued clause.

Burr and its progeny thus require a far more refined analysis than the Government offers here. The reasons those decisions give to recognize a restriction on a sue-and-be-sued clause do not justify the wholesale incorporation of the discretionary function exception. As explained above, the "constitutional scheme" has nothing to say about lawsuits challenging a public corporation's discretionary activity—except to leave their fate to Congress. *Burr*, 309 U. S., at 245; see *supra*, at 226. For its part, Congress has not said in enacting sue-and-be-sued clauses that it wants to prohibit all such suits—quite the contrary. And no concern for "governmental functions" can immunize discretionary activities that are commercial in kind. *Burr*, 309 U. S., at 245; see *supra*, at 226. When the TVA or similar body operates in the marketplace as private companies do, it is as liable as they are

for choices and judgments. The possibility of immunity arises only when a suit challenges governmental activities—the kinds of functions private parties typically do not perform. And even then, an entity with a sue-and-be-sued clause may receive immunity only if it is "clearly shown" that prohibiting the "type[ ] of suit[ ]" at issue "is necessary to avoid grave interference" with a governmental function's performance. *Burr*, 309 U. S., at 245. That is a high bar. But it is no higher than appropriate given Congress's enactment of so broad an immunity waiver—which demands, as we have held, a "liberal construction." *Ibid.* (quotation modified).

III

All that remains is to decide this case in accord with what we have said so far. But as we often note at this point, "we are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). In wrongly relying on the discretionary function exception, the courts below never addressed the issues we have found relevant in deciding whether this suit may go forward. Those courts should have the first chance to do so, as guided by the principles set out above and a few last remarks about applying them here.

As described earlier, the TVA sometimes resembles a government actor, sometimes a commercial one. See *supra*, at 221. Consider a few diverse examples. When the TVA exercises the power of eminent domain, taking landowners' property for public purposes, no one would confuse it for a private company. So too when the TVA exercises its law enforcement powers to arrest individuals. But in other operations—and over the years, a growing number—the TVA acts like any other company producing and supplying electric power. It is an accident of history, not a difference in function, that explains why most Tennesseans get their electricity from a public enterprise and most Virginians get theirs from a private one. Whatever their ownership struc-

tures, the two companies do basically the same things to deliver power to customers.

So to determine if the TVA has immunity here, the court on remand must first decide whether the conduct alleged to be negligent is governmental or commercial in nature. For the reasons given above, if the conduct is commercial—the kind of thing any power company might do—the TVA cannot invoke sovereign immunity. In that event, the TVA's sue-and-be-sued clause renders it liable to the same extent as a private party. Only if the conduct at issue is governmental might the court decide that an implied limit on the clause bars the suit. But even assuming governmental activity, the court must find that prohibiting the "type[ ] of suit[ ]" at issue "is necessary to avoid grave interference" with that function's performance. *Burr*, 309 U. S., at 245. Unless it is, Congress's express statement that the TVA may "be sued" continues to demand that this suit go forward.

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

It is so ordered.

Syllabus

FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 17–1299. Argued January 9, 2019—Decided May 13, 2019

Respondent Hyatt sued petitioner Franchise Tax Board of California (Board) in Nevada state court for alleged torts committed during a tax audit. The Nevada Supreme Court rejected the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California law and immunize the Board from liability. The court held instead that general principles of comity entitled the Board only to the same immunity that Nevada law afforded Nevada agencies. This Court affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law. On remand, the Nevada Supreme Court declined to apply a cap on tort liability applicable to Nevada state agencies. This Court reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. The Court was equally divided, however, on whether to overrule *Nevada* v. *Hall*, 440 U. S. 410, which held that the Constitution does not bar suits brought by an individual against a State in the courts of another State. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with Nevada's statutory cap. The Board sought certiorari a third time, raising only the question whether *Nevada* v. *Hall* should be overruled.

Held: *Nevada* v. *Hall* is overruled; States retain their sovereign immunity from private suits brought in courts of other States. Pp. 236–249.

(a) The *Hall* majority held that nothing "implicit in the Constitution" requires States to adhere to the sovereign immunity that prevailed at the time of the founding. 440 U. S., at 417–418, 424–427. The Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.*, at 419. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do. Pp. 236–237.

(b) *Hall*'s determination misreads the historical record and misapprehends the constitutional design created by the Framers. Although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails the States' ability, as sover-

eigns, to decline to recognize each other's immunity in their own courts. Pp. 237–248.

(1) At the time of the founding, it was well settled that States were immune from suit both under the common law and under the law of nations. The States retained these aspects of sovereignty, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U. S. 706, 713. Pp. 237–241.

(2) Article III abrogated certain aspects of the States' traditional immunity by providing a neutral federal forum in which the States agreed to be amenable to suits brought by other States. And in ratifying the Constitution, the States similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. When this Court held in *Chisholm* v. *Georgia*, 2 Dall. 419, that Article III extended the federal judicial power over controversies between a State and citizens of another State, Congress and the States acted swiftly to draft and ratify the Eleventh Amendment, which confirms that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted," *Hans* v. *Louisiana*, 134 U. S. 1, 18. The "natural inference" from the Amendment's speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, *supra*, at 723–724. This view of the States' sovereign immunity accorded with the understanding of the Constitution by its leading advocates, including Hamilton, Madison, and Marshall, when it was ratified. Pp. 241–244.

(3) State sovereign immunity in another State's courts is integral to the structure of the Constitution. The problem with Hyatt's argument—that interstate sovereign immunity exists only as a matter of comity and can be disregarded by the forum State—is that the Constitution affirmatively altered the relationships between the States so that they no longer relate to each other as true foreign sovereigns. Numerous provisions reflect this reality. Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. And Article IV imposes duties on the States not required by international law. The Constitution also reflects alterations to the States' relationships with each other, confirming that they are no longer fully independent nations free to disregard each other's sovereignty. See *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90. Hyatt's argument is precisely the type of "ahistorical literalism" this Court has rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden*, *supra*, at 730. Moreover, his argument proves too much. Many constitutional doctrines not spelled

out in the Constitution are nevertheless implicit in its structure and supported by historical practice, *e. g.*, judicial review, *Marbury* v. *Madison*, 1 Cranch 137, 176–180. Pp. 244–248.

(c) *Stare decisis* is "'not an inexorable command,'" *Pearson* v. *Callahan*, 555 U. S. 223, 233, and is "at its weakest" when interpreting the Constitution, *Agostini* v. *Felton*, 521 U. S. 203, 235. The Court's precedents identify, as relevant here, four factors to consider: the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 918–919. The first three factors support overruling *Hall*. As to the fourth, case-specific reliance interests are not sufficient to persuade this Court to adhere to an incorrect resolution of an important constitutional question. Pp. 248–249.

133 Nev. 826, 407 P. 3d 717, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and KAVANAUGH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 249.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Paul R. Q. Wolfson*, *Daniel Winik*, *Joshua M. Koppel*, *James Barton*, *William C. Hilson, Jr.*, *Scott W. DePeel*, *Ann Hodges*, *James W. Bradshaw*, *Pat Lundvall*, and *Debbie Leonard*.

Erwin Chemerinsky argued the cause for respondent. With him on the brief were *Donald J. Kula*, *Joel W. Nomkin*, *Mark D. Rosenbaum*, *Alisa Hartz*, and *Paul Hoffman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Kian Hudson* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General of their respective States as follows: *Steve Marshall* of Alabama, *Jahna Lindemuth* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell A. Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota,

JUSTICE THOMAS delivered the opinion of the Court.

This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in *Nevada* v. *Hall*, 440 U. S. 410 (1979).

I

In the early 1990s, respondent Gilbert Hyatt earned substantial income from a technology patent for a computer formed on a single integrated circuit chip. Although Hyatt's claim was later canceled, see *Hyatt* v. *Boone*, 146 F. 3d 1348 (CA Fed. 1998), his royalties in the interim totaled millions of dollars. Prior to receiving the patent, Hyatt had been a long-time resident of California. But in 1991, Hyatt sold his house in California and rented an apartment, registered to vote, obtained insurance, opened a bank account, and acquired a driver's license in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada—which collects no personal income tax, see Nev. Const., Art. 10, § 1(9)—as his primary place of residence.

Jim Hood of Mississippi, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Laxalt* of Nevada, *Gurbir S. Grewal* of New Jersey, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Mark Herring* of Virginia, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for Law Professors by *Benjamin L. Hatch*; and for the Multistate Tax Commission et al. by *Gregory S. Matson*, *Helen Hecht*, and *David Parkhurst*.

Stephen I. Vladeck, *pro se*, and *Lindsay C. Harrison* filed a brief for Professors of Federal Jurisdiction as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for Alan B. Morrison et al. by *Mr. Morrison*, *pro se*; for James C. Giudici by *Mr. Giudici*, *pro se*; and for William Baude et al. by *Stephen E. Sachs*.

Petitioner Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham. Thus, in 1993, the Board launched an audit to determine whether Hyatt underpaid his 1991 and 1992 state income taxes by misrepresenting his residency. In the course of the audit, employees of the Board traveled to Nevada to conduct interviews with Hyatt's estranged family members and shared his personal information with business contacts. In total, the Board sent more than 100 letters and demands for information to third parties. The Board ultimately concluded that Hyatt had not moved to Nevada until April 1992 and owed California more than $10 million in back taxes, interest, and penalties. Hyatt protested the audit before the Board, which upheld the audit after an 11-year administrative proceeding. The appeal of that decision remains pending before the California Office of Tax Appeals.

In 1998, Hyatt sued the Board in Nevada state court for torts he alleged the agency committed during the audit. After the trial court denied in part the Board's motion for summary judgment, the Board petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal on the ground that the State of California was immune from suit. The Board argued that, under the Full Faith and Credit Clause, Nevada courts must apply California's statute immunizing the Board from liability for all injuries caused by its tax collection. See U. S. Const., Art. IV, § 1; Cal. Govt. Code Ann. § 860.2 (West 1995). The Nevada Supreme Court rejected that argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies—that is, immunity for negligent but not intentional torts. We granted certiorari and unanimously affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the case. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U. S. 488, 498–499 (2003)

(*Hyatt I*). Because the Board did not ask us to overrule *Nevada* v. *Hall*, *supra*, we did not revisit that decision. *Hyatt I*, *supra*, at 497.

On remand, the trial court conducted a 4-month jury trial that culminated in a verdict for Hyatt that, with prejudgment interest and costs, exceeded $490 million. On appeal, the Nevada Supreme Court rejected most of the damages awarded by the lower court, upholding only a $1 million judgment on one of Hyatt's claims and remanding for a new damages trial on another. Although the court recognized that tort liability for Nevada state agencies was capped at $50,000 under state law, it nonetheless held that Nevada public policy precluded it from applying that limitation to the California agency in this case. We again granted certiorari and this time reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 578 U. S. 171, 176–180 (2016) (*Hyatt II*). Although the question was briefed and argued, the Court was equally divided on whether to overrule *Hall* and thus affirmed the jurisdiction of the Nevada Supreme Court. *Hyatt II*, *supra*, at 173. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with the statutory cap for Nevada agencies. 133 Nev. 826, 407 P. 3d 717 (2017).

We granted, for a third time, the Board's petition for certiorari, 585 U. S. 1029 (2018). The sole question presented is whether *Nevada* v. *Hall* should be overruled.[1]

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[1] Hyatt argues that the law-of-the-case doctrine precludes our review of this question, but he failed to raise that nonjurisdictional issue in his brief in opposition. We therefore deem this argument waived. See this Court's Rule 15.2; *Arizona* v. *California*, 460 U. S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"). We also reject Hyatt's argument that the Board waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause.

II

Nevada v. *Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent. We therefore overrule *Hall* and hold that States retain their sovereign immunity from private suits brought in the courts of other States.

A

Hall held that the Constitution does not bar private suits against a State in the courts of another State. 440 U. S., at 416–421. The opinion conceded that States were immune from such actions at the time of the founding, but it nonetheless concluded that nothing "implicit in the Constitution" requires States "to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.*, at 417–418, 424–427. Instead, the Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.*, at 419. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do, meaning that immunity is available only if the forum State "voluntar[ily]" decides "to respect the dignity of the [defendant State] as a matter of comity." *Id.*, at 416; see also *id.*, at 424–427.

The *Hall* majority was unpersuaded that the Constitution implicitly altered the relationship between the States. In the Court's view, the ratification debates, the Eleventh Amendment, and our sovereign-immunity precedents did not bear on the question because they "concerned questions of federal-court jurisdiction." *Id.*, at 420. The Court also found unpersuasive the fact that the Constitution delineates several limitations on States' authority, such as Article I

powers granted exclusively to Congress and Article IV requirements imposed on States. *Id.*, at 425. Despite acknowledging "that ours is not a union of 50 wholly independent sovereigns," *Hall* inferred from the lack of an express sovereign immunity granted to the States and from the Tenth Amendment that the States retained the power in their own courts to deny immunity to other States. *Ibid.*

Chief Justice Burger, Justice Blackmun, and Justice Rehnquist dissented.

B

Hall's determination that the Constitution does not contemplate sovereign immunity for each State in a sister State's courts misreads the historical record and misapprehends the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." *Id.*, at 433 (Rehnquist, J., dissenting). As Chief Justice Marshall explained, the Founders did not state every postulate on which they formed our Republic—"we must never forget, that it is *a constitution* we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). And although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity.

1

After independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Declaration of Independence ¶4. Under international law, then, independence "en-

titled" the Colonies "to all the rights and powers of sovereign states." *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209, 212 (1808).

"An integral component" of the States' sovereignty was "their immunity from private suits." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751–752 (2002); see *Alden* v. *Maine*, 527 U. S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . "). This fundamental aspect of the States' "inviolable sovereignty" was well established and widely accepted at the founding. The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); see *Alden*, *supra*, at 715–716 ("[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified"). As Alexander Hamilton explained:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." The Federalist No. 81, at 487 (emphasis deleted).

The Founders believed that both "common law sovereign immunity" and "law-of-nations sovereign immunity" prevented States from being amenable to process in any court without their consent. See Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 581–588 (1994); see also Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1574–1579 (2002). The common-law rule was that "no suit or action can be brought against the king, even

in civil matters, because no court can have jurisdiction over him." 1 W. Blackstone, Commentaries on the Laws of England 235 (1765) (Blackstone). The law-of-nations rule followed from the "perfect equality and absolute independence of sovereigns" under that body of international law. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 137 (1812); see C. Phillipson, Wheaton's Elements of International Law 261 (5th ed. 1916) (recognizing that sovereigns "enjoy equality before international law"); 1 J. Kent, Commentaries on American Law 20 (G. Comstock ed. 1867). According to the founding era's foremost expert on the law of nations, "[i]t does not . . . belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." 2 E. de Vattel, The Law of Nations § 55, p. 155 (J. Chitty ed. 1883). The sovereign is "exemp[t] . . . from all [foreign] jurisdiction." 4 *id.*, § 108, at 486.

The founding generation thus took as given that States could not be haled involuntarily before each other's courts. See Woolhandler, Interstate Sovereign Immunity, 2006 S. Ct. Rev. 249, 254–259. This understanding is perhaps best illustrated by preratification examples. In 1781, a creditor named Simon Nathan tried to recover a debt that Virginia allegedly owed him by attaching some of its property in Philadelphia. James Madison and other Virginia delegates to the Confederation Congress responded by sending a communique to Pennsylvania requesting that its executive branch have the action dismissed. See Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), in 3 The Papers of James Madison 184–185 (W. Hutchinson & W. Rachal eds. 1963). As Madison framed it, the Commonwealth's property could not be attached by process issuing from a court of "any other State in the Union." *Id.*, at 184. To permit otherwise would require Virginia to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." *Ibid.* Pennsylvania Attorney

General William Bradford intervened, urging the Court of Common Pleas to dismiss the action. See *Nathan* v. *Virginia*, 1 Dall. 77, n. (C. P. Phila. Cty. 1781). According to Bradford, the suit violated international law because "all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction." *Id.*, at 78, n. "[A]ll jurisdiction implies superiority over the party," Bradford argued, "but there could be no superiority" between the States, and thus no jurisdiction, because the States were "perfect[ly] equa[l]" and "entire[ly] independen[t]." *Ibid.* The court agreed and refused to grant Nathan the writ of attachment. *Id.*, at 80.

Similarly, a Pennsylvania Admiralty Court that very same year dismissed a libel action against a South Carolina warship, brought by its crew to recover unpaid wages. The court reasoned that the vessel was owned by a "sovereign independent state." *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (No. 9,697) (1781).

The Founders were well aware of the international-law immunity principles behind these cases. Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued in the courts of other States. One Federalist, who argued that Article III would waive the States' immunity in federal court, admitted that the waiver was desirable because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." 3 Debates on the Constitution 549 (J. Elliot ed. 1876) (Pendleton) (Elliot's Debates). Two of the most prominent Antifederalists—Federal Farmer and Brutus—disagreed with the Federalists about the desirability of a federal forum in which States could be sued, but did so for the very reason that the States had previously been "subject to no such actions" in any court and were not "oblige[d]" "to answer to an individual in a court of law." Federal Farmer No. 3 (Oct. 10, 1787), in 4 The Founders' Constitution 227 (P. Kurland & R. Lerner eds. 1987). They found it "humiliating and degrading" that

a State might have to answer "the suit of an individual." Brutus No. 13 (Feb. 21, 1788), in *id.*, at 238.

In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations. The Constitution's use of the term "States" reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U. S., at 713.

2

One constitutional provision that abrogated certain aspects of this traditional immunity was Article III, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States. Art. III, § 2; see *Alden*, *supra*, at 755. "The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union." *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 328 (1934). As James Madison explained during the Convention debates, "there can be no impropriety in referring such disputes" between coequal sovereigns to a superior tribunal. Elliot's Debates 532.

The States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. See *Monaco*, *supra*, at 328; *Federal Maritime Comm'n*, 535 U. S., at 752. "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Monaco*, *supra*, at 329. Given that "all jurisdiction implies superiority of power," Blackstone 235, the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts. See *Federal Maritime Comm'n*, *supra*, at 752.

The Antifederalists worried that Article III went even further by extending the federal judicial power over controversies "between a State and Citizens of another State." They suggested that this provision implicitly waived the States' sovereign immunity against *private* suits in federal courts. But "[t]he leading advocates of the Constitution assured the people in no uncertain terms" that this reading was incorrect. *Alden*, 527 U. S., at 716; see *id.*, at 716–718 (citing arguments by Hamilton, Madison, and John Marshall). According to Madison:

> "[A federal court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." Elliot's Debates 533.

John Marshall echoed these sentiments:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." *Id.*, at 555 (emphasis in original).

Not long after the founding, however, the Antifederalists' fears were realized. In *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), the Court held that Article III allowed the very suits that the "Madison-Marshall-Hamilton triumvirate" insisted it did not. *Hall*, 440 U. S., at 437 (Rehnquist, J., dissenting). That decision precipitated an immediate "furor" and "up-

roar" across the country. 1 J. Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States 734, 737 (1971); see *id.*, at 734–741. Congress and the States accordingly acted swiftly to remedy the Court's blunder by drafting and ratifying the Eleventh Amendment.[2] See *Edelman* v. *Jordan*, 415 U. S. 651, 660–662 (1974); see also *Federal Maritime Comm'n*, *supra*, at 753 (acknowledging that *Chisholm* was incorrect); *Alden*, *supra*, at 721–722 (same).

The Eleventh Amendment confirmed that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted." *Hans* v. *Louisiana*, 134 U. S. 1, 18 (1890). Although the terms of that Amendment address only "the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision," the "natural inference" from its speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, *supra*, at 723–724. We have often emphasized that "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 146 (1993). In proposing the Amendment, "Congress acted not to change but to restore the original constitutional design." *Alden*, 527 U. S., at 722. The "sovereign immunity of the States," we have said, "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.*, at 713.

Consistent with this understanding of state sovereign immunity, this Court has held that the Constitution bars suits

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[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

against nonconsenting States in a wide range of cases. See, *e. g.*, *Federal Maritime Comm'n*, 535 U. S. 743 (actions by private parties before federal administrative agencies); *Alden*, *supra* (suits by private parties against a State in its own courts); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991) (suits by Indian tribes in federal court); *Monaco*, 292 U. S. 313 (suits by foreign states in federal court); *Ex parte New York*, 256 U. S. 490 (1921) (admiralty suits by private parties in federal court); *Smith* v. *Reeves*, 178 U. S. 436 (1900) (suits by federal corporations in federal court).

3

Despite this historical evidence that interstate sovereign immunity is preserved in the constitutional design, Hyatt insists that such immunity exists only as a "matter of comity" and can be disregarded by the forum State. *Hall*, *supra*, at 416. He reasons that, before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns; thus, the States must retain that power today with respect to each other because "nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states." Brief for Respondent 14. Like the majority in *Hall*, he relies primarily on our early foreign immunity decisions. For instance, he cites *Schooner Exchange* v. *McFaddon*, in which the Court dismissed a libel action against a French warship docked in Philadelphia because, under the law of nations, a sovereign's warships entering the ports of a friendly nation are exempt from the jurisdiction of its courts. 7 *Cranch*, at 145–146. But whether the host nation respects that sovereign immunity, Chief Justice Marshall noted, is for the host nation to decide, for "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*, at 136. Similar reasoning is found in *The Santissima Trinidad*, 7 Wheat. 283, 353 (1822), where Justice Story noted that

the host nation's consent to provide immunity "may be withdrawn upon notice at any time, without just offence."

The problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional "limitation[s] on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 293 (1980). One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. Numerous provisions reflect this reality.

To begin, Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. Specifically, the States can no longer prevent or remedy departures from customary international law because the Constitution deprives them of the independent power to lay imposts or duties on imports and exports, to enter into treaties or compacts, and to wage war. Compare Art. I, § 10, with Declaration of Independence ¶4 (asserting the power to "levy War, conclude Peace, contract Alliances, [and] establish Commerce"); see *Kansas* v. *Colorado*, 185 U. S. 125, 143 (1902).

Article IV also imposes duties on the States not required by international law. The Court's Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from "adopt[ing] any policy of hostility to the public Acts" of other States. *Hyatt II*, 578 U. S., at 176 (internal quotation marks omitted); see Art. IV, § 1. States must also afford citizens of each State "all Privileges and Immunities of Citizens in the several States" and honor extradition requests upon "Demand of the executive Authority

of the State" from which the fugitive fled. Art. IV, § 2. Foreign sovereigns cannot demand these kinds of reciprocal responsibilities absent consent or compact. But the Constitution imposes them as part of its transformation of the States from a loose league of friendship into a perpetual Union based on the "fundamental principle of *equal* sovereignty among the States." *Shelby County* v. *Holder*, 570 U. S. 529, 544 (2013) (emphasis in original and internal quotation marks omitted).

The Constitution also reflects implicit alterations to the States' relationships with each other, confirming that they are no longer fully independent nations. See *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90 (1883). For example, States may not supply rules of decision governing "disputes implicating the[ir] conflicting rights." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641 (1981). Thus, no State can apply its own law to interstate disputes over borders, *Cissna* v. *Tennessee*, 246 U. S. 289, 295 (1918), water rights, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938), or the interpretation of interstate compacts, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 278–279 (1959). The States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because the "interstate . . . nature of the controversy makes it inappropriate for state law to control." *Texas Industries*, *supra*, at 641. Some subjects that were decided by pure "political power" before ratification now turn on federal "rules of law." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737 (1838). See Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1322–1331 (1996).

Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between

sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is "implied as an essential component of federalism." *Hall*, 440 U. S., at 430–431 (Blackmun, J., dissenting).

Hyatt argues that we should find no right to sovereign immunity in another State's courts because no constitutional provision explicitly grants that immunity. But this is precisely the type of "ahistorical literalism" that we have rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden*, 527 U. S., at 730; see *id.*, at 736 ("[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit"). In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment after the Court departed from this understanding in *Chisholm*, "[i]t is not rational to suppose that the sovereign power should be dragged before a court." Elliot's Debates 555 (Marshall). Indeed, the spirited historical debate over Article III courts and the immediate reaction to *Chisholm* make little sense if the Eleventh Amendment were the only source of sovereign immunity and private suits against the States could already be brought in "partial, local tribunals." Elliot's Debates 532 (Madison). Nor would the Founders have objected so strenuously to a neutral federal forum for private suits against States if they were open to a State being sued in a different State's courts. Hyatt's view thus inverts the Founders' concerns about state-court parochialism. *Hall*, *supra*, at 439 (Rehnquist, J., dissenting).

Moreover, Hyatt's ahistorical literalism proves too much. There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review, *Marbury* v. *Madison*, 1

Cranch 137, 176–180 (1803); intergovernmental tax immunity, *McCulloch*, 4 Wheat., at 435–436; executive privilege, *United States* v. *Nixon*, 418 U. S. 683, 705–706 (1974); executive immunity, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 755–758 (1982); and the President's removal power, *Myers* v. *United States*, 272 U. S. 52, 163–164 (1926). Like these doctrines, the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.

C

With the historical record and precedent against him, Hyatt defends *Hall* on the basis of *stare decisis*. But *stare decisis* is "'not an inexorable command,'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009), and we have held that it is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment," *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). The Court's precedents identify a number of factors to consider, four of which warrant mention here: the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 918–919 (2018); *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

The first three factors support our decision to overrule *Hall*. We have already explained that *Hall* failed to account for the historical understanding of state sovereign immunity and that it failed to consider how the deprivation of traditional diplomatic tools reordered the States' relationships with one another. We have also demonstrated that *Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions.

As to the fourth factor, we acknowledge that some plaintiffs, such as Hyatt, have relied on *Hall* by suing sovereign States. Because of our decision to overrule *Hall*, Hyatt un-

fortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct. But in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.

* * *

Nevada v. *Hall* is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts. We therefore overrule that decision. Because the Board is thus immune from Hyatt's suit in Nevada's courts, the judgment of the Nevada Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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

Can a private citizen sue one State in the courts of another? Normally the answer to this question is no, because the State where the suit is brought will choose to grant its sister States immunity. But the question here is whether the Federal Constitution *requires* each State to grant its sister States immunity, or whether the Constitution instead *permits* a State to grant or deny its sister States immunity as it chooses.

We answered that question 40 years ago in *Nevada* v. *Hall*, 440 U. S. 410 (1979). The Court in *Hall* held that the Constitution took the permissive approach, leaving it up to each State to decide whether to grant or deny its sister States sovereign immunity. Today, the majority takes the contrary

approach—the absolute approach—and overrules *Hall*. I can find no good reason to overrule *Hall*, however, and I consequently dissent.

I

Hall involved a suit brought by a California resident against the State of Nevada in the California courts. We rejected the claim that the Constitution entitled Nevada to absolute immunity. We first considered the immunity that States possessed as independent sovereigns before the Constitution was ratified. And we then asked whether ratification of the Constitution altered the principles of state sovereign immunity in any relevant respect. At both steps, we concluded, the relevant history and precedent refuted the claim that States are entitled to absolute immunity in each other's courts.

A

Hall first considered the immunity that States possessed before ratification. "States considered themselves fully sovereign nations" during this period, *ante*, at 237, and the Court in *Hall* therefore asked whether sovereign nations would have enjoyed absolute immunity in each other's courts at the time of our founding.

The answer was no. At the time of the founding, nations granted other nations sovereign immunity in their courts not as a matter of legal obligation but as a matter of choice, *i. e.*, of comity or grace or consent. Foreign sovereign immunity was a doctrine "of implied consent by the territorial sovereign . . . deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect." *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 362 (1955). Since customary international law made the matter one of choice, a nation could withdraw that sovereign immunity if it so chose.

This Court took that view of foreign sovereign immunity in two founding-era decisions that forecast the result in *Hall*.

In *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), when considering whether an American citizen could impose a lien upon a French warship, Chief Justice John Marshall wrote for the Court that international law did not *require* the United States to grant France sovereign immunity. Any such requirement, he reasoned, "would imply a diminution" of American "sovereignty." *Id.*, at 136. Instead, Chief Justice Marshall observed that any "exceptions" to "the full and complete power of a nation within its own territories, must be traced up to *the consent of the nation itself*" and "can flow from no other legitimate source." *Ibid.* (emphasis added).

The Court ultimately held in *Schooner Exchange* that the United States had consented implicitly to give immunity to the French warship. See *id.*, at 147. But that was because "national ships of war, entering the port of a friendly power open for their reception, [we]re to be considered as exempted by the consent of that power from its jurisdiction." *Id.*, at 145–146. And the Chief Justice was careful to note that this implication of consent could be "destroy[ed]" in various ways, including by subjecting the foreign nation "to the ordinary tribunals." *Id.*, at 146.

Ten years later, in *The Santissima Trinidad*, 7 Wheat. 283 (1822), this Court unanimously reaffirmed *Schooner Exchange*'s conclusion that foreign sovereign immunity was not an absolute right. The Court in *Santissima Trinidad* was called upon to determine whether the cargo of an Argentine ship, found in Baltimore Harbor, was immune from seizure. The ship's commander asserted that Argentina had an absolute right to immunity from suit, claiming that "no sovereign is answerable for his acts to the tribunals of any foreign sovereign." *Id.*, at 352. But Justice Joseph Story, writing for the Court, squarely rejected the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory." *Ibid.*

Rather, any exception to jurisdiction, including sovereign immunity, "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations." *Id.*, at 353. Accordingly, Justice Story explained, the right to assert sovereign immunity "*may be withdrawn upon notice at any time, without just offence.*" *Ibid.* (emphasis added). Justice Story then held that the Argentine ship's cargo was not immune from seizure. *Id.*, at 354.

The Court in *Hall* relied on this reasoning. See 440 U. S., at 416–417. Drawing on the comparison to foreign nations, the Court in *Hall* emphasized that California had made a sovereign decision not to "exten[d] immunity to Nevada as a matter of comity." *Id.*, at 418. Unless some constitutional rule required California to grant immunity that it had chosen to withhold, the Court "ha[d] no power to disturb the judgment of the California courts." *Ibid.*

B

The Court in *Hall* next held that ratification of the Constitution did not alter principles of state sovereign immunity in any relevant respect. The Court concluded that express provisions of the Constitution—such as the Eleventh Amendment and the Full Faith and Credit Clause of Article IV—did not require States to accord each other sovereign immunity. See *id.*, at 418–424. And the Court held that nothing "implicit in the Constitution" treats States differently in respect to immunity than international law treats sovereign nations. *Id.*, at 418; see also *id.*, at 424–427.

To the contrary, the Court in *Hall* observed that an express provision of the Constitution undermined the assertion that States were absolutely immune in each other's courts. Unlike suits brought against a State in the State's own courts, *Hall* noted, a suit against a State in the courts of a different State "necessarily implicates the power and authority of" both States. *Id.*, at 416. The defendant State has a sovereign interest in immunity from suit, while the forum

State has a sovereign interest in defining the jurisdiction of its own courts. The Court in *Hall* therefore justified its decision in part by reference to "the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people." *Id.*, at 425. Compelling States to grant immunity to their sister States would risk interfering with sovereign rights that the Tenth Amendment leaves to the States.

To illustrate that principle, *Hall* cited *Georgia* v. *Chattanooga*, 264 U. S. 472 (1924), which concerned condemnation proceedings brought by a municipality against property owned by a neighboring State. See *Hall*, 440 U. S., at 426, n. 29. The Court in *Chattanooga* held that one State (Georgia) that had purchased property for a railroad in a neighboring State (Tennessee) could not exempt itself from the eminent domain power of the Tennessee city in which the property was located. 264 U. S., at 480. The reason was obvious: "The power of eminent domain is an attribute of sovereignty," and Tennessee did not surrender that sovereign power simply by selling land to Georgia. *Ibid.* In light of the competing sovereignty interests on both sides of the matter, the Court in *Chattanooga* found no basis to interpose a federally mandated resolution.

Similar reasoning applied in *Hall*. Mandating absolute interstate immunity "by inference from the structure of our Constitution and nothing else" would "intru[de] on the sovereignty of the States—and the power of the people—in our Union." 440 U. S., at 426–427.

II

The majority disputes both *Hall*'s historical conclusion regarding state immunity before ratification and its conclusion that the Constitution did not alter that immunity. But I do not find the majority's arguments convincing.

A

The majority asserts that before ratification "it was well settled that States were immune under both the common law and the law of nations." *Ante*, at 241. The majority thus maintains that States were exempt from suit in each other's courts.

But the question in *Hall* concerned the *basis* for that exemption. Did one sovereign have an absolute right to an exemption from the jurisdiction of the courts of another, or was that exemption a customary matter, a matter of consent that a sovereign might withdraw? As to that question, nothing in the majority's opinion casts doubt on *Hall*'s conclusion that States—like foreign nations—were accorded immunity as a matter of consent rather than absolute right.

The majority refers to "the founding era's foremost expert on the law of nations," Emer de Vattel, who stated that a "sovereign is 'exempt from all foreign jurisdiction.'" *Ante*, at 239 (quoting 4 E. de Vattel, The Law of Nations 486 (J. Chitty ed. 1883) (Vattel); alterations omitted). But Vattel made clear that the source of a sovereign's immunity in a foreign sovereign's courts is the "'consen[t]'" of the foreign sovereign, which, he added, reflects a "'tacit convention'" among nations. *Schooner Exchange*, 7 Cranch, at 143 (quoting 4 Vattel 472). And *Schooner Exchange* and *Santissima Trinidad* underscore that such a tacit convention can be rejected, and that consent can be "withdrawn upon notice at any time." *Santissima Trinidad*, 7 Wheat., at 353.

The majority also draws on statements of the Founders concerning the importance of sovereign immunity generally. But, as *Hall* noted, those statements concerned matters entirely distinct from the question of state immunity at issue here. Those statements instead "concerned questions of *federal-court* jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." 440 U. S., at 420–421 (emphasis added). That issue was "a mat-

ter of importance in the early days of independence," for it concerned the ability of holders of Revolutionary War debt owed by States to collect that debt in a federal forum. *Id.*, at 418. There is no evidence that the Founders who made those statements intended to express views on the question before us. And it seems particularly unlikely that John Marshall, one of those to whom the Court refers, see *ante*, at 242, would have held views of the law in respect to States that he later repudiated in respect to sovereign nations.

The majority cites *Nathan* v. *Virginia*, 1 Dall. 77, n. (C. P. Phila. Cty. 1781). As the majority points out, that case involved a Pennsylvania citizen who filed a suit in Pennsylvania's courts seeking to attach property belonging to Virginia. The Pennsylvania Court of Common Pleas accepted Virginia's claim of sovereign immunity and dismissed the suit. But it did so only after "delegates in Congress from Virginia . . . applied to the supreme executive council of Pennsylvania" for immunity, and Pennsylvania's attorney general, representing its executive, asked the court to dismiss the case. *Id.*, at 78, n. The Pennsylvania court thus granted immunity only after Virginia "followed the usual diplomatic course." Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 585 (1994). Given the participation of Pennsylvania's executive in this diplomatic matter, the case likely involved Pennsylvania's consent to a claim of sovereign immunity rather than a view that Virginia had an absolute right to immunity.

B

The majority next argues that "the Constitution affirmatively altered the relationships between the States" by giving them immunity that they did not possess when they were fully independent. *Ante*, at 245. The majority thus maintains that, whatever the nature of state immunity before ratification, the Constitution accorded States an absolute immunity that they did not previously possess.

The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other's courts. The majority does not attempt to situate its newfound constitutional immunity in any provision of the Constitution itself. Instead, the majority maintains that a State's immunity in other States' courts is "implicit" in the Constitution, *ante*, at 247, "embed[ded] . . . within the constitutional design," *ante*, at 245, and reflected in "'the plan of the Convention,'" *ante*, at 241. See also *Hall*, 440 U. S., at 430 (Blackmun, J., dissenting) (arguing that immunity in this context is found "not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism").

I agree with today's majority and the dissenters in *Hall* that the Constitution contains implicit guarantees as well as explicit ones. But, as I have previously noted, concepts like the "'constitutional design'" and "'plan of the convention'" are "highly abstract, making them difficult to apply"—at least absent support in "considerations of history, of constitutional purpose, or of related consequence." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 778 (2002) (BREYER, J., dissenting). Such concepts "invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases" such as "'due process'" and "'liberty,'" and "they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution." *Ibid.*

At any rate, I can find nothing in the "plan of the Convention" or elsewhere to suggest that the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw. None of the majority's arguments indicates that the Constitution accomplished any such transformation.

The majority argues that the Constitution sought to preserve States' "equal dignity and sovereignty." *Ante*, at 245.

That is true, but tells us nothing useful here. When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. In contrast to a State's power to assert sovereign immunity in its own courts, sovereignty interests here lie on both sides of the constitutional equation.

The majority also says—also correctly—that the Constitution demanded that States give up certain sovereign rights that they would have retained had they remained independent nations. From there the majority infers that the Constitution must have implicitly given States immunity in each other's courts to provide protection that they gave up when they entered the Federal Union.

But where the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly. The Import-Export Clause cited by the majority, for example, creates "harmony among the States" by preventing them from "burden[ing] commerce . . . among themselves." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 283, 285 (1976). The Full Faith and Credit Clause, also invoked by the majority, prohibits States from adopting a "policy of hostility to the public Acts" of another State. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 578 U. S. 171, 173 (2016) (internal quotation marks omitted). By contrast, the Constitution says nothing explicit about interstate sovereign immunity.

Nor does there seem to be any need to create implicit constitutional protections for States. As the history of this case shows, the Constitution's express provisions seem adequate to prohibit one State from treating its sister States unfairly—even if the State permits suits against its sister States in its courts. See *id.*, at 176 (holding that the Full Faith and Credit Clause prohibits Nevada from subjecting the Board to greater liability than Nevada would impose upon its own agency in similar circumstances).

The majority may believe that the distinction between permissive and absolute immunity was too nuanced for

the Framers. The Framers might have understood that most nations did in fact allow other nations to assert sovereign immunity in their courts. And they might have stopped there, ignoring the fact that, under international law, a nation had the sovereign power to change its mind.

But there is simply nothing in the Constitution or its history to suggest that anyone reasoned in that way. No constitutional language supports that view. Chief Justice Marshall, Justice Story, and the Court itself took a somewhat contrary view without mentioning the matter. And there is no strong reason for treating States differently than foreign nations in this context. Why would the Framers, silently and without any evident reason, have transformed sovereign immunity from a permissive immunity predicated on comity and consent into an absolute immunity that States must accord one another? The Court in *Hall* could identify no such reason. Nor can I.

III

In any event, *stare decisis* requires us to follow *Hall*, not overrule it. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992); see also *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455–456 (2015). Overruling a case always requires "'special justification.'" *Id.*, at 456. What could that justification be in this case? The majority does not find one.

The majority believes that *Hall* was wrongly decided. But "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U. S., at 455. Three dissenters in *Hall* also believed that *Hall* was wrong, but they recognized that the Court's opinion was "plausible." 440 U. S., at 427 (opinion of Blackmun, J.). While reasonable jurists might disagree about whether *Hall* was correct, that very fact—that *Hall* is not obviously wrong—shows that today's majority is obviously wrong to overrule it.

The law has not changed significantly since this Court decided *Hall* and has not left *Hall* a relic of an abandoned doctrine. To the contrary, *Hall* relied on this Court's precedent in reaching its conclusion, and this Court's subsequent cases are consistent with *Hall*. As noted earlier, *Hall* drew its historical analysis from earlier decisions such as *Schooner Exchange*, written by Chief Justice Marshall. And our post-*Hall* decisions regarding the immunity of foreign nations are consistent with those earlier decisions. The Court has recently reaffirmed "Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 689 (2004). And the Court has reiterated that a nation may decline to grant other nations sovereign immunity in its courts. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).

Nor has our understanding of state sovereign immunity evolved to undermine *Hall*. The Court has decided several state sovereign immunity cases since *Hall*, but these cases have all involved a State's immunity in a federal forum or in the State's own courts. Compare *Federal Maritime Comm'n*, 535 U. S., at 769 (state immunity in a federal forum); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 47 (1996) (same); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 782 (1991) (same), with *Alden* v. *Maine*, 527 U. S. 706, 715 (1999) (state immunity in a State's "own courts"); *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 67 (1989) (same). None involved immunity asserted by one State in the courts of another. And our most recent case to address *Hall* in any detail endorses it. See *Alden*, 527 U. S., at 739–740 (noting that *Hall*'s distinction "between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign" is "consistent with, and even support[s]," modern cases).

The dissenters in *Hall* feared its "practical implications." 440 U. S., at 443 (opinion of Rehnquist, J.). But I can find

nothing in the intervening 40 years to suggest that this fear was well founded. The Board and its *amici* have, by my count, identified only 14 cases in 40 years in which one State has entertained a private citizen's suit against another State in its courts. See Brief for Petitioner 46–47; Brief for State of Indiana et al. as *Amici Curiae* 13–14. In at least one of those 14 cases, moreover, the state court eventually agreed to dismiss the suit against its sister State as a matter of comity. See *Montaño* v. *Frezza*, 2017–NMSC–015, 393 P. 3d 700, 710. How can it be that these cases, decided over a period of four decades, show *Hall* to be unworkable?

The *Hall* issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally. Thus, even in the absence of constitutionally mandated immunity, States normally grant sovereign immunity voluntarily. States that fear that this practice will be insufficiently protective are free to enter into an interstate compact to guarantee that the normal practice of granting immunity will continue. See *Cuyler* v. *Adams*, 449 U. S. 433, 440 (1981).

Although many States have filed an *amicus* brief in this case asking us to overturn *Hall*, I can find nothing in the brief that indicates that reaffirming *Hall* would affront "the dignity and respect due sovereign entities." *Federal Maritime Comm'n*, 535 U. S., at 769. As already explained, sovereign interests fall on both sides of this question. While reaffirming *Hall* might harm States seeking sovereign immunity, overruling *Hall* would harm States seeking to control their own courts.

Perhaps the majority believes that there has been insufficient reliance on *Hall* to justify preserving it. But any such belief would ignore an important feature of reliance. The people of this Nation rely upon stability in the law. Legal stability allows lawyers to give clients sound advice and allows ordinary citizens to plan their lives. Each time the Court overrules a case, the Court produces increased uncer-

tainty. To overrule a sound decision like *Hall* is to encourage litigants to seek to overrule other cases; it is to make it more difficult for lawyers to refrain from challenging settled law; and it is to cause the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay.

I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error. And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it.

* * *

It is one thing to overrule a case when it "def[ies] practical workability," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U. S., at 854–855. It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question. The majority has surrendered to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today's decision can only cause one to wonder which cases the Court will overrule next. I respectfully dissent.

Syllabus

COCHISE CONSULTANCY, INC., ET AL. *v.* UNITED STATES EX REL. HUNT

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

No. 18–315. Argued March 19, 2019—Decided May 13, 2019

The False Claims Act permits a private person, known as a relator, to bring a *qui tam* civil action "in the name of the [Federal] Government," 31 U. S. C. § 3730(b), against "any person" who "knowingly presents . . . a false or fraudulent claim for payment" to the Government or to certain third parties acting on the Government's behalf, §§ 3729(a), (b)(2). The Government may choose to intervene in the action. See §§ 3730(b)(2), (4). Two limitations periods apply to a "civil action under section 3730." § 3731(b). An action must be brought within either 6 years after the statutory violation occurred, § 3731(b)(1), or 3 years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation, § 3731(b)(2). The period providing the later date serves as the limitations period.

In November 2013, respondent Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false payment claims for providing security services in Iraq up until early 2007. Hunt claims that he revealed Cochise's allegedly fraudulent scheme during a November 30, 2010, interview with federal officials about his role in an unrelated contracting fraud in Iraq. The United States declined to intervene in the action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt countered that his complaint was timely under § 3731(b)(2). In dismissing the action, the District Court considered three potential interpretations: that § 3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to intervene; that § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when the relator knew or should have known the relevant facts; or that § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when the Government official responsible for acting knew or should have known the relevant facts. The court rejected the third interpretation and found that Hunt's complaint would be untimely under either of the first two. The Eleventh Circuit reversed and remanded, adopting the third interpretation.

Syllabus

Held:

1. The limitations period in § 3731(b)(2) applies in a relator-initiated suit in which the Government has declined to intervene. Both Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits. Cochise claims that starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should apply only when the Government is a party. But treating a relator-initiated, nonintervened suit as a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2) is at odds with fundamental rules of statutory interpretation. Because a single use of a statutory phrase generally must have a fixed meaning, see *Ratzlaf* v. *United States*, 510 U. S. 135, 143, interpretations that would "attribute different meanings to the same phrase" should be avoided, *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329. Here, the clear text of the statute controls. Cochise's reliance on *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, is misplaced. Nothing in *Graham County* supports giving the phrase "civil action under section 3730" in § 3731(b) two different meanings depending on whether the Government intervenes. While the *Graham County* Court sought "a construction that avoids . . . counterintuitive results," there the text "admit[ted] of two plausible interpretations." *Id.*, at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462. Pp. 268–271.

2. The relator in a nonintervened suit is not "the official of the United States" whose knowledge triggers § 3731(b)(2)'s 3-year limitations period. The statute provides no support for such a reading. First, a private relator is neither appointed as an officer of the United States nor employed by the United States. Second, the provision authorizing *qui tam* suits is entitled "Actions by Private Persons." § 3730(b). Third, the statute refers to "the" official "charged with responsibility to act in the circumstances." Regardless of precisely which official or officials the statute is referring to, § 3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434. Nor are private relators "charged with responsibility to act" in the sense contemplated by § 3731(b), as they are not required to investigate or prosecute a False Claims Act action. Pp. 271–272.

887 F. 3d 1081, affirmed.

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

Theodore J. Boutrous, Jr., argued the cause for petitioners. With him on the briefs were *Lauren M. Blas*, *Amir C. Tayrani*, and *Duane A. Daiker*.

Earl N. Mayfield III argued the cause for respondent. With him on the brief were *Christopher M. Day*, *Sarah O. Schrup*, and *Jocelyn D. Francoeur*.

Matthew Guarnieri argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Charles W. Scarborough*, and *Martin V. Totaro*.*

JUSTICE THOMAS delivered the opinion of the Court.

The False Claims Act contains two limitations periods that apply to a "civil action under section 3730"—that is, an action asserting that a person presented false claims to the United

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Jonathan G. Cedarbaum*, *Peter C. Tolsdorf*, *James C. Stansel*, and *Melissa B. Kimmel*; for the Coalition for Government Procurement by *Dan Himmelfarb*; for DRI–The Voice of the Defense Bar et al. by *Zach Chaffee-McClure*; and for the Washington Legal Foundation by *Corbin K. Barthold* and *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Kian J. Hudson*, Deputy Solicitor General, and *Aaron T. Craft* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Ashley Moody* of Florida, *Clare E. Connors* of Hawaii, *Thomas John Miller* of Iowa, *Jeff Landry* of Louisiana, *Dana Nessel* of Michigan, *Keith M. Ellison* of Minnesota, *Gurbir Singh Grewal* of New Jersey, *Joshua H. Stein* of North Carolina, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Sean D. Reyes* of Utah, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washington, and *Josh Kaul* of Wisconsin; for the National Whistleblower Center by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; for the Taxpayers Against Fraud Education Fund by *Tejinder Singh*; and for Joel D. Hesch by *Mr. Hesch*, *pro se*.

States Government. 31 U. S. C. § 3731(b). The first period requires that the action be brought within six years after the statutory violation occurred. The second period requires that the action be brought within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation. Whichever period provides the later date serves as the limitations period.

This case requires us to decide how to calculate the limitations period for *qui tam* suits in which the United States does not intervene. The Court of Appeals held that these suits are "civil action[s] under section 3730" and that the limitations periods in § 3731(b) apply in accordance with their terms, regardless of whether the United States intervenes. It further held that, for purposes of the second period, the private person who initiates the *qui tam* suit cannot be deemed the official of the United States. We agree, and therefore affirm.

I

As relevant, the False Claims Act imposes civil liability on "any person" who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government or to certain third parties acting on the Government's behalf. 31 U. S. C. §§ 3729(a), (b)(2). Section 3730 authorizes two types of actions: First, the Attorney General, who "diligently shall investigate a violation under section 3729," may bring a civil action against the alleged false claimant. § 3730(a). Second, a private person, known as a relator, may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § 3730(b).

If a relator initiates the action, he must deliver a copy of the complaint and supporting evidence to the Government, which then has 60 days to intervene in the action. §§ 3730(b)(2), (4). During this time, the complaint remains sealed. § 3730(b)(2). If the Government intervenes, it as-

sumes primary responsibility for prosecuting the action, though the relator may continue to participate. § 3730(c). Otherwise, the relator has the right to pursue the action. §§ 3730(b)(4), (c)(3). Even if it does not intervene, the Government is entitled to be served with all pleadings upon request and may intervene at any time with good cause. § 3730(c)(3). The relator receives a share of any proceeds from the action—generally 15 to 25 percent if the Government intervenes, and 25 to 30 percent if it does not—plus attorney's fees and costs. §§ 3730(d)(1)–(2). See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 769–770 (2000).

At issue here is the Act's statute of limitations, which provides:

> "(b) A civil action under section 3730 may not be brought—
>
> "(1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> "(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> "whichever occurs last." § 3731(b).

On November 27, 2013, respondent Billy Joe Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false claims for payment under a subcontract to provide security services in Iraq "from some time prior to January 2006 until early 2007." App. 43a. A little less than three years before bringing his complaint, Hunt was interviewed by federal agents about his role in an unrelated contracting fraud in Iraq. Hunt claims to have revealed Cochise's allegedly fraudulent scheme during this November 30, 2010, interview.

The United States declined to intervene in Hunt's action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt conceded that the 6-year limitations period in § 3731(b)(1) had elapsed before he filed suit on November 27, 2013. But Hunt argued that his complaint was timely under § 3731(b)(2) because it was filed within 3 years of the interview in which he informed federal agents about the alleged fraud (and within 10 years after the violation occurred).

The District Court dismissed the action. It considered three potential interpretations of § 3731(b). Under the first interpretation, § 3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to intervene, so any such action must be filed within six years after the violation. Under the second interpretation, § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when the relator knew or should have known the relevant facts. Under the third interpretation, § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts. The District Court rejected the third interpretation and declined to choose between the first two because it found that Hunt's complaint would be untimely under either. The Court of Appeals reversed and remanded, adopting the third interpretation. 887 F. 3d 1081 (CA11 2018).

Given a conflict between the Courts of Appeals,* we granted certiorari. 586 U. S. 1018 (2018).

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*Compare 887 F. 3d 1081, 1089–1097 (CA11 2018) (adopting the third interpretation), with *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F. 3d 1211, 1216–1218 (CA9 1996) (adopting the second interpretation); *United States ex rel. Sanders* v. *North Am. Bus Industries, Inc.*, 546 F. 3d 288, 293–294 (CA4 2008) (adopting the first interpretation); and *United States ex rel. Sikkenga* v. *Regence BlueCross BlueShield of Utah*, 472 F. 3d 702, 725–726 (CA10 2006) (same).

II

The first question before us is whether the limitations period in § 3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene. If so, the second question is whether the relator in such a case should be considered "the official of the United States" whose knowledge triggers § 3731(b)(2)'s 3-year limitations period.

A

Section 3731(b) sets forth two limitations periods that apply to "civil action[s] under section 3730." Both Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits.

Cochise agrees with that view as to the limitations period in § 3731(b)(1), but argues that the period in § 3731(b)(2) is available in a relator-initiated suit only if the Government intervenes. According to Cochise, starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should be read to apply only when the Government is a party. In short, under Cochise's reading, a relator-initiated, nonintervened suit is a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2).

This reading is at odds with fundamental rules of statutory interpretation. In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. See *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994). We therefore avoid interpretations that would "attribute different meanings to the same phrase." *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329 (2000). Here, either a relator-initiated, nonintervened suit is a "civil action under section 3730"—and thus subject to the limitations periods in subsections (b)(1) and (b)(2)—or it is not. It is such an action.

Whatever the default tolling rule might be, the clear text of the statute controls this case.

Under Cochise's reading, a relator-initiated civil action would convert to "[a] civil action under section 3730" for purposes of subsection (b)(2) if and when the Government intervenes. That reading cannot be correct. If the Government intervenes, the civil action remains the same—it simply has one additional party. There is no textual basis to base the meaning of "[a] civil action under section 3730" on whether the Government has intervened.

Cochise relies on our decision in *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409 (2005), which addressed the question whether § 3731(b)(1) or federal common law provided the limitations period for § 3730(h) retaliation actions. Section 3730(h) creates a cause of action for an employee who suffers retaliation for, among other things, assisting with the prosecution of a False Claims Act action. At the time, § 3730(h) did not specify a time limit for bringing a retaliation action, so the question before us was whether the phrase "civil action under section 3730" in § 3731(b) encompassed actions under § 3730(h). We considered the statute "ambiguous because its text, literally read, admits of two plausible interpretations." *Id.*, at 419, n. 2. One reading was that a "civil action under section 3730" includes § 3730(h) actions because such actions arise under § 3730. *Id.*, at 415. "Another reasonable reading" was that a "civil action under section 3730" "applies only to actions arising under §§ 3730(a) and (b)" because "§ 3731(b)(1) t[ies] the start of the time limit to 'the date on which the violation of section 3729 is committed.'" *Ibid.* That reading had force because retaliation claims need not involve an actual violation of § 3729. *Ibid.* Looking to statutory context, we explained that the phrase "'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section

3729,' that is, §§ 3730(a) and (b) actions"—not § 3730(h) retaliation actions. *Id.*, at 421–422.

A relator-initiated, nonintervened suit arises under § 3730(b) and has as an element a violation of § 3729. *Graham County* supports our reading. Nonetheless, Cochise points out that in considering the statutory context, we discussed a similar phrase contained in § 3731(c) (now § 3731(d)), which stated: "In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." (Emphasis added.) We explained that § 3731(c) "use[d] the similarly unqualified phrase 'action brought under section 3730' to refer only to §§ 3730(a) and (b) actions." *Id.*, at 417–418. We then stated: "As [respondent] and the United States concede, the context of this provision implies that the phrase 'any action brought under section 3730' is limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party, as those are the types of § 3730 actions in which the United States necessarily participates." *Id.*, at 418.

Cochise contends that we should adopt a similar construction of the phrase "civil action under section 3730" in § 3731(b). We disagree. Our discussion of § 3731(c) was focused on "the context of th[at] provision" and on whether it could be read to impose the burden of proof on the Government even in cases where the Government did not participate. *Id.*, at 418. Those considerations do not apply here; there is nothing illogical about reading § 3731(b) to apply in accordance with its plain terms. Moreover, if a "civil action under section 3730" included only an action in which the Government participates for purposes of § 3731(b)(2), then we would be obligated to give it a like meaning for purposes of § 3731(b)(1). This would mean that a relator-initiated, nonintervened suit would be subject to neither § 3731(b)(1) nor § 3731(b)(2)—a reading Cochise expressly disclaims.

See Brief for Petitioners 20, n. 3. Nothing in *Graham County* supports giving the same phrase in § 3731(b) two different meanings depending on whether the Government intervenes.

Again pointing to *Graham County*, Cochise next contends that our reading would lead to "'counterintuitive results.'" Brief for Petitioners 26. For instance, if the Government discovers the fraud on the day it occurred, it would have 6 years to bring suit, but if a relator instead discovers the fraud on the day it occurred and the Government does not discover it, the relator could have as many as 10 years to bring suit. That discrepancy arises because § 3731(b)(2) begins its limitations period on the date that "the official of the United States charged with responsibility to act" obtained knowledge of the relevant facts. But we see nothing unusual about extending the limitations period when the Government official did not know and should not reasonably have known the relevant facts, given that the Government is the party harmed by the false claim and will receive the bulk of any recovery. See § 3730(d). In any event, a result that "may seem odd . . . is not absurd." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 565 (2005). Although in *Graham County* we sought "a construction that avoids . . . counterintuitive results," there the text "admit[ted] of two plausible interpretations." 545 U. S., at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

B

Cochise's fallback argument is that the relator in a nonintervened suit should be considered "the official of the United States charged with responsibility to act in the circumstances," meaning that § 3731(b)(2)'s 3-year limitations period would start when the relator knew or should have known about the fraud. But the statute provides no support

for reading "the official of the United States" to encompass a private relator.

First, a private relator is not an "official of the United States" in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States, see U. S. Const., Art. II, § 2, cl. 2, nor employed by the United States. Indeed, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." § 3730(b). Although that provision explains that the action is brought "for the person and for the United States Government" and "in the name of the Government," *ibid.*, it does not make the relator anything other than a private person, much less "the official of the United States" referenced by the statute. Cf. *Stevens*, 529 U. S., at 773, n. 4 ("[A] *qui tam* relator is, in effect, suing as a partial assignee of the United States" (emphasis deleted)).

Second, the statute refers to "the" official "charged with responsibility to act in the circumstances." The Government argues that, in context, "the" official refers to the Attorney General (or his delegate), who by statute "shall investigate a violation under section 3729." § 3730(a). Regardless of precisely which official or officials the statute is referring to, § 3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for any and all private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434 (2004) (explaining that the "use of the definite article . . . indicates that there is generally only one" person covered). More fundamentally, private relators are not "charged with responsibility to act" in the sense contemplated by § 3731(b), as they are not required to investigate or prosecute a False Claims Act action.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

Syllabus

APPLE INC. *v.* PEPPER ET AL.

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

No. 17–204. Argued November 26, 2018—Decided May 13, 2019

Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store—the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a $99 annual membership fee, allows them to set the retail price of the apps, and charges a 30 percent commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. Pp. 278–288.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court's precedent. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U. S. C. § 15(a). That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying § 4, this Court has consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators, *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. Pp. 278–281.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and

Syllabus

precedent by requiring the Court to rewrite the rationale of *Illinois Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that "any person" injured by an antitrust violation may sue to recover damages. Second, Apple's theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement. Pp. 281–285.

(c) Contrary to Apple's argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut strongly in respondents' favor. First, Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id.*, at 726–727. Pp. 285–288.

846 F. 3d 313, affirmed.

KAVANAUGH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 288.

Daniel M. Wall argued the cause for petitioner. With him on the briefs were *Christopher S. Yates*, *Sadik Huseny*, *Aaron T. Chiu*, and *J. Scott Ballenger*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him

Counsel

on the brief were *Assistant Attorney General Delrahim*, *Deputy Solicitor General Stewart*, *Principal Deputy Assistant Attorney General Finch*, *Zachary D. Tripp*, *Kristen C. Limarzi*, and *Adam D. Chandler*.

David C. Frederick argued the cause for respondents. With him on the brief were *Aaron M. Panner*, *Gregory G. Rapawy*, *Mark C. Rifkin*, and *Matthew M. Guiney*.*

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*Briefs of *amici curiae* urging reversal were filed for ACT | The App Association by *Brian Scarpelli*; for BSA | The Software Alliance by *Andrew J. Pincus*, *Michael B. Kimberly*, and *Matthew A. Waring*; for the Chamber of Commerce of the United States of America by *Theodore J. Boutrous, Jr.*, and *Daniel G. Swanson*; for the Computer & Communications Industry Association by *Beth Brinkmann*, *Thomas O. Barnett*, and *Derek Ludwin*; for the R Street Institute by *Charles Duan*; and for the Washington Legal Foundation by *Cory L. Andrews* and *Corbin K. Barthold*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Kyle D. Hawkins*, Solicitor General, *J. Campbell Barker*, Deputy Solicitor General, *Joseph D. Hughes*, Assistant Solicitor General, *Kim Van Winkle*, Deputy Chief, Antitrust Division, *Brett Fulkerson*, *David M. Ashton*, and *Nicholas G. Grimmer*, Assistant Attorneys General, and *Tom Miller*, Attorney General of Iowa, *Nathan Blake*, Deputy Attorney General, and *Max M. Miller*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *Cynthia H. Coffman* of Colorado, *George Jepsen* of Connecticut, *Matthew Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Hector Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Wayne Stenehjem* of North Dakota, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, and *Mark R. Herring* of Virginia; for the American Antitrust Institute by *Richard M. Brunell*, *Randy M. Stutz*, and *Jay L. Himes*; for Antitrust Scholars by *Lauren M. Weinstein*, *Robert K. Kry*, and *William J. Cooper*; and for Open Markets Institute by *Deepak Gupta* and *Jonathan E. Taylor*.

Thomas R. McCarthy and *Jeffrey M. Harris* filed a brief for Verizon Communications Inc. as *amicus curiae*.

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 745–746 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $99 annual membership fee. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30% fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." *Id.*, at 45a. According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." *Id.*, at 54a–55a. The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." *Id.*, at 55a. And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market." *Id.*, at 53a.

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not

direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices. *Id.*, at 324. We granted certiorari. 585 U. S. 1003 (2018).

II

A

The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. *Illinois Brick*, 431 U. S., at 745–746. It is undisputed that the iPhone owners bought the apps directly from Apple. There-

fore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 26 Stat. 209, 15 U. S. C. § 2. Section 4 of the Clayton Act in turn provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U. S. C. § 15(a) (emphasis added). The broad text of § 4—"any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: Applying § 4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207 (1990); see also *Illinois Brick*, 431 U. S., at 745–746. At the same time, incorporating principles of proximate cause into § 4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers. *Id.*, at 746.[1]

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete

[1] *Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid.*

The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp*, 497 U. S., at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc.* v. *Sumitomo Corp.*, 306 F. 3d 469, 481–482 (CA7 2002) (Wood, J.).[2]

[2] Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of § 4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price.

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suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

Rather, *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay noth-

ing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." 846 F. 3d, at 324. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream

manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for

the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. 497 U. S., at 216. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.*, at 217.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737.

Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain. Cf. *id.*, at 726–727; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 483–484 (1968). If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." 431 U. S., at 741.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive

price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not persuade us to remake *Illinois Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

* * *

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

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

More than 40 years ago, in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), this Court held that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed.

It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how antitrust law is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Hanover sued United, a company that supplied machinery Hanover used to make shoes. Hanover alleged that United's illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United replied that Hanover hadn't been damaged at all because, United asserted, Hanover had not absorbed the supposedly "illegal overcharge" but had "passed the cost on to its customers" by raising the prices it charged for shoes. *Id.*, at 487–488, and n. 6. This Court called United's argument a "'passing-on' defense" because it suggested that a court should consider whether an antitrust plaintiff had "passed on" the defendant's overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant's anticompetitive conduct. *Id.*, at 488.

This Court rejected that defense. While § 4 of the Clayton Act allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, *e. g.*, *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–531 (1983). And under ancient rules of proximate causation, the "'general tendency of the law, in regard to damages at

least, is not to go beyond the first step.'" *Hanover Shoe*, 392 U. S., at 490, n. 8 (quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). In *Hanover Shoe*, the first step was United's overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed to avoid. "[N]early insuperable" questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoe-making market United's alleged monopoly rent from the separate shoe-making-machinery market. 392 U. S., at 493. Resolving those questions would, in turn, necessitate a trial within a trial about Hanover's power and conduct in its own market, with the attendant risk that proceedings would become "long and complicated" and would "involv[e] massive evidence and complicated theories." *Ibid.*

Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants' price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a "pass-on theory" defensively, the Court declined to "permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense." 431 U. S., at 735. "Permitting the use of pass-on theories under § 4," the Court reasoned, would require determining how much of the manufacturer's monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id.*, at 737.

Allowing pass-on theories would, as well, allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 132 (2014). That proximate cause requirement typically bars suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts." *Id.*, at 133 (internal quotation marks omitted). So, for example, if a defendant's false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the Lanham Act. But if the competitor is unable to pay its rent as a result, the competitor's landlord can't sue the false advertiser, because the landlord's harm derives from the harm to the competitor. *Id.*, at 134; see also, *e. g.*, *Bank of America Corp.* v. *Miami*, 581 U. S. 189, 201–203 (2017); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346 (2005); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268–270 (1992). This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors*, 459 U. S., at 532–535, 544–545.[1]

[1] For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante*, at 279, n. 1. Under our normal rule of construction, a plaintiff who's not proximately harmed

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer . . . we're going to take this 30 percent commission . . . what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." App. 143.

Because this is *exactly* the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these

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by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 135 (2014) (although a plaintiff that "cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief," the requirement of proximate causation "must be met in every case").

difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with "'complicated theories'" about "how the relevant market variables would have behaved had there been no overcharge." *Illinois Brick*, 431 U. S., at 741–743. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further by Apple's requirement that all app prices end in $0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $0.99. Brief for Respondents 44. And a developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs

suffered as a result of Apple's allegedly excessive 30% commission.[2]

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. *Illinois Brick*, 431 U. S., at 737. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that *Illinois Brick* doesn't govern this situation surely must mean *Hanover Shoe* doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); *Illinois Brick*, 431 U. S., at 739 (explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder").[3]

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[2] Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

[3] The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will "result in 'conflicting claims to a common fund'" as *Illinois Brick* feared. *Ante*, at 286. But

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante*, at 281. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then

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Apple charged only one commission on each sale. So even assuming for argument's sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because "there is only *one 30% markup*," any claim by the developers against Apple would necessarily be seeking "a piece of the same 30% pie." Brief in Opposition 12. It's a mystery why the Court refuses to accept that sensible concession.

remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 763, 772–774 (1984) (rejecting an "'artificial distinction'" that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*'s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the "general tendency of the law . . . not to go beyond" the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra*, at 289–290. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante*, at 286–288. The Court even tells us that any "ambiguity" about the permissibility of pass-on damages should be

resolved "in the direction of the statutory text," *ante*, at 282—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common-law principles of proximate cause. Last but not least, the Court suggests that the traditional understanding of *Illinois Brick* leads to "arbitrary and unprincipled" results. *Ante*, at 282. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a "markup" scenario in which a monopolistic retailer buys a product from a manufacturer for $6 and then decides to sell the product to a consumer for $10, applying a supracompetitive $4 markup. The second is a "commission" scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer's product to a consumer for $10 and the retailer keeps a supracompetitive 40% commission, sending $6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

But there is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those

directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

Some *amici* share the Court's skepticism of *Illinois Brick*. They even urge us to overrule *Illinois Brick*, assuring us that "modern economic techniques" can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe not. But there's plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they've disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

Syllabus

MERCK SHARP & DOHME CORP. *v.* ALBRECHT ET AL.

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

No. 17–290. Argued January 7, 2019—Decided May 20, 2019

Petitioner Merck Sharp & Dohme Corp. manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. However, the mechanism through which Fosamax treats and prevents osteoporosis may increase the risk that patients will suffer "atypical femoral fractures," that is, a rare type of complete, low-energy fracture that affects the thigh bone. When the Food and Drug Administration first approved of the manufacture and sale of Fosamax in 1995, the Fosamax label did not warn of the then-speculative risk of atypical femoral fractures associated with the drug. But stronger evidence connecting Fosamax to atypical femoral fractures developed after 1995. And the FDA ultimately ordered Merck to add a warning about atypical femoral fractures to the Fosamax label in 2011.

Respondents are more than 500 individuals who took Fosamax and suffered atypical femoral fractures between 1999 and 2010. Respondents sued Merck seeking tort damages on the ground that state law imposed upon Merck a legal duty to warn respondents and their doctors about the risk of atypical femoral fractures associated with using Fosamax. Merck, in defense, argued that respondents' state-law failure-to-warn claims should be dismissed as pre-empted by federal law. Merck conceded that the FDA regulations would have permitted Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt. In particular, Merck claimed that the FDA's rejection of Merck's 2008 attempt to warn of a risk of "stress fractures" showed that the FDA would also have rejected any attempt by Merck to warn of the risk of atypical femoral fractures associated with the drug.

The District Court agreed with Merck's pre-emption argument and granted summary judgment to Merck, but the Third Circuit vacated and remanded. The Court of Appeals recognized that its pre-emption analysis was controlled by this Court's decision in *Wyeth* v. *Levine*, 555 U. S. 555, which held that a state-law failure-to-warn claim is pre-empted where there is "clear evidence" that the FDA would not have approved a change to the label. The Court of Appeals, however, suggested that the "clear evidence" standard had led to varying lower court applications and that it would be helpful for this Court to "clarif[y] or buil[d] out the doctrine." 852 F. 3d 268, 284.

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Held:

1. "Clear evidence" is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning. Pp. 310–316.

(a) The *Wyeth* Court undertook a careful review of the history of federal regulation of drugs and drug labeling and found both a reluctance by Congress to displace state laws that would penalize drug manufacturers for failing to warn consumers of the risks associated with their drugs and an insistence by Congress that drug manufacturers bear the responsibility for the content of their drug labels. Accordingly, this Court held in *Wyeth* that "absent clear evidence that the FDA would not have approved a change" to the label, the Court "will not conclude that it was impossible . . . to comply with both federal and state requirements." 555 U. S., at 571. Applying that rule to the facts of that case, the Court said that Wyeth's evidence of pre-emption fell short for two reasons. First, the record did not show that Wyeth "supplied the FDA with an evaluation or analysis concerning the specific dangers" that would have merited the warning. *Id.*, at 572–573. And second, the record did not show that Wyeth "attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA." *Ibid.*, and n. 5. Pp. 310–313.

(b) Thus, in a case like *Wyeth*, showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning. These conclusions flow from this Court's precedents on impossibility pre-emption and the statutory and regulatory scheme that the Court reviewed in *Wyeth*. See 555 U. S., at 578. In particular, this Court has refused to find clear evidence of impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit. And as explained in *Wyeth*, FDA regulations permit drug manufacturers to change a label to "reflect newly acquired information" if the changes "add or strengthen a . . . warning" for which there is "evidence of a causal association." 21 CFR § 314.70(c)(6)(iii)(A). Pp. 313–315.

(c) The only agency actions that can determine the answer to the pre-emption question are agency actions taken pursuant to the FDA's congressionally delegated authority. The Supremacy Clause grants "supreme" status only to the "the *Laws* of the United States." U. S.

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Const., Art. VI, cl. 2. And pre-emption takes place "'only when and if [the agency] is acting within the scope of its congressionally delegated authority.'" *New York* v. *FERC*, 535 U. S. 1, 18 (some alterations omitted). Pp. 315–316.

2. The question of agency disapproval is primarily one of law for a judge to decide. The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination, and are better suited to understand and to interpret agency decisions in light of the governing statutory and regulatory context. While contested brute facts will sometimes prove relevant to a court's legal determination about the meaning and effect of an agency decision, such factual questions are subsumed within an already tightly circumscribed legal analysis and do not warrant submission alone or together with the larger pre-emption question to a jury. Pp. 316–318.

852 F. 3d 268, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 318. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and KAVANAUGH, J., joined, *post*, p. 323.

Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *Jeffrey R. Johnson*, *Stephanie Parker*, and *Benjamin M. Flowers*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Wall*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Anthony A. Yang*, *Scott R. McIntosh*, *Joshua M. Salzman*, and *Karen E. Schifter*.

David C. Frederick argued the cause for respondents. With him on the brief were *Brendan J. Crimmins* and *Jeremy S. B. Newman*.*

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*Briefs of *amici curiae* urging reversal were filed for Pharmaceutical Research and Manufacturers of America et al. by *Robert A. Long, Jr.*, *Michael X. Imbroscio*, and *Paul W. Schmidt*; for the Product Liability Advisory Council, Inc., et al. by *Alan E. Untereiner* and *Daryl Joseffer*;

JUSTICE BREYER delivered the opinion of the Court.

When Congress enacted the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, it charged the Food and Drug Administration with ensuring that prescription drugs are "safe for use under the conditions prescribed, recommended, or suggested" in the drug's "labeling." § 355(d). When the FDA exercises this authority, it makes careful judgments about what warnings should appear on a drug's label for the safety of consumers.

For that reason, we have previously held that "clear evidence" that the FDA would not have approved a change to the drug's label pre-empts a claim, grounded in state law,

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and for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Virginia et al. by *Mark R. Herring*, Attorney General of Virginia, *Toby J. Heytens*, Solicitor General, *Matthew R. McGuire*, Principal Deputy Solicitor General, and *Michelle S. Kallen*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepson* of Connecticut, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the American Association for Justice by *Matthew W. H. Wessler* and *Jeffrey R. White*; for the CATO Institute by *Erik S. Jaffe*, *Gene C. Schaerr*, *W. Mark Lanier*, *Arthur R. Miller*, *Kenneth W. Starr*, *Kevin P. Parker*, and *Ilya Shapiro*; for the Medshadow Foundation et al. by *William B. Schultz* and *Margaret M. Dotzel*; for Public Citizen by *Allison M. Zieve* and *Scott L. Nelson*; for Public Law Scholars by *Elizabeth J. Cabraser* and *Ernest A. Young*; for Jerome P. Kassirer, M. D., et al. by *Robert S. Peck*, *Michael L. Baum*, *Bijan Esfandiari*, and *Stephen J. Herman*; for John C. P. Goldberg et al. by *Earl Landers Vickery* and *Gary L. Wilson*; and for Joseph Lane, M. D., et al. by *Karen Barth Menzies* and *Andre M. Mura.*

that a drug manufacturer failed to warn consumers of the change-related risks associated with using the drug. See *Wyeth* v. *Levine*, 555 U. S. 555, 571 (2009). We here determine that this question of pre-emption is one for a judge to decide, not a jury. We also hold that "clear evidence" is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning.

I

The central issue in this case concerns federal pre-emption, which as relevant here, takes place when it is "'impossible for a private party to comply with both state and federal requirements.'" *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472, 480 (2013). See also U. S. Const., Art. VI, cl. 2. The state law that we consider is state common law or state statutes that require drug manufacturers to warn drug consumers of the risks associated with drugs. The federal law that we consider is the statutory and regulatory scheme through which the FDA regulates the information that appears on brand-name prescription drug labels. The alleged conflict between state and federal law in this case has to do with a drug that was manufactured by petitioner Merck Sharp & Dohme and was administered to respondents without a warning of certain associated risks.

A

The FDA regulates the safety information that appears on the labels of prescription drugs that are marketed in the United States. 21 U. S. C. § 355(b)(1)(F); 21 CFR § 201.57(a) (2018). Although we commonly understand a drug's "label" to refer to the sticker affixed to a prescription bottle, in this context the term refers more broadly to the written material that is sent to the physician who prescribes the drug and the

written material that comes with the prescription bottle when the drug is handed to the patient at the pharmacy. 21 U. S. C. § 321(m). These (often lengthy) package inserts contain detailed information about the drug's medical uses and health risks. § 355(b)(1)(F); 21 CFR § 201.57(a).

FDA regulations set out requirements for the content, the format, and the order of the safety information on the drug label. § 201.57(c). Those regulations require drug labels to include, among other things: (1) prominent "boxed" warnings about risks that may lead to death or serious injury; (2) contraindications describing any situation in which the drug should not be used because the risk of use outweighs any therapeutic benefit; (3) warnings and precautions about other potential safety hazards; and (4) any adverse reactions for which there is some basis to believe a causal relationship exists between the drug and the occurrence of the adverse event. *Ibid.*

As those requirements make clear, the category in which a particular risk appears on a drug label is an indicator of the likelihood and severity of the risk. The hierarchy of label information is designed to "prevent overwarning" so that less important information does not "overshadow" more important information. 73 Fed. Reg. 49605–49606 (2008). It is also designed to exclude "[e]xaggeration of risk, or inclusion of speculative or hypothetical risks," that "could discourage appropriate use of a beneficial drug." *Id.*, at 2851.

Prospective drug manufacturers work with the FDA to develop an appropriate label when they apply for FDA approval of a new drug. 21 U. S. C. §§ 355(a), 355(b), 355(d)(7); 21 CFR § 314.125(b)(6). But FDA regulations also acknowledge that information about drug safety may change over time, and that new information may require changes to the drug label. §§ 314.80(c), 314.81(b)(2)(i). Drug manufacturers generally seek advance permission from the FDA to make substantive changes to their drug labels. However, an FDA regulation called the "changes being effected" or

"CBE" regulation permits drug manufacturers to change a label without prior FDA approval if the change is designed to "add or strengthen a . . . warning" where there is "newly acquired information" about the "evidence of a causal association" between the drug and a risk of harm. 21 CFR §314.70(c)(6)(iii)(A).

B

Petitioner Merck Sharp & Dohme manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. App. 192; *In re Fosamax (Alendronate Sodium) Prods. Liability Litigation*, 852 F. 3d 268, 271, 274–275 (CA3 2017). Fosamax belongs to a class of drugs called bisphosphonates. Fosamax and other bisphosphonates work by affecting the "bone remodeling process," that is, the process through which bones are continuously broken down and built back up again. App. 102, 111. For some postmenopausal women, the two parts of the bone remodeling process fall out of sync; the body removes old bone cells faster than it can replace them. That imbalance can lead to osteoporosis, a disease that is characterized by low bone mass and an increased risk of bone fractures. Fosamax (like other bisphosphonates) slows the breakdown of old bone cells and thereby helps postmenopausal women avoid osteoporotic fractures. *Id.*, at 102.

However, the mechanism through which Fosamax decreases the risk of osteoporotic fractures may increase the risk of a different type of fracture. *Id.*, at 400–444, 661–663. That is because all bones—healthy and osteoporotic alike—sometimes develop microscopic cracks that are not due to any trauma, but are instead caused by the mechanical stress of everyday activity. *Id.*, at 102. Those so-called stress fractures ordinarily heal on their own through the bone remodeling process. But, by slowing the breakdown of old bone cells, Fosamax and other bisphosphonates may cause stress fractures to progress to complete breaks that cause great pain and require surgical intervention to repair. *Id.*,

at 106–109, 139, 144–145. When that rare type of complete, low-energy fracture affects the thigh bone, it is called an Atypical Femoral Fracture. *Id.*, at 101.

The Fosamax label that the FDA approved in 1995 did not warn of the risk of atypical femoral fractures. 852 F. 3d, at 274–275. At that time, Merck's scientists were aware of at least a theoretical risk of those fractures. Indeed, as far back as 1990 and 1991, when Fosamax was undergoing preapproval clinical trials, Merck scientists expressed concern in internal discussions that Fosamax could inhibit bone remodeling to such a "'profound'" degree that "inadequate repair may take place" and "'micro-fractures would not heal.'" App. 111–113. When Merck applied to the FDA for approval of Fosamax, Merck brought those theoretical considerations to the FDA's attention. 852 F. 3d, at 274–275. But, perhaps because the concerns were only theoretical, the FDA approved Fosamax's label without requiring any mention of this risk. *Ibid.*

Evidence connecting Fosamax to atypical femoral fractures developed after 1995. Merck began receiving adverse event reports from the medical community indicating that long-term Fosamax users were suffering atypical femoral fractures. App. 122–125. For example, Merck received a report from a doctor who said that hospital staff had begun calling atypical femoral fractures the "'Fosamax Fracture'" because "'100% of patients in his practice who have experienced femoral fractures (without being hit by a taxicab), were taking Fosamax . . . for over 5 years.'" *Id.*, at 126. Merck performed a statistical analysis of Fosamax adverse event reports, concluding that these reports revealed a statistically significant incidence of femur fractures. 3 App. in No. 14–1900 (CA3), pp. A1272–A1273, A1443. And about the same time, Merck began to see numerous scholarly articles and case studies documenting possible connections between long-term Fosamax use and atypical femoral fractures. App. 106–110, 116–122.

In 2008, Merck applied to the FDA for preapproval to change Fosamax's label to add language to both the "Adverse Reaction[s]" and the "Precaution[s]" sections of the label. *Id.*, at 670. In particular, Merck proposed adding a reference to "'low-energy femoral shaft fracture'" in the Adverse Reactions section, and cross-referencing a longer discussion in the Precautions section that focused on the risk of stress fractures associated with Fosamax. *Id.*, at 728. The FDA approved the addition to the Adverse Reactions section, but rejected Merck's proposal to warn of a risk of "stress fractures." *Id.*, at 511–512. The FDA explained that Merck's "justification" for the proposed change to the Precautions section was "inadequate," because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature." *Id.*, at 511. The FDA invited Merck to "resubmit" its application and to "fully address all the deficiencies listed." *Id.*, at 512; see 21 CFR §314.110(b). But Merck instead withdrew its application and decided to make the changes to the Adverse Reactions section through the CBE process. App. 654–660. Merck made no changes to the Precautions section at issue here. *Id.*, at 274.

A warning about "atypical femoral fractures" did not appear on the Fosamax label until 2011, when the FDA ordered that change based on its own analyses. *Id.*, at 246–252, 526–534. Merck was initially resistant to the change, proposing revised language that, once again, referred to the risk of "stress fractures." *Id.*, at 629–634. But the FDA, once again, rejected that language. And this time, the FDA explained that "the term 'stress fracture' was considered and was not accepted" because, "for most practitioners, the term 'stress fracture' represents a minor fracture and this would contradict the seriousness of the atypical femoral fractures associated with bisphosphonate use." *Id.*, at 566. In January 2011, Merck and the FDA ultimately agreed upon adding a three-paragraph discussion of atypical femoral fractures to

the Warnings and Precautions section of the Fosamax label. *Id.*, at 223–224. The label now refers to the fractures five times as "atypical" without using the term "stress fracture." *Ibid.*

C

Respondents here are more than 500 individuals who took Fosamax and who suffered atypical femoral fractures between 1999 and 2010. Brief for Respondents 7. Respondents, invoking federal diversity jurisdiction, filed separate actions seeking tort damages on the ground that, during the relevant period, state law imposed upon Merck a legal duty to warn them and their doctors about the risk of atypical femoral fractures associated with using Fosamax. *Id.*, at 1. One respondent, for example, filed a complaint alleging that she took Fosamax for roughly 10 years and suffered an atypical femoral fracture. One day in 2009, when the respondent was 70 years old, she turned to unlock the front door of her house, heard a popping sound, and suddenly felt her left leg give out beneath her. She needed surgery, in which doctors repaired her leg with a rod and screws. She explained she would not have used Fosamax for so many years if she had known that she might suffer an atypical femoral fracture as a result. See *id.*, at 18–19.

Merck, in defense, argued that respondents' state-law failure-to-warn claims should be dismissed as pre-empted by federal law. Both Merck and the FDA have long been aware that Fosamax could theoretically increase the risk of atypical femoral fractures. But for some period of time between 1995 (when the FDA first approved a drug label for Fosamax) and 2010 (when the FDA decided to require Merck to add a warning about atypical femoral fractures to Fosamax's label), both Merck and the FDA were unsure whether the developing evidence of a causal link between Fosamax and atypical femoral fractures was strong enough to require adding a warning to the Fosamax drug label. Merck conceded that the FDA's CBE regulation would have permitted

Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt. In particular, Merck pointed to the FDA's rejection of Merck's 2008 attempt to amend the Fosamax label to warn of the risk of "stress fractures" associated with Fosamax. On that basis, Merck claimed that federal law prevented Merck from complying with any state-law duty to warn respondents of the risk of atypical femoral fractures associated with Fosamax.

The District Court agreed with Merck's pre-emption argument and granted summary judgment to Merck, *In re Fosamax (Alendronate Sodium): Prods. Liability Litigation*, 2014 WL 1266994, *17 (D NJ, Mar. 22, 2017), but the Court of Appeals vacated and remanded, 852 F. 3d, at 302. The Court of Appeals concluded that its pre-emption analysis was controlled by this Court's decision in *Wyeth*. 852 F. 3d, at 302. The Court of Appeals understood that case as making clear that a failure-to-warn claim grounded in state law is preempted where there is " 'clear evidence that the FDA would not have approved a change to the . . . label.' " *Id.*, at 280 (quoting *Wyeth*, 555 U. S., at 571). The Court of Appeals, however, suggested that this statement had led to varying lower court applications and that it would be helpful for this Court to "clarif[y] or buil[d] out the doctrine." 852 F. 3d, at 284.

In attempting to do so itself, the Court of Appeals held that "the Supreme Court intended to announce a standard of proof when it used the term 'clear evidence' in *Wyeth*." *Ibid.* That is, the Court of Appeals believed that "[t]he term 'clear evidence' . . . does not refer directly to the *type* of facts that a manufacturer must show, or to the circumstances in which preemption will be appropriate." *Id.*, at 285. "Rather, it specifies how *difficult* it will be for the manufacturer to convince the factfinder that the FDA would have rejected a proposed label change." *Ibid.* And in the Court of Appeals' view, "for a defendant to establish a preemption defense under *Wyeth*, the factfinder must conclude

that it is highly probable that the FDA would not have approved a change to the drug's label." *Id.*, at 286. Moreover and importantly, the Court of Appeals also held that "whether the FDA would have rejected a proposed label change is a question of fact that must be answered by a jury." *Ibid.*

Merck filed a petition for a writ of certiorari. Merck's petition asked the Court to decide whether Merck's case and others like it "must . . . go to a jury" to determine whether the FDA, in effect, has disapproved a state-law-required labeling change. In light of differences and uncertainties among the courts of appeals and state supreme courts in respect to the application of *Wyeth*, we granted certiorari. See, *e. g.*, *Mason* v. *SmithKline Beecham Corp.*, 596 F. 3d 387, 391 (CA7 2010) ("The Supreme Court . . . did not clarify what constitutes 'clear evidence' "); *Reckis* v. *Johnson & Johnson*, 471 Mass. 272, 286, 28 N. E. 3d 445, 457 (2015) ("*Wyeth* did not define 'clear evidence' . . . " (some internal quotation marks omitted)).

II

We stated in *Wyeth* v. *Levine* that state-law failure-to-warn claims are pre-empted by the Federal Food, Drug, and Cosmetic Act (FDCA) and related labeling regulations when there is "clear evidence" that the FDA would not have approved the warning that state law requires. 555 U. S., at 571. We here decide that a judge, not the jury, must decide the pre-emption question. And we elaborate *Wyeth*'s requirements along the way.

A

We begin by describing *Wyeth.* In that case, the plaintiff developed gangrene after a physician's assistant injected her with Phenergan, an antinausea drug. The plaintiff brought a state-law failure-to-warn claim against Wyeth, the drug's manufacturer, for failing to provide an adequate warning about the risks that accompany various methods of adminis-

tering the drug. In particular, the plaintiff claimed that directly injecting Phenergan into a patient's vein (the "IV-push" method of administration) creates a significant risk of catastrophic consequences. And those consequences could be avoided by introducing the drug into a saline solution that slowly descends into a patient's vein (the "IV-drip" method of administration). A jury concluded that Wyeth's warning label was inadequate, and that the label's inadequacy caused the plaintiff's injury. On appeal, Wyeth argued that the plaintiff's state-law failure-to-warn claims were pre-empted because it was impossible for Wyeth to comply with both state-law duties and federal labeling obligations. The Vermont Supreme Court rejected Wyeth's pre-emption claim. *Id.*, at 563.

We too considered Wyeth's pre-emption argument, and we too rejected it. In rejecting Wyeth's argument, we undertook a careful review of the history of federal regulation of drugs and drug labeling. *Id.*, at 566–568. In doing so, we "assum[ed] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 565 (internal quotation marks omitted). And we found nothing within that history to indicate that the FDA's power to approve or to disapprove labeling changes, by itself, pre-empts state law.

Rather, we concluded that Congress enacted the FDCA "to bolster consumer protection against harmful products"; that Congress provided no "*federal* remedy for consumers harmed by unsafe or ineffective drugs"; that Congress was "awar[e] of the prevalence of state tort litigation"; and that, whether Congress' general purpose was to protect consumers, to provide safety-related incentives to manufacturers, or both, language, history, and purpose all indicate that "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.*, at 574–575 (emphasis added). See also *id.*, at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it

surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history").

We also observed that "through many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times." *Id.*, at 570–571. A drug manufacturer "is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." *Id.*, at 571. Thus, when the risks of a particular drug become apparent, the manufacturer has "a duty to provide a warning that adequately describe[s] that risk." *Ibid.* "Indeed," we noted, "prior to 2007, the FDA lacked the authority to order manufacturers to revise their labels." *Ibid.* And even when "Congress granted the FDA this authority," in the 2007 amendments to the FDCA, Congress simultaneously "reaffirmed the manufacturer's obligations and referred specifically to the CBE regulation, which both reflects the manufacturer's ultimate responsibility for its label and provides a mechanism for adding safety information to the label prior to FDA approval." *Ibid.*

In light of Congress' reluctance to displace state laws that would penalize drug manufacturers for failing to warn consumers of the risks associated with their drugs, and Congress' insistence on requiring drug manufacturers to bear the responsibility for the content of their drug labels, we were unpersuaded by Wyeth's pre-emption argument. In Wyeth's case, we concluded, "when the risk of gangrene from IV-push injection of Phenergan became apparent, Wyeth had a duty" under state law "to provide a warning that adequately described that risk, and the CBE regulation permitted it to provide such a warning before receiving the FDA's approval." *Ibid.*

At the same time, and more directly relevant here, we pointed out that "the FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its re-

view of the manufacturer's supplemental application, just as it retains such authority in reviewing all supplemental applications." *Ibid.* We then said that, nonetheless, "*absent clear evidence that the FDA would not have approved a change* to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Ibid.* (emphasis added).

We reviewed the record and concluded that "Wyeth has offered no such evidence." *Id.*, at 572. We said that Wyeth's evidence of pre-emption fell short for two reasons. First, the record did not show that Wyeth "supplied the FDA with an evaluation or analysis concerning the specific dangers" that would have merited the warning. *Id.*, at 572–573. We could find "no evidence in this record that either the FDA or the manufacturer gave more than passing attention to the issue of IV-push versus IV-drip administration"—the matter at issue in the case. *Id.*, at 572 (internal quotation marks omitted). Second, the record did not show that Wyeth "attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA." *Ibid.*, and n. 5. The "FDA had not made an affirmative decision to preserve" the warning as it was or "to prohibit Wyeth from strengthening its warning." *Id.*, at 572. For those reasons, we could not "credit Wyeth's contention that the FDA would have prevented it from adding a stronger warning about the IV-push method of intravenous administration." *Id.*, at 573. And we could not conclude that "it was impossible for Wyeth to comply with both federal and state requirements." *Ibid.* We acknowledged that meeting the standard we set forth would be difficult, but, we said, "[i]mpossibility pre-emption is a demanding defense." *Ibid.*

B

The underlying question for this type of impossibility pre-emption defense is whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from

adding any and all warnings to the drug label that would satisfy state law. And, of course, in order to succeed with that defense the manufacturer must show that the answer to this question is yes. But in *Wyeth*, we confronted that question in the context of a particular set of circumstances. Accordingly, for purposes of this case, we assume—but do not decide—that, as was true of the warning at issue in *Wyeth*, there is sufficient evidence to find that Merck violated state law by failing to add a warning about atypical femoral fractures to the Fosamax label. In a case like *Wyeth*, showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning.

These conclusions flow from our precedents on impossibility pre-emption and the statutory and regulatory scheme that we reviewed in *Wyeth*. See 555 U. S., at 578. In particular, "it has long been settled that state laws that conflict with federal law are without effect." *Mutual Pharmaceutical Co.*, 570 U. S., at 479–480. But as we have cautioned many times before, the "possibility of impossibility [is] not enough." *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 625, n. 8 (2011) (internal quotation marks omitted). Consequently, we have refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit. See, *e. g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 31 (1996); *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Bd.*, 467 U. S. 461, 478, and n. 21 (1984).

And, as we explained in *Wyeth*, 555 U. S., at 571–573, federal law—the FDA's CBE regulation—permits drug manufacturers to change a label to "reflect newly acquired infor-

mation" if the changes "add or strengthen a . . . warning" for which there is "evidence of a causal association," without prior approval from the FDA. 21 CFR § 314.70(c)(6)(iii)(A). Of course, the FDA reviews CBE submissions and can reject label changes even after the manufacturer has made them. See §§ 314.70(c)(6), (7). And manufacturers cannot propose a change that is not based on reasonable evidence. § 314.70(c)(6)(iii)(A). But in the interim, the CBE regulation permits changes, so a drug manufacturer will not ordinarily be able to show that there is an actual conflict between state and federal law such that it was impossible to comply with both.

We do not further define *Wyeth*'s use of the words "clear evidence" in terms of evidentiary standards, such as "preponderance of the evidence" or "clear and convincing evidence" and so forth, because, as we shall discuss, *infra*, at 316–318, courts should treat the critical question not as a matter of fact for a jury but as a matter of law for the judge to decide. And where that is so, the judge must simply ask himself or herself whether the relevant federal and state laws "irreconcilably conflic[t]." *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982); see *ibid.* ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute").

We do note, however, that the only agency actions that can determine the answer to the pre-emption question, of course, are agency actions taken pursuant to the FDA's congressionally delegated authority. The Supremacy Clause grants "supreme" status only to "the *Laws* of the United States." U. S. Const., Art. VI, cl. 2. And pre-emption takes place "'only when and if [the agency] is acting within the scope of its congressionally delegated authority, . . . for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York* v. *FERC*, 535 U. S. 1, 18 (2002) (some alterations omitted). Federal law

permits the FDA to communicate its disapproval of a warning by means of notice-and-comment rulemaking setting forth labeling standards, see, *e. g.*, 21 U. S. C. § 355(d); 21 CFR §§ 201.57, 314.105; by formally rejecting a warning label that would have been adequate under state law, see, *e. g.*, 21 CFR §§ 314.110(a), 314.125(b)(6); or with other agency action carrying the force of law, cf., *e. g.*, 21 U. S. C. § 355(*o*)(4)(A). The question of disapproval "method" is not now before us. And we make only the obvious point that, whatever the means the FDA uses to exercise its authority, those means must lie within the scope of the authority Congress has lawfully delegated.

III

We turn now to what is the determinative question before us: Is the question of agency disapproval primarily one of fact, normally for juries to decide, or is it a question of law, normally for a judge to decide without a jury?

The complexity of the preceding discussion of the law helps to illustrate why we answer this question by concluding that the question is a legal one for the judge, not a jury. The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination. Judges are experienced in "[t]he construction of written instruments," such as those normally produced by a federal agency to memorialize its considered judgments. *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 388 (1996). And judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context. Cf. 5 U. S. C. § 706 (specifying that a "reviewing court," not a jury, "shall . . . determine the meaning or applicability of the terms of an agency action"); see also H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (noting longstanding view that "questions respecting the . . . terms of any agency action"

and its "application" are "questions of law"). To understand the question as a legal question for judges makes sense given the fact that judges are normally familiar with principles of administrative law. Doing so should produce greater uniformity among courts; and greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of federal agency action. Cf. *Markman*, 517 U. S., at 390–391.

We understand that sometimes contested brute facts will prove relevant to a court's legal determination about the meaning and effect of an agency decision. For example, if the FDA rejected a drug manufacturer's supplemental application to change a drug label on the ground that the information supporting the application was insufficient to warrant a labeling change, the meaning and scope of that decision might depend on what information the FDA had before it. Yet in litigation between a drug consumer and a drug manufacturer (which will ordinarily lack an official administrative record for an FDA decision), the litigants may dispute whether the drug manufacturer submitted all material information to the FDA.

But we consider these factual questions to be subsumed within an already tightly circumscribed legal analysis. And we do not believe that they warrant submission alone or together with the larger pre-emption question to a jury. Rather, in those contexts where we have determined that the question is "for the judge and not the jury," we have also held that "courts may have to resolve subsidiary factual disputes" that are part and parcel of the broader legal question. *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318, 326–327 (2015). And, as in contexts as diverse as the proper construction of patent claims and the voluntariness of criminal confessions, they create a question that "'falls somewhere between a pristine legal standard and a simple historical fact.'" *Markman*, 517 U. S., at 388 (quoting *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985)). In those

circumstances, "'the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Markman*, 517 U. S., at 388 (quoting *Miller*, 474 U. S., at 114). In this context, that "better positioned" decisionmaker is the judge.

IV

Because the Court of Appeals treated the pre-emption question as one of fact, not law, and because it did not have an opportunity to consider fully the standards we have described in Part II of our opinion, we vacate its judgment and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion and write separately to explain my understanding of the relevant pre-emption principles and how they apply to this case.

The Supremacy Clause of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Under this Clause, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 617 (2011). Although the Court has articulated several theories of pre-emption, Merck's sole argument here is that state law is pre-empted because it is impossible for Merck to comply with federal and state law. I remain skeptical that "physical impossibility" is a proper test for

deciding whether a direct conflict exists between federal and state law. But even under our impossibility precedents, Merck's pre-emption defense fails.

I

As I have explained before, it is not obvious that the "'physical impossibility' standard is the best proxy for determining when state and federal laws 'directly conflict' for purposes of the Supremacy Clause." *Wyeth* v. *Levine*, 555 U. S. 555, 590 (2009) (opinion concurring in judgment). Evidence from the founding suggests that, under the original meaning of the Supremacy Clause, federal law pre-empts state law only if the two are in logical contradiction. See *ibid.*; Nelson, Preemption, 86 Va. L. Rev. 225, 260–261 (2000). Sometimes, federal law will logically contradict state law even if it is possible for a person to comply with both. For instance, "if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior." *Wyeth*, 555 U. S., at 590 (opinion of THOMAS, J.).

Merck does not advance this logical-contradiction standard, and it is doubtful that a pre-emption defense along these lines would succeed here. "To say, as the statute does, that [Merck] may not market a drug without federal approval (*i. e.*, without [a Food and Drug Administration (FDA)] approved label) is not to say that federal approval gives [Merck] the unfettered right, for all time, to market its drug with the specific label that was federally approved." *Id.*, at 592. Nothing in the federal brand-name-drug "statutory or regulatory scheme necessarily insulates [Merck] from liability under state law simply because the FDA has approved a particular label." *Id.*, at 593. The relevant question would be whether federal law gives Merck "an unconditional right to market [a] federally approved drug at all times with the

precise label initially approved by the FDA," *id.*, at 592, or whether it instead provides a federal floor that can be supplemented by different state standards, see Brief for Cato Institute as *Amicus Curiae* 14, n. 4. Absent a federal statutory right to sell a brand-name drug with an FDA-approved label, FDA approval "does not represent a finding that the drug, as labeled, can never be deemed unsafe by later federal action, or as in this case, the application of state law." *Wyeth*, *supra*, at 592 (opinion of THOMAS, J.).

II

Applying the Court's impossibility precedents leads to the same conclusion. The question for impossibility is whether it was "lawful under federal law for [Merck] to do what state law required of" it. *Mensing*, 564 U. S., at 618. Because "[p]re-emption analysis requires us to compare federal and state law," I "begin by identifying the [relevant] state tort duties and federal labeling requirements." *Id.*, at 611. Respondents' claim here is "that state law obligated Merck to add a warning about atypical femur fractures" to the Warnings and Precautions section of Fosamax's label. *In re Fosamax (Alendronate Sodium) Prods. Liability Litigation*, 852 F. 3d 268, 282 (CA3 2017). Under the Federal Food, Drug, and Cosmetic Act, a manufacturer of a brand-name drug "bears responsibility for the content of its label at all times." *Wyeth*, 555 U. S., at 570–571 (majority opinion). The manufacturer "is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." *Id.*, at 571. Generally, to propose labeling changes, the manufacturer can submit a Prior Approval Supplement (PAS) application, which requires FDA approval before the changes are made. 21 CFR §314.70(b) (2018). Alternatively, under the FDA's Changes Being Effected (CBE) regulation, if the manufacturer would like to change a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" "to reflect

newly acquired information," it can change the label immediately upon filing its supplemental application with the FDA, without waiting for FDA approval. § 314.70(c)(6)(iii); see *Wyeth*, *supra*, at 568. If the FDA later disapproves the CBE application, "it may order the manufacturer to cease distribution of the drug product(s)" with the new labeling. § 314.70(c)(7).

Here, Merck's impossibility pre-emption defense fails because it does not identify any federal law that "prohibited [it] from adding any and all warnings . . . that would satisfy state law." *Ante*, at 313–314. By its reference to "the Laws of the United States," the Supremacy Clause "requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, *supra*, at 586 (opinion of THOMAS, J.). Merck's primary argument, based on various agency communications, is that the FDA would have rejected a hypothetical labeling change submitted via the CBE process. But neither agency musings nor hypothetical future rejections constitute pre-emptive "Laws" under the Supremacy Clause.

As the Court describes, in 2008, Merck submitted PAS applications to add certain language regarding fractures to the Adverse Reactions and the Warnings and Precautions sections of Fosamax's label. *Ante*, at 307–308. In 2009, the FDA sent Merck a "complete response" letter "agree[ing] that atypical and subtrochanteric fractures should be added" to the Adverse Reactions section. App. 510–511. But the letter said that Merck's proposed Warnings and Precautions language, which focused on "the risk factors for stress fractures," was "inadequate" because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature." *Id.*, at 511. In accord with FDA regulations, the letter required Merck to take one of three actions: (1) "[r]esubmit the appli-

cation . . . , addressing all deficiencies identified in the complete response letter"; (2) "[w]ithdraw the application . . . without prejudice to a subsequent submission"; or (3) "[a]sk the agency to provide . . . an opportunity for a hearing," after which "the agency will either approve" or "refuse to approve the application." 21 CFR §314.110(b); see App. 512. As this regulation suggests and the FDA has explained, complete response letters merely "infor[m] sponsors of changes that must be made before an application can be approved, *with no implication as to the ultimate approvability of the application.*" 73 Fed. Reg. 39588 (2008) (emphasis added). In other words, the 2009 letter neither marked "the consummation of the agency's decisionmaking process" nor determined Merck's "rights or obligations." *Bennett* v. *Spear*, 520 U. S. 154, 178 (1997) (internal quotation marks omitted). Instead, it was "of a merely tentative or interlocutory nature." *Ibid.* Therefore, the letter was not a final agency action with the force of law, so it cannot be "Law" with preemptive effect.

Merck's argument that the 2009 letter and other agency communications suggest that the FDA would have denied a future labeling change fares no better: hypothetical agency action is not "Law." As Merck acknowledges, it could have resubmitted its PAS applications, sought a hearing, or changed its label at any time through the CBE process. See Reply Brief 13. Indeed, when Merck instead decided to withdraw its PAS applications, it added atypical femoral fractures to the Adverse Reactions section through the CBE process. That process also enabled Merck to add language to the Warnings and Precautions section, but Merck did not do so. If it had, it could have satisfied its federal and alleged state-law duties—meaning that it was possible for Merck to independently satisfy both sets of duties. Merck's belief that the FDA would have eventually rejected a CBE application does not make an earlier CBE change impossible. As the Court correctly explains, "'the possibility of impossibil-

ity [is] not enough.'" *Ante*, at 314. The very point of the CBE process is that a manufacturer can "unilaterally" make a labeling change that does not violate other federal law, *Wyeth*, 555 U. S., at 573; see *id.*, at 570; *e. g.*, 21 U. S. C. § 352, at least until the FDA rules on its application.*

Because Merck points to no statute, regulation, or other agency action with the force of law that would have prohibited it from complying with its alleged state-law duties, its pre-emption defense should fail as a matter of law.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KAVANAUGH join, concurring in the judgment.

I concur in the judgment because I agree with the Court's decision on the only question that it actually decides, namely, that whether federal law allowed Merck to include in the Fosamax label the warning alleged to be required by state law is a question of law to be decided by the courts, not a question of fact. I do not, however, join the opinion of the Court because I am concerned that its discussion of the law and the facts may be misleading on remand.

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*In 2007, Congress "granted the FDA statutory authority to require a manufacturer to change its drug label based on safety information that becomes available after a drug's initial approval," but even after this amendment, brand-name-drug "manufacturers remain responsible for updating their labels." *Wyeth*, 555 U. S., at 567–568; see 21 U. S. C. § 355(*o*)(4). As I understand the Court's opinion, if proper agency actions pursuant to this amendment, or other federal law, "prohibited the drug manufacturer from . . . satisfy[ing] state law," state law would be pre-empted under our impossibility precedents regardless of whether the manufacturer "show[ed] that it fully informed the FDA of the justifications for the warning required by state law." *Ante*, at 314; see, *e. g.*, *Wyeth*, 555 U. S., at 576; *id.*, at 582 (BREYER, J., concurring). Of course, the only proper agency actions are those "that are set forth in, or necessarily follow from, the statutory text," and they must have the force of law to be pre-emptive. *Id.*, at 586 (opinion of THOMAS, J.). I am aware of no such agency action here that prevented Merck from complying with state law.

I

I begin with the law. The Court correctly notes that a drug manufacturer may prove impossibility pre-emption by showing that "federal law (including appropriate [Food and Drug Administration (FDA)] actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law." *Ante*, at 313–314. But in expounding further on the pre-emption analysis, the Court provides a skewed summary. While dwelling on our decision in *Wyeth* v. *Levine*, 555 U. S. 555 (2009), see *ante*, at 310–315, the Court barely notes a statutory provision enacted after the underlying events in that case that may have an important bearing on the ultimate pre-emption analysis in this case.

Under 21 U. S. C. § 355(*o*)(4)(A), which was enacted in 2007, Congress has imposed on the FDA a duty to initiate a label change "[i]f the Secretary becomes aware of new information, including any new safety information . . . that the Secretary determines should be included in the labeling of the drug."* This provision does not relieve drug manufacturers of their own responsibility to maintain their drug labels, see § 355(*o*)(4)(I), but the FDA's "actions," *ante*, at 313, taken pursuant to this duty arguably affect the pre-emption analysis. This is so because, if the FDA declines to require a label change despite having received and considered information regarding a new risk, the logical conclusion is that the FDA determined that a label change was unjustified. See *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). The FDA's duty does not depend on whether the relevant drug manufacturer, as

*Prior to October 2018, § 355(*o*)(4)(A)'s language contained slight differences not relevant here. See Substance Use–Disorder Prevention That Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. 115–271, § 3041(b), 132 Stat. 3942–3943, effective Oct. 24, 2018.

opposed to some other entity or individual, brought the new information to the FDA's attention. Cf. *ante*, at 314 ("[T]he drug manufacturer [must] show that it fully informed the FDA of the justifications for the warning required by state law"). Nor does § 355(*o*)(4)(A) require the FDA to communicate to the relevant drug manufacturer that a label change is unwarranted; instead, the FDA could simply consider the new information and decide not to act. Cf. *ante*, at 314 ("[T]he FDA, in turn, [must have] informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning").

Section 355(*o*)(4)(A) is thus highly relevant to the pre-emption analysis, which turns on whether "federal law (*including appropriate FDA actions*) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law." *Ante*, at 313–314 (emphasis added). On remand, I assume that the Court of Appeals will consider the effect of § 355(*o*)(4)(A) on the pre-emption issue in this case.

Two other aspects of the Court's discussion of the legal background must also be mentioned. First, although the Court's discussion of the point is a bit opaque, the Court holds—correctly, in my view—that *Wyeth*'s use of the phrase "clear evidence" was merely a rhetorical flourish. As the Court explains, a judge, in determining whether federal law would permit a label change allegedly required by state law, "must simply ask himself or herself whether the relevant federal and state laws 'irreconcilably conflic[t].'" *Ante*, at 315 (quoting *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982)). Standards of proof, such as preponderance of the evidence and clear and convincing evidence, have no place in the resolution of this question of law.

Second, for reasons that entirely escape me, the Court refuses to acknowledge that there are two ways in which a drug manufacturer may attempt to alter a drug's label. The Court notes that a manufacturer may proceed under the

FDA's "'changes being effected'" or "'CBE'" regulation, which permits a manufacturer to change a label without prior FDA approval under some circumstances. See *ante*, at 304–305, 315. But the Court refuses to note that a manufacturer may (and, in many circumstances, must) submit a Prior Approval Supplement (PAS). 21 CFR §314.70(b) (2018). As the name suggests, changes proposed in a PAS must receive FDA approval before drug manufacturers may make the changes. §314.70(b)(3). And "[h]istorically," the FDA has "accepted PAS applications instead of CBE supplements, as occurred in this case, particularly where significant questions exist on whether to revise or how to modify existing drug labeling." Brief for United States as *Amicus Curiae* 5.

II

I now turn to the facts. Resolution of the legal question that the Court decides does not require much discussion of the facts, but if the Court wishes to include such a summary, its presentation should be balanced. Instead, the Court provides a one-sided account. For example, it highlights historical accounts dating back to the 1990s that purportedly linked atypical femoral fractures with Fosamax use, see *ante*, at 306, 308, but it omits any mention of the extensive communication between Merck and the FDA during the relevant period.

A reader of the Court's opinion will inevitably be left with the impression that, once the FDA rejected Merck's proposed warning in 2009, neither the FDA nor Merck took any other actions related to atypical femoral fractures "until 2011," *ante*, at 307. But that is simply not true.

While Merck's 2008 proposal was pending, the FDA remained in contact with Merck about the issue of atypical femoral fractures, which Merck, at the time, labeled as a type of stress fracture. See, *e. g.*, App. 707, 746–748. An internal Merck memorandum describes a phone call in which an FDA official allegedly told Merck that "[t]he conflicting nature of the literature does not provide a clear path forward,

and more time will be need[ed] for FDA to formulate a formal opinion on the issue of a precaution around these data." *Id.*, at 767. In an e-mail about a week later, another FDA official told Merck that the FDA would "close out" Merck's applications if Merck "agree[d] to hold off on the [Precautions] language at this time." *Id.*, at 508. The official went on to say that the FDA "would then work with . . . Merck to decide on language for a [Precautions] atypical fracture language, if it is warranted." *Ibid.*

Then, months after the FDA rejected Merck's proposed warning, the FDA issued a Safety Announcement regarding its "[o]ngoing safety review of oral bisphosphonates and atypical subtrochanteric femur fractures." *Id.*, at 519. The Safety Announcement stated that, "[a]t this point, the data that FDA has reviewed have not shown a clear connection between bisphosphonate use and a risk of atypical subtrochanteric femur fractures." *Ibid.* Nonetheless, the Safety Announcement announced the FDA's intent to further study the issue alongside a task force formed to address the atypical fractures. *Id.*, at 519–520. And the Safety Announcement concluded by admonishing healthcare professionals to "continue to follow the recommendations in the drug label when prescribing oral bisphosphonates" and patients to "not stop taking their medication unless told to do so by their healthcare professional." *Id.*, at 520–521.

In September 2010, the task force published its report, which concluded that, although there was no established "causal association" between bisphosphonates and atypical femoral fractures, "recent observations suggest that the risk rises with increasing duration of exposure, and there is concern that lack of awareness and underreporting may mask the true incidence of the problem." *Id.*, at 284. The same day, the FDA issued a statement acknowledging the task force report and committing to "considering label revisions." *Id.*, at 523–525. And in October 2010, the FDA issued another Safety Announcement in which the FDA stated that it

would initiate changes in the Precautions section of bisphosphonate drug labels to warn of atypical femoral fractures. *Id.*, at 246–249. It was not until then that, pursuant to its § 355(*o*)(4)(A) obligations, the FDA instructed Merck to include a warning about such fractures in its Fosamax drug labels. *Id.*, at 526–534.

Thus, for years the FDA was: aware of this issue, communicating with drug manufacturers, studying all relevant information, and instructing healthcare professionals and patients alike to continue to use Fosamax as directed. For this reason, the FDA itself, speaking through the Solicitor General, takes the position that the FDA's decision not to require a label change prior to October 2010 reflected the FDA's "determin[ation]" that a new warning "should [not] be included in the labeling of the drug," § 355(*o*)(4)(A). See Brief for United States as *Amicus Curiae* 30, 33–34.

For these reasons, I concur in the judgment only.

Syllabus

HERRERA *v.* WYOMING

CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

No. 17–532. Argued January 8, 2019—Decided May 20, 2019

An 1868 treaty between the United States and the Crow Tribe promised that in exchange for most of the Tribe's territory in modern-day Montana and Wyoming, its members would "have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts." 15 Stat. 650. In 2014, Wyoming charged petitioner Clayvin Herrera with off-season hunting in Bighorn National Forest and being an accessory to the same. The state trial court rejected Herrera's argument that he had a protected right to hunt in the forest pursuant to the 1868 Treaty, and a jury convicted him. On appeal, the state appellate court relied on the reasoning of the Tenth Circuit's decision in *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982—which in turn relied upon this Court's decision in *Ward* v. *Race Horse*, 163 U. S. 504—and held that the treaty right expired upon Wyoming's statehood. The court rejected Herrera's argument that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, repudiated *Race Horse* and therefore undercut the logic of *Repsis*. In any event, the court concluded, Herrera was precluded from arguing that the treaty right survived Wyoming's statehood because the Crow Tribe had litigated *Repsis* on behalf of itself and its members. Even if the 1868 Treaty right survived Wyoming's statehood, the court added, it did not permit Herrera to hunt in Bighorn National Forest because the treaty right applies only on unoccupied lands and the national forest became categorically occupied when it was created.

Held:

1. The Crow Tribe's hunting rights under the 1868 Treaty did not expire upon Wyoming's statehood. Pp. 337–348.

(a) This case is controlled by *Mille Lacs*, not *Race Horse*. *Race Horse* concerned a hunting right guaranteed in an 1868 treaty with the Shoshone and Bannock Tribes containing language identical to that at issue here. Relying on two lines of reasoning, the *Race Horse* Court held that Wyoming's admission to the United States in 1890 extinguished the Shoshone-Bannock Treaty right. First, the doctrine that new States are admitted to the Union on an "equal footing" with existing States led the Court to conclude that affording the Tribes a pro-

tected hunting right lasting after statehood would conflict with the power vested in those States—and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 514. Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* established that the crucial inquiry for treaty termination analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right, 526 U. S., at 202, or whether a termination point identified in the treaty itself has been satisfied, *id.*, at 207. Thus, while *Race Horse* "was not expressly overruled" in *Mille Lacs*, it "retain[s] no vitality," *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361, and is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. Pp. 337–342.

(b) *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood. Even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834. Here, *Mille Lacs*' repudiation of *Race Horse*'s reasoning—on which *Repsis* relied—justifies such an exception. Pp. 342–344.

(c) Applying *Mille Lacs*, Wyoming's admission into the Union did not abrogate the Crow Tribe's off-reservation treaty hunting right. First, the Wyoming Statehood Act does not show that Congress "clearly expressed" an intent to end the 1868 Treaty hunting right. See 526 U. S., at 202. There is also no evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. Nor does the historical record support such a reading of the treaty. The State counters that statehood, as a practical matter, rendered all the lands in the State occupied. Even assuming that Wyoming presents an accurate historical picture, the State, by using statehood as a proxy for occupation, subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Id.*, at 207. To the extent that the State seeks to rely on historical evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. Pp. 344–348.

2. Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created. Construing the treaty's terms as "'they would naturally be understood by the Indians,'" *Washington* v. *Washington State Commer-*

Syllabus

cial Passenger Fishing Vessel Assn., 443 U. S. 658, 676, it is clear that the Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians. That interpretation follows from several cues in the treaty's text. For example, the treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," 15 Stat. 650, thus contrasting the unoccupied hunting districts with areas of white settlement. Historical evidence confirms this reading of "unoccupied." Wyoming's counterarguments are unavailing. The Federal Government's exercise of control and withdrawing of the forest lands from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would mining and logging of the forest lands prior to 1897 have caused the Tribe to view the Bighorn Mountains as occupied. Pp. 348–352.

3. This decision is limited in two ways. First, the Court holds that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation," an issue not reached by the appellate court. The Court also does not address the viability of the State's arguments on this issue. P. 352.

Vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and KAVANAUGH, JJ., joined, *post*, p. 353.

George W. Hicks, Jr., argued the cause for petitioner. With him on the briefs were *Andrew C. Lawrence*, *Kyle A. Gray*, *Steven T. Small*, and *Hadassah Reimer*.

Frederick Liu argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *Elizabeth Ann Peterson*, and *Rachel Heron*.

John G. Knepper, Chief Deputy Attorney General of Wyoming, argued the cause for respondent. With him on the brief were *Peter K. Michael*, Attorney General of Wyoming, *Jay Jerde*, Special Assistant Attorney General, *James Kaste*,

Deputy Attorney General, and *Erik Petersen* and *D. David Dewald*, Senior Assistant Attorneys General.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts." Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member

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*Briefs of *amici curiae* urging reversal were filed for the Crow Tribe of Indians by *Heather Daphne Whiteman Runs Him*, *Daniel David Lewerenz*, and *Joel West Williams*; for the Eastern Shoshone Tribe by *Richard Verri*; for Indian Law Professors by *Monte Mills* and *Alexander Blewett III*; for the National Congress of American Indians et al. by *Marc D. Slonim*; for Natural Resources Law Professors by *Colette Routel*; for the Pacific and Inland Northwest Treaty Tribes by *Maryanne E. Mohan*, *Anne E. Tweedy*, and *Rob Roy Smith*; for the Shoshone-Bannock Tribes of the Fort Hall Reservation by *William F. Bacon*, *Monte Gray*, *Douglas B. L. Endreson*, *Anne D. Noto*, and *Frank S. Holleman IV*; for the Southern Ute Indian Tribe et al. by *Thomas H. Shipps* and *David C. Smith*; and for Timothy P. McCleary et al. by *Ashley C. Parrish* and *Jeremy M. Bylund*.

Briefs of *amici curiae* urging affirmance were filed for the State of Nebraska et al. by *Douglas J. Peterson*, Attorney General of Nebraska, *James D. Smith*, Solicitor General, *David A. Lopez*, Deputy Solicitor General, and *Ryan S. Post* and *Chris C. Di Lorenzo*, Assistant Attorneys General, and by the Attorneys General of their respective States as follows: *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Wayne Stenehjem* of North Dakota, *Marty J. Jackley* of South Dakota, and *Ken Paxton* of Texas; for the Association of Fish and Wildlife Agencies by *Carol Frampton*; for the Citizen Equal Rights Foundation et al. by *Gary R. Leistico*; for Safari Club International by *Anna M. Seidman* and *Douglas S. Burdin*; for the Western Association of Fish and Wildlife Agencies et al. by *Jennifer A. MacLean*; and for the Wyoming Stock Growers Association et al. by *William Perry Pendley*.

of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve.

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana* v. *United States*, 450 U. S. 544, 547 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming "historically made up both the geographic and the spiritual heart" of the Tribe's territory. Brief for Crow Tribe of Indians as *Amicus Curiae* 5.

The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U. S., at 547–548. The Treaty of Fort Laramie specified that "the tribes did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands in dispute" by entering the treaty. *Id.*, at 548.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, Parading Through

History 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that "settlements ha[d] been made" upon the Crow Tribe's lands and that their "game [was] being driven away." Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 86 (1975) (hereinafter Proceedings). He told the assembled tribal leaders that the United States wished to "set apart a tract of [Crow Tribe] country as a home" for the Tribe "forever" and to buy the rest of the Tribe's land. *Ibid.* Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); *id.*, at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. *Id.*, at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U. S., at 547–548; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members

with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, *id.*, at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

> "The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.*, at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming "into the Union on an equal footing with the original States in all respects," in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land "reserved from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 985 (CA10 1995).

B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014,

Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss. See Nos. CT–2015–2687, CT–2015–2688 (4th Jud. Dist. C. C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U. S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians* v. *Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d, at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward* v. *Race Horse*, 163 U. S. 504, 516 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that *Mille Lacs* had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon

Wyoming's statehood. No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on "unoccupied" lands and that the national forest became categorically "occupied" when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d, at 994. The state appellate court affirmed the trial court's judgment and sentence.

The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U. S. 1029 (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid. Relying on this Court's decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The

Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [*sic*] and the Bannack [*sic*] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"). The *Race Horse* Court concluded that Wyoming's admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U. S., at 505, 514–515.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an "equal footing" with existing States. *Id.*, at 511–514 (citing, *e.g.*, *Lessee of Pollard* v. *Hagan*, 3 How. 212 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes' hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be "irreconcilably in conflict" with the power—"vested in all other States of the Union" and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 509, 514.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. *Id.*, at 509. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were "essentially perishable" and afforded the Tribes only a "temporary and precarious" privilege. *Id.*, at 515.

More than a century after *Race Horse* and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut

both pillars of *Race Horse*'s reasoning. *Mille Lacs* considered an 1837 treaty that guaranteed to several bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands " 'during the pleasure of the President.' " 526 U. S., at 177 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U. S., at 202–208.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquiries roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U. S., at 203. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U. S., at 514. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U. S., at 204. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. *Id.*, at 204–205 (citing *Washington* v. *Washington*

State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 682 (1979); *Antoine* v. *Washington*, 420 U. S. 194, 207–208 (1975); *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 398 (1968)). "[B]ecause treaty rights are reconcilable with state sovereignty over natural resources," the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient "to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U. S., at 205.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U. S., at 202 (citing *United States* v. *Dion*, 476 U. S. 734, 738–740 (1986); *Fishing Vessel Assn.*, 443 U. S., at 690; *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968)). The Court found no such "'clear evidence'" in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U. S., at 203.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U. S., at 206. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are "'"of such a nature as to imply their perpetuity,"'" rather than "'temporary and precarious.'" 526 U. S., at 206. The Court rejected such an approach. The Court found the "'temporary and precarious'" language "too broad to be useful," given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U. S., at 738—could be described in those terms. 526 U. S., at 206–207. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate "intended the rights secured by the . . . Treaty to survive statehood." 526 U. S., at 207. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the

Chippewa bands' treaty rights. The Chippewa Treaty itself defined the specific "circumstances under which the rights would terminate," and there was no suggestion that statehood would satisfy those circumstances. *Ibid.*

Maintaining its focus on the treaty's language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse.* Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, "tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]"—*i.e.*, to whenever the hunting grounds would cease to "remai[n] unoccupied and owned by the United States." 526 U. S., at 207. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the "Treaty itself." *Ibid.* Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was "impliedly repealed," *Mille Lacs* disavowed that earlier holding. 526 U. S., at 207. "Treaty rights," the Court clarified, "are not impliedly terminated upon statehood." *Ibid.* The Court further explained that "[t]he *Race Horse* Court's decision to the contrary"—that Wyoming's statehood did imply repeal of Indian treaty rights—"was informed by" that Court's erroneous conclusion "that the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.*, at 207–208.

In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse.* The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U. S., at 207. "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that

they can be extinguished by *implication* at statehood." *Ibid.*

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*' analysis with the Court's prior reasoning in *Race Horse*.[1]

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs*, "it must be regarded as retaining no vitality" after that decision. *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361 (1984). To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

B

Because this Court's intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis*, *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood.

Under the doctrine of issue preclusion, "a prior judgment . . . foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire* v. *Maine*,

[1] Notably, the four Justices who dissented in *Mille Lacs* protested that the Court "effectively overrule[d] *Race Horse sub silentio*." 526 U. S., at 219 (Rehnquist, C. J., dissenting). Others have agreed with this assessment. See, *e.g.*, *State* v. *Buchanan*, 138 Wash. 2d 186, 211–212, 978 P. 2d 1070, 1083 (1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota* v. *Mille Lacs*").

532 U. S. 742, 748–749 (2001). Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28, Comment *c* (1980)); see *Limbach*, 466 U. S., at 363 (refusing to find a party bound by "an early decision based upon a now repudiated legal doctrine"); see also *Montana* v. *United States*, 440 U. S. 147, 155 (1979) (asking "whether controlling facts or legal principles ha[d] changed significantly" since a judgment before giving it preclusive effect); *id.*, at 157–158 (explaining that a prior judgment was conclusive "[a]bsent significant changes in controlling facts or legal principles" since the judgment); *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948) (issue preclusion "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally"). The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U. S., at 836–837.[2]

We conclude that a change in law justifies an exception to preclusion in this case. There is no question that the Tenth

[2] The dissent does not disagree outright with this conclusion, noting only that "there is a respectable argument on the other side," *post*, at 363. The dissent argues that the cases cited above are distinguishable, but we do not read them as narrowly as does the dissent. We note, too, that the lower federal courts have long applied the change-in-law exception in a variety of contexts. See, *e. g.*, *Dow Chemical Co.* v. *Nova Chemicals Corp. (Canada)*, 803 F. 3d 620, 627–630 (CA Fed. 2015), cert. denied, 578 U. S. 1003 (2016); *Coors Brewing Co.* v. *Mendez-Torres*, 562 F. 3d 3, 11 (CA1 2009), abrogated on other grounds by *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413 (2010); *Ginters* v. *Frazier*, 614 F. 3d 822, 826–827 (CA8 2010); *Faulkner* v. *National Geographic Enterprises Inc.*, 409 F. 3d 26, 37–38 (CA2 2005); *Chippewa & Flambeau Improvement Co.* v. *FERC*, 325 F. 3d 353, 356–357 (CADC 2003); *Spradling* v. *Tulsa*, 198 F. 3d 1219, 1222–1223 (CA10 2000); *Mendelovitz* v. *Adolph Coors Co.*, 693 F. 2d 570, 579 (CA5 1982).

Circuit in *Repsis* relied on this Court's binding decision in *Race Horse* to conclude that the 1868 Treaty right terminated upon Wyoming's statehood. See 73 F. 3d, at 994. When the Tenth Circuit reached its decision in *Repsis*, it had no authority to disregard this Court's holding in *Race Horse* and no ability to predict the analysis this Court would adopt in *Mille Lacs*. *Mille Lacs* repudiated *Race Horse*'s reasoning. Although we recognize that it may be difficult at the margins to discern whether a particular legal shift warrants an exception to issue preclusion, this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force. See *Limbach*, 466 U. S., at 363.[3]

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U. S., at 202. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to re-

[3] We do not address whether a different outcome would be justified if the State had identified "compelling concerns of repose or reliance." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4425, p. 726 (3d ed. 2016). Wyoming here has not done so. The State suggests that public support for its conservation efforts may be jeopardized if it no longer has "unquestioned" authority over wildlife management in the Bighorn Mountains. Brief for Respondent 54. Wyoming does not explain why its authority to regulate Indians exercising their treaty rights when necessary for conservation is not sufficient to preserve that public support, see *infra*, at 344. The State's passing reference to upsetting the settled expectations of private property owners is unconvincing because the 1868 Treaty right applies only to "unoccupied lands of the United States."

solve that conflict by abrogating the treaty.'" *Id.*, at 202–203 (quoting *Dion*, 476 U. S., at 740); see *Menominee Tribe*, 391 U. S., at 412. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." Cf. *Mille Lacs*, 526 U. S., at 203; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the "'clear evidence'" this Court's precedent requires. *Mille Lacs*, 526 U. S., at 203.[4]

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is "essentially a contract between two sovereign nations." *Fishing Vessel Assn.*, 443 U. S., at 675. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U. S., at 206, and the words of a treaty must be construed "'in the sense in which they would naturally be understood by the Indians,'" *Fishing Vessel Assn.*, 443 U. S., at 676. If a treaty "itself defines the circumstances under which the rights would terminate," it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille Lacs*, 526 U. S., at 207.

Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found

[4] Recall also that the Act establishing the Wyoming Territory declared that the creation of the Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory" unless a treaty extinguished those rights. Wyoming Territory Act, 15 Stat. 178.

thereon"; and (4) the Tribe and non-Indians are no longer at "peace . . . on the borders of the hunting districts." Art. IV, 15 Stat. 650. Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U. S., at 207.

The historical record likewise does not support the State's position. See *Choctaw Nation* v. *United States*, 318 U. S. 423, 432 (1943) (explaining that courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine a treaty's meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, *e.g.*, Proceedings 88, and Commissioner Taylor assured them that the Tribe would have "the right to hunt upon [the ceded land] as long as the game lasts," *id.*, at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota, May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical mat-

ter, marked the arrival of "civilization" in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming's arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members "'wholly within the limits of their respective reservations'"; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting §237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. §492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 495 (1873) (Black Foot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain"). As for the Indian Department Regulations, there are reports that a group of Crow Tribe members "regularly hunted along the Little Bighorn River" even after the regulation the State cites was in effect. Hoxie, Parading Through History, at 26. In 1889, the Office of Indian Affairs wrote to U. S. Indian Agents in the Northwest that "[f]requent complaints have been made to this Department that Indians are in the habit of leaving their reservations for the purpose of hunting." 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State's mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming sub-

verts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Mille Lacs*, 526 U. S., at 207.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 350–351. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case's reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U. S., at 514; *Mille Lacs*, 526 U. S., at 207–208.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

III

We turn next to the question whether the 1868 Treaty right, even if still valid after Wyoming's statehood, does not protect hunting in Bighorn National Forest because the forest lands are "occupied." We agree with Herrera and the United States that Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.[5]

[5] Wyoming argues that the judgment below should be affirmed because the Tenth Circuit held in *Repsis* that the creation of the forest rendered the land "occupied," see 73 F. 3d, at 994, and thus Herrera is precluded from raising this issue. We did not grant certiorari on the question of how preclusion principles would apply to the alternative judgment in *Repsis*, and—although our dissenting colleagues disagree, see *post*, at 364, and n. 6—the decision below did not address that issue.

The Wyoming appellate court agreed with the State that "the primary issue in [Herrera's] case is identical to the *primary issue* in the *Repsis*

Treaty analysis begins with the text, and treaty terms are construed as "'they would naturally be understood by the Indians.'" *Fishing Vessel Assn.*, 443 U. S., at 676. Here it

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case." No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 13 (emphasis added). That "primary issue" was the *Race Horse* ground of decision, not the "occupation" ground, which *Repsis* referred to as "an alternative basis for affirmance," *Repsis*, 73 F. 3d, at 993, and which the Wyoming court itself described as an "alternativ[e]" holding, No. 2016–242, App. to Pet. for Cert. 33. Reading the state court's decision to give preclusive effect to the occupation ground as well would not fit with the Wyoming court's preclusion analysis, which, among other things, relied on a decision of the Federal District Court in *Repsis* that did not address the occupation issue. See No. 2016–242, App. to Pet. for Cert. 14, 18; see also *Repsis*, 73 F. 3d, at 993 (explaining that "the district court did not reach [the occupation] issue"). Context thus makes clear that the state court gave issue-preclusive effect only to *Repsis*' holding that the 1868 Treaty was no longer valid, not to *Repsis*' independent, narrower holding that Bighorn National Forest in particular was "occupied" land. The court may not have addressed the issue-preclusive effect of the latter holding because of ambiguity in the State's briefing. See Appellee's Supplemental Brief in No. 2016–242, pp. 4, 11–12.

While the dissent questions whether forfeiture could have played a part in the state court's analysis given that the court invited the parties to submit supplemental briefs on preclusion, *post*, at 364, n. 6, the parties suggest that Wyoming failed adequately to raise the claim even in its supplemental brief. See Brief for Petitioner 49 ("the state made no such argument before" the state court); Brief for United States as *Amicus Curiae* 31 (noting ambiguity in the State's supplemental brief).

It can be "appropriate in special circumstances" for a court to address a preclusion argument *sua sponte*. *Arizona* v. *California*, 530 U. S. 392, 412 (2000). But because the Wyoming District Court "did not address" this contention, "we decline to address it here." *County of Los Angeles* v. *Mendez*, 581 U. S. 420, 429, n. (2017); see *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005); *Archer* v. *Warner*, 538 U. S. 314, 322–323 (2003). Resolution of this question would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in this litigation, among other matters. These gateway issues should be decided before this Court addresses them, especially given that even the dissent acknowledges that one of the preclusion issues raised by the parties is important and undecided, *post*, at 365, and some of the parties' other arguments are equally weighty. Unlike the dissent, we do not address these issues in the first instance.

is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty's text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word "occupation" to refer to the Tribe's residence inside the reservation boundaries and referred to the Tribe members as "settlers" on the new reservation. Arts. II, VI, *id.*, at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make "no permanent settlement" other than on the new reservation, but could hunt on the "unoccupied lands" of the United States. Art. IV, *id.*, at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, A Dictionary of Law 725 (1889) (defining "occupy" as "[t]o hold in possession; to hold or keep for use" and noting that the word "[i]mplies actual use, possession or cultivation by a particular person"); *id.*, at 944 (defining "settle" as "[t]o establish one's self upon; to occupy, reside upon").

Historical evidence confirms this reading of the word "unoccupied." At the treaty negotiations, Commissioner Taylor commented that "settlements ha[d] been made upon [Crow Tribe] lands" and that "white people [were] rapidly increasing and . . . occupying all the valuable lands." Proceedings 86. It was against this backdrop of white settlement that the United States proposed to buy "the right to use and settle" the ceded lands, retaining for the Tribe the right to hunt. *Ibid.* A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area "as long

as there are any buffalo, and as long as the white men are not [in that area] with farms." Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 500.

Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not "occupy" that area within the treaty's meaning. To the contrary, the President "reserved" the lands "from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning . . . to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." *Id.*, at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Wyoming's counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government's "exercise of dominion and control" over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§241.2, 241.3 (Supp. 1941); §261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was "very little" settlement of Bighorn National For-

est around the time the forest was created. Dept. of Interior, 19th Ann. Rep. of the U. S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

IV

Finally, we note two ways in which our decision is limited. First, we hold that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was "occupied" within the meaning of the 1868 Treaty. See *State* v. *Cutler*, 109 Idaho 448, 451, 708 P. 2d 853, 856 (1985) (stating that the Federal Government may not be foreclosed from using land in such a way that the Indians would have considered it occupied).

Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation." Nos. CT–2015–2687, CT–2015–2688, App. to Pet. for Cert. 39–41; see *Antoine*, 420 U. S., at 207. The appellate court did not reach this issue. No. 2016–242, App. to Pet. for Cert. 14, n. 3. On remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation. We do not pass on the viability of those arguments today.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Alito, with whom The Chief Justice, Justice Thomas, and Justice Kavanaugh join, dissenting.

The Court's opinion in this case takes a puzzling course. The Court holds that members of the Crow Tribe retain a virtually unqualified right under the Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty) to hunt on land that is now part of the Bighorn National Forest. This interpretation of the treaty is debatable and is plainly contrary to the decision in *Ward* v. *Race Horse*, 163 U. S. 504 (1896), which construed identical language in a closely related treaty. But even if the Court's interpretation of the treaty is correct, its decision will have no effect if the members of the Crow Tribe are bound under the doctrine of issue preclusion by the judgment in *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 992–993 (CA10 1995) (holding that the hunting right conferred by that treaty is no longer in force).

That judgment was based on two independent grounds, and the Court deals with only one of them. The Court holds that the first ground no longer provides an adequate reason to give the judgment preclusive effect due to an intervening change in the legal context. But the Court sidesteps the second ground and thus leaves it up to the state courts to decide whether the *Repsis* judgment continues to have binding effect. If it is still binding—and I think it is—then no member of the Tribe will be able to assert the hunting right that the Court addresses. Thus, the Court's decision to plow ahead on the treaty-interpretation issue is hard to understand, and its discourse on that issue is likely, in the end, to be so much wasted ink.

I

A

As the Court notes, the Crow Indians eventually settled in what is now Montana, where they subsequently came into contact with early white explorers and trappers. F. Hoxie,

The Crow 26–28, 33 (1989). In an effort to promote peace between Indians and white settlers and to mitigate conflicts between different tribes, the United States negotiated treaties that marked out a territory for each tribe to use as a hunting district. See 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (2d ed. 1904) (Kappler). The Treaty of Fort Laramie of 1851 (1851 Treaty), 11 Stat. 749, created such a hunting district for the Crow.

As white settlement increased, the United States entered into a series of treaties establishing reservations for the Crow and neighboring tribes, and the 1868 Treaty was one such treaty. 15 Stat. 649; Kappler 1008. It set out an 8-million-acre reservation for the Crow Tribe but required the Tribe to cede ownership of all land outside this reservation, including 30 million acres that lay within the hunting district defined by the 1851 Treaty. Under this treaty, however, the Crow kept certain enumerated rights with respect to the use of those lands, and among these was "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, Art. IV, 15 Stat. 650.

Shortly after the signing of the 1868 Treaty, Congress created the Wyoming Territory, which was adjacent to and immediately south of the Crow Tribe's reservation. The Act creating the Territory provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." Act of July 25, 1868, ch. 235, 15 Stat. 178. Twenty-two years later, Congress admitted Wyoming as a State "on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. The following year, Congress passed an Act empowering the President to "set apart and reserve" tracts of public lands owned by the United States

as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority, President Cleveland designated some lands in Wyoming that remained under federal ownership as a forest reservation. Presidential Proclamation No. 30, 29 Stat. 909. Today, those lands make up the Bighorn National Forest. Bighorn abuts the Crow Reservation along the border between Wyoming and Montana and includes land that was previously part of the Crow Tribe's hunting district.

These enactments did not end legal conflicts between the white settlers and Indians. Almost immediately after Wyoming's admission to the Union, this Court had to determine the extent of the State's regulatory power in light of a tribe's reserved hunting rights. A member of the Shoshone-Bannock Tribes named Race Horse had been arrested by Wyoming officials for taking elk in violation of state hunting laws. *Race Horse*, *supra*, at 506. The Shoshone-Bannock Tribes, like the Crow, had accepted a reservation while retaining the right to hunt in the lands previously within their hunting district. Their treaty reserves the same right, using the same language, as the Crow Tribe's treaty.[1] Race Horse argued that he had the right to hunt at the spot of his alleged offense, as the nearest settlement lay more than 60 miles distant, making the land where he was hunting "unoccupied lands of the United States." *In re Race Horse*, 70 F. 598, 599–600 (Wyo. 1895).

This Court rejected Race Horse's argument, holding that the admission of Wyoming to the Union terminated the hunting right. 163 U. S., at 514. Although the opinion of the Court is not a model of clarity, this conclusion appears to rest on two grounds.

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[1] The Shoshone-Bannock Treaty reserved "'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'" *Race Horse*, 163 U. S., at 507; Kappler 1020, 1021.

First, the Court held that Wyoming's admission necessarily ended the Tribe's hunting right because otherwise the State would lack the power, possessed by every other State, "to regulate the killing of game within [its] borders." *Ibid.* Limiting Wyoming's power in this way, the Court reasoned, would contravene the equal-footing doctrine, which dictates that all States enter the Union with the full panoply of powers enjoyed by the original 13 States at the adoption of the Constitution. *Ibid.* Under this rationale, the Act of Congress admitting Wyoming could not have preserved the hunting right even if that had been Congress's wish.

After providing this basis for its holding, however, the Court quickly turned to a second ground, namely, that even if Congress could have limited Wyoming's authority in this way, it had not attempted to do so. *Id.*, at 515. The Court thought that Congress's intention not to impose such a restriction on the State was "conveyed by the express terms of the act of admission," but the Court did not identify the terms to which it was referring. *Ibid.* It did, however, see support for its decision in the nature of the hunting right reserved under the treaty. This right, the Court observed, was not "of such a nature as to imply [its] perpetuity" but was instead "temporary and precarious," since it depended on the continuation of several conditions, including at least one condition wholly within the control of the Government—continued federal ownership of the land. *Ibid.*

Race Horse did not mark a final resolution of the conflict between Wyoming's regulatory power and tribal hunting rights. Nearly a century later, Thomas Ten Bear, a member of the Crow Tribe, crossed into Wyoming to hunt elk in the Bighorn National Forest, just as Herrera did in this case. Wyoming game officials cited Ten Bear, and he was ultimately convicted of hunting elk without the requisite license.[2]

[2] Wyoming officials enforce the State's hunting laws on national forest lands pursuant to a memorandum of understanding between the State and Federal Governments. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521, n. 1 (Wyo. 1994).

Ten Bear, like Race Horse before him, filed a lawsuit in federal court disputing Wyoming's authority to regulate hunting by members of his Tribe. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521 (Wyo. 1994). Joined by the Crow Tribe, he argued that the 1868 Treaty—the same treaty at issue here—gave him the right to take elk in the national forest.

The District Court found that challenge indistinguishable from the one addressed in *Race Horse*. The District Court noted that Race Horse had pointed to "identical treaty language" and had "advanced the identical contention now made by" Ten Bear and the Tribe. *Repsis*, 866 F. Supp., at 522. Because *Race Horse* "remain[ed] controlling," the District Court granted summary judgment to the State. 866 F. Supp., at 524.

The Tenth Circuit affirmed that judgment on two independent grounds. First, the Tenth Circuit agreed with the District Court that, under *Race Horse*, "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Repsis*, 73 F. 3d, at 992. Second, as an independent alternative ground for affirmance, the Tenth Circuit held that the Tribe's hunting right had expired because "'the treaty reserved an off-reservation hunting right on 'unoccupied' lands and the lands of the Big Horn National Forest are 'occupied.'" *Id.*, at 993. The Tenth Circuit reasoned that "unoccupied" land within the meaning of the treaty meant land that was open for commercial or residential use, and since the creation of the national forest precluded those activities, it followed that the land was no longer "unoccupied" in the relevant sense. *Ibid.*

B

The events giving rise to the present case are essentially the same as those in *Race Horse* and *Repsis*. During the winter of 2013, Herrera, who was an officer in the Crow Tribe's fish and game department, contacted Wyoming game

officials to offer assistance investigating a number of poaching incidents along the border between Bighorn and the Crow Reservation.[3] After a lengthy discussion in which Herrera asked detailed questions about the State's investigative capabilities, the Wyoming officials became suspicious of Herrera's motives. The officials conducted a web search for Herrera's name and found photographs posted on trophy-hunting and social media websites that showed him posing with bull elk. The officers recognized from the scenery in the pictures that the elk had been killed in Bighorn and were able to locate the sites where the pictures had been taken. At those sites, about a mile south of the fence running along the Bighorn National Forest boundary, state officials discovered elk carcasses. The heads had been taken from the carcasses but much of the meat was abandoned in the field. State officials confronted Herrera, who confessed to the shootings and turned over the heads that he and his companions had taken as trophies. The Wyoming officials cited Herrera for hunting out of season.

Herrera moved to dismiss the citations, arguing that he had a treaty right to hunt in Bighorn. The trial court rejected this argument, concluding that it was foreclosed by the Tenth Circuit's analysis in *Repsis*, and the jury found Herrera guilty. On appeal, Herrera continued to argue that he had a treaty right to hunt in Bighorn. The appellate court held that the judgment in *Repsis* precluded him from asserting a treaty hunting right, and it also held, in the alternative, that Herrera's treaty rights did not allow him to hunt in Bighorn. This Court granted certiorari.

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[3] Such cooperative law enforcement is valuable because the Crow Reservation and Bighorn National Forest face one another along the border between Montana, where the Crow Reservation is located, and Wyoming, where Bighorn is located. *Supra*, at 354–355. The border is delineated by a high fence intermittently posted with markers.

II

In seeking review in this Court, Herrera framed this case as implicating only a question of treaty interpretation. But unless the state court was wrong in holding that Herrera is bound by the judgment in *Repsis*, there is no reason to reach the treaty-interpretation question. For this reason, I would begin with the question of issue preclusion, and because I believe that Herrera is bound by the adverse decision on that issue in *Repsis*, I would not reach the treaty-interpretation issue.

A

It is "a fundamental precept of common-law adjudication" that "an issue once determined by a competent court is conclusive." *Arizona* v. *California*, 460 U. S. 605, 619 (1983). "The idea is straightforward: Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 147 (2015) (internal quotation marks, citation, and alterations omitted). Succinctly put, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

Under federal issue-preclusion principles,[4] "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*,

[4] The preclusive effect of the judgment of a federal court is governed by federal law, regardless of whether that judgment's preclusive effect is later asserted in a state or federal forum. *Taylor* v. *Sturgell*, 553 U. S. 880, 892 (2008). This means that the preclusive effect of *Repsis*, decided by a federal court, is governed by federal law, not Wyoming law, even though preclusion was asserted in a Wyoming court.

440 U. S. 147, 153 (1979). That standard for issue preclusion is met here.

In *Repsis*, the central issue—and the question on which the Crow Tribe sought a declaratory judgment—was whether members of the Tribe "have an unrestricted right to hunt and fish on Big Horn National Forest lands." 866 F. Supp., at 521. The Tenth Circuit's judgment settled that question by holding that "the Tribe and its members are subject to the game laws of Wyoming." 73 F. 3d, at 994. In this case, Herrera asserts the same hunting right that was actually litigated and decided against his Tribe in *Repsis*. He does not suggest that either the Federal District Court or the Tenth Circuit lacked jurisdiction to decide *Repsis*. And, because Herrera's asserted right is based on his membership in the Tribe, a judgment binding on the Tribe is also binding on him. As a result, the Wyoming appellate court held that *Repsis* bound Herrera and precluded him from asserting a treaty-rights defense. That holding was correct.

B

The majority concludes otherwise based on an exception to issue preclusion that applies when there has been an intervening "change in the applicable legal context." *Ante*, at 343 (internal quotation marks and alteration omitted). Specifically, the majority reasons that the *Repsis* judgment was based on *Race Horse* and that our subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), represents a change in the applicable law that is sufficient to abrogate the *Repsis* judgment's preclusive effect. There is support in the Restatement (Second) of Judgments for the general proposition that a change in law may alter a judgment's preclusive effect, § 28, Comment *c*, p. 276 (1980), and in a prior case, *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009), we invoked that provision. But we have never actually held that a prior judgment lacked preclusive effect on this ground. Nor have we ever defined how much

the relevant "legal context" must change in order for the exception to apply. If the exception is applied too aggressively, it could dangerously undermine the important interests served by issue preclusion. So caution is in order in relying on that exception here.

The majority thinks that the exception applies because *Mille Lacs* effectively overruled *Race Horse*, even though it did not say that in so many words. But that is a questionable interpretation. The fact of the matter is that the *Mille Lacs* majority held back from actually overruling *Race Horse*, even though the dissent claimed that it had effectively done so. See *Mille Lacs*, 526 U. S., at 207 (applying the "*Race Horse* inquiry" but factually distinguishing that case from the facts present in *Mille Lacs*); *id.*, at 219 (Rehnquist, C. J., dissenting) (noting the Court's "apparent overruling *sub silentio*" of *Race Horse*). And while the opinion of the Court repudiated one of the two grounds that the *Race Horse* Court gave for its decision (the equal-footing doctrine), it is by no means clear that *Mille Lacs* also rejected the second ground (the conclusion that the terms of the Act admitting Wyoming to the Union manifested a congressional intent not to burden the State with the right created by the 1868 Treaty). With respect to this latter ground, the *Mille Lacs* Court characterized the proper inquiry as follows: "whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood." 526 U. S., at 207. And the Court then went on to analyze the terms of the particular treaty at issue in that case and to contrast those terms with those of the treaty in *Race Horse*. *Mille Lacs*, *supra*, at 207.

On this reading, it appears that *Mille Lacs* did not reject the second ground for the decision in *Race Horse* but simply found it inapplicable to the facts of the case at hand. I do not claim that this reading of *Mille Lacs* is indisputable, but it is certainly reasonable, and if it is correct, *Mille Lacs* did not change the legal context as much as the majority sug-

gests. It knocked out some of *Race Horse*'s reasoning but did not effectively overrule the decision. Is that enough to eliminate the preclusive effect of the first ground for the *Repsis* judgment?

The majority cites no authority holding that a decision like *Mille Lacs* is sufficient to deprive a prior judgment of its issue-preclusive effect. Certainly, *Bies*, *supra*, upon which the majority relies, is not such authority. In that case, Bies had been convicted of murder and sentenced to death at a time when what was then termed "mental retardation" did not render a defendant ineligible for a death sentence but was treated as simply a mitigating factor to be taken into account in weighing whether such a sentence should be imposed. When Bies contested his death sentence on appeal, the state appellate court observed that he suffered from a mild form of intellectual disability, but it nevertheless affirmed his sentence. Years later, in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court ruled that an intellectually disabled individual cannot be executed, and the Sixth Circuit then held that the state court's prior statements about Bies's condition barred his execution under issue-preclusion principles.

This Court reversed, and its primary reason for doing so has no relation to the question presented here. We found that issue preclusion was not available to Bies because he had not prevailed in the first action; despite the state court's recognition of mild intellectual disability as a mitigating factor, it had affirmed his sentence. As we put it, "[i]ssue preclusion . . . does not transform final judgment losers . . . into partially prevailing parties." *Bies*, 556 U. S., at 829; see also *id.*, at 835.

Only after providing this dispositive reason for rejecting the Sixth Circuit's invocation of issue preclusion did we go on to cite the Restatement's discussion of the change-in-law exception. And we then quickly noted that the issue addressed by the state appellate courts prior to *Atkins* ("[m]en-

tal retardation as a mitigator") was not even the same issue as the issue later addressed after *Atkins*. *Bies*, *supra*, at 836 (the two "are discrete legal issues"). So *Bies* is very far afield.[5]

Although the majority in the present case believes that *Mille Lacs* unquestionably constitutes a sufficient change in the legal context, see *ante*, at 341–342, there is a respectable argument on the other side. I would not decide that question because Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies.

C

That is so because the *Repsis* judgment was based on a second, independently sufficient ground that has nothing to do with *Race Horse*, namely, that the Bighorn National Forest is not "unoccupied." Herrera and the United States, appearing as an *amicus* in his support, try to escape the effect of this alternative ground based on other exceptions to the general rule of issue preclusion. But accepting any of those exceptions would work a substantial change in established principles, and it is fortunate that the majority has not taken that route.

Unfortunately, the track that the majority has chosen is no solution because today's decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judg-

[5] Nor are the other cases cited by the majority more helpful to the Court's position. *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), and *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353 (1984)—and, indeed, *Montana* v. *United States*, 440 U. S. 147 (1979)—are tax cases that hold, consistent with the general policy against "discriminatory distinctions in tax liability," *Sunnen*, 333 U. S., at 599, that issue preclusion has limited application when the conduct in the second litigation occurred in a different tax year than the conduct that was the subject of the earlier judgment. We have not, prior to today, applied *Sunnen*'s tax-specific policy in cases that do not involve tax liability and do not create a possibility of "inequalities in the administration of the revenue laws." *Ibid.*

ment binds all members of the Crow Tribe who hunt within the Bighorn National Forest. And for the reasons I will explain, such a holding would be correct.

1

Attempting to justify its approach, the majority claims that the decision below gave preclusive effect to only the first ground adopted by the Tenth Circuit in *Repsis*—that is, the ground that relied on *Race Horse*. *Ante*, at 348–349, n. 5. But nowhere in the decision below can any such limitation be found. The Wyoming appellate court discussed the second ground for the *Repsis* judgment, see App. to Pet. for Cert. 22 ("[T]he creation of the Big Horn National Forest resulted in the 'occupation' of the land, extinguishing the off-reservation hunting right"), and it concluded that *the judgment* in *Repsis*, not just one of the grounds for that judgment, "preclude[s] Herrera from attempting to relitigate the validity of the off-reservation hunting right that was previously held to be invalid," App. to Pet. for Cert. 31.[6]

[6] The decision below, in other words, held that the issue that was precluded was whether members of the Crow Tribe have a treaty right to hunt in Bighorn. The majority rejects this definition of the issue, and instead asks only whether the first line of reasoning in *Repsis* retains preclusive effect. Such hairsplitting conflicts with the fundamental purpose of issue preclusion—laying legal disputes at rest. If courts allow a party to escape preclusion whenever a decision on one legal question can be divided into multiple or alternative parts, the doctrine of preclusion would lose its value. The majority's "[n]arrower definition of the issues resolved augments the risk of apparently inconsistent results" and undermines the objectives of finality and economy served by preclusion. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4417, p. 470 (3d ed. 2016).

The Court also hints that the state court might have thought that Wyoming forfeited reliance on issue preclusion, *ante*, at 348–349, n. 5, but there is no basis for that suggestion. The Wyoming appellate court invited the parties to submit supplemental briefs on issue preclusion and specifically held that "it [was] proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues." App. to Pet. for Cert. 10, n. 2.

2

Herrera takes a different approach in attempting to circumvent the effect of the alternative *Repsis* ground. When a judgment rests on two independently sufficient grounds, he contends, neither ground should be regarded as having an issue-preclusive effect. This argument raises an important question that this Court has never decided and one on which the First and Second Restatements of Judgments take differing views. According to the First Restatement, a judgment based on alternative grounds "is determinative on both grounds, although either alone would have been sufficient to support the judgment." Restatement of Judgments § 68, Comment *n* (1942). Other authorities agree. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4421, p. 613 (3d ed. 2016) (noting "substantial support in federal decisions" for this approach).[7] But the Second Restatement reversed this view, recommending that a judgment based on the determination of two independent issues "is not conclusive with respect to either issue standing alone." § 27, Comment *i*, at 259.

There is scant explanation for this change in position beyond a reference in the Reporter's Note to a single decision of the United States Court of Appeals for the Second Circuit. *Id.*, Reporter's Note, Comment *i*, at 270 (discussing *Halpern* v. *Schwartz*, 426 F. 2d 102 (1970)). But even that court has subsequently explained that *Halpern* was "not intended to have . . . broad impact outside the [bankruptcy] context," and it continues to follow the rule of the First Restatement "in circumstances divergent from those in *Halpern*." *Winters* v. *Lavine*, 574 F. 2d 46, 67 (1978). It thus appears that in this portion of the Second Restatement, the Reporters

[7] See, *e. g.*, *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 251–257 (CA3 2006) (collecting cases); *In re Westgate-California Corp.*, 642 F. 2d 1174, 1176–1177 (CA9 1981); *Winters* v. *Lavine*, 574 F. 2d 46, 66–67 (CA2 1978); *Irving Nat. Bank* v. *Law*, 10 F. 2d 721, 724 (CA2 1926) (Hand, J.).

adopted a prescriptive rather than a descriptive approach. In such situations, the Restatement loses much of its value. See *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

The First Restatement has the more compelling position. There appear to be two principal objections to giving alternative grounds preclusive effect. The first is that the court rendering the judgment may not have given each of the grounds "the careful deliberation and analysis normally applied to essential issues." *Halpern*, *supra*, at 105. This argument is based on an unjustified assessment of the way in which courts do their work. Even when a court bases its decision on multiple grounds, "it is reasonable to expect that such a finding is the product of careful judicial reasoning." *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 254 (CA3 2006).

The other argument cited for the Second Restatement's rule is that the losing party may decline to appeal if one of the two bases for a judgment is strong and the other is weak. § 27, Comment *i*, at 259. There are reasons to be skeptical of this argument as well. While there may be cases in which the presence of multiple grounds causes the losing party to forgo an appeal, that is likely to be true in only a small subset of cases involving such judgments.

Moreover, other aspects of issue-preclusion doctrine protect against giving binding effect to decisions that result from unreliable litigation. Issue preclusion applies only to questions "actually and necessarily determined," *Montana*, 440 U. S., at 153, and a party may be able to avoid preclusion by showing that it "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5)(c). To be sure, this exception should not be applied "without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous." *Id.*, § 28, Comment *j*, at 284. This exception provides an important safety valve, but it is narrow and clearly

does not apply here. Not only did the Tribe have an opportunity in *Repsis* to litigate the subject of the alternative ground, it actually did so.[8]

Finally, regardless of whether alternative grounds *always* have preclusive effect, it is sufficient to say that, at least in a declaratory judgment action, each conclusion provides an independent basis for preclusion. "Since the very purpose of declaratory relief is to achieve a final and reliable determination of legal issues, there should be no quibbling about the necessity principle. Every issue that the parties have litigated and that the court has undertaken to resolve is necessary to the judgment, and should be precluded." 18 Wright, Federal Practice and Procedure § 4421, at 630; see *Henglein* v. *Colt Industries Operating Corp.*, 260 F. 3d 201, 212 (CA3 2001). Because *Repsis* was a declaratory judgment action aimed at settling the Tribe's hunting rights, that principle suffices to bind Herrera to *Repsis*'s resolution of the occupied-land issue.

D

Herrera and the United States offer a variety of other arguments to avoid the preclusive effect of *Repsis*, but all are unavailing.

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[8] From the beginning of the *Repsis* litigation, Wyoming argued that Bighorn was occupied land, and the Tribe argued that it was not. Wyoming pressed this argument in its answer to the Tribe's declaratory judgment complaint. Record in No. 92–cv–1002, Doc. 29, p. 4. Wyoming reiterated that argument in its motion for summary judgment and repeated it in its reply. *Id.*, Doc. 34, pp. 1, 6; *id.*, Doc. 54, pp. 7–8. The Tribe dedicated a full 10 pages of its summary judgment brief to the argument that "[t]he Big Horn National Forest [l]ands [are] '[u]noccupied [l]ands'" of the United States. *Id.*, Doc. 52, pp. 6–15. Both parties repeated these arguments in their briefs before the Tenth Circuit. Brief for Appellees 20–29 and Reply Brief for Appellants 2–3, and n. 6, in No. 94–8097 (1995). And the Tribe pressed this argument as an independent basis for this Court's review in its petition for certiorari, which this Court denied. Pet. for Cert. in *Crow Tribe of Indians* v. *Repsis*, O. T. 1995, No. 95–1560, pp. i, 22–24, cert. denied, 517 U. S. 1221 (1996).

Herrera contends that he is not bound by the *Repsis* judgment because he was not a party, but this argument is clearly wrong. Indian hunting rights, like most Indian treaty rights, are reserved to the Tribe as a whole. Herrera's entitlement derives solely from his membership in the Tribe; it is not personal to him. As a result, a judgment determining the rights of the Tribe has preclusive effect in subsequent litigation involving an individual member of the Tribe. Cf. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 106–108 (1938) (judgment as to water rights of a State is binding on individual residents of State). That rule applies equally to binding judgments finding in favor of and against asserted tribal rights.

Herrera also argues that a judgment in a civil action should not have preclusive effect in a subsequent criminal prosecution, but this argument would unjustifiably prevent the use of the declaratory judgment device to determine potential criminal exposure. The Declaratory Judgment Act provides an equitable remedy allowing a party to ask a federal court to "declare [the party's] rights" through an order with "the force and effect of a final judgment." 28 U. S. C. § 2201(a). The Act thus allows a person to obtain a definitive *ex ante* determination of his or her right to engage in conduct that might otherwise be criminally punishable. It thereby avoids "putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129 (2007). If the Tribe had prevailed in *Repsis*, surely Herrera would expect that Wyoming could not attempt to relitigate the question in this case and in prosecutions of other members of the Tribe. A declaratory judgment "is conclusive . . . as to the matters declared" when the State prevails just as it would be when the party challenging the State is the winning party. Restatement (Second) of Judgments § 33, at 332.

It is true that we have been cautious about applying the doctrine of issue preclusion in criminal proceedings. See

e. g., *Currier* v. *Virginia*, 585 U. S. 493, 504 (2018); *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 10 (2016). But we have never adopted the blanket prohibition that Herrera advances. Instead, we have said that preclusion doctrines should have "guarded application." *Ibid.*

We employ such caution because preclusion rests on "an underlying confidence that the result achieved in the initial litigation was substantially correct," and that confidence, in turn, is bolstered by the availability of appellate review. *Standefer* v. *United States*, 447 U. S. 10, 23, n. 18 (1980); see also Restatement (Second) of Judgments § 28, Comment *a*, at 274. In *Currier* and *Bravo-Fernandez*, we were reluctant to apply issue preclusion not because the *subsequent* trial was criminal but because the *initial* trial was. While a defense verdict in a criminal trial is generally not subject to testing on appeal, summary judgment in a civil declaratory judgment action can be appealed. Indeed, the Crow Tribe did appeal the District Court's decision to the Tenth Circuit and petitioned for our review of the Tenth Circuit's decision. The concerns that we articulated in *Currier* and *Bravo-Fernandez* have no bearing here.[9]

* * *

For these reasons, Herrera is precluded by the judgment in *Repsis* from relitigating the continuing validity of the hunting right conferred by the 1868 Treaty. Because the majority has chosen to disregard this threshold problem and issue a potentially pointless disquisition on the proper interpretation of the 1868 Treaty, I respectfully dissent.

[9] Nor is that the only distinction between those cases and this one. In both *Currier* and *Bravo-Fernandez* a party sought preclusion as to an element of the charged offense. The elements of the charged offense are not disputed here—Herrera's asserted treaty right is an affirmative defense. And while the State bears the burden of proof as to elements of the offense, under Wyoming law, the defendant asserting an affirmative defense must state a prima facie case before any burden shifts to the State. See *Duckett* v. *State*, 966 P. 2d 941, 948 (Wyo. 1998).

Syllabus

MISSION PRODUCT HOLDINGS, INC. *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

No. 17–1657. Argued February 20, 2019—Decided May 20, 2019

Petitioner Mission Product Holdings, Inc., entered into a contract with respondent Tempnology, LLC, which gave Mission a license to use Tempnology's trademarks in connection with the distribution of certain clothing and accessories. Tempnology filed for Chapter 11 bankruptcy and sought to reject its agreement with Mission. Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. § 365(a). It further provides that rejection "constitutes a breach of such contract." § 365(g). The Bankruptcy Court approved Tempnology's rejection and further held that the rejection terminated Mission's rights to use Tempnology's trademarks. The Bankruptcy Appellate Panel reversed, relying on Section 365(g)'s statement that rejection "constitutes a breach" to hold that rejection does not terminate rights that would survive a breach of contract outside bankruptcy. The First Circuit rejected the Panel's judgment and reinstated the Bankruptcy Court's decision.

Held:

1. This case is not moot. Mission presents a plausible claim for money damages arising from its inability to use Tempnology's trademarks, which is sufficient to preserve a live controversy. See *Chafin* v. *Chafin*, 568 U. S. 165, 172. Tempnology's various arguments that Mission is not entitled to damages do not so clearly preclude recovery as to render this case moot. Pp. 376–378.

2. A debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Pp. 378–387.

(a) Section 365(g) provides that rejection "constitutes a breach." And "breach" is neither a defined nor a specialized bankruptcy term—it means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69. Outside bankruptcy, a licensor's breach cannot revoke continuing rights given to a counterparty under a contract (assuming no special contract term or state law). And because rejection "constitutes a breach," the same result must follow from rejec-

tion in bankruptcy. In preserving a counterparty's rights, Section 365 reflects the general bankruptcy rule that the estate cannot possess anything more than the debtor did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15. And conversely, allowing rejection to rescind a counterparty's rights would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which debtors may unwind pre-bankruptcy transfers that undermine the bankruptcy process. See, *e. g.*, § 548(a). Pp. 379–382.

(b) Tempnology's principal counterargument rests on a negative inference drawn from provisions of Section 365 identifying categories of contracts under which a counterparty may retain specified rights after rejection. See §§ 365(h), (i), (n). Tempnology argues that these provisions indicate that the ordinary consequence of rejection must be something different—*i. e.*, the termination of contractual rights previously granted. But that argument offers no account of how to read Section 365(g) (rejection "constitutes a breach") to say essentially its opposite. And the provisions Tempnology treats as a reticulated scheme of exceptions each emerged at a different time and responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges.

Tempnology's remaining argument turns on how the special features of trademark law may affect the fulfillment of the Code's goals. Unless rejection terminates a licensee's right to use a trademark, Tempnology argues, a debtor must choose between monitoring the goods sold under a license or risking the loss of its trademark, either of which would impede a debtor's ability to reorganize. But the distinctive features of trademarks do not persuade this Court to adopt a construction of Section 365 that will govern much more than trademark licenses. And Tempnology's plea to facilitate reorganizations cannot overcome what Sections 365(a) and (g) direct. In delineating the burdens a debtor may and may not escape, Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges. Pp. 382–387.

879 F. 3d 389, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 387. GORSUCH, J., filed a dissenting opinion, *post*, p. 389.

Danielle Spinelli argued the cause for petitioner. With her on the briefs were *Craig Goldblatt*, *Joel Millar*, *James Barton*, *Robert J. Keach*, and *Lindsay Z. Milne.*

Zachary D. Tripp argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, and *Mark B. Stern*.

Douglas Hallward-Driemeier argued the cause for respondent. With him on the brief were *Jonathan Ference-Burke*, *Gregg Galardi*, *Christopher M. Desiderio*, *James Wilton*, *Patricia Chen*, *Lee Harrington*, *George Skelly*, and *Daniel W. Sklar*.*

JUSTICE KAGAN delivered the opinion of the Court.

Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. § 365(a). The section further provides that a debtor's rejection of a contract under that authority "constitutes a breach of such contract." § 365(g).

Today we consider the meaning of those provisions in the context of a trademark licensing agreement. The question is whether the debtor-licensor's rejection of that contract deprives the licensee of its rights to use the trademark. We hold it does not. A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place.

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*Briefs of *amici curiae* urging reversal were filed for the Intellectual Property Owners Association by *Wendy C. Larson*, *Travis R. Wimberly*, and *Mark W. Lauroesch*; for the International Trademark Association by *David H. Bernstein*, *Jeffrey P. Cunard*, *Jeremy Feigelson*, *Henry Lebowitz*, *Jared I. Kagan*, and *Eleanor M. Lackman*; and for Law Professors by *Eric F. Citron* and *Jay Lawrence Westbrook*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Theodore H. Davis, Jr.*, and *Sheldon H. Klein*; and for the New York Intellectual Property Law Association by *Stephen J. Smirti, Jr.*, *Michael C. Cannata*, *Frank Misiti*, *Stuart I. Gordon*, *Robert M. Isackson*, *Richard Levy, Jr.*, and *Dyan Finguerra-DuCharme*.

I

This case arises from a licensing agreement gone wrong. Respondent Tempnology, LLC, manufactured clothing and accessories designed to stay cool when used in exercise. It marketed those products under the brand name "Coolcore," using trademarks (*e. g.*, logos and labels) to distinguish the gear from other athletic apparel. In 2012, Tempnology entered into a contract with petitioner Mission Product Holdings, Inc. See App. 203–255. The agreement gave Mission an exclusive license to distribute certain Coolcore products in the United States. And more important here, it granted Mission a non-exclusive license to use the Coolcore trademarks, both in the United States and around the world. The agreement was set to expire in July 2016. But in September 2015, Tempnology filed a petition for Chapter 11 bankruptcy. And it soon afterward asked the Bankruptcy Court to allow it to "reject" the licensing agreement. § 365(a).

Chapter 11 of the Bankruptcy Code sets out a framework for reorganizing a bankrupt business. See §§ 1101–1174. The filing of a petition creates a bankruptcy estate consisting of all the debtor's assets and rights. See § 541. The estate is the pot out of which creditors' claims are paid. It is administered by either a trustee or, as in this case, the debtor itself. See §§ 1101, 1107.

Section 365(a) of the Code provides that a "trustee [or debtor], subject to the court's approval, may assume or reject any executory contract." § 365(a). A contract is executory if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 522, n. 6 (1984) (internal quotation marks omitted). Such an agreement represents both an asset (the debtor's right to the counterparty's future performance) and a liability (the debtor's own obligations to perform). Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its

obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential "business judgment" rule. *Id.*, at 523.

According to Section 365(g), "the rejection of an executory contract[ ] constitutes a breach of such contract." As both parties here agree, the counterparty thus has a claim against the estate for damages resulting from the debtor's nonperformance. See Brief for Petitioner 17, 19; Brief for Respondent 30–31. But such a claim is unlikely to ever be paid in full. That is because the debtor's breach is deemed to occur "immediately before the date of the filing of the [bankruptcy] petition," rather than on the actual post-petition rejection date. § 365(g)(1). By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar. See *Bildisco*, 465 U. S., at 531–532 (noting the higher priority of post-petition claims).

In this case, the Bankruptcy Court (per usual) approved Tempnology's proposed rejection of its executory licensing agreement with Mission. See App. to Pet. for Cert. 83–84. That meant, as laid out above, two things on which the parties agree. First, Tempnology could stop performing under the contract. And second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from Tempnology's nonperformance.

But Tempnology thought still another consequence ensued, and it returned to the Bankruptcy Court for a declaratory judgment confirming its view. According to Tempnology, its rejection of the contract also terminated the rights it had granted Mission to use the Coolcore trademarks. Tempnology based its argument on a negative inference. See Motion in No. 15–11400 (Bkrtcy. Ct. NH), pp. 9–14. Several provisions in Section 365 state that a counterparty to specific

kinds of agreements may keep exercising contractual rights after a debtor's rejection. For example, Section 365(h) provides that if a bankrupt landlord rejects a lease, the tenant need not move out; instead, she may stay and pay rent (just as she did before) until the lease term expires. And still closer to home, Section 365(n) sets out a similar rule for some types of intellectual property licenses: If the debtor-licensor rejects the agreement, the licensee can continue to use the property (typically, a patent), so long as it makes whatever payments the contract demands. But Tempnology pointed out that neither Section 365(n) nor any similar provision covers trademark licenses. So, it reasoned, in that sort of contract a different rule must apply: The debtor's rejection must extinguish the rights that the agreement had conferred on the trademark licensee. The Bankruptcy Court agreed. See *In re Tempnology, LLC*, 541 B. R. 1 (Bkrtcy. Ct. NH 2015). It held, relying on the same "negative inference," that Tempnology's rejection of the licensing agreement revoked Mission's right to use the Coolcore marks. *Id.*, at 7.

The Bankruptcy Appellate Panel reversed, relying heavily on a decision of the Court of Appeals for the Seventh Circuit about the effects of rejection on trademark licensing agreements. See *In re Tempnology, LLC*, 559 B. R. 809, 820–823 (Bkrtcy. App. Panel CA1 2016); *Sunbeam Products, Inc.* v. *Chicago Am. Mfg., LLC*, 686 F. 3d 372, 376–377 (CA7 2012). Rather than reason backward from Section 365(n) or similar provisions, the Panel focused on Section 365(g)'s statement that rejection of a contract "constitutes a breach." Outside bankruptcy, the court explained, the breach of an agreement does not eliminate rights the contract had already conferred on the non-breaching party. See 559 B. R., at 820. So neither could a rejection of an agreement in bankruptcy have that effect. A rejection "convert[s]" a "debtor's unfulfilled obligations" to a pre-petition damages claim. *Id.*, at 822 (quoting *Sunbeam*, 686 F. 3d, at 377). But it does not "terminate the contract" or "vaporize[ ]" the counterparty's rights. 559 B. R., at 820, 822 (quoting *Sunbeam*, 686 F. 3d,

at 377). Mission could thus continue to use the Coolcore trademarks.

But the Court of Appeals for the First Circuit rejected the Panel's and Seventh Circuit's view, and reinstated the Bankruptcy Court decision terminating Mission's license. See *In re Tempnology, LLC*, 879 F. 3d 389 (2018). The majority first endorsed that court's inference from Section 365(n) and similar provisions. It next reasoned that special features of trademark law counsel against allowing a licensee to retain rights to a mark after the licensing agreement's rejection. Under that body of law, the majority stated, the trademark owner's "failure to monitor and exercise [quality] control" over goods associated with a trademark "jeopardiz[es] the continued validity of [its] own trademark rights." *Id.*, at 402. So if (the majority continued) a licensee can keep using a mark after an agreement's rejection, the licensor will need to carry on its monitoring activities. And according to the majority, that would frustrate "Congress's principal aim in providing for rejection": to "release the debtor's estate from burdensome obligations." *Ibid.* (internal quotation marks omitted). Judge Torruella dissented, mainly for the Seventh Circuit's reasons. See *id.*, at 405–407.

We granted certiorari to resolve the division between the First and Seventh Circuits. 586 U. S. 960 (2018). We now affirm the Seventh's reasoning and reverse the decision below.[1]

II

Before reaching the merits, we pause to consider Tempnology's claim that this case is moot. Under settled law, we

[1] In its briefing before this Court, Mission contends that its exclusive distribution rights survived the licensing agreement's rejection for the same reason as its trademark rights did. See Brief for Petitioner 40–44; *supra*, at 373. But the First Circuit held that Mission had waived that argument, see 879 F. 3d, at 401, and we have no reason to doubt that conclusion. Our decision thus affects only Mission's trademark rights.

may dismiss the case for that reason only if "it is impossible for a court to grant any effectual relief whatever" to Mission assuming it prevails. *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013) (internal quotation marks omitted). That demanding standard is not met here.

Mission has presented a claim for money damages—essentially lost profits—arising from its inability to use the Coolcore trademarks between the time Tempnology rejected the licensing agreement and its scheduled expiration date. See Reply Brief 22, and n. 8. Such claims, if at all plausible, ensure a live controversy. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978). For better or worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 2 (3d ed. 2008) (Wright & Miller) ("[A] case is not moot so long as a claim for monetary relief survives"). Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, Mission's suit remains live. See *Chafin*, 568 U. S., at 172.

Tempnology makes a flurry of arguments about why Mission is not entitled to damages, but none so clearly precludes recovery as to make this case moot. First, Tempnology contends that Mission suffered no injury because it "never used the trademark[s] during [the post-rejection] period." Brief for Respondent 24; see Tr. of Oral Arg. 33. But that gets things backward. Mission's non-use of the marks during that time is precisely what gives rise to its damages claim; had it employed the marks, it would not have lost any profits. So next, Tempnology argues that Mission's non-use was its own "choice," for which damages cannot lie. See *id.*, at 26. But recall that the Bankruptcy Court held that Mission *could not* use the marks after rejection (and its decision remained in effect through the agreement's expiration). See

supra, at 375. And although (as Tempnology counters) the court issued "no injunction," Brief for Respondent 26, that difference does not matter: Mission need not have flouted a crystal-clear ruling and courted yet more legal trouble to preserve its claim. Cf. 13B Wright & Miller § 3533.2.2, at 852 ("[C]ompliance [with a judicial decision] does not moot [a case] if it remains possible to undo the effects of compliance," as through compensation). So last, Tempnology claims that it bears no blame (and thus should not have to pay) for Mission's injury because all it did was "ask[ ] the court to make a ruling." Tr. of Oral Arg. 34–35. But whether Tempnology did anything to Mission amounting to a legal wrong is a prototypical merits question, which no court has addressed and which has no obvious answer. That means it is no reason to find this case moot.

And so too for Tempnology's further argument that Mission will be unable to convert any judgment in its favor to hard cash. Here, Tempnology notes that the bankruptcy estate has recently distributed all of its assets, leaving nothing to satisfy Mission's judgment. See Brief for Respondent 27. But courts often adjudicate disputes whose "practical impact" is unsure at best, as when "a defendant is insolvent." *Chafin*, 568 U. S., at 175. And Mission notes that if it prevails, it can seek the unwinding of prior distributions to get its fair share of the estate. See Reply Brief 23. So although this suit "may not make [Mission] rich," or even better off, it remains a live controversy—allowing us to proceed. *Chafin*, 568 U. S., at 176.

III

What is the effect of a debtor's (or trustee's) rejection of a contract under Section 365 of the Bankruptcy Code? The parties and courts of appeals have offered us two starkly different answers. According to one view, a rejection has the same consequence as a contract breach outside bankruptcy: It gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under

the contract. According to the other view, a rejection (except in a few spheres) has more the effect of a contract rescission in the non-bankruptcy world: Though also allowing a damages claim, the rejection terminates the whole agreement along with all rights it conferred. Today, we hold that both Section 365's text and fundamental principles of bankruptcy law command the first, rejection-as-breach approach. We reject the competing claim that by specifically enabling the counterparties in some contracts to retain rights after rejection, Congress showed that it wanted the counterparties in all other contracts to lose their rights. And we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.

A

We start with the text of the Code's principal provisions on rejection—and find that it does much of the work. As noted earlier, Section 365(a) gives a debtor the option, subject to court approval, to "assume or reject any executory contract." See *supra*, at 373. And Section 365(g) describes what rejection means. Rejection "constitutes a breach of [an executory] contract," deemed to occur "immediately before the date of the filing of the petition." See *supra*, at 374. Or said more pithily for current purposes, a rejection is a breach. And "breach" is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69 (1995) (Congress generally meant for the Bankruptcy Code to "incorporate the established meaning" of "terms that have accumulated settled meaning" (internal quotation marks omitted)). So the first place to go in divining the effects of rejection is to non-bankruptcy contract law, which can tell us the effects of breach.

Consider a made-up executory contract to see how the law of breach works outside bankruptcy. A dealer leases a pho-

tocopier to a law firm, while agreeing to service it every month; in exchange, the firm commits to pay a monthly fee. During the lease term, the dealer decides to stop servicing the machine, thus breaching the agreement in a material way. The law firm now has a choice (assuming no special contract term or state law). The firm can keep up its side of the bargain, continuing to pay for use of the copier, while suing the dealer for damages from the service breach. Or the firm can call the whole deal off, halting its own payments and returning the copier, while suing for any damages incurred. See 13 R. Lord, Williston on Contracts § 39:32, pp. 701–702 (4th ed. 2013) ("[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further"). But to repeat: The choice to terminate the agreement and send back the copier is for the *law firm*. By contrast, the *dealer* has no ability, based on its own breach, to terminate the agreement. Or otherwise said, the dealer cannot get back the copier just by refusing to show up for a service appointment. The contract gave the law firm continuing rights in the copier, which the dealer cannot unilaterally revoke.

And now to return to bankruptcy: If the rejection of the photocopier contract "constitutes a breach," as the Code says, then the same results should follow (save for one twist as to timing). Assume here that the dealer files a Chapter 11 petition and decides to reject its agreement with the law firm. That means, as above, that the dealer will stop servicing the copier. It means, too, that the law firm has an option about how to respond—continue the contract or walk away, while suing for whatever damages go with its choice. (Here is where the twist comes in: Because the rejection is deemed to occur "immediately before" bankruptcy, the firm's damages suit is treated as a pre-petition claim on the estate, which will likely receive only cents on the dollar. See *supra*, at 374.) And most important, it means that assuming the law firm wants to keep using the copier, the dealer cannot

take it back. A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

All of this, it will hardly surprise you to learn, is not just about photocopier leases. Sections 365(a) and (g) speak broadly, to "any executory contract[s]." Many licensing agreements involving trademarks or other property are of that kind (including, all agree, the Tempnology-Mission contract). The licensor not only grants a license, but provides associated goods or services during its term; the licensee pays continuing royalties or fees. If the licensor breaches the agreement outside bankruptcy (again, barring any special contract term or state law), everything said above goes. In particular, the breach does not revoke the license or stop the licensee from doing what it allows. See, *e. g.*, *Sunbeam*, 686 F. 3d, at 376 ("Outside of bankruptcy, a licensor's breach does not terminate a licensee's right to use [the licensed] intellectual property"). And because rejection "constitutes a breach," § 365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.

In preserving those rights, Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15 (1924) (establishing that principle); § 541(a)(1) (defining the estate to include the "interests *of the debtor* in property" (emphasis added)). As one bankruptcy scholar has put the point: Whatever "limitation[s] on the debtor's property [apply] outside of bankruptcy[ ] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either." D. Baird, Elements of Bank-

ruptcy 97 (6th ed. 2014). So if the not-yet debtor was subject to a counterparty's contractual right (say, to retain a copier or use a trademark), so too is the trustee or debtor once the bankruptcy petition has been filed. The rejection-as-breach rule (but *not* the rejection-as-rescission rule) ensures that result. By insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up.

And conversely, the rejection-as-rescission approach would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process. The most notable example is for fraudulent conveyances—usually, something-for-nothing transfers that deplete the estate (and so cheat creditors) on the eve of bankruptcy. See § 548(a). A trustee's avoidance powers are laid out in a discrete set of sections in the Code, see §§ 544–553, far away from Section 365. And they can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason. See, *e. g.*, § 548(a) (describing the requirements for avoiding fraudulent transfers); *supra*, at 373–374. If trustees (or debtors) could use rejection to rescind previously granted interests, then rejection would become functionally equivalent to avoidance. Both, that is, would roll back a prior transfer. And that result would subvert everything the Code does to keep avoidances cabined—so they do not threaten the rule that the estate can take only what the debtor possessed before filing. Again, then, core tenets of bankruptcy law push in the same direction as Section 365's text: Rejection is breach, and has only its consequences.

B

Tempnology's main argument to the contrary, here as in the courts below, rests on a negative inference. See Brief

for Respondent 33–41; *supra*, at 374–375. Several provisions of Section 365, Tempnology notes, "identif[y] categories of contracts under which a counterparty" may retain specified contract rights "notwithstanding rejection." Brief for Respondent 34. Sections 365(h) and (i) make clear that certain purchasers and lessees of real property and timeshare interests can continue to exercise rights after a debtor has rejected the lease or sales contract. See § 365(h)(1) (real-property leases); § 365(i) (real-property sales contracts); §§ 365(h)(2), (i) (timeshare interests). And Section 365(n) similarly provides that licensees of some intellectual property—but not trademarks—retain contractual rights after rejection. See § 365(n); § 101(35A); *supra*, at 375. Tempnology argues from those provisions that the ordinary consequence of rejection must be something different—*i. e.*, the termination, rather than survival, of contractual rights previously granted. Otherwise, Tempnology concludes, the statute's "general rule" would "swallow the exceptions." Brief for Respondent 19.

But that argument pays too little heed to the main provisions governing rejection and too much to subsidiary ones. On the one hand, it offers no account of how to read Section 365(g) (recall, rejection "constitutes a breach") to say essentially its opposite (*i. e.*, that rejection and breach have divergent consequences). On the other hand, it treats as a neat, reticulated scheme of "narrowly tailored exception[s]," *id.*, at 36 (emphasis deleted), what history reveals to be anything but. Each of the provisions Tempnology highlights emerged at a different time, over a span of half a century. See, *e. g.*, 52 Stat. 881 (1938) (real-property leases); § 1(b), 102 Stat. 2538 (1988) (intellectual property). And each responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges. See Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 911–912, 916–919 (1988) (identifying judicial decisions that the provisions overturned); compare, *e. g.*, *In re Som-*

brero Reef Club, Inc., 18 B. R. 612, 618–619 (Bkrtcy. Ct. SD Fla. 1982), with, *e. g.*, §§ 365(h)(2), (i). Read as generously as possible to Tempnology, this mash-up of legislative interventions says nothing much of anything about the content of Section 365(g)'s general rule. Read less generously, it affirmatively refutes Tempnology's rendition. As one bankruptcy scholar noted after an exhaustive review of the history: "What the legislative record [reflects] is that whenever Congress has been confronted with the consequences of the [view that rejection terminates all contractual rights], it has expressed its disapproval." Andrew, 59 U. Colo. L. Rev., at 928. On that account, Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection.[2]

Consider more closely, for example, Congress's enactment of Section 365(n), which addresses certain intellectual property licensing agreements. No one disputes how that provision came about. In *Lubrizol Enterprises* v. *Richmond Metal Finishers*, the Fourth Circuit held that a debtor's rejection of an executory contract worked to revoke its grant of a patent license. See 756 F. 2d 1043, 1045–1048 (1985). In other words, *Lubrizol* adopted the same rule for patent licenses that the First Circuit announced for trademark licenses here. Congress sprang into action, drafting Section 365(n) to reverse *Lubrizol* and ensure the continuation of patent (and some other intellectual property) licensees' rights. See 102 Stat. 2538 (1988); S. Rep. No. 100–505,

[2] At the same time, Congress took the opportunity when drafting those provisions to fill in certain details, generally left to state law, about the post-rejection relationship between the debtor and counterparty. See, *e. g.*, Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 903, n. 200 (1988) (describing Congress's addition of subsidiary rules for real-property leases in Section 365(h)); Brief for United States as *Amicus Curiae* 29 (noting that Congress similarly set out detailed rules for patent licenses in Section 365(n)). The provisions are therefore not redundant of Section 365(g): Each sets out a remedial scheme embellishing on or tweaking the general rejection-as-breach rule.

pp. 2–4 (1988) (explaining that Section 365(n) "corrects [*Lubrizol*'s] perception" that "Section 365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights"). As Tempnology highlights, that provision does not cover trademark licensing agreements, which continue to fall, along with most other contracts, within Section 365(g)'s general rule. See Brief for Respondent 38. But what of that? Even put aside the claim that Section 365(n) is part of a pattern—that Congress whacked Tempnology's view of rejection wherever it raised its head. See *supra*, at 384. Still, Congress's repudiation of *Lubrizol* for patent contracts does not show any intent to *ratify* that decision's approach for almost all others. Which is to say that no negative inference arises. Congress did nothing in adding Section 365(n) to alter the natural reading of Section 365(g)—that rejection and breach have the same results.

Tempnology's remaining argument turns on the way special features of trademark law may affect the fulfillment of the Code's goals. Like the First Circuit below, Tempnology here focuses on a trademark licensor's duty to monitor and "exercise quality control over the goods and services sold" under a license. Brief for Respondent 20; see *supra*, at 376. Absent those efforts to keep up quality, the mark will naturally decline in value and may eventually become altogether invalid. See 3 J. McCarthy, Trademarks and Unfair Competition § 18:48, pp. 18–129, 18–133 (5th ed. 2018). So (Tempnology argues) unless rejection of a trademark licensing agreement terminates the licensee's rights to use the mark, the debtor will have to choose between expending scarce resources on quality control and risking the loss of a valuable asset. See Brief for Respondent 59. "Either choice," Tempnology concludes, "would impede a [debtor's] ability to reorganize," thus "undermining a fundamental purpose of the Code." *Id.*, at 59–60.

To begin with, that argument is a mismatch with Tempnology's reading of Section 365. The argument is trademark-

specific. But Tempnology's reading of Section 365 is not. Remember, Tempnology construes that section to mean that a debtor's rejection of a contract terminates the counterparty's rights "unless the contract falls within an express statutory exception." *Id.*, at 27–28; see *supra*, at 382–383. That construction treats trademark agreements identically to most other contracts; the only agreements getting different treatment are those falling within the discrete provisions just discussed. And indeed, Tempnology could not have discovered, however hard it looked, any trademark-specific rule in Section 365. That section's special provisions, as all agree, do not mention trademarks; and the general provisions speak, well, generally. So Tempnology is essentially arguing that distinctive features of trademarks should persuade us to adopt a construction of Section 365 that will govern not just trademark agreements, but pretty nearly every executory contract. However serious Tempnology's trademark-related concerns, that would allow the tail to wag the Doberman.

And even putting aside that incongruity, Tempnology's plea to facilitate trademark licensors' reorganizations cannot overcome what Sections 365(a) and (g) direct. The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal. See, *e. g.*, *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008) (observing that in enacting Chapter 11, Congress did not have "a single purpose," but "str[uck] a balance" among multiple competing interests (internal quotation marks omitted)). Here, Section 365 provides a debtor like Tempnology with a powerful tool: Through rejection, the debtor can escape all of its future contract obligations, without having to pay much of anything in return. See *supra*, at 374. But in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—

imposes on property owners. See 28 U. S. C. § 959(b) (requiring a trustee to manage the estate in accordance with applicable law). Nor does Section 365 relieve the debtor of the need, against the backdrop of that law, to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark. In thus delineating the burdens that a debtor may and may not escape, Congress also weighed (among other things) the legitimate interests and expectations of the debtor's counterparties. The resulting balance may indeed impede some reorganizations, of trademark licensors and others. But that is only to say that Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges.

IV

For the reasons stated above, we hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Here, that construction of Section 365 means that the debtor-licensor's rejection cannot revoke the trademark license.

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

I agree with the Court that a debtor's choice to reject an executory contact under 11 U. S. C. § 365(a) functions as a breach of the contract rather than unwinding the rejected contract as if it never existed. *Ante*, at 379–381. This result follows from traditional bankruptcy principles and from the general rule set out in § 365(g) of the Bankruptcy Code. I also agree that no specific aspects of trademark law compel

a contrary rule that equates rejection with rescission. I therefore join the Court's opinion in full. I write separately to highlight two potentially significant features of today's holding.

First, the Court does not decide that every trademark licensee has the unfettered right to continue using licensed marks postrejection. The Court granted certiorari to decide whether rejection "terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law." Pet. for Cert. i. The answer is no, for the reasons the Court explains. But the baseline inquiry remains whether the licensee's rights would survive a breach under applicable nonbankruptcy law. Special terms in a licensing contract or state law could bear on that question in individual cases. See *ante*, at 379–381; Brief for American Intellectual Property Law Association as *Amicus Curiae* 20–25 (discussing examples of contract terms that could potentially lead a bankruptcy court to limit licensee rights postrejection).

Second, the Court's holding confirms that trademark licensees' postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property. Those variances stem from § 365(n), one of several subject-specific provisions in the Bankruptcy Code that "embellis[h] on or twea[k]" the general rejection rule. *Ante*, at 384, n. 2. Section 365(n)—which applies to patents, copyrights, and four other types of intellectual property, but not to trademarks, § 101(35A)—alters the general rejection rule in several respects. For example, a covered licensee that chooses to retain its rights postrejection must make all of its royalty payments; the licensee has no right to deduct damages from its payments even if it otherwise could have done so under nonbankruptcy law. § 365(n)(2)(C)(i). This provision and others in § 365(n) mean that the covered intellectual property types are governed by different rules than trademark licenses.

Although these differences may prove significant for individual licensors and licensees, they do not alter the outcome here. The Court rightly rejects Tempnology's argument that the presence of § 365(n) changes what § 365(g) says. As the Senate Report accompanying § 365(n) explained, the bill did not "address or intend any inference to be drawn concerning the treatment of executory contracts" under § 365's general rule. S. Rep. No. 100–505, p. 5 (1988); see *ante*, at 384–385. To the extent trademark licensees are treated differently from licensees of other forms of intellectual property, that outcome leaves Congress with the option to tailor a provision for trademark licenses, as it has repeatedly in other contexts. See *ante*, at 384–385.

With these observations, I join the Court's opinion.

JUSTICE GORSUCH, dissenting.

This Court is not in the business of deciding abstract questions, no matter how interesting. Under the Constitution, our power extends only to deciding "Cases" and "Controversies" where the outcome matters to real parties in the real world. Art. III, § 2. Because it's unclear whether we have anything like that here, I would dismiss the petition as improvidently granted.

This case began when Mission licensed the right to use certain of Tempnology's trademarks. After Tempnology entered bankruptcy, it sought and won from a bankruptcy court an order declaring that Mission could no longer use those trademarks. On appeal and now in this Court, Mission seeks a ruling that the bankruptcy court's declaration was wrong. But whoever is right about that, it isn't clear how it would make a difference: After the bankruptcy court ruled, the license agreement expired by its own terms, so nothing we might say here could restore Mission's ability to use Tempnology's trademarks.

Recognizing that its original case seems to have become moot, Mission attempts an alternative theory in briefing be-

fore us. Now Mission says that if it prevails here it will, on remand, seek money damages from Tempnology's estate for the profits it lost when, out of respect for the bankruptcy court's order, it refrained from using the trademarks while its license still existed.

But it's far from clear whether even this theory can keep the case alive. A damages claim "suffices to avoid mootness only if viable," which means damages must at least be "legally available for [the alleged] wrong." 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 22 (3d ed. 2008). Yet, as far as Mission has told us, Tempnology did nothing that could lawfully give rise to a damages claim. After all, when Tempnology asked the bankruptcy court to issue a declaratory ruling on a question of law, it was exercising its protected "First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983). And petitioning a court normally isn't an actionable wrong that can give rise to a claim for damages. Absent a claim of malice (which Mission hasn't suggested would have any basis here), the ordinary rule is that "'no action lies against a party for resort to civil courts'" or for "the assertion of a legal argument." *Lucsik* v. *Board of Ed. of Brunswick City School Dist.*, 621 F. 2d 841, 842 (CA6 1980) (*per curiam*); see, *e. g.*, *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 770, n. 14 (1983); *Russell* v. *Farley*, 105 U. S. 433, 437–438 (1882).

Maybe Mission's able lawyers will conjure something better on remand. But, so far at least, the company hasn't come close to articulating a viable legal theory on which a claim for damages could succeed. And where our jurisdiction is so much in doubt, I would decline to proceed to the merits. If the legal questions here are of sufficient importance, a live case presenting them will come along soon enough; there is no need to press the bounds of our constitutional authority to reach them today.

Reporter's Note

The next page is purposely numbered 901. The numbers between 390 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 26 THROUGH
MAY 24, 2019

MARCH 26, 2019

Dismissal Under Rule 46

No. 18–1129. CADIAN CAPITAL MANAGEMENT, LP, ET AL. *v.* KLEIN ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 906 F. 3d 215.

MARCH 28, 2019

Miscellaneous Orders

No. 18A963. GUN OWNERS OF AMERICA, INC., ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied.

No. 18A985. MURPHY *v.* COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, granted. The State may not carry out Murphy's execution pending the timely filing and disposition of a petition for writ of certiorari unless the State permits Murphy's Buddhist spiritual adviser or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution. JUSTICE THOMAS and JUSTICE GORSUCH would deny the application for stay of execution.

JUSTICE KAVANAUGH, concurring.

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution. The government may not discriminate against religion generally or against particular religious denominations. See *Morris County Bd. of Chosen Freeholders* v. *Freedom from*

Religion Foundation, 586 U. S. 1213, 1214 (2019) (statement of KAVANAUGH, J., respecting denial of certiorari); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 465–466 (2017); *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). In this case, the relevant Texas policy allows a Christian or Muslim inmate to have a state-employed Christian or Muslim religious adviser present either in the execution room *or* in the adjacent viewing room. But inmates of other religious denominations—for example, Buddhist inmates such as Murphy—who want their religious adviser to be present can have the religious adviser present *only* in the viewing room and *not* in the execution room itself for their executions. In my view, the Constitution prohibits such denominational discrimination.

In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. See *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975). For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. A State may choose a remedy in which it would allow religious advisers only into the viewing room and not the execution room because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions. The solution to that concern would be to allow religious advisers only into the viewing room.

In any event, the choice of remedy going forward is up to the State. What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.*

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*Under all the circumstances of this case, I conclude that Murphy made his request to the State in a sufficiently timely manner, one month before the scheduled execution.

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

Patrick H. Murphy, who was convicted and sentenced to death in 2003, was scheduled to be executed at 7 p.m. on March 28. Murphy's attorneys waited until March 26 before filing this suit in Federal District Court. The complaint they filed challenges a feature of the Texas execution protocol that has been in place and on the public record since 2012. The complaint claims that the Texas protocol violates the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.*, insofar as it permits only a prison chaplain and not any outside cleric to be present in the room where executions are carried out. Murphy is a Buddhist, and none of the more than 100 Texas prison chaplains is a Buddhist priest.

In carefully reasoned opinions based squarely on precedents of this Court, both the District Court and the Court of Appeals rejected Murphy's request for a stay of execution due to his dilatory litigation tactics, see 919 F. 3d 913, 916 (CA5 2019); 376 F. Supp. 3d 734, 735 (SD Tex. 2019). Then, on the afternoon of March 28, only hours before his execution was scheduled to occur, Murphy asked this Court to block his execution. And despite his inexcusable delay in raising his claims, the Court granted Murphy's request.

I did not agree with the decision of the Court when it was made. Because inexcusably late stay applications present a recurring and important problem and because religious liberty claims like Murphy's may come before the Court in future cases, I write now to explain why, in my judgment, the Court's decision in this case was seriously wrong.

I

In 2000, while serving a 55-year sentence for aggravated sexual assault, Murphy and six other inmates executed a well-planned, coordinated, and violent escape from a Texas prison. About two weeks later, on Christmas Eve, the group robbed a sporting goods store and killed Irving, Texas, police officer Aubrey Hawkins when he arrived at the scene. The escapees shot Hawkins 11

*[REPORTER'S NOTE: This opinion was filed on May 13, 2019.]

times, dragged him from his vehicle, drove over him, and dragged his body for some distance. Six of the seven were eventually captured, convicted of capital murder, and sentenced to death. See *Murphy* v. *Davis*, 737 Fed. Appx. 693, 696–697 (CA5 2018); *Murphy* v. *State*, 2006 WL 1096924, *1, *4 (Tex. Crim. App., Apr. 26, 2006). Murphy was convicted and sentenced in 2003, and his direct appeal ended in 2007. *Murphy* v. *Texas*, 549 U. S. 1119 (2007). During the next 11 years, he unsuccessfully pursued post-conviction relief in state and federal court. See *Murphy* v. *Davis*, 737 Fed. Appx., at 695, 699, 709. In November 2018, the State obtained a death warrant setting Murphy's execution for March 28, 2019.

By this time, Murphy had become a Pure Land Buddhist. According to his papers, he converted nearly a decade ago and has been visited by a Buddhist priest, Rev. Hui-Yong Shih, for the past six years.[1] In 2012, Texas made publicly available its policy regarding the presence of a member of the clergy in the room where an execution by lethal injection is carried out. Under that policy, any of the prison system's chaplains, but no other cleric, may enter this room. Texas has more than 100 chaplains, who are either employees of or under contract with the prison system. These chaplains include Christians, Muslims, Jews, and practitioners of a Native American religion, but no Buddhist priest. The inadequate record compiled in this case does not explain the reason for this omission. It does not tell us how many Texas prisoners are Buddhists, whether any Texas prisoners ever requested a Buddhist chaplain, whether Texas made any effort to recruit such a chaplain, or whether any Buddhist priest is willing to do whatever is needed to serve as a chaplain. Nor do we know anything about the vetting of potential chaplains, any general training that chaplains receive, and any special orientation provided to a chaplain who accompanies a prisoner during the process of execution. And we also do not know what a chaplain is permitted to do during an execution or whether there are specific restrictions on movements or sounds that might interfere with the work of those carrying out an execution.

On February 28, 2019, about three months after Murphy's execution date was set, his attorneys wrote to the general counsel

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[1] See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–13.

of the Texas Department of Criminal Justice and inquired whether Rev. Shih would be permitted to enter the execution room with their client, and on March 5, the department responded that only a chaplain is permitted in the room. Two days later, Murphy's attorney responded and said that he believed Murphy would be satisfied with a Buddhist chaplain but that he assumed none of Texas's chaplains were Buddhists. Texas did not respond, and Murphy's attorneys never renewed their inquiry.

After receiving Texas's response, Murphy's attorneys waited 15 days—until March 20—before challenging this decision in state court. The state court rejected the claim as untimely late in the evening of March 25, see *In re Murphy*, 2019 WL 1379859, *1 (Tex. Crim. App.), and on March 26, Murphy's lawyers filed this lawsuit in federal court. They asked the District Court to grant a stay of execution, but the District Court refused, citing the well-established rule that a stay of execution is an equitable remedy that should not be granted to an applicant who engages in inexcusably dilatory litigation tactics. 376 F. Supp. 3d, at 735, 740. On March 27, the Court of Appeals for the Fifth Circuit likewise refused to grant a stay, holding that the District Court had not abused its discretion in denying that relief. See 919 F. 3d, at 916.

On March 28, at about 1 p.m.—six hours before the scheduled time of Murphy's execution—his attorneys brought his religious liberty claims to this Court. They filed, among other things, an application for a stay of execution pending the filing of a petition for a writ of certiorari.[2] At about 4 p.m., Texas filed a response, and shortly after 9 p.m., more than two hours after the time scheduled for Murphy's execution, the Court issued an order staying Murphy's execution unless the State allowed Rev. Shih "or another Buddhist reverend of the State's choosing" to accompany Murphy during the execution. 587 U. S. 901. Murphy's death warrant was set to expire at midnight on March 28, and Texas announced that Murphy's execution would not proceed. Under Texas law, a new death warrant may be issued, but such a warrant may not set a date less than 90 days in the future. Tex. Code Crim. Proc. Ann., Art. 43.141(c) (Vernon 2018).

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[2] They also filed a petition for a writ of prohibition and an application for a stay pending the consideration of that petition.

II

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). An applicant for a stay of execution must satisfy all the traditional stay factors and therefore must show that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," and, in a close case, that the equities favor the granting of relief. *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*).

A court must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson* v. *Campbell*, 541 U. S. 637, 650 (2004); see also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

Thus, in granting a stay in this case, the Court must have concluded that there is a reasonable probability that we will grant review of the question whether the District Court abused its discretion in finding that Murphy's delay in raising his religious liberty claims disentitled him to the equitable remedy of a stay. We do not generally grant review of such factbound questions. See this Court's Rule 10. But in death penalty matters, it appears, ordinary procedural rules do not apply, see *Madison* v. *Alabama*, 586 U. S. 265, 284 (2019) (ALITO, J., dissenting). And in light of the dissent in *Dunn* v. *Ray*, 586 U. S. 1138 (2019)—about which I will say more later—I do not contest the Court's prediction about the probability of certiorari (as opposed to its propriety).

The likelihood of review, however, is not enough to justify a stay, so the Court's decision must also mean that, in its view, there is a significant likelihood that Murphy will succeed in showing that the District Court abused its discretion. And that I do contest. It is established that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief," *Gomez*, *supra*, at 654, and

the District Court's decision—and the Fifth Circuit's affirmance—cannot reasonably be thought to represent anything other than the careful and measured consideration of that matter. It is particularly remarkable to conclude that the District Court abused its discretion by ruling exactly as we had less than two months earlier. Compare 376 F. Supp. 3d, at 737 (relying on *Gomez* to deny untimely stay application), with *Dunn* v. *Ray*, 586 U. S. 1138 (same).

By granting a stay in this case, the Court disregards the "strong equitable presumption" against the grant of such relief when the applicant unreasonably delayed in raising the underlying claims. This presumption deserves greater respect because it serves many important interests.

First, it honors a State's strong interest in the timely enforcement of valid judgments of its courts. See *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). In this case, direct review of the judgment ended more than a decade ago. Moreover, if a State is pressured to modify a rule adopted for security reasons, the State has a legitimate claim to be given sufficient time to consider whether acceptable modifications are possible.

Second, eleventh-hour stay requests can impair valid interests of the federal courts. When courts do not have adequate time to consider a claim, the decisionmaking process may be compromised. And last-minute applications may disrupt other important work.

Third, the hasty decisionmaking resulting from late applications may harm the interests of applicants with potentially meritorious claims. Attorneys do not serve such clients well by unduly delaying the filing of claims that hold a real prospect of relief.

Finally, the cancellation of a scheduled execution only hours before (or even after) it is scheduled to take place may inflict further emotional trauma on the family and friends of the murder victim and the affected community.

In the present case, Murphy cannot overcome the presumption against last-minute applications. As I will explain, see Part III, *infra*, his religious liberty claims are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level. Those questions cannot be properly resolved in a matter of hours on a woefully deficient record. But that is precisely what Murphy asked of the lower courts and this Court.

As of at least 2013, Murphy and his attorneys knew or had reason to know everything necessary to assert the claim that the First Amendment and RLUIPA entitled him to have Rev. Shih at his side during his execution. By that date, Murphy had converted to Pure Land Buddhism, had begun to see Rev. Shih, and should have been aware of the Texas policy now at issue. Had Murphy begun to pursue his claims at that time, they could have been properly adjudicated long ago.

Even if Murphy is not held responsible for failing to act in 2013 or shortly thereafter, he and his attorneys certainly should have been spurred to action when, in November of last year, his execution date was set. Instead, his lawyers waited three months before writing to the Texas Department of Criminal Justice. How can that be justified?

Then, after receiving word on March 5 that Texas would adhere to its long-established policy, the attorneys waited three more weeks before filing suit. While they blame Texas's failure to respond to their second e-mail for their delay, that is simply untenable. If they could not act without further communication from Texas, why did they fail to follow up with the State? Why did the attorneys decide they could file on March 20 in state court without further response from Texas but not before? What justified that delay? And why didn't the attorneys file in federal court at the same time?

By the time they got around to filing in federal court, it was March 26, two days before the scheduled execution date. And by the time they filed in this Court, the scheduled execution time and the time when the death warrant would expire were only hours away. If the tactics of Murphy's attorneys in this case are not inexcusably dilatory, it is hard to know what the concept means.

This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent. By countenancing the dilatory litigation in this case, the Court, I fear, will encourage this damaging practice.[3]

[3] In my judgment, the tactics in this case are just as unjustified as those that led the Court to vacate a stay of execution a few weeks ago in *Dunn* v. *Ray*, 586 U. S. 1138 (2019). In that case, Ray, a Muslim, objected to Alabama's refusal to allow an imam to be present in the execution room. Ray filed suit in Federal District Court 10 days before his execution date. The

III

While I strongly disagree with the decision to grant a stay in this case, I recognize that Murphy, like Ray, raises serious questions under both the First Amendment and RLUIPA. Murphy argues, among other things, that Texas's policy of admitting only authorized chaplains illegally discriminates on the basis of religion. That is the argument embraced by both the concurrence in this case and the dissent in *Ray*. Both of those opinions seem to see this religious discrimination claim as one that is easily resolved under our Establishment Clause precedents, but that is simply not so.

Both opinions invoke precedents involving the constitutional rights of persons who are not incarcerated, see *Ray*, 586 U. S., at 1139; *ante*, at 901–902, and there is no question that, if Murphy were not in prison, Texas could not tell him that the only cleric he could have at his side in the moments before death is one who is approved by the State. But this Court's precedents hold that imprisonment necessarily imposes limitations on a prisoner's constitutional rights. See *Turner* v. *Safley*, 482 U. S. 78, 90 (1987); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348–350 (1987). Under those cases, it is not enough for a prisoner to assert a claim that would succeed in the outside world. Instead, we must consider the following four factors: (1) whether a prison rule bears a "valid, rational connection to a legitimate governmental interest"; (2) "whether alternative means are open to inmates to exercise the asserted right"; (3) "what impact an accommodation of the right would have on guards, inmates, and prison resources"; and (4) "whether there are ready alternatives to the regulation." *Overton* v. *Bazzetta*, 539 U. S. 126, 132 (2003) (quoting *Turner*, *supra*, at 89–91; internal quotation marks omitted). Neither the

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District Court refused to issue a stay of execution, holding, among other things, that the application was untimely, *Ray* v. *Dunn*, 2019 WL 418105, *1 (MD Ala., Feb. 1, 2019), but on February 6, the Eleventh Circuit granted a stay on the ground that Alabama's policy of allowing only its official chaplain, a Christian minister, to enter the execution room likely violated the Establishment Clause. *Ray* v. *Commissioner, Ala. Dept. of Corrections*, 915 F. 3d 689, 695–701, 703 (2019). The State asked us to vacate this stay, and we did so based on Ray's delay in raising his religious liberty claims. See *Ray*, 586 U. S., at 1138. In both *Ray* and this case, the Court was presented at the last minute with claims that raised complicated issues that cannot be adequately decided with hasty briefing and an inadequate record.

Ray dissent nor the concurrence in this case even mentions these precedents. Indeed, the *Ray* dissent is based on strict scrutiny, 586 U. S., at 1139, even though *Turner* specifically and emphatically rejected the use of that test in prisoner cases, 482 U. S., at 89.

On the flimsy record now before us, I would not presume to apply the *Turner* factors to Murphy's First Amendment claims, but there can be no doubt that *Turner* presents a serious obstacle. Here, Texas argues that it must be able to regulate the members of the clergy who are allowed in the execution room in order to ensure that these individuals do not intentionally or unintentionally engage in any conduct that might interfere with an execution. Murphy responds that Texas has failed to show that this is a real concern in his case because Rev. Shih has visited him in prison without incident and because Texas had sufficient time to do whatever additional vetting and training it thinks is needed. But on the present record, we cannot tell whether this is true. Visiting a living prisoner is not the same as watching from a short distance and chanting while a lethal injection is administered. And Texas may have an interest that goes beyond interference with Murphy's execution, namely, that allowing members of the clergy and spiritual advisers other than official chaplains to enter the execution room would set an unworkable precedent.

Specifically, Texas may be concerned that if it admits any cleric other than an official chaplain, every prisoner will insist on the presence of whichever outside cleric he prefers. Although the Court's order in this case permitted Texas to proceed with Murphy's execution if *any* Buddhist priest was allowed in the execution room, such a limited accommodation would not be acceptable in the outside world. There, Texas surely could not successfully defend a policy of admitting to the side of a dying patient only a state-approved cleric. Texas could not force a dying Baptist to settle for a Catholic priest; it could not tell an Orthodox Jew that only a Reform rabbi would be allowed at his side; it could not force a Shi'ite to accept a Sunni imam; and so forth. I am aware of no single authoritative tally of the number of religions and denominations that exist in the United States, but the number is certainly very large. And of course, even within a particular religion or denomination, all clerics are not fungible. Moreover, I assume that, in the world outside prison walls, a State could not discriminate between clerics and any other person whose

presence a dying patient might want at his side for spiritual or emotional support.

In permitting Murphy's execution to go forward provided that *some* Buddhist priest was allowed in the execution room, the Court may perhaps be understood to have concluded that a prison need not afford a prisoner facing execution the same array of choices that he would enjoy in the outside world. But if that is the Court's reasoning, what it shows is that the prison setting justifies important adjustments in the rules that apply outside prison walls. Determining just how far those adjustments may go is a sensitive question requiring an understanding of many factual questions that cannot be adequately decided on the thin record before us.[4]

So far, I have discussed the prospects of Murphy's Establishment Clause claim, but even if that claim cannot succeed, he might still prevail under RLUIPA, which was enacted by Congress to provide greater protection for religious liberty than do this Court's First Amendment precedents. To prevail under RLUIPA, Murphy would have to show at the outset that excluding Rev. Shih would impose a substantial burden on his exercise of religion. See 42 U. S. C. § 2000cc–1(a).

We have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, which contains an identical threshold requirement, § 2000bb–1(b), there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred. In past

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[4] I have discussed the constitutional claim set out in the concurrence in this case and in the *Ray* dissent, namely, an Establishment Clause claim based on discrimination among religions. But Murphy also asserts Free Exercise Clause and RLUIPA claims, which, as he frames them, do not depend on disparate treatment of different religions or denominations. If States respond to the decision on Murphy's stay application by banning all clerics from the execution room, that may obviate any conflict with the Establishment Clause, but a prisoner might still press free exercise claims. A claim under the Free Exercise Clause of the First Amendment would have to contend with both *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), and *Turner* v. *Safley*, 482 U. S. 78 (1987). Under RLUIPA, such a claim would present issues similar to those discussed below. See *infra* this page and 912.

cases, we have assessed regulations that compel an activity that a practitioner's faith prohibits. See, *e. g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 725–726 (2014); *Holt* v. *Hobbs*, 574 U. S. 352 (2015). And, while some Members of this Court have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden, see *Hobby Lobby*, 573 U. S., at 758–760 (GINSBURG, J., joined by BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (arguing that it is not a substantial burden to require Christian-owned businesses to facilitate the acquisition of abortifacients), a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected belief or practice, see *id.*, at 723–726. Similarly, it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." § 2000cc–5(7)(A) (emphasis added).

But this does not answer what results when the State offers a prisoner an alternative practice that, in terms of religious significance, is indistinguishable from the prohibited practice. Persons of many faiths may *desire* the support of a cleric in the moments before death, but not every religion would draw a distinction between a meeting with a clergyman shortly before death and one precisely at the moment of death. Murphy's situation, however, may be different because he believes that he will be reborn in the Pure Land only if he succeeds in remaining focused on Buddha while dying and that the chants of a Buddhist priest will help him in this endeavor. See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–17.

I will assume for present purposes that a policy like Texas's imposes a substantial burden on *any* prisoner who seeks the presence of a cleric other than one of the official chaplains, but that does not necessarily mean that the prisoner's RLUIPA claim would prevail. The State claims that its policy furthers its compelling interest in security and that the policy is narrowly tailored to serve that interest, see Brief in Opposition 20–23, 29, and in deciding whether its policy can be sustained on that basis, we would face unresolved factual questions that are similar to those

discussed above. The RLUIPA standard, § 2000cc–1(a)(2), to be sure, would be more favorable to the prisoner, but the nature of the underlying issues would be similar.

IV

The claims raised by Murphy and Ray are important and may ultimately be held to have merit. But they are not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons. See *Holt* v. *Hobbs*, *supra*. Prisoners should bring such claims well before their scheduled executions so that the courts can adjudicate them in the way that the claims require and deserve and so that States are afforded sufficient time to make any necessary modifications to their execution protocols.

In this case, however, Murphy egregiously delayed in raising his claims. By countenancing such tactics, the Court invites abuse.

For these reasons, Murphy's stay application, like Ray's, should have been denied.

Statement of JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, respecting grant of application for stay.*

In light of JUSTICE ALITO's opinion dissenting from the Court's March 28 order, I write to respectfully add two points.

1. On March 28, the Court stayed Murphy's execution. Murphy is Buddhist and wanted a Buddhist minister in the execution room. Under Texas' policy at the time, inmates who were Christian or Muslim could have ministers of their religions in the execution room. But inmates such as Murphy who were of other religions could have ministers of their religions only in the adjacent viewing room and not in the execution room. That discriminatory state policy violated the Constitution's guarantee of religious equality.

On April 2, five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately. Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution

*[REPORTER'S NOTE: This statement was filed on May 13, 2019.]

room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.*, and the Free Exercise Clause.

Put simply, this Court's stay facilitated the prompt resolution of a significant religious equality problem with the State's execution protocol and should alleviate any future litigation delays or disruptions that otherwise might have occurred as a result of the State's prior discriminatory policy.

2. I greatly respect JUSTICE ALITO's position that the Court nonetheless should have denied Murphy's stay application as untimely, although I ultimately disagree. In saying that the Court should have denied a stay in this case, JUSTICE ALITO points in part to the execution earlier this year of Domineque Ray in Alabama, where this Court did not approve a stay. But several significant differences between the two cases demonstrate why a stay was warranted in Murphy's case but not in Ray's case.

First, unlike Murphy, Ray did not raise an equal-treatment claim. Ray raised an Establishment Clause claim to have the State's Christian chaplain removed from the execution room. The State of Alabama then agreed to remove the Christian chaplain, thereby mooting that claim. Notably, in the District Court, Ray expressly agreed that his Establishment Clause claim would be moot if the State removed the Christian chaplain from the execution room, as the State subsequently agreed to do. Ray also raised a RLUIPA claim to have his Muslim religious minister in the execution room and not just in the viewing room. As noted above, however, the State has a compelling interest in controlling access to the execution room, which means that an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room, as opposed to the viewing room.

To be sure, in granting Ray a stay, the Eleventh Circuit relied on an equal-treatment theory, on the idea that the State's policy discriminated against non-Christian inmates. But Ray did not raise an equal-treatment argument in the District Court or the Eleventh Circuit. The Eleventh Circuit came up with the equal-treatment argument on its own, as the State correctly pointed out when the case later came to this Court. Amended Emer-

gency Motion and Application to Vacate Stay of Execution in *Dunn* v. *Ray*, O. T. 2018, No. 18A815, pp. 10–11, 17. Given that Ray did not raise an equal-treatment argument, the Eleventh Circuit's stay of Ray's execution on that basis was incorrect.

For present purposes, the bottom line is that Ray did not raise an equal-treatment claim. Murphy did.

Second, in response to the Eleventh Circuit's stay in Ray's case, Alabama indicated to this Court that an equal-treatment problem, if there were one, would typically be remedied by removing ministers of all religions from the execution room (as Texas has now done). *Id.*, at 17. That remedy would of course have done nothing for Ray, who wanted his religious minister *in the execution room*. That presumably explains why Ray raised a RLUIPA claim, but did not raise an equal-treatment claim. And that further explains why it was incorrect for the Eleventh Circuit to stay Ray's execution on the basis of an argument (the equal-treatment theory) that was not raised by Ray and that, even if successful, would not have afforded Ray the relief he sought of having his religious minister in the execution room.

Third, Murphy made his request to the State of Texas a full month before his scheduled execution. Yet the State never responded to Murphy's request to have any Buddhist minister in the execution room. The timing of Murphy's request, when combined with the State's foot-dragging in response and the ease with which the State could have promptly responded and addressed this discrete issue, was relevant to the assessment of the equities for purposes of the stay. See *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). As we have now seen, moreover, it took Texas only five days to change its discriminatory policy after a stay was granted. Texas' prompt response in the wake of the stay further underscores that Murphy's request was made in plenty of time for Texas to fix its discriminatory policy before Murphy's scheduled execution. Moreover, unlike Alabama in Ray's case, Texas did not indicate to this Court whether it would remedy any unconstitutional discrimination by allowing all ministers into the execution room or by keeping all ministers out. (After this Court granted the stay, the State of Texas chose the latter option.)

* * *

In sum, this Court's stay in Murphy's case was appropriate, and the stay facilitated a prompt fix to the religious equality problem

in Texas' execution protocol. That said, both the facts and the religious equality claim in Murphy's case were highly unusual. I fully agree with JUSTICE ALITO that counsel for inmates facing execution would be well advised to raise any potentially meritorious claims in a timely manner, as this Court has repeatedly emphasized. See generally *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*).

APRIL 1, 2019

Certiorari Dismissed

No. 18–8061. GRIGSBY *v.* BALTAZAR, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 744 Fed. Appx. 592.

Miscellaneous Orders

No. 18M121. RIDGEWAY *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL.;

No. 18M122. KENON *v.* UNITED STATES;

No. 18M123. FRANKLIN *v.* MAY, WARDEN, ET AL.; and

No. 18M124. DANIELS *v.* BRENNAN, POSTMASTER GENERAL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–9560. REHAIF *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 586 U. S. 1113.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–459. EMULEX CORP. ET AL. *v.* VARJABEDIAN ET AL. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–481. FOOD MARKETING INSTITUTE *v.* ARGUS LEADER MEDIA, DBA ARGUS LEADER. C. A. 8th Cir. [Certiorari

granted, 586 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–5881. VURIMINDI *v.* HOOPSKIRT LOFTS CONDOMINIUM ASSN. Commw. Ct. Pa. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 986] denied.

No. 18–7530. UDOH ET VIR *v.* MINNESOTA DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 8th Cir.;

No. 18–7647. SMITH ET VIR *v.* MANASQUAN SAVINGS BANK. Sup. Ct. N. J.; and

No. 18–7907. HASSAN *v.* MARKS, CHIEF ADMINISTRATIVE JUDGE, ET AL. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 22, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8322. IN RE MADKINS; and

No. 18–8356. IN RE EASON. Petitions for writs of habeas corpus denied.

No. 18–982. IN RE HENNAGER ET AL.;

No. 18–7596. IN RE RUSSO;

No. 18–7630. IN RE FREY;

No. 18–8156. IN RE BOWDEN;

No. 18–8169. IN RE AGUIRRE; and

No. 18–8220. IN RE GRAHAM. Petitions for writs of mandamus denied.

No. 18–7583. IN RE HERRON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

No. 18–7704. IN RE ALBRA. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 18–7013. In re Zimmermann;

No. 18–7673. In re Hiramanek; and

No. 18–7686. In re Thomas Bey. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 18–556. Kansas *v.* Glover. Sup. Ct. Kan. Certiorari granted. Reported below: 308 Kan. 590, 422 P. 3d 64.

Certiorari Denied

No. 18–579. Alaska Airlines, Inc. *v.* Schurke et al. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 3d 904.

No. 18–608. Capital Medical Center *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 909 F. 3d 427.

No. 18–682. Santana *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 543.

No. 18–694. Williams *v.* Merit Systems Protection Board et al. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 3d 1156.

No. 18–696. Center for Medical Progress et al. *v.* Planned Parenthood Federation of America et al. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 3d 828.

No. 18–814. Walker, Individually and on Behalf of All Others Similarly Situated *v.* City of Calhoun, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 3d 1245.

No. 18–959. Rooks *v.* Rooks. Sup. Ct. Colo. Certiorari denied. Reported below: 429 P. 3d 579.

No. 18–965. Sullivan *v.* Pugh et ux. Ct. App. N. C. Certiorari denied. Reported below: 258 N. C. App. 691, 814 S. E. 2d 117.

No. 18–968. Najda *v.* Paterakis. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass. App. 1103, 103 N. E. 3d 767.

No. 18–975. Stuart *v.* Lane et al. Ct. App. Ariz. Certiorari denied.

No. 18–978. Robertson *v.* Republic of Nicaragua et al. C. A. 9th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 705.

No. 18–992. Beltran Ortiz *v.* Barr, Attorney General. C. A. 5th Cir. Certiorari denied.

No. 18–1012. Lafferty et al. *v.* Wells Fargo Bank, N. A. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 25 Cal. App. 5th 398, 235 Cal. Rptr. 3d 842.

No. 18–1030. United States ex rel. Berg et al. *v.* Honeywell International, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 535.

No. 18–1032. Mawhinney *v.* American Airlines, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 3d 1114.

No. 18–1046. Callahan et al. *v.* Pacific Cycle, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 216.

No. 18–1051. Dickey *v.* City of Boston Inspectional Services Department. C. A. 1st Cir. Certiorari denied.

No. 18–1066. Chang et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 385.

No. 18–1080. Anderson Living Trust, fka James H. Anderson Living Trust, et al. *v.* WPX Energy Production, LLC, fka WPX Energy San Juan, LLC, et al. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 3d 1135.

No. 18–1088. Asghari-Kamrani et al. *v.* United Services Automobile Assn. C. A. Fed. Cir. Certiorari denied. Reported below: 737 Fed. Appx. 542.

No. 18–1100. Ramsay *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 307.

No. 18–1101. Classic Cab, Inc. *v.* District of Columbia et al. Ct. App. D. C. Certiorari denied.

No. 18–1102. Cuff *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–1103. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–1107. CHANDLER *v.* VERMONT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 728 Fed. Appx. 73.

No. 18–1123. SOUTHERN TRUST METALS, INC., ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 3d 1313.

No. 18–1124. STEPHENS INSTITUTE, DBA ACADEMY OF ART UNIVERSITY *v.* UNITED STATES EX REL. ROSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 3d 1012.

No. 18–1126. SEJOUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 825.

No. 18–1127. SPEEDYPC SOFTWARE *v.* BEATON. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 1018.

No. 18–1167. SAM FRANCIS FOUNDATION ET AL. *v.* SOTHEBY'S, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 3d 1204.

No. 18–6547. BROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–6823. WILLIAMS *v.* COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 536.

No. 18–6936. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 974.

No. 18–7241. KERRIGAN *v.* QBE INSURANCE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 481.

No. 18–7326. SOLIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 282.

No. 18–7548. ONAFEKO *v.* GREAT BRITAIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 157.

No. 18–7549. ROBLES *v.* BROOKWOOD TERRACE APARTMENTS; and

No. 18–7595. Robles *v.* Brookwood Terrace Apartments. Ct. App. Kan. Certiorari denied.

No. 18–7568. Shere *v.* Florida. Sup. Ct. Fla. Certiorari denied.

No. 18–7569. Scott *v.* Jones, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied.

No. 18–7590. Jacobs *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 560 S. W. 3d 205.

No. 18–7591. Kyei *v.* Swift et al. Ct. App. Ore. Certiorari denied.

No. 18–7597. Ponce *v.* Baughman, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7603. Zayas *v.* Luther, Superintendent, State Correctional Institution at Laurel Highlands, et al. C. A. 3d Cir. Certiorari denied.

No. 18–7604. Villafana *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 252.

No. 18–7610. Colbaugh *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7620. Adeyinka *v.* Harris County Jail et al. C. A. 5th Cir. Certiorari denied.

No. 18–7622. Demus *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7624. Griffin *v.* Clark, Superintendent, State Correctional Institution at Albion, et al. C. A. 3d Cir. Certiorari denied.

No. 18–7625. Florence *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7629. Barnett *v.* Allbaugh et al. C. A. 10th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 653.

No. 18–7631. HALEY *v.* LEIBACH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7633. HEARD *v.* SOLOMAN ET AL. Sup. Ct. Ark. Certiorari denied.

No. 18–7636. GLOVER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7637. VALDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7640. HOCKMAN *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 277.

No. 18–7641. HUERTA *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7643. KEARSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 252 So. 3d 693.

No. 18–7651. ANDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 372, 420 P. 3d 825.

No. 18–7653. BONNER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7655. SPENGLER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7657. SMITH *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7658. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 18–7659. HARDWICK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 18–7665. GARRETT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7671. GONZALEZ *v.* MALOY, CLERK. Sup. Ct. Fla. Certiorari denied.

No. 18–7676. HILL *v.* LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7677. Geeter *v.* Lesatz, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7683. Anderson *v.* Lesatz, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–7685. Bargo *v.* Porter County, Indiana, et al. C. A. 7th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 375.

No. 18–7688. Johnson *v.* United States Court of Appeals for the Sixth Circuit. C. A. 6th Cir. Certiorari denied.

No. 18–7690. Bell *v.* Leigh et al. C. A. 8th Cir. Certiorari denied.

No. 18–7691. Arunachalam *v.* United States District Court for the Northern District of California et al. C. A. 9th Cir. Certiorari denied.

No. 18–7701. Schneider *v.* Bank of America, N. A., et al. C. A. 9th Cir. Certiorari denied.

No. 18–7703. Smith *v.* Pennywell et al. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 230.

No. 18–7708. Koebel *v.* Chandler et al. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 418.

No. 18–7710. Garcia Mejia *v.* Hatton, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–7718. Gant *v.* Peterson. C. A. 6th Cir. Certiorari denied.

No. 18–7719. Gomez *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7724. Johnson *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–7729. Harris *v.* Diaz, Acting Secretary, California Department of Corrections and Rehabilitation, et al. C. A. 9th Cir. Certiorari denied.

No. 18–7730. Frazier *v.* Lee, Warden. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–7731. CIAVONE *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7761. HARRIS *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7793. CHASSON, AKA HANSON *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 18–7807. YOUNG *v.* KRAUS ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7810. TRAXLER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7811. THOMPSON *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7819. DENT, AKA JIMENEZ-MENDEZ *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 3d 1075.

No. 18–7826. LEACHMAN *v.* WINN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7831. LOCKETT *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 243 So. 3d 393.

No. 18–7854. WILLS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2017 IL App (2d) 150240, 92 N. E. 3d 1057.

No. 18–7866. GRANT-DAVIS *v.* SOUTH CAROLINA OFFICE OF THE GOVERNOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 790.

No. 18–7870. BALIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7872. TORRES *v.* REWERTS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7929. BURNS *v.* SHOOP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7937. SULLIVAN *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 347.

No. 18–7972. VICKERS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 560 S. W. 3d 3.

No. 18–8022. ARIAS COREAS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 193.

No. 18–8089. MORRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8095. GAMINO-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 238.

No. 18–8117. PETE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 151.

No. 18–8131. PAMATMAT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 537.

No. 18–8133. MINGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8139. HARDISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8143. TALBERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8145. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 367.

No. 18–8159. CAMILLO-AMISANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8160. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 440.

No. 18–8162. BARTOLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 424.

No. 18–8165. GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 543.

No. 18–8166. WINSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 124.

No. 18–8167. BANKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 737 Fed. Appx. 639.

No. 18–8168. LONG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 193 A. 3d 1077 and 1078.

No. 18–8171. ALARCON FUENTES, AKA FUENTES ALARCON, AKA QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8172. BOSTIC *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 228.

No. 18–8177. MACRI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2018 IL App (5th) 160325–U.

No. 18–8181. SOTO-LUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 561.

No. 18–8183. SPEROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8185. FERRARI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 560.

No. 18–8186. GANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 898.

No. 18–8187. TONEY *v.* STOCK, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 18–8190. PINEDA-PINEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 547.

No. 18–8195. BOLDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8198. LISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 706 Fed. Appx. 48.

No. 18–8205. BASHIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 Fed. Appx. 743.

No. 18–8210. ALEXANDER *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8213. SANTILLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 3d 49.

No. 18–8216. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 742 Fed. Appx. 616.

No. 18–8217. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 749 Fed. Appx. 29.

No. 18–8218. HOSKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 320.

No. 18–8226. BIRD *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 18–8238. GOMEZ URANGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 3d 1292.

No. 18–8247. KOFALT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8252. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8259. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8260. HARRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8280. WILLIAMS *v.* REYNOLDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 278.

No. 18–8291. GARCIA *v.* JOHNSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 402.

No. 18–8298. BRAZILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141068–U.

No. 17–1269. KUMAR, INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE AND NEXT FRIEND OF C. K., A MINOR, ET AL. *v.* REPUBLIC OF SUDAN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 880 F. 3d 144.

No. 18–1105. PIERCE *v.* YALE UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 18–6747. FIGUEROA-BELTRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

No. 18–7486. MONTE *v.* VANCE ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 18–7944. WALLACE *v.* UNITED STATES; and

No. 18–8239. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 755 Fed. Appx. 63.

No. 18–8107. POWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 739 Fed. Appx. 511.

Rehearing Denied

No. 17–9149. GREEN *v.* UNITED STATES, 586 U. S. 845;

No. 18–5135. HONISH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 1116;

No. 18–5664. CHEESEBORO *v.* LITTLE RICHIE BUS SERVICE, INC., 586 U. S. 1077;

No. 18–6261. VARGAS, AKA VARGAS ROMERO *v.* MCMAHON, 586 U. S. 1079;

No. 18–6263. VARGAS, AKA VARGAS ROMERO *v.* MCMAHON ET AL., 586 U. S. 1079;

No. 18–6926. VALENTINE *v.* UNITED STATES, 586 U. S. 1095; and

No. 18–7360. MATHIS *v.* UNITED STATES, 586 U. S. 1170. Petitions for rehearing denied.

APRIL 2, 2019

Dismissal Under Rule 46

No. 18–645. WINN *v.* MELLEN ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 900 F. 3d 1085.

APRIL 3, 2019

Miscellaneous Order

No. 18A942. REPUBLIC OF HUNGARY ET AL. *v.* SIMON ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

APRIL 5, 2019

Miscellaneous Order

No. 18A1019. GUEDES ET AL. *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL. Application for stay,

presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Applicants request that if we deny this application we grant a limited stay of 120 hours to allow them to come into compliance with the final Rule. We refer the issue of such stay to the D. C. Circuit for its consideration. JUSTICE THOMAS and JUSTICE GORSUCH would grant the application.

APRIL 12, 2019

Miscellaneous Orders

No. 18A1053. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* PRICE. Application to vacate the stay of execution, presented to JUSTICE THOMAS, and by him referred to the Court, is granted, and the stays entered by the District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit on April 11, 2019, are vacated. In June 2018, death-row inmates in Alabama whose convictions were final before June 1, 2018, had 30 days to elect to be executed via nitrogen hypoxia. Ala. Code § 15–18–82.1(b)(2). Price, whose conviction became final in 1999, did not do so, even though the record indicates that all death-row inmates were provided a written election form, and 48 other death-row inmates elected nitrogen hypoxia. He then waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief").

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

Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening.

1. This case comes to us on the assumption that executing Christopher Lee Price using Alabama's current three-drug protocol is likely to cause him severe pain and needless suffering. Price submitted an expert declaration explaining why that is so, and the State "submitted nothing" to rebut his expert's assertions. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 920 F.

3d 1317, 1330 (CA11 2019). The Court of Appeals thus correctly held that Price satisfied his burden to show a severe risk of pain from lethal injection, "since the only evidence of record supports that conclusion." *Ibid.*

2. Price proposed nitrogen hypoxia as an alternative method of execution. Alabama expressly authorized execution by nitrogen hypoxia in 2018, and state officials have actively worked to develop a hypoxia protocol since that time. The State is mere months away from finalizing its protocol. In light of those facts, the Court of Appeals correctly held that nitrogen hypoxia is "available," "feasible," and "readily implemented" by the State. *Id.*, at 1326–1329.

3. The only remaining question was whether Price could show that death by nitrogen hypoxia would be substantially less painful than death by the existing lethal injection protocol. To make this showing, Price submitted an academic study on which the Oklahoma Legislature had relied in adopting nitrogen hypoxia as a method of execution. That study noted that death by nitrogen hypoxia has been described as "painless," "peaceful," and unlikely to cause "any substantial physical discomfort." Record in No. 1:19–00057 (SD Ala.), Doc. 45–2, pp. 6, 9. It concluded that nitrogen hypoxia is "an effective and humane alternative to the current methods of capital punishment practiced in Oklahoma." *Id.*, at 2.

Crucially, as the District Court noted, the State *did not challenge* Price's evidence on this question. It did not question the reliability of the Oklahoma study. And it did not otherwise dispute (either in the District Court or on appeal) that nitrogen hypoxia was likely to be less painful than the State's lethal injection protocol. The District Court thus correctly held that "Price is likely to prevail on the issue of whether execution by nitrogen . . . would provide a significant reduction in the substantial risk of severe pain Price would incur if he were executed" by lethal injection. *Price* v. *Dunn*, 385 F. Supp. 3d 1215, 1233 (SD Ala. 2019).

4. The Court of Appeals found the District Court's determination on this question clearly erroneous. It reached that conclusion primarily because the version of the Oklahoma study that Price's counsel submitted was "a preliminary draft report that is stamped with the words 'Do Not Cite.' " *Price* v. *Commissioner*, 920 F. 3d, at 1330. The Court of Appeals appeared to believe that

a "preliminary" report could not constitute "reliable evidence" on the effects of nitrogen hypoxia. *Ibid.*

5. It turns out, however, that a *final* version of the same Oklahoma study was published and available. That version is identical in every relevant respect to the preliminary version that Price submitted. That is, the final report also describes nitrogen hypoxia as "painless," "humane," and unlikely to cause "any substantial physical discomfort," based on exactly the same evidence discussed in the earlier draft.

6. Price's counsel, realizing the error, quickly sought to ensure the District Court would be able to consider the final version of the report. Price filed a new motion for preliminary injunction in the District Court, along with the final report and additional expert declarations.

7. The District Court found this new evidence "reliable" and noted that the State had "not submit[ted] anything in contradiction." *Price* v. *Dunn*, 2019 WL 1578277, *8 (SD Ala., Apr. 11, 2019). The District Court concluded "based on the current record" that "Price has a substantial likelihood of succeeding on the merits." *Ibid.* The District Court then considered the remaining stay factors. Notably, the District Court found that Price had *not* "timed his motion in an effort to manipulate the execution." *Ibid.* "Rather, Price, the State and the [District Court] have been proceeding *as quickly as possible* on this issue *since before the execution date was set*." *Ibid.* (emphasis added). The District Court ultimately concluded that a 60-day stay of the execution was warranted.

8. The State then asked the Court of Appeals to vacate the stay in part because, in its view, the District Court did not have jurisdiction to issue it. The Court of Appeals had not yet issued its mandate, the appeal remained pending, and, in the State's view, the arguments Price raised in his new motion in the District Court were the same arguments at issue in his pending appeal. The District Court had rejected the argument that the pending appeal deprived it of jurisdiction; Price, it explained, has "presented a *new* motion for preliminary injunction accompanied by *new* evidence." *Id.*, at *2 (emphasis added).

9. The Court of Appeals refused to vacate the District Court's stay. It explained that the parties had raised "substantial questions" about jurisdiction. *Price* v. *Commissioner, Ala. Dept. of*

Corrections, 2019 WL 1591475, *1 (CA11, Apr. 11, 2019). "In light of the jurisdictional questions raised by the parties' motions," it stayed Price's execution until further order of the court. *Ibid.*

10. Shortly before 9 p.m. this evening, the State filed an application to the Justice of this Court who is the Circuit Justice for the Eleventh Circuit. It was later referred to the Conference. I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days. But in my judgment, that delay was warranted, at least on the facts as we have them now. During the pendency of our consideration, the State called off this evening's scheduled execution.

The Court nevertheless grants the State's application to vacate the stay, thus preventing full discussion among the Court's Members. In doing so, it overrides the discretionary judgment of not one, but two lower courts. Why? The Court suggests that the reason is delay. But that suggestion is untenable in light of the District Court's express finding that Price has been "proceeding *as quickly as possible* on this issue since *before the execution date was set*." 2019 WL 1578277, *8 (emphasis added). Surely the District Court is in a better position than we are to gauge whether Price has engaged in undue delay.

The Court also points out that Price did not elect nitrogen hypoxia within 30 days of the legislature authorizing this method of execution on June 1, 2018. State law appeared to provide death row inmates only until June 30, 2018, to make the election. See 2018 Ala. Laws Act 2018–353. Yet based on the limited information before us, it appears no inmate received a copy of the election form (prepared by a public defender) until June 26, and the State makes no representation about when Price received it other than that it was "before the end of June." Brief for Appellee in No. 19–11268 (CA11), p. 9. Thus, it is possible that Price was given no more than 72 hours to decide how he wanted to die, notwithstanding the 30-day period prescribed by state law. That is not a reason to override the lower courts' discretionary determination that the equitable factors warrant a stay.

The State also argues that the District Court lacked jurisdiction to entertain Price's new motion for a preliminary injunction. But as the Court of Appeals appeared to recognize, that jurisdic-

tional question is a substantial one, the answer to which is by no means clear. See 2019 WL 1591475; cf. 16A C. Wright, A. Miller, E. Cooper, & C. Struve, Federal Practice and Procedure § 3949.1, p. 63 (4th ed. 2008) ("An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal"). To resolve it with minimal briefing on an extraordinarily compressed timeline would be deeply misguided.

What is at stake in this case is the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment. At a minimum, "before acting irretrievably" to vacate a stay and allow a potentially cruel execution to proceed, the Court should decide whether the District Court did in fact lack jurisdiction to issue the stay. See *Bowersox* v. *Williams*, 517 U. S. 345, 347 (1996) (Ginsburg, J., dissenting). "Appreciation of our own fallibility . . . demand[s] as much." *Ibid.*

* * *

Alabama will soon subject Price to a death that he alleges will cause him severe pain and needless suffering. It can do so *not* because Price failed to prove the likelihood of severe pain and *not* because he failed to identify a known and readily implemented alternative, as this Court has recently required inmates to do. Instead, Alabama can subject him to that death due to a minor oversight (the submission of a "preliminary" version of a final report) and a significant mistake of law by the Court of Appeals (the suggestion that a report marked "preliminary" carries *no* evidentiary value). These mistakes could be easily remedied by simply allowing the lower courts to consider the final version of the report. Yet instead of allowing the lower courts to do just that, the Court steps in and vacates the stays that both courts have exercised their discretion to enter. To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate.

No. 18–389. Parker Drilling Management Services, Ltd. *v.* Newton. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1112.]

Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–485. McDonough *v.* Smith, Individually and as Special District Attorney for the County of Rensselaer, New York. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motions of Indiana et al., International Municipal Lawyers Association et al., and St. Thomas More Lawyers Guild of Rochester, New York, for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 18–489. Taggart *v.* Lorenzen, Executor of the Estate of Brown, et al. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–525. Fort Bend County, Texas *v.* Davis. C. A. 5th Cir. [Certiorari granted, 586 U. S. 1113.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–966. Department of Commerce et al. *v.* New York et al. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1140.] Motion of the United States House of Representatives for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Joint motion of respondents for enlargement of time for oral argument and for divided argument granted in part, and the time is divided as follows: 40 minutes for petitioners, 20 minutes for respondent New York et al., 10 minutes for respondent New York Immigration Coalition et al., and 10 minutes for United States House of Representatives as *amicus curiae.*

Certiorari Denied

No. 18–8766 (18A1044). Price *v.* Dunn, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application for stay of execution. Reported below: 920 F. 3d 1317.

April 15, 2019

Certiorari Granted—Vacated and Remanded

No. 18–609. Robertson *v.* United States. C. A. 9th Cir. Motion to substitute Carri Robertson, authorized representative, as petitioner in place of Joseph D. Robertson, deceased, granted. Certiorari granted, judgment vacated, and case remanded for consideration of question whether case is moot. Reported below: 875 F. 3d 1281.

No. 18–852. Precythe *v.* Johnson. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bucklew* v. *Precythe*, 587 U. S. 119 (2019). Reported below: 901 F. 3d 973.

Certiorari Dismissed

No. 18–7894. McNeill *v.* Wayne County Third Circuit Court et al. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–7980. Ladeairous *v.* Department of Justice. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Justice Kavanaugh took no part in the consideration or decision of this motion and this petition.

No. 18–7988. Forney *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 238 So. 3d 839.

No. 18–8201. Butler *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 740 Fed. Appx. 360.

No. 18–8377. BOOKER *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 717 Fed. Appx. 301.

Miscellaneous Orders

No. 18M125. GABRIEL NUNEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 18M127. VAUGHN *v.* GIBSON, WARDEN, ET AL.;

No. 18M128. DIEP *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION;

No. 18M130. FAWEMIMO *v.* AMERICAN AIRLINES, INC.; and

No. 18M133. MERAZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M126. DECK *v.* JENNINGS, WARDEN. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 18M129. YI S. *v.* ADMINISTRATION FOR CHILDREN'S SERVICES OF THE CITY OF NEW YORK. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 18M131. SEALED APPELLANT *v.* SEALED APPELLEE. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 18M132. REYNOLDS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with appendix B available for the public record granted.

No. 18–540. RUTLEDGE, ATTORNEY GENERAL OF ARKANSAS *v.* PHARMACEUTICAL CARE MANAGEMENT ASSN. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–7806. BERKA *v.* CITY OF MIDDLETOWN, CONNECTICUT. App. Ct. Conn.;

No. 18–7891. HAYMOND *v.* HELMAND INVESTMENT, LLC. Sup. Ct. Va.;

No. 18–8023. A. R. *v.* Florida Department of Children and Families et al. Dist. Ct. App. Fla., 3d Dist.; and

No. 18–8060. Solberg *v.* First National Bank & Trust Co. of Williston et al. Sup. Ct. N. D. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 6, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8475. In re Funk;

No. 18–8503. In re Wells;

No. 18–8579. In re Weter; and

No. 18–8587. In re Stegawski. Petitions for writs of habeas corpus denied.

No. 18–1008. In re Hollowell et al.;

No. 18–1014. In re Russo; and

No. 18–8123. In re Fagan. Petitions for writs of mandamus denied.

No. 18–7939. In re Salley. Petition for writ of mandamus denied. Justice Kagan took no part in the consideration or decision of this petition.

Certiorari Denied

No. 18–722. Soundboard Assn. *v.* Federal Trade Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 888 F. 3d 1261.

No. 18–755. Illinois Liberty PAC et al. *v.* Raoul, Attorney General of Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 3d 463.

No. 18–811. JPay, Inc. *v.* Kobel et al. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 3d 923.

No. 18–838. Kaseburg et al. *v.* Port of Seattle et al. (Reported below: 744 Fed. Appx. 356); and Hornish et al. *v.* King County, Washington (899 F. 3d 680). C. A. 9th Cir. Certiorari denied.

No. 18–868. Electric Power Supply Assn. et al. *v.* Star et al. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 3d 518.

No. 18–879. Electric Power Supply Assn. et al. *v.* Rhodes et al. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 3d 41.

No. 18–899. Saint Regis Mohawk Tribe et al. *v.* Mylan Pharmaceuticals, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 896 F. 3d 1322.

No. 18–996. Stringer *v.* Storesonline, Inc., et al. Sup. Ct. Miss. Certiorari denied.

No. 18–1004. Seaman *v.* Westfield Medical Center, L. P., et al. Sup. Ct. Pa. Certiorari denied.

No. 18–1020. Gounder *v.* Communicar, Inc., et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–1024. Johnson *v.* Winfrey. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 483.

No. 18–1026. Kinney et al. *v.* Anderson Lumber Co., Inc., et al. C. A. 6th Cir. Certiorari denied.

No. 18–1031. Little *v.* CSRA et al. C. A. 11th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 679.

No. 18–1033. Griffin *v.* United Healthcare of Georgia, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 793.

No. 18–1034. McGee *v.* City of Sacramento, California. C. A. 9th Cir. Certiorari denied.

No. 18–1035. Thomas *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 18–1036. Ramos *v.* Firestone Building Products Co., LLC. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 777.

No. 18–1037. Zheng Cai *v.* Diamond Hong, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 901 F. 3d 1367.

No. 18–1039. Levin et ux. *v.* JPMorgan Chase Bank, N. A. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 143.

No. 18–1040. Licong Li *v.* Dang. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 18–1041. Konieczko et al. *v.* Adventist Health System/Sunbelt, Inc., et al. Sup. Ct. Fla. Certiorari denied.

No. 18–1042. Gonzalez *v.* City of Hialeah, Florida. C. A. 11th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 611.

No. 18–1045. Brent et al. *v.* Wayne County Department of Human Services et al. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 3d 656.

No. 18–1050. Wu et ux. *v.* Prudential Financial, Inc., et al. C. A. 7th Cir. Certiorari denied.

No. 18–1058. Smets *v.* Wilson, Secretary of the Air Force. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 662.

No. 18–1060. Weiss, Individually and as Executor of the Estate of Marsh, Deceased *v.* Marsh, as Executor of the Estate of Marsh, Deceased, et al. (two judgments). Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 18–1071. Stokes *v.* Sulak. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 589.

No. 18–1072. Macor *v.* United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 742 Fed. Appx. 510.

No. 18–1073. King et al. *v.* Murphy, Governor of New Jersey, et al. C. A. 3d Cir. Certiorari denied.

No. 18–1091. Adesanya et vir *v.* Novartis Pharmaceuticals Corp. C. A. 3d Cir. Certiorari denied. Reported below: 755 Fed. Appx. 154.

No. 18–1099. Robinson *v.* State Compensation Mutual Insurance Fund. Sup. Ct. Mont. Certiorari denied. Reported below: 393 Mont. 178, 430 P. 3d 69.

No. 18–1110. Daughtrey et al. *v.* Rivera. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 3d 1255.

No. 18–1114. TS Patents LLC *v.* Yahoo! Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 731 Fed. Appx. 978.

No. 18–1133. LANGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 804.

No. 18–1135. SHAKARI *v.* ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 170285, 97 N. E. 3d 199.

No. 18–1141. BROWN *v.* NEW HAMPSHIRE BOARD OF VETERINARY MEDICINE. Sup. Ct. N. H. Certiorari denied. Reported below: 171 N. H. 468, 198 A. 3d 276.

No. 18–1155. MURPHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 471.

No. 18–1163. HUTCHINGS ET AL. *v.* AMEREN TRANSMISSION COMPANY OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2018 IL 122973, 120 N. E. 3d 998.

No. 18–1169. THORNE *v.* UNION PACIFIC CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 875.

No. 18–1194. CRUTCHFIELD *v.* DENNISON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 968.

No. 18–1204. HAYNIE *v.* UNITED AIRLINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 273.

No. 18–6450. RUSSELL *v.* EPPINGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–6672. MILLAN VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 3d 363.

No. 18–6777. HYATT *v.* MICHIGAN; and
No. 18–6782. SKINNER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 502 Mich. 89, 917 N. W. 2d 292.

No. 18–6905. SZCZERBA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 897 F. 3d 929.

No. 18–6908. MANNERS *v.* CANNELLA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 3d 959.

No. 18–6919. SANTOS-CORDERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 530.

No. 18–7033. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–7091. BUTLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 528.

No. 18–7204. ROLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–7217. C. G., A MINOR *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–7219. AMADOR ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 541.

No. 18–7226. BLANCO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 249 So. 3d 536.

No. 18–7233. SWOPES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 3d 961.

No. 18–7379. BRUNO GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 601.

No. 18–7618. NEAL *v.* ASTA FUNDING, INC. C. A. 3d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 184.

No. 18–7733. COWAN *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7743. DRISCOLL *v.* GASTELO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7744. CLARK *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 18–7749. GONZALEZ *v.* MALOY. Sup. Ct. Fla. Certiorari denied.

No. 18–7752. HARIHAR *v.* U. S. BANK N. A. ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–7753. MUNT *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 920 N. W. 2d 410.

No. 18–7757. DAVENPORT *v.* FALK, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 877.

No. 18–7767. SANCHEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 18–7771. BROTHERTON *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–7772. FRANKLIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 152 Ohio St. 3d 1419, 2018-Ohio-923, 93 N. E. 3d 1001.

No. 18–7774. BOYETT *v.* SANTISTEVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 569.

No. 18–7775. OLIVARES *v.* MICHIGAN WORKERS' COMPENSATION AGENCY ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7782. MASON *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–7785. DERRINGER *v.* SAENZ. Sup. Ct. N. M. Certiorari denied.

No. 18–7786. SHOTWELL *v.* GENOVESE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7789. RICHARDS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7791. SMITH *v.* CITY OF PRINCETON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–7798. VOSS *v.* SECOND JUDICIAL DISTRICT COURT OF NEVADA, WASHOE COUNTY. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 1025.

No. 18–7803. HEGSTROM *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 258 So. 3d 554.

No. 18–7813. BARTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7815. DEASE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–7816. BROOKS *v.* WEISER, ATTORNEY GENERAL OF COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 18–7820. PIERCE *v.* HOOKS. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 187.

No. 18–7822. MCDONALD *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–7827. KAUFMAN *v.* KEMPER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–7828. LARGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–7832. HARRIS *v.* MULLINS, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7834. BOGSETH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7837. BLACHER *v.* SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 18–7845. GRIGSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 375.

No. 18–7850. HOWARD *v.* LESATZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7851. YOUNG *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7852. HUG *v.* CONLEY, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–7853. FLETCHER *v.* SCHWARTZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 71.

No. 18–7855. THUNDER *v.* WEBER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–7860. BARNES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 502 Mich. 265, 917 N. W. 2d 577.

No. 18–7864. COTTON *v.* HARRIS, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1428, 2018-Ohio-2418, 100 N. E. 3d 444.

No. 18–7865. DROZDOVSKA *v.* SEMINOLE COUNTY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 237 So. 3d 454.

No. 18–7867. BRADLEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7873. SIERRA *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7879. COLKLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 235 Md. App. 734.

No. 18–7885. VANGUILDER *v.* MARTUSCELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–7888. SALOMON *v.* NOGAN, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7889. ROMERO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 143132, 105 N. E. 3d 1048.

No. 18–7892. HALOUSEK *v.* CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7893. HALOUSEK *v.* BANK OF AMERICA, N. A. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7897. OWENS *v.* ZUCKER ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7899. DEWBERRY *v.* THIRD CIRCUIT COURT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 18–7901. COHEE *v.* YATES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 717.

No. 18–7902. AKOTHE *v.* BEAR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 207.

No. 18–7906. FLORES *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 18–7908. HAYNES *v.* WALMART ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7909. WILSON *v.* CORRECT CARE, LLC, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7912. TISDALE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 257 So. 3d 357.

No. 18–7917. WILKINS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7919. GRUND *v.* MURPHY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 601.

No. 18–7924. LYLES *v.* BROACH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 247.

No. 18–7925. ALI *v.* FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 438.

No. 18–7926. BABB *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7932. HAMER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7933. CHARLESTON *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7934. FARTHING *v.* WATSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 295.

No. 18–7935. SMITH *v.* HOFFNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7936. HENDERSON *v.* SKIPPER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7940. JOHNS *v.* ALABAMA DEPARTMENT OF HUMAN RESOURCES. C. A. 11th Cir. Certiorari denied.

No. 18–7942. LANCASTER *v.* RUANE. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 372.

No. 18–7945. WATTS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7953. PETERSON ET UX. *v.* NEW HAMPSHIRE DIVISION OF CHILDREN, YOUTH AND FAMILIES, ET AL. Sup. Ct. N. H. Certiorari denied.

No. 18–7955. BARNES *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7956. IBEABUCHI *v.* PENZONE. C. A. 9th Cir. Certiorari denied.

No. 18–7957. IBEABUCHI *v.* STEINFELD. C. A. 9th Cir. Certiorari denied.

No. 18–7959. MAZE *v.* TERRELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7962. ABDULLAH *v.* PLANT CITY POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7963. REYNOLDS *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7967. SMITH *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–7970. CALDERON-LOPEZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 569.

No. 18–7976. ADGER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 156 App. Div. 3d 1458, 66 N. Y. S. 3d 584.

No. 18–7982. JAIMES-AVILES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 257 So. 3d 431.

No. 18–7985. BAHRAMPOUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7987. IBEABUCHI *v.* PENZONE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7990. BROOKINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 18–7991. KERSEY *v.* TRUMP, PRESIDENT OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–7992. LIVINGSTON *v.* ESSLINGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 352.

No. 18–7998. BYRD *v.* LINDSEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 465.

No. 18–7999. GALAN *v.* GEGENHEIMER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 84.

No. 18–8000. FREEMAN *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8001. FYKES *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–8004. CRAIG *v.* BRADLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8007. BEAGLE *v.* LINDSEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8008. DRAPER *v.* MUY PIZZA SOUTHEAST LLC, DBA PIZZA HUT. C. A. 4th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 187.

No. 18–8030. RHINES *v.* YOUNG, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 482.

No. 18–8062. TAYLOR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied. Reported below: 193 A. 3d 749.

No. 18–8069. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 784.

No. 18–8074. MORGAN *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2017–0932 (La. App. 1 Cir. 2/20/18).

No. 18–8077. ESTES *v.* BAKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 143.

No. 18–8078. WALKER *v.* CALDWELL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 18–8085. THOMASON *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 18–8088. MENIUS *v.* STEPHAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 195.

No. 18–8093. FERREIRA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 345 Ga. App. XXV.

No. 18–8118. DAVIS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2016–1524 (La. App. 1 Cir. 7/5/17).

No. 18–8119. JENKINS *v.* HAMILTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 158.

No. 18–8120. LOFTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 248 So. 3d 798.

No. 18–8126. WILSON *v.* STEPHAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 230.

No. 18–8134. VASQUEZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 188 A. 3d 543.

No. 18–8136. ONG VUE *v.* BARR, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 910.

No. 18–8146. GEER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 257 So. 3d 447.

No. 18–8147. HORN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 53 Kan. App. 2d xii, 386 P. 3d 929.

No. 18–8150. LIVIZ *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8155. SMITH *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8161. LORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 549.

No. 18–8164. FREEMAN *v.* LASHBROOK, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 18–8173. HERRERA *v.* PRICE. C. A. 9th Cir. Certiorari denied.

No. 18–8175. GUNCHICK *v.* BANK OF AMERICA, N. A. C. A. 7th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 786.

No. 18–8194. HENDERSON *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8206. CLARK *v.* CARR, ATTORNEY GENERAL OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 18–8215. SANDLAIN *v.* JOHNSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 861.

No. 18–8225. DRUILHET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 557.

No. 18–8231. BRIGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8233. REID *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8234. SNIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 3d 183.

No. 18–8237. BRISCOE *v.* EPPINGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8244. CORNELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8245. FITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 530.

No. 18–8256. NAUSHAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 526.

No. 18–8261. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 237.

No. 18–8262. WOMACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 Fed. Appx. 136.

No. 18–8264. AVENDANO-VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 691.

No. 18–8265. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 909 F. 3d 671.

No. 18–8266. ABDUL-SAMAD, AKA HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 525.

No. 18–8267. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 931.

No. 18–8268. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 238.

No. 18–8269. CASILLAS PRIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 88.

No. 18–8274. ANTHONY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 364.

No. 18–8275. SAWYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 585.

No. 18–8277. RANSFER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8281. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 524.

No. 18–8282. WRIGHT *v.* OREGON. C. A. 9th Cir. Certiorari denied.

No. 18–8289. ASAFO-ADJEI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 734.

No. 18–8293. RIVERO GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 559.

No. 18–8294. FITZGERALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 971.

No. 18–8299. LINGARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 785.

No. 18–8302. LASKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 532.

No. 18–8306. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8307. CLEVELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 3d 423.

No. 18–8308. JONES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8310. Lal *v.* Flores et al. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 24.

No. 18–8311. Adeyemi *v.* United States; Anderson *v.* United States; Bandy *v.* United States; Bell *v.* United States; Berkley *v.* United States; Betts *v.* United States; Bond *v.* United States; Borden *v.* United States; Brown *v.* United States; Bullard *v.* United States; Cantu *v.* United States; Carr *v.* United States; Caruthers *v.* United States; Day *v.* United States; De La Torre *v.* United States; Dennis *v.* United States; Douglas *v.* United States; Dumbrique *v.* United States; Enriquez *v.* United States; Flott *v.* United States; Gibson *v.* United States; Good *v.* United States; Hackney *v.* United States; Harrell *v.* United States; Harris *v.* United States; Manuel Ibarra *v.* United States; Jackson *v.* United States; Johnson *v.* United States; Kuffel *v.* United States; Lewis, aka Foster *v.* United States; Lindsey *v.* United States; Manrow *v.* United States; Maxwell *v.* United States; McCracken *v.* United States; McCraw *v.* United States; McFarland *v.* United States; Nicolas Medina *v.* United States; Mitchell *v.* United States; Moreno *v.* United States; Moreno *v.* United States; Newsome *v.* United States; Nickson *v.* United States; Piazza *v.* United States; Robinson *v.* United States; Rodriguez *v.* United States; Russell *v.* United States; Sampson *v.* United States; Sanders *v.* United States; Shelton *v.* United States; Singleton *v.* United States; Strobehn *v.* United States; Tablada *v.* United States; Turner *v.* United States; Walden *v.* United States; Walker *v.* United States; Walker *v.* United States; Williams *v.* United States; Winkles *v.* United States; and Wolters *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 18–8313. Newton *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 436.

No. 18–8315. Drevaleva *v.* United States District Court for the Northern District of California. C. A. 9th Cir. Certiorari denied.

No. 18–8316. Guerrero *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–8317. Gering *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 252 So. 3d 334.

No. 18–8318. GARDNER *v.* VERIZON COMMUNICATIONS INC. C. A. 2d Cir. Certiorari denied.

No. 18–8320. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8321. LOVELL *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8324. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8325. VILLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 716.

No. 18–8327. ALM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 524.

No. 18–8328. BURGUENO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 737.

No. 18–8329. DUARTEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 34.

No. 18–8330. CONNORS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8331. BOWERS *v.* LAWRENCE, ACTING WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8333. SOSA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 3d 920.

No. 18–8336. DUNBAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8337. DECKER *v.* LANEY, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 663.

No. 18–8339. SHEPHERD *v.* KRUEGER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 911 F. 3d 861.

No. 18–8344. WHITNEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 18–8345. LAKEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8346. VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 283.

No. 18–8347. TISZAI *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 90 So. 3d 304.

No. 18–8349. FOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 572.

No. 18–8352. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 395.

No. 18–8355. TABRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 819.

No. 18–8357. WILFORD *v.* TRATE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 27.

No. 18–8358. ELLIOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 624.

No. 18–8359. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 242.

No. 18–8360. CASTILLO-QUINTANILLA *v.* UNITED STATES (Reported below: 747 Fed. Appx. 986); CHOY-SOTO *v.* UNITED STATES (747 Fed. Appx. 262); RUIZESPARZA NAVARRETTE *v.* UNITED STATES (747 Fed. Appx. 245); NEVAREZ-MARTELL *v.* UNITED STATES (746 Fed. Appx. 432); VILLARREAL-CARDENAS *v.* UNITED STATES (746 Fed. Appx. 427); and VITE-GARCIA *v.* UNITED STATES (749 Fed. Appx. 290). C. A. 5th Cir. Certiorari denied.

No. 18–8361. SARLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 913 F. 3d 491.

No. 18–8362. RODRIGUEZ-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 431.

No. 18–8363. STEGEMANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–8364. SULLIVAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 799.

No. 18–8366. WOOLLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 893.

No. 18–8373. GALIANY-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8378. BRIGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8382. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 838.

No. 18–8387. VREELAND *v.* ZUPAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 3d 866.

No. 18–8388. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 530.

No. 18–8390. SALVADOR LANTIGUA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 875.

No. 18–8391. NAM NHAT NGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 532.

No. 18–8392. OBIORA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 910 F. 3d 555.

No. 18–8394. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 528.

No. 18–8395. SCHONEWOLF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 3d 683.

No. 18–8400. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 739.

No. 18–8401. BURGESS *v.* WILMINGTON SAVINGS FUND SOCIETY, FSB, DBA CHRISTIANA TRUST, AS TRUSTEE FOR PREMIUM MORTGAGE ACQUISITION TRUST. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–8402. DAUENHAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 41.

No. 18–8403. CABALLERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 32.

No. 18–8404. SEYMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 558.

No. 18–8405. ROBLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 193 A. 3d 744.

No. 18–8406. RULE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 960.

No. 18–8411. PIERCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 969.

No. 18–8423. WHITE *v.* HAMMERS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8424. JENKINS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8427. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 3d 346.

No. 18–8430. ALVAREZ *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 569.

No. 18–8433. LOGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 910 F. 3d 864.

No. 18–8436. HARDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 222.

No. 18–8439. LACEY *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 364 Ore. 171, 431 P. 3d 400.

No. 18–8442. DUTCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 632.

No. 18–8445. MCADOO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 736.

No. 18–8448. BISHOP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 335.

No. 18–8451. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 708.

No. 18–8455. SHIROMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 647.

No. 18–8469. ANDRUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 235.

No. 18–8470. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 348.

No. 18–8471. ABRAHAM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–8473. BROWN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 256 So. 3d 643.

No. 18–8490. MITCHELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–759. SAMPLE *v.* UNITED STATES. C. A. 10th Cir. Motion of National Association of Criminal Defense Lawyers for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 901 F. 3d 1196.

No. 18–949. KNOX *v.* PENNSYLVANIA. Sup. Ct. Pa. Motions of Michael Render et al., Cato Institute et al., Art Scholars and Historians, and National Association of Criminal Defense Lawyers for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 647 Pa. 593, 190 A. 3d 1146.

No. 18–7235. BUSH *v.* ARIZONA. Sup. Ct. Ariz. Motion of respondent for leave to file brief in opposition with appendix under seal granted. Motion of petitioner for leave to file reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 244 Ariz. 575, 423 P. 3d 370.

No. 18–8005. BROOKS *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 717 Fed. Appx. 831.

No. 18–8029. RHINES *v.* YOUNG, WARDEN. C. A. 8th Cir. Motions of Law Professors, NAACP Legal Defense & Educational Fund, Inc., and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 18–8182. SHELTON *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 732 Fed. Appx. 495.

No. 18–8230. AKERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 740 Fed. Appx. 633.

No. 18–8353. HICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 693 Fed. Appx. 209.

No. 18–8370. LILLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

No. 18–8410. MILLER *v.* MCFADDEN, WARDEN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 733 Fed. Appx. 133.

No. 18–8435. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 3d 315.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United State*s, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

Rehearing Denied

No. 17–8969. NOE *v.* DANIELS, WARDEN, 585 U. S. 1023;

No. 17–9561. POLK *v.* HILL, ACTING WARDEN, 586 U. S. 867;

No. 18–686. KING ET AL. *v.* CALIBER HOME LOANS, INC., 586 U. S. 1146;

No. 18–701. TANKSLEY *v.* DANIELS ET AL., 586 U. S. 1146;

No. 18–723. RODRIGUEZ *v.* BANK OF AMERICA, N. A., 586 U. S. 1147;

No. 18–732. COULTER *v.* TATANANNI ET AL., 586 U. S. 1147;

No. 18–783. BARONE *v.* WELLS FARGO BANK, N. A., 586 U. S. 1193;

No. 18–799. DAVIS *v.* BHATT, 586 U. S. 1149;

No. 18–800. SHAO *v.* MCMANIS FAULKNER, LLP, 586 U. S. 1194;

No. 18–888. BENT *v.* STRANGE ET AL., 586 U. S. 1151;

No. 18–961. SWARTZ *v.* UNITED STATES PATENT AND TRADEMARK OFFICE ET AL., 586 U. S. 1195;

No. 18–5798. C. B. *v.* FISCHGRUND, 586 U. S. 972;

No. 18–6314. KHOUANMANY *v.* UNITED STATES, 586 U. S. 1003;

No. 18–6784. IN RE RIVERA, 586 U. S. 1067;

No. 18–6793. BOOTH *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 586 U. S. 1092;

No. 18–6878. DALEY *v.* MARYLAND ET AL., 586 U. S. 1155;
No. 18–6947. GILLARD *v.* ILLINOIS, 586 U. S. 1156;
No. 18–6965. LEI YIN *v.* BIOGEN, INC., FKA BIOGEN-IDEC, 586 U. S. 1157;
No. 18–7052. WILKERSON *v.* WOODS, 586 U. S. 1160;
No. 18–7070. JACKSON *v.* GMAC MORTGAGE CORP., 586 U. S. 1160;
No. 18–7092. CAIN *v.* ATELIER ESTHETIQUE INSTITUTE OF ESTHETICS, INC., 586 U. S. 1161;
No. 18–7160. ARANOFF *v.* ARANOFF, 586 U. S. 1197;
No. 18–7161. MARTIN *v.* WHITAKER, ACTING ATTORNEY GENERAL, 586 U. S. 1164;
No. 18–7211. MONTE *v.* KESSLING ET AL., 586 U. S. 1209;
No. 18–7237. SAUNDERS *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 586 U. S. 1198; and
No. 18–7404. LAAKE *v.* TURNING STONE RESORT CASINO, 586 U. S. 1199. Petitions for rehearing denied.

APRIL 18, 2019

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see 587 U. S. ——.)

APRIL 19, 2019

Dismissal Under Rule 46

No. 18–855. ALLEN, SECRETARY, WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 904 F. 3d 490.

APRIL 22, 2019

Certiorari Dismissed

No. 18–8287. KILPATRICK *v.* DHILLON, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Mar-*

tin v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 18M134. TAHA ET UX. *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari by Ali M. Taha denied.

No. 18M135. PIERCE *v.* LIVINGSTON ET AL.; and
No. 18M137. ROSS *v.* FRANKE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M136. ROBERTS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 18–328. ROTKISKE *v.* KLEMM ET AL. C. A. 3d Cir. [Certiorari granted, 586 U. S. 1190.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–926. PUTNAM INVESTMENTS, LLC, ET AL. *v.* BROTHERSTON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–5813. KILPATRICK *v.* HENKIN. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1031] denied.

No. 18–6130. KILPATRICK *v.* CUOMO, GOVERNOR OF NEW YORK. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1032] denied.

No. 18–6131. KILPATRICK *v.* ARP; and KILPATRICK *v.* SCOTT. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1032] denied.

No. 18–8541. IN RE JONES. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 13, 2019, within which to pay the docketing fee required by

Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8619. In re Gilchrist. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 18–565. CITGO Asphalt Refining Co. et al. *v.* Frescati Shipping Co., Ltd., et al. C. A. 3d Cir. Certiorari granted. Reported below: 886 F. 3d 291.

No. 18–725. Barton *v.* Barr, Attorney General. C. A. 11th Cir. Certiorari granted. Reported below: 904 F. 3d 1294.

No. 17–1618. Bostock *v.* Clayton County, Georgia. C. A. 11th Cir.; and

No. 17–1623. Altitude Express, Inc., et al. *v.* Zarda et al., Co-Independent Executors of the Estate of Zarda. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 17–1618, 723 Fed. Appx. 964; No. 17–1623, 883 F. 3d 100.

No. 18–107. R. G. & G. R. Harris Funeral Homes, Inc. *v.* Equal Employment Opportunity Commission et al. C. A. 6th Cir. Certiorari granted limited to the following question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989)." Reported below: 884 F. 3d 560.

Certiorari Denied

No. 18–709. Bentley et al. *v.* Vooys et al. C. A. 3d Cir. Certiorari denied. Reported below: 901 F. 3d 172.

No. 18–710. Demirayak *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 746 Fed. Appx. 49.

No. 18–847. BNSF Railway Co. *v.* Nye, as Personal Representative of the Estate of Nye. Sup. Ct. Okla. Certiorari denied. Reported below: 2018 OK 51, 428 P. 3d 863.

No. 18–894. McNeal et ux. *v.* Navajo Nation et al. C. A. 10th Cir. Certiorari denied. Reported below: 896 F. 3d 1196.

No. 18–896. Missouri Ethics Commission et al. *v.* Free and Fair Election Fund et al. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 3d 759.

No. 18–932. Osburn et al. *v.* Loeb et al. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 385.

No. 18–974. Mar-Bow Value Partners, LLC *v.* McKinsey Recovery & Transformation Services US LLC. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 412.

No. 18–1063. Cottam *v.* Pelton. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 791.

No. 18–1068. Mittal *v.* County of Clark, Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 644.

No. 18–1079. Flores Gaytan *v.* Hardee. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 774.

No. 18–1081. Wilson *v.* Horton's Towing et al. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 773.

No. 18–1108. Stucky *v.* Takeno et al. Int. Ct. App. Haw. Certiorari denied. Reported below: 142 Haw. 356, 418 P. 3d 1212.

No. 18–1125. ZocDoc, Inc. *v.* Radha Geismann, M. D., P. C. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 3d 534.

No. 18–1130. Charron *v.* Morris et al. C. A. 6th Cir. Certiorari denied.

No. 18–1161. Bryant *v.* UnitedHealth Group, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 488.

No. 18–1188. Jacobi *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2018 WI App 39, 382 Wis. 2d 833, 917 N. W. 2d 234.

No. 18–1190. DoctorDirectory.com, LLC, et al. *v.* Davis Neurology, P. A. C. A. 8th Cir. Certiorari denied. Reported below: 896 F. 3d 872.

No. 18–1201. Gartenlaub *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 998.

No. 18–6423. McRae *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 978.

No. 18–6702. Combs *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 250.

No. 18–6972. Pereira-Gomez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 3d 155.

No. 18–7431. Batiste *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 189.

No. 18–8009. Aguirre *v.* Clark, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8013. Pieczynski *v.* Wells Fargo & Co., N. A. C. A. 3d Cir. Certiorari denied.

No. 18–8014. Baird *v.* Foss, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8017. Kindred *v.* Titus, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–8018. Kendrick *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8020. Besteder *v.* Bowerman, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–8021. Baker *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8024. Rodriguez *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–8032. Arellano *v.* California. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 18–8035. Adigun *v.* Express Scripts, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 474.

No. 18–8037. Brandon *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 2016–1817 (La. 2/9/18), 235 So. 3d 1092.

No. 18–8039. BARSTAD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 18–8045. MITCHELL *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8086. THOMASON *v.* ONEWEST BANK, FSB, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8121. HARRISON *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8127. NGUYEN VU *v.* BYRD, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, FIRST JUDICIAL DISTRICT, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 18–8140. WASHINGTON *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 750.

No. 18–8144. ALBRA *v.* SELENE FINANCE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8188. WILLIAMS *v.* DESANTIS, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8189. TOVAR *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 18–8236. BIANCHI *v.* MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 18–8253. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 18–8263. WEATHERLY *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8284. WINTERS *v.* CITY OF WEST JORDAN, UTAH, ET AL. Ct. App. Utah. Certiorari denied.

No. 18–8286. TORRES *v.* WILLIAMS, JUDGE, JUDICIAL CIRCUIT COURT OF FLORIDA, HILLSBOROUGH COUNTY. Sup. Ct. Fla. Certiorari denied.

No. 18–8312. AGUILAR *v.* GITTERE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8335. CHAPMAN *v.* OBAMA. C. A. D. C. Cir. Certiorari denied. Reported below: 719 Fed. Appx. 13.

No. 18–8342. SPEARS *v.* R&R CLEANING SERVICES ET AL. Ct. App. S. C. Certiorari denied.

No. 18–8348. GARNER *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 908 F. 3d 845.

No. 18–8371. GRANT *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 501 Mich. 1059, 910 N. W. 2d 257.

No. 18–8381. SCHNEIDER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 18–8397. VICTORY *v.* CALIFORNIA BOARD OF PAROLE HEARINGS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 422.

No. 18–8416. KINNEY *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8428. MARTINEZ *v.* TRANI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 759.

No. 18–8437. COLEMAN *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT I. Sup. Ct. Wis. Certiorari denied. Reported below: 2017 WI 90, 378 Wis. 2d 26, 904 N. W. 2d 124.

No. 18–8449. BUSTOS-CHAVEZ *v.* HANSEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 84.

No. 18–8458. SCARLETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8463. DYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 3d 995.

No. 18–8464. MIMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8467. BEYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 285.

No. 18–8468. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 620.

No. 18–8481. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 398.

No. 18–8492. GIBSON *v.* HAVILAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8493. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8494. SOSTRE-CINTRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 911 F. 3d 54.

No. 18–8498. YAZZIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 772.

No. 18–8499. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 291.

No. 18–8500. ARDD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 3d 348.

No. 18–8501. BAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8504. WHALEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 148.

No. 18–8506. JAIME LOPEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 537.

No. 18–8536. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8537. SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8540. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 218.

No. 18–8543. PEOPLES *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8570. PRESTON *v.* FERGUSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PHOENIX, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 3d 365.

No. 18–8574. BURTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 200 A. 3d 1206.

No. 18–8577. LONG *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2018 IL App (4th) 160015–U.

No. 18–8585. BLOODYWONE *v.* BELLNIER, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–964. GALLAGHER *v.* DIOCESE OF PALM BEACH, INC. Dist. Ct. App. Fla., 4th Dist. Motion of CHILD USA for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 249 So. 3d 657.

No. 18–7426. EZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 743 Fed. Appx. 784.

No. 18–8376. FARMER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–9317. HALL *v.* CITY OF DETROIT, MICHIGAN, ET AL., 586 U. S. 853;

No. 18–6449. IN RE SULTAANA, 586 U. S. 1067;

No. 18–7008. WHITE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 586 U. S. 1158;

No. 18–7317. DAVIS *v.* UNITED STATES, 586 U. S. 1169;

No. 18–7338. JONES *v.* OFFICE OF ADMINISTRATIVE HEARINGS ET AL., 586 U. S. 1230;

No. 18–7372. CUEVAS *v.* KELLY, SUPERINTENDENT, OREGON STATE PRISON, 586 U. S. 1170;

No. 18–7461. IN RE LEE, 586 U. S. 1144; and

No. 18–7559. DALEY *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 586 U. S. 1233. Petitions for rehearing denied.

No. 18–7260. IN RE DANIELS, 586 U. S. 1144. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

April 24, 2019

Certiorari Denied

No. 18–8970 (18A1091). King *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied.

April 25, 2019

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see 587 U. S. ——; amendments to the Federal Rules of Bankruptcy Procedure, see 587 U. S. ——; amendments to the Federal Rules of Criminal Procedure, see 587 U. S. ——; and an amendment to the Federal Rules of Evidence, see 587 U. S. ——.)

April 29, 2019

Certiorari Dismissed

No. 18–8174. Hall *v.* United States District Court for the Eastern District of Michigan. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 18–8197. Boone *v.* Texas. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–8250. Munt *v.* Minnesota Department of Corrections et al. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 745 Fed. Appx. 656.

No. 18–8279. Brooks *v.* Pennsylvania. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 192 A. 3d 214.

No. 18–8532. WRIGHT *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*). Reported below: 372 N. C. 63, 822 S. E. 2d 41.

Miscellaneous Orders

No. 18A995 (18–8559). SMITH *v.* DANIEL. Cir. Ct. Madison County, Fla. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 18M138. IN RE ASHLEY. Motion for leave to proceed as a veteran denied.

No. 18M139. KHOUANMANY *v.* DOE ET AL.;
No. 18M140. MATTHEWS *v.* ROBLES; and
No. 18M142. WILLIAMS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M141. MARIA S., AS NEXT FRIEND FOR E. H. F. ET AL., MINORS, ET AL. *v.* GARZA. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 18–280. NEW YORK STATE RIFLE & PISTOL ASSN., INC., ET AL. *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1126.] Motion of respondents to hold briefing schedule in abeyance denied.

No. 18–956. GOOGLE LLC *v.* ORACLE AMERICA, INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–5924. RAMOS *v.* LOUISIANA. Ct. App. La., 4th Cir. [Certiorari granted, 586 U. S. 1221.] Motion of petitioner for appointment of counsel granted, and G. Ben Cohen, Esq., of New Orleans, La., is appointed to serve as counsel for petitioner in this case.

No. 18–7225. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS, INC. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1206] denied.

No. 18–8128. COLLIE *v.* SOUTH CAROLINA COMMISSION ON LAWYER CONDUCT. Sup. Ct. S. C.; and

No. 18–8520. HAAS ET AL. *v.* CITY OF RICHMOND, VIRGINIA, ET AL. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 20, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8726. IN RE CALHOUN; and

No. 18–8730. IN RE DIXON. Petitions for writs of habeas corpus denied.

No. 18–962. IN RE ARPAIO;

No. 18–1076. IN RE HUDNALL;

No. 18–8170. IN RE CLONINGER; and

No. 18–8208. IN RE DIAZ. Petitions for writs of mandamus denied.

No. 18–8615. IN RE MURPHY. Petition for writ of prohibition denied.

Certiorari Denied

No. 18–319. E. & J. GALLO WINERY ET AL. *v.* ARREGUIN. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 18–670. SFR INVESTMENTS POOL 1, LLC *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 3d 1136.

No. 18–679. HALL *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 163 Idaho 744, 419 P. 3d 1042.

No. 18–772. AVILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 263.

No. 18–782. BOND *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 735.

No. 18–790. TIN CUP, LLC *v.* ARMY CORPS OF ENGINEERS. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 3d 1068.

No. 18–952. MOUNTJOY *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 430 P. 3d 389.

No. 18–957. NEXTERA ENERGY, INC. *v.* ELLIOTT ASSOCIATES, L. P., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 3d 298.

No. 18–979. BOHMKER ET AL. *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 1029.

No. 18–1077. JAHI, AKA CARTER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–1087. CHAVEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–1089. BENJAMIN *v.* FELDER SERVICES, L. L. C., DBA OXFORD HEALTH AND REHAB CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 298.

No. 18–1095. KINNEY *v.* ROTHSCHILD ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1096. KINNEY *v.* CANTIL-SAKAUYE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1098. WITTE *v.* HUYNH, NKA SCACCO. Ct. App. Utah. Certiorari denied.

No. 18–1104. RINGGOLD *v.* PROVIDENCE HEALTH & SERVICES ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1106. DELAWARE RIVERKEEPER NETWORK ET AL. *v.* SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 3d 65.

No. 18–1112. KANOFSKY *v.* BETHLEHEM AREA SCHOOL DISTRICT. Commw. Ct. Pa. Certiorari denied. Reported below: 177 A. 3d 1070.

No. 18–1113. THOMAS *v.* ZELON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 780.

No. 18–1115. DeCoster *v.* Waushara County Highway Department et al. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 3d 1093.

No. 18–1118. Kerrigan *v.* Qualstar Credit Union et al. C. A. 9th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 787.

No. 18–1121. Linlor *v.* Polson. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 167.

No. 18–1128. Minchuk *v.* Strand. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 909.

No. 18–1136. Hennager *v.* Troutman Sanders LLP. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 173.

No. 18–1138. Kinney *v.* Superior Court of California, Los Angeles County, et al. Sup. Ct. Cal. Certiorari denied.

No. 18–1146. Ong et al. *v.* Hudson County Superior Court et al. C. A. 3d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 133.

No. 18–1148. Franett-Fergus *v.* Omak School District 19 et al. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 855.

No. 18–1153. Rizzo *v.* Applied Materials, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 743 Fed. Appx. 484.

No. 18–1159. Universal Church, Inc. *v.* Toellner et al. C. A. 2d Cir. Certiorari denied. Reported below: 752 Fed. Appx. 67.

No. 18–1174. Goldenberg et al. *v.* Transcontinental Gas Pipe Line Co., LLC. C. A. 11th Cir. Certiorari denied. Reported below: 910 F. 3d 1130.

No. 18–1175. Shillinglaw *v.* Baylor University et al. (two judgments). Sup. Ct. Tex. Certiorari denied.

No. 18–1176. Wenzel et al. *v.* Storm. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 598.

No. 18–1216. Lussy *v.* Florida Elections Commission et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 18–1234. MORIARTY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 18–1248. KIENAST ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 522.

No. 18–1251. ANNABI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–1254. KING *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 218.

No. 18–6611. PHILIPS *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 724.

No. 18–6734. REDDICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 3d 636.

No. 18–6758. BORDMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 895 F. 3d 1048.

No. 18–6774. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 3d 785.

No. 18–6870. FREDERICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 522.

No. 18–7188. DAVIS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 315.

No. 18–7203. SALAZAR *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 18–7470. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 707.

No. 18–7527. WILSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 273 So. 3d 862.

No. 18–7543. LANDINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7546. VICKERS *v.* MARINA DEL REY MARINA, LLC. Sup. Ct. Cal. Certiorari denied.

No. 18–7573. HEARN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7576. CREQUE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 272 So. 3d 659.

No. 18–7648. STEVENSON *v.* CORDOVA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 939.

No. 18–8027. SAMPLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–8052. ZACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 18–8063. LAWLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8071. THOMAS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8072. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–8073. THOMPSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 18–8081. KING *v.* CREED ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8082. BAKER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 249 So. 3d 647.

No. 18–8084. TAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8087. KURZ *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 51,781 (La. App. 2 Cir. 2/28/18), 245 So. 3d 1219.

No. 18–8092. BLANKUMSEE *v.* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 773.

No. 18–8097. HERRERA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8102. HOLMAN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8103. HEARD *v.* BERRY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 18–8105. HERRIOTT *v.* HERRIOTT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 18–8108. BUSH *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 3d 1188.

No. 18–8109. ADAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8122. HALL *v.* LACLAIR ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8124. GROSS *v.* HAVLIN, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1440, 2018-Ohio-2715, 102 N. E. 3d 498.

No. 18–8129. RUSSELL *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–8135. WILLIAMS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8137. STEELE *v.* PEDRO ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8138. HUGHES *v.* SCHNURR, WARDEN. Ct. App. Kan. Certiorari denied. Reported below: 56 Kan. App. 2d xxi, 423 P. 3d 557.

No. 18–8141. TAYLOR *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8142. WILLIAMSON *v.* SLUSHER ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8149. FRIES *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8151. WILLIAMSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8152. TRIGG *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8154. Romero *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–8157. Brinson *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8158. Anderson *v.* Miller et al. C. A. 6th Cir. Certiorari denied.

No. 18–8163. Basson *v.* Mortgage Electronic Registration Systems, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 770.

No. 18–8176. Brightwell *v.* Capozza, Superintendent, State Correctional Institution at Fayette, et al. C. A. 3d Cir. Certiorari denied.

No. 18–8179. Lewis *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8180. Lucy, Personal Representative of Fox, Deceased *v.* Dialysis Associates et al. Sup. Ct. Ala. Certiorari denied.

No. 18–8184. Sharp *v.* Dolan. C. A. D. C. Cir. Certiorari denied. Reported below: 744 Fed. Appx. 705.

No. 18–8192. Barnett *v.* Alamance County Sheriff Office Detention Center et al. C. A. 4th Cir. Certiorari denied. Reported below: 726 Fed. Appx. 192.

No. 18–8193. Albors Gonzalez *v.* Stern et al. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 244 So. 3d 1187.

No. 18–8196. Tart *v.* Hooks, Secretary, North Carolina Department of Public Safety. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 829.

No. 18–8199. Johnson *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–8200. Boone *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8203. Burghardt *v.* Stein-Graham. C. A. 9th Cir. Certiorari denied.

No. 18–8204. Molina Bracero *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 200.

No. 18–8207. Dilts *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 18–8209. Bradford *v.* Marchak et al. C. A. 9th Cir. Certiorari denied.

No. 18–8211. Berger *v.* Gibson et al. C. A. 8th Cir. Certiorari denied.

No. 18–8212. Brantley *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 202.

No. 18–8219. Hernandez *v.* Spearman, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8221. Judkins *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 18–8222. Lewis *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–8223. Young *v.* Oliver, Judge, Superior Court of Connecticut, Tolland Judicial District, et al. C. A. 2d Cir. Certiorari denied.

No. 18–8227. Cook *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 142134, 99 N. E. 3d 73.

No. 18–8228. Bocook *v.* Mohr, Warden. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1459, 2018-Ohio-3257, 104 N. E. 3d 790.

No. 18–8229. Chinn *v.* Noeth, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 18–8290. Ware Bey *v.* Ponte et al. C. A. 2d Cir. Certiorari denied.

No. 18–8343. Baez Carmona Lopez Cordero *v.* Connecticut Department of Correction et al. C. A. 2d Cir. Certiorari denied.

No. 18–8443. OLIVEIRA *v.* COYNE-FAGUE ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8476. GRANDISON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 238 Md. App. 728.

No. 18–8477. FLETCHER *v.* CARTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 175.

No. 18–8489. MOORE *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 482.

No. 18–8495. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 213.

No. 18–8496. SWATZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 833.

No. 18–8507. JENNETTE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 741 Fed. Appx. 140.

No. 18–8508. COOPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 609.

No. 18–8512. GADSDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 546.

No. 18–8514. HOMEDEW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 895 F. 3d 1083.

No. 18–8518. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 295.

No. 18–8519. BANKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 747 Fed. Appx. 41.

No. 18–8521. GALAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 74.

No. 18–8522. FERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8523. REINERIO, NKA AAEBO *v.* BANK OF AMERICA, N. A., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 725 Fed. Appx. 442.

No. 18–8525. WINSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8526. HENDERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 911 F. 3d 32.

No. 18–8528. ROBERTSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 914.

No. 18–8531. BEASLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 379.

No. 18–8534. CARLUCCI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8539. SANDLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8556. BARRIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 544.

No. 18–8558. RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 629.

No. 18–8566. LOWE *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 269 So. 3d 244.

No. 18–8568. PIPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 3d 847.

No. 18–8575. CAMARGO-ALEJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 551.

No. 18–8576. ALLEN *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 68.

No. 18–8581. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8582. NATER-AYALA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8584. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 452.

No. 18–8586. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 260.

No. 18–8589. RANKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 257.

No. 18–8599. JENKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–8600. MCLEOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 670.

No. 18–8601. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 379.

No. 18–8602. PONZO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 3d 162.

No. 18–8603. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8614. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8617. DOYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 321.

No. 18–8623. MILAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 289.

No. 18–8624. MILLER *v.* ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 18–8625. NERE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2018 IL 122566, 115 N. E. 3d 205.

No. 18–8626. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8627. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 748.

No. 18–8629. BARAJAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 838.

No. 18–8630. BIRDTAIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 492.

No. 18–8631. FISEKU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 3d 863.

No. 18–8632. LOPEZ-GUZMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 417.

No. 18–8634. CHAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–8647. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8649. COBBLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 748 Fed. Appx. 345.

No. 18–8650. EASLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 3d 1074.

No. 18–8654. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 228.

No. 18–8660. MANSELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8662. LAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8665. BENANTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 556.

No. 18–8672. HOLDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 3d 395 and 732 Fed. Appx. 619.

No. 18–8673. STUBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 159.

No. 18–8676. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 652.

No. 18–8698. WALTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 548.

No. 18–719. URADNIK *v.* INTER FACULTY ORGANIZATION ET AL. C. A. 8th Cir. Motion of Freedom Foundation for leave to file brief as *amicus curiae* granted. Certiorari denied.

No. 18–1143. BLAKE *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

No. 18–8350. ASLAN *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 637 Fed. Appx. 509.

No. 18–8616. HARDMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–8495. VELEZ *v.* UNITED STATES, 586 U. S. 944;

No. 18–757. CHUANG *v.* CALIFORNIA, 586 U. S. 1148;

No. 18–1005. ZELL *v.* KLINGELHAFER ET AL., 586 U. S. 1208;

No. 18–6881. ALSTON *v.* MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY, 586 U. S. 1155;

No. 18–7017. BLACK *v.* LINDSAY, 586 U. S. 1158;

No. 18–7321. YOUNG *v.* CHAPDELAINE, WARDEN; YOUNG *v.* CHAPDELAINE, WARDEN; and YOUNG *v.* CHAPDELAINE, WARDEN, ET AL., 586 U. S. 1229;

No. 18–7450. MILLER *v.* TEXAS ET AL., 586 U. S. 1232;

No. 18–7713. GRIMSLEY *v.* MCGINLEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL., 586 U. S. 1202;

No. 18–7911. KUN *v.* STATE BAR OF CALIFORNIA, 586 U. S. 1239; and

No. 18–7916. WREN *v.* MISSISSIPPI, 586 U. S. 1240. Petitions for rehearing denied.

MAY 2, 2019

Certiorari Denied

No. 18–9117 (18A1133). MORROW *v.* FORD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 3, 2019

Dismissal Under Rule 46

No. 18–1262. CORONA REGIONAL MEDICAL CENTER ET AL. *v.* SALI ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 909 F. 3d 996.

MAY 13, 2019

Certiorari Granted—Vacated and Remanded

No. 18–6859. MYERS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019. Reported below: 896 F. 3d 866.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE KAVANAUGH join, dissenting.

I dissent from the Court's decision to grant the petition, vacate the judgment, and remand the case. Nothing has changed since the Eighth Circuit held that Myers's conviction for first-degree terroristic threatening qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U. S. C. § 924(e). The Government continues to believe that classification is correct, for the same reasons that it gave to the Eighth Circuit. But the Solicitor General asks us to send the case back, and this Court obliges, because he believes the Eighth Circuit made some mistakes in its legal analysis, even if it ultimately reached the right result. He wants the hard-working judges of the Eighth Circuit to take a "fresh" look at the case, so that they may "consider the substantial body of Arkansas case law supporting the conclusion that the statute's death-or-serious-injury language sets forth an element of the crime," and then re-enter the same judgment the Court vacates today. Brief in Opposition 9, 11.

I see no basis for this disposition in these circumstances. See *Machado* v. *Holder*, 559 U. S. 966 (2010) (ROBERTS, C. J., dissenting); *Nunez* v. *United States*, 554 U. S. 911, 912 (2008) (Scalia, J., dissenting). Unless there is some new development to consider, we should vacate the judgment of a lower federal court only after affording that court the courtesy of reviewing the case on the merits and identifying a controlling legal error. This case does not warrant our independent review. If the Government wants to ensure that the Eighth Circuit does not repeat its alleged error, it should have no difficulty presenting the matter to subsequent panels of the Eighth Circuit, employing the procedure for en banc review should it be necessary.

I would deny the petition.

Certiorari Dismissed

No. 18–8297. BACCUS *v.* CLEMENTS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 728 Fed. Appx. 233.

No. 18–8384. SMALL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As

petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 278 So. 3d 627.

No. 18–8486. MUNT *v.* MILES, WARDEN. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–8713. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders**

No. 18M143. GRETHEN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.;

No. 18M145. TAYLOR *v.* EDWARDS ET AL.;

No. 18M146. CUNNINGHAM *v.* UNITED STATES MARSHALS SERVICE;

No. 18M150. ACEDO *v.* PINEDO ET AL.;

No. 18M151. LONG *v.* KEETON, WARDEN; and

No. 18M152. BONANNO *v.* BARR, ATTORNEY GENERAL, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M144. OULTON *v.* FLORIDA; and

No. 18M149. GOSSAGE *v.* MERIT SYSTEMS PROTECTION BOARD. Motions for leave to proceed as veterans denied.

No. 18M147. SHOOP *v.* TERRY, ACTING WARDEN; and

No. 18M148. CORDOBA *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari with supplemental appendixes under seal granted.

No. 18M153. SEALED APPELLANT *v.* SEALED APPELLEE. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

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*[REPORTER'S NOTE: For dissenting opinion of JUSTICE ALITO and statement of JUSTICE KAVANAUGH in No. 18A985, see *Murphy* v. *Collier*, 587 U. S. 901, 903, 913.]

No. 17–1618. BOSTOCK *v.* CLAYTON COUNTY, GEORGIA. C. A. 11th Cir.; and

No. 17–1623. ALTITUDE EXPRESS, INC., ET AL. *v.* ZARDA ET AL., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF ZARDA. C. A. 2d Cir. [Certiorari granted, 587 U. S. 960]; and

No. 18–107. R. G. & G. R. HARRIS FUNERAL HOMES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. [Certiorari granted, 587 U. S. 960.] Petitioner in No. 17–1618, respondents in No. 17–1623, and respondent Aimee Stephens in No. 18–107 shall file their briefs on the merits, pursuant to this Court's Rule 33.1(g)(v), on or before Wednesday, June 26, 2019. Respondent in No. 17–1618, petitioners in No. 17–1623, and petitioner and respondent EEOC in No. 18–107 shall file their briefs on the merits, pursuant to Rule 33.1(g)(vi), on or before Friday, August 16, 2019. Reply briefs, if any, pursuant to Rule 33.1(g)(vii), shall be filed on or before Monday, September 16, 2019. *Amicus curiae* briefs shall be filed pursuant to Rule 37.3.

No. 18–431. UNITED STATES *v.* DAVIS ET AL. C. A. 5th Cir. [Certiorari granted, 586 U. S. 1063.] Motion for appointment of counsel granted, and J. Joseph Mongaras, Esq., of Dallas, Tex., is appointed to serve as counsel for respondent Andre L. Glover.

No. 18–8191. BURKE, MOTHER OF CAUDLE, DECEASED *v.* RAVEN ELECTRIC, INC., ET AL. Sup. Ct. Alaska; and

No. 18–8270. HETTINGA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 3, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8886. IN RE RODGERS;

No. 18–8922. IN RE CAMPOS; and

No. 18–8960. IN RE WINKEL. Petitions for writs of habeas corpus denied.

No. 18–8872. IN RE SURLES. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 18–8907. IN RE WILLIAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of

habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 18–8452. In re Mason; and

No. 18–8485. In re Hower. Petitions for writs of mandamus denied.

No. 18–1274. In re Bhagat. Motion of Mr. Marcos Gonzalez for leave to file brief as *amicus curiae* granted. Petition for writ of mandamus denied.

No. 18–1164. In re Giordani;

No. 18–1229. In re Fjord et al.; and

No. 18–8724. In re Cabello. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 18–673. Prince *v.* Lizarraga, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 382.

No. 18–766. Bierman et al. *v.* Walz, Governor of Minnesota, et al. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 3d 570.

No. 18–807. Baskins et al. *v.* Oklahoma Tax Commission. Ct. Civ. App. Okla. Certiorari denied.

No. 18–813. Velasquez et al. *v.* Barr, Attorney General. C. A. 4th Cir. Certiorari denied.

No. 18–830. Township of Millburn, New Jersey, et al. *v.* Palardy. C. A. 3d Cir. Certiorari denied. Reported below: 906 F. 3d 76.

No. 18–842. Mendez *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–881. American Fuel & Petrochemical Manufacturers et al. *v.* O'Keeffe et al. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 903.

No. 18–944. Tree of Life Christian Schools *v.* City of Upper Arlington, Ohio. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 3d 357.

No. 18–1017. ANGELEX, LTD. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 907 F. 3d 612.

No. 18–1117. KABANI & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 918.

No. 18–1142. TOCZYLOWSKI *v.* GIULIANO ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 188 A. 3d 567.

No. 18–1144. NATURAL ALTERNATIVES INTERNATIONAL, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 904 F. 3d 1375 and 738 Fed. Appx. 1016.

No. 18–1147. BRUNSON *v.* HOGAN ET AL. Ct. App. Utah. Certiorari denied.

No. 18–1149. GALLENTHIN *v.* BOROUGH OF PAULSBORO ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–1152. STEELE ET AL. *v.* MCCAULEY ET AL. Ct. App. Mich. Certiorari denied.

No. 18–1158. TAYLOR *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–1168. FLORIMONTE *v.* BOROUGH OF DALTON, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 53.

No. 18–1172. WILLIAMS *v.* CITY OF CLEVELAND, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 3d 924.

No. 18–1178. PAIGE ET UX. *v.* LERNER MASTER FUND, LLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 Fed. Appx. 85.

No. 18–1179. MBAWE *v.* FERRIS STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 832.

No. 18–1180. NEW VISION HOME HEALTH CARE, INC., ET AL. *v.* ANTHEM, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 228.

No. 18–1183. SMULLEY *v.* FEDERAL HOUSING FINANCE AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 754 Fed. Appx. 18.

No. 18–1184. KINNEY *v.* CLARK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 18–1213. GONZALEZ GARITA *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 18–1217. WAPLES MOBILE HOME PARK L. P. ET AL. *v.* GIRON DE REYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 903 F. 3d 415.

No. 18–1247. RIES *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 293 Ore. App. 121, 432 P. 3d 1168.

No. 18–1250. LEA *v.* PERDUE, SECRETARY OF AGRICULTURE. C. A. 6th Cir. Certiorari denied.

No. 18–1268. JHOKKE *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–1270. JAGOS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 18–1273. CALDAVADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 166 App. Div. 3d 792, 88 N. Y. S. 3d 236.

No. 18–1278. KERNS ET AL. *v.* CHESAPEAKE EXPLORATION, L. L. C., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 Fed. Appx. 289.

No. 18–1282. SANDERS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 279 So. 3d 618.

No. 18–1286. BAUR *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 181 A. 3d 1261.

No. 18–1312. MATESKI *v.* RAYTHEON CO. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 49.

No. 18–6750. PULTRO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 181 A. 3d 1209.

No. 18–6993. BJERKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 319.

No. 18–7130. ALDEN *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass. App. 438, 105 N. E. 3d 282.

No. 18–7232. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 801.

No. 18–7369. GHOSH *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–7378. HILL *v.* DANIELS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 353.

No. 18–7540. RILEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 270 So. 3d 291.

No. 18–7542. HARNDEN *v.* ST. CLAIR COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7584. MARBERRY *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 18–7613. ACKELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 3d 67.

No. 18–7670. PORTER *v.* ZOOK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 3d 408.

No. 18–7680. CIRINO *v.* UNITED STATES; MACHADO *v.* UNITED STATES; NEWMAN *v.* UNITED STATES; SUGGS *v.* UNITED STATES; TELLEZ *v.* UNITED STATES (Reported below: 744 Fed. Appx. 528); and WEILBURG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7695. WILLIAMS *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 725 Fed. Appx. 1012.

No. 18–7809. WERE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 1422, 2018-Ohio-4496, 111 N. E. 3d 20.

No. 18–7907. HASSAN *v.* MARKS, CHIEF ADMINISTRATIVE JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 19.

No. 18–8057. SHORT *v.* OHIO. Ct. App. Ohio, 2d App. Dist., Montgomery County. Certiorari denied. Reported below: 2018-Ohio-2429.

No. 18–8090. ZAKRZEWSKI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 254 So. 3d 324.

No. 18–8153. WALCOTT *v.* NAQUIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 413.

No. 18–8178. JUSTISE *v.* LIEBEL ET AL. Ct. App. Ind. Certiorari denied. Reported below: 107 N. E. 3d 1111.

No. 18–8232. ROSALES *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 548 S. W. 3d 796.

No. 18–8235. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 18–8240. MONIZ *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–8241. MORET *v.* GARRETT. C. A. 9th Cir. Certiorari denied.

No. 18–8242. MCCREARY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 334.

No. 18–8248. JONES *v.* SUPREME COURT OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 83.

No. 18–8249. MORGAN *v.* STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–8251. PETERSON *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8255. PONDER *v.* AVALON CORRECTIONAL SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 546.

No. 18–8257. MCCLAIN *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 797.

No. 18–8258. JACKSON *v.* CLIMMER ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8271. HERNANDEZ *v.* SIMS ET AL. Ct. App. Wis. Certiorari denied.

No. 18–8272. FAIRLEY *v.* FORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 356.

No. 18–8276. SAMPLE *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 18–8278. SCHIEVE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 110 N. E. 3d 1193.

No. 18–8283. BURLISON *v.* ANGUS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS MARION COUNTY, FLORIDA COURT DEPUTY CLERK. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 523.

No. 18–8285. MARTINEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 560 S. W. 3d 681.

No. 18–8288. ALLEN *v.* ENVIROGREEN LANDSCAPE PROFESSIONALS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 322.

No. 18–8295. LUMSDEN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 564 S. W. 3d 858.

No. 18–8296. ALEXANDER *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE. C. A. 3d Cir. Certiorari denied.

No. 18–8303. ALFORD *v.* CARLTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8304. BROACH *v.* PEAKE, CHAPTER 13 TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 395.

No. 18–8305. ZAINULABEDDIN *v.* UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 776.

No. 18–8319. FLICK *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8323. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 265 So. 3d 460.

No. 18–8326. GRAY *v.* ROMERO ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8334. GONZALEZ *v.* ERNESTO GONZALEZ. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 18–8338. JACKSON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2018 IL App (5th) 150090–U.

No. 18–8340. ROBLERO *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 688.

No. 18–8351. FRESSADI *v.* ARIZONA MUNICIPAL RISK RETENTION POOL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 672.

No. 18–8354. ANDERSON *v.* HOWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 484.

No. 18–8365. SCOTT *v.* STARK ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8367. WILLIAMS *v.* AMERICAN AUTO LOGISTICS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–8368. MARTIN *v.* GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8372. GREEN *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 18–8374. HILL *v.* BREWER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8375. HOLLAND *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 503 Mich. 913, 920 N. W. 2d 115.

No. 18–8379. DOBBS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 18–8383. SOUTHGATE *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 809.

No. 18–8385. REPELLA *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 201.

No. 18–8398. WATTERS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–8399. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 803.

No. 18–8409. MUNGIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 716.

No. 18–8412. PERRYMAN *v.* GEORGIA ET AL. Ct. App. Ga. Certiorari denied. Reported below: 345 Ga. App. XXIII.

No. 18–8413. AVOKI *v.* CAROLINAS TELCO FEDERAL CREDIT UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 493.

No. 18–8414. DENNIS E. *v.* D'EMIC, ADMINISTRATIVE JUDGE, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DISTRICT, ET AL. (Reported below: 159 App. Div. 3d 699, 69 N. Y. S. 3d 514); and WAI-KIM C. *v.* OZZI, ACTING JUSTICE, SUPREME COURT OF NEW YORK, 13TH JUDICIAL DISTRICT, ET AL. (164 App. Div. 3d 1444, 81 N. Y. S. 3d 913). App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–8420. BRIGGS *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 394 Mont. 387, 429 P. 3d 275.

No. 18–8421. THOMAS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8422. YOUNG *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 18–8425. LUCAS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8438. COLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 342, 806 S. E. 2d 387.

No. 18–8444. NOVERO *v.* DUKE ENERGY FLORIDA, LLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 759.

No. 18–8446. WERNER *v.* CITY OF GREEN BAY, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 10.

No. 18–8459. BISSO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 259 So. 3d 838.

No. 18–8460. AVILEZ *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 94 Mass. App. 1109, 113 N. E. 3d 934.

No. 18–8474. HENNEBERRY *v.* COUNTY OF ALAMEDA, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 721.

No. 18–8479. FELS *v.* MCCONNELL ET AL. C. A. 7th Cir. Certiorari denied.

No. 18–8482. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 3d 1255.

No. 18–8497. LYNCH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 18–8509. KOMATSU *v.* NTT DATA, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 730 Fed. Appx. 98.

No. 18–8510. THANIEL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 238 Md. App. 343, 192 A. 3d 804.

No. 18–8533. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 18–8535. HELEVA *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8545. LOHRI *v.* SPECIALIZED LOAN SERVICING, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 857.

No. 18–8549. GOODMAN *v.* HAMILTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 295.

No. 18–8559. SMITH *v.* DANIEL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 266 So. 3d 141.

No. 18–8560. SULTAANA *v.* HARRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8567. MCDERMOTT *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–8571. PELLECER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–8580. MARTS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 260 So. 3d 1057.

No. 18–8590. RAMOS *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2018 UT App 161, 428 P. 3d 334.

No. 18–8592. GRISSOM *v.* CARPENTER, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 3d 1265.

No. 18–8594. TISZAI *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8596. BERNAZARD *v.* KOCH. C. A. 2d Cir. Certiorari denied.

No. 18–8606. SMITH *v.* DOZIER ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8620. HICKLIN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 18–8633. GREENE *v.* WALGREEN EASTERN CO., INC. C. A. 1st Cir. Certiorari denied.

No. 18–8635. WILLIS *v.* ROSS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 629.

No. 18–8644. FINCH *v.* GRAHAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 556.

No. 18–8656. HAMES *v.* YELDELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 206.

No. 18–8675. SEDILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 826.

No. 18–8678. CAMPBELL *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 18–8684. YOUNG *v.* BRENNAN, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 423.

No. 18–8688. MCSHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 454.

No. 18–8690. ONTIVEROS *v.* PACHECO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 601.

No. 18–8691. BOISVERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–8694. HENDERSON *v.* UNITED STATES (Reported below: 906 F. 3d 1109); and HAMMOND *v.* UNITED STATES (740 Fed. Appx. 573). C. A. 9th Cir. Certiorari denied.

No. 18–8695. TATE *v.* TITUS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8696. BROWN *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 17–348 (La. App. 5 Cir. 12/20/17), 235 So. 3d 1314.

No. 18–8699. CHERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 687.

No. 18–8700. GIVENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 421.

No. 18–8703. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8708. CLARK *v.* COAKLEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 59.

No. 18–8711. LUSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8714. WHIGHAM, AKA PRINGLE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8715. SPRAY *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SHIRLEY. C. A. 1st Cir. Certiorari denied.

No. 18–8716. DONAHUE *v.* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY ET AL. Sup. Ct. Pa. Certiorari denied.

No. 18–8717. ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8718. BARRETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 134.

No. 18–8721. REED *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–8725. MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 280.

No. 18–8729. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8740. MANLEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 198 A. 3d 724.

No. 18–8741. APODACA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8743. TORRES-CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 361.

No. 18–8747. AGUILAR-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 362.

No. 18–8752. SANDHU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 595.

No. 18–8755. MURDOCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8767. SLATON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 689.

No. 18–8775. MAINES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8779. HUDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8781. KALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 667.

No. 18–8782. LOPEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 234.

No. 18–8783. KENDRICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 687.

No. 18–8784. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 505.

No. 18–8786. KRELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2017–0013 (La. 1/8/19), 260 So. 3d 583.

No. 18–8808. REDMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 150081–U.

No. 18–8816. HOOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8824. GONZALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 3d 808.

No. 18–8829. DJUGA, AKA DZHUGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8923. WATKINS *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–761. DAHNE *v.* RICHEY. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 881.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE KAVANAUGH join, dissenting.

Does the First Amendment require a prison to entertain a prisoner grievance that contains veiled threats to kill or injure a guard? Or may the prison insist that the prisoner rewrite the grievance to eliminate any threatening language? In this case, respondent Thomas Richey, an inmate currently serving a sentence for murder in Washington state prison, submitted a written prison grievance complaining that a guard had improperly denied him shower privileges. His grievance not only insulted the guard, referring to her as a "fat Hispanic," but contained language that may reasonably be construed as a threat. Specifically, the grievance stated:

> "It is no wonder [why] guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position . . . it can make prisoners less civilized than myself to resort to violent behavior in retaliation." App. to Pet. for Cert. 109a–110a.

The prison refused to entertain the grievance, but permitted Richey to refile his complaint with the offensive language omitted. Richey refused to comply and instead submitted a second grievance that repeated much of the original language, adding, "[i]t is no wonder why guards are slapped and strangled by some prisoners." *Id.*, at 111a. The record reflects that Richey's grievance came "just a few months after an inmate actually did murder a DOC staff member" at a Washington state prison "by strangling her to death." *Id.*, at 106a.

Petitioner Dennis Dahne, a prison employee who processes inmate grievances, refused to accept Richey's modified grievance. Dahne later explained that his decision was based on the fact that the grievance contained "so much irrelevant, inappropriate, and borderline threatening extra language." *Ibid.* When Dahne refused to process Richey's modified grievance, Richey filed this action in Federal District Court, claiming that Dahne violated his First Amendment free speech and petition rights. Although the District Court originally dismissed Richey's claim, that decision was reversed by the United States Court of Appeals for the Ninth Circuit, which held that Richey stated a valid claim for relief under the First Amendment. See *Richey* v. *Dahne*, 624 Fed. Appx. 525, 526 (2015). In the decision below, the Ninth Circuit doubled down on its earlier ruling, holding that prisoners have a clearly established constitutional right to use "disrespectful" language in prison grievances and that Richey was entitled to summary judgment on his First Amendment claim. 733 Fed. Appx. 881, 883–884 (2018).

We have made it clear that prisoners do not retain all of the free speech rights enjoyed by persons who are not incarcerated. See, *e. g.*, *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001). Prisons are dangerous places. To maintain order, prison authorities may insist on compliance with rules that would not be permitted in the outside world. See *Turner* v. *Safley*, 482 U. S. 78, 89–91 (1987). Even if a prison must accept grievances containing personal insults of guards, a proposition that is not self-evident,* does it follow that prisons must tolerate veiled threats? I doubt it, but if the Court is uncertain, we should grant review in this case. Perhaps there is more here than is apparent on the submissions before us, but based on those submissions, the decision of the Ninth Circuit defies both our precedents and common sense.

No. 18–809. LOVELACE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motions of Fines and Fees Justice Center et al. and National Association of Criminal Defense Lawyers for leave to file briefs

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*Indeed, several courts have upheld prison rules barring or punishing prisoners' use of insolent, disrespectful, or profane language in written grievances and complaints. See, *e. g.*, *Smith* v. *Mosley*, 532 F. 3d 1270, 1274, 1277 (CA11 2008); *Ustrak* v. *Fairman*, 781 F. 2d 573, 580 (CA7 1986); *In re Parmelee*, 115 Wash. App. 273, 283–285, 63 P. 3d 800, 806–807 (2003).

as *amici curiae* granted. Certiorari denied. Reported below: 2018 IL App (4th) 170401, 104 N. E. 3d 532.

No. 18–983. CITY OF MACKINAC ISLAND, MICHIGAN, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 898 F. 3d 1.

No. 18–1249. PRICE *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 701.

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring.

I concur in the denial of certiorari. I write separately to set the record straight regarding the Court's earlier orders vacating the stays of execution entered by the District Court and the Court of Appeals in this case. See *Dunn* v. *Price*, 587 U. S. 929 (2019). In a late-night dissenting opinion accompanying one of those orders, JUSTICE BREYER asserted that petitioner's death sentence was being "carried out in an arbitrary way" and that Members of this Court deviated from "basic principles of fairness." *Id.*, at 929, 933. There is nothing of substance to these assertions. An accurate recounting of the circumstances leading to the now-delayed execution makes clear that petitioner's execution was set to proceed in a procedurally unremarkable and constitutionally acceptable manner.

I

The dissent omitted any discussion of the murder that warranted petitioner's sentence of death and the extensive procedural protections afforded to him before his last-minute, dilatory filings. I therefore begin by more fully recounting the "circumstances as they [were] presented to our Court." *Id.*, at 929.

On the evening of Sunday, December 22, 1991, Bill Lynn, a minister, and his wife Bessie returned home after church. *Price* v. *State*, 725 So. 2d 1003, 1011 (Ala. Crim. App. 1997). Bill began assembling Christmas toys for his grandchildren while Bessie prepared for bed. *Ibid.* After the electricity appeared to fail, Bill went outside to check the power box. *Ibid.* He was then brutally attacked with a sword and a knife by petitioner and his accomplice. *Id.*, at 1011, 1015. According to the trial court, Bill

suffered a total of 38 "cuts, lacerations, and stab wounds." App. to Pet. for Cert., O. T. 2018, No. 18–8766, p. 230a (App. in No. 18–8766). "One of his arms was almost severed," and "[h]is scalp was detached from [his] skull." *Ibid.* Bessie tried to call the police, but the phone lines were cut. *Price*, 725 So. 2d, at 1011. When she tried to escape and go get help, petitioner and his accomplice ordered her out of the van and attacked her, too. *Ibid.* They also stole checks, cash, and firearms, and even demanded Bessie hand over her wedding bands. *Id.*, at 1011–1012. Bill "died a slow, lingering and painful death." App. in No. 18–8766, at 230a.

Petitioner later confessed, and an Alabama jury convicted him of capital murder and first-degree robbery. *Price*, 725 So. 2d, at 1011–1012. The jury recommended death, which the trial court imposed after finding that the killing was committed during the course of a robbery and that it was particularly heinous, atrocious, or cruel. *Id.*, at 1011, 1034–1035. Petitioner's conviction and sentence were affirmed on direct appeal and his conviction became final in 1999. See *Price*, 725 So. 2d 1003, aff'd, *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U. S. 1133 (1999).

Twenty years later, after multiple unsuccessful attempts to obtain postconviction relief,* petitioner brought an action under 42 U. S. C. § 1983 attacking the constitutionality of the State's lethal injection protocol. Record in *Price* v. *Dunn*, No. 14–cv–472 (SD Ala.), Doc. 1 (Record in No. 14–cv–472). Following our decision in *Glossip* v. *Gross*, 576 U. S. 863, 878 (2015), which confirmed that prisoners challenging a State's method of execution must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain, petitioner amended his complaint to propose an alternative compounded drug. See Record in No. 14–cv–472, Doc. 32, at 19–20. The District Court entered judgment for the State, explaining that petitioner had failed to show that this alternative was readily available. App. in No. 18–8766, at 38a–39a.

While petitioner's appeal was pending before the Eleventh Circuit, Alabama enacted Act 2018–353, which approved nitrogen hypoxia as an alternative to lethal injection. Death-row inmates

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*See *Price* v. *State*, 880 So. 2d 502 (Ala. Crim. App. 2003) (Table); *Price* v. *Allen*, 679 F. 3d 1315 (CA11 2012), cert. denied, 568 U. S. 1212 (2013); *Price* v. *State*, 265 So. 3d 366 (Ala. Crim. App. 2017) (Table).

whose convictions were final before June 1, 2018, had 30 days from that date to elect to be executed via nitrogen hypoxia. Ala. Code § 15–18–82.1(b)(2) (2018). As the Eleventh Circuit noted in affirming the District Court, petitioner did not do so. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 752 Fed. Appx. 701, 703, n. 3 (2018).

According to JUSTICE BREYER, the warden may not have given petitioner an election form until "72 hours" before the June 30 deadline. *Price*, 587 U. S., at 932. That "possib[ility]," *ibid.*, even if true, is irrelevant. As an initial matter, petitioner (like all other individuals) is presumed to be aware of the law and thus the June 30 deadline. Moreover, the Alabama statute neither required special notice to inmates nor mandated the use of a particular form. It merely required that the election be "personally made by the [inmate] in writing and delivered to the warden." Ala. Code § 15–18–82.1(b)(2). Cynthia Stewart, the warden at Holman Correctional Facility, went beyond what the statute required by affirmatively providing death-row inmates at Holman a written election form and an envelope in which they could return it to her. App. in No. 18–8766, at 181a. No fewer than 48 other inmates took advantage of this election. Petitioner did not, even though he was represented throughout this time period by a well-heeled Boston law firm.

It was not until January 27, 2019—two weeks after the State sought to set an execution date and six months after petitioner declined to elect nitrogen hypoxia—that petitioner's counsel asked the warden, for the first time, that petitioner be executed through nitrogen hypoxia instead of lethal injection. The warden explained that she was unable to accept the belated request under state law. Petitioner's counsel then approached the State's counsel, who gave the same response. On February 8, petitioner filed another § 1983 action challenging the constitutionality of Alabama's lethal injection protocol under the Eighth Amendment and proposing nitrogen hypoxia as an alternative. See *Bucklew* v. *Precythe*, 587 U. S. 119, 140 (2019) (requiring a prisoner bringing a § 1983 method of execution claim to "identif[y] a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain"). On March 1, the Alabama Supreme Court set petitioner's execution date for April 11.

On April 5, the District Court denied petitioner's motion for a preliminary injunction to stay his execution pending resolution of his new § 1983 claim. App. in No. 18–8766, at 54a. The court found that nitrogen hypoxia could not be "readily implemented" because although Alabama had legally approved nitrogen hypoxia as a future method of execution, the State was still preparing its execution protocol. *Id.*, at 48a–49a. It also found that the State had "'legitimate' reason[s]" for declining to use nitrogen hypoxia—namely, that petitioner failed to comply with the statutory deadline. *Id.*, at 49a–50a. But the court stated that petitioner was likely to prevail on the question whether execution by nitrogen "would provide a significant reduction in the substantial risk of severe pain" as compared to execution by lethal injection. *Id.*, at 52a. That same day, petitioner filed a motion for reconsideration in which he proposed, for the first time, his own one-page "execution protocol" for nitrogen hypoxia. Record in *Price* v. *Dunn*, No. 19–0057, Doc. 33, p. 4, and n. 2 (Record in No. 19–0057). The court denied the motion because petitioner "still fail[ed] to show that [a nitrogen hypoxia execution protocol] may be readily implemented by the State and that the State does not have [a] legitimate reason for refusing his untimely request." App. in No. 18–8766, at 28a.

On April 10, the Eleventh Circuit affirmed on alternative grounds and denied petitioner's motion to stay his execution. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 920 F. 3d 1317 (2019). The court acknowledged that petitioner "did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution." *Id.*, at 1328. But it concluded that this failure was irrelevant because the State had officially adopted that method of execution. *Id.*, at 1328–1329. Nonetheless, the court held that the District Court erred in concluding that petitioner had met his burden to show that his proposed alternative method would significantly reduce the risk of substantial pain. *Id.*, at 1329–1331. In particular, the court held that the District Court had before it "no reliable evidence" from which to conclude that nitrogen would reduce petitioner's risk of pain in execution, as compared to the lethal injection protocol. *Id.*, at 1330. It noted that in reaching the contrary conclusion, the District Court had relied on a preliminary draft report by East Central University marked "'Do Not Cite.'" *Ibid.*

A few hours before his scheduled execution on April 11, petitioner filed a petition for a writ of certiorari and an accompanying application for a stay of his execution. *Price* v. *Dunn*, O. T. 2018, No. 18–8766 (18A1044). While that petition and application were pending here, and before any mandate issued from the Eleventh Circuit, petitioner filed yet another motion for a preliminary injunction in the District Court. Record in No. 19–0057, Doc. 45. Petitioner attached several affidavits and a final version of the report by the East Central University. The District Court granted a stay approximately two hours before the scheduled execution time of 6 p.m. central time, holding that, in light of the Eleventh Circuit's opinion and the new submissions, petitioner had now demonstrated a likelihood of success on the merits. *Id.*, Doc. 49, at 9–10, 13. The State immediately filed in the Eleventh Circuit a motion to vacate on the ground that the District Court lacked jurisdiction over the case, which was still at the Eleventh Circuit. But the Eleventh Circuit entered its own stay "in light of the jurisdictional questions raised by the parties' motions." 2019 WL 1591475, *1 (Apr. 11, 2019). The State then promptly filed an application to vacate the stays in this Court so that it could carry out the execution as planned before the warrant expired at midnight. *Dunn* v. *Price*, O. T. 2018, No. 18A1053.

II

We granted the State's application to vacate the stays. Consistent with our usual practice in resolving eleventh-hour applications, we did not issue a full opinion explaining our reasoning. Yet our brief order was not issued until hours after the execution warrant had already expired. The Court's delay in issuing the order happens to have the same effect as JUSTICE BREYER's preferred course of action. As he explained in his dissent, he preferred to discuss the matter at Conference the following day, which would require the State to "obtain a new execution warrant, thus delaying the execution." *Price*, 587 U. S., at 932. JUSTICE BREYER asserted that "delay was warranted" in part because the legal issues raised were "substantial." *Id.*, at 932–933. That rationale does not withstand even minimal legal scrutiny.

JUSTICE BREYER framed the issue before the Court as "the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment." *Id.*, at 933. That framing was incorrect. The issue before the Court

was whether the lower courts abused their discretion in staying the execution. For three independent reasons—all raised by the State in its application—the State was entitled to vacatur. The dissent failed to adequately address any of them.

First, the District Court abused its discretion in granting a preliminary injunction because it manifestly lacked jurisdiction over the case, which was pending in the Court of Appeals. It is well settled that "[f]iling a notice of appeal," as petitioner did, "transfers adjudicatory authority from the district court to the court of appeals." *Manrique* v. *United States*, 581 U. S. 116, 120 (2017). "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982) (*per curiam*). Thus, as the Eleventh Circuit has long recognized, "a district court generally is without jurisdiction to rule in a case that is on appeal"—even after the court has rendered a decision—"until the mandate has issued." *Zaklama* v. *Mount Sinai Medical Center*, 906 F. 2d 645, 649 (1990); see also *Kusay* v. *United States*, 62 F. 3d 192, 194 (CA7 1995) (Easterbrook, J.) (until the Court of Appeals issues its mandate, the case remains in the Court of Appeals, and "any action by the district court is a nullity"); 16AA C. Wright, A. Miller, E. Cooper, & C. Struve, Federal Practice and Procedure § 3987, p. 612 (4th ed. 2008) (Wright & Miller). In this case, there was no dispute that the Eleventh Circuit had not yet issued its mandate when petitioner sought a preliminary injunction from the District Court on the same issues pending in the Court of Appeals. The District Court therefore lacked authority to grant the preliminary injunction, and the Court of Appeals abused its discretion in granting a stay instead of vacating the preliminary injunction.

Even if the Eleventh Circuit believed that the jurisdictional issue was difficult, that belief still would not have been a sufficient reason to grant a stay. Under the traditional stay factors, a petitioner is required to make "'a strong showing that he is likely to succeed on the merits.'" *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). It is not enough, as the dissent suggests, that the question be "substantial." *Price*, 587 U. S., at 933. But the question is not even "substantial." The dissent relied only on an out-of-context quote from a treatise to support its position that this

jurisdictional question was difficult. See *ibid.* ("'An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal'" (quoting 16A Wright & Miller § 3949.1, p. 63)). The section from which this statement is plucked, however, reiterates that a notice of appeal "'is an event of jurisdictional significance'" that "'divests the district court of its control over those aspects of the case involved in the appeal.'" *Id.*, at 50 (quoting *Griggs*, *supra* at 58). The exceptions to this rule pertain to matters outside the scope of the appeal or in aid of the Court of Appeals' jurisdiction, such as taxing costs, awarding attorney's fees, or reducing to writing an earlier oral decision without altering its substance. 16A Wright & Miller § 3949.1. Those exceptions were not applicable to petitioner's case. The issue before the Eleventh Circuit was whether petitioner was entitled to a preliminary injunction based on petitioner's claim that he should be executed using nitrogen hypoxia—the exact claim petitioner raised in the District Court. There is no question that the District Court was deprived of jurisdiction to hear the identical claim and award the exact same relief petitioner sought from the Eleventh Circuit. To suggest that this question was difficult or that the Court was "deeply misguided" to follow black-letter law is at best disingenuous. See *Price*, 587 U. S., at 933.

Second, the Eleventh Circuit did not consider how petitioner's unjustified delay in presenting his "new evidence" to the District Court factored into the equitable considerations of a stay. See *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006) (equity weighs against a stay when "'a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay'"). Notably, the Eleventh Circuit did not conclude that petitioner's new affidavits or the "final" version of the report made him likely to succeed on the merits or that those materials were unavailable to him earlier. And more broadly, petitioner delayed in bringing this successive § 1983 action until almost a year after Alabama enacted the legislation authorizing nitrogen hypoxia as an alternative method, six months after he forwent electing it as his preferred method, and weeks after the State sought to set an execution date. There is simply no plausible explanation for the delay other than litigation strategy. A stay

under these circumstances—in which the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place—only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage. See *Bucklew*, 587 U. S., at 150–151; *Dunn* v. *Ray*, 586 U. S. 1138 (2019).

Third, petitioner was unlikely to succeed on the merits of his method-of-execution claim. The three-drug protocol petitioner attacks is the very one we upheld in *Glossip*. And the Eleventh Circuit's April 10 analysis about whether nitrogen hypoxia was "available" and could be "readily implemented" was suspect under our precedent. As we recently held, "the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Bucklew*, *supra*, at 141 (internal quotation marks omitted). Here, petitioner's haphazard, one-page proposed protocol—provided for the first time in his motion for reconsideration less than a week before his scheduled execution date—was, to put it charitably, untested. It contemplated that the execution team could use a "hose fitting" to "fill" a "hood" with nitrogen gas, and then attempt to "[p]lace [the] hood over [the] inmate's head" and "secure" it with an "elastic strap/drawstring to ensure seal." Record in No. 19–0057, Doc. 33, at 4. Even if all the equipment were available on Amazon.com, as he alleged, many details remained unanswered, particularly regarding the actual process of administering the gas and, critically, the safety of the state employees administering it. For instance, what does "a robust yet controlled flow of nitrogen" mean? *Ibid.* How full of nitrogen gas should the hood be before placing it over the inmate's head? How does one prevent nitrogen from seeping out of the hood into the execution chamber before the hood is secured? The need to settle on details like these explains why the State has repeatedly stated that it will not be ready to implement its nitrogen hypoxia method until the end of the summer or later (and why the State requested that inmates elect nitrogen within a set time period). Petitioner's proposal certainly fell short of showing a safe alternative that could be "readily implemented" by Alabama, particularly in the week before his scheduled execution.

The facts of this case cast serious doubt on the Eleventh Circuit's suggestion that the State bears a heavy burden of showing that a method of execution is unavailable as soon as its legislature

authorizes it to employ a new method. That kind of burden-shifting framework would perversely incentivize States to delay or even refrain from approving even the most humane methods of execution.

As for petition No. 18–8766—the challenge to the original order denying petitioner a preliminary injunction—and its accompanying stay application, four Justices noted, without explanation, that they would have stayed the execution to allow consideration of this petition as well. It is unclear what legal issue they believed warranted our review. Petitioner did not identify a lower court conflict on an important question of law—certainly not one passed on by the Eleventh Circuit. Instead, petitioner asked the Court to engage in mere error correction about the scope of evidence that the District Court may consider in deciding whether to grant a preliminary-injunction motion, and about the scope of appellate review. The dissenting Justices made no attempt to explain how those issues warranted our review.

For these reasons, our decisions to vacate the stays entered by the lower courts and decline to grant a stay were undoubtedly correct.

III

Given petitioner's weak position under the law, it is difficult to see his litigation strategy as anything other than an attempt to delay his execution. Yet four Members of the Court would have countenanced his tactics without a shred of legal support. Indeed, JUSTICE BREYER's six-page dissent musters only one, non-precedential case citation for a proposition of law. See *Price*, 587 U. S., at 933 (citing *Bowersox* v. *Williams*, 517 U. S. 345, 347 (1996) (GINSBURG, J., dissenting)). To be sure, the dissent gestures at a compressed timeframe, as if to suggest the legal issues were too complicated to allow reasoned consideration before the State's execution warrant expired. But as explained above, the legal issues were remarkably straightforward. And any blame for decisions "in the middle of the night," 587 U. S., at 933, falls on petitioner, who filed the new preliminary injunction-motion that resulted in the stays just *five hours* before his execution.

Insofar as JUSTICE BREYER was serious in suggesting that the Court simply "take no action" on the State's emergency motion to vacate until the following day, *id.*, at 932, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.

This approach would only further incentivize prisoners to file dilatory challenges to their executions by rewarding them with *de facto* stays of execution while requiring timely petitioners to meet the ordinary legal standards for a stay. JUSTICE BREYER's approach would also have significant real-world consequences. It would hamper the States' ability to carry out lawful judgments, while simultaneously flooding the courts with last-minute, meritless filings. And this practice would harm victims. Take Bessie Lynn, Bill's widow who witnessed his horrific slaying and was herself attacked by petitioner. She waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure. See Alabama, Running Out of Time, Halts Execution of Sword and Dagger Killer of Pastor, CBS News (Apr. 12, 2019), https://www.cbsnews.com/news/alabama-sword-dagger-killer-christopher-lee-price-execution-halted-pastor-bill-lynn/ (all Internet materials as last visited on May 9, 2019); Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late (Apr. 11 2019), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html. This "injustice, in the form of justice delayed," *ibid.*, would become the norm if the Court were to regularly delay resolution of emergency applications.

Of course, the dissent got its way by default. Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously. The Court instead failed to issue an order before the expiration of the warrant at midnight, forcing the State to "cal[l] off" the execution. *Price*, 587 U. S., at 932. To the extent the Court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-minute stay applications the norm instead of the exception. See *Bucklew*, 587 U. S., at 150.

Perhaps those who oppose capital punishment will celebrate the last-minute cancellation of lawful executions. But "[t]he Constitution allows capital punishment," *id.*, at 129, and by enabling the delay of petitioner's execution on April 11, we worked a "miscarriage of justice" on the State of Alabama, Bessie Lynn, and her

family. Governor Ivey Releases Statement on Stay of Execution for Death Row Inmate Christopher Lee Price (Apr. 12, 2019), https://governor.alabama.gov/statements/governor-ivey-releases-statement-on-stay-of-execution-for-death-row-inmate-christopher-lee-price.

No. 18–8300. EVERETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 258 So. 3d 1199.

JUSTICE SOTOMAYOR, dissenting.

I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. 1004, 1011 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

No. 18–8332. ABDUR'RAHMAN ET AL. *v.* PARKER, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 558 S. W. 3d 606.

JUSTICE SOTOMAYOR, dissenting.

I have already explained my opposition to the "perverse requirement that inmates offer alternative methods for their own executions." *McGehee* v. *Hutchinson*, 581 U. S. 933, 935 (2017) (opinion dissenting from denial of application for stay and denial of certiorari); see generally *Glossip* v. *Gross*, 576 U. S. 863, 969–973 (2015). I have likewise addressed the added perversity of the secrecy laws that Tennessee imposes on death-row prisoners seeking to meet this requirement. See *Zagorski* v. *Parker*, 586 U. S. 938, 941–942 (2018) (opinion dissenting from denial of application for stay and denial of certiorari) (discussing prisoners' inability to depose those with firsthand knowledge of the State's efforts to procure an alternative drug or to learn which sellers the State had contacted).

The Court has recently reaffirmed (and extended) the alternative-method requirement. See *Bucklew* v. *Precythe*, 587 U. S. 119, 134–140 (2019). And today, the Court again ignores the further injustice of state secrecy laws denying death-row prisoners access to potentially crucial information for meeting that requirement. Because I continue to believe that the alternative-method requirement is fundamentally wrong—and particularly so when compounded by secrecy laws like Tennessee's—I dissent.

No. 18–8396. WEIDRICK *v.* TRUMP, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari before judgment denied.

No. 18–8738. Machado-Erazo et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Justice Kavanaugh took no part in the consideration or decision of this petition. Reported below: 901 F. 3d 326.

Rehearing Denied

No. 18–793. Brewster *v.* United States, 586 U. S. 1127;

No. 18–798. Blauch *v.* Colorado, 586 U. S. 1203;

No. 18–859. Peel *v.* H. E. Butt Grocery Co., 586 U. S. 1223;

No. 18–869. Lecuona *v.* Lecuona, 586 U. S. 1223;

No. 18–917. Bent *v.* Talkin, Marshal, Supreme Court of the United States, et al., 586 U. S. 1224;

No. 18–5453. Elliott *v.* Palmer, Warden, 586 U. S. 923;

No. 18–5818. Kilpatrick *v.* Kondaveeti, 586 U. S. 989;

No. 18–5819. Kilpatrick *v.* Fields, 586 U. S. 989;

No. 18–5833. Kilpatrick *v.* Volterra, 586 U. S. 989;

No. 18–5834. Kilpatrick *v.* Robinson, 586 U. S. 989;

No. 18–5877. Stoltzfoos *v.* Wetzel, Secretary, Pennsylvania Department of Corrections, et al., 586 U. S. 990;

No. 18–5906. Kilpatrick *v.* Weiss, 586 U. S. 1000;

No. 18–5907. Kilpatrick *v.* Elia, Commissioner, New York State Department of Education, 586 U. S. 1000;

No. 18–5908. Kilpatrick *v.* Zucker, Commissioner, New York State Department of Health, Office of Professional Medical Conduct; and Kilpatrick *v.* Dreslin, Executive Deputy Commissioner, New York State Department of Health, Office of Professional Medical Conduct, 586 U. S. 1000;

No. 18–6794. Bradshaw *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1153;

No. 18–7016. Washington *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 586 U. S. 1158;

No. 18–7051. Taylor *v.* CVS Caremark Corp., 586 U. S. 1159;

No. 18–7063. In re Dread, 586 U. S. 1220;

No. 18–7153. J. E., aka J. E. C. *v.* Oregon Department of Human Services, 586 U. S. 1163;

No. 18–7191. Pendergraft et al. *v.* Network of Neighbors, Inc., 586 U. S. 1165;

No. 18–7213. DIXIT *v.* BRASHER, JUDGE, SUPERIOR COURT OF GEORGIA, ATLANTA JUDICIAL CIRCUIT, 586 U. S. 1209;

No. 18–7236. STOUTAMIRE *v.* LA ROSE, WARDEN, 586 U. S. 1166;

No. 18–7325. ZINKAND *v.* HERNANDEZ, SUPERINTENDENT, AVERY-MITCHELL CORRECTIONAL INSTITUTION, ET AL., 586 U. S. 1169;

No. 18–7486. MONTE *v.* VANCE ET AL., 587 U. S. 927;

No. 18–7539. ROSSI *v.* THE CROWN, 586 U. S. 1251;

No. 18–7580. NEAL *v.* WAYNE COUNTY TREASURER, 586 U. S. 1252;

No. 18–7601. CHHIM *v.* GOLDEN NUGGETT LAKE CHARLES, L. L. C., 586 U. S. 1234;

No. 18–7755. GARCIA *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS, 586 U. S. 1236;

No. 18–7756. CHAMBERS *v.* SARCONE, 586 U. S. 1252;

No. 18–7790. SIMPSON *v.* COOPER, JUDGE, COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO, 586 U. S. 1237;

No. 18–7824. KILLINGBECK *v.* UNITED STATES, 586 U. S. 1237;

No. 18–7859. MONSEGUE *v.* UNITED STATES, 586 U. S. 1238;

No. 18–7895. ANDERSON *v.* MICHIGAN, 586 U. S. 1253; and

No. 18–8110. IN RE ANDERSON, 586 U. S. 1220. Petitions for rehearing denied.

MAY 14, 2019

Miscellaneous Order

No. 18–9031 (18A1120). IN RE SAMRA. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 18–9033 (18A1121). SAMRA *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 17, 2019

Dismissal Under Rule 46

No. 16–317. DEUTSCHE BANK TRUST COMPANY AMERICAS ET AL. *v.* ROBERT R. MCCORMICK FOUNDATION ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.

MAY 20, 2019

Certiorari Granted—Vacated and Remanded

No. 17–1348. NEVADA DEPARTMENT OF WILDLIFE *v.* SMITH. Ct. App. Cal., 3d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230 (2019).

No. 18–7096. SANTOS *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court grants, vacates, and remands in this case, apparently because it harbors doubt that petitioner's 1987 conviction under Florida law for battery on a law enforcement officer qualifies as a "violent felony" as defined by the Armed Career Criminal Act's elements clause, which covers a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U. S. C. § 924(e)(2)(B)(i). I share no such doubt: As the case comes to us, it is undisputed that petitioner was convicted of battery on a law enforcement officer after he "'struck [an] officer in the face using a closed fist.'" App. to Pet. for Cert. A–1, p. 11. See Fla. Stat. § 784.03(1)(a) (2018) (a person commits battery when he "[a]ctually and intentionally touches or strikes another person against the will of the other," among other things). Because the record makes "perfectly clear" that petitioner "was convicted of battery on a law enforcement officer by striking, which involves the use of physical force against the person of another," App. to Pet. for Cert. A–1, at 11, I would count the conviction as a "violent felony" under the elements clause and would therefore deny the petition. *Mathis* v. *United States*, 579 U. S. 500, 537 (2016) (ALITO, J., dissenting).

Miscellaneous Orders

No. 18A1062 (18–1164). IN RE GIORDANI. Application for stay, addressed to JUSTICE KAVANAUGH and referred to the Court, denied.

No. 18M154. Brewington *v.* Oklahoma; and

No. 18M156. Bowles *v.* Florida Department of Corrections et al. Motions for leave to proceed as veterans denied.

No. 18M155. Moody *v.* Baltimore City Department of Social Services;

No. 18M157. Pidanick *v.* Maddaloni et al.;

No. 18M158. Robinson *v.* Hall;

No. 18M159. Jackson *v.* Ferguson, Superintendent, State Correctional Institution at Phoenix, et al.; and

No. 18M161. Crystal M. *v.* Rhode Island Department of Children, Youth and Families. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M160. Moore et al. *v.* Pompeo, Secretary of State, et al. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 18–725. Barton *v.* Barr, Attorney General. C. A. 11th Cir. [Certiorari granted, 587 U. S. 960.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–8407. Savoy *v.* Burns et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 10, 2019, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8967. In re Brinson. Petition for writ of habeas corpus denied.

No. 18–9035. In re Avery. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 18–1196. In re Kinney et ux. Petition for writ of mandamus denied.

Certiorari Granted

No. 18–938. Ritzen Group, Inc. *v.* Jackson Masonry, LLC. C. A. 6th Cir. Certiorari granted. Reported below: 906 F. 3d 494.

Certiorari Denied

No. 18–672. City of Newport Beach, California, et al. *v.* Vos et al. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 3d 1024.

No. 18–733. 1A Auto, Inc., et al. *v.* Sullivan, Director, Massachusetts Office of Campaign and Political Finance. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 480 Mass. 423, 105 N. E. 3d 1175.

No. 18–810. Maguire et al. *v.* Edrei et al. C. A. 2d Cir. Certiorari denied. Reported below: 892 F. 3d 525.

No. 18–827. Shabo *v.* Barr, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 3d 237.

No. 18–853. United Parcel Service, Inc. *v.* Postal Regulatory Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 890 F. 3d 1053.

No. 18–873. Casino Pauma *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 3d 1066.

No. 18–941. Davis, Chapter 13 Trustee *v.* Tyson Prepared Foods, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 163.

No. 18–1010. Hagan et al. *v.* Khoja. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 988.

No. 18–1049. Hoffman et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 523.

No. 18–1056. Johanknecht, Sheriff, King County, Washington *v.* Moore et al. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 1094.

No. 18–1057. von Saher *v.* Norton Simon Museum of Art at Pasadena et al. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 3d 1141.

No. 18–1061. GRAVISS *v.* DEPARTMENT OF DEFENSE, DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS. C. A. Fed. Cir. Certiorari denied. Reported below: 898 F. 3d 1222.

No. 18–1173. I. B. ET AL. *v.* WOODARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 3d 1278.

No. 18–1187. MIORELLI ET AL. *v.* ROYAL CARIBBEAN CRUISE LINES, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 871.

No. 18–1193. MOON *v.* COUNTY OF EL PASO, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 3d 352.

No. 18–1200. FLUID DYNAMICS, LLC *v.* JEA, FKA JACKSONVILLE ELECTRIC AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 924.

No. 18–1202. MONTALVO *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Knox County. Certiorari denied. Reported below: 2018-Ohio-3142.

No. 18–1205. LEISER ET AL. *v.* LEMON, CHIEF JUSTICE, SUPREME COURT OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 841.

No. 18–1208. TURNER *v.* MIDDLE RIO GRANDE CONSERVANCY DISTRICT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 715.

No. 18–1209. BONACCI *v.* TRANSPORTATION SECURITY ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 909 F. 3d 1155.

No. 18–1215. KANOFSKY *v.* CITY OF BETHLEHEM, PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 175 A. 3d 467.

No. 18–1221. HUNT *v.* GOODRICH ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1226. CLINTON COUNTY CHILDREN AND YOUTH SERVICES *v.* A. A. R., NATURAL MOTHER, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 650 Pa. 266, 199 A. 3d 868.

No. 18–1227. KANOFSKY *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 174 A. 3d 1209.

No. 18–1228. BRUNDO *v.* CHRIST THE KING CHURCH OF OMAHA. C. A. 8th Cir. Certiorari denied.

No. 18–1232. ZEINY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1237. GOUNDER *v.* GRIPPA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1040, 113 N. E. 3d 453.

No. 18–1239. HAVASUPAI TRIBE *v.* PROVENCIO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 1155.

No. 18–1241. JACKSON *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-3492.

No. 18–1243. MONTOYA-AGUILAR *v.* BARR, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 741 Fed. Appx. 129.

No. 18–1244. PICKUP ET AL. *v.* NEWSOM, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1275. XIAOHUA HUANG *v.* HUAWEI TECHNOLOGIES CO., LTD. C. A. Fed. Cir. Certiorari denied. Reported below: 735 Fed. Appx. 715.

No. 18–1294. LYNCH ET UX. *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 920.

No. 18–1304. ASHBAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 425.

No. 18–1313. MORAN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 18–1321. ATES *v.* GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–6907. KULICK *v.* LEISURE VILLAGE ASSN., INC. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 459.

No. 18–7414. FREENEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 198.

No. 18–7444. TALADA *v.* COLE, SHERIFF, STEUBEN COUNTY JAIL. C. A. 2d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 73.

No. 18–7471. HENRY, AKA WEIDA ZHENG, AKA RUSSEL, AKA WILSON, AKA ZHONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 3d 589.

No. 18–7530. UDOH ET VIR *v.* MINNESOTA DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 906.

No. 18–8408. MCCRAY *v.* DRISCOLL ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 719 and 725.

No. 18–8418. WADDLETON *v.* RODRIGUEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 248.

No. 18–8450. CARDER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 18–8454. SCOTT *v.* GOODWIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8457. SMITH *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 18–8461. WILLIAMSON *v.* BOYER, JUDGE, CIRCUIT COURT OF FLORIDA, FOURTH JUDICIAL CIRCUIT. C. A. 11th Cir. Certiorari denied.

No. 18–8462. TRUESDALE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8465. KUNSMAN *v.* WALL. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 938.

No. 18–8478. HALOUSEK *v.* YUBA COUNTY ANIMAL CARE SERVICES. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–8480. FUNK *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 18–8483. AGOSTO *v.* MILLER, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8484. BAILEY *v.* FOXWELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 208.

No. 18–8491. FLOWERS *v.* URIARTE ET AL. Sup. Ct. Fla. Certiorari denied.

No. 18–8502. ALEXANDER *v.* REWERTS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8516. DRUMMOND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 1456, 2018-Ohio-5085, 113 N. E. 3d 562.

No. 18–8527. RIVERA *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8538. SPEARMAN *v.* PARSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8542. S. N. ET AL. *v.* SAN DIEGO HEALTH AND HUMAN SERVICES AGENCY ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 18–8544. MYLES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 260 So. 3d 266.

No. 18–8548. BELSER *v.* WOODS ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8553. HICKS *v.* DALLAS COUNTY COMMUNITY COLLEGES. C. A. 5th Cir. Certiorari denied.

No. 18–8564. HEATH *v.* BRAMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8638. BENNEFIELD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 304 Ga. 491, 819 S. E. 2d 10.

No. 18–8646. HAMPTON *v.* MCLAUGHLIN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–8655. HOLLOWAY *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 18–8759. JUAREZ-AQUINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 337.

No. 18–8761. JONES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 18–8763. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 3d 1026.

No. 18–8777. GOULD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 371 N. C. 474, 818 S. E. 2d 290.

No. 18–8792. CHEERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 272.

No. 18–8798. LYNCH *v.* MILES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8810. MARTINEZ-NEGRETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 967.

No. 18–8814. PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 258.

No. 18–8821. SEALED APPELLANT *v.* SEALED APPELLEE. C. A. 5th Cir. Certiorari denied.

No. 18–8825. HEDSPETH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 236.

No. 18–8830. CESAR DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 Fed. Appx. 318.

No. 18–8831. CONTRERAS VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8833. DEASE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8834. AMAYA-VASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 78.

No. 18–8842. NIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 995.

No. 18–8843. MILNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 739.

No. 18–8852. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8856. ESTUPINAN MICOLTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8865. LOPEZ-AGUILAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 3d 1327.

No. 18–8868. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8885. ROMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 969.

No. 18–8891. CRIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8893. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 678.

No. 18–8894. MAYFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 956.

No. 18–8898. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 476.

No. 18–8900. GARCIA HERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 539.

No. 18–8902. KLOSZEWSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 12.

No. 18–8920. GLASSCOCK *v.* TAYLOR. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 566.

No. 18–8975. SMILEY *v.* MUNIZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 341.

No. 18–460. DANIEL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE GINSBURG would grant the petition for writ of certiorari. Reported below: 889 F. 3d 978.

JUSTICE THOMAS, dissenting.

Petitioner Walter Daniel filed this tort suit against the United States after his wife, Navy Lieutenant Rebekah Daniel, died at a naval hospital due to a complication following childbirth. The District Court determined that the suit was barred by *Feres* v. *United States*, 340 U. S. 135 (1950), which held that military personnel injured by the negligence of a federal employee cannot

sue the United States under the Federal Tort Claims Act. The Court of Appeals "regretfully" reached the same conclusion and affirmed. 889 F. 3d 978, 980 (CA9 2018).

Petitioner now asks the Court to reconsider *Feres*. I have explained before that "'*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.'" *Lanus* v. *United States*, 570 U. S. 932, 933 (2013) (opinion dissenting from denial of certiorari) (quoting *United States* v. *Johnson*, 481 U. S. 681, 700 (1987) (Scalia, J., dissenting)). I write again to point out the unintended consequences of this Court's refusal to revisit *Feres*.

Earlier this Term, in *Air & Liquid Systems Corp.* v. *DeVries*, 586 U. S. 446 (2019), we confronted the case of two veterans who alleged that their exposure to asbestos caused them to develop cancer. *Id.*, at 450. Both veterans served in the U. S. Navy on ships outfitted with equipment that used asbestos insulation or parts. *Id.*, at 449. The manufacturers of that equipment delivered much of it to the Navy in "bare-metal" condition, *i. e.*, without asbestos, meaning that the Navy added the asbestos to the equipment after delivery. *Id.*, at 451. Neither veteran was exposed to any asbestos sold or delivered by the equipment manufacturers, as opposed to asbestos added by the Navy. See *id.*, at 450, and n. 1. Yet because the Navy was likely immune from suit under *Feres*, the veterans sued the manufacturers. 586 U. S., at 450. This Court then twisted traditional tort principles to afford them the possibility of relief. *Id.*, at 458–460 (GORSUCH, J., dissenting).

Such unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*. Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits "would (insofar as we are permitted to inquire into such things) be just." *Johnson*, *supra*, at 703 (Scalia, J., dissenting). But it did not. Accordingly, I respectfully dissent from the Court's decision to deny this petition.

No. 18–756. GITTERE, WARDEN, ET AL. *v.* ECHAVARRIA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 896 F. 3d 1118.

No. 18–981. JONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 903.

JUSTICE THOMAS, dissenting.

I dissent for the reasons set out in *Daniel* v. *United States*, 587 U. S. 1020 (2019) (THOMAS, J., dissenting from denial of certiorari).

No. 18–1181. SHOOP, WARDEN *v.* ISSA. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 904 F. 3d 446.

No. 18–1212. PAPPAS *v.* LORINTZ, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPREME COURT JUDGE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 18–8822. REYNOLDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 740 Fed. Appx. 3.

Rehearing Denied

No. 18–930. BRANDON *v.* BRANDON, 586 U. S. 1248;
No. 18–1025. LEON *v.* NEW YORK CITY DEPARTMENT OF EDUCATION ET AL., 586 U. S. 1248;
No. 18–1031. LITTLE *v.* CSRA ET AL., 587 U. S. 938;
No. 18–1103. EVANS *v.* UNITED STATES, 587 U. S. 920;
No. 18–7322. YERTON *v.* BRYANT, WARDEN, 586 U. S. 1229;
No. 18–7564. HOWARD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 586 U. S. 1252;
No. 18–7591. KYEI *v.* SWIFT ET AL., 587 U. S. 921;
No. 18–7667. TAYLOR *v.* VANNOY, WARDEN, 586 U. S. 1202;
No. 18–7690. BELL *v.* LEIGH ET AL., 587 U. S. 923;
No. 18–7731. CIAVONE *v.* HORTON, WARDEN, 587 U. S. 924;
No. 18–7794. KROTT *v.* MAY, WARDEN, ET AL., 586 U. S. 1213;
No. 18–7876. CALLAHAN *v.* UNITED STATES, 586 U. S. 1253;
No. 18–8024. RODRIGUEZ *v.* NEW JERSEY, 587 U. S. 962;
No. 18–8038. BURKE *v.* UNITED STATES, 586 U. S. 1256;
No. 18–8062. TAYLOR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, 587 U. S. 947;
No. 18–8112. BROWN *v.* UNITED STATES, 586 U. S. 1258;

No. 18–8246. In re Jackson, 586 U. S. 1247; and

No. 18–8315. Drevaleva *v.* United States District Court for the Northern District of California, 587 U. S. 951. Petitions for rehearing denied.

May 21, 2019

Dismissal Under Rule 46

No. 18–1246. BNSF Railway Co. et al. *v.* Montana Eighth Judicial District Court, Cascade County, et al. Sup. Ct. Mont. Certiorari dismissed under this Court's Rule 46. Reported below: 395 Mont. 524, 437 P. 3d 115.

May 23, 2019

Certiorari Denied

No. 18–9356 (18A1200). Long *v.* Inch, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

No. 18–9358 (18A1202). Long *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 271 So. 3d 938.

No. 18–9396 (18A1216). Long *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 924 F. 3d 1171.

May 24, 2019

Miscellaneous Orders

No. 18A1165. Householder et al. *v.* Ohio A. Philip Randolph Institute et al. Application for stay, presented to Justice Sotomayor, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Southern District of Ohio, case No. 1:18–CV–00357, entered May 3, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1166. CHABOT ET AL. *v.* OHIO A. PHILIP RANDOLPH INSTITUTE ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Southern District of Ohio, case No. 1:18–CV–00357, entered May 3, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1170. MICHIGAN SENATE ET AL. *v.* LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Eastern District of Michigan, case No. 2:17–CV–14148, entered April 25, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1171. CHATFIELD ET AL. *v.* LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Eastern District of Michigan, case No. 2:17–CV–14148, entered April 25, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.