*PRELIMINARY PRINT*

VOLUME 589 U. S. - PART 2

PAGES 154–432; 1248–1321

# OFFICIAL REPORTS

OF

# THE SUPREME COURT

FEBRUARY 26 THROUGH APRIL 19, 2020

END OF VOLUME

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS



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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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# 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.

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(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 list 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.

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**CASES ADJUDGED**

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2019

Syllabus

# SHULAR *v.* UNITED STATES

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

No. 18–6662. Argued January 21, 2020—Decided February 26, 2020

The Armed Career Criminal Act (ACCA) mandates a 15-year minimum sentence for a defendant convicted of being a felon in possession of a firearm who has at least three convictions for "serious drug offense[s]." 18 U. S. C. § 924(e)(1). A state offense ranks as a "serious drug offense" only if it "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." § 924(e)(2)(A)(ii).

To determine whether an offender's prior convictions qualify for ACCA enhancement, this Court has used a "categorical approach," looking "only to the statutory definitions of the prior offenses." *Taylor* v. *United States*, 495 U. S. 575, 600. Under some statutes, a court employing a categorical approach must come up with a "generic" version of a crime—that is, the elements of the offense as commonly understood. The court then determines whether the elements of the offense of conviction match those of the generic crime. Other statutes, which ask the court to determine whether the conviction meets some other criterion, require no such generic-offense analysis.

Shular pleaded guilty to being a felon in possession of a firearm and received a 15-year sentence, the mandatory minimum under ACCA. In imposing this sentence, the District Court held that Shular's six prior cocaine-related convictions under Florida law qualified as "serious drug offense[s]" triggering ACCA enhancement. The Eleventh Circuit affirmed, concluding that § 924(e)(2)(A)(ii)'s "serious drug offense" definition does not require a comparison to a generic offense.

*Held*: Section 924(e)(2)(A)(ii)'s "serious drug offense" definition requires only that the state offense involve the conduct specified in the statute; it does not require that the state offense match certain generic offenses. Pp. 160–165.

(a) The parties agree that § 924(e)(2)(A)(ii) requires a categorical approach. They differ, however, on what comparison the statute requires. In the Government's view, § 924(e)(2)(A)(ii) identifies conduct a court should compare directly against the state crime's elements. In Shular's view, § 924(e)(2)(A)(ii) identifies generic offenses whose elements a court must first expound, then compare against the state crime's elements. Pp. 160–161.

Syllabus

(b) The statutory text and context show that § 924(e)(2)(A)(ii) refers to conduct, not offenses. In two respects, § 924(e)(2)(A)(ii) contrasts with neighboring § 924(e)(2)(B)(ii), which refers to a crime that "is burglary, arson, or extortion" and calls for the generic-offense analysis that Shular urges. First, the terms in § 924(e)(2)(A)(ii)—"manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"—can be used to describe conduct. Unlike "burglary," "arson," and "extortion," those terms do not unambiguously name offenses. Second, by speaking of activities a state-law drug offense "involv[es]," § 924(e)(2)(A)(ii) suggests that the descriptive terms immediately following the word "involving" identify conduct. To refer to offenses, it would have been far more natural for the drafter to follow § 924(e)(2)(B)(ii) in using "is." Pp. 161–162.

(c) Shular argues that Congress meant to capture the drug offenses generally existing in state laws at the time of § 924(e)(2)(A)(ii)'s enactment. But he admits that those state laws lacked common nomenclature. The evident solution was for Congress to identify offenses by the conduct involved, not by the name of the offenses. Shular offers no persuasive explanation for why Congress would have chosen "involving" over "is" to refer to offenses. Nor do the other ACCA provisions on which Shular relies shed light on whether § 924(e)(2)(A)(ii) refers to conduct or offenses. Pp. 162–164.

(d) Rejecting a generic-offense approach, Shular contends, would subject defendants to ACCA enhancement based on outlier state laws. He emphasizes that the Florida drug offenses of which he was convicted do not require, as an element, knowledge of the illicit nature of the controlled substance. But Shular overstates the extent to which Florida law is idiosyncratic, for if a defendant asserts that he was unaware of the substance's illicit nature, the jury must find knowledge beyond a reasonable doubt. In any event, Shular's interpretation is scarcely the only one that promotes consistency. Congress intended consistent application of ACCA to all offenders who engaged—according to the elements of their prior convictions—in certain conduct. Pp. 164–165.

(e) The rule of lenity has no application here, for after consulting traditional canons of interpretation there remains no ambiguity for the rule of lenity to resolve. P. 165.

736 Fed. Appx. 876, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion, *post,* p. 166.

*Richard M. Summa* argued the cause for petitioner. With him on the briefs were *Randolph P. Murrell*,

*Jeffrey T. Green*, *David W. McAloon*, and *Susan E. Provenzano.*

*Jonathan C. Bond* argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *David M. Lieberman.**

JUSTICE GINSBURG delivered the opinion of the Court.

The Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e), mandates a 15-year minimum sentence of imprisonment for certain defendants with prior convictions for a "serious drug offense." A state offense ranks as a "serious drug offense" only if it "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." § 924(e)(2)(A)(ii). This case concerns the methodology courts use to apply that definition.

While the parties agree that a court should look to the state offense's elements, they disagree over what the court should measure those elements against. In the Government's view, the court should ask whether those elements involve the conduct identified in § 924(e)(2)(A)(ii)—namely, "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Petitioner Eddie Lee Shular, however, contends that the terms employed in the statute identify not conduct, but offenses. In his view, those terms are shorthand for the elements of the offenses as commonly understood. According to Shular, the court must first identify the elements of the "generic" offense, then ask whether the elements of the state offense match those of the generic crime.

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*Briefs of *amici curiae* urging reversal were filed for the American Immigration Lawyers Association et al. by *Sui Chung*, *Ira J. Kurzban*, and *Michael S. Vastine*; for FAMM by *David Debold*, *Avi Weitzman*, *Lee R. Crain*, *Mary Price*, and *Peter Goldberger*; and for the National Association of Criminal Defense Lawyers by *Caitlin J. Halligan* and *Jonathan D. Hacker.*

Under the approach he advances, Shular argues, his sentence is not subject to ACCA enhancement. The generic offenses named in § 924(e)(2)(A)(ii), as Shular understands them, include a *mens rea* element of knowledge that the substance is illicit. He emphasizes that his prior convictions were for state offenses that do not make knowledge of the substance's illegality an element of the offense; the state offenses, he therefore maintains, do not match the generic offenses in § 924(e)(2)(A)(ii).

The question presented: Does § 924(e)(2)(A)(ii)'s "serious drug offense" definition call for a comparison to a generic offense? We hold it does not. The "serious drug offense" definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses.

## I

Ordinarily, a defendant convicted of being a felon in possession of a firearm, in violation of § 922(g)(1), faces a maximum sentence of ten years. § 924(a)(2). If the offender's prior criminal record includes at least three convictions for "serious drug offense[s]" or "violent felon[ies]," however, ACCA mandates a minimum sentence of 15 years. § 924(e)(1).

To determine whether an offender's prior convictions qualify for ACCA enhancement, we have used a "categorical approach," under which we look "only to the statutory definitions of the prior offenses." *Taylor* v. *United States*, 495 U. S. 575, 600 (1990). Under this approach, we consider neither "the particular facts underlying the prior convictions" nor "the label a State assigns to [the] crime[s]." *Mathis* v. *United States*, 579 U. S. 500, 509–510 (2016) (internal quotation marks and alterations omitted). So, for example, to apply ACCA's provision defining "violent felony" to include "burglary," § 924(e)(2)(B)(ii), we ask only whether the elements of the prior conviction constitute burglary; we do not ask what

the person did or whether the offense of conviction was named "burglary."

Under some statutes, using a categorical approach requires the court to come up with a "generic" version of a crime—that is, the elements of "the offense as commonly understood," *id.*, at 503.[1] We have required that step when the statute refers generally to an offense without specifying its elements. In that situation, the court must define the offense so that it can compare elements, not labels. For example, in *Taylor*, confronted with ACCA's unadorned reference to "burglary," we identified the elements of "generic burglary" based on the "sense in which the term is now used in the criminal codes of most States." 495 U. S., at 598–599; § 924(e)(2)(B)(ii). We then inquired whether the elements of the offense of conviction matched those of the generic crime. *Id.*, at 602. See also, *e. g.*, *Esquivel-Quintana* v. *Sessions*, 581 U. S. 385, 390 (2017) ("generic federal definition of sexual abuse of a minor" for purposes of 8 U. S. C. § 1101(a)(43)(A)).

In contrast, other statutes calling for a categorical approach ask the court to determine not whether the prior conviction was for a certain offense, but whether the conviction meets some other criterion. For example, in *Kawashima* v. *Holder*, 565 U. S. 478 (2012), we applied a categorical approach to a statute assigning immigration consequences to prior convictions for "an offense that . . . involves fraud or deceit" with a loss exceeding $10,000. § 1101(a)(43)(M)(i). The quoted language, we held, "mean[s] offenses with elements that necessarily entail fraudulent or deceitful *conduct*." *Id.*, at 484 (emphasis added). Consequently, no identification of generic-offense elements was necessary; we simply asked whether the prior convictions before us met

[1] We have also used the term "generic crime" to mean the crime "in general" as opposed to "the specific acts in which an offender engaged on a specific occasion." *Nijhawan* v. *Holder*, 557 U. S. 29, 33–34 (2009). That is not the sense in which we use "generic" in this opinion.

that measure. *Id.*, at 483–485. See also, *e. g.*, *Stokeling* v. *United States*, 586 U. S. 73, 85–86 (2019) (determining whether an offense "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)).

This case invites us to decide which of the two categorical methodologies just described applies in determining whether a state offense is a "serious drug offense" under ACCA. ACCA defines that term to include:

> "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U. S. C. [§] 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U. S. C. § 924(e)(2)(A)(ii).

## II

Shular pleaded guilty in the United States District Court for the Northern District of Florida to possessing a firearm after having been convicted of a felony, in violation of § 922(g)(1), and possessing with intent to distribute cocaine and cocaine base, in violation of 21 U. S. C. § 841(a)(1) and (b)(1)(C). The District Court sentenced Shular to imprisonment for 15 years, the mandatory minimum under ACCA, to be followed by three years of supervised release.

In imposing that enhanced sentence, the District Court took account of Shular's prior convictions under Florida law. In 2012, Shular pleaded guilty to five counts of selling cocaine and one count of possessing cocaine with intent to sell, all in violation of Fla. Stat. § 893.13(1)(a). That law makes it a crime to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." *Ibid.* For those offenses, "knowledge of the illicit nature of a controlled substance is not an element," but lack

of such knowledge "is an affirmative defense." § 893.101(2). Shular's six convictions under that Florida law, the District Court concluded, qualified as "serious drug offense[s]" triggering ACCA enhancement under 18 U. S. C. § 924(e)(2)(A)(ii).

The United States Court of Appeals for the Eleventh Circuit affirmed the sentence. 736 Fed. Appx. 876 (2018). It relied on Circuit precedent holding that a court applying § 924(e)(2)(A)(ii) "need not search for the elements of 'generic' definitions" of any offense, because the statute "require[s] only that the predicate offense 'involv[e]' . . . certain activities." *United States* v. *Smith*, 775 F. 3d 1262, 1267 (2014).

Courts of Appeals have divided on whether § 924(e)(2)(A)(ii)'s "serious drug offense" definition requires a comparison to a generic offense. Compare, *e. g.*, *id.*, at 1267 (no generic-offense comparison), with *United States* v. *Franklin*, 904 F. 3d 793, 800 (CA9 2018) (court must define a generic crime). We granted certiorari to resolve this conflict, 588 U. S. 920 (2019), and now affirm the Eleventh Circuit's judgment.

## III

### A

The parties here agree that § 924(e)(2)(A)(ii) requires a categorical approach. A court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction.

They differ, however, on what comparison § 924(e)(2)(A)(ii) requires. Shular would require "a generic-offense matching exercise": A court should define the elements of the generic *offenses* identified in § 924(e)(2)(A)(ii), then compare those elements to the elements of the state offense. Brief for Petitioner 13–14. In the Government's view, a court should apply "the *Kawashima* categorical approach": It should ask whether the state offense's elements "necessarily entail one

of the types of *conduct*" identified in § 924(e)(2)(A)(ii). Brief for United States 13, 20 (emphasis added).

This methodological dispute is occasioned by an interpretive disagreement over § 924(e)(2)(A)(ii)'s reference to "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Those terms, in the Government's view, describe conduct a court can compare directly against the state crime's elements. Shular sees them instead as offenses whose elements a court must first expound.

B

The Government's reading, we are convinced, correctly interprets the statutory text and context. Two features of § 924(e)(2)(A)(ii), compared against a neighboring provision referring to offenses, § 924(e)(2)(B)(ii), show that § 924(e)(2)(A)(ii) refers to conduct.

First, the terms in § 924(e)(2)(A)(ii)—"manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"—are unlikely names for generic offenses. Those words undoubtedly can be used to describe conduct. But as Shular acknowledges, they are not universal names of offenses; instead, States define "core drug offenses with all manner of terminology, including: trafficking, selling, giving, dispensing, distributing, delivering, promoting, and producing." Reply Brief 7.

Contrast § 924(e)(2)(A)(ii) with § 924(e)(2)(B)(ii), the enumerated-offense clause of ACCA's "violent felony" definition, appearing in the same section of the Career Criminals Amendment Act of 1986, 100 Stat. 3207–39 to 3207–40. That provision, which refers to a crime that "is burglary, arson, or extortion," requires a generic-offense analysis. See *Mathis*, 579 U. S., at 503. The terms "burglary," "arson," and "extortion"—given their common-law history and widespread usage—unambiguously name offenses. Cf., *e. g.*, *Taylor*, 495 U. S., at 590–599 (discussing "burglary"). Drug offenses,

Shular admits, lack "the same heritage and the same established lexicon." Brief for Petitioner 14.

Second, by speaking of activities a state-law drug offense "involv[es]," § 924(e)(2)(A)(ii) suggests that the descriptive terms immediately following the word "involving" identify conduct. The parties agree that "involve" means "necessarily requir[e]." Brief for Petitioner 14 (citing Random House Dictionary of the English Language 1005 (2d ed. 1987) ("to include as a necessary circumstance, condition, or consequence")); Brief for United States 21 (same). It is natural to say that an offense "involves" or "requires" certain conduct. *E. g.*, § 924(e)(2)(B)(ii) (addressing a crime "involv[ing] conduct that presents a serious potential risk of physical injury to another"); *Mathis*, 579 U. S., at 507 ("The generic offense [of burglary] requires unlawful entry into a building or other structure." (internal quotation marks omitted)).

To refer to offenses as Shular urges, it would have been far more natural for the drafter to follow the enumerated-offense clause in using "is," not "involving." See § 924(e)(2)(B)(ii) (crime that "is burglary, arson, or extortion"). There, the word "is" indicates a congruence between "crime" and the terms that follow, terms that are also crimes. See American Heritage Dictionary 114 (def. 7a) (1981) ("To equal in meaning or identity"). Yet Congress did not adopt that formulation in § 924(e)(2)(A)(ii), opting instead for language suited to conduct.

C

Shular principally urges that at the time of § 924(e)(2)(A)(ii)'s enactment, federal and state criminal laws widely prohibited the "core conduct" of manufacturing, distributing, and possessing with intent to manufacture or distribute drugs. Brief for Petitioner 10–12. Some laws, Shular observes, used those very terms. See, *e. g.*, 21 U. S. C. § 841(a)(1) (1982 ed.). But even if the substance of state drug laws was well established—rather than their nomenclature, which Shular con-

cedes was not—Congress could capture that substance by reference to conduct, rather than offenses.

Shular points out that the word "involving" can accommodate a generic-offense approach. Cf. *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 409 (2003) ("act or threat involving . . . extortion," 18 U. S. C. § 1961(1), contemplates "'generic' extortion" (some internal quotation marks omitted)). But we have no reason to think Congress intended that approach for § 924(e)(2)(A)(ii)—which uses no deeply rooted offense name like "extortion" and contrasts with the offense-oriented language of a neighboring provision.

Endeavoring to explain why Congress might have chosen "involving" over "is" in § 924(e)(2)(A)(ii), Shular suggests that variation in state drug-offense terminology required a word more approximate than "is." But if Congress was concerned that state drug offenses lacked clear, universally employed names, the evident solution was to identify them instead by conduct. Using "involving" rather than "is" does not clarify that the terms are names of offenses; quite the opposite. See *supra*, at 162.

Shular asserts that to describe conduct rather than offenses, Congress would have used the language of the elements clause of the "violent felony" definition, which captures a crime that "*has as an element* the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i) (emphasis added). It would have been awkward, however, to describe "possessing with intent to manufacture or distribute"—requiring both possession and intent—as "an element." Congress may also have wanted to clarify that the state offense need not include the identified conduct as a formal element. Cf. *Kawashima*, 565 U. S., at 483–484 (the statutory phrase "an offense that . . . involves fraud or deceit" "is not limited to offenses that include fraud or deceit as formal elements" but extends to offenses "that necessarily entail fraudulent or deceitful

conduct"). Whatever the reason, Congress' choice not to describe each term in § 924(e)(2)(A)(ii) as "an element" neither refutes that those terms refer to conduct nor shows that they refer to offenses.

Nor does the other clause of the "serious drug offense" definition shed light on the question before us. Section 924(e)(2)(A)(i) includes as "serious drug offenses" "offense[s] under" specific portions of the U. S. Code.[2] That provision, Shular observes, refers to fully defined crimes. But "the divergent text of the two provisions" of the serious-drug-offense definition, as the Government explains, "makes any divergence in their application unremarkable." Brief for United States 22. Congress' decision to identify federal offenses by reference to the U. S. Code does not speak to whether it identified state offenses by reference to named offenses or conduct.

D

Shular expresses concern that rejecting a generic-offense approach would yield an anomalous result. Unlike other drug laws, Shular contends, the Florida law under which he was previously convicted does not require that the defendant know the substance is illicit. Unless § 924(e)(2)(A)(ii) takes into account all the elements of the offense as commonly understood, Shular maintains, defendants would face ACCA enhancement based on outlier state laws.

As an initial matter, Shular overstates Florida's disregard for *mens rea*. Charged under Fla. Stat. § 893.13(1)(a), a defendant unaware of the substance's illicit nature can raise that unawareness as an affirmative defense, in which case the standard jury instructions require a finding of knowledge beyond a reasonable doubt. § 893.101(2); Fla. Crim. Jury

[2] Section 924(e)(2)(A)(i) provides that the term "serious drug offense" includes "an offense under the Controlled Substances Act (21 U. S. C. [§] 801 et seq.), the Controlled Substances Import and Export Act (21 U. S. C. [§] 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law."

Instr. § 25.2 (2020) (online source archived at www.supremecourt.gov).

In any event, both parties' interpretations of 18 U. S. C. § 924(e)(2)(A)(ii) achieve a measure of consistency. Resolving this case requires us to determine which form of consistency Congress intended: application of ACCA to all offenders who engaged in certain conduct or to all who committed certain generic offenses (in either reading, judging only by the elements of their prior convictions). For the reasons explained, we are persuaded that Congress chose the former.

E

Shular urges us to apply the rule of lenity in determining whether § 924(e)(2)(A)(ii) requires a generic-offense-matching analysis. The rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States* v. *Shabani*, 513 U. S. 10, 17 (1994). Here, we are left with no ambiguity for the rule of lenity to resolve. Section 924(e)(2)(A)(ii)'s text and context leave no doubt that it refers to an offense involving the *conduct* of "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Because those terms describe conduct and do not name offenses, a court applying § 924(e)(2)(A)(ii) need not delineate the elements of generic offenses.[3]

* * *

For the reasons stated, the judgment of the Court of Appeals for the Eleventh Circuit is

*Affirmed.*

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[3] Shular argues in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature. See Brief for Petitioner 23; Reply Brief 8–10. We do not address that argument. Not only does it fall outside the question presented, Pet. for Cert. i, Shular disclaimed it at the certiorari stage, Supp. Brief for Petitioner 3.

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. In Part III–E of the opinion, the Court rejects Shular's argument for applying the rule of lenity. I write separately to elaborate on why the rule of lenity does not apply here.

This Court's longstanding precedents establish that the rule of lenity applies when two conditions are met.

*First*, as the Court today says and as the Court has repeatedly held, a court may invoke the rule of lenity only "'after consulting traditional canons of statutory construction.'" *Ante*, at 165 (quoting *United States* v. *Shabani*, 513 U. S. 10, 17 (1994)).[1] In other words, a court must first employ all of the traditional tools of statutory interpretation, and a court may resort to the rule of lenity only "'after seizing everything from which aid can be derived.'" *Ocasio* v. *United States*, 578 U. S. 282, 295, n. 8 (2016) (quoting *Muscarello* v. *United States*, 524 U. S. 125, 138–139 (1998)). In summarizing the case law, Justice Scalia underscored that the rule of lenity "'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning.'" A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 298 (2012) (quoting *Callanan* v. *United States*, 364 U. S. 587, 596 (1961)). Of course, when "a re-

[1] See also, *e. g.*, *Ocasio* v. *United States*, 578 U. S. 282, 295, n. 8 (2016); *Robers* v. *United States*, 572 U. S. 639, 646 (2014); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U. S. 1, 16 (2011); *Abbott* v. *United States*, 562 U. S. 8, 28, n. 9 (2010); *United States* v. *Hayes*, 555 U. S. 415, 429 (2009); *Burgess* v. *United States*, 553 U. S. 124, 135 (2008); *Muscarello* v. *United States*, 524 U. S. 125, 138 (1998); *Caron* v. *United States*, 524 U. S. 308, 316 (1998); *United States* v. *Wells*, 519 U. S. 482, 499 (1997); *Reno* v. *Koray*, 515 U. S. 50, 65 (1995); *Smith* v. *United States*, 508 U. S. 223, 239 (1993); *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 410 (1991); *Moskal* v. *United States*, 498 U. S. 103, 108 (1990); *Callanan* v. *United States*, 364 U. S. 587, 596 (1961). Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) (instructing courts to employ "traditional tools of statutory construction" before concluding that a statute is ambiguous and deferring to an agency's reasonable interpretation).

viewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation," thereby resolving any perceived ambiguity. *Kisor* v. *Wilkie*, 588 U. S. 558, 632 (2019) (KAVANAUGH, J., concurring in judgment). That explains why the rule of lenity rarely comes into play.

*Second*, this Court has repeatedly explained that the rule of lenity applies only in cases of "'grievous'" ambiguity—where the court, even after applying all of the traditional tools of statutory interpretation, "'can make no more than a guess as to what Congress intended.'" *Ocasio*, 578 U. S., at 295, n. 8 (quoting *Muscarello*, 524 U. S., at 138–139). The Court has stated that the "simple existence of some statutory ambiguity" is "not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Id.*, at 138. To be sure, as Justice Scalia rightly noted, the term "'grievous ambiguity'" provides "'little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity.'" Reading Law, at 299 (quoting *United States* v. *Hansen*, 772 F. 2d 940, 948 (CADC 1985) (Scalia, J., for the court)); see also Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016). That said, atmospherics can matter. Although the Court has not always been perfectly consistent in its formulations, the Court has repeatedly emphasized that a court must find not just ambiguity but "grievous ambiguity" before resorting to the rule of lenity.[2]

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[2] See, *e. g.*, *Shaw* v. *United States*, 580 U. S. 63, 71–72 (2016); *Salman* v. *United States*, 580 U. S. 39, 51 (2016); *Abramski* v. *United States*, 573 U. S. 169, 188, n. 10 (2014); *Robers*, 572 U. S., at 646; *United States* v. *Castleman*, 572 U. S. 157, 172–173 (2014); *Barber* v. *Thomas*, 560 U. S. 474, 488 (2010); *Dolan* v. *United States*, 560 U. S. 605, 621 (2010); *Dean* v. *United States*, 556 U. S. 568, 577 (2009); *Hayes*, 555 U. S., at 429; *Staples* v. *United States*, 511 U. S. 600, 619, n. 17 (1994); *Chapman* v. *United States*, 500 U. S. 453, 463 (1991); *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974).

To sum up: Under this Court's longstanding precedents, the rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no more than a guess as to what the statute means.

Because the Court correctly concludes that the rule of lenity does not apply in this case, I join the Court's opinion in full.

Syllabus

# HOLGUIN-HERNANDEZ *v.* UNITED STATES

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

No. 18–7739. Argued December 10, 2019—Decided February 26, 2020

A criminal defendant who wants to "preserve a claim of error" for appellate review must first inform the trial judge "of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b).

Petitioner Holguin-Hernandez was convicted on drug charges and sentenced to 60 months in prison and five years of supervised release while he was still serving a term of supervised release for an earlier conviction. The Government asked the District Court to impose an additional consecutive prison term of 12 to 18 months for violating the conditions of the earlier term. Petitioner countered that 18 U. S. C. § 3553's sentencing factors either did not support imposing any additional time or supported a sentence of less than 12 months. The court nonetheless imposed a consecutive 12-month term. Petitioner argued on appeal that this sentence was unreasonably long because it was "'greater than necessar[y]' to accomplish the goals of sentencing," *Kimbrough* v. *United States*, 552 U. S. 85, 101, but the Fifth Circuit held that he had forfeited that argument by failing to object to the reasonableness of the sentence in the District Court.

*Held*: Petitioner's district-court argument for a specific sentence (nothing or less than 12 months) preserved his claim on appeal that the sentence imposed was unreasonably long. A party who informs the court of the "action" he "wishes the court to take," Rule 51(b), ordinarily brings to the court's attention his objection to a contrary decision. That is certainly true where, as here, the defendant advocates for a sentence shorter than the one actually imposed. Judges, having in mind their "overarching duty" under § 3553(a) "to 'impose a sentence sufficient, but not greater than necessary,' to serve the purposes of sentencing," would ordinarily understand that a defendant in that circumstance was making the argument that the shorter sentence would be "'sufficient'" and a longer sentence "'greater than necessary.'" *Pepper* v. *United States*, 562 U. S. 476, 493 (quoting § 3553(a)). Nothing more is needed to preserve a claim that a longer sentence is unreasonable. Defendants need not also refer to the "reasonableness" of a sentence. Rule 51 abolished the requirement of making formal "exceptions" to a district court's decision. And, in any event, reasonableness pertains to the standard of

"*appellate* review" of a trial court's sentencing decision, *Gall* v. *United States*, 552 U. S. 38, 46 (emphasis added); it is not the substantive standard that trial courts apply under § 3553(a). A defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is "greater than necessary" has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence.

Other issues raised by the Government and *amicus* are not addressed here because they were not considered by the Fifth Circuit. Pp. 173–175.

746 Fed. Appx. 403, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 175.

*Kendall Turner* argued the cause for petitioner. With her on the briefs were *Philip J. Lynch*, *Jeffrey L. Fisher*, *Brian H. Fletcher*, and *Pamela S. Karlan*.

*Morgan L. Ratner* argued the cause for the United States. With her on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Francesco Valentini*.

*K. Winn Allen*, by invitation of the Court, 588 U. S. 919, argued the cause as *amicus curiae* urging affirmance. With him on the brief were *Kasdin M. Mitchell* and *Lauren N. Beebe*.*

JUSTICE BREYER delivered the opinion of the Court.

A criminal defendant who wishes a court of appeals to consider a claim that a ruling of a trial court was in error must first make his objection known to the trial-court judge. The Federal Rules of Criminal Procedure provide two ways of doing so. They say that

> "[a] party may preserve a claim of error by informing the court . . . of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action

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**Chanakya A. Sethi*, *Rakesh N. Kilaru*, *Barbara E. Bergman*, and *Daniel L. Kaplan* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

and the grounds for that objection." Fed. Rule Crim. Proc. 51(b).

Errors "not brought to the court's attention" in one of these two ways are subject to review only insofar as they are "plain." Rule 52(b); see *United States* v. *Olano*, 507 U. S. 725, 732–736 (1993).

In this case, a criminal defendant argued in the District Court that the sentencing factors set forth in 18 U. S. C. § 3553(a) did not support imposing any prison time for a supervised-release violation. At the very least, the defendant contended, any term of imprisonment should be less than 12 months long. The judge nevertheless imposed a sentence of 12 months. The question is whether the defendant's district-court argument for a specific sentence (namely, nothing or less than 12 months) preserved his claim on appeal that the 12-month sentence was unreasonably long. We think that it did.

## I

Petitioner in this case, Gonzalo Holguin-Hernandez, was convicted of drug trafficking and sentenced to 60 months in prison and five years of supervised release. At the time of his conviction, he was also serving a term of supervised release related to an earlier crime. The Government asked the court to find that petitioner had violated the conditions of that earlier term, to revoke it, and to impose an additional consecutive prison term consistent with the pertinent Sentencing Guidelines, namely, 12 to 18 months in prison. See United States Sentencing Commission, Guidelines Manual §§ 7B1.4(a), 7B1.3(f) (Nov. 2018).

Petitioner's counsel argued that there "would be no reason under [18 U. S. C. §]3553 that an additional consecutive sentence would get [petitioner's] attention any better than" the five years in prison the court had already imposed for the current trafficking offense. App. 10. She added that petitioner understood that, if he offended again, he was

"going to serve his life in prison." *Ibid.* And she urged the court to impose either "no additional time or certainly less than the [G]uidelines." *Ibid.* At the least, she said, the court should "depart" from the Guidelines, imposing a sentence "below" the applicable range "because it is a substantial sentence and to me overrepresents the role that he played in" the underlying offense. *Ibid.*

The court then imposed a consecutive term of 12 months, a sentence at the bottom of, but not below, the Guidelines range. See *id.*, at 11. The judge indicated that he did not disagree with counsel's argument, but thought that circumstances justified a greater sentence. He asked counsel if there was "[a]nything further." *Ibid.* Counsel said that there was not. See *ibid.*

Petitioner appealed, arguing that the 12-month sentence was unreasonably long in that it was "'greater than necessar[y]' to accomplish the goals of sentencing." *Kimbrough* v. *United States*, 552 U. S. 85, 101 (2007) (quoting 18 U. S. C. § 3553(a)); see also, *e. g.*, *Gall* v. *United States*, 552 U. S. 38, 49–50 (2007) (noting the District Court's obligation to "consider all of the § 3553(a) factors to determine" the "appropriate sentence"); 18 U. S. C. § 3583(e) (making these factors applicable in substantial part to proceedings to revoke or modify a term of supervised release). The Court of Appeals held that petitioner had forfeited this argument by failing to "object in the district court to the reasonableness of the sentence imposed." 746 Fed. Appx. 403 (CA5 2018) (*per curiam*). The court would, of course, consider whether the error petitioner asserted was "plain." See *ibid.*; Rule 52(b) (permitting review of a plain error "even though it was not brought to the court's attention"). But it found no plain error, and so it affirmed.

Petitioner sought review in this Court and, in light of differences among the Courts of Appeals, we granted his petition for certiorari. Compare 746 Fed. Appx. 403 with, *e. g.*, *United States* v. *Curry*, 461 F. 3d 452, 459 (CA4 2006); *United*

*States* v. *Vonner*, 516 F. 3d 382, 389 (CA6 2008) (en banc); *United States* v. *Castro-Juarez*, 425 F. 3d 430, 433–434 (CA7 2005); *United States* v. *Sullivan*, 327 Fed. Appx. 643, 645 (CA7 2009); *United States* v. *Autery*, 555 F. 3d 864, 868–871 (CA9 2009); *United States* v. *Torres-Duenas*, 461 F. 3d 1178, 1183 (CA10 2006); *United States* v. *Gonzalez-Mendez*, 545 Fed. Appx. 848, 849, and n. 1 (CA11 2013); *United States* v. *Bras*, 483 F. 3d 103, 113 (CADC 2007). Because the Government agrees with petitioner that the Fifth Circuit's approach is inconsistent with the Federal Rules of Criminal Procedure, we appointed K. Winn Allen to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

## II

Congress has instructed sentencing courts to impose sentences that are "'sufficient, *but not greater than necessary*, to comply with'" (among other things) certain basic objectives, including the need for "just punishment, deterrence, protection of the public, and rehabilitation." *Dean* v. *United States*, 581 U. S. 62, 67 (2017) (quoting 18 U. S. C. §3553(a); emphasis added); see *Pepper* v. *United States*, 562 U. S. 476, 491, 493 (2011). If the trial court follows proper procedures and gives adequate consideration to these and the other listed factors, then the question for an appellate court is simply, as here, whether the trial court's chosen sentence was "reasonable" or whether the judge instead "abused his discretion in determining that the §3553(a) factors supported" the sentence imposed. *Gall*, 552 U. S., at 56; see *United States* v. *Booker*, 543 U. S. 220, 261–262 (2005).

By "informing the court" of the "action" he "wishes the court to take," Rule 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision. See Rule 52(b). And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges, having in mind their "overarching duty" under

§ 3553(a), would ordinarily understand that a defendant in that circumstance was making the argument (to put it in statutory terms) that the shorter sentence would be "'sufficient'" and a longer sentence "'greater than necessary'" to achieve the purposes of sentencing. *Pepper*, 562 U. S., at 493 (quoting § 3553(a)). Nothing more is needed to preserve the claim that a longer sentence is unreasonable.

We do not agree with the Court of Appeals' suggestion that defendants are required to refer to the "reasonableness" of a sentence to preserve such claims for appeal. See 746 Fed. Appx. 403; *United States* v. *Peltier*, 505 F. 3d 389, 391 (CA5 2007). The rulemakers, in promulgating Rule 51, intended to dispense with the need for formal "exceptions" to a trial court's rulings. Rule 51(a); see also Advisory Committee's 1944 Notes on Fed. Rule Crim. Proc. 51, 18 U. S. C. App., p. 591. They chose not to require an objecting party to use any particular language or even to wait until the court issues its ruling. Rule 51(b) (a party may "infor[m] the court" of its position either "when the court ruling or order is made or" when it is "sought"). The question is simply whether the claimed error was "brought to the court's attention." Rule 52(b). Here, it was.

The Court of Appeals properly noted that, to win on appeal, a defendant making such a claim must show that the trial court's decision was not "reasonable." *Gall*, 552 U. S., at 56. But that fact is not relevant to the issue here. Our decisions make plain that reasonableness is the label we have given to "the familiar abuse-of-discretion standard" that "applies to *appellate* review" of the trial court's sentencing decision. *Id.*, at 46 (emphasis added); see *Kimbrough*, 552 U. S., at 90–91; *Rita* v. *United States*, 551 U. S. 338, 351 (2007); *Booker*, 543 U. S., at 261. The substantive standard that Congress has prescribed for *trial* courts is the "parsimony principle" enshrined in § 3553(a). *Dean*, 581 U. S., at 67; see *Pepper*, 562 U. S., at 491. A defendant who, by advocating for a particular sentence, communicates to the trial judge his

view that a longer sentence is "greater than necessary" has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence. He need not also refer to the standard of review.

## III

The Government and *amicus* raise other issues. They ask us to decide what is sufficient to preserve a claim that a trial court used improper *procedures* in arriving at its chosen sentence. And they ask us to decide when a party has properly preserved the right to make particular arguments supporting its claim that a sentence is unreasonably long. We shall not consider these matters, however, for the Court of Appeals has not considered them. See, *e. g.*, *Tapia* v. *United States*, 564 U. S. 319, 335 (2011); *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). We hold only that the defendant here properly preserved the claim that his 12-month sentence was unreasonably long by advocating for a shorter sentence and thereby arguing, in effect, that this shorter sentence would have proved "sufficient," while a sentence of 12 months or longer would be "greater than necessary" to "comply with" the statutory purposes of punishment. 18 U. S. C. § 3553(a).

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

*It is so ordered.*

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court that a defendant who requests a specific sentence during a sentencing hearing need not object to the sentence after its pronouncement in order to preserve a challenge to its substantive reasonableness (*i. e.*, length) on appeal. I write to emphasize what we are not deciding.

*First*, we do not decide "what is sufficient to preserve a claim that a trial court used improper *procedures* in arriving at its chosen sentence." *Ante*, at 175. That question is not currently before us. Nevertheless, as we have previously explained, failing to object at all to a procedural error (*e. g.*, a district court's miscalculation of the Guidelines range) will subject a procedural challenge to plain-error review. *Molina-Martinez* v. *United States*, 578 U. S. 189, 193–194 (2016).

*Second*, we do not decide what is sufficient to preserve any "particular" substantive-reasonableness argument. *Ante*, at 175. Again, the question here "is simply whether the claimed error was 'brought to the court's attention.'" *Ante*, at 174 (quoting Fed. Rule Crim. Proc. 52(b)). Thus, we do not suggest that a generalized argument in favor of less imprisonment will insulate *all* arguments regarding the length of a sentence from plain-error review. The plain-error rule serves many interests, judicial efficiency and finality being chief among them. See *Puckett* v. *United States*, 556 U. S. 129, 134–135 (2009). Requiring a party to bring an error to the attention of the court enables the court to correct itself, obviating the need for an appeal. At the very least, the court can explain its reasoning and thus assist the appellate process. A court cannot address particular arguments or facts not brought to its attention.

*Third*, we do not decide whether this petitioner properly preserved his particular substantive-reasonableness arguments, namely, that he did not pose a danger to the public and that a 12-month sentence would not serve deterrence purposes. See *ante*, at 171–172, 175. In determining whether arguments have been preserved, courts should make a case-specific assessment of how the error was "brought to the court's attention." Rule 52(b); see also, *e. g.*, *United States* v. *Vonner*, 516 F. 3d 382, 392 (CA6) (en banc) ("While we do not require defendants to challenge the 'reasonableness' of their sentences in front of the district court, we surely should

apply plain-error review to any arguments for leniency that the defendant does not present to the trial court"), cert. denied, 555 U. S. 816 (2008). On remand, the Fifth Circuit can decide whether petitioner preserved these specific arguments and whether the sentence was substantively unreasonable.

Syllabus

# INTEL CORPORATION INVESTMENT POLICY COMMITTEE ET AL. *v.* SULYMA

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

No. 18–1116. Argued December 4, 2019—Decided February 26, 2020

The Employee Retirement Income Security Act of 1974 (ERISA) requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge, 29 U. S. C. § 1113(2), rather than within the 6-year period that would otherwise apply. Respondent Sulyma worked at Intel Corporation from 2010 to 2012 and participated in two Intel retirement plans. In October 2015, he sued petitioners—administrators of those plans—alleging that they had managed the plans imprudently. Petitioners countered that the suit was untimely under § 1113(2) because Sulyma filed it more than three years after they had disclosed their investment decisions to him. Although Sulyma had visited the website that hosted many of these disclosures many times, he testified that he did not remember reviewing the relevant disclosures and that he had been unaware of the allegedly imprudent investments while working at Intel. The District Court granted summary judgment to petitioners under § 1113(2). The Ninth Circuit reversed. That court agreed with petitioners that Sulyma could have known about the investments from the disclosures, but held that his testimony created a dispute as to when he gained "actual knowledge" for purposes of § 1113(2).

*Held*: A plaintiff does not necessarily have "actual knowledge" under § 1113(2) of the information contained in disclosures that he receives but does not read or cannot recall reading. To meet § 1113(2)'s "actual knowledge" requirement, the plaintiff must in fact have become aware of that information. Pp. 184–190.

(a) ERISA's "plain and unambiguous statutory language" must be enforced "according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251. Although ERISA does not define the phrase "actual knowledge," its meaning is plain. Dictionaries confirm that, to have "actual knowledge" of a piece of information, one must in fact be aware of it. Legal dictionaries give "actual knowledge" the same meaning. The law will sometimes impute knowledge—often called "constructive" knowledge—to a person who fails to learn something that a reasonably diligent person would have learned. The addition of "actual" in § 1113(2) signals that the plaintiff's knowledge must be more than hypothetical. Congress has repeatedly drawn the same "linguistic distinc-

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tion," *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 647, elsewhere in ERISA. When Congress has included both actual and constructive knowledge in ERISA limitations provisions, Congress has done so explicitly. But Congress has never added to § 1113(2) the language it has used in those other provisions to encompass both forms of knowledge. Pp. 184–187.

(b) Petitioners' arguments for a broader reading of § 1113(2) based on text, context, purpose, and statutory history all founder on Congress's choice of the word "actual." Petitioners may well be correct that heeding the plain meaning of § 1113(2) substantially diminishes the protection that it provides for ERISA fiduciaries. But if policy considerations suggest that the current scheme should be altered, Congress must be the one to do it. Pp. 187–189.

(c) This opinion does not foreclose any of the "usual ways" to prove actual knowledge at any stage in the litigation. *Farmer* v. *Brennan*, 511 U. S. 825, 842. Plaintiffs who recall reading particular disclosures will be bound by oath to say so in their depositions. Actual knowledge can also be proved through "inference from circumstantial evidence." *Ibid.* And this opinion does not preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge." Cf. *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 769. Pp. 189–190.

909 F. 3d 1069, affirmed.

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

*Donald B. Verrilli, Jr.*, argued the cause for petitioners. With him on the briefs were *Ginger D. Anders*, *Jordan D. Segall*, *John J. Buckley, Jr.*, *Daniel F. Katz*, *Vidya Atre Mirmira*, *David Kurtzer-Ellenbogen*, *Juli Ann Lund*, and *Tanya Abrams*.

*Matthew W. H. Wessler* argued the cause for respondent. With him on the brief were *Jonathan E. Taylor*, *Gregory Y. Porter*, and *Joseph A. Creitz*.

*Matthew Guarnieri* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Deputy Attorney General Kneedler*, and *G. William Scott*.*

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**Mark A. Perry*, *Matthew S. Rozen*, *Peter C. Tolsdorf*, *Leland P. Frost*, *Kevin Carroll*, and *Daryl Joseffer* filed a brief for the National Association of Manufacturers et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Paul Blankenstein*, *Dara S. Smith*, and *William Alvarado Rivera*;

JUSTICE ALITO delivered the opinion of the Court.

The Employee Retirement Income Security Act of 1974 (ERISA) requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the 6-year period that would otherwise apply. § 413(a)(2)(A), 88 Stat. 889, as amended, 29 U. S. C. § 1113. The question here is whether a plaintiff necessarily has "actual knowledge" of the information contained in disclosures that he receives but does not read or cannot recall reading. We hold that he does not and therefore affirm.

## I

### A

Retirement plans governed by ERISA must have at least one named fiduciary, § 1102(a)(1), who must manage the plan prudently and solely in the interests of participants and their beneficiaries, § 1104(a). Fiduciaries who breach these duties are personally liable to the plan for any resulting losses. § 1109(a). ERISA authorizes participants and their beneficiaries, as well as co-fiduciaries and the Secretary of Labor, to sue for that relief. § 1132(a)(2).

Such suits must be filed within one of three time periods, each with different triggering events. The first begins when the breach occurs. Specifically, under § 1113(1), suit must be filed within six years of "the date of the last action which constituted a part of the breach or violation" or, in cases of breach by omission, "the latest date on which the fiduciary could have cured the breach or violation." We have referred to § 1113(1) as a statute of repose, which "effect[s] a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *California Public Employees' Retirement System* v.

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and for the Pension Rights Center by *Elizabeth Hopkins* and *Karen W. Ferguson.*

*ANZ Securities, Inc.*, 582 U. S. 497, 505 (2017) (internal quotation marks omitted).

The second period, which accelerates the filing deadline, begins when the plaintiff gains "actual knowledge" of the breach. Under § 1113(2), suit must be filed within three years of "the earliest date on which the plaintiff had actual knowledge of the breach or violation." Section 1113(2) is a statute of limitations, which "encourage[s] plaintiffs to pursue diligent prosecution of known claims." *Id.*, at 504 (internal quotation marks omitted).

The third period, which applies "in the case of fraud or concealment," begins when the plaintiff discovers the alleged breach. § 1113. In such cases, suit must be filed within six years of "the date of discovery." *Ibid.*

B

Respondent Sulyma worked at Intel Corporation from 2010 to 2012. He participated in two Intel retirement plans, the Intel Retirement Contribution Plan and the Intel 401(k) Savings Plan. Payments into these plans were in turn invested in two funds managed by the Intel Investment Policy Committee.[1] These funds mostly comprised stocks and bonds. After the stock market decline in 2008, however, the committee increased the funds' shares of alternative assets, such as hedge funds, private equity, and commodities. These assets carried relatively high fees. And as the stock market rebounded, Sulyma's funds lagged behind others such as index funds.

Sulyma filed this suit on behalf of a putative class in October 2015, alleging primarily that the committee and other plan administrators (petitioners here) had breached their fiduciary duties by overinvesting in alternative assets. Petitioners countered that the suit was untimely under

[1] Specifically the Intel Global Diversified Fund, in which his retirement contribution plan was automatically invested, and the Intel Target Date 2045 Fund, which he chose for his 401(k) plan.

§ 1113(2). Although Sulyma filed it within six years of the alleged breaches, he filed it more than three years after petitioners had disclosed their investment decisions to him.

ERISA and its implementing regulations mandate various disclosures to plan participants. See generally 29 U. S. C. §§ 1021–1031; see also *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U. S. 312, 321–323 (2016). Sulyma received numerous disclosures while working at Intel, some explaining the extent to which his retirement plans were invested in alternative assets. In November 2011, for example, he received an e-mail informing him that a Qualified Default Investment Alternative (QDIA) notice was available on a website called NetBenefits, where many of his disclosures were hosted. See App. 149–151; see also 29 CFR §§ 2550.404c–5(b) through (d) (2019) (QDIA notices); § 2520.104b–1(c) (regulating electronic disclosure). This notice broke down the percentages at which his 401(k) fund was invested in stocks, bonds, hedge funds, and commodities. See App. 236. In 2012, he received a summary plan description explaining that the funds were invested in stocks and alternative assets, *id.*, at 227, and referring him to other documents—called fund fact sheets—with the percentages in graphical form. See 29 U. S. C. §§ 1022, 1024(b) (summary plan descriptions); see also App. 307 (June 2012 fact sheet for his 401(k) plan fund); *id.*, at 338 (June 2012 fact sheet for his retirement contribution plan fund); *id.*, at 277–340 (other fact sheets provided during his tenure at Intel). Also in 2012, he received e-mails directing him to annual disclosures that petitioners provided for both his plans, which showed the underlying funds' return rates and again directed him to the NetBenefits site for further information. See 29 CFR § 2550.404a–5; see also App. 242–243 (retirement contribution plan annual disclosure); *id.*, at 250–251 (401(k) plan annual disclosure).

Petitioners submitted records showing that Sulyma visited the NetBenefits site repeatedly during his employment. *Id.*, at 258–276. But he testified in his deposition that he

did not "remember reviewing" the above disclosures during his tenure. *Id.*, at 175; see also *id.*, at 183, 193, 196–197. He also stated in a declaration that he was "unaware" while working at Intel "that the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity." *Id.*, at 212. He recalled reviewing only account statements sent to him by mail, which directed him to the NetBenefits site and noted that his plans were invested in "short-term/other" assets but did not specify which. See, *e. g.*, *id.*, at 375.

The District Court granted summary judgment to petitioners under § 1113(2), reasoning that "[i]t would be improper to allow Sulyma's claims to survive merely because he did not look further into the disclosures made to him." 2017 WL 1217185, *9 (ND Cal., Mar. 31, 2017). The Ninth Circuit reversed. As relevant here,[2] the court construed "actual knowledge" to mean "what it says: knowledge that is actual, not merely a possible inference from ambiguous circumstances." 909 F. 3d 1069, 1076 (2018) (internal quotation marks omitted). Although Sulyma "had sufficient information available to him to know about the allegedly imprudent investments" more than three years before filing suit, the court held that his testimony created a dispute as to when he actually gained that knowledge. *Id.*, at 1077.

Several Circuits have likewise construed § 1113(2) to require "knowledge that is actual," *id.*, at 1076, but one has construed it to require only proof of sufficient disclosure.[3]

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[2] The court also addressed the separate question of what exactly a plaintiff must actually know about a defendant's conduct and the relevant law in order for § 1113(2) to apply. That question is not before us and we do not address it.

[3] Compare *Caputo* v. *Pfizer, Inc.*, 267 F. 3d 181, 194 (CA2 2001); *Reich* v. *Lancaster*, 55 F. 3d 1034, 1056–1057 (CA5 1995); *Gluck* v. *Unisys Corp.*, 960 F. 2d 1168, 1176 (CA3 1992); *Radiology Center, S. C.*, v. *Stifel, Nicolaus & Co.*, 919 F. 2d 1216, 1222 (CA7 1990); *Brock* v. *Nellis*, 809 F. 2d 753, 754–755 (CA11 1987), with *Brown* v. *Owens Corning Investment Review Comm.*, 622 F. 3d 564, 571 (CA6 2010) ("Actual knowledge does not require

We granted certiorari, 587 U. S. 1050 (2019), to resolve whether the phrase "actual knowledge" does in fact mean "what it says," 909 F. 3d, at 1076, and hold that it does.

## II

### A

"We must enforce plain and unambiguous statutory language" in ERISA, as in any statute, "according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). Although ERISA does not define the phrase "actual knowledge," its meaning is plain. Dictionaries are hardly necessary to confirm the point, but they do. When Congress passed ERISA, the word "actual" meant what it means today: "existing in fact or reality." Webster's Seventh New Collegiate Dictionary 10 (1967); accord, Merriam-Webster's Collegiate Dictionary 13 (11th ed. 2005); see also American Heritage Dictionary 14 (1973) ("In existence; real; factual"); *id.*, at 18 (5th ed. 2011) ("Existing in reality and not potential, possible, simulated, or false"). So did the word "knowledge," which meant and still means "the fact or condition of being aware of something." Webster's Seventh New Collegiate Dictionary, at 469; accord, Merriam-Webster's Collegiate Dictionary, at 691; see also American Heritage Dictionary 725 (1973) ("Familiarity, awareness, or understanding gained through experience or study"); *id.*, at 973 (2011) (same). Thus, to have "actual knowledge" of a piece of information, one must in fact be aware of it.

Legal dictionaries give "actual knowledge" the same meaning: "[r]eal knowledge as distinguished from presumed knowledge or knowledge imputed to one." Ballentine's Law Dictionary 24 (3d ed. 1969); accord, Black's Law Dictionary 1043 (11th ed. 2019) (defining "actual knowledge" as "[d]irect

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proof that the individual Plaintiffs actually saw or read the documents that disclosed the allegedly harmful investments" (internal quotation marks omitted)).

and clear knowledge, as distinguished from constructive knowledge").[4] The qualifier "actual" creates that distinction. In everyday speech, "actual knowledge" might seem redundant; one who claims "knowledge" of a topic likely means to suggest that he actually knows a thing or two about it. But the law will sometimes impute knowledge—often called "constructive" knowledge—to a person who fails to learn something that a reasonably diligent person would have learned. See *id.*, at 1043. Similarly, we held in *Merck & Co.* v. *Reynolds*, 559 U. S. 633 (2010), that the word "discovery," when used in a statute of limitations without qualification, "encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Id.*, at 648. The addition of "actual" in § 1113(2) signals that the plaintiff's knowledge must be more than "potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal." Black's Law Dictionary 53 (4th ed. 1951). Indeed, in *Merck*, we cited § 1113(2) as evidence of the "linguistic distinction" between "'*actual knowledge*'" and the "hypothetical" knowledge that a reasonably diligent plaintiff would have. 559 U. S., at 646–647 (quoting § 1113(2); emphasis in original).

Congress has drawn the same distinction elsewhere in ERISA. Multiple provisions contain alternative 6-year and 3-year limitations periods, with the 6-year period beginning at "the date on which the cause of action arose" and the

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[4] Petitioners cite this dictionary's somewhat puzzling second definition of "actual knowledge," which it dubs "implied actual knowledge": "[k]nowledge of information that would lead a reasonable person to inquire further." Black's Law Dictionary, at 1043. Not even this entry, however, appears to equate "implied actual knowledge" with "actual knowledge" as normally understood. It instead proceeds to reference the common-law "discovery rule," *ibid.*, under which a limitations period begins when "the plaintiff discovers (or reasonably *should have* discovered) the injury giving rise to the claim," *id.*, at 585 (emphasis added); see also *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 646 (2010). As we noted in *Merck*, that rule is broader than "*actual knowledge*." *Id.*, at 647.

3-year period starting at "the earliest date on which the plaintiff acquired *or should have acquired* actual knowledge of the existence of such cause of action." §§ 1303(e)(6), (f)(5) (emphasis added); accord, §§ 1370(f)(1)–(2), 1451(f)(1)–(2). ERISA also requires plaintiffs challenging the suspension of benefits under § 1085 to do so within "one year after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." § 1085(e)(9)(I)(iv). Thus, Congress has repeatedly drawn a "linguistic distinction" between what an ERISA plaintiff actually knows and what he should actually know. *Merck*, 559 U. S., at 647. And when Congress has included both forms of knowledge in a provision limiting ERISA actions, it has done so explicitly. We cannot assume that it meant to do so by implication in § 1113(2). Instead we "generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 537 (1994) (internal quotation marks omitted).

Petitioners dispute the characterization of anything less than actual knowledge as constructive knowledge, arguing that the latter term usually refers to information that a plaintiff must seek out rather than information that is sent to him. But if a plaintiff is not aware of a fact, he does not have "actual knowledge" of that fact however close at hand the fact might be. § 1113(2). And Congress has never added to § 1113(2) the language it has used in other ERISA limitations provisions to encompass both what a plaintiff actually knows and what he reasonably could know.

As presently written, therefore, § 1113(2) requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt *relevant* in judging whether he gained knowledge of that information. See Part III, *infra*. To meet § 1113(2)'s "actual knowledge"

requirement, however, the plaintiff must in fact have become aware of that information.

B

Petitioners offer arguments for a broader reading of § 1113(2) based on text, context, purpose, and statutory history. All founder on Congress's choice of the word "actual."

As for text, petitioners do not dispute the normal definitions of "actual," "knowledge," or "actual knowledge." They focus instead on the least conspicuous part of the phrase "had actual knowledge": the word "had." § 1113(2). Once a plaintiff receives a disclosure, they argue, he "ha[s]" the knowledge that § 1113(2) requires because he effectively holds it in his hand. *Ibid.* In other words, he has the requisite knowledge because he could acquire it with reasonable effort. That turns § 1113(2) into what it is plainly not: a constructive-knowledge requirement.

Petitioners' contextual argument fails for the same reason. As they point out, ERISA's disclosure regime is meant to "ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 118 (1989) (quoting H. R. Rep. No. 93–533, p. 11 (1973)). This is the reason for ERISA's requirements that disclosures be written for a lay audience. See, *e. g.*, 29 U. S. C. § 1022(a). Once plan administrators satisfy their obligations to impart knowledge, petitioners say, § 1113(2)'s knowledge requirement is satisfied too. But that is simply not what § 1113(2) says. Unlike other ERISA limitations periods—which also form § 1113(2)'s context—§ 1113(2) begins only when a plaintiff actually is aware of the relevant facts, not when he should be. And a given plaintiff will not necessarily be aware of all facts disclosed to him; even a reasonably diligent plaintiff would not know those facts immediately upon receiving the disclosure. Although "the words of a statute must be read in

their context," *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989), petitioners' argument again gives the word "actual" little meaning at all.

Petitioners also argue that § 1113(2)'s plain meaning undermines its purpose of protecting plan administrators from suits over bygone investment decisions. If a plan participant can simply deny knowledge, they say, administrators will rarely get the benefit of § 1113(2). But even if this is true, as it may well be, we cannot say that heeding the clear meaning of the word "actual" renders the statute so " '[in]coherent' " that it must be disregarded. *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 171 (2016).

For one thing, plan participants are not the only potential plaintiffs subject to § 1113. The Secretary of Labor, for example, may also sue imprudent fiduciaries for the benefit of plan participants. See § 1132(a)(2). And the United States represents that the Secretary will have a hard time doing so within § 1113(2)'s timeframe if deemed to have actual knowledge of the facts contained in the many reports that the Department receives from ERISA plans each year. See Brief for United States as *Amicus Curiae* 27–28. Moreover, the statute's repose period will still protect defendants from suits filed more than six years after the alleged breach. See § 1113(1).

Petitioners may well be correct that heeding the plain meaning of § 1113(2) substantially diminishes the protection that it provides for ERISA fiduciaries, but by the same token, petitioners' interpretation would greatly reduce § 1113(1)'s value for beneficiaries, given the disclosure regime that petitioners themselves emphasize. Choosing between these alternatives is a task for Congress, and we must assume that the language of § 1113(2) reflects Congress's choice. If policy considerations suggest that the current scheme should be altered, Congress must be the one to do it. See, *e. g.*, *Azar* v. *Allina Health Services*, 587 U. S. 566, 582–583 (2019).

Finally, petitioners argue that the plain meaning of "actual knowledge" renders an *earlier* version of § 1113(2) incoherent. As originally enacted, the § 1113(2) limitations period began either when the plaintiff gained actual knowledge of the alleged breach or when "a report from which [the plaintiff] could reasonably be expected to have obtained knowledge . . . was filed with" the Secretary of Labor. 29 U. S. C. § 1113(2) (1976 ed.). That latter, constructive-knowledge clause was later repealed. See Omnibus Budget Reconciliation Act of 1987, § 9342(b), 101 Stat. 1330–371. According to petitioners, if "actual knowledge" means what it says, then the original version of § 1113(2) charged plan participants with learning what was sent to the Secretary but not what was sent to them.

The version at issue here, however, is the current one—from which Congress removed any mention of constructive knowledge. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U. S. 241, 258–259 (2004) (internal quotation marks omitted). Section 1113(2)'s history thus more readily suggests that the current version does in fact require actual knowledge.

## III

Nothing in this opinion forecloses any of the "usual ways" to prove actual knowledge at any stage in the litigation. *Farmer* v. *Brennan*, 511 U. S. 825, 842 (1994). Plaintiffs who recall reading particular disclosures will of course be bound by oath to say so in their depositions. On top of that, actual knowledge can be proved through "inference from circumstantial evidence." *Ibid.*; see also *Staples* v. *United States*, 511 U. S. 600, 615–616, n. 11 (1994) ("[K]nowledge can be inferred from circumstantial evidence"). Evidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response

to the information contained in them. And though, "[a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party," that is true "only if there is a 'genuine' dispute as to those facts." *Scott* v. *Harris*, 550 U. S. 372, 380 (2007) (quoting Fed. Rule Civ. Proc. 56(c)). If a plaintiff's denial of knowledge is "blatantly contradicted by the record," "a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U. S., at 380.

Today's opinion also does not preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge." Cf. *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 769 (2011).

In the case before us, however, petitioners do not argue that "actual knowledge" is established in any of these ways, only that they need not offer any such proof. And that is incorrect.

* * *

For these reasons, we affirm.

*It is so ordered.*

Syllabus

# KANSAS *v.* GARCIA

## CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 17–834. Argued October 16, 2019—Decided March 3, 2020*

The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful to hire an alien knowing that he or she is unauthorized to work in the United States. 8 U. S. C. §§ 1324a(a)(1), (h)(3). IRCA requires employers to comply with a federal employment verification system. § 1324a(b). Using a federal work-authorization form (I–9), they "must attest" that they have "verified" that any new employee, regardless of citizenship or nationality, "is not an unauthorized alien" by examining approved documents, *e. g.*, a United States passport or an alien registration card, § 1324a(b)(1)(A). IRCA concomitantly requires all employees to complete an I–9 by their first day of employment and to attest that they are authorized to work. § 1324a(b)(2). Every employee must also provide certain personal information, including name, address, birth date, Social Security number, e-mail address, and telephone number. It is a federal crime for an employee to provide false information on an I–9 or to use fraudulent documents to show work authorization. See 18 U. S. C. §§ 1028, 1546. But it is not a federal crime for an alien to work without authorization, and state laws criminalizing such conduct are preempted. *Arizona* v. *United States*, 567 U. S. 387, 403–407. The I–9 forms and appended documentation, as well as the employment verification system, may only be used for enforcement of the Immigration and Nationality Act or other specified federal prohibitions. See §§ 1324a(b)(5), (d)(2)(F). IRCA does not directly address the use of an employee's federal and state tax-withholding forms, the W–4 and K–4 respectively. Finally, IRCA expressly "preempt[s] any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2).

Kansas makes it a crime to commit "identity theft" or engage in fraud to obtain a benefit. Respondents, three unauthorized aliens, were tried for fraudulently using another person's Social Security number on the W–4's and K–4's that they submitted upon obtaining employment. They had used the same Social Security numbers on their I–9 forms.

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*Together with *Kansas* v. *Morales* (see this Court's Rule 12.4) and *Kansas* v. *Ochoa-Lara* (see this Court's Rule 12.4), also on certiorari to the same court.

Syllabus

Respondents were convicted, and the Kansas Court of Appeals affirmed. A divided Kansas Supreme Court reversed, concluding that § 1324a(b)(5) expressly prohibits a State from using *any* information contained within an I–9 as the basis for a state law identity-theft prosecution of an alien who uses another's Social Security information in an I–9. The court deemed irrelevant the fact that this information was also included in the W–4 and K–4. One justice concurred based on implied preemption.

*Held*:

1. The Kansas statutes under which respondents were convicted are not expressly preempted. IRCA's express preemption provision applies only to *employers* and those who recruit or refer prospective employees and is thus plainly inapplicable. The Kansas Supreme Court instead relied on § 1324a(b)(5), which broadly restricts *any use* of an I–9, information "contained in" an I–9, and any documents appended to an I–9, reasoning that respondents' W–4's and K–4's used the same false Social Security numbers contained in their I–9's. The theory that no information placed on an I–9 could ever be used by any entity or person for any reason—other than the handful of federal statutes mentioned in § 1324a(b)(5)—is contrary to standard English usage. A tangible object can be "contained in" only one place at any point in time, but information may be "contained in" many different places. The mere fact that an I–9 contains an item of information, such as a name or address, does not mean that information "contained in" the I–9 is used whenever that name or address is used elsewhere. Nothing in § 1324a(b)(5)'s text supports the Kansas Supreme Court's limiting interpretation to prosecuting aliens for using a false identity to establish "employment eligibility." And respondents' express preemption argument cannot be saved by § 1324a(d)(2)(F), which prohibits use of the federal employment verification system "for law enforcement purposes other than" enforcement of IRCA and the same handful of federal statutes mentioned in § 1324a(b)(5). This argument fails because it rests on a misunderstanding of the meaning of the federal "employment verification system." The sole function of that system is to establish that an employee is not barred from working in this country. The completion of tax-withholding documents plays no part in the process of determining whether a person is authorized to work. Pp. 203–207.

2. Respondents' argument that Kansas's laws are preempted by implication is also rejected. Pp. 208–213.

(a) The laws do not fall into a field that is implicitly reserved exclusively for federal regulation, including respondents' claimed field of "fraud on the federal verification system." The submission of tax-withholding forms is neither part of, nor "related" to, the verification system. Employees may complete their W–4's, K–4's, and I–9's at roughly the same time, but IRCA plainly does not foreclose all state

regulation of information required as a precondition of employment. In arguing that the State's statutes require proof that the accused engaged in the prohibited conduct for the purpose of getting a "benefit," respondents conflate the benefit that results from complying with the federal employment verification system with the benefit of actually getting a job. Submitting W–4's and K–4's helped respondents get jobs, but it did not assist them in showing that they were authorized to work in this country. Federal law does not create a comprehensive and unified system regarding the information that a State may require employees to provide. Pp. 208–210.

(b) There is likewise no ground for holding that the Kansas statutes at issue conflict with federal law. It is certainly possible to comply with both IRCA and the Kansas statutes, and respondents do not suggest otherwise. They instead maintain that the Kansas statutes, as applied in their prosecutions, stand as "an obstacle to the accomplishment and execution of the full purposes" of IRCA—one of which is purportedly that the initiation of any legal action against an unauthorized alien for using a false identity in applying for employment should rest exclusively within the prosecutorial discretion of federal authorities. Respondents analogize their case to *Arizona* v. *United States*, 567 U. S., at 404–407, where the Court concluded that a state law making it a crime for an unauthorized alien to obtain employment conflicted with IRCA, which does not criminalize that conduct. But here, Congress made no decision that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution, and it has made using fraudulent information on a W–4 a federal crime. Moreover, in the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests. Federal authorities played a role in all three cases, and the Federal Government fully supports Kansas's position in this Court. In the end, however, the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to "the Laws of the United States," not the criminal law enforcement priorities or preferences of federal officers. Art. VI, cl. 2. Pp. 210–213.

306 Kan. 1113, 401 P. 3d 588 (first judgment); 306 Kan. 1100, 401 P. 3d 155 (second judgment); and 306 Kan. 1107, 401 P. 3d 159 (third judgment), reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 213. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 215.

Counsel

*Derek Schmidt,* Attorney General of Kansas, argued the cause for petitioner. With him on the briefs were *Jeffrey A. Chanay,* Chief Deputy Attorney General, *Toby Crouse*, Solicitor General, *Kristafer Ailslieger*, Deputy Solicitor General, and *Bryan C. Clark*, *Natalie Chalmers*, *Dwight R. Carswell*, and *Steven J. Obermeier*, Assistant Solicitors General, *Stephen M. Howe*, and *Jacob M. Gontesky.*

*Christopher G. Michel* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, and *Mark B. Stern.*

*Paul W. Hughes* argued the cause for respondents. With him on the brief were *Michael B. Kimberly*, *Sarah P. Hogarth*, *Randall L. Hodgkinson*, *Rick Kittel*, and *Rekha Sharma-Crawford.*†

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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, *Kian J. Hudson*, Deputy Solicitor General, and *Julia C. Payne*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Christopher M. Carr* of Georgia, *Aaron M. Frey* of Maine, *Jim Hood* of Mississippi, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, and *Patrick Morrisey* of West Virginia; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; and for the Immigration Reform Law Institute by *Christopher J. Hajec* and *Lew J. Olowski.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Harold C. Becker* and *Matthew J. Ginsburg*; for Immigration Law Scholars et al. by *Trisha B. Anderson*; for Law Office of David J. Grummon, P. A., by *Brian Leininger*; for the National Immigration Law Center et al. by *Kristi L. Graunke*, *Meredith B. Stewart*, *Matthew J. Piers*, *Caryn C. Lederer*, and *Nicholas Espíritu*; and for Puente Arizona et al. by *Anne Lai.*

*Kathleen M. Sullivan* and *Daryl Joseffer* filed a brief for the Chamber of Commerce of the United States of America as *amicus curiae.*

JUSTICE ALITO delivered the opinion of the Court.

Kansas law makes it a crime to commit "identity theft" or engage in fraud to obtain a benefit. Respondents—three aliens who are not authorized to work in this country—were convicted under these provisions for fraudulently using another person's Social Security number on state and federal tax-withholding forms that they submitted when they obtained employment. The Supreme Court of Kansas held that a provision of the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, expressly preempts the Kansas statutes at issue insofar as they provide a basis for these prosecutions. We reject this reading of the provision in question, as well as respondents' alternative arguments based on implied preemption. We therefore reverse.

## I

### A

The foundation of our laws on immigration and naturalization is the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, which sets out the "'terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 587 (2011). As initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field. See *De Canas* v. *Bica*, 424 U. S. 351, 353 (1976).

With the enactment of IRCA, Congress took a different approach. IRCA made it unlawful to hire an alien knowing that he or she is unauthorized to work in the United States. 8 U. S. C. §§ 1324a(a)(1)(A), (h)(3). To enforce this prohibition, IRCA requires employers to comply with a federal employment verification system. § 1324a(b). Using a federal work-authorization form (I–9), employers "must attest" that they have "verified" that an employee "is not an unau-

thorized alien" by examining approved documents such as a United States passport or alien registration card. § 1324a(b)(1)(A); see also §§ 1324a(b)(1)(B)–(D); 8 CFR § 274a.2(a)(2) (2019) (establishing Form I–9). This requirement applies to the hiring of any individual regardless of citizenship or nationality. 8 U. S. C. § 1324a(b)(1). Employers who fail to comply may face civil and criminal sanctions. See §§ 1324a(e)(4), (f); 8 CFR § 274a.10. IRCA instructs employers to retain copies of their I–9 forms and allows employers to make copies of the documents submitted by employees to show their authorization to work. 8 U. S. C. §§ 1324a(b)(3)–(4).

IRCA concomitantly imposes duties on all employees, regardless of citizenship. No later than their first day of employment, all employees must complete an I–9 and attest that they fall into a category of persons who are authorized to work in the United States. § 1324a(b)(2); 8 CFR § 274a.2(b)(1)(i)(A). In addition, under penalty of perjury, every employee must provide certain personal information—specifically: name, residence address, birth date, Social Security number, e-mail address, and telephone number. It is a federal crime for an employee to provide false information on an I–9 or to use fraudulent documents to show authorization to work. See 18 U. S. C. §§ 1028, 1546. Federal law does not make it a crime for an alien to work without authorization, and this Court has held that state laws criminalizing such conduct are preempted. *Arizona* v. *United States*, 567 U. S. 387, 403–407 (2012). But if an alien works illegally, the alien's immigration status may be adversely affected. See 8 U. S. C. §§ 1255(c)(2), (8), 1227(a)(1)(C)(i).

While IRCA imposes these requirements on employers and employees, it also limits the use of I–9 forms. A provision entitled "Limitation on use of attestation form," § 1324a(b)(5), provides that I–9 forms and "any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of" the INA or other

specified provisions of federal law, including those prohibiting the making of a false statement in a federal matter (18 U. S. C. § 1001), identity theft (§ 1028), immigration-document fraud (§ 1546), and perjury (§ 1621). In addition, 8 U. S. C. § 1324a(d)(2)(F) prohibits use of the "employment verification system" "for law enforcement purposes," apart from the enforcement of the aforementioned federal statutes.

Although IRCA expressly regulates the use of I–9's and documents appended to that form, no provision of IRCA directly addresses the use of other documents, such as federal and state tax-withholding forms, that an employee may complete upon beginning a new job. A federal regulation provides that all employees must furnish their employers with a signed withholding exemption certificate when they start a new job, but federal law apparently does not require the discharge of an employee who fails to do so. See 26 CFR §§ 31.3402(f)(2)–1, (5)–1 (2019). Instead, the regulation provides that if an employee fails to provide a signed W–4, the employer must treat the employee "as a single person claiming no withholding exemptions." § 31.3402(f)(2)–1(a). The submission of a fraudulent W–4, however, is a federal crime. 26 U. S. C. § 7205.

Kansas uses a tax-withholding form (K–4) that is similar to the federal form. Kan. Stat. Ann. § 79–3298 (2018 Cum. Supp.); Kansas Dept. of Revenue, Notice 07–07: New K–4 Form for State Withholding (Sept. 2007), www.orthodon.com/home/document/KS-WithholdingForm.pdf; Kansas Dept. of Revenue, Kansas Withholding Form K–4, www.ksrevenue.org/k4info.html. Employees must attest to the veracity of the information under penalty of perjury. Form K–4, Kansas Employee's Withholding Allowance Certificate (rev. Nov. 2018), www.ksrevenue.org/pdf/k-4.pdf; Kan. Stat. Ann. § 21–5903; see also Kansas Dept. of Revenue, Tax Fraud Enforcement, www.ksrevenue.org/taxfraud.html.

Finally, IRCA contains a provision that expressly "preempt[s] any State or local law imposing civil or criminal sanc-

tions (other than through licensing and similar laws) *upon those who employ, or recruit or refer for a fee for employment*, unauthorized aliens." 8 U. S. C. § 1324a(h)(2) (emphasis added). This provision makes no mention of state or local laws that impose criminal or civil sanctions on employees or applicants for employment. See *ibid.*

B

Like other States, Kansas has laws against fraud, forgeries, and identity theft. These statutes apply to citizens and aliens alike and are not limited to conduct that occurs in connection with employment. The Kansas identity-theft statute criminalizes the "using" of any "personal identifying information" belonging to another person with the intent to "[d]efraud that person, or anyone else, in order to receive any benefit." Kan. Stat. Ann. § 21–6107(a)(1). "[P]ersonal identifying information" includes, among other things, a person's name, birth date, driver's license number, and Social Security number. § 21–6107(e)(2). Kansas courts have interpreted the statute to cover the use of another person's Social Security number to receive the benefits of employment. See *State* v. *Meza*, 38 Kan. App. 2d 245, 247–250, 165 P. 3d 298, 301–302 (2007).

Kansas's false-information statute criminalizes, among other things, "making, generating, distributing or drawing" a "written instrument" with knowledge that it "falsely states or represents some material matter" and "with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." § 21–5824.

The respondents in the three cases now before us are aliens who are not authorized to work in this country but nevertheless secured employment by using the identity of other persons on the I–9 forms that they completed when they applied for work. They also used these same false identities when they completed their W–4's and K–4's. All three respondents were convicted under one or both of the

Kansas laws just mentioned for fraudulently using another person's Social Security number on tax-withholding forms. We summarize the pertinent facts related to these three prosecutions.

C

*Ramiro Garcia.* In August 2012, a local patrol officer stopped Garcia for speeding and learned that Garcia had been previously contacted by a financial crimes detective about possible identity theft. App. 39–44, 89–91; 306 Kan. 1113, 1114, 401 P. 3d 588, 590 (2017). Local authorities obtained the documents that Garcia had completed when he began work at a restaurant, and a joint state-federal investigation discovered that Garcia had used another person's Social Security number on his I–9, W–4, and K–4 forms. The State then charged Garcia with identity theft. The complaint alleged that, when he began work at the restaurant, he used another person's Social Security number with the intent to defraud and in order to receive a benefit. App. 9–10.

*Donaldo Morales.* A joint state-federal investigation of Morales began after the Kansas Department of Labor notified a Social Security agent that an employee at a local restaurant was using a Social Security number that did not match the identifying information in the department's files. 306 Kan. 1100, 1101, 401 P. 3d 155, 156 (2017); App. to Pet. for Cert. 73; App. 124–125, 168–170. A federal agent contacted the restaurant and learned that Morales had used another person's Social Security number on his I–9, W–4, and K–4 forms. The federal agent arrested Morales, who then admitted that he had bought the Social Security number from someone he met in a park. App. 171–172; 306 Kan., at 1101–1102, 401 P. 3d, at 156; App. to Pet. for Cert.73. This information was turned over to state prosecutors, who charged Morales with identity theft and making false information. App. 124–125; 306 Kan., at 1101, 401 P. 3d, at 156.

*Guadalupe Ochoa-Lara.* Ochoa-Lara came to the attention of a joint state-federal task force after officers learned

that he had used a Social Security number issued to someone else when he leased an apartment. 306 Kan. 1107, 1108–1109, 401 P. 3d 159, 160–161 (2017). The individual to whom this number was lawfully assigned advised the investigating officers that she had no knowledge that another person was using her number, and she later told authorities that income that she had not earned had been reported under her number. *Id.*, at 1109, 401 P. 3d, at 160. After contacting the restaurant where Ochoa-Lara worked, investigators determined that he had also used the same Social Security number to complete his I–9 and W–4 forms. *Ibid.* The State charged Ochoa-Lara with identity theft and making false information for using another's Social Security number on those documents.

D

In all three cases, respondents argued before trial that IRCA preempted their prosecutions. They relied on 8 U. S. C. § 1324a(b)(5), which, as noted, provides that I–9 forms and "any information contained in or appended to such form[s] may not be used for purposes other than for enforcement of" the INA or other listed federal statutes. In response, the State dismissed the charges that were based on I–9's and agreed not to rely on the I–9's at trial. The State maintained, however, that § 1324a(b)(5) did not apply to respondents' use of false Social Security numbers on the tax-withholding forms.

The trial courts allowed the State to proceed with the charges based on those forms. The State entered the K–4's and W–4's into evidence against Garcia and Morales, and Ochoa-Lara stipulated to using a stolen Social Security number on a W–4. App. 109–110; 306 Kan., at 1108–1109, 401 P. 3d, at 160–161.[1] Respondents were convicted, and three

[1] In Morales's bench trial, the State also introduced into evidence his I–9 and a photocopy of a permanent resident card and Social Security card that was appended to his I–9. App. 152–154, 178–179. The trial court, however, explicitly assured Morales that it would not make any findings

separate panels of the Kansas Court of Appeals affirmed their convictions.

A divided Kansas Supreme Court reversed, concluding that "the plain and unambiguous language of 8 U. S. C. § 1324a(b)(5)" expressly prohibits a State from using "any information contained within [an] I–9 as the bas[i]s for a state law identity theft prosecution of an alien who uses another's Social Security information in an I–9." 306 Kan., at 1130–1131, 401 P. 3d, at 599 (emphasis deleted). The court added that "[t]he fact that this information was included in the W–4 and K–4 did not alter the fact that it was also part of the I–9." *Id.*, at 1131, 401 P. 3d, at 599. In deciding the appeal on these grounds, the court appears to have embraced the proposition that any fact to which an employee attests in an I–9 is information that is "contained in" the I–9 and is thus subject to the restrictions imposed by § 1324a(b)(5), namely, that this fact cannot be used by anyone for any purpose other than the few listed in that provision. Nevertheless, the court suggested that its holding did not sweep this broadly but was instead limited to the prosecution of aliens for using a false identity to establish "employment eligibility." *Id.*, at 1126, 1131, 401 P. 3d, at 596, 600.

Justice Luckert concurred based on implied, not express, preemption. In her view, IRCA occupies "the field" within which the prosecutions at issue fell, namely, "the use of false documents, including those using the identity of others, when an unauthorized alien seeks employment." *Id.*, at 1136, 401 P. 3d, at 602. Justice Luckert also opined that the Kansas statutes, as applied in these cases, conflict with IRCA because they "usur[p] federal enforcement discretion" regard-

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based on the I–9, and defense counsel did not further object to the introduction of the I–9 into evidence. *Id.*, at 150–151. Before the state appellate courts, Morales did not argue that admitting the I–9 and photocopy was error. Nor did his brief in opposition to certiorari argue that the admission of these exhibits provided a ground for relief under federal law. See this Court's Rule 15.2.

ing the treatment of aliens who obtain employment even though they are barred from doing so under federal law. *Ibid.*, 401 P. 3d, at 603.

Two members of the court, Justices Biles and Stegall, dissented, and we granted review. 586 U. S. 1221 (2019).

## II

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land." Art. VI, cl. 2. The Clause provides "a rule of decision" for determining whether federal or state law applies in a particular situation. *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015). If federal law "imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," "the federal law takes precedence and the state law is preempted." *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 477 (2018).

In all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress. "There is no federal pre-emption *in vacuo*," without a constitutional text, federal statute, or treaty made under the authority of the United States. *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988); see also *Whiting*, 563 U. S., at 607 (preemption cannot be based on "a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives' "); *Virginia Uranium, Inc.* v. *Warren*, 587 U. S. 761, 767 (2019) (lead opinion of GORSUCH, J.) ("Invoking some brooding federal interest or appealing to a judicial policy preference" does not show preemption).

In some cases, a federal statute may expressly preempt state law. See *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S.

190, 203 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms"). But it has long been established that preemption may also occur by virtue of restrictions or rights that are inferred from statutory law. See, *e. g.*, *Osborn* v. *Bank of United States*, 9 Wheat. 738, 865 (1824) (rejecting argument that a federal exemption from state regulation "not being expressed, ought not to be implied by the Court"). And recent cases have often held state laws to be impliedly preempted. See, *e. g.*, *Arizona*, 567 U. S., at 400–408; *Kurns* v. *Railroad Friction Products Corp.*, 565 U. S. 625, 630–631 (2012); *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 617–618 (2011).

In these cases, respondents do not contend that the Kansas statutes under which they were convicted are preempted in their entirety. Instead, they argue that these laws must yield only insofar as they apply to an unauthorized alien's use of false documents on forms submitted for the purpose of securing employment. In making this argument, respondents invoke all three categories of preemption identified in our cases. They defend the Kansas Supreme Court's holding that provisions of IRCA expressly bar their prosecutions. And they also argue that the decision below is supported by "field" or "conflict" preemption or some combination of the two. We consider these arguments in turn.

## III

We begin with the argument that the state criminal statutes under which respondents were convicted are expressly preempted.

As noted, IRCA contains a provision that expressly preempts state law, but it is plainly inapplicable here. That provision applies only to the imposition of criminal or civil liability on *employers* and those who receive a fee for recruiting or referring prospective employees. 8 U. S. C.

§ 1324a(h)(2). It does not mention state or local laws that impose criminal or civil sanctions on employees or applicants for employment.

The Kansas Supreme Court did not base its holding on this provision but instead turned to § 1324a(b)(5), which is far more than a preemption provision. This provision broadly restricts *any use* of an I–9, information contained in an I–9, and any documents appended to an I–9. Thus, unlike a typical preemption provision, it applies not just to the States but also to the Federal Government and all private actors.

The Kansas Supreme Court thought that the prosecutions in these cases ran afoul of this provision because the charges were based on respondents' use in their W–4's and K–4's of the same false Social Security numbers that they also inserted on their I–9's. Taken at face value, this theory would mean that no information placed on an I–9—including an employee's name, residence address, date of birth, telephone number, and e-mail address—could ever be used by any entity or person for any reason.

This interpretation is flatly contrary to standard English usage. A tangible object can be "contained in" only one place at any point in time, but an item of information is different. It may be "contained in" many different places, and it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source.

Consider a person's e-mail address, one of the bits of information that is called for on an I–9. A person's e-mail address may be "contained in" a great many places. Individuals often provide their e-mail addresses to a wide circle of friends, acquaintances, online vendors, work-related contacts, and others. In addition, the records of every recipient of an e-mail from a particular person will contain that address.[2] In ordinary speech, no one would say that a person

[2] Of course, a considerate sender may remember to put the addresses in the BCC line.

who uses an e-mail address has used information that is contained in all these places.

Suppose that John used his e-mail address five years ago to purchase a pair of shoes and that the vendor has that address in its files. Suppose that John now sends an e-mail to Mary and that Mary sends an e-mail reply. No one would say that Mary has used information contained in the files of the shoe vendor.

Or consider this bit of information: that the first man set foot on the moon on July 20, 1969.[3] That fact was reported in newspapers around the world, from Neil Armstrong's hometown newspaper, the Wapakoneta (Ohio) Daily News,[4] to the Soviet newspaper Izvestia.[5] Suppose that an elementary school student writes a report in which she states that the first man walked on the moon in 1969. No one would say that the student used information contained in the Wapakoneta Daily News or Izvestia if she never saw those publications. But it would be natural to say that the student used information contained in a book in the school library if that is where she got the information for her report.

Accordingly, the mere fact that an I–9 contains an item of information, such as a name or address, does not mean that information "contained in" the I–9 is used whenever that name or address is later employed.

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[3] Twentieth Century Almanac 405 (R. Ferrell & J. Bowman eds. 1984); NASA, The First Person on the Moon (last updated Apr. 9, 2009), www.nasa.gov/audience/forstudents/k-4/stories/first-person-on-moon.html.

[4] Neil Steps on the Moon, Wapakoneta Daily News, July 21, 1969, p. 1, https://blogs.loc.gov/headlinesandheroes/2019/08/newspaper-coverage-of-one-giant-leap-for-mankind.

[5] See The First Steps: Luna Took the Envoys of the Earth, Izvestia, Moscow Evening ed., July 21, 1969, p. 1 (transl.); NASA, Astronautics and Aeronautics, 1969: Chronology on Science, Technology, and Policy 233 (NASA SP–4014 1970); see also McFall-Johnsen, Newspaper Front Pages From 50 Years Ago Reveal How the World Reacted to the Apollo 11 Moon Landing, Business Insider US, July 20, 2019, http://www.businessinsider.com/apollo-11-moon-landing-newspaper-front-pages-2019-7/.

If this were not so, strange consequences would ensue. Recall that 8 U. S. C. § 1324a(b)(5) applies to the Federal Government. Under 26 U. S. C. § 7205, it is a crime to willfully supply false information on a W–4, and this provision is not among those listed in 8 U. S. C. § 1324a(b)(5). Thus, if an individual provided the same false information on an I–9 and a W–4, the Federal Government could not prosecute this individual under 26 U. S. C. § 7205 even if the Government made no use whatsoever of the I–9. And that is just the beginning.

Suppose that an employee truthfully states on his I–9 that his name is Jim Smith. Under the interpretation of 8 U. S. C. § 1324a(b)(5) that the Kansas Supreme Court seemingly adopted, no one could use Jim's name for any purpose. If he robbed a bank, prosecutors could not use his name in an indictment. His employer could not cut a paycheck using that name. His sister could not use his name to mail him a birthday card.

The Kansas Supreme Court tried to fend off these consequences by suggesting that its interpretation applied only to the prosecution of aliens for using a false identity to establish "employment eligibility." 306 Kan., at 1126, 401 P. 3d, at 596. But there is no trace of these limitations in the text of § 1324a(b)(5). The point need not be belabored any further: The argument that § 1324a(b)(5) expressly bars respondents' prosecutions cannot be defended.

Apparently recognizing this, respondents turn to § 1324a(d)(2)(F), which prohibits use of the federal employment verification system[6] "for law enforcement purposes other than" enforcement of IRCA and the same handful of federal statutes mentioned in § 1324a(b)(5): 18 U. S. C. § 1001 (false statements), § 1028 (identity theft), § 1546 (immigration-document fraud), and § 1621 (perjury).

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[6] This provision refers to "[t]he system," but it is apparent that this means "the employment verification system," which is described in some detail in § 1324a(b). There is no other system to which this reference could plausibly refer.

This argument fails because it rests on a misunderstanding of the meaning of the federal "employment verification system." The sole function of that system is to establish that an employee is not barred from working in this country due to alienage. As described in § 1324a(b), the system includes the steps that an employee must take to establish that he or she is not prohibited from working, the steps that an employer must take to verify the employee's status, and certain related matters—such as the preservation and copying of records that are used to show authorization to work.

The federal employment verification system does not include things that an employee must or may do to satisfy requirements unrelated to work authorization. And completing tax-withholding documents plays no part in the process of determining whether a person is authorized to work.[7] Instead, those documents are part of the apparatus used to enforce federal and state income tax laws.[8]

For all these reasons, there is no express preemption in these cases.

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[7] Moreover, these documents are not always submitted when an employee begins a job. Instead, new W–4's and K–4's may be, and often are, completed at later dates when an employee wishes to make changes that affect the amount of withholding. 26 CFR § 31.3402(f)(2)–1; IRS, Publication 505: Tax Withholding and Estimated Tax 3 (May 15, 2019) ("During the year, changes may occur . . . . When this happens, you may need to give your employer a new Form W–4 . . . . Otherwise, if you want to change your withholding allowances for any reason, you can generally do that whenever you wish"); Kansas Dept. of Revenue, Kansas Withholding Form K–4, www.ksrevenue.org/k4info.html.

[8] Respondents also contend that 18 U. S. C. § 1546(c) expressly preempts the relevant Kansas statutes as applied in their prosecutions, but it is impossible to see any basis for that argument in the statutory text. This subsection, which is part of a provision that criminalizes certain conduct relating to immigration and authorization to work, provides that the section "does not prohibit any lawfully authorized investigative, protective, or intelligence activity" of a federal or state law enforcement agency, a federal intelligence agency, or others engaged in certain activity relating to the prosecution of organized crime. How this provision can be seen as expressly barring respondents' prosecutions is a mystery.

## IV

We therefore proceed to consider respondents' alternative argument that the Kansas laws, as applied, are preempted by implication. This argument, like all preemption arguments, must be grounded "in the text and structure of the statute at issue." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993).

### A

Respondents contend, first, that the Kansas statutes, as applied, fall into a field that is implicitly reserved exclusively for federal regulation. In rare cases, the Court has found that Congress "legislated so comprehensively" in a particular field that it "left no room for supplementary state legislation," *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 140 (1986), but that is certainly not the situation here.

In order to determine whether Congress has implicitly ousted the States from regulating in a particular field, we must first identify the field in which this is said to have occurred. In their merits brief in this Court, respondents' primary submission is that IRCA preempts "the field of fraud on the federal employment verification system," Brief for Respondents 41 (quotation altered), but this argument fails because, as already explained, the submission of tax-withholding forms is not part of that system.

At some points in their brief, respondents define the supposedly preempted field more broadly as the "field *relating to* the federal employment verification system," *id.*, at 42 (emphasis added); see also *id.*, at 40, but this formulation does not rescue the argument. The submission of tax-withholding forms is *fundamentally unrelated* to the federal employment verification system because, as explained, those forms serve entirely different functions. The employment verification system is designed to prevent the employment of unauthorized aliens, whereas tax-withholding forms help

to enforce income tax laws. And using another person's Social Security number on tax forms threatens harm that has no connection with immigration law.

For instance, using another person's Social Security number on tax-withholding forms affects the wages reported to federal and state tax authorities. In addition, many benefits—such as those for disability, unemployment, and retirement—are tied to an individual's work status and income. Inaccurate data also affect the accuracy of a State's tax information.[9]

It is true that employees generally complete their W–4's and K–4's at roughly the same time as their I–9's, but IRCA plainly does not foreclose all state regulation of information that must be supplied as a precondition of employment. New employees may be required by law to provide all sorts of information that has nothing to do with authorization to work in the United States, such as information about age (for jobs with a minimum age requirement), educational degrees, licensing, criminal records, drug use, and personal information needed for a background check. IRCA surely does not preclude States from requiring and regulating the submission of all such information.

Respondents suggest that federal law precludes their prosecutions because both the Kansas identity-theft statute and the Kansas false-information statute require proof that the accused engaged in the prohibited conduct for the purpose of getting a "benefit." Their argument is as follows. Since the benefit alleged by the prosecution in these cases was getting a job, and since the employment verification system concerns authorization to work, the theory of respondents' prosecutions is related to that system.

This argument conflates the benefit that results from complying with the federal employment verification system (ver-

[9] See, *e. g.*, Kansas Dept. of Revenue, Annual Reports, www.ksrevenue.org/prannualreport.html; Kansas Dept. of Revenue, Tax Fraud Enforcement, www.ksrevenue.org/taxfraud.html.

ifying authorization to work in the United States) with the benefit of actually getting a job. Submitting W–4's and K–4's helped respondents get jobs, but this did not in any way assist them in showing that they were authorized to work in this country. Thus, respondents' "relating to" argument must be rejected, as must the even broader definitions of the putatively preempted field advanced by respondents at earlier points in this litigation.

Contrary to respondents' suggestion, IRCA certainly does not bar all state regulation regarding the "use of false documents . . . when an unauthorized alien seeks employment." Brief in Opposition 21. Nor does IRCA exclude a State from the entire "field of employment verification." *Id.*, at 22. For example, IRCA certainly does not prohibit a public school system from requiring applicants for teaching positions to furnish legitimate teaching certificates. And it does not prevent a police department from verifying that a prospective officer does not have a record of abusive behavior.

Respondents argue that field preemption in these cases "follows directly" from our decision in *Arizona*, 567 U. S. 387, Brief for Respondents 45–46, but that is not so. In *Arizona*, relying on our prior decision in *Hines* v. *Davidowitz*, 312 U. S. 52 (1941), we held that federal immigration law occupied the field of alien registration. 567 U. S., at 400–402. "Federal law," we observed, "makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id.*, at 401–402. But federal law does not create a comprehensive and unified system regarding the information that a State may require employees to provide.

In sum, there is no basis for finding field preemption in these cases.

B

We likewise see no ground for holding that the Kansas statutes at issue conflict with federal law. It is certainly

possible to comply with both IRCA and the Kansas statutes, and respondents do not suggest otherwise. They instead maintain that the Kansas statutes, as applied in their prosecutions, stand as "an obstacle to the accomplishment and execution of the full purposes" of IRCA—one of which is purportedly that the initiation of any legal action against an unauthorized alien for using a false identity in applying for employment should rest exclusively within the prosecutorial discretion of federal authorities. Brief for Respondents 49–55. Allowing Kansas to bring prosecutions like these, according to respondents, would risk upsetting federal enforcement priorities and frustrating federal objectives, such as obtaining the cooperation of unauthorized aliens in making bigger cases. *Ibid.*

Respondents analogize these cases to our holding in *Arizona*, 567 U. S., at 404–407—that a state law making it a crime for an unauthorized alien to obtain employment conflicted with IRCA, which does not criminalize that conduct—but respondents' analogy is unsound. In *Arizona*, the Court inferred that Congress had made a considered decision that it was inadvisable to criminalize the conduct in question. In effect, the Court concluded that IRCA implicitly conferred a right to be free of criminal (as opposed to civil) penalties for working illegally, and thus a state law making it a crime to engage in that conduct conflicted with this federal right.

Nothing similar is involved here. In enacting IRCA, Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution. On the contrary, federal law makes it a crime to use fraudulent information on a W–4. 26 U. S. C. § 7205.

The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemp-

tion. From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today. In recent times, the reach of federal criminal law has expanded, and there are now many instances in which a prosecution for a particular course of conduct could be brought by either federal or state prosecutors. Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap. Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.

In the present cases, there is certainly no suggestion that the Kansas prosecutions frustrated any federal interests. Federal authorities played a role in all three cases, and the Federal Government fully supports Kansas's position in this Court. In the end, however, the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption. The Supremacy Clause gives priority to "the Laws of the United States," not the criminal law enforcement priorities or preferences of federal officers. Art. VI, cl. 2.

Finally, contrary to respondents' suggestion, these cases are very different from *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341 (2001), and *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282 (1986). In *Buckman Co.*, the preempted state tort claim for fraud on the Food and Drug Administration threatened serious disruption of the sensitive and highly technical process of approving medical devices. 531 U. S., at 347–353. In these cases, the state prosecutions posed no comparable risk.

In *Gould*, the decision rested on a special preemption rule governing state laws regulating matters that the National Labor Relations Act "protects, prohibits, or arguably protects." 475 U. S., at 286–289; *San Diego Building Trades*

*Council* v. *Garmon*, 359 U. S. 236, 246 (1959). No similar rule is operative or appropriate here.

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For these reasons, the judgments of the Supreme Court of Kansas are reversed, and these cases are remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree that Kansas' prosecutions and convictions of respondents for identity theft and making false information are not pre-empted by § 101(a)(1) of the Immigration Reform and Control Act of 1986, 8 U. S. C. § 1324a. I write separately to reiterate my view that we should explicitly abandon our "purposes and objectives" pre-emption jurisprudence.

The founding generation treated conflicts between federal and state laws as implied repeals. *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 622 (2011) (plurality opinion). Then, as now, courts disfavored repeals by implication. See, *e. g.*, *Warder* v. *Arell*, 2 Va. 282, 299 (1796) (opinion of President Judge); 2 T. Cunningham, A New and Complete Law-Dictionary (2d ed. 1771) (defining "Statute"); 4 M. Bacon, A New Abridgment of the Law 638 (3d ed. 1768). To overcome this disfavor, legislatures included *non obstante* clauses in statutes. See Nelson, Preemption, 86 Va. L. Rev. 225, 237–240, and nn. 42–44 (2000) (collecting examples). Courts understood *non obstante* provisions to mean that, "[r]ather than straining the new statute in order to harmonize it with prior law, [they] were supposed to give the new statute its natural meaning and to let the chips fall where they may." *Id.*, at 242.

The Founders included a *non obstante* provision in the Supremacy Clause. It directs that "the Judges in every

State shall be bound" by the "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, . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. If we interpret the Supremacy Clause as the founding generation did, our task is straightforward. We must use the accepted methods of interpretation to ascertain whether the ordinary meaning of federal and state law "directly conflict." *Wyeth* v. *Levine*, 555 U. S. 555, 590 (2009) (THOMAS, J., concurring in judgment). "[F]ederal law pre-empts state law only if the two are in logical contradiction." *Merck Sharp & Dohme Corp.* v. *Albrecht*, 587 U. S. 299, 319 (2019) (THOMAS, J., concurring); see also Nelson, *supra*, at 236–237.

The doctrine of "purposes and objectives" pre-emption impermissibly rests on judicial guesswork about "broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law." *Wyeth*, *supra*, at 587 (opinion of THOMAS, J.); see also *Arizona* v. *United States*, 567 U. S. 387, 440 (2012) (THOMAS, J., concurring in part and dissenting in part). I therefore cannot apply "purposes and objectives" pre-emption doctrine, as it is contrary to the Supremacy Clause.*

In these cases, the Court correctly distinguishes our "purposes and objectives" precedents and does not engage in a "'freewheeling judicial inquiry into whether a state statute

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*I am also skeptical of field pre-emption, "at least as applied in the absence of a congressional command that a particular field be pre-empted." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting). For today, however, it suffices to say that the Court correctly applies our field pre-emption precedents and that "nothing in the text of the relevant federal statutes indicates that Congress intended" to pre-empt a pertinent field. *Arizona*, 567 U. S., at 439 (opinion of THOMAS, J.).

is in tension with federal objectives.'" *Wyeth*, *supra,* at 588 (opinion of THOMAS, J.) (quoting *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 459 (2005) (THOMAS, J., concurring in judgment in part and dissenting in part)). It also acknowledges that "[t]he Supremacy Clause gives priority to 'the laws of the United States,' not the criminal law enforcement priorities or preferences of federal officers." *Ante,* at 212. Because the Court rejects respondents' "purposes and objectives" argument without atextual speculation about legislative intentions, I join its opinion in full.

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

I agree with the majority that nothing in the Immigration Reform and Control Act of 1986 (IRCA), 100 Stat. 3359, expressly preempts Kansas' criminal laws as they were applied in the prosecutions at issue here. But I do not agree with the majority's conclusion about implied preemption.

When we confront a question of implied preemption, the words of the statute are especially unlikely to determine the answer by themselves. Nonetheless, in my view, IRCA's text, together with its structure, context, and purpose, make it "'clear and manifest'" that Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization. *Arizona* v. *United States*, 567 U. S. 387, 400 (2012) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)); see Brief for United States as *Amicus Curiae* in *Puente Arizona* v. *Arpaio*, No. 15–15211 etc. (CA9), p. 15 (contending that the Act preempts state criminal laws "to the extent they regulate fraud committed to demonstrate authorization to work in the United States under federal immigration law"); Tr. of Oral Arg. 22–23 (standing by the Government's position in *Puente Arizona*). That is to say, the Act reserves to the Federal Government—and thus takes from the States—the power to

prosecute people for misrepresenting material information in an effort to convince their employer that they are authorized to work in this country.

The Act creates what we have called "a comprehensive scheme" to "comba[t] the employment of illegal aliens." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147 (2002). To that end, the statute's text sets forth highly detailed requirements. The Act specifies, for example: that employers and employees must affirm in writing that the employee is authorized to work in the United States, 8 U. S. C. §§ 1324a(b)(1)(A), (b)(2); that only certain documents suffice to demonstrate identity and work authorization (*e. g.*, a passport or alien-registration card), §§ 1324a(b)(1)(B)–(D); that employers and employees must affirm the truthfulness of the information they have given by "a hand-written or an electronic signature," §§ 1324a(b)(1)(A), (b)(2); that all this information must be consolidated on the I–9 form, *ibid.*; that the employer must store the I–9 in "paper, microfiche, microfilm, or electronic" form, typically for three years, § 1324a(b)(3); and that employers must make it available for federal inspection, *ibid.*

IRCA also contains two carefully calibrated sets of sanctions for noncompliance. On the employer side, the Act makes it unlawful for employers to hire someone without complying with the I–9 process, § 1324a(a)(1)(B), or to recruit, hire, or employ someone the employer knows to be unauthorized, §§ 1324a(a)(1)(A), (a)(2). The Act subjects employers who violate these prohibitions to an escalating series of civil and criminal penalties. See §§ 1324a(e)(4)–(5), (f). It also expressly "preempt[s] any State or local law imposing civil or criminal sanctions" on those employers, but with a saving clause that gives States some room to regulate employers (and only employers) in this area "through licensing and similar laws." § 1324a(h)(2); see also *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 587 (2011).

On the employee side, IRCA is somewhat more lenient. Employees, unlike employers, are not subject to punishment for mere failure to complete the paperwork that the Act requires. See § 1324a(e)(5). And while employees who work without authorization may suffer adverse immigration consequences, unauthorized work does not by itself trigger federal criminal prosecution. See *Arizona*, 567 U. S., at 404–405 (citing §§ 1227(a)(1)(C)(i), 1255(c)(2), (c)(8)). Rather, the Act makes it a federal crime for anyone to commit fraud "for the purpose of satisfying" the Act's requirements. 18 U. S. C. § 1546(b).

Our precedent demonstrates that IRCA impliedly preempts state laws that trench on Congress' detailed and delicate design. In *Arizona*, we invalidated a state law that made it a crime for an unauthorized alien to work. 567 U. S., at 403. In reaching that conclusion, we acknowledged that the Act's employer-related sections contain an express preemption provision, while the employee-related provisions do not. *Id.*, at 406. Even so, the Act's employee-related provisions retained, through implication, preemptive force. *Id.*, at 406–407.

Congress, we explained, "made a deliberate choice not to impose criminal penalties on aliens who" merely "seek, or engage in, unauthorized employment." *Id.*, at 405. The Act puts combating the employment of unauthorized aliens at the forefront of federal immigration policy. *Id.*, at 404. But it also reflects "a considered judgment" not to pursue that goal at all costs. *Id.*, at 405. "Unauthorized workers trying to support their families" usually "pose less danger than alien smugglers or aliens who commit a serious crime." *Id.*, at 396. And they may have "children born in the United States, long ties to the community," or other attributes that could counsel in favor of prosecutorial restraint. *Ibid.*

We ultimately held in *Arizona* that the States thus may not make criminal what Congress did not, for any such state law "would interfere with the careful balance struck by Con-

gress with respect to unauthorized employment of aliens." *Id.*, at 406. Given that "obstacle to the regulatory system Congress chose," we concluded that the state law at issue conflicted with the federal Act and was therefore preempted. *Id.*, at 406–407.

State laws that police fraud committed to demonstrate federal work authorization are similarly preempted. Even though IRCA criminalizes that conduct, the Act makes clear that only the Federal Government may prosecute people for misrepresenting their federal work-authorization status. This is so for two reasons.

First, the Act takes from the States the most direct means of policing work-authorization fraud. It prohibits States from using for that purpose both the I–9 and the federal employment verification system more generally. See 8 U. S. C. §§ 1324a(b)(5), (d)(2)(F). Those two provisions strongly suggest that the Act occupies the field of policing fraud committed to demonstrate federal work authorization. Otherwise, their express prohibitions would not constrain the States in any meaningful way. States could evade the Act simply by creating their own work-authorization form with the same requirements as the I–9, requiring employees to submit that form at the same time as the I–9, and prosecuting employees who make misrepresentations on the state form. No one contends that the States may do *that*.

Second, consider another part of our decision in *Arizona*. We also addressed in that case a different federal statute, one establishing a federal alien-registration system. See 567 U. S., at 400–403. Pointing to that statute's "full set of standards governing alien registration, including the punishment for noncompliance," we concluded that Congress had enacted "a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id.*, at 401–402. The statute therefore left no room for a state law designed to police violations of the federal alien-registration system. Similarly, IRCA's intricate procedures and penalties create

a comprehensive and unified system to keep track of who is authorized to work within the Nation's borders. See *supra*, at 216–217. This too shows that criminal enforcement falls to the Federal Government alone.

Nor does it matter that the state statutes invalidated in *Arizona* had expressly targeted aliens. In preemption cases, we must consider not just what a state law says, but also what it does. *Wos* v. *E. M. A.*, 568 U. S. 627, 637 (2013). For this reason, even generally applicable and facially neutral state laws may be preempted when applied in a particular factual context in a particular way. See, *e. g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347–350 (2001) (rejecting claims grounded in generally applicable state-law principles because they were based on a preempted theory of liability); *Northwest, Inc.* v. *Ginsberg*, 572 U. S. 273, 289 (2014) (similar). And here, Kansas applied its criminal laws to do what IRCA reserves to the Federal Government alone—police fraud committed to demonstrate federal work authorization. That is true even though Kansas prosecuted respondents based on their tax-withholding forms, rather than their I–9s.

Take Donaldo Morales, for example. Kansas charged him under two state antifraud statutes. Both required the State to prove, as an element, an intent to defraud. See Kan. Stat. Ann. §§21–5824(a), 21–6107(a)(1) (2018 Cum. Supp.). Kansas law defines "intent to defraud" as the "intention to deceive another person, and to induce such other person, in reliance upon such deception, to" transfer a property right. §21–5111(o). Kansas' theory of guilt was that Morales intended to deceive his employer about his federal work-authorization status so that his employer, in reliance upon that deception, would give him a job. At trial, the State elicited testimony that employees needed "proof of eligibility to work in the United States." App. 149. It then argued that Morales knew people like him had to use a false Social Security number to get a job because of "how they were

here." *Id.*, at 176. The trial court, sitting as the finder of fact, confirmed how it understood the reliance that Morales induced: Morales convinced his employer that he was "a legal citizen," even though he was in truth "undocumented." *Id.*, at 179–181.

On different facts, there would have been no preemption. Had Kansas proved instead that Morales used a false Social Security number on his tax-withholding forms to induce another sort of reliance (*e. g.*, to hide a criminal history), or perhaps to obtain another kind of benefit (*e. g.*, to pay less in taxes), IRCA would permit the prosecution. But that is not what Kansas did. What Kansas did was prosecute Morales for misrepresenting his federal work-authorization status for the purpose of obtaining employment. Kansas' prosecution of Morales thus fell squarely within the field that, in my view, the federal Act preempts.

By permitting these prosecutions, the majority opens a colossal loophole. Starting a new job almost always involves filling out tax-withholding forms alongside an I–9. So unless they want to give themselves away, people hoping to hide their federal work-authorization status from their employer will put the same false information on their tax-withholding forms as they do on their I–9. To let the States prosecute such people for the former is, in practical effect, to let the States police the latter. And policing the latter is what the Act expressly forbids.

For these reasons, I would hold that federal law impliedly preempted Kansas' criminal laws as they were applied in these cases. Because the majority takes a different view, with respect, I dissent.

Syllabus

# GUERRERO-LASPRILLA *v.* BARR, ATTORNEY GENERAL

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

No. 18–776. Argued December 9, 2019—Decided March 23, 2020*

The Immigration and Nationality Act provides for judicial review of a final Government order directing the removal of an alien from this country. 8 U. S. C. § 1252(a). Section 1252(a)(2)(C) limits the scope of that review where the removal rests upon the fact that the alien has committed certain crimes. And § 1252(a)(2)(D), the Limited Review Provision, says that in such instances courts may consider only "constitutional claims or questions of law."

Petitioners Guerrero-Lasprilla and Ovalles, aliens who lived in the United States, committed drug crimes and were subsequently ordered removed (Guerrero-Lasprilla in 1998 and Ovalles in 2004). Neither filed a motion to reopen his removal proceedings "within 90 days of the date of entry of [the] final administrative order of removal." § 1229a(c)(7)(C)(i). Nonetheless, Guerrero-Lasprilla (in 2016) and Ovalles (in 2017) asked the Board of Immigration Appeals to reopen their removal proceedings, arguing that the 90-day time limit should be equitably tolled. Both petitioners, who had become eligible for discretionary relief due to various judicial and Board decisions years after their removal, rested their claim for equitable tolling on *Lugo-Resendez* v. *Lynch*, 831 F. 3d 337, in which the Fifth Circuit had held that the 90-day time limit could be equitably tolled. The Board denied both petitioners' requests, concluding, *inter alia*, that they had not demonstrated the requisite due diligence. The Fifth Circuit denied their requests for review, holding that, given the Limited Review Provision, it "lack[ed] jurisdiction" to review petitioners' "factual" due diligence claims. Petitioners contend that whether the Board incorrectly applied the equitable tolling due diligence standard to the undisputed facts of their cases is a "question of law" that the Provision authorizes courts of appeals to consider.

*Held*: Because the Provision's phrase "questions of law" includes the application of a legal standard to undisputed or established facts, the Fifth

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*Together with No. 18–1015, *Ovalles* v. *Barr, Attorney General*, also on certiorari to the same court.

Circuit erred in holding that it had no jurisdiction to consider petitioners' claims of due diligence for equitable tolling purposes. Pp. 227–236.

(a) Nothing in the statute's language precludes the conclusion that Congress used the term "questions of law" to refer to the application of a legal standard to settled facts. Indeed, this Court has at times referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry. See *Neitzke* v. *Williams*, 490 U. S. 319, 326 ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"); *Mitchell* v. *Forsyth*, 472 U. S. 511, 528, n. 9 ("[T]he appealable issue is a purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law"); cf. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, 376 ("The effect of admitted facts is a question of law"). That judicial usage indicates that the statutory term "questions of law" can reasonably encompass questions about whether settled facts satisfy a legal standard. The Court has sometimes referred to such a question as a "mixed question of law and fact." See, *e. g.*, *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 394. And the Court has often used the phrase "mixed questions" in determining the proper standard for appellate review of a district, bankruptcy, or agency decision that applies a legal standard to underlying facts. But these cases present no such question involving the standard of review. And, in any event, nothing in those cases, nor in the language of the statute, suggests that the statutory phrase "questions of law" excludes the application of law to settled facts. Pp. 227–228.

(b) A longstanding presumption, the statutory context, and the statute's history all support the conclusion that the application of law to undisputed or established facts is a "questio[n] of law" within the meaning of § 1252(a)(2)(D). Pp. 228–234.

(1) A "well-settled" and "strong presumption," *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496, 498, "favor[s] judicial review of administrative action," *Kucana* v. *Holder*, 558 U. S. 233, 251. That presumption, which can only be overcome by "'"clear and convincing evidence"'" of congressional intent to preclude judicial review, *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 64, has consistently been applied to immigration statutes, *Kucana*, 558 U. S., at 251. And there is no reason to make an exception here. Because the Court can reasonably interpret the statutory term "questions of law" to encompass the application of law to undisputed facts, and given that a contrary interpretation would result in a barrier to meaningful judicial review, the presumption indicates that "questions of law" does indeed include mixed questions. Pp. 229–230.

Syllabus

(2) The Limited Review Provision's immediate statutory context belies the Government and the dissent's claim that "questions of law" excludes the application of law to settled facts. The Provision is part of § 1252, which also contains § 1252(b)(9), the "zipper clause." The zipper clause is meant to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals." *INS* v. *St. Cyr*, 533 U. S. 289, 313. The zipper clause's language makes clear that Congress understood the statutory term "questions of law and fact" to include the application of law to facts. One interpretation of the zipper clause at the very least disproves the Government's argument that Congress consistently uses a three-part typology, such that "questions of law" cannot include mixed questions. And another interpretation—that "questions of law" in the zipper clause includes mixed questions—directly supports the holding here and would give the term the same meaning in the zipper clause and the Limited Review Provision. Pp. 230–231.

(3) The Provision's statutory history and relevant precedent also support this conclusion. The Provision was enacted in response to *INS* v. *St. Cyr*, in which the Court interpreted the predecessor of § 1252(a)(2)(C) to permit habeas corpus review in order to avoid the serious constitutional questions that would arise from a contrary interpretation, 533 U. S., at 299–305, 314. In doing so, the Court suggested that the Constitution, at a minimum, protected the writ of habeas corpus "'as it existed in 1789.'" *Id.*, at 300–301. The Court then noted the kinds of review that were traditionally available in a habeas proceeding, which included "detentions based on errors of law, including the erroneous *application* or interpretation of statutes." *Id.*, at 302 (emphasis added). Congress took up the Court's invitation to "provide an adequate substitute [for habeas review] through the courts of appeals," *id.*, at 314, n. 38. It made clear that the limits on judicial review in various § 1252 provisions included habeas review, and it consolidated virtually all review of removal orders in one proceeding in the courts of appeals. Congress also added the Limited Review Provision, permitting review of "constitutional claims or questions of law." Congress did so, the statutory history strongly suggests, because it sought an "adequate substitute" for habeas in view of *St. Cyr*'s guidance. If "questions of law" in the Provision does not include the misapplication of a legal standard to undisputed facts, then review would not include an element that *St. Cyr* said was traditionally reviewable in habeas. Lower court precedent citing *St. Cyr* and legislative history also support this conclusion. Pp. 231–234.

(c) The Government's additional arguments in favor of its contrary reading are unpersuasive. More than that, the Government's interpre-

tation is itself difficult to reconcile with the Provision's basic purpose of providing an adequate substitute for habeas review. Pp. 234–236.

No. 18–776, 737 Fed. Appx. 230; No. 18–1015, 741 Fed. Appx. 259, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined as to all but Part II–A–1, *post*, p. 236.

*Paul W. Hughes* argued the cause for petitioners. With him on the briefs were *Michael B. Kimberly*, *Ethan H. Townsend*, *Mark Andrew Prada*, *Mario R. Urizar*, *Eugene R. Fidell*, *Andrew J. Pincus*, *Charles A. Rothfeld*, and *Brian Wolfman*.

*Frederick Liu* argued the cause for respondent. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, *John W. Blakeley*, and *W. Manning Evans*.†

JUSTICE BREYER delivered the opinion of the Court.

Section 242(a) of the Immigration and Nationality Act, codified as 8 U. S. C. § 1252(a), provides for judicial review of a final Government order directing the removal of an alien from this country. See 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* A subdivision of that section limits the scope of that review where the removal rests upon the fact that the alien has committed certain crimes, including aggravated felonies and controlled substance offenses. § 1252(a)(2)(C).

†Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation by *Jennifer B. Sokoler*, *Cody Wofsy*, *Lee Gelernt*, *Omar C. Jadwat*, and *David Cole*; for the American Immigration Counsel et al. by *Trina Realmuto*, *Kristin Macleod-Ball*, *Emma Winger*, and *Mark C. Fleming*; and for Scholars of Habeas Corpus Law by *Lucas Guttentag*, *Joshua S. Lipshutz*, *Jesenka Mrdjenovic*, and *Shannon Han*.

Another subdivision, § 1252(a)(2)(D), which we shall call the Limited Review Provision, says that in such instances courts may consider only "constitutional claims or questions of law." The question that these two consolidated cases present is whether the phrase "questions of law" in the Provision includes the application of a legal standard to undisputed or established facts. We believe that it does.

## I

The two petitioners before us, Pedro Pablo Guerrero-Lasprilla and Ruben Ovalles, are aliens who lived in the United States. Each committed a drug crime and consequently became removable. App. 33; Record in No. 18–1015, p. 66. In 1998, an Immigration Judge ordered Guerrero-Lasprilla removed. Record in No. 18–776, p. 137. In 2004, the Board of Immigration Appeals ordered Ovalles removed, reversing a decision by an Immigration Judge. App. to Pet. for Cert. in No. 18–1015, pp. 32a–35a. Both removal orders became administratively final, and both petitioners left the country.

Several months after their removal orders became final, each petitioner's window for filing a timely motion to reopen his removal proceedings closed. That is because the Immigration and Nationality Act permits a person one motion to reopen, "a form of procedural relief that asks the Board to change its decision in light of newly discovered evidence or a change in circumstances." *Dada* v. *Mukasey*, 554 U. S. 1, 12, 14 (2008) (internal quotation marks omitted). But the motion must usually be filed "within 90 days of the date of entry of a final administrative order of removal." 8 U. S. C. § 1229a(c)(7)(C)(i).

Nonetheless, Guerrero-Lasprilla (in 2016) and Ovalles (in 2017) asked the Board to reopen their removal proceedings. Recognizing that the 90-day time limit had long since passed, both petitioners argued that the time limit should be equita-

bly tolled. Both petitioners, who had become eligible for discretionary relief due to various judicial and Board decisions years after their removal, rested their claim for equitable tolling on *Lugo-Resendez* v. *Lynch*, 831 F. 3d 337 (CA5 2016). In that case, the Fifth Circuit had held that the 90-day time limit could be "equitably tolled." *Id.*, at 344. Guerrero-Lasprilla filed his motion to reopen a month after *Lugo-Resendez* was decided. App. 5. Ovalles filed his motion to reopen eight months after the decision. *Id.*, at 35. The Board denied both petitioners' requests for equitable tolling, concluding, *inter alia*, that they had failed to demonstrate the requisite due diligence. App. to Pet. for Cert. in No. 18–1015, at 6a; App. to Pet. for Cert. in No. 18–776, p. 12a.

Guerrero-Lasprilla and Ovalles each asked the Fifth Circuit to review the Board's decision. See 8 U. S. C. § 1252(a)(1); 28 U. S. C. § 2342; *Reyes Mata* v. *Lynch*, 576 U. S. 143, 147 (2015) ("[C]ircuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding"). The Fifth Circuit denied their requests for review, concluding in both cases that "whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question." *Guerrero-Lasprilla* v. *Sessions*, 737 Fed. Appx. 230, 231 (2018) (*per curiam*); *Ovalles* v. *Sessions*, 741 Fed. Appx. 259, 261 (2018) (*per curiam*). And, given the Limited Review Provision, it "lack[ed] jurisdiction" to review those "factual" claims. 737 Fed. Appx., at 231; 741 Fed. Appx., at 261.

Both petitioners claim that the underlying facts were not in dispute, and they asked us to grant certiorari in order to determine whether their claims that the Board incorrectly applied the equitable tolling due diligence standard to the "undisputed" (or established) facts is a "question of law," which the Limited Review Provision authorizes courts of appeals to consider. We agreed to do so.

## II

The Limited Review Provision provides that, in this kind of immigration case (involving aliens who are removable for having committed certain crimes), a court of appeals may consider only "constitutional claims or questions of law." 8 U. S. C. § 1252(a)(2)(D). The issue before us is, as we have said, whether the statutory phrase "questions of law" includes the application of a legal standard to undisputed or established facts. If so, the Fifth Circuit erred in holding that it "lack[ed] jurisdiction" to consider the petitioners' claims of due diligence for equitable tolling purposes. We conclude that the phrase "questions of law" does include this type of review, and the Court of Appeals was wrong to hold the contrary.

### A

Consider the statute's language. Nothing in that language precludes the conclusion that Congress used the term "questions of law" to refer to the application of a legal standard to settled facts. Indeed, we have at times referred to the question whether a given set of facts meets a particular legal standard as presenting a legal inquiry. Do the facts alleged in a complaint, taken as true, state a claim for relief under the applicable legal standard? See Fed. Rule Civ. Proc. 12(b)(6); *Neitzke* v. *Williams*, 490 U. S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Did a Government official's alleged conduct violate clearly established law? See *Mitchell* v. *Forsyth*, 472 U. S. 511, 528, n. 9 (1985) ("[T]he appealable issue is a purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law"); cf. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, 376 (1941) ("The effect of admitted facts is a question of law"). Even the dissent concedes that we have sometimes referred to mixed questions as raising a legal inquiry. See *post*, at 239 (opinion of THOMAS, J.). While that judicial

usage alone does not tell us what Congress meant by the statutory term "questions of law," it does indicate that the term can reasonably encompass questions about whether settled facts satisfy a legal standard.

We have sometimes referred to such a question, which has both factual and legal elements, as a "mixed question of law and fact." See, *e. g.*, *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 394 (2018) ("[W]hether the historical facts found satisfy the legal test chosen" is a "so-called 'mixed question' of law and fact" (citing *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982))). And we have often used the phrase "mixed questions" in determining the proper standard for appellate review of a district, bankruptcy, or agency decision that applies a legal standard to underlying facts. The answer to the "proper standard" question may turn on practical considerations, such as whether the question primarily "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" (often calling for review *de novo*), or rather "immerse[s] courts in case-specific factual issues" (often calling for deferential review). *Village at Lakeridge*, 583 U. S., at 396. But these cases present no such question involving the standard of review. And, in any event, nothing in those cases forecloses the conclusion that the application of law to settled facts can be encompassed within the statutory phrase "questions of law." Nor is there anything in the language of the statute that suggests that "questions of law" excludes the application of law to settled facts.

## B

The Government, respondent here, argues to the contrary. Namely, the Government claims that Congress intended to exclude from judicial review all mixed questions. We do not agree. Rather, a longstanding presumption, the statutory context, and the statute's history all support the conclusion that the application of law to undisputed or established facts is a "questio[n] of law" within the meaning of § 1252(a)(2)(D).

1

Consider first "a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Kucana* v. *Holder*, 558 U. S. 233, 251 (2010). Under that "well-settled" and "strong presumption," *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496, 498 (1991), when a statutory provision "is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana*, 558 U. S., at 251 (quoting *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 434 (1995); internal quotation marks omitted); see *McNary*, 498 U. S., at 496 ("[G]iven [that] presumption . . . , it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review"). The presumption can only be overcome by "clear and convincing evidence" of congressional intent to preclude judicial review. *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 64 (1993) (quoting *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967); internal quotation marks omitted); see *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 273–274 (2016).

We have "consistently applied" the presumption of reviewability to immigration statutes. *Kucana*, 558 U. S., at 251. And we see no reason to make an exception here. The dissent's "doubts" about the presumption, see *post*, at 242–244, do not undermine our recognition that it is a "well-settled" principle of statutory construction, *McNary*, 498 U. S., at 496. Notably, even the Government does not dispute the soundness of the presumption or its applicability here. See Brief for Respondent 47–48 (arguing only that the presumption is overcome).

As discussed above, we can reasonably interpret the statutory term "questions of law" to encompass the application of law to undisputed facts. See *supra*, at 227–228. And as we explain further below, *infra*, at 235–236, interpreting the Limited Review Provision to exclude mixed questions would effec-

tively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard. The resulting barrier to meaningful judicial review is thus a strong indication, given the presumption, that "questions of law" does indeed include the application of law to established facts. That is particularly so given that the statutory context and history point to the same result.

2

Consider next the Limited Review Provision's immediate statutory context. That context belies the Government and the dissent's claim that "questions of law" refers only to "pure" questions and necessarily excludes the application of law to settled facts. See Brief for Respondent 19–26; *post*, at 238–241. The Limited Review Provision forms part of § 1252, namely, § 1252(a)(2)(D). The same statutory section contains a provision, § 1252(b)(9), which we have called a "'zipper clause.'" *INS* v. *St. Cyr*, 533 U. S. 289, 313 (2001). We have explained that Congress intended the zipper clause to "consolidate judicial review of immigration proceedings into one action in the court of appeals." *Ibid.* (internal quotation marks omitted). The zipper clause reads in part as follows:

> "Judicial review of *all questions of law and fact*, including interpretation *and application of* constitutional and *statutory provisions*, arising from any action taken . . . to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." § 1252(b)(9) (emphasis added).

Because it is meant to consolidate judicial review, the zipper clause must encompass mixed questions. Indeed, the clause by its very language includes the "application of [a] statutory provisio[n]." *Ibid.*

The zipper clause accordingly makes clear that Congress understood the statutory term "questions of law and fact" to

include the application of law to facts. Reread the zipper clause: It uses the terms "[(1)] questions of law and [(2)] fact, *including*" the "application of" statutes, *i. e.*, the application of law to fact. *Ibid.* (emphasis added). Thus, there are three possibilities: Congress either used (1) "questions of law," (2) "fact," or (3) the combination of both terms to encompass mixed questions. Even the Government does not argue that Congress used "questions of fact" *alone* to cover mixed questions. Congress thus either meant the term "questions of law" alone to include mixed questions, or it used both "questions of law" and questions of "fact" to encompass mixed questions. The latter interpretation at the very least disproves the Government's argument that Congress consistently uses a three-part typology, referring to mixed questions separately from questions of law or questions of fact (such that "questions of law" cannot include mixed questions). See Brief for Respondent 21; see also *post*, at 238 (arguing that this Court has often used that three-part typology and thus "questions of law" must exclude mixed questions). And the former interpretation directly supports the conclusion that "questions of law" includes mixed questions. That interpretation gives "questions of law" the same meaning across both provisions. Notably, when Congress enacted the Limited Review Provision, it added language to the end of the zipper clause (following the language quoted above) to clarify that, except as provided elsewhere in § 1252, "'no court shall have jurisdiction'" to "'review . . . such questions of law or fact.'" § 106, 119 Stat. 311. There is thus every reason to think that Congress used the phrase "questions of law" to have the same meaning in both provisions.

3

Consider also the Limited Review Provision's statutory history and the relevant precedent. The parties agree that Congress enacted the Limited Review Provision in response to this Court's decision in *St. Cyr*. See Brief for Re-

spondent 16, 27–31; Brief for Petitioners 31–33. In that case, the Court evaluated the effect of various allegedly jurisdiction-stripping provisions, including the predecessor to § 1252(a)(2)(C). That predecessor (which today is modified by the Limited Review Provision) essentially barred judicial review of removal orders based on an alien's commission of certain crimes. See *St. Cyr*, 533 U. S., at 298, 311 (citing § 1252(a)(2)(C) (1994 ed., Supp. V)). This Court interpreted that predecessor and the other purportedly jurisdiction-stripping provisions as not barring (*i. e.*, as permitting) review in habeas corpus proceedings, to avoid the serious constitutional questions that would be raised by a contrary interpretation. See *St. Cyr*, 533 U. S., at 299–305, 314.

In doing so, the Court suggested that the Constitution, at a minimum, protected the writ of habeas corpus "'as it existed in 1789.'" *Id.*, at 300–301. The Court then noted the kinds of review that were traditionally available in a habeas proceeding, which included "detentions based on errors of law, including the erroneous *application* or interpretation of statutes." *Id.*, at 302 (emphasis added). And it supported this view by citing cases from the 18th and early 19th centuries. See *id.*, at 302–303, and nn. 18–23. English cases consistently demonstrate that the "erroneous application . . . of statutes" includes the misapplication of a legal standard to the facts of a particular case. See, *e. g.*, *Hollingshead's Case*, 1 Salk. 351, 91 Eng. Rep. 307 (K. B. 1702); *King* v. *Nathan*, 2 Str. 880, 93 Eng. Rep. 914 (K. B. 1724); *King* v. *Rudd*, 1 Cowp. 331, 334–337, 98 Eng. Rep. 1114, 1116–1117 (K. B. 1775); *King* v. *Pedley*, 1 Leach 325, 326, 168 Eng. Rep. 265, 266 (1784). The Court ultimately made clear that "Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas review] through the courts of appeals." *St. Cyr*, 533 U. S., at 314, n. 38.

Congress took up this suggestion. It made clear that the limits on judicial review in various provisions of § 1252 in-

cluded habeas review, and it consolidated virtually all review of removal orders in one proceeding in the courts of appeals. See § 106(a), 119 Stat. 310–311 (inserting specific references to 28 U. S. C. § 2241 and "'any other habeas corpus provision'"). At the same time, Congress added the Limited Review Provision, which permits judicial review of "'constitutional claims or questions of law,'" the words directly before us now. 119 Stat. 310.

This statutory history strongly suggests that Congress added the words before us because it sought an "adequate substitute" for habeas in view of *St. Cyr*'s guidance. See *supra*, at 232. If so, then the words "questions of law" in the Limited Review Provision must include the misapplication of a legal standard to undisputed facts, for otherwise review would not include an element that *St. Cyr* said was traditionally reviewable in habeas.

We reach the same conclusion through reference to lower court precedent. After we decided *St. Cyr*, numerous Courts of Appeals held that habeas review included review of the application of law to undisputed facts. See *Cadet* v. *Bulger*, 377 F. 3d 1173, 1184 (CA11 2004) ("[W]e hold that the scope of habeas review available in [28 U. S. C.] § 2241 petitions by aliens challenging removal orders . . . includes . . . errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts"); *Ogbudimkpa* v. *Ashcroft*, 342 F. 3d 207, 222 (CA3 2003) (same); *Mu-Xing Wang* v. *Ashcroft*, 320 F. 3d 130, 143 (CA2 2003) (same); *Singh* v. *Ashcroft*, 351 F. 3d 435, 441–442 (CA9 2003) ("[O]ther courts have rejected the Government's argument that only 'purely legal questions of statutory interpretation' permit the exercise of habeas jurisdiction. . . . We agree with those rulings"). We normally assume that Congress is "aware of relevant judicial precedent" when it enacts a new statute. *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 648 (2010). Thus, we should assume that Congress, aware of this precedent (and wishing to substitute review in the

courts of appeals for habeas review), would have intended the phrase "questions of law" to include the application of a legal standard to established or undisputed facts.

Those who deem legislative history a useful interpretive tool will find that the congressional history of the Limited Review Provision supports this analysis. The House Conference Report refers to *St. Cyr* and adds that Congress' amendments are designed to "provide an 'adequate and effective' alternative to habeas corpus" in the courts of appeals. H. R. Conf. Rep. No. 109–72, p. 175 (2005) (citing *St. Cyr*, 533 U. S., at 314, n. 38). The Report adds that the amendments "would not change the scope of review that criminal aliens currently receive." H. R. Conf. Rep. No. 109–72, at 175. And as we know, that "scope of review" included review of decisions applying a legal standard to undisputed or established facts. That is what this Court, in *St. Cyr*, had said was traditionally available in habeas; and it was how courts of appeals then determined the scope of habeas review. Notably, the legislative history indicates that Congress was well aware of the state of the law in the courts of appeals in light of *St. Cyr*. See H. R. Conf. Rep. No. 109–72, at 174 (discussing issues on which the Courts of Appeals agreed and those on which they had split after *St. Cyr*). The statutory history and precedent, as well as the legislative history, thus support the conclusion that the statutory term "questions of law" includes the application of a legal standard to established facts.

## III

The Government makes two significant arguments that we have not yet discussed. First, it points out that § 1252(a)(2)(C) forbids (subject to the Limited Review Provision) review of a removal order based on an alien's commission of certain crimes. If the words "questions of law" include "mixed questions," then for such aliens, the Limited Review Provision excludes only (or primarily) agency fact-finding

from review. But if Congress intended no more than that, then why, the Government asks, did it not just say so directly rather than eliminate judicial review and then restore it for "constitutional claims or questions of law?" Brief for Respondent 49–50.

One answer to this question is that the Limited Review Provision applies to more of the statute than the immediately preceding subparagraph. See § 1252(a)(2)(D) (applying notwithstanding "subparagraph (B) or (C), or in any other provision of this chapter (other than this section)"). Another answer is that Congress did not write the Limited Review Provision on a blank slate. Rather, subparagraph (C) initially forbade judicial review, and Congress then simply wrote another subparagraph reflecting our description in *St. Cyr* of the review traditionally available in habeas (or a substitute for habeas in the courts of appeals). See *supra*, at 231–233. That statutory history also illustrates why the dissent errs in relying so significantly on language in subparagraph (C) proscribing judicial review. See *post*, at 229–230, 232 (referring to the "sweeping" and "broad" language of subparagraph (C)). A broad and sweeping reading of subparagraph (C) was precisely what this Court rejected in *St. Cyr*, and Congress enacted subparagraph (D) in response to that opinion. Subparagraph (C)—constrained as it is by subparagraph (D)—must thus be read in that context.

Second, the Government argues that our interpretation will undercut Congress' efforts to severely limit and streamline judicial review of an order removing aliens convicted of certain crimes. See Brief for Respondent 29–30; see also *post*, at 246, n. 5 (noting that the legislative history indicates that Congress intended to streamline removal proceedings by limiting judicial review). The Limited Review Provision, however, will still forbid appeals of factual determinations—an important category in the removal context. And that Provision, taken together with other contemporaneous amendments to § 1252, does streamline judicial review rela-

tive to the post-*St. Cyr* regime, by significantly curtailing habeas proceedings in district courts.

More than that, the Government's interpretation is itself difficult to reconcile with the Provision's basic purpose of providing an adequate substitute for habeas review. That interpretation would forbid review of any Board decision applying a properly stated legal standard, irrespective of how mistaken that application might be. By reciting the standard correctly, the Board would be free to apply it in a manner directly contrary to well-established law. The Government, recognizing the extreme results of its interpretation, suggested at oral argument that the courts of appeals might still be able to review certain "categori[es]" of applications, such as whether someone being in a coma always, sometimes, or never requires equitable tolling. See Tr. of Oral Arg. 38. The Government, however, left the nature and rationale of this approach unclear. The approach does not overcome the problem we have just raised, and seems difficult to reconcile with the language and purposes of the statute.

* * *

For these reasons, we reverse the Fifth Circuit's "jurisdictional" decisions, vacate its judgments, and remand these cases for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE ALITO joins as to all but Part II–A–1, dissenting.

We granted certiorari to decide whether a denial of equitable tolling for lack of due diligence is reviewable as a "question of law" under 8 U. S. C. § 1252(a)(2)(D). Not content with resolving that narrow question, the Court categorically proclaims that federal courts may review immigration judges' applications of *any* legal standard to established facts in criminal aliens' removal proceedings. *Ante*, at 224–225. In

doing so, the majority effectively nullifies a jurisdiction-stripping statute, expanding the scope of judicial review well past the boundaries set by Congress. Because this arrogation of authority flouts both the text and structure of the statute, I respectfully dissent.

## I

Under § 1252(a)(2)(C), "[n]otwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain] criminal offense[s]." This broad jurisdiction-stripping provision is known as the "criminal-alien bar." The only exceptions to the provision's otherwise all-encompassing language are found in § 1252(a)(2)(D), which states that "[n]othing in subparagraph . . . (C) . . . shall be construed as precluding review of constitutional claims or questions of law." Thus, under the criminal-alien bar, any claim that neither is constitutional nor raises a question of law is unreviewable. Because petitioners raise no constitutional claim and due diligence in the equitable-tolling context is not a "question of law," their claims are unreviewable.

### A

Equitable tolling's due-diligence requirement presents a mixed question of law and fact. A litigant will qualify for equitable tolling only if he "has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10 (2014). To determine whether a litigant has exercised due diligence, judges must conduct what this Court has characterized as an "'equitable, often fact-intensive'" inquiry, considering "in detail" the unique facts of each case to decide whether a litigant's efforts were reasonable in light of his circumstances. *Holland* v. *Florida*, 560 U. S. 631, 653–654 (2010) (BREYER, J., for the Court). In other words,

courts ask "whether the historical facts found satisfy the legal test," which, as this Court recently (and unanimously) recognized, is a quintessential "'mixed question' of law and fact." *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 394 (2018) (quoting *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982)); but see *ante*, at 227–228.

B

The text of § 1252(a)(2)(D) authorizes courts to review only "constitutional claims or questions of law." It does not refer to mixed questions of law and fact, and cannot be divined to do so. As the statute's plain language and structure demonstrate, "questions of law" cannot reasonably be read to include mixed questions.

Although the statute does not define "questions of law," longstanding historical practice indicates that the phrase does not encompass mixed questions of law and fact. For well over a century, this Court has recognized questions of law, questions of fact, and mixed questions of law and fact as three discrete categories. See, *e. g.*, *Pullman-Standard*, *supra*, at 288 (distinguishing between a "question of law," a "mixed question of law and fact," and a "pure question of fact"); *Ross* v. *Day*, 232 U. S. 110, 116 (1914) (distinguishing between "a mere question of law" and "a mixed question of law and fact"); *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109 (1904) (distinguishing between "mixed questions of law and fact" and questions "of law alone"); *Jewell* v. *Knight*, 123 U. S. 426, 432 (1887) (distinguishing between "questions of law only," "questions of fact," and questions "of mixed law and fact"); *Republican River Bridge Co.* v. *Kansas Pacific R. Co.*, 92 U. S. 315, 318–319 (1876) (distinguishing between a "mixed question of law and fact," a "law question," and a "fact [question]"). A leading civil procedure treatise at the time of § 1252(a)(2)(D)'s enactment confirms this understanding. See 9A C. Wright & A. Miller, Federal Practice and Procedure §§ 2588–2589 (2d ed. 1995) (distinguishing be-

tween conclusions and questions of law, and "mixed questions of law and fact").

The majority resists this conclusion by pointing to cases in which the Court has characterized mixed questions as either legal or factual. But this occasional emphasis on either law or fact does not change the reality that many questions include both. This Court sometimes uses these two categories because "[m]ixed questions are not all alike" and, in certain contexts, this Court must distinguish between them by determining whether they present primarily legal or primarily factual inquiries. *Village at Lakeridge*, *supra*, at 395–396 (whether a creditor is a nonstatutory insider presents a factual inquiry); see also *Neitzke* v. *Williams*, 490 U. S. 319, 326 (1989) (whether a complaint fails to state a claim presents a legal inquiry).[1]

The Court often uses these labels in contexts that lend themselves to a fact/law dichotomy. For example, it asks whether a question is primarily legal or primarily factual when it needs to determine the appropriate standard of appellate review. See, *e. g.*, *Village at Lakeridge*, *supra*, at 396. A similar dichotomy arises when the Court considers whether an issue is one for the judge or jury. See, *e. g.*, *United States* v. *Gaudin*, 515 U. S. 506, 512 (1995) ("the application-of-legal-standard-to-fact sort of question . . . , commonly called a 'mixed question of law and fact,' has typically been resolved by juries" as a fact issue).

But these considerations are irrelevant in the context of a statutory judicial-review provision such as § 1252(a)(2),

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[1] The majority also cites *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), for the proposition that "whether a given set of facts meets a particular legal standard . . . present[s] a legal inquiry." *Ante,* at 227. But that case involved a motion for summary judgment, so the inquiry was limited to whether "a given proposition of law was not clearly established at the time the defendant committed the alleged acts." 472 U. S., at 529, n. 10. It did not concern the application of facts to a legal standard, such as whether "the defendant's actions were in fact unlawful." *Ibid.*

which contains text that refers only to "questions of law." The federal appellate judges who review claims under this provision are competent to review legal, factual, and mixed questions alike; their authority is constrained only by the statutory text. Our task, therefore, is simply to interpret the words of the statute, which invoke no forced dichotomy because Congress could have easily included mixed questions in the text if it wanted to do so. See, *e. g.*, 38 U. S. C. § 7292(d) (referring to a "challenge to a law . . . as applied to the facts of a particular case" as distinct from "questions of law"). Accordingly, there is no need to place the due-diligence inquiry into either category here.[2]

Moreover, conflating "questions of law" with mixed questions would lead to absurd results in light of the statute's structure. The criminal-alien bar, which directly precedes 8 U. S. C. § 1252(a)(2)(D), is an unequivocally broad jurisdiction-stripping provision, barring review "[n]otwithstanding any other provision of law (statutory or nonstatutory)." § 1252(a)(2)(C). That is the default rule. Section 1252(a)(2)(D) merely delineates two narrow exceptions to this criminal-alien bar—"constitutional claims" and "questions of law."

Reading "questions of law" to include *all* mixed questions would turn § 1252(a)(2)'s structure on its head. It would transform § 1252(a)(2)(D)'s narrow exception into a broad provision permitting judicial review of all criminal aliens' challenges to their removal proceedings except the precious few that raise only pure questions of fact. Because those questions are already effectively unreviewable under the Immigration and Nationality Act's (INA's) extremely deferential standard, § 1252(b)(4)(B) (Board's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"), this interpretation

[2] Even if this statute were interpreted in terms of a fact/law dichotomy, the majority offers no explanation as to why the due-diligence inquiry would fall on the "primarily legal" side of the line.

would reduce the jurisdiction-stripping provision to a near nullity. Put another way, the exception would all but swallow the rule.[3] The logical reading of § 1252(a)(2) is that the exception is narrower than the rule and covers only what is stated in the text: constitutional claims and questions of law.[4]

## II

Undeterred by the statute's text and structure, the majority concludes that criminal aliens are entitled to judicial review of any question involving the application of established facts to a legal standard. *Ante*, at 224–225. Even a fact-intensive mixed question like due diligence, which requires "[p]recious little" "legal work," *Village at Lakeridge*, 583 U. S., at 398, is a "question of law" according to the majority. To justify its erroneous reading of the text, the majority resorts to the presumption favoring judicial review and to legislative intent. Neither interpretive tool is appropriate for, or helpful to, the majority's analysis.

### A

The majority relies heavily on the presumption favoring judicial review of agency action as set out in our modern cases. *Ante*, at 229–230. Even accepting those precedents,

[3] The majority claims we must read § 1252(a)(2)(C) "in th[e] context" of the purported legislative intent behind § 1252(a)(2)(D). *Ante*, at 235. As explained below, atextual legislative intent is not an appropriate tool for interpreting a statute. See *infra*, at 243. But even if it were, the purported legislative intent here supports a narrow reading of § 1252(a)(2)(D) that leaves much of § 1252(a)(2)(C) intact. See *infra*, at 246–247.

[4] The majority makes much of the phrase "questions of law and fact" in another subsection of § 1252, known as the "zipper clause," which consolidates judicial review of immigration proceedings. *Ante*, at 230–231 (discussing 8 U. S. C. § 1252(b)(9)). But that language is most naturally read to encompass all three categories—"questions of law," "questions of . . . fact," and "questions of law and fact." § 1252(b)(9). At a minimum, the meaning of the zipper clause's text is ambiguous and cannot overcome the plain text of §§ 1252(a)(2)(C)–(D).

which no party asks us to reconsider, the presumption does no work here because the statute's text and structure plainly preclude review of mixed questions.

1

As an initial matter, I have come to have doubts about our modern cases applying the presumption of reviewability. Courts have long understood that they "generally have jurisdiction to grant relief" when individuals are injured by unlawful administrative action. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108 (1902). Applying this well-settled principle, we have refused to read a statute's "silence . . . as to judicial review" to preclude such review. *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944); see also *Board of Governors, FRS* v. *Agnew*, 329 U. S. 441, 444 (1947). But the modern presumption of reviewability relied on by the majority today goes far beyond this traditional approach.

The modern presumption developed against the backdrop of the Administrative Procedure Act (APA). See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967); see also *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22 (2018). In that statute, Congress created a general right of judicial review for individuals injured by agency action. 5 U. S. C. § 702. Notably, however, Congress also specified that this right did not apply when "statutes preclude judicial review." § 701(a)(1).

Rather than recognize that courts should give the words of both the APA and agencies' organic statutes their natural meaning, the Court relied on "[t]he spirit of [legislators'] statements" in Committee Reports and the "broadly remedial purposes of the [APA]" to craft a strong presumption of reviewability. *Heikkila* v. *Barber*, 345 U. S. 229, 232 (1953). The Court ultimately concluded that statutory text alone, even that which "appears to bar [judicial review]," is "not conclusive." *Id.*, at 233. Under this approach, a court will yield its jurisdiction "only upon a showing of 'clear and con-

vincing evidence,'" drawn from a statute's purpose and legislative history, that Congress "intended" as much. *Abbott Laboratories*, *supra*, at 139, 141; see also *ante*, at 229.

There are at least three reasons to doubt the soundness of this modern presumption. First, it elevates the supposed purpose or "spirit" of the APA over the statute's text. The "spirit" of a law is nothing more than "the unhappy interpretive conception of a supposedly better policy than can be found in the words of [the] authoritative text." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 344 (2012). Its invocation represents a "bald assertion of an unspecified and hence unbounded judicial power to ignore what the law says." *Id.*, at 343. And it is especially problematic to rely on the "spirit" of the APA in actions arising under a separate substantive statute with a judicial-review provision that is entirely distinct from the APA, such as the INA.

Second, the Court's test for rebutting the presumption relies heavily on legislative intent, inviting courts to discern the mental processes of legislators through legislative history. But "[e]ven assuming a majority of Congress read the [legislative history], agreed with it, and voted for [the statute] with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'" *Digital Realty Trust, Inc.* v. *Somers*, 583 U. S. 149, 172 (2018) (THOMAS, J., concurring in part and concurring in judgment) (quoting *Lawson* v. *FMR LLC*, 571 U. S. 429, 459–460 (2014) (Scalia, J., concurring in principal part and concurring in judgment)).

Finally, the clear-and-convincing-evidence requirement appears to conflict with the text of the Constitution. Under Articles I and III, Congress has the authority to establish the jurisdiction of inferior federal courts and to regulate the appellate jurisdiction of this Court. See Art. I, §8, cl. 9; Art. III, §2, cl. 2; see also *Patchak* v. *Zinke*, 583 U. S. 244, 252–255 (2018). It occasionally wields this power

to prevent federal courts from reviewing certain actions through jurisdiction-stripping statutes. See, *e. g.*, 12 U. S. C. §§ 1818(i)(1), 4208; 15 U. S. C. § 719h(c)(3); 31 U. S. C. § 3730(e)(4)(A). Using this modern presumption, however, the Court has reached the opposite result, despite a statute's plain text. See, *e. g.*, *INS* v. *St. Cyr*, 533 U. S. 289 (2001); see also *ante*, at 229–230. By placing heightened requirements on statutes promulgated under Congress' exclusive authority rather than simply giving effect to their ordinary meaning, courts upset the delicate balance of power reflected in the Constitution's text.

2

Even assuming that the modern presumption is justified and can properly be applied to actions outside the APA context, it does no work in these cases. First, as explained above, "questions of law" cannot reasonably be read to include mixed questions. See *supra*, at 241–243; cf. *Kucana* v. *Holder*, 558 U. S. 233, 251 (2010). But even if it could, the sweeping language of § 1252(a)(2)(C) provides clear and convincing evidence that judicial review of mixed questions is barred. The broad language of that provision leaves no room for ambiguity as to Congress' design. In erecting the criminal-alien bar, Congress unequivocally precluded judicial review of wide swaths of claims. The presumption, to the extent it should apply here at all, is thus firmly rebutted.

The Court nevertheless concludes that the presumption of reviewability dictates today's result. It bases this conclusion on the observation that "interpreting [§ 1252(a)(2)(D)] to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard." *Ante*, at 229–230. But "[t]he resulting barrier to meaningful judicial review" is not a problem in need of a judicial solution, *ante*, at 230—it is evidence of Congress' design, which is precisely the sort of "clear and convincing evidence" that should "dislodge the presumption," *Kucana*, *supra*, at 252 (internal quotation marks omit-

ted). By using Congress' preclusive design to *justify* rather than dislodge the presumption, the majority dramatically expands the presumption, rendering it effectively irrebuttable.

B

The majority next relies on the purported purpose of § 1252(a)(2)(D) to justify its reading of the text. It claims that Congress intended to provide an " 'adequate substitute' for habeas in view of *St. Cyr*'s guidance" regarding the scope of the Suspension Clause. *Ante*, at 233. As explained above, legislative intent, to the extent it exists independent of the words in the statute, is unhelpful to the proper interpretation of a statute's text. See *supra*, at 243. But its invocation is especially unhelpful to the majority here. Even assuming Congress looked to *St. Cyr* when drafting § 1252(a)(2)(D), the limited "guidance" provided in that opinion supports my reading of the statute, not the majority's.

As an initial matter, the Court in *St. Cyr* expressly declined to resolve "the difficult question of what the Suspension Clause protects." 533 U. S., at 301, n. 13. Respondent in that case argued that § 1252(a)(2)(C) would violate the Suspension Clause if it were read to preclude review of all questions of law in habeas proceedings. But rather than affirm that position, the Court concluded that it was enough to merely identify that "substantial constitutional questio[n]" to warrant rejection of the Government's interpretation. *Id.*, at 300. Indeed, the meaning of the Suspension Clause and its applicability to removal proceedings remain open questions. See *Department of Homeland Security* v. *Thuraissigiam*, 589 U. S. 1034 (2019) (granting certiorari). In explaining its decision, the Court in *St. Cyr* merely asserted that the Suspension Clause "protects the writ as it existed in 1789" and noted that "there is substantial evidence . . . that *pure questions of law*" were generally covered by the common-law writ. 533 U. S., at 301, 304–305 (emphasis added; internal quotation marks omitted). The

decision said nothing about mixed questions or the application of settled facts to a legal standard.

The majority relies on one sentence of dicta in *St. Cyr*, which states that the common-law writ addressed "the erroneous application or interpretation of statutes." *Id.*, at 302; see *ante*, at 232. But the application of a statute does not always involve applying facts to a legal standard, nor is it necessarily analogous to the equitable and fact-intensive due-diligence inquiry.

The majority next suggests that Congress was familiar with the underlying details of common-law cases cited in *St. Cyr*, *ante*, at 232, or the lower court decisions expanding on *St. Cyr*'s dicta, *ante*, at 233. But such a "fanciful presumption of legislative knowledge" cannot justify the majority's position. Scalia, Reading Law, at 324.[5] And if Congress were presumed to have such a robust knowledge of our precedents, one would certainly expect it to be familiar with our historical practice of using "questions of law" and "mixed questions" as distinct terms. See *supra*, at 238.

The only guidance provided by *St. Cyr*'s dicta concerned "pure questions of law." 533 U. S., at 305; see also *id.*, at

[5] To support its reliance on this presumption, the majority cites *Merck & Co.* v. *Reynolds*, 559 U. S. 633 (2010). But that case presumed that when Congress used a specific term it imported a particular meaning that courts had given the term through uniform interpretation. See *id.*, at 647–648. The majority goes much further here, claiming that Congress' "intent" was to give effect to lower courts' interpretations of this Court's dicta. *Ante*, at 234. Contrary to the majority's suggestion, nothing in the legislative history indicates that Congress relied on lower courts' interpretations of *St. Cyr* in enacting § 1252(a)(2)(D). Congress merely highlighted the "confusion in the federal courts" as one of "the many problems caused by *St. Cyr*." H. R. Conf. Rep. No. 109–72, pp. 173–174 (2005). Notably, the Report also stated that "the most significant [problem]" was "that [the] decision allow[ed] criminal aliens to delay their expulsion from the United States for years." *Id.*, at 173. Thus, even if one could divine a shared legislative intent by reading this Conference Report, it would appear that Congress intended to streamline removal proceedings by limiting judicial review to the greatest extent possible under *St. Cyr*.

314, n. 38 ("[T]his case raises only a pure question of law . . . , not . . . an objection to the manner in which discretion was exercised"). So even if it were appropriate to assume that Congress enacted § 1252(a)(2)(D) with the collective intention of following *St. Cyr*'s guidance (which it is not), that statutory purpose supports reading "questions of law" to mean just that: "questions of law."

* * *

Ironically, the majority refers to § 1252(a)(2)(D) as the "Limited Review Provision." *Ante*, at 225. But according to the majority's interpretation, it is anything but "limited"—nearly all claims are reviewable. That reading contradicts the plain text and structure of § 1252(a)(2), which was enacted to strip federal courts of their jurisdiction to review most criminal aliens' claims challenging removal proceedings. The Constitution gives the Legislative Branch the authority to curtail that jurisdiction. We cannot simply invoke this presumption of reviewability to circumvent Congress' decision. Doing so upsets, not preserves, the separation of powers reflected in the Constitution's text. I respectfully dissent.

Syllabus

# ALLEN ET AL. *v.* COOPER, GOVERNOR OF NORTH CAROLINA, ET AL.

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

No. 18–877. Argued November 5, 2019—Decided March 23, 2020

In 1996, a marine salvage company named Intersal, Inc., discovered the shipwreck of the *Queen Anne's Revenge* off the North Carolina coast. North Carolina, the shipwreck's legal owner, contracted with Intersal to conduct recovery operations. Intersal, in turn, hired videographer Frederick Allen to document the efforts. Allen recorded videos and took photos of the recovery for more than a decade. He registered copyrights in all of his works. When North Carolina published some of Allen's videos and photos online, Allen sued for copyright infringement. North Carolina moved to dismiss the lawsuit on the ground of state sovereign immunity. Allen countered that the Copyright Remedy Clarification Act of 1990 (CRCA) removed the States' sovereign immunity in copyright infringement cases. The District Court agreed with Allen, finding in the CRCA's text a clear congressional intent to abrogate state sovereign immunity and a proper constitutional basis for that abrogation. The court acknowledged that *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, precluded Congress from using its Article I powers—including its authority over copyrights—to deprive States of sovereign immunity. But the court held that Congress could accomplish its objective under Section 5 of the Fourteenth Amendment. The Fourth Circuit reversed, reading *Florida Prepaid* to prevent recourse to both Article I and Section 5.

*Held*: Congress lacked authority to abrogate the States' immunity from copyright infringement suits in the CRCA. Pp. 254–267.

(a) In general, a federal court may not hear a suit brought by any person against a nonconsenting State. But such suits are permitted if Congress has enacted "unequivocal statutory language" abrogating the States' immunity from suit, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 56, and some constitutional provision allows Congress to have thus encroached on the States' sovereignty. Congress used clear language to abrogate the States' immunity from copyright infringement suits in the CRCA. Allen contends that Congress's constitutional power to do so arises either from the Intellectual Property Clause, Art. I, § 8, cl. 8, or from Section 5 of the Fourteenth Amendment, which authorizes Congress to "enforce" the commands of the Due Process Clause. Each contention is foreclosed by precedent. Pp. 254–256.

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(b) The Intellectual Property Clause enables Congress to grant both copyrights and patents. In Allen's view, Congress's authority to abrogate sovereign immunity from copyright suits naturally follows, in order to "secur[e]" a copyright holder's "exclusive Right" as against a State's intrusion. But that theory was rejected in *Florida Prepaid*. That case considered the constitutionality of the Patent Remedy Act, which, like the CRCA, attempted to put "States on the same footing as private parties" in patent infringement lawsuits. 527 U. S., at 647, 648. *Florida Prepaid* acknowledged that Congress's goal of providing uniform remedies in infringement cases was a "proper Article I concern," but held that *Seminole Tribe* precluded Congress from using its Article I powers "to circumvent" the limits sovereign immunity "place[s] upon federal jurisdiction," 517 U. S., at 73. For the same reason, Article I cannot support the CRCA. Allen reads *Central Va. Community College* v. *Katz*, 546 U. S. 356, to have replaced *Seminole Tribe*'s general rule with a clause-by-clause approach to evaluating whether a particular constitutional provision allows the abrogation of sovereign immunity. But *Katz* rested on the unique history of the Bankruptcy Clause. 546 U. S., at 369, n. 9. And even if the limits of *Katz*'s holding were not so clear, *Florida Prepaid*, together with *stare decisis*, would doom Allen's argument. Overruling *Florida Prepaid* would require a "special justification," over and above the belief "that the precedent was wrongly decided," *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266, which Allen does not offer. Pp. 256–260.

(c) Section 5 of the Fourteenth Amendment allows Congress to abrogate the States' immunity as part of its power "to enforce" the Amendment's substantive prohibitions. *City of Boerne* v. *Flores*, 521 U. S. 507, 519. For Congress's action to fall within its Section 5 authority, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. This test requires courts to consider the nature and extent of state conduct violating the Fourteenth Amendment and to examine the scope of Congress's response to that injury. *Florida Prepaid* again serves as the critical precedent. There, the Court defined the scope of unconstitutional patent infringement as intentional conduct for which there is no adequate state remedy. 527 U. S., at 642–643, 645. Because Congress failed to identify a pattern of unconstitutional patent infringement when it enacted the Patent Remedy Act, the Court held that the Act swept too far. Given the identical scope of the CRCA and Patent Remedy Act, this case could be decided differently only if the CRCA responded to materially stronger evidence of unconstitutional infringement. But as in *Florida Prepaid*, the legislative record contains thin evidence of infringement. Because this record cannot support Congress's choice to strip the States of their sovereign immunity in all copy-

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right infringement cases, the CRCA fails the "congruence and proportionality" test. Pp. 260–266.

895 F. 3d 337, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, GORSUCH, and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined except for the final paragraph in Part II–A and the final paragraph in Part II–B. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 267. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 269.

*Derek L. Shaffer* argued the cause for petitioners. With him on the briefs were *Todd Anten*, *Ellyde R. Thompson*, *Lisa M. Geary*, *Joanna E. Menillo*, *Susan Freya Olive*, *David L. McKenzie*, and *G. Jona Poe, Jr.*

*Ryan Y. Park*, Deputy Solicitor General of North Carolina, argued the cause for respondents. With him on the brief were *Joshua H. Stein*, Attorney General of North Carolina, *Matthew W. Sawchak*, Solicitor General, and *Nicholas S. Brod*, Assistant Solicitor General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Society of Media Photographers, Inc., et al. by *Thomas B. Maddrey, J. Michael Heinlen*, and *Mickey H. Osterreicher*; for the Constitutional Accountability Center by *Elizabeth B. Wydra, Brianne J. Gorod*, and *David H. Gans*; for the Copyright Alliance et al. by *Beth S. Brinkmann, Ronald G. Dove, Jr.*, and *Daryl Joseffer*; for Dow Jones & Co., Inc., by *Robert P. LoBue*; for the Intellectual Property Law Association of Chicago by *Donald W. Rupert, Charles W. Shifley*, and *Robert H. Resis*; for Law Professors by *Owen J. McGovern* and *William J. Rich, pro se*; for Oracle America, Inc., by *Kelsi Brown Corkran, Karen Johnson-McKewan*, and *Brian P. Goldman*; for Public Law Scholars by *Ernest A. Young* and *Chris Dove*; for the Recording Industry Association of America et al. by *Elaine J. Goldenberg*; for the Software & Information Industry Association by *J. Matthew Williams, Theresa B. Bowman*, and *Christopher A. Mohr*; for the Washington Legal Foundation by *Cory L. Andrews* and *Corbin K. Barthold*; and for Ralph Oman by *Melissa Arbus Sherry, Sarang Vijay Damle*, and *Joseph Wetzel*.

Briefs of *amici curiae* urging affirmance were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia,

JUSTICE KAGAN delivered the opinion of the Court.

In two basically identical statutes passed in the early 1990s, Congress sought to strip the States of their sovereign immunity from patent and copyright infringement suits. Not long after, this Court held in *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), that the patent statute lacked a valid constitutional basis. Today, we take up the copyright statute. We find that our decision in *Florida Prepaid* compels the same conclusion.

I

In 1717, the pirate Edward Teach, better known as Blackbeard, captured a French slave ship in the West Indies and renamed her *Queen Anne's Revenge*. The vessel became his flagship. Carrying some 40 cannons and 300 men, the *Revenge* took many prizes as she sailed around the Caribbean and up the North American coast. But her reign over those

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*Lindsay S. See*, Solicitor General, and *John M. Masslon II*, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *William Tong* of Connecticut, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeffrey Martin Landry* of Louisiana, *Brian E. Frosh* of Maryland, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Gurbir S. Grewal* of New Jersey, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean Reyes* of Utah, *Mark R. Herring* of Virginia, and *Robert C. Ferguson* of Washington; for the American Library Association et al. by *Jonathan Band*; for the Association of Public and Land-grant Universities et al. by *Scott A. Keller* and *Lauren J. Dreyer*; for Law Professors by *Trevor S. Cox* and *Matthew R. McGuire*; and for Simone Rose by *Andrew H. Erteschik*, *Saad Gul*, and *John Michael Durnovich*.

*James Klaiber* filed a brief for the Association of the Bar of the City of New York as *amicus curiae*.

seas was short-lived. In 1718, the ship ran aground on a sandbar a mile off Beaufort, North Carolina. Blackbeard and most of his crew escaped without harm. Not so the *Revenge*. She sank beneath the waters, where she lay undisturbed for nearly 300 years.

In 1996, a marine salvage company named Intersal, Inc., discovered the shipwreck. Under federal and state law, the wreck belongs to North Carolina. See 102 Stat. 433, 43 U. S. C. § 2105(c); N. C. Gen. Stat. Ann. § 121–22 (2019). But the State contracted with Intersal to take charge of the recovery activities. Intersal in turn retained petitioner Frederick Allen, a local videographer, to document the operation. For over a decade, Allen created videos and photos of divers' efforts to salvage the *Revenge*'s guns, anchors, and other remains. He registered copyrights in all those works.

This suit arises from North Carolina's publication of some of Allen's videos and photos. Allen first protested in 2013 that the State was infringing his copyrights by uploading his work to its website without permission. To address that allegation, North Carolina agreed to a settlement paying Allen $15,000 and laying out the parties' respective rights to the materials. But Allen and the State soon found themselves embroiled in another dispute. Allen complained that North Carolina had impermissibly posted five of his videos online and used one of his photos in a newsletter. When the State declined to admit wrongdoing, Allen filed this action in Federal District Court. It charges the State with copyright infringement (call it a modern form of piracy) and seeks money damages.

North Carolina moved to dismiss the suit on the ground of sovereign immunity. It invoked the general rule that federal courts cannot hear suits brought by individuals against nonconsenting States. See State Defendants' Memorandum in No. 15–627 (EDNC), Doc. 50, p. 7. But Allen responded that an exception to the rule applied because Congress had abrogated the States' sovereign immunity from suits like his.

See Plaintiffs' Response, Doc. 57, p. 7. The Copyright Remedy Clarification Act of 1990 (CRCA or Act) provides that a State "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement. 17 U. S. C. §511(a). And the Act specifies that in such a suit a State will be liable, and subject to remedies, "in the same manner and to the same extent as" a private party. §501(a); see §511(b).[1] That meant, Allen contended, that his suit against North Carolina could go forward.

The District Court agreed. Quoting the CRCA's text, the court first found that "Congress has stated clearly its intent to abrogate sovereign immunity for copyright claims against a state." 244 F. Supp. 3d 525, 533 (EDNC 2017). And that abrogation, the court next held, had a proper constitutional basis. *Florida Prepaid* and other precedent, the District Court acknowledged, precluded Congress from using its Article I powers—including its authority over copyrights—to take away a State's sovereign immunity. See 244 F. Supp. 3d, at 534. But in the court's view, *Florida Prepaid* left open an alternative route to abrogation. Given the States' "pattern" of "abus[ive]" copyright infringement, the court held, Congress could accomplish its object under Section 5 of the Fourteenth Amendment. 244 F. Supp. 3d, at 535.

On interlocutory appeal, the Court of Appeals for the Fourth Circuit reversed. It read *Florida Prepaid* to prevent recourse to Section 5 no less than to Article I. A Section 5 abrogation, the Fourth Circuit explained, must be

[1] The CRCA served as the model for the Patent and Plant Variety Protection Clarification Act (Patent Remedy Act), passed two years later (and repudiated by this Court in *Florida Prepaid*, see *supra*, at 251). Using the same language, the latter statute provided that a State "shall not be immune, under the [E]leventh [A]mendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for patent infringement. §2, 106 Stat. 4230. And so too, the statute specified that in such a suit, a State will be liable, and subject to remedies, "in the same manner and to the same extent as" a private party. *Ibid.*

"congruent and proportional" to the Fourteenth Amendment injury it seeks to remedy. 895 F. 3d 337, 350 (2018). *Florida Prepaid* had applied that principle to reject Congress's attempt, in the Patent Remedy Act, to abolish the States' immunity from patent infringement suits. See 527 U. S., at 630. In the Fourth Circuit's view, nothing distinguished the CRCA. That abrogation, the court reasoned, was "equally broad" and rested on a "similar legislative record" of constitutional harm. 895 F. 3d, at 352. So Section 5 could not save the law.

Because the Court of Appeals held a federal statute invalid, this Court granted certiorari. 587 U. S. 1039 (2019). We now affirm.

## II

In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State. That bar is nowhere explicitly set out in the Constitution. The text of the Eleventh Amendment (the single most relevant provision) applies only if the plaintiff is not a citizen of the defendant State.[2] But this Court has long understood that Amendment to "stand not so much for what it says" as for the broader "presupposition of our constitutional structure which it confirms." *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991). That premise, the Court has explained, has several parts. First, "each State is a sovereign entity in our federal system." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 54 (1996). Next, "[i]t is inherent in the nature of sovereignty not to be amenable to [a] suit" absent consent. *Id.*, at 54, 70, n. 13 (quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton)). And last, that fundamental aspect of sover-

[2] The Eleventh Amendment reads: "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."

eignty constrains federal "judicial authority." *Blatchford*, 501 U. S., at 779.

But not entirely. This Court has permitted a federal court to entertain a suit against a nonconsenting State on two conditions. First, Congress must have enacted "unequivocal statutory language" abrogating the States' immunity from the suit. *Seminole Tribe*, 517 U. S., at 56 (internal quotation marks omitted); see *Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989) (requiring Congress to "mak[e] its intention unmistakably clear"). And second, some constitutional provision must allow Congress to have thus encroached on the States' sovereignty. Not even the most crystalline abrogation can take effect unless it is "a valid exercise of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 78 (2000).

No one here disputes that Congress used clear enough language to abrogate the States' immunity from copyright infringement suits. As described above, the CRCA provides that States "shall not be immune" from those actions in federal court. §511(a); see *supra*, at 253. And the Act specifies that a State stands in the identical position as a private defendant—exposed to liability and remedies "in the same manner and to the same extent." §501(a); see §511(b). So there is no doubt what Congress meant to accomplish. Indeed, this Court held in *Florida Prepaid* that the essentially verbatim provisions of the Patent Remedy Act "could not have [made] any clearer" Congress's intent to remove the States' immunity. 527 U. S., at 635.

The contested question is whether Congress had authority to take that step. Allen maintains that it did, under either of two constitutional provisions. He first points to the clause in Article I empowering Congress to provide copyright protection. If that fails, he invokes Section 5 of the Fourteenth Amendment, which authorizes Congress to "enforce" the commands of the Due Process Clause. Neither contention can succeed. The slate on which we write today

is anything but clean. *Florida Prepaid*, along with other precedent, forecloses each of Allen's arguments.

## A

Congress has power under Article I "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." § 8, cl. 8. That provision—call it the Intellectual Property Clause—enables Congress to grant both copyrights and patents. And the monopoly rights so given impose a corresponding duty (*i. e.*, not to infringe) on States no less than private parties. See *Goldstein* v. *California*, 412 U. S. 546, 560 (1973).

In Allen's view, Congress's authority to abrogate sovereign immunity from copyright suits naturally follows. Abrogation is the single best—or maybe, he says, the only—way for Congress to "secur[e]" a copyright holder's "exclusive Right[s]" as against a State's intrusion. See Brief for Petitioners 20 (quoting Art. I, § 8, cl. 8). So, Allen contends, the authority to take that step must fall within the Article I grant of power to protect intellectual property.

The problem for Allen is that this Court has already rejected his theory. The Intellectual Property Clause, as just noted, covers copyrights and patents alike. So it was the first place the *Florida Prepaid* Court looked when deciding whether the Patent Remedy Act validly stripped the States of immunity from infringement suits. In doing so, we acknowledged the reason for Congress to put "States on the same footing as private parties" in patent litigation. 527 U. S., at 647. It was, just as Allen says here, to ensure "uniform, surefire protection" of intellectual property. Reply Brief 10. That was a "proper Article I concern," we allowed. 527 U. S., at 648. But still, we said, Congress could not use its Article I power over patents to remove the States' immunity. We based that conclusion on *Seminole Tribe* v. *Florida*, decided three years earlier. There, the

Court had held that "Article I cannot be used to circumvent" the limits sovereign immunity "place[s] upon federal jurisdiction." 517 U. S., at 73. That proscription ended the matter. Because Congress could not "abrogate state sovereign immunity [under] Article I," *Florida Prepaid* explained, the Intellectual Property Clause could not support the Patent Remedy Act. 527 U. S., at 636. And to extend the point to this case: if not the Patent Remedy Act, not its copyright equivalent either, and for the same reason. Here too, the power to "secur[e]" an intellectual property owner's "exclusive Right" under Article I stops when it runs into sovereign immunity. §8, cl. 8.

Allen claims, however, that a later case offers an exit ramp from *Florida Prepaid*. In *Central Va. Community College* v. *Katz*, 546 U. S. 356, 359 (2006), we held that Article I's Bankruptcy Clause enables Congress to subject nonconsenting States to bankruptcy proceedings (there, to recover a preferential transfer). We thus exempted the Bankruptcy Clause from *Seminole Tribe*'s general rule that Article I cannot justify haling a State into federal court. In bankruptcy, we decided, sovereign immunity has no place. But if that is true, Allen asks, why not say the same thing here? Allen reads *Katz* as "adopt[ing] a clause-by-clause approach to evaluating whether a particular clause of Article I" allows the abrogation of sovereign immunity. Brief for Petitioners 20. And he claims that the Intellectual Property Clause "supplies singular warrant" for Congress to take that step. *Ibid.* That is so, Allen reiterates, because "Congress could not 'secur[e]' authors' 'exclusive Right' to their works if [it] were powerless" to make States pay for infringing conduct. *Ibid.*

But everything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism. In part, *Katz* rested on the "singular nature" of bankruptcy jurisdiction. 546 U. S., at 369, n. 9. That jurisdiction is, and was at the Founding,

"principally *in rem*"—meaning that it is "premised on the debtor and his estate, and not on the creditors" (including a State). *Id.*, at 369–370 (internal quotation marks omitted). For that reason, we thought, "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.*, at 362. In remaining part, *Katz* focused on the Bankruptcy Clause's "unique history." *Id.*, at 369, n. 9. The Clause emerged from a felt need to curb the States' authority. The States, we explained, "had wildly divergent schemes" for discharging debt, and often "refus[ed] to respect one another's discharge orders." *Id.*, at 365, 377. "[T]he Framers' primary goal" in adopting the Clause was to address that problem—to stop "competing sovereigns[ ]" from interfering with a debtor's discharge. *Id.*, at 373. And in that project, the Framers intended federal courts to play a leading role. The nation's first Bankruptcy Act, for example, empowered those courts to order that States release people they were holding in debtors' prisons. See *id.*, at 374. So through and through, we thought, the Bankruptcy Clause embraced the idea that federal courts could impose on state sovereignty. In that, it was *sui generis*—again, "unique"—among Article I's grants of authority. *Id.*, at 369, n. 9.

Indeed, *Katz*'s view of the Bankruptcy Clause had a yet more striking aspect, which further separates it from any other. The Court might have concluded from its analysis that the Clause allows Congress to abrogate the States' sovereign immunity (as Allen argues the Intellectual Property Clause does). But it did not; it instead went further. Relying on the above account of the Framers' intentions, the Court found that *the Bankruptcy Clause itself* did the abrogating. *Id.*, at 379 ("[T]he relevant 'abrogation' is the one effected in the plan of the [Constitutional] Convention"). Or stated another way, we decided that no congressional abrogation was needed because the States had already "agreed in the plan of the Convention not to assert any sovereign immu-

nity defense" in bankruptcy proceedings. *Id.*, at 377. We therefore discarded our usual rule—which Allen accepts as applying here—that *Congress* must speak, and indeed speak unequivocally, to abrogate sovereign immunity. Compare *id.*, at 378–379 ("[O]ur decision today" does not "rest[ ] on any statement Congress ha[s] made on the subject of state sovereign immunity"), with *supra*, at 255 (our ordinary rule). Our decision, in short, viewed bankruptcy as on a different plane, governed by principles all its own. Nothing in that understanding invites the kind of general, "clause-by-clause" reexamination of Article I that Allen proposes. See *supra*, at 257. To the contrary, it points to a good-for-one-clause-only holding.

And even if *Katz*'s confines were not so clear, *Florida Prepaid*, together with *stare decisis*, would still doom Allen's argument. As Allen recognizes, if the Intellectual Property Clause permits the CRCA's abrogation, it also would permit the Patent Remedy Act's. See Tr. of Oral Arg. 9 (predicting that if his position prevailed, "ultimately, the Patent Remedy Act would be revisited and properly upheld as a valid exercise of Congress's Article I power"). Again, there is no difference between copyrights and patents under the Clause, nor any material difference between the two statutes' provisions. See *supra*, at 253, and n. 1, 256. So we would have to overrule *Florida Prepaid* if we were to decide this case Allen's way. But *stare decisis*, this Court has understood, is a "foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). To reverse a decision, we demand a "special justification," over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014). Allen offers us nothing special at all; he contends only that if the Court were to use a clause-by-clause approach, it would discover that *Florida Prepaid* was wrong (because, he says again, the decision misjudged Congress's authority under the Intellectual Property Clause).

See Brief for Petitioners 37; *supra*, at 256–257. And with that charge of error alone, Allen cannot overcome *stare decisis*.

B

Section 5 of the Fourteenth Amendment, unlike almost all of Article I, can authorize Congress to strip the States of immunity. The Fourteenth Amendment "fundamentally altered the balance of state and federal power" that the original Constitution and the Eleventh Amendment struck. *Seminole Tribe*, 517 U. S., at 59. Its first section imposes prohibitions on the States, including (as relevant here) that none may "deprive any person of life, liberty, or property, without due process of law." Section 5 then gives Congress the "power to enforce, by appropriate legislation," those limitations on the States' authority. That power, the Court has long held, may enable Congress to abrogate the States' immunity and thus subject them to suit in federal court. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976).

For an abrogation statute to be "appropriate" under Section 5, it must be tailored to "remedy or prevent" conduct infringing the Fourteenth Amendment's substantive prohibitions. *City of Boerne* v. *Flores*, 521 U. S. 507, 519 (1997). Congress can permit suits against States for actual violations of the rights guaranteed in Section 1. See *Fitzpatrick*, 427 U. S., at 456. And to deter those violations, it can allow suits against States for "a somewhat broader swath of conduct," including acts constitutional in themselves. *Kimel*, 528 U. S., at 81. But Congress cannot use its "power to enforce" the Fourteenth Amendment to alter what that Amendment bars. See *id.*, at 88 (prohibiting Congress from "substantively redefin[ing]" the Fourteenth Amendment's requirements). That means a congressional abrogation is valid under Section 5 only if it sufficiently connects to conduct courts have held Section 1 to proscribe.

To decide whether a law passes muster, this Court has framed a type of means-end test. For Congress's action to

fall within its Section 5 authority, we have said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U. S., at 520. On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. See *Florida Prepaid*, 527 U. S., at 646. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations. Hard problems often require forceful responses and, as noted above, Section 5 allows Congress to "enact[ ] reasonably prophylactic legislation" to deter constitutional harm. *Kimel*, 528 U. S., at 88; *Boerne*, 521 U. S., at 536 (Congress's conclusions on that score are "entitled to much deference"); *supra*, at 260. But "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U. S., at 530. Always, what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to "enforce."

All this raises the question: When does the Fourteenth Amendment care about copyright infringement? Sometimes, no doubt. Copyrights are a form of property. See *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128 (1932). And the Fourteenth Amendment bars the States from "depriv[ing]" a person of property "without due process of law." But even if sometimes, by no means always. Under our precedent, a merely negligent act does not "deprive" a person of property. See *Daniels* v. *Williams*, 474 U. S. 327, 328 (1986). So an infringement must be intentional, or at least reckless, to come within the reach of the Due Process Clause. See *id.*, at 334, n. 3 (reserving whether reckless conduct suffices).

And more: A State cannot violate that Clause unless it fails to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of "due process." See *Hudson* v. *Palmer*, 468 U. S. 517, 533 (1984). That means within the broader world of state copyright infringement is a smaller one where the Due Process Clause comes into play.

Because the same is true of patent infringement, *Florida Prepaid* again serves as the critical precedent. That decision defined the scope of unconstitutional infringement in line with the caselaw cited above—as intentional conduct for which there is no adequate state remedy. See 527 U. S., at 642–643, 645. It then searched for evidence of that sort of infringement in the legislative record of the Patent Remedy Act. And it determined that the statute's abrogation of immunity—again, the equivalent of the CRCA's—was out of all proportion to what it found. That analysis is the starting point of our inquiry here. And indeed, it must be the ending point too unless the evidence of unconstitutional infringement is materially different for copyrights than patents. Consider once more, then, *Florida Prepaid*, now not on Article I but on Section 5.

In enacting the Patent Remedy Act, *Florida Prepaid* found, Congress did not identify a pattern of unconstitutional patent infringement. To begin with, we explained, there was only thin evidence of States infringing patents at all—putting aside whether those actions violated due process. The House Report, recognizing that "many states comply with patent law," offered just two examples of patent infringement suits against the States. *Id.*, at 640 (quoting H. R. Rep. No. 101–960, pt. 1, p. 38 (1990)). The appellate court below, boasting some greater research prowess, discovered another seven in the century-plus between 1880 and 1990. See 527 U. S., at 640. Even the bill's House sponsor conceded the lack of "any evidence" of "widespread violation of patent laws." *Id.*, at 641 (quoting statement of Rep. Kast-

enmeier). What was more, there was no evidence that any instance of infringement by States crossed constitutional lines. Congress, we observed, "did not focus" on intentional or reckless conduct; to the contrary, the legislative record suggested that "most state infringement was innocent or at worst negligent." *Id.*, at 645. And similarly, Congress "barely considered the availability of state remedies for patent infringement." *Id.*, at 643. So, we concluded, nothing could support the idea that States were more than sporadically (if that) "depriving patent owners of property without due process of law." *Id.*, at 646.

Given that absence of evidence, *Florida Prepaid* held, the Patent Remedy Act swept too far. Recall what the Patent Remedy Act did—and did not. It abrogated sovereign immunity for any and every patent suit, thereby "plac[ing] States on the same footing as private parties." *Id.*, at 647. It did not set any limits. It did not, for example, confine the abrogation to suits alleging "nonnegligent infringement or infringement authorized [by] state policy." *Ibid.* Neither did it target States refusing to offer alternative remedies to patent holders. No, it exposed all States to the hilt—on a record that failed to show they had caused any discernible constitutional harm (or, indeed, much harm at all). That imbalance made it impossible to view the legislation "as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 646 (quoting *Boerne*, 521 U. S., at 532). The statute's "indiscriminate scope" was too "out of proportion" to any due process problem. 527 U. S., at 646–647. It aimed not to correct such a problem, but to "provide a uniform remedy for patent infringement" writ large. *Id.*, at 647. The Patent Remedy Act, in short, did not "enforce" Section 1 of the Fourteenth Amendment—and so was not "appropriate" under Section 5.

Could, then, this case come out differently? Given the identical scope of the CRCA and Patent Remedy Act, that could happen only if the former law responded to materially

stronger evidence of infringement, especially of the unconstitutional kind. Allen points to a significant disparity in how Congress created a record for the two statutes. See Brief for Petitioners 7–10, 47–50. Before enacting the CRCA, Congress asked the then-Register of Copyrights, Ralph Oman, to submit a report about the effects of the Eleventh Amendment on copyright enforcement. Oman and his staff conducted a year-long examination, which included a request for public comments eliciting letters from about 40 copyright holders and industry groups. The final 158-page report concluded that "copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court." Copyright Office, Copyright Liability of States and the Eleventh Amendment 103 (1988) (Oman Report). Is that report enough, as Allen claims, to flip *Florida Prepaid*'s outcome when it comes to copyright cases against the States?

It is not. Behind the headline-grabbing conclusion, nothing in the Oman Report, or the rest of the legislative record, cures the problems we identified in *Florida Prepaid*. As an initial matter, the concrete evidence of States infringing copyrights (even ignoring whether those acts violate due process) is scarcely more impressive than what the *Florida Prepaid* Court saw. Despite undertaking an exhaustive search, Oman came up with only a dozen possible examples of state infringement. He listed seven court cases brought against States (with another two dismissed on the merits) and five anecdotes taken from public comments (but not further corroborated). See Oman Report, at 7–9, 90–97. In testifying about the report, Oman acknowledged that state infringement is "not widespread" and "the States are not going to get involved in wholesale violation of the copyright laws." Hearings on H. R. 1131 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, 101st Cong., 1st Sess., 53 (1989) (House Hearings). In-

deed, he opined: "They are all respectful of the copyright law" and "will continue to respect the law"; what State, after all, would "want[ ] to get a reputation as a copyright pirate?" *Id.*, at 8. The bill's House and Senate sponsors got the point. The former admitted that "there have not been any significant number" of copyright violations by States. *Id.*, at 48 (Rep. Kastenmeier). And the latter conceded he could not currently see "a big problem." Hearings on S. 497 before the Subcommittee on Patents, Copyrights and Trademarks, 101st Cong., 1st Sess., 130 (1989) (Sen. DeConcini). This is not, to put the matter charitably, the stuff from which Section 5 legislation ordinarily arises.

And it gets only worse. Neither the Oman Report nor any other part of the legislative record shows concern with whether the States' copyright infringements (however few and far between) violated the Due Process Clause. Of the 12 infringements listed in the report, only two appear intentional, as they must be to raise a constitutional issue. See Oman Report, at 7–8, 91 (describing a judicial finding of "willful" infringement and a public comment charging continued infringement after a copyright owner complained). As Oman testified, the far greater problem was the frequency of "honest mistakes" or "innocent" misunderstandings; the benefit of the bill, he therefore thought, would be to "guard against sloppiness." House Hearings, at 8–9. Likewise, the legislative record contains no information about the availability of state-law remedies for copyright infringement (such as contract or unjust enrichment suits)—even though they might themselves satisfy due process. Those deficiencies in the record match the ones *Florida Prepaid* emphasized. See 527 U. S., at 643–645. Here no less than there, they signal an absence of constitutional harm.

Under *Florida Prepaid*, the CRCA thus must fail our "congruence and proportionality" test. *Boerne*, 521 U. S., at 520. As just shown, the evidence of Fourteenth Amend-

ment injury supporting the CRCA and the Patent Remedy Act is equivalent—for both, that is, exceedingly slight. And the scope of the two statutes is identical—extending to every infringement case against a State. It follows that the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew. In this case, as in *Florida Prepaid*, the law's "indiscriminate scope" is "out of proportion" to any due process problem. 527 U. S., at 646–647; see *supra*, at 263. In this case, as in that one, the statute aims to "provide a uniform remedy" for statutory infringement, rather than to redress or prevent unconstitutional conduct. 527 U. S., at 647; see *supra*, at 263. And so in this case, as in that one, the law is invalid under Section 5.

That conclusion, however, need not prevent Congress from passing a valid copyright abrogation law in the future. In doing so, Congress would presumably approach the issue differently than when it passed the CRCA. At that time, the Court had not yet decided *Seminole Tribe*, so Congress probably thought that Article I could support its all-out abrogation of immunity. See *supra*, at 256. And to the extent it relied on Section 5, Congress acted before this Court created the "congruence and proportionality" test. See *supra*, at 261. For that reason, Congress likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection. But going forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.

## III

*Florida Prepaid* all but prewrote our decision today. That precedent made clear that Article I's Intellectual Prop-

erty Clause could not provide the basis for an abrogation of sovereign immunity. And it held that Section 5 of the Fourteenth Amendment could not support an abrogation on a legislative record like the one here. For both those reasons, we affirm the judgment below.

*It is so ordered.*

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

I agree with the Court's conclusion that the Copyright Remedy Clarification Act of 1990, 17 U. S. C. § 501 *et seq.*, does not validly abrogate States' sovereign immunity. But I cannot join the Court's opinion in its entirety. I write separately to note two disagreements and one question that remains open for resolution in a future case.

First, although I agree that *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), is binding precedent, I cannot join the Court's discussion of *stare decisis*. The Court claims we need "'special justification[s]'" to overrule precedent because error alone "cannot overcome *stare decisis*." *Ante*, at 259–260. That approach "does not comport with our judicial duty under Article III." *Gamble* v. *United States*, 587 U. S. 678, 711 (2019) (THOMAS, J., concurring). If our decision in *Florida Prepaid* were demonstrably erroneous, the Court would be obligated to "correct the error, regardless of whether other factors support overruling the precedent." 587 U. S., at 718 (same).

Here, adherence to our precedent is warranted because petitioners have not demonstrated that our decision in *Florida Prepaid* "is incorrect, much less demonstrably erroneous." *Gamble*, 587 U. S., at 726 (same). The Court in *Florida Prepaid* correctly concluded that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers," including its powers under the Intellectual Property Clause. 527 U. S., at 636 (citing *Seminole Tribe of Fla.*

v. *Florida*, 517 U. S. 44, 72–73 (1996)). Petitioners' claims to the contrary are unpersuasive.*

Second, I do not join the Court's discussion regarding future copyright legislation. In my view, we should opine on "only the case before us in light of the record before us." *Manhattan Community Access Corp.* v. *Halleck*, 587 U. S. 802, 818 (2019). We should not purport to advise Congress on how it might exercise its legislative authority, nor give our blessing to hypothetical statutes or legislative records not at issue here.

Finally, I believe the question whether copyrights are property within the original meaning of the Fourteenth Amendment's Due Process Clause remains open. The Court relies on *Fox Film Corp.* v. *Doyal*, 286 U. S. 123 (1932), to conclude that "[c]opyrights are a form of property." *Ante*, at 261. But *Fox Film Corp.* addressed "property" in the context of state tax laws, not the Due Process Clause. 286 U. S., at 128. And although we stated in *Florida Prepaid* that patents are "property" for due process purposes, we did not analyze the Fourteenth Amendment's text, and neither of the cases we cited involved due process. 527 U. S., at 642 (citing *Brown* v. *Duchesne*, 19 How. 183, 197 (1857); *Consolidated Fruit-Jar Co.* v. *Wright*, 94 U. S. 92, 96 (1877)); see also Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 887 (2000) (noting that the "Court has not always been attentive to the 'property' threshold" of the Due Process Clauses). Because the parties agree that petitioners' copyrights are property, and because the Fourteenth Amendment does not authorize this statute's abrogation of

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*Because I adhere to our precedents regarding Article I and state sovereign immunity, I continue to believe that *Central Va. Community College* v. *Katz*, 546 U. S. 356 (2006), was wrongly decided. See *id.*, at 379–385 (THOMAS, J., dissenting). The Court today rightfully limits that decision to the Bankruptcy Clause context, calling it a "good-for-one-clause-only holding." *Ante*, at 259. I would go a step further and recognize that the Court's decision in *Katz* is not good for even that Clause.

state sovereign immunity either way, we need not resolve this open question today. I would, however, be willing to consider the matter in an appropriate case.

For these reasons, I join all of the Court's opinion except for the final paragraph in Part II–A and the final paragraph in Part II–B.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring in the judgment.

The Constitution gives Congress certain enumerated powers. One of them is set forth in the Intellectual Property Clause: Congress may "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. "And the monopoly rights so given," the Court acknowledges, operate against "States no less than private parties." *Ante*, at 256. States, in other words, have "a specific duty" not to infringe that "is assigned by law" and upon which "individual rights depend." *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803). One might therefore expect that someone injured by a State's violation of that duty could "resort to the laws of his country for a remedy," *ibid.*, especially where, as here, Congress has sought to provide one. Or more concretely, one might think that Walt Disney Pictures could sue a State (or anyone else) for hosting an unlicensed screening of the studio's 2003 blockbuster film, Pirates of the Caribbean (or any one of its many sequels).

Yet the Court holds otherwise. In its view, Congress' power under the Intellectual Property Clause cannot support a federal law providing that, when proven to have pirated intellectual property, States must pay for what they plundered. *Ante*, at 256–260. To subject nonconsenting States to private suits for copyright or patent infringement, says the Court, Congress must endeavor to pass a more "tailored statute" than the one before us, relying not on the Intellec-

tual Property Clause, but on § 5 of the Fourteenth Amendment. *Ante*, at 266. Whether a future legislative effort along those lines will pass constitutional muster is anyone's guess. But faced with the risk of unfairness to authors and inventors alike, perhaps Congress will venture into this great constitutional unknown.

That our sovereign-immunity precedents can be said to call for so uncertain a voyage suggests that something is amiss. Indeed, we went astray in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), as I have consistently maintained. See *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 699–701 (1999) (dissenting opinion); *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 787–788 (2002) (same). We erred again in *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), by holding that Congress exceeded its § 5 powers when it passed a patent counterpart to the copyright statute at issue here. See *id.*, at 652–664 (Stevens, J., dissenting). But recognizing that my longstanding view has not carried the day, and that the Court's decision in *Florida Prepaid* controls this case, I concur in the judgment. See *ante*, 259–260, 265–266; *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455–456 (2015); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 261 (2019) (BREYER, J., dissenting).

Syllabus

# KAHLER *v.* KANSAS

## CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 18–6135. Argued October 7, 2019—Decided March 23, 2020

In *Clark* v. *Arizona*, 548 U. S. 735, this Court catalogued the diverse strains of the insanity defense that States have adopted to absolve mentally ill defendants of criminal culpability. Two—the cognitive- and moral-incapacity tests—appear as alternative pathways to acquittal in the landmark English ruling *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718. The moral-incapacity test asks whether a defendant's illness left him unable to distinguish right from wrong with respect to his criminal conduct. Respondent Kansas has adopted the cognitive-incapacity test, which examines whether a defendant was able to understand what he was doing when he committed a crime. Specifically, under Kansas law a defendant may raise mental illness to show that he "lacked the culpable mental state required as an element of the offense charged," Kan. Stat. Ann. §21–5209. Kansas does not recognize any additional way that mental illness can produce an acquittal, although a defendant may use evidence of mental illness to argue for a lessened punishment at sentencing. See §§21–6815(c)(1)(C), 21–6625(a). In particular, Kansas does not recognize a moral-incapacity defense.

Kansas charged petitioner James Kahler with capital murder after he shot and killed four family members. Prior to trial, he argued that Kansas's insanity defense violates due process because it permits the State to convict a defendant whose mental illness prevented him from distinguishing right from wrong. The court disagreed and the jury returned a conviction. During the penalty phase, Kahler was free to raise any argument he wished that mental illness should mitigate his sentence, but the jury still imposed the death penalty. The Kansas Supreme Court rejected Kahler's due process argument on appeal.

*Held*: Due process does not require Kansas to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong. Pp. 279–297.

(a) A state rule about criminal liability violates due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Leland* v. *Oregon*, 343 U. S. 790, 798 (internal quotation marks omitted). History is the primary guide for this analysis. The due process standard sets a high bar, and a rule of criminal responsibility is unlikely to be sufficiently entrenched to bind all States to a single approach. As the Court explained in *Powell* v. *Texas*, 392 U. S. 514, the scope of criminal responsi-

bility is animated by complex and ever-changing ideas that are best left to the States to evaluate and reevaluate over time. This principle applies with particular force in the context of the insanity defense, which also involves evolving understandings of mental illness. This Court has thus twice declined to constitutionalize a particular version of the insanity defense, see *Leland*, 343 U. S. 790; *Clark*, 548 U. S. 735, holding instead that a State's "insanity rule[ ] is substantially open to state choice," *id.*, at 752. Pp. 279–282.

(b) Against this backdrop, Kahler argues that Kansas has abolished the insanity defense—and, in particular, that it has impermissibly jettisoned the moral-incapacity approach. As a starting point, Kahler is correct that for hundreds of years jurists and judges have recognized that insanity can relieve criminal responsibility. But Kansas recognizes the same: Under Kansas law, mental illness is a defense to culpability if it prevented a defendant from forming the requisite criminal intent; a defendant is permitted to offer whatever evidence of mental health he deems relevant at sentencing; and a judge has discretion to replace a defendant's prison term with commitment to a mental health facility.

So Kahler can prevail only by showing that due process requires States to adopt a specific test of insanity—namely, the moral-incapacity test. He cannot do so. Taken as a whole, the early common-law cases and commentaries reveal no settled consensus favoring Kahler's preferred right-from-wrong rule. Even after *M'Naghten* gained popularity in the 19th century, States continued to experiment with new approaches. *Clark* therefore declared: "History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle." 548 U. S., at 749–752. The tapestry of approaches States have adopted shows that no single version of the insanity defense has become so ingrained in American law as to rank as "fundamental." *Id.*, at 749.

This result is not surprising. *Ibid.* The insanity defense sits at the juncture of medical views of mental illness and moral and legal theories of criminal culpability—two areas of conflict and change. Small wonder that no particular test of insanity has developed into a constitutional baseline. And it is not for the courts to insist on any single criterion moving forward. Defining the precise relationship between criminal culpability and mental illness requires balancing complex considerations, among them the workings of the brain, the purposes of criminal law, and the ideas of free will and responsibility. This balance should remain open to revision as new medical knowledge emerges and societal norms evolve. Thus—as the Court recognized previously in *Leland*, *Powell*, and *Clark*—the defense is a project for state governance, not constitutional law. Pp. 282–297.

307 Kan. 374, 410 P. 3d 105, affirmed.

Syllabus

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 297.

*Sarah O'Rourke Schrup* argued the cause for petitioner. With her on the briefs were *Meryl Carver-Allmond*, *Clayton J. Perkins*, *Jeffrey T. Green*, *Tobias S. Loss-Eaton*, and *Naomi Igra*.

*Toby Crouse*, Solicitor General of Kansas, argued the cause for respondent. With him on the brief were *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Kristafer Ailslieger* and *Brant M. Laue*, Deputy Solicitors General, and *Dwight R. Carswell*, *Natalie Chalmers*, and *Rachel L. Pickering*, Assistant Solicitors General.

*Elizabeth B. Prelogar* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Christopher J. Smith*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert M. Carlson*, *Matthew S. Hellman*, *David A. Strauss*, and *Sarah M. Konsky*; for the American Civil Liberties Union et al. by *Caitlin Halligan*, *David Cole*, and *Cassandra Stubbs*; for the American Psychiatric Association et al. by *Aaron M. Panner*, *David W. Ogden*, *Paul R. Q. Wolfson*, *Nathalie F. P. Gilfoyle*, *Deanne M. Ottaviano*, *Ira Abraham Burnim*, *Jennifer Mathis*, and *Mark J. Heyrman*; for the Idaho Association of Criminal Defense Lawyers et al. by *Jonah J. Horwitz*, *Craig Durham*, *Brian McComas*, and *Richard P. Mauro*; by Legal Historians et al. by *Allison R. McLaughlin* and *Theresa Wardon Benz*; for the National Association of Criminal Defense Lawyers by *Jonathan L. Marcus* and *Barbara E. Bergman*; for Philosphy Professors by *Eugene R. Fidell*; and for 290 Criminal Law and Mental Health Law Professors by *Richard J. Bonnie*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of Utah et al. by *Sean D. Reyes*, Attorney General of Utah, *Tyler R. Green*, Solicitor General, *Thomas B. Brunker*, Deputy Solicitor General, and *Andrew F. Peterson*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G.*

JUSTICE KAGAN delivered the opinion of the Court.

This case is about Kansas's treatment of a criminal defendant's insanity claim. In Kansas, a defendant can invoke mental illness to show that he lacked the requisite *mens rea* (intent) for a crime. He can also raise mental illness after conviction to justify either a reduced term of imprisonment or commitment to a mental health facility. But Kansas, unlike many States, will not wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong. The issue here is whether the Constitution's Due Process Clause forces Kansas to do so—otherwise said, whether that Clause compels the acquittal of any defendant who, because of mental illness, could not tell right from wrong when committing his crime. We hold that the Clause imposes no such requirement.

## I

### A

In *Clark* v. *Arizona*, 548 U. S. 735, 749 (2006), this Court catalogued state insanity defenses, counting four "strains variously combined to yield a diversity of American standards" for when to absolve mentally ill defendants of criminal culpability. The first strain asks about a defendant's "cognitive capacity"—whether a mental illness left him "unable to understand what he [was] doing" when he committed a crime. *Id.*, at 747, 749. The second examines his "moral capacity"—whether his illness rendered him "unable to understand that his action [was] wrong." *Ibid.* Those two in-

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*Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Eric Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, and *Ken Paxton* of Texas; and for Lynn Denton et al. by *Allyson N. Ho*, *Bradley G. Hubbard*, *Steven J. Twist*, and *Paul G. Cassell*.

*Andrew T. Tutt*, *R. Stanton Jones*, and *Stephen K. Wirth* filed a brief of *amicus curiae* for John F. Stinneford.

quiries, *Clark* explained, appeared as alternative pathways to acquittal in the landmark English ruling *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H. L. 1843), as well as in many follow-on American decisions and statutes: If the defendant lacks either cognitive or moral capacity, he is not criminally responsible for his behavior. Yet a third "building block[ ]" of state insanity tests, gaining popularity from the mid-19th century on, focuses on "volitional incapacity"—whether a defendant's mental illness made him subject to "irresistible[ ] impulse[s]" or otherwise unable to "control[ ] his actions." *Clark*, 548 U. S., at 749, 750, n. 11; see, *e. g.*, *Parsons* v. *State*, 81 Ala. 577, 597, 2 So. 854, 866–867 (1887). And bringing up the rear, in *Clark*'s narration, the "product-of-mental-illness test" broadly considers whether the defendant's criminal act stemmed from a mental disease. 548 U. S., at 749–750.

As *Clark* explained, even that taxonomy fails to capture the field's complexity. See *id.*, at 750, n. 11. Most notable here, *M'Naghten*'s "moral capacity" prong later produced a spinoff, adopted in many States, that does not refer to morality at all. Instead of examining whether a mentally ill defendant could grasp that his act was *immoral*, some jurisdictions took to asking whether the defendant could understand that his act was *illegal*. Compare, *e. g.*, *People* v. *Schmidt*, 216 N. Y. 324, 333–334, 110 N. E. 945, 947 (1915) (Cardozo, J.) (asking about moral right and wrong), with, *e. g.*, *State* v. *Hamann*, 285 N. W. 2d 180, 183 (Iowa 1979) (substituting ideas of legal right and wrong). That change in legal standard matters when a mentally ill defendant knew that his act violated the law yet believed it morally justified. See, *e. g.*, *Schmidt*, 216 N. Y., at 339, 110 N. E., at 949; *People* v. *Serravo*, 823 P. 2d 128, 135 (Colo. 1992).[1]

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[1] Another complicating factor in *Clark*'s classification scheme is that States "limit, in varying degrees, which sorts of mental illness" can support an insanity claim. *Clark* v. *Arizona*, 548 U. S. 735, 750, n. 11 (2006). So even two States using the same test for judging culpability may apply it to differently sized sets of offenders. See *infra*, at 295, n. 12.

Kansas law provides that "[i]t shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged." Kan. Stat. Ann. §21–5209 (2018 Cum. Supp.).[2] Under that statute, a defendant may introduce any evidence of any mental illness to show that he did not have the intent needed to commit the charged crime. Suppose, for example, that the defendant shot someone dead and goes on trial for murder. He may then offer psychiatric testimony that he did not understand the function of a gun or the consequences of its use—more generally stated, "the nature and quality" of his actions. *M'Naghten*, 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722. And a jury crediting that testimony must acquit him. As everyone here agrees, Kansas law thus uses *M'Naghten*'s "cognitive capacity" prong—the inquiry into whether a mentally ill defendant could comprehend what he was doing when he committed a crime. See Brief for Petitioner 41; Brief for Respondent 31; Brief for United States as *Amicus Curiae* 18. If the defendant had no such capacity, he could not form the requisite intent—and thus is not criminally responsible.

At the same time, the Kansas statute provides that "[m]ental disease or defect is not otherwise a defense." §21–5209. In other words, Kansas does not recognize any additional way that mental illness can produce an acquittal.[3] Most important for this case, a defendant's moral incapacity cannot exonerate him, as it would if Kansas had adopted *both* original prongs of *M'Naghten*. Assume, for example, that a de-

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[2] At the time of the crime in this case, a materially identical provision was codified at §22–3220 (2007).

[3] Four other States similarly exonerate a mentally ill defendant only when he cannot understand the nature of his actions and so cannot form the requisite *mens rea*. See Alaska Stat. §§12.47.010(a), 12.47.020 (2018); Idaho Code Ann. §§18–207(1), (3) (2016); Mont. Code Ann. §46–14–102 (2019); Utah Code §76–2–305 (2017).

fendant killed someone because of an "insane delusion that God ha[d] ordained the sacrifice." *Schmidt*, 216 N. Y., at 339, 110 N. E., at 949. The defendant knew what he was doing (killing another person), but he could not tell moral right from wrong; indeed, he thought the murder morally justified. In many States, that fact would preclude a criminal conviction, although it would almost always lead to commitment in a mental health facility. In Kansas, by contrast, evidence of a mentally ill defendant's moral incapacity—or indeed, of anything except his cognitive inability to form the needed *mens rea*—can play no role in determining guilt.

That partly closed-door policy changes once a verdict is in. At the sentencing phase, a Kansas defendant has wide latitude to raise his mental illness as a reason to judge him not fully culpable and so to lessen his punishment. See §§21–6815(c)(1)(C), 21–6625(a). He may present evidence (of the kind *M'Naghten* deemed relevant) that his disease made him unable to understand his act's moral wrongness—as in the example just given of religious delusion. See §21–6625(a). Or he may try to show (in line with *M'Naghten*'s spinoff) that the illness prevented him from "appreciat[ing] the [conduct's] criminality." §21–6625(a)(6). Or again, he may offer testimony (here invoking volitional incapacity) that he simply could not "conform [his] conduct" to legal restraints. *Ibid.* Kansas sentencing law thus provides for an individualized determination of how mental illness, in any or all of its aspects, affects culpability. And the same kind of evidence can persuade a court to place a defendant who needs psychiatric care in a mental health facility rather than a prison. See §22–3430. In that way, a defendant in Kansas lacking, say, moral capacity may wind up in the same kind of institution as a like defendant in a State that would bar his conviction.

B

This case arises from a terrible crime. In early 2009, Karen Kahler filed for divorce from James Kahler and moved

out of their home with their two teenage daughters and 9-year-old son. Over the following months, James Kahler became more and more distraught. On Thanksgiving weekend, he drove to the home of Karen's grandmother, where he knew his family was staying. Kahler entered through the back door and saw Karen and his son. He shot Karen twice, while allowing his son to flee the house. He then moved through the residence, shooting Karen's grandmother and each of his daughters in turn. All four of his victims died. Kahler surrendered to the police the next day and was charged with capital murder.

Before trial, Kahler filed a motion arguing that Kansas's treatment of insanity claims violates the Fourteenth Amendment's Due Process Clause. Kansas, he asserted, had "unconstitutionally abolished the insanity defense" by allowing the conviction of a mentally ill person "who cannot tell the difference between right and wrong." App. 11–12. The trial court denied the motion, leaving Kahler to attempt to show through psychiatric and other testimony that severe depression had prevented him from forming the intent to kill. See *id.*, at 16; § 21–5209. The jury convicted Kahler of capital murder. At the penalty phase, the court permitted Kahler to offer additional evidence of his mental illness and to argue in whatever way he liked that it should mitigate his sentence. The jury still decided to impose the death penalty.

Kahler appealed, again challenging the constitutionality of Kansas's approach to insanity claims. The Kansas Supreme Court rejected his argument, relying on an earlier precedential decision. See 307 Kan. 374, 400–401, 410 P. 3d 105, 124–125 (2018) (discussing *State* v. *Bethel*, 275 Kan. 456, 66 P. 3d 840 (2003)). There, the court denied that any single version of the insanity defense is so "ingrained in our legal system" as to count as "fundamental." *Id.*, at 473, 66 P. 3d, at 851. The court thus found that "[d]ue process does not mandate that a State adopt a particular insanity test." *Ibid.*

Kahler then asked this Court to decide whether the Due Process Clause requires States to provide an insanity defense that acquits a defendant who could not "distinguish right from wrong" when committing his crime—or, otherwise put, whether that Clause requires States to adopt the moral-incapacity test from *M'Naghten*. Pet. for Cert. 18. We granted certiorari, 586 U. S. 1221 (2019), and now hold it does not.[4]

## II

### A

A challenge like Kahler's must surmount a high bar. Under well-settled precedent, a state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952) (internal quotation marks omitted). Our primary guide in applying that standard is "historical practice." *Montana* v. *Egelhoff*, 518 U. S. 37, 43 (1996) (plurality opinion). And in assessing that practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions. See, *e. g.*, *id.*, at 44–45; *Patterson* v. *New York*, 432 U. S. 197, 202 (1977). The question is whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another. An affirmative answer, though not unheard of, is rare. See, *e. g.*, *Clark*, 548 U. S., at 752 ("[T]he conceptualization of criminal offenses" is mostly left to the States).

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[4] Kahler also asked us to decide whether the Eighth Amendment requires that States make available the moral-incapacity defense. See Pet. for Cert. 18. But that claim is not properly before us. Kahler did not raise the argument below, and the Kansas courts therefore did not address it.

In *Powell* v. *Texas*, 392 U. S. 514 (1968), this Court explained why. There, Texas declined to recognize "chronic alcoholism" as a defense to the crime of public drunkenness. *Id.*, at 517 (plurality opinion). The Court upheld that decision, emphasizing the paramount role of the States in setting "standards of criminal responsibility." *Id.*, at 533. In refusing to impose a "constitutional doctrine" defining those standards, the Court invoked the many "interlocking and overlapping concepts" that the law uses to assess when a person should be held criminally accountable for "his antisocial deeds." *Id.*, at 535–536. "The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress"—the Court counted them off—reflect both the "evolving aims of the criminal law" and the "changing religious, moral, philosophical, and medical views of the nature of man." *Id.*, at 536. Or said a bit differently, crafting those doctrines involves balancing and rebalancing over time complex and oft-competing ideas about "social policy" and "moral culpability"—about the criminal law's "practical effectiveness" and its "ethical foundations." *Id.*, at 538, 545, 548 (Black, J., concurring). That "constantly shifting adjustment" could not proceed in the face of rigid "[c]onstitution[al] formulas." *Id.*, at 536–537 (plurality opinion). Within broad limits, *Powell* thus concluded, "doctrine[s] of criminal responsibility" must remain "the province of the States." *Id.*, at 534, 536.

Nowhere has the Court hewed more closely to that view than in addressing the contours of the insanity defense. Here, uncertainties about the human mind loom large. See, *e. g.*, *Ake* v. *Oklahoma*, 470 U. S. 68, 81 (1985) ("[P]sychiatrists disagree widely and frequently on what constitutes mental illness, on [proper] diagnos[es, and] on cure and treatment"). Even as some puzzles get resolved, others emerge. And those perennial gaps in knowledge intersect with differing opinions about how far, and in what ways, mental illness should excuse criminal conduct. See *Clark*, 548 U. S., at

749–752 (canvassing how those competing views produced a wealth of insanity tests); *supra*, at 274–275. "This whole problem," we have noted, "has evoked wide disagreement." *Leland*, 343 U. S., at 801. On such unsettled ground, we have hesitated to reduce "experimentation, and freeze [the] dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U. S., at 536–537. Indeed, while addressing the demand for an alcoholism defense in *Powell*, the Court pronounced—as something close to self-evident—that "[n]othing could be less fruitful" than to define a specific "insanity test in constitutional terms." *Id.*, at 536.

And twice before we have declined to do so. In *Leland* v. *Oregon*, a criminal defendant challenged as a violation of due process the State's use of the moral-incapacity test of insanity—the very test Kahler now asks us to require. See 343 U. S., at 800–801. According to the defendant, Oregon instead had to adopt the volitional-incapacity (or irresistible-impulse) test to comply with the Constitution. See *ibid.*; *supra*, at 275. We rejected that argument. "[P]sychiatry," we first noted, "has made tremendous strides since [the moral-incapacity] test was laid down in *M'Naghten's Case*," implying that the test seemed a tad outdated. 343 U. S., at 800–801. But still, we reasoned, "the progress of science has not reached a point where its learning" would demand "eliminat[ing] the right and wrong test from [the] criminal law." *Id.*, at 801. And anyway, we continued, the "choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy" about when mental illness should absolve someone of "criminal responsibility." *Ibid.* The matter was thus best left to each State to decide on its own. The dissent agreed (while parting from the majority on another ground): "[I]t would be indefensible to impose upon the States[ ] one test rather than another for determining criminal culpability" for the mentally ill, "and thereby to displace a State's own choice." *Id.*, at 803 (opinion of Frankfurter, J.).

A half-century later, we reasoned similarly in *Clark*. There, the defendant objected to Arizona's decision to discard the cognitive-incapacity prong of *M'Naghten* and leave in place only the moral-incapacity one—essentially the flipside of what Kansas has done. Again, we saw no due process problem. Many States, we acknowledged, allowed a defendant to show insanity through either prong of *M'Naghten*. See 548 U. S., at 750. But we denied that this approach "represents the minimum that a government must provide." *Id.*, at 748. In so doing, we invoked the States' traditional "capacity to define crimes and defenses," and noted how views of mental illness had been particularly "subject to flux and disagreement." *Id.*, at 749, 752. And then we surveyed the disparate ways that state laws had historically excused criminal conduct because of mental disease—those "strains variously combined to yield a diversity of American standards." See *id.*, at 749–752; *supra*, at 274–275. The takeaway was "clear": A State's "insanity rule[ ] is substantially open to state choice." *Clark*, 548 U. S., at 752. Reiterating *Powell*'s statement, *Clark* held that "no particular" insanity test serves as "a baseline for due process." 548 U. S., at 752. Or said just a bit differently, that "due process imposes no single canonical formulation of legal insanity." *Id.*, at 753.

B

Yet Kahler maintains that Kansas's treatment of insanity fails to satisfy due process. He sometimes makes his argument in the broadest of strokes, as he did before trial. See *supra*, at 278. Kansas, he then contends, has altogether "abolished the insanity defense," in disregard of hundreds of years of historical practice. Brief for Petitioner 39. His central claim, though, is more confined. It is that Kansas has impermissibly jettisoned the moral-incapacity test for insanity. See *id.*, at 12, 23. As earlier noted, both *Clark* and *Leland* described that test as coming from *M'Naghten*. See 548 U. S., at 749; 343 U. S., at 801; *supra*, at 274–275, 281. But according

to Kahler (and the dissent), the moral-incapacity inquiry emerged centuries before that decision, thus forming part of the English common-law heritage this country inherited. See Brief for Petitioner 21, 42; *post*, at 300–310 (opinion of BREYER, J.). And the test, he claims, served for all that time—and continuing into the present—as the touchstone of legal insanity: If a defendant could not understand that his act was morally wrong, then he could not be found criminally liable. See Brief for Petitioner 20–23; see also *post*, at 310–312. So Kahler concludes that the moral-incapacity standard is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Leland*, 343 U. S., at 798; see *supra*, at 279. In essence—and contra *Clark*—that test *is* the "single canonical formulation of legal insanity" and thus the irreducible "baseline for due process." 548 U. S., at 752–753; see *supra*, at 282.[5]

One point, first, of agreement: Kahler is right that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime. "In criminal cases therefore," Sir William Blackstone wrote, "lunatics are not chargeable for their own acts, if committed when under these incapacities." 4 Commentaries on the Laws of England 24 (1769). Sir Edward Coke even earlier

[5] Although the dissent at times claims to the contrary, its argument is the same. Given the clear direction of our precedent, the dissent must purport to grant the States "leeway" in defining legal insanity. *Post*, at 297. But the entirety of the dissent's historical analysis focuses on the moral-incapacity standard—attempting to show, just as Kahler does, that it both preceded and succeeded *M'Naghten*. See *post*, at 300–313. And in line with that narration, the dissent insists on moral understanding as the indispensable criterion of legal sanity—the *sine qua non* of criminal responsibility. See, *e. g.*, *post*, at 297, 299–300, 304–305, 313–317. Indeed, the dissent offers only one way the States have actual "leeway" to change their insanity rules: They can "*expand* upon *M'Naghten*'s principles" by finding that even some who *have* moral capacity are insane. *Post*, at 318. But that is just to say that moral capacity is the constitutional floor—again, exactly what Kahler argues.

explained that in criminal cases, "the act and wrong of a mad man shall not be imputed to him." 2 Institutes of the Laws of England § 405, p. 247b (1628) (Coke). And so too Henry de Bracton thought that a "madman" could no sooner be found criminally liable than a child. 2 Bracton on Laws and Customs of England 384 (S. Thorne transl. 1968) (Bracton). That principle of non-culpability appeared in case after case involving allegedly insane defendants, on both sides of the Atlantic. "The defen[s]e of insanity[ ] is a defen[s]e for all crimes[,] from the highest to the lowest," said the Court in Old Bailey. *Trial of Samuel Burt* (July 19, 1786), in 6 Proceedings in the Old Bailey 874 (E. Hodgson ed. 1786) (Old Bailey Proceedings). Repeated Justice Story, when riding circuit: "In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility." *United States* v. *Drew*, 25 F. Cas. 913 (No. 14,993) (CC Mass. 1828); see also, *e. g.*, *State* v. *Marler*, 2 Ala. 43, 49 (1841) ("If the prisoner was insane, he was not an accountable being"); *Cornwell* v. *State*, 8 Tenn. 147, 156 (1827) ("[P]erfect madness" will "free a man from punishment for crime"). We have not found a single case to the contrary.

But neither do we think Kansas departs from that broad principle. First, Kansas has an insanity defense negating criminal liability—even though not the type Kahler demands. As noted earlier, Kansas law provides that it is "a defense to a prosecution" that "the defendant, as a result of mental disease or defect, lacked the culpable mental state required" for a crime. § 21–5209; see *supra*, at 276. That provision enables a defendant to present psychiatric and other evidence of mental illness to defend himself against a criminal charge. More specifically, the defendant can use that evidence to show that his illness left him without the cognitive capacity to form the requisite intent. See *supra*, at 276. Recall that such a defense was exactly what the defendant in *Clark* wanted, in preference to Arizona's moral-incapacity defense: His (unsuccessful) appeal rested on the trial court's

exclusion of psychiatric testimony to show that he lacked the relevant *mens rea*. See 548 U. S., at 745–747; *supra*, at 282. Here, Kahler could do what Clark could not—try to show through such testimony that he had no intent to kill. Of course, Kahler would have preferred Arizona's kind of insanity defense (just as Clark would have liked Kansas's). But that does not mean that Kansas (any more than Arizona) failed to offer any insanity defense at all.

Second, and significantly, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing. See §§ 21–6815(c)(1)(C), 21–6625(a); *supra*, at 277. A mentally ill defendant may argue there that he is not blameworthy because he could not tell the difference between right and wrong. Or, because he did not know his conduct broke the law. Or, because he could not control his behavior. Or, because of anything else. In other words, any manifestation of mental illness that Kansas's guilt-phase insanity defense disregards—including the moral incapacity Kahler highlights—can come in later to mitigate culpability and lessen punishment. And that same kind of evidence can persuade a judge to replace any prison term with commitment to a mental health facility. See § 22–3430; *supra*, at 277. So as noted above, a defendant arguing moral incapacity may well receive the same treatment in Kansas as in States that would acquit—and, almost certainly, commit—him for that reason. See *supra*, at 277. In sum, Kansas does not bar, but only channels to sentencing, the mental health evidence that falls outside its intent-based insanity defense. When combined with Kansas's allowance of mental health evidence to show a defendant's inability to form criminal intent, that sentencing regime defeats Kahler's charge that the State has "abolish[ed] the insanity defense entirely."[6] Brief for Petitioner 39.

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[6] We here conclude only that Kansas's scheme does not abolish the insanity defense. We say nothing, one way or the other, about whether any other scheme might do so.

So Kahler can prevail here only if he can show (again, contra *Clark*) that due process demands a specific test of legal insanity—namely, whether mental illness prevented a defendant from understanding his act as immoral. Kansas, as we have explained, does not use that type of insanity rule. See *supra*, at 276–277. If a mentally ill defendant had enough cognitive function to form the intent to kill, Kansas law directs a conviction even if he believed the murder morally justified. In Kansas's judgment, that delusion does not make an intentional killer entirely blameless. See Brief for Respondent 40. Rather than eliminate, it only lessens the defendant's moral culpability. See *ibid.* And sentencing is the appropriate place to consider mitigation: The decisionmaker there can make a nuanced evaluation of blame, rather than choose, as a trial jury must, between all and nothing. See *ibid.* In any event, so Kansas thinks.[7] Those views are contested and contestable; other States—many others—have made a different choice. But Kahler must show more than that. He must show that adopting the moral-incapacity version of the insanity rule is not a choice at all—because,

[7] The dissent is therefore wrong to suggest that Kansas's law has become untethered from moral judgments about culpability. See *post*, at 297, 299, 311–318. No doubt, Kansas's moral judgments differ from the dissent's. Again, Kansas believes that an intentional killer is not wholly blameless, even if, for example, he thought his actions commanded by God. The dissent, in contrast, considers Kansas's view benighted (as maybe some in the majority do too). But that is not a dispute, as the dissent suggests, about *whether* morality should play a role in assigning legal responsibility. It is instead a disagreement about what morality entails—that is, about *when* a defendant is morally culpable for an act like murder. See *State* v. *Bethel*, 275 Kan. 456, 465–471, 66 P. 3d 840, 847–850 (2003) (accepting Kansas's view that "moral blameworthiness" is linked to a defendant's intent to kill, rather than to his ability to tell right from wrong). And we have made clear, from *Leland* to *Powell* to *Clark*, that courts do not get to make such judgments. See *supra*, at 280–282. Instead, the States have broad discretion to decide who counts as blameworthy, and to weigh that along with other factors in defining the elements of, and defenses to, crimes.

again, that version is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Leland*, 343 U. S., at 798. And he cannot. The historical record is, on any fair reading, complex—even messy. As we will detail, it reveals early versions of not only Kahler's proposed standard but also Kansas's alternative.

Early commentators on the common law proposed various formulations of the insanity defense, with some favoring a morality inquiry and others a *mens rea* approach. Kahler cites William Lambard's 16th-century treatise defining a "mad man" as one who "hath no knowledge of good nor evil" (the right and wrong of the day). Eirenarcha, ch. 21, p. 218 (1581). He likewise points to William Hawkins's statement, over a hundred years later, that a "lunatick[ ]" is not punishable because "under a natural disability of distinguishing between good and evil." 1 Pleas of the Crown § 1, p. 2 (1716) (capitalization omitted). Both true enough. But other early versions of the insanity test—and from a more famous trio of jurists—demanded the kind of cognitive impairment that prevented a defendant from understanding the nature of his acts, and thus intending his crime. Henry de Bracton's 13th-century treatise gave rise to what became known as the "wild beast" test. See J. Biggs, The Guilty Mind 82 (1955). Used for hundreds of years, it likened a "madman" to an "animal[ ] which lack[s] reason" and so could not have "the intention to injure." Bracton 384; see *ibid.* (A "madman" cannot commit a crime because "[i]t is will and purpose which mark" misdeeds). Sir Edward Coke similarly linked the definition of insanity to a defendant's inability to form criminal intent. He described a legally insane person in 1628 as so utterly "without his mind or discretion" that he could not have the needed *mens rea*. 2 Coke § 405, at 247b. So too Lord Matthew Hale a century later. He explained that insanity involves "a total alienation of the mind or perfect madness," such that a defendant could not act "*animo felonico*," meaning with felonious intent. 1 Pleas

of the Crown, ch. 4, pp. 30, 37 (1736); see *id.*, at 37 ("[F]or being under a full alienation of mind, he acts not *per electionem* or *intentionem* [by choice or intent]").[8]

Quite a few of the old common-law cases similarly stressed the issue of cognitive capacity. To be sure, even these cases included some references to the ability to tell right from wrong (and the dissent eagerly cherry-picks every one of them). But the decisions' overall focus was less on whether a defendant thought his act moral than on whether he had the ability to do much thinking at all. In the canonical case of *Rex* v. *Arnold*, 16 How. St. Tr. 695 (1724), for example, the jury charge descended straight from Bracton:

> "[I]t is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to

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[8] The dissent tries to recruit these three jurists to the side of the moral-incapacity test, see *post*, at 300–302, but cannot succeed. Even the carefully curated passages the dissent quotes focus on cognitive capability rather than moral judgment. See, *e. g.*, *post*, at 301–302 (asking whether a defendant had "sense and reason" or "understanding and liberty of will"). In so doing, they refer to the defendant's ability to form the requisite *mens rea*, or felonious intent. See *Clark*, 548 U. S., at 747; *supra*, at 274–275.

The dissent still insists all is not lost because (it says) *mens rea* itself hinged at common law on a defendant's "moral understanding." *Post*, at 304–305. Here, the dissent infers from the use of "good-from-evil" language in various common-law treatises and cases that moral blameworthiness must have defined the *mens rea* inquiry. See *ibid.* But to begin with—and to repeat the point made in the text—the most influential treatises used little of that language, emphasizing instead the need for a defendant to intend his act in the ordinary sense of the term. And as we will explain, the joint presence of references to *mens rea* and moral understanding in other common-law sources involving insanity does not show that most jurists saw the two concepts as one and the same. See *infra* this page and 289–291. Some may well have viewed *mens rea* through a moral prism; but others emphasized cognitive understanding in using that term; and still others combined the moral and cognitive in diverse ways. Which is to say that the record is far more complicated than the dissent lets on, with jurists invoking, both within particular sources and across all of them, a variety of ways to resolve insanity claims. And under our long-established precedent, that motley sort of history cannot provide the basis for a successful due process claim.

> be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast." *Id.*, at 764–765.

And the court offered an accompanying test linking that lack of reason to *mens rea*: If a man is "deprived of his reason, and consequently of his intention, he cannot be guilty." *Id.*, at 764; see *ibid.* (defining a "madman" as a "person that hath no design"); see also *Trial of William Walker* (Apr. 21, 1784), in 4 Old Bailey Proceedings 544, 547 (asking whether the defendant had a "distemper of mind which had deprived him of the use of his reason" or instead whether "he knew what he was doing [and] meant to do it"); *Beverley's Case*, 4 Co. Rep. 123b, 124b, 76 Eng. Rep. 1118, 1121 (K. B. 1603) (asking whether a man "is deprived of reason and understanding" and so "cannot have a felonious intent"). The House of Lords used much the same standard in *Rex* v. *Lord Ferrers*, 19 How. St. Tr. 886 (1760), when sitting in judgment on one of its members. There, the Solicitor General told the Lords to address "the capacity and intention of the noble prisoner." *Id.*, at 948. Relying heavily on Hale's treatise, he defined the legally insane as suffering from an "alienation of mind" and a "total[ ] want of reason." *Id.*, at 947. And in recapping the evidence on that issue, he asked about the defendant's intention: "Did [Ferrers] proceed with deliberation? Did he know the consequences" of his act? *Id.*, at 948.[9]

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[9] Even in the face of these instructions, the dissent claims that *Arnold* and *Ferrers* actually used the moral-incapacity test. See *post*, at 305–307. The assertion is based on some "good and evil" language (in *Ferrers*, mostly from witnesses) appearing in the case reports. But scholars generally agree, in line with our view, that *Arnold* and *Ferrers* "demonstrate how strictly" courts viewed "the criteria of insanity." 1 N. Walker, Crime and Insanity in England 53 (1968) (noting that the two decisions "have often been cited" for that proposition). Kahler himself does not dispute the point; indeed, he essentially concedes our reading. Rather than try

In such cases, even the language of morality mostly worked in service of the emphasis on cognition and *mens rea*. The idea was that if a defendant had such a "total[ ] want of reason" as to preclude moral thinking, he could not possibly have formed the needed criminal intent. *Id.*, at 947. Lord Chief Justice Mansfield put the point neatly in *Bellingham's Case*, 1 G. Collinson, Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis 636 (1812) (Collinson). He instructed the jury:

> "If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all." *Id.*, at 671.

On that account, moral incapacity was a byproduct of the kind of cognitive breakdown that precluded finding *mens rea*, rather than a self-sufficient test of insanity. See also *Rex* v. *Offord*, 5 Car. & P. 168, 169, 172 Eng. Rep. 924, 925 (N. P. 1831) ("express[ing] complete accordance in the observations of th[e] learned Judge" in *Bellingham*). Or said another way, a mentally ill defendant's inability to distinguish right from wrong, rather than independently producing an insanity acquittal, served as a sign—almost a kind of evidence—that the defendant lacked the needed criminal intent.

Other early common-law cases do not adopt the *mens rea* approach—but neither can they sustain Kahler's position. Kahler relies mainly on *Hadfield's Case*, 27 How. St. Tr. 1281

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to make the decisions say something they do not, he argues only that they were "outlier[s]" and "could hardly have been less typical." Brief for Petitioner 22, n. 5; Reply Brief 4 (internal quotation marks omitted). But that contrasting response fares no better. As even the dissent agrees, these were the "seminal" common-law decisions relating to insanity—indeed, two of only a small number in that period to make it into official reports. *Post*, at 305.

(1800), to show that common-law courts would acquit a mentally ill defendant who understood the nature of his act, but believed it moral. See Reply Brief 4. There, the defendant had deliberately set out to assassinate King George III on the view that doing so would bring about the Second Coming. See 27 How. St. Tr., at 1322. The judge instructed the jury that the defendant was so "deranged" as to make acquittal appropriate. *Id.*, at 1353. Maybe, as Kahler argues, that directive stemmed from the defendant's inability to tell right from wrong. But the judge never used that language, or stated any particular legal standard, so it is hard to know. Still other judges explained insanity to juries by throwing everything against the wall—mixing notions of cognitive incapacity, moral incapacity, and more, without trying to order, prioritize, or even distinguish among them. See, *e. g.*, *Regina* v. *Oxford*, 9 Car. & P. 525, 545–548, 173 Eng. Rep. 941, 950 (N. P. 1840); *Trial of Francis Parr* (Jan. 15, 1787), in 2 Old Bailey Proceedings 228–229; *Bowler's Case*, 1 Collinson 674. Those decisions treat the inability to make moral judgments more as part of an all-things-considered assessment of legal insanity, and less as its very definition. But even if some of them belong in Kahler's corner, that would be far from enough. Taken as a whole, the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule. And without that, they cannot support his proposed constitutional baseline.

Only with *M'Naghten*, in 1843, did a court articulate, and momentum grow toward accepting, an insanity defense based independently on moral incapacity. See *Clark*, 548 U. S., at 749; *Leland*, 343 U. S., at 801; *supra*, at 274–275, 281. The *M'Naghten* test, as already described, found insanity in either of two circumstances. See *supra*, at 274–275. A defendant was acquitted if he "labour[ed] under such a defect of reason, from disease of the mind, [1] as not to know the nature and quality of the act he was doing; *or*, [2] if he did know it, that he did not know he was doing what was wrong."

10 Cl. & Fin., at 210, 8 Eng. Rep., at 722 (emphasis added). That test disaggregated the concepts of cognitive and moral incapacity, so that each served as a stand-alone defense. And its crisp two-part formulation proved influential, not only in Great Britain but in the United States too. Over the course of the 19th century, many States adopted the test, making it the most popular one in the country.

Still, *Clark* unhesitatingly declared: "History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle." 548 U. S., at 749. As *Clark* elaborated, even *M'Naghten* failed to unify state insanity defenses. See 548 U. S., at 749–752. States continued to experiment with insanity rules, reflecting what one court called "the infinite variety of forms [of] insanity" and the "difficult and perplexing" nature of the defense. *Roberts* v. *State*, 3 Ga. 310, 328, 332 (1847). Some States in the 1800s gravitated to the newly emergent "volitional incapacity" standard, focusing on whether the defendant could at all control his actions. *Clark*, 548 U. S., at 749; see, *e. g.*, *Roberts*, 3 Ga., at 331. One court viewed that inquiry as "much more practical" than the "right and wrong test," which it thought often "speculative and difficult of determination." *State* v. *Felter*, 25 Iowa 67, 82, 84 (1868); see *Leland*, 343 U. S., at 801 (recognizing such skepticism about the moral-incapacity test); *supra*, at 281. Another prophesied that the volitional test was the one "towards which all the modern authorities in this country[ ] are gradually but surely tending." *Parsons*, 81 Ala., at 586, 2 So., at 859. But that test, too, failed to sweep all before it: State innovation proceeded apace. See, *e. g.*, *State* v. *Pike*, 49 N. H. 399, 442 (1870) (applying the "product" test, which excuses a defendant whose crime "was the offspring or product of mental disease"); N. D. Cent. Code Ann. § 12.1–04.1–01(1)(a) (2012) (replacing the right-from-wrong test with an inquiry into whether the defendant's act arose from "[a] serious distortion of [his] capacity to recognize reality"). Much as medical

views of mental illness changed as time passed, so too did legal views of how to account for that illness when assigning blame.

As earlier noted, even the States that adopted *M'Naghten* soon divided on what its second prong should mean. See *supra*, at 274–275. Most began by asking, as Kahler does, about a defendant's ability to grasp that his act was *immoral*. See, *e. g.*, *Wright* v. *State*, 4 Neb. 407, 409 (1876); *State* v. *Spencer*, 21 N. J. L. 196, 201 (1846). Thus, *Clark* labeled *M'Naghten*'s second prong a test of "moral capacity," and invoked the oft-used phrase "telling right from wrong" (or in older language, good from evil) to describe its central inquiry. 548 U. S., at 747, 753; see *supra*, at 275. But over the years, 16 States have reoriented the test to focus on the defendant's understanding that his act was *illegal*—that is, legally rather than morally "wrong."[10] They thereby excluded from the ranks of the insane those who knew an act was criminal but still thought it right.

Contrary to Kahler's (and the dissent's) contention, that difference matters. See Reply Brief 7 (claiming that "there is little daylight between these inquiries"); *post*, at 312–313, 317 (same). The two tests will treat some, even though not all, defendants in opposite ways. And the defendants they will treat differently are exactly those Kahler (and the dissent)

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[10] See *State* v. *Skaggs*, 120 Ariz. 467, 472, 586 P. 2d 1279, 1284 (1978); *Wallace* v. *State*, 766 So. 2d 364, 367 (Fla. App. 2000); *State* v. *Hamann*, 285 N. W. 2d 180, 184 (Iowa 1979); *Commonwealth* v. *Lawson*, 475 Mass. 806, 811, 62 N. E. 3d 22, 28 (2016); *State* v. *Worlock*, 117 N. J. 596, 610–611, 569 A. 2d 1314, 1322 (1990); *People* v. *Wood*, 12 N. Y. 2d 69, 76, 187 N. E. 2d 116, 121–122 (1962); *State* v. *Carreiro*, 2013-Ohio-1103, 988 N. E. 2d 21, 27 (App.); *McElroy* v. *State*, 242 S. W. 883, 884 (Tenn. 1922); *McAfee* v. *State*, 467 S. W. 3d 622, 636 (Tex. Crim. App. 2015); *State* v. *Crenshaw*, 98 Wash. 2d 789, 794–795, 659 P. 2d 488, 492–493 (1983); Ark. Code Ann. §5–2–301(6) (2017); Ill. Comp. Stat., ch. 720, §5/6–2(a) (West 2016); Ky. Rev. Stat. Ann. §504.020(1) (West 2016); Md. Crim. Proc. Code Ann. §3–109(a) (2018); Ore. Rev. Stat. §161.295(1) (2019); Vt. Stat. Ann., Tit. 13, §4801(a)(1) (2019).

focus on: those who know exactly what they are doing (including that it is against the law) but believe it morally justified—because, say, it is commanded by God (or in the dissent's case, a dog). See Brief for Petitioner 15; *post*, at 315; *Schmidt*, 216 N. Y., at 339, 110 N. E., at 949.[11] A famed theorist of criminal law put the point this way:

> "A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by . . . the murder of B[.] A's act is a crime if the word 'wrong' [in *M'Naghten*] means illegal. It is not a crime if the word wrong means morally wrong." 2 J. Stephen, History of the Criminal Law of England, ch. 19, p. 149 (1883).

So constitutionalizing the moral-incapacity standard, as Kahler requests, would require striking down not only the

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[11] The great judge (later Justice) whom the dissent cites to suggest there is no real difference between the legal wrong and moral wrong tests wrote a lengthy opinion whose point was the opposite. Consider a case, Judge Cardozo said: "A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice." *People* v. *Schmidt*, 216 N. Y. 324, 339, 110 N. E. 945, 949 (1915). If the legal wrong test were used, Judge Cardozo continued, "it would be the duty of a jury to hold her responsible for the crime." *Ibid.* But not if the focus was, as in the original *M'Naghten* test, on moral wrong. And that difference led the New York Court of Appeals to hold that the trial court's jury instruction was in error. See 216 N. Y., at 340, 110 N. E., at 950. The additional cases the dissent cites to downplay the distinction between moral and legal wrong in fact follow *Schmidt* in recognizing when they diverge. See *Worlock*, 117 N. J., at 611, 569 A. 2d, at 1322 (explaining that "the distinction between moral and legal wrong may be critical" when, for example, a defendant "knowingly kill[s] another in obedience to a command from God"); *Crenshaw*, 98 Wash. 2d, at 798, 659 P. 2d, at 494 (acknowledging *Schmidt*'s view that even when a defendant "knows that the law and society condemn [her] act," she should not be held responsible if "her free will has been subsumed by her belief in [a] deific decree").

five state laws like Kansas's (as the dissent at times suggests, see *post*, at 312), but 16 others as well (as the dissent eventually concedes is at least possible, see *post*, at 317). And with what justification? The emergence of *M'Naghten*'s legal variant, far from raising a due process problem, merely confirms what *Clark* already recognized. Even after its articulation in *M'Naghten* (much less before), the moral-incapacity test has never commanded the day. *Clark*, 548 U. S., at 749.[12]

Indeed, just decades ago Congress gave serious consideration to adopting a *mens rea* approach like Kansas's as the federal insanity rule. See *United States* v. *Pohlot*, 827 F. 2d 889, 899, and n. 9 (CA3 1987) (describing bipartisan support for that proposal). The Department of Justice at the time favored that version of the insanity test. Perhaps more surprisingly, the American Medical Association did too. And the American Psychiatric Association took no position one way or the other. Although Congress chose in the end to adhere to the *M'Naghten* rule, the debate over the bill itself reveals continuing division over the proper scope of the insanity defense.

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[12] The diversity of American approaches to insanity is also evident in the States' decisions about which kinds of mental illness can support the defense. See *Clark*, 548 U. S., at 750, n. 11; *supra*, at 275, n. 1. Some States limit the defense to those with a "severe" mental disease. See, *e. g.*, Ala. Code § 13A–3–1 (2015). Others prohibit its assertion by defendants with specific mental disorders. See, *e. g.*, Ariz. Rev. Stat. Ann. § 13–502 (2010) ("psychosexual" or "impulse control disorders"); Ore. Rev. Stat. § 161.295(2) ("personality disorder[s]"). In particular, many States follow the Model Penal Code in prohibiting psychopaths from raising the defense. See ALI, Model Penal Code § 4.01(2), p. 163 (1985); *e. g.*, Ind. Code § 35–41–3–6(b) (2019) ("abnormality manifested only by repeated unlawful or otherwise antisocial conduct"). All those limitations apply even when the defendant's mental illness prevented him from recognizing that his crime was immoral. In that way too, many States have departed from the principle that Kahler (along with the dissent) claims the Constitution commands.

Nor is that surprising, given the nature of the inquiry. As the American Psychiatric Association once noted, "insanity is a matter of some uncertainty." Insanity Defense Work Group, Statement on the Insanity Defense, 140 Am. J. Psych. 681, 685 (1983). Across both time and place, doctors and scientists have held many competing ideas about mental illness. And that is only the half of it. Formulating an insanity defense also involves choosing among theories of moral and legal culpability, themselves the subject of recurrent controversy. At the juncture between those two spheres of conflict and change, small wonder there has not been the stasis Kahler sees—with one version of the insanity defense entrenched for hundreds of years.

And it is not for the courts to insist on any single criterion going forward. We have made the point before, in *Leland*, *Powell*, and *Clark*. See *supra*, at 280–282. Just a brief reminder: "[F]ormulating a constitutional rule would reduce, if not eliminate, [the States'] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U. S., at 536–537. Or again: In a sphere of "flux and disagreement," with "fodder for reasonable debate about what the cognate legal and medical tests should be," due process imposes no one view of legal insanity. *Clark*, 548 U. S., at 752–753. Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.

We therefore decline to require that Kansas adopt an insanity test turning on a defendant's ability to recognize that

his crime was morally wrong. Contrary to Kahler's view, Kansas takes account of mental health at both trial and sentencing. It has just not adopted the particular insanity defense Kahler would like. That choice is for Kansas to make—and, if it wishes, to remake and remake again as the future unfolds. No insanity rule in this country's heritage or history was ever so settled as to tie a State's hands centuries later. For that reason, we affirm the judgment below.

*It is so ordered.*

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

Like the Court, I believe that the Constitution gives the States broad leeway to define state crimes and criminal procedures, including leeway to provide different definitions and standards related to the defense of insanity. But here, Kansas has not simply redefined the insanity defense. Rather, it has eliminated the core of a defense that has existed for centuries: that the defendant, *due to mental illness*, lacked the mental capacity necessary for his conduct to be considered morally blameworthy. Seven hundred years of Anglo-American legal history, together with basic principles long inherent in the nature of the criminal law itself, convince me that Kansas' law " 'offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952) (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)).

## I

A much-simplified example will help the reader understand the conceptual distinction that is central to this case. Consider two similar prosecutions for murder. In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecu-

tion Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Under Kansas' rule, it can convict the second but not the first.

To put the matter in more explicitly legal terms, consider the most famous statement of the traditional insanity defense, that contained in *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H. L. 1843). Lord Chief Justice Tindal, speaking for a majority of the judges of the common-law courts, described the insanity defense as follows:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, [1] as not to know the nature and quality of the act he was doing; or, [2] if he did know it, that he did not know he was doing what was wrong." *Id.*, at 210, 8 Eng. Rep., at 722.

The first prong (sometimes referred to as "cognitive incapacity") asks whether the defendant knew what he was doing. This prong corresponds roughly to the modern concept of *mens rea* for many offenses. The second (sometimes referred to as "moral incapacity") goes further. It asks, even if the defendant knew what he was doing, did he have the capacity to know that it was wrong? Applying this test to my example, a court would find that both defendants successfully established an insanity defense. Prosecution One (he thought the victim was a dog) falls within *M'Naghten*'s first prong, while Prosecution Two (he thought the dog ordered him to do it) falls within its second prong.

In Kansas' early years of statehood, its courts recognized the *M'Naghten* test as the "cardinal rule of responsibility in the criminal law." *State* v. *Nixon*, 32 Kan. 205, 206, 4 P. 159,

160 (1884). Kansas "steadfastly adhered to that test" for more than a century. *State* v. *Baker*, 249 Kan. 431, 449–450, 819 P. 2d 1173, 1187 (1991). But in 1995, Kansas "'legislatively abolish[ed] the insanity defense.'" *State* v. *Jorrick*, 269 Kan. 72, 82, 4 P. 3d 610, 617 (2000) (quoting Rosen, Insanity Denied: Abolition of the Insanity Defense in Kansas, 8 Kan. J. L. & Pub. Pol'y 253, 254–255 (1997)). Under the new provision, a criminal defendant's mental disease or defect is relevant to his guilt or innocence only insofar as it shows that he lacked the intent defined as an element of the offense, or *mens rea*. If the defendant acted with the required level of intent, then he has no defense based on mental illness. Kan. Stat. Ann. §21–5209 (2018 Cum. Supp.).

Under Kansas' changed law, the defendant in Prosecution One could defend against the charge by arguing that his mental illness prevented him from forming the mental state required for murder (intentional killing of a human being)—just as any defendant may attempt to rebut the State's prima facie case for guilt. The defendant in Prosecution Two has no defense. Because he acted with the requisite level of intent, he must be convicted regardless of any role his mental illness played in his conduct. See 307 Kan. 374, 401, 410 P. 3d 105, 125 (2018) (acknowledging that Kansas' *mens rea* approach "allows conviction of an individual who had no capacity to know that what he or she was doing was wrong").

I do not mean to suggest that *M'Naghten*'s particular approach to insanity is constitutionally required. As we have said, "[h]istory shows no deference to *M'Naghten*." *Clark* v. *Arizona*, 548 U. S. 735, 749 (2006). *M'Naghten*'s second prong is merely one way of describing something more fundamental. Its basic insight is that mental illness may so impair a person's mental capacities as to render him no more responsible for his actions than a young child or a wild animal. Such a person is not properly the subject of the criminal law. As I shall explain in the following section, throughout history, the law has attempted to embody this principle

in a variety of ways. As a historical matter, *M'Naghten* is by far its most prominent expression, but not its exclusive one. Other ways of capturing it may well emerge in the future. The problem with Kansas' law is that it excises this fundamental principle from its law entirely.

## II

The Due Process Clause protects those "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Leland*, 343 U. S., at 798. Our "primary guide" in determining whether a principle of justice ranks as fundamental is "historical practice." *Montana* v. *Egelhoff*, 518 U. S. 37, 43 (1996) (plurality opinion). The Court contends that the historical formulations of the insanity defense were so diverse, so contested, as to make it impossible to discern a unified principle that Kansas' approach offends. I disagree.

Few doctrines are as deeply rooted in our common-law heritage as the insanity defense. Although English and early American sources differ in their linguistic formulations of the legal test for insanity, with striking consistency, they all express the same underlying idea: A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime. This principle remained embedded in the law even as social mores shifted and medical understandings of mental illness evolved. Early American courts incorporated it into their jurisprudence. The States eventually codified it in their criminal laws. And to this day, the overwhelming majority of U. S. jurisdictions recognize insanity as an affirmative defense that excuses a defendant from criminal liability even where he was capable of forming the *mens rea* required for the offense. See Appendix, *infra*.

### A

Consider the established common-law background of the insanity defense at and around the time the Framers wrote the Constitution. The four preeminent common-law jurists,

Bracton, Coke, Hale, and Blackstone, each linked criminality to the presence of reason, free will, and moral understanding. It is "will and purpose," wrote Henry de Bracton in his 13th-century treatise, that "mark *maleficia* [misdeeds]." 2 Bracton on Laws and Customs of England 384 (S. Thorne transl. 1968) (Bracton); Oxford Latin Dictionary 1067 (P. Glare ed. 1982). A "madman," he explained, "can no more commit an *injuria* [unlawful conduct] or a felony than a brute animal, since they are not far removed from brutes." 2 Bracton 424; Oxford Latin Dictionary, at 914. Seizing on Bracton's reference to "brute animals" (sometimes translated "wild beasts"), the Court concludes that Bracton's approach, like Kansas', would excuse only those who lack capacity to form any intention at all. See *ante*, at 287. But what does it mean to be like a "brute animal"? A brute animal may well and readily intend to commit a violent act without being able to judge its moral nature. For example, when a lion stalks and kills its prey, though it acts intentionally, it does not offend against the criminal laws. See 2 Bracton 379 (noting that "murder" is defined as "by the hand of man" to "distinguish it from the case of those slain or devoured by beasts and animals which lack reason").

Bracton's other references to "madmen" shed further light on the meaning he attached to that term. Bracton described such persons as "without sense and reason" and "lack[ing] *animus*." *Id.*, at 324, 424. And he likened a "lunatic" to an "infant," who cannot be held liable in damages unless he "is capable of perceiving the wrongful character of his act." *Id.*, at 324; see also 4 *id.*, at 356 ("[I]n many ways a minor and a madman are considered equals or not very different, because they lack reason" (footnote omitted)). Thus, Bracton's "brute animal" included those who lacked the qualities of reason and judgment that make human beings responsible moral agents. See Platt, The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility, 1 Issues in Crim. 1, 6 (1965).

Leaving Bracton, let us turn to Sir Edward Coke, writing in the early 17th century. Coke wrote that "the act and wrong of a mad man shall not be imputed to him," not because he could not engage in intentional conduct (the equivalent of the modern concept of *mens rea*), but because he lacked something more—"mind or discretion." 2 Institutes of the Laws of England § 405, p. 247b (1628). Coke, like Bracton before him, likened a "mad man" to an "[i]nfant," who could not be punished as a criminal "untill he be of the age of fourteene, which in Law is accounted the age of discretion." *Ibid.* What is it that the "[i]nfant" lacks? Since long before Coke's time, English jurists and scholars believed that it was the moral nature, not the physical nature, of an act that a young child is unlikely to understand. See Platt & Diamond, The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey, 54 Cal. L. Rev. 1227, 1233–1234 (1966) (Platt & Diamond).

Sir Matthew Hale also premised criminal liability on the presence of "understanding and liberty of will," without which "there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of the crimes or offenses." 1 History of the Pleas of the Crown, ch. 2, pp. 14–15 (1736). Hale, too, likened insane persons to "infants" under the age of 14, who were subject to the criminal laws only if they "had discretion to judge between good and evil." *Id.*, ch. 3, at 26–27; *id.*, ch. 4, at 30 (a person who is "labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony"). Those suffering from "total insanity" could not be guilty of capital offenses, "for they have not the use of understanding, and act not as reasonable creatures, but their actions are in effect in the condition of brutes." *Id.*, at 30–32.

Sir William Blackstone, whose influence on the founding generation was the most profound, was yet more explicit. A criminal offense, he explained, requires both a "vitious will"

and a "vitious act." 4 Commentaries on the Laws of England 21 (1769). Persons suffering from a "deficiency in will" arising from a "defective or vitiated understanding" were "not [criminally] chargeable for their own acts." *Id.*, at 24. Citing Coke, he explained that murder must be "committed by a person of sound memory and discretion" because a "lunatic or infant" is "incapable of committing any crime, unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil." *Id.*, at 195–196 (emphasis deleted). And he opined that deprivation of "the capacity of discerning right from wrong" is necessary "to form a legal excuse." *Id.*, at 189.

These four eminent jurists were not alone. Numerous other commentators expressly linked criminal liability with the accused's capacity for moral agency. William Lambard's 1581 treatise ranked a "mad man" as akin to a "childe" who had "no knowledge of good nor evil." Eirenarcha, ch. 21, p. 218. If such a person killed a man, that is "no felonious acte" because "they can[n]ot be said to have any understanding wil[l]." *Ibid.* But if "upon examination" it appeared that "they knew what they did, *[and] it was ill*, the[n] seemeth it to be otherwise." *Ibid.* (emphasis added). Michael Dalton's 1618 manual for justices of the peace instructed that "[i]f one that is *Non compos mentis* . . . kill a man, this is no felonie; for they have no knowledge of good and evill, nor can have a felonious intent, nor a will or mind to do harme." The Countrey Justice 215. William Hawkins, in 1716, wrote that "those who," like "[l]unaticks," are "under a natural Disability of distinguishing between Good and Evil . . . are not punishable by any criminal Prosecution whatsoever." 1 Pleas of the Crown § 1, p. 2; see also *id.*, at 1 ("The Guilt of offending against any Law whatsoever . . . can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it").

English treatises on the law of mental disability adopted the same view. George Collinson explained that "[t]o excuse a man in the commission of a crime, he must at the period

when he committed the offence, have been wholly incapable of distinguishing between good and evil, or of comprehending the nature of what he is doing." Treatise on the Law Concerning Idiots, Lunatics, and Other Persons Non Compotes Mentis § 7, p. 474 (1812) (Collinson); see also *id.*, § 2, at 471 ("[A]n evil intention is implied in every offence, and constitutes the charge of every indictment: but a non compos, not having a will of his own, cannot have an intention morally good or bad; so that the overt act by which alone the motives of other men are discerned, with respect to him proves nothing"). Similarly, Leonard Shelford, summarizing English case law, wrote that "[t]he essence of a crime consists in the animus or intention of the person who commits it, considered as a free agent, and in a capacity of distinguishing between moral good and evil." Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind 458 (1833) (emphasis deleted).

The majority believes that I am "cherry-pick[ing]" references to moral understanding while ignoring references to intent and *mens rea*. See *ante*, at 288–290, and nn. 8, 9. With respect, I disagree. The Court points out, correctly, that many of the common-law sources state that the insane lack *mens rea* or felonious intent. But what did they mean by that? At common law, the term *mens rea* ordinarily incorporated the notion of "general moral blameworthiness" required for criminal punishment. Sayre, Mens Rea, 45 Harv. L. Rev. 974, 988 (1932); 3 Encyclopedia of Crime & Justice 995 (2d ed. 2002) (as used at common law, the term *mens rea* "is synonymous with a person's blameworthiness"). The modern meaning of *mens rea* is narrower and more technical. *Ibid.* It refers to the "state of mind or inattention that, together with its accompanying conduct, the criminal law defines as an offense." *Ibid.* When common-law writers speak of intent or *mens rea*, we cannot simply assume that they use those terms in the modern sense. That is an anach-

ronism. Instead, we must examine the context to understand what meaning they ascribed to those terms. And when we do so, we see that, over and over again, they link criminal intent to the presence of free will and moral understanding. The Court dismisses those passages as just "some 'good and evil' language." *Ante*, at 289, n. 9. But it fails to explain why, if *mens rea* in the modern sense were sufficient, these common-law writers discuss the role of moral agency at all, much less why such language appears in virtually every treatise and virtually every case. In the Court's view, all that is just spilled ink.

The English case law illustrates this point. In the seminal case of *Rex* v. *Arnold*, 16 How. St. Tr. 695 (1724), the defendant stood accused of shooting Lord Onslow while laboring under the insane delusion that Onslow had bewitched him. *Id.*, at 699, 721. The Court emphasizes Justice Tracy's statement to the jury that if a man is "'deprived of his reason, and consequently of his intention, he cannot be guilty,'" concluding that the court adopted a modern *mens rea* test. *Ante*, at 289. But in the passage immediately preceding that statement, Justice Tracy explained that the defendant's intent to shoot was clearly proved, and that the only remaining question was whether his mental illness excused him from blame:

> "That he shot, and that wilfully [is proved]: but whether maliciously, that is the thing: that is the question; whether this man hath the use of his reason and sense? If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man. If a man be *deprived of his reason, and consequently of his intention, he cannot be guilty*; and if that be the case, though he

> had actually killed my lord Onslow, he is exempted from punishment." 16 How. St. Tr., at 764 (emphasis added; brackets in original).

See also *ibid.* (summarizing the testimony of one Mr. Coe, who testified that he went to the defendant three days after the shooting "and asked him, If he intended to kill my lord Onslow? and he said, Yes, to be sure"). On the next page, Justice Tracy concluded that the jury must determine whether the evidence "doth shew a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did." *Id.*, at 765.

Likewise, in the case of *Rex* v. *Lord Ferrers*, 19 How. St. Tr. 886 (1760), the solicitor general instructed the members of the House of Lords to consider the "'capacity and intention'" of the accused, to be sure, *ante*, at 289, but what did he mean by those terms? The ultimate question of insanity, he explained, depended on the defendant's capacity at the time of the offense to distinguish right from wrong:

> "My lords, the question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? It is not pretended to be a constant general insanity. Was he under the power of it, at the time of the offence committed? Could he, did he, at that time, distinguish between good and evil?" 19 How. St. Tr., at 948.

In summation, the solicitor general argued that Lord Ferrers' own witnesses failed to provide any testimony "which proves his lunacy or insanity at any time." *Id.*, at 952. Reviewing the pertinent evidence, he noted that one witness testified that he "had observed great oddities in my lord," but acknowledged that he "never saw him in such a situation, as not to be capable of distinguishing between good and evil, and not to know, that murder was a great crime." *Ibid.* Another admitted under questioning by the Lords that "he thought lord Ferrers capable of distinguishing between

moral and immoral actions." *Ibid.* The defendant's brother was the only witness to testify that "at particular times, the noble lord might not be able to distinguish between moral good and evil," but even he, the solicitor general argued, had been unable to testify to "any instance within his own recollection." *Id.*, at 953. If Lord Ferrers' bare intention to kill were sufficient to convict, why the extensive discussion of the evidence concerning his capacity for moral understanding?

These examples reflect the prevailing view of the law around the time of the founding. Judges regularly instructed juries that the defendant's criminal liability depended on his capacity for moral responsibility. See, *e. g.*, *Trial of Samuel Burt* (July 19, 1786), in 6 Old Bailey Proceedings 875 (E. Hodgson ed. 1786) (to acquit based on insanity, it must be shown that the mental disorder "takes away from the party all moral agency and accountability," and "destroys in them, for the time at least, all power of judging between right and wrong"); *Trial of Francis Parr* (Jan. 15, 1787), 2 *id.*, at 228 (jury must "judge whether at the moment of committing [the offense] he was not a moral agent, capable of discerning between good and evil, and of knowing the consequences of what he did"); *Bowler's Case*, 1 Collinson 673–674, n. (judge "concluded by observing to the jury, that it was for them to determine whether the Prisoner, when he committed the offence with which he stood charged, was or was not incapable of distinguishing right from wrong"). The government's attorneys agreed that this was the proper inquiry. See, *e. g.*, *Parker's Case*, 1 *id.*, at 479–480 (the Attorney General argued that "the jury must be perfectly satisfied, that at the time when the crime was committed, the prisoner did not really know right from wrong").

In none of the common-law cases was the judge's reference to the defendant's capacity for moral agency simply a proxy for the narrow modern notion of *mens rea*. See *ante*, at 290. Something more was required. Consider *Bellingham's*

*Case*, 1 Collinson 636. The defendant stood accused of the murder of Spencer Perceval, the Chancellor of the Exchequer, in the lobby of the House of Commons. *Ibid.* The Court emphasizes Chief Justice Mansfield's statement that one who could not distinguish right from wrong "'could have no intention at all,'" concluding that Chief Justice Mansfield viewed moral incapacity as a symptom of cognitive breakdown rather than a test of insanity. *Ante*, at 290. But, as in *Rex* v. *Arnold*, see *supra*, at 305–306, the defendant's intention to shoot Perceval was not seriously in dispute. 1 Collinson 670. Instead, his guilt or innocence turned on his capacity for moral blame. The "single question" for the jury, charged the Chief Justice, "was whether, when [the defendant] committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his Country." *Id.*, at 673. Lord Lyndhurst, presiding over the case of *Rex* v. *Offord*, 5 Car. & P. 168, 172 Eng. Rep. 924 (N. P. 1831), certainly understood that inquiry to be the crux of Chief Justice Mansfield's charge. Citing *Bellingham's Case*, he instructed the jury that "[t]he question was, did [the accused] know that he was committing an offence against the laws of God and nature?" 5 Car. & P., at 168, 172 Eng. Rep., at 925.

The Court dismisses other common-law cases as failing to articulate a clear legal standard. See *ante*, at 290–291. But these cases, too, required more than bare intent. In *Hadfield's Case*, 27 How. St. Tr. 1281 (1800), the defendant was acquitted after the prosecution conceded that he was "in a deranged state of mind" when he shot at King George III. *Id.*, at 1353. And in *Regina* v. *Oxford*, 9 Car. & P. 525, 173 Eng. Rep. 941 (N. P. 1840), the court observed that a "person may commit a criminal act, and yet not be responsible." *Id.*, at 546, 173 Eng. Rep., at 950. Although it acknowledged the difficulty of "lay[ing] down the rule of the English law on the subject," it summed up the inquiry as "whether the prisoner

was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime." *Id.*, at 546–547, 173 Eng. Rep., at 950. Although these and other English cases discuss insanity in terms that are less precise than our modern taxonomy of mental states, their lesson is clear. To be guilty of a crime, the accused must have something more than bare ability to form intentions and carry them out.

B

These fundamental principles of criminal responsibility were incorporated into American law from the early days of the Republic. Early American commentaries on the criminal law generally consisted of abridgments of the works of prominent English jurists. As early as 1792, one such abridgment instructed that "lunaticks, who are under a natural disability of distinguishing between good and evil are not punishable by any criminal prosecution." R. Burn, Abridgment, or the American Justice 300; see also W. Stubbs, Crown Circuit Companion 288 (1st Am. ed. 1816) ("If one that is *non compos mentis* . . . kill a man, this is no felony; for they have not knowledge of good and evil, nor can have a felonious intent, nor a will or mind to do harm"). And an influential founding-era legal dictionary described the "general rule" that lunatics, "being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever." 2 T. Cunningham, New and Complete Law Dictionary (2d corr. ed. 1771). Similarly, the first comprehensive American text on forensic medicine, published in 1823, cited Chief Justice Mansfield's charge to the jury in *Bellingham's Case* for the proposition that "[s]o long as they could distinguish good from evil, so long would they be answerable for their con-

duct." 1 T. Beck, Elements of Medical Jurisprudence 369. These principles, it concluded, "are doubtless correct, and conducive to the ends of justice." *Id.*, at 370.

Early American jurists closely hewed to these principles. In case after case, judges instructed juries that they must inquire into the defendant's capacity for moral understanding. See, *e. g.*, *Meriam's Case*, 7 Mass. 168 (1810), 6 N. Y. City-Hall Recorder 162 (1822) (whether the defendant was "at the time, capable of distinguishing good from evil"); *Clark's Case*, 1 N. Y. City-Hall Recorder 176, 177 (1816) (same); *Ball's Case*, 2 N. Y. City-Hall Recorder 85, 86 (1817) (same); *United States* v. *Clarke*, 25 F. Cas. 454 (No. 14,811) (CC DC 1818) (whether defendant was "in such a state of mental insanity . . . as not to have been conscious of the moral turpitude of the act"); *Cornwell* v. *State*, 8 Tenn. 147, 155 (1827) (whether the prisoner "had not sufficient understanding to know right from wrong").

C

As the foregoing demonstrates, by the time the House of Lords articulated the *M'Naghten* test in 1843, its "essential concept and phraseology" were "already ancient and thoroughly embedded in the law." Platt & Diamond 1258; see also 1 W. Russell, Crimes and Misdemeanors 8–14 (3d ed. 1843) (summarizing the pre-*M'Naghten* English case law and concluding that the key questions were whether "there be thought and design, a faculty to distinguish the nature of actions, [and] to discern the difference between moral good and evil"). Variations on the *M'Naghten* rules soon became the predominant standard in the existing States of the United States. Platt & Diamond 1257. That tradition has continued, almost without exception, to the present day.

It is true that, even following *M'Naghten*, States continued to experiment with different formulations of the insanity defense. See *ante*, at 291–292. Some adopted the volitional incapacity, or "irresistible-impulse," test. But those States

understood that innovation to expand, not contract, the scope of the insanity defense, excusing not only defendants who met some variant of the traditional *M'Naghten* test but also those who understood that their conduct was wrong but were incapable of restraint. See, *e. g.*, *Parsons* v. *State*, 81 Ala. 577, 584–585, 2 So. 854, 858–859 (1887); *Bradley* v. *State*, 31 Ind. 492, 507–508 (1869); *State* v. *Felter*, 25 Iowa 67, 82–83 (1868); *Hopps* v. *People*, 31 Ill. 385, 391–392 (1863).

So too, the "offspring" or "product" test, which asks whether the defendant's conduct was attributable to mental disease or defect. The States that adopted this test did so out of the conviction that the *M'Naghten* test was too restrictive in its approach to assessing the accused's capacity for criminal responsibility. See *Durham* v. *United States*, 214 F. 2d 862, 874 (CADC 1954) ("We conclude that a broader test should be adopted"); *State* v. *Pike*, 49 N. H. 399, 441–442 (1870); see also Reid, Understanding the New Hampshire Doctrine of Criminal Insanity, 69 Yale L. J. 367, 386 (1960) ("[T]he New Hampshire doctrine . . . is more liberal and has a wider range than *M'Naghten* rules"). Even as States experimented with broader insanity rules, they retained the core of the traditional common-law defense.

In the early 20th century, several States attempted to break with that tradition. The high courts of those States quickly struck down their restrictive laws. As one justice of the Mississippi Supreme Court wrote in 1931: The "common law proceeds upon an idea that before there can be a crime there must be an intelligence capable of comprehending the act prohibited, and the probable consequence of the act, and that the act is wrong." *Sinclair* v. *State*, 161 Miss. 142, 158, 132 So. 581, 583 (Ethridge, J., concurring). Accordingly, Justice Ethridge said, insanity "has always been a complete defense to all crimes from the earliest ages of the common law." *Ibid.*; *State* v. *Strasburg*, 60 Wash. 106, 116, 110 P. 1020, 1022–1023 (1910); cf. *State* v. *Lange*, 168 La. 958, 965, 123 So. 639, 642 (1929).

Today, 45 States, the Federal Government, and the District of Columbia continue to recognize an insanity defense that retains some inquiry into the blameworthiness of the accused. Seventeen States and the Federal Government use variants of the *M'Naghten* test, with its alternative cognitive and moral incapacity prongs. Three States have adopted *M'Naghten* plus the volitional test. Ten States recognize a defense based on moral incapacity alone. Thirteen States and the District of Columbia have adopted variants of the Model Penal Code test, which combines volitional incapacity with an expanded version of moral incapacity. See Appendix, *infra*. New Hampshire alone continues to use the "product" test, asking whether "a mental disease or defect caused the charged conduct." *State* v. *Fichera*, 153 N. H. 588, 593, 903 A. 2d 1030, 1035 (2006). This broad test encompasses "'whether the defendant knew the difference between right and wrong and whether the defendant acted impulsively,'" as well as "'whether the defendant was suffering from delusions or hallucinations.'" *State* v. *Cegelis*, 138 N. H. 249, 255, 638 A. 2d 783, 786 (1994). And North Dakota uses a unique formulation that asks whether the defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality." N. D. Cent. Code Ann. § 12.1–04.1–01(1) (2012).

Of the States that have adopted the *M'Naghten* or Model Penal Code tests, some interpret knowledge of wrongfulness to refer to moral wrong, whereas others hold that it means legal wrong. See *ante*, at 274–276, 293–295. While there is, of course, a logical distinction between those interpretations, there is no indication that it makes a meaningful difference in practice. The two inquiries are closely related and excuse roughly the same universe of defendants. See *State* v. *Worlock*, 117 N. J. 596, 609–611, 569 A. 2d 1314, 1321–1322 (1990) ("In most instances, legal wrong is coextensive with moral

wrong'"); *State* v. *Crenshaw*, 98 Wash. 2d 789, 799, 659 P. 2d 488, 494 (1983) ("'[S]ince by far the vast majority of cases in which insanity is pleaded as a defense to criminal prosecutions involves acts which are universally recognized as morally wicked as well as illegal, the hair-splitting distinction between legal and moral wrong need not be given much attention'"); *People* v. *Schmidt*, 216 N. Y. 324, 340, 110 N. E. 945, 949 (1915) (Cardozo, J.) ("Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals"); see also ALI, Model Penal Code § 4.01, Explanatory Note, p. 164 (1985) (explaining that "few cases are likely to arise in which the variation will be determinative").

## III

### A

Consider the basic reason that underlies and explains this long legal tradition. That reason reveals that more is at stake than its duration alone. The tradition reflects the fact that a community's moral code informs its criminal law. As Henry Hart stated it, the very definition of crime is conduct that merits "a formal and solemn pronouncement of the moral condemnation of the community." The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 405 (1958).

The criminal law does not adopt, nor does it perfectly track, moral law. It is no defense simply to claim that one's criminal conduct was morally right. But the criminal law nonetheless tries in various ways to prevent the distance between criminal law and morality from becoming too great. In the words of Justice Holmes, a law that "punished conduct [that] would not be blameworthy in the average member of the community would be too severe for that community to bear." O. Holmes, The Common Law 50 (1881); see also *ibid.* ("[T]o deny that criminal liability . . . is founded on

blameworthiness . . . would shock the moral sense of any civilized community").

Sometimes the criminal law seeks to keep its strictures roughly in line with the demands of morality through grants of discretion that will help it to reach appropriate results in individual cases, including special instances where the law points one way and morality the other. Thus, prosecutors need not prosecute. Jurors (however instructed) may decide to acquit. Judges may exercise the discretion the law allows them to impose a lenient sentence. Executives may grant clemency.

And sometimes the law attempts to maintain this balance by developing and retaining a "collection of interlocking and overlapping concepts," including defenses, that will help "assess the moral accountability of an individual for his antisocial deeds." *Powell* v. *Texas*, 392 U. S. 514, 535–536 (1968) (plurality opinion). These concepts and defenses include "*actus reus*, *mens rea*, insanity, mistake, justification, and duress." *Id.*, at 536.

As we have recognized, the "process of adjustment" within and among these overlapping legal concepts "has always been thought to be the province of the States." *Ibid.* Matters of degree, specific content, and aptness of application all may be, and have always been, the subject of legal dispute. But the general purpose—to ensure a rough congruence between the criminal law and widely accepted moral sentiments—persists. To gravely undermine the insanity defense is to pose a significant obstacle to this basic objective.

The majority responds that Kansas has not removed the element of blameworthiness from its treatment of insanity; it has simply made a different judgment about what conduct is blameworthy. See *ante*, at 286, n. 7. That is not how the Kansas Supreme Court has characterized its law. See *State* v. *Bethel*, 275 Kan. 456, 472, 66 P. 3d 840, 850 (2003) (holding that Kansas law provides for "no consideration," at the guilt phase, "of whether wrongfulness was inherent in the defend-

ant's intent"). In any event, as the Court acknowledges, the States' discretion in this area must be constrained within "broad limits," *ante*, at 280, which are derived from history and tradition. The question is whether Kansas' approach transgresses those limits. I doubt that the Court would declare, for example, that a State may do away with the defenses of duress or self-defense on the ground that, in its idiosyncratic judgment, they are not required. With respect to the defense of insanity, I believe that our history shows clearly that the criminal law has always required a higher degree of individual culpability than the modern concept of *mens rea*. See Part II, *supra*. And in my view, Kansas' departure from this long uniform tradition poses a serious problem.

B

To see why Kansas' departure is so serious, go back to our two simplified prosecutions: the first of the defendant who, because of serious mental illness, believes the victim is a dog; the second of a defendant who, because of serious mental illness, believes the dog commanded him to kill the victim. Now ask, what moral difference exists between the defendants in the two examples? Assuming equivalently convincing evidence of mental illness, I can find none at all. In both cases, the defendants differ from ordinary persons in ways that would lead most of us to say that they should not be held morally responsible for their acts. I cannot find one defendant more responsible than the other. And for centuries, neither has the law.

More than that, scholars who have studied this subject tell us that examples of the first kind are rare. See Brief for 290 Criminal Law and Mental Health Law Professors as *Amici Curiae* 12. Others repeat this claim. See Slobogin, An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases, 86 Va. L. Rev. 1199, 1205 (2000); Morse, Mental Disorder and Criminal Law, 101 J. Crim. L. & C. 885, 933 (2011). That is because mental illness typically does not

deprive individuals of the ability to form intent. Rather, it affects their *motivations* for forming such intent. Brief for 290 Criminal Law and Mental Health Law Professors as *Amici Curiae* 12. For example, the American Psychiatric Association tells us that individuals suffering from mental illness may experience delusions—erroneous perceptions of the outside world held with strong conviction. They may believe, incorrectly, that others are threatening them harm (persecutory delusions), that God has commanded them to engage in certain conduct (religious delusions), or that they or others are condemned to a life of suffering (depressive delusions). Brief for American Psychiatric Association et al. as *Amici Curiae* 25–26. Such delusions may, in some cases, lead the patient to behave violently. *Id.*, at 28. But they likely would not interfere with his or her perception in such a way as to negate *mens rea*. See H. R. Rep. No. 98–577, p. 15, n. 23 (1984) ("Mental illness rarely, if ever, renders a person incapable of understanding what he or she is doing. Mental illness does not, for example, alter the perception of shooting a person to that of shooting a tree").

Kansas' abolition of the second part of the *M'Naghten* test requires conviction of a broad swath of defendants who are obviously insane and would be adjudged not guilty under any traditional form of the defense. This result offends deeply entrenched and widely recognized moral principles underpinning our criminal laws. See, *e. g.*, National Comm'n on Reform of Fed. Crim. Laws, Final Report, Proposed New Fed. Crim. Code § 503, pp. 40–41 (1971) (to attribute guilt to a "manifestly psychotic person" would "be immoral and inconsistent with the aim of a criminal code"); H. R. Rep. No. 98–577, at 7–8 ("[T]he abolition of the affirmative insanity defense would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment"); ABA Criminal Justice Mental Health Standards § 7–6.1, pp. 336–338 (1989) (rejecting the *mens rea* approach "out of hand" as "a jarring reversal of

hundreds of years of moral and legal history" that "inhibits if not prevents the exercise of humane judgment that has distinguished our criminal law heritage").

By contrast, the rule adopted by some States that a defendant must be acquitted if he was unable to appreciate the *legal* wrongfulness of his acts, see *ante*, at 293–295, would likely lead to acquittal in the mine run of such cases. See *supra*, at 312–313. If that is so, then that rule would not pose the same due process problem as Kansas' approach. That issue is not before us, as Kansas' law does not provide even that protection to mentally ill defendants.

C

Kansas and the Solicitor General, in their efforts to justify Kansas' change, make four important arguments. First, they point to cases in this Court in which we have said that the States have broad leeway in shaping the insanity defense. See *Leland*, 343 U. S. 790; *Clark*, 548 U. S. 735. In *Leland*, we rejected the defendant's argument that the Constitution required the adoption of the "'irresistible impulse'" test. 343 U. S., at 800–801. Similarly, in *Clark*, we upheld Arizona's effort to eliminate the first part of the *M'Naghten* rule, applicable to defendants whose mental illness deprived them of the ability to know the "'nature and quality of the act,'" 548 U. S., at 747–748. If Arizona can eliminate the first prong of *M'Naghten*, Kansas asks, why can Kansas not eliminate the second part?

The answer to this question lies in the fact that Arizona, while amending the insanity provisions of its criminal code, did not in practice eliminate the traditional insanity defense in any significant part. See 548 U. S., at 752, n. 20 (reserving the question whether "the Constitution mandates an insanity defense"). As we pointed out, "cognitive incapacity is itself enough to demonstrate moral incapacity." *Id.*, at 753. Evidence that the defendant did not know what he was doing would also tend to establish that he did not know that

it was wrong. *Id.*, at 753–754. And Prosecution One (he thought the victim was a dog) would still fail. The ability of the States to refuse to adopt other insanity tests, such as the "irresistible impulse" test or the "product of mental illness" test are also beside the point. See *Leland*, 343 U. S., at 800–801. Those tests both *expand* upon *M'Naghten*'s principles. Their elimination would cut the defense back to what it traditionally has been, not, as here, eliminate its very essence.

Second, the United States as *amicus curiae* suggests that the insanity defense is simply too difficult for juries to administer. Brief for United States as *Amicus Curiae* 12–13. Without doubt, assessing the defendant's claim of insanity is difficult. That is one reason I believe that States must remain free to refine and redefine their insanity rules within broad bounds. But juries have been making that determination for centuries and continue to do so in 45 States. And I do not see how an administrative difficulty can justify abolishing the heart of the defense.

Third, Kansas argues that it has not abolished the insanity defense or any significant part of it. It has simply moved the stage at which a defendant can present the full range of mental-capacity evidence to sentencing. See Brief for Respondent 8; *ante*, at 277. But our tradition demands that an insane defendant should not be found guilty in the first place. Moreover, the relief that Kansas offers, in the form of sentencing discretion and the possibility of commitment in lieu of incarceration, is a matter of judicial discretion, not of right. See *State* v. *Maestas*, 298 Kan. 765, 316 P. 3d 724 (2014). The insane defendant is, under Kansas law, exposed to harsh criminal sanctions up to and including death. And Kansas' sentencing provisions do nothing to alleviate the stigma and the collateral consequences of a criminal conviction.

Finally, Kansas argues that the insane, provided they are capable of intentional action, are culpable and should be held liable for their antisocial conduct. Brief for Respondent 40. To say this, however, is simply to restate the conclusion for

which Kansas argues in this case. It is a conclusion that in my view runs contrary to a legal tradition that embodies a fundamental precept of our criminal law and that stretches back, at least, to the origins of our Nation.

For these reasons, with respect, I dissent.

## APPENDIX

### *M'Naghten*

| State | Text |
|---|---|
| Alabama | "It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts." Ala. Code §13A–3–1(a) (2015). |
| California | "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." Cal. Penal Code Ann. §25(b) (West 2014). |
| Colorado | "(1) The applicable test of insanity shall be:<br>"(a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for, when the act is induced by any of these causes, the person is accountable to the law; or<br>"(b) A person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes, the person is accountable to the law." Colo. Rev. Stat. §16–8–101.5(1) (2019). |
| Florida | "(1) AFFIRMATIVE DEFENSE.—All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:<br>"(a) The defendant had a mental infirmity, disease, or defect; and<br>"(b) Because of this condition, the defendant:<br>"1. Did not know what he or she was doing or its consequences; or<br>"2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong. |

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| State | Text |
|---|---|
| | "Mental infirmity, disease, or defect does not constitute a defense of insanity except as provided in this subsection." Fla. Stat. § 775.027 (2018). |
| Iowa | "A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act." Iowa Code § 701.4 (2016). |
| Minnesota | "No person having a mental illness or cognitive impairment so as to be incapable of understanding the proceedings or making a defense shall be tried, sentenced, or punished for any crime; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong." Minn. Stat. § 611.026 (2019). |
| Mississippi | "In determining sanity in criminal cases Mississippi utilizes the common law *M'Naghten* test. Under the *M'Naghten* test, the accused must be laboring under such defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing or (2) if he did know it, that he did not know that what he was doing was wrong." *Parker* v. *State*, 273 So. 3d 695, 705–706 (Miss. 2019) (internal quotation marks and footnote omitted). |
| Missouri | "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he was incapable of knowing and appreciating the nature, quality or wrongfulness of his or her conduct." Mo. Rev. Stat. § 562.086(1) (2016). |
| Nebraska | "Under our current common-law definition, the two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong." *State* v. *Hotz*, 281 Neb. 260, 270, 795 N. W. 2d 645, 653 (2011). |
| Nevada | "To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law." *Finger* v. *State*, 117 Nev. 548, 576, 27 P. 3d 66, 84–85 (2001). |
| New Jersey | "A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." N. J. Stat. Ann. § 2C:4–1 (West 2015). |
| New York | "In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such |

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| State | Text |
|---|---|
| | lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:<br>"1. The nature and consequences of such conduct; or<br>"2. That such conduct was wrong." N. Y. Penal Law Ann. § 40.15 (West 2009). |
| North Carolina | "[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." *State* v. *Thompson*, 328 N. C. 477, 485–486, 402 S. E. 2d 386, 390 (1991). |
| Oklahoma | "Oklahoma uses the *M'Naghten* test to determine the issue of sanity at the time of the crime. This Court has held that the *M'Naghten* insanity test, as applied in Oklahoma, has two prongs. Under the first prong, the defendant is considered insane if he is suffering from a mental disability such that he does not know his acts are wrong and he is unable to distinguish right from wrong with respect to his acts. Under the second prong, the defendant is considered insane if suffering from a disability of reason or disease of the mind such that he does not understand the nature or consequences of his acts or omissions. The defendant need only satisfy one of these prongs in order to be found not guilty by reason of insanity." *Cheney* v. *State*, 909 P. 2d 74, 90 (Okla. Crim. App. 1995) (footnotes omitted). |
| Pennsylvania | "Common law *M'Naghten*'s Rule preserved.—Nothing in this section shall be deemed to repeal or otherwise abrogate the common law defense of insanity (M'Naghten's Rule) in effect in this Commonwealth on the effective date of this section." 18 Pa. Cons. Stat. § 314(d) (2015). |
| Tennessee | "It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of the defendant's acts." Tenn. Code Ann. § 39–11–501(a) (2018). |
| Washington | "To establish the defense of insanity, it must be shown that:<br>"(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:<br>"(a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or<br>"(b) He or she was unable to tell right from wrong with reference to the particular act charged." Wash. Rev. Code § 9A.12.010 (2015). |
| Federal | "Affirmative Defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U. S. C. § 17. |

Appendix to opinion of BREYER, J.

## *M'Naghten* Plus Volitional Incapacity

| State | Text |
|---|---|
| Georgia | "A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence." Ga. Code Ann. § 16–3–2 (2019).<br>"A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime." § 16–3–3. |
| New Mexico | "In order to support a verdict of insanity under the M'Naghten test, the jury must be satisfied that the defendant (1) did not know the nature and quality of the act or (2) did not know that it was wrong. This rule prevailed in New Mexico until 1954 when this court in *State* v. *White*, 56 N. M. 324, 270 P. 2d 727 (1954) made a careful analysis of the authorities and made a limited extension of the M'Naghten rule, adding a third ingredient. The court held that if the accused, (3) as a result of disease of the mind 'was incapable of preventing himself from committing' the crime, he could be adjudged insane and thereby relieved of legal responsibility for what would otherwise be a criminal act." *State* v. *Hartley*, 90 N. M. 488, 490, 565 P. 2d 658, 660 (1977). |
| Virginia | "As applied in Virginia, the defense of insanity provides that a defendant may prove that at the time of the commission of the act, he was suffering from a mental disease or defect such that he did not know the nature and quality of the act he was doing, or, if he did know it, he did not know what he was doing was wrong. . . . In addition, we have approved in appropriate cases the granting of an instruction defining an 'irresistible impulse' as a form of legal insanity. The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act." *Orndorff* v. *Commonwealth*, 279 Va. 597, 601, n. 5, 691 S. E. 2d 177, 179, n. 5 (2010) (internal quotation marks and citation omitted). |

## Moral Incapacity

| State | Text |
|---|---|
| Arizona | "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Ariz. Rev. Stat. Ann. § 13–502(A) (2010). |
| Delaware | "In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or serious mental disorder, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct." Del. Code Ann., Tit. 11, § 401(a) (2015). |

Appendix to opinion of BREYER, J.

| State | Text |
|---|---|
| Illinois | "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." Ill. Comp. Stat., ch. 720, § 5/6–2(a) (West 2017). |
| Indiana | "A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35–41–3–6(a) (2019). |
| Louisiana | "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." La. Rev. Stat. Ann. § 14:14 (West 2016). |
| Maine | "A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct." Me. Rev. Stat. Ann., Tit. 17, § 39(1) (2006). |
| Ohio | "A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." Ohio Rev. Code Ann. § 2901.01(14) (Lexis 2014). |
| South Carolina | "It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S. C. Code Ann. § 17–24–10(A) (2014). |
| South Dakota | "'Insanity,' the condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act, the person was incapable of knowing its wrongfulness, but not including an abnormality manifested only by repeated unlawful or antisocial behavior." S. D. Codified Laws § 22–1–2(20) (2017).<br>"Insanity is an affirmative defense to a prosecution for any criminal offense." § 22–5–10. |
| Texas | "It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." Tex. Penal Code Ann. § 8.01(a) (West 2011). |

## Model Penal Code

| State | Text |
|---|---|
| Arkansas | "'Lack of criminal responsibility' means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either:<br>"(A) Appreciate the criminality of his or her conduct; or |

Appendix to opinion of BREYER, J.

| State | Text |
|---|---|
| | "(B) Conform his or her conduct to the requirements of the law." Ark. Code Ann. §5–2–301(6) (Supp. 2019). |
| Connecticut | "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." Conn. Gen. Stat. §53a–13(a) (2017). |
| Hawaii | "A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law." Haw. Rev. Stat. §704–400(1) (2014). |
| Kentucky | "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or intellectual disability, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ky. Rev. Stat. Ann. §504.020(1) (West 2016). |
| Maryland | "A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to:<br>"(1) appreciate the criminality of that conduct; or<br>"(2) conform that conduct to the requirements of law." Md. Crim. Proc. Code Ann. §3–109(a) (2018). |
| Massachusetts | "1. *Criminal responsibility.* Where a defendant asserts a defense of lack of criminal responsibility and there is evidence at trial that, viewed in the light most favorable to the defendant, would permit a reasonable finder of fact to have a reasonable doubt whether the defendant was criminally responsible at the time of the offense, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant was criminally responsible. In this process, we require the Commonwealth to prove negatives beyond a reasonable doubt: that the defendant did not have a mental disease or defect at the time of the crime and, if that is not disproved beyond a reasonable doubt, that no mental disease or defect caused the defendant to lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Commonwealth* v. *Lawson*, 475 Mass. 806, 811, 62 N. E. 3d 22, 28 (2016) (internal quotation marks and citation omitted). |
| Michigan | "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." Mich. Comp. Laws Ann. §768.21a(1) (West 2000). |
| Oregon | "A person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, |

Appendix to opinion of BREYER, J.

| State | Text |
|---|---|
| | the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." Ore. Rev. Stat. § 161.295(1) (2019). |
| Rhode Island | "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness [of] his conduct or to conform his conduct to the requirements of the law were so substantially impaired that he cannot justly be held responsible." *State* v. *Carpio*, 43 A. 3d 1, 12, n. 10 (R. I. 2012) (internal quotation marks omitted). |
| Vermont | "The test when used as a defense in criminal cases shall be as follows:<br>"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks adequate capacity either to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law." Vt. Stat. Ann., Tit. 13, § 4801(a) (2018). |
| West Virginia | "When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law." *State* v. *Fleming*, 237 W. Va. 44, 52–53, 784 S. E. 2d 743, 751–752 (2016). |
| Wisconsin | "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. Stat. § 971.15(1) (2016). |
| Wyoming | "A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Wyo. Stat. Ann. § 7–11–304(a) (2019). |
| District of Columbia | "A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Bethea* v. *United States*, 365 A. 2d 64, 79, and n. 30 (D. C. 1976). |

## Unique Formulation

| State | Text |
|---|---|
| New Hampshire | "A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions." *State* v. *Fichera*, 153 N. H. 588, 593, 903 A. 2d 1030, 1034 (2006). |
| North Dakota | "An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs: |

Appendix to opinion of BREYER, J.

| State | Text |
|---|---|
| | "a. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and<br>"b. It is an essential element of the crime charged that the individual act willfully." N. D. Cent. Code Ann. § 12.1–04.1–01(1) (2012). |

Syllabus

# COMCAST CORP. *v.* NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA ET AL.

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

No. 18–1171. Argued November 13, 2019—Decided March 23, 2020

Entertainment Studios Network (ESN), an African-American-owned television-network operator, sought to have cable television conglomerate Comcast Corporation carry its channels. Comcast refused, citing lack of programming demand, bandwidth constraints, and a preference for programming not offered by ESN. ESN and the National Association of African American-Owned Media (collectively, ESN) sued, alleging that Comcast's behavior violated 42 U. S. C. § 1981, which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." The District Court dismissed the complaint for failing plausibly to show that, but for racial animus, Comcast would have contracted with ESN. The Ninth Circuit reversed, holding that ESN needed only to plead facts plausibly showing that race played "some role" in the defendant's decisionmaking process and that, under this standard, ESN had pleaded a viable claim.

*Held*: A § 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit. Pp. 331–341.

(a) To prevail, a tort plaintiff typically must prove but-for causation. See *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 347. Normally, too, the essential elements of a claim remain constant throughout the lawsuit. See, *e. g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561. ESN suggests that § 1981 creates an exception to one or both of these general principles, either because a § 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision or because, even when but-for causation applies at trial, a plausible "motivating factor" showing is all that is necessary to overcome a motion to dismiss at the pleading stage. Pp. 331–341.

(1) Several clues, taken collectively, make clear that § 1981 follows the usual rules. The statute's text suggests but-for causation: An ordinary English speaker would not say that a plaintiff did not enjoy the "same right" to make contracts "as is enjoyed by white citizens" if race was not a but-for cause affecting the plaintiff's ability to contract. Nor

does the text suggest that the test should be different in the face of a motion to dismiss. The larger structure and history of the Civil Rights Act of 1866 provide further clues. When enacted, § 1981 did not provide a private enforcement mechanism for violations. That right was judicially created, see *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459, but even in that era, the Court usually insisted that the legal elements of implied causes of action be at least as demanding as those found in analogous statutory causes of action. That rule supplies useful guidance here, where a neighboring section of the 1866 Act uses the terms "on account of" and "by reason of," § 2, 14 Stat. 27—phrases often held to indicate but-for causation—and gives no hint that a different rule might apply at different times in the life of a lawsuit. Another provision provides that in cases not provided for by the Act, the common law shall govern, § 3, *ibid.*, which in 1866, usually treated a showing of but-for causation as a prerequisite to a tort suit. This Court's precedents confirm what the statute's language and history indicate. See, *e. g.*, *Johnson*, 421 U. S., at 459–460; *Buchanan* v. *Warley*, 245 U. S. 60, 78–79. Pp. 333–336.

(2) ESN urges applying the "motivating factor" causation test in Title VII of the Civil Rights Act of 1964 to § 1981 cases. But this Court has already twice rejected such efforts in other contexts, see, *e. g.*, *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, and there is no reason to think it would fit any better here. Moreover, when that test was added to Title VII in the Civil Rights Act of 1991, Congress also amended § 1981 without mentioning "motivating factors." Even if ESN is correct that those amendments clarified that § 1981 addresses not just contractual *outcomes* but the whole contracting *process*, its claim that a process-oriented right necessarily pairs with a motivating factor causal standard is mistaken. The burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, also supplies no support for the innovations ESN seeks. Pp. 336–341.

(b) The court of appeals should determine in the first instance how the operative amended complaint in this case fares under the proper standard. P. 341.

743 Fed. Appx. 106, vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, ALITO, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined, and in which GINSBURG, J., joined except for the footnote. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 341.

*Miguel A. Estrada* argued the cause for petitioner. With him on the briefs were *Thomas G. Hungar*, *Jesse A. Cripps*, and *Bradley J. Hamburger*.

*Morgan L. Ratner* argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Marleigh D. Dover*, and *Stephanie R. Marcus*.

*Erwin Chemerinsky* argued the cause for respondents. With him on the brief were *Louis R. Miller*, *J. Mira Hashmall*, and *David W. Schecter*.*

JUSTICE GORSUCH delivered the opinion of the Court.

Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred "but for" the defendant's unlawful conduct. The plaintiffs before us suggest that 42 U. S. C. § 1981 departs from this traditional ar-

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*Briefs of *amici curiae* urging reversal were filed for the Center for Workplace Compliance by *Rae T. Vann*; for the Chamber of Commerce of the United States of America et al. by *Gregory G. Garre*, *Benjamin W. Snyder*, *Daryl Joseffer*, *Karen R. Harned*, *Elizabeth Milito*, and *Francisco Negrón, Jr.*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for Employment Law Professors by *Sandra F. Sperino*, *Sachin S. Pandya*, and *Deborah A. Widiss*, all *pro se*; for the Issues4Life Foundation by *Catherine W. Short*; for Law and History Professors by *Eugene R. Fidell*; for the Lawyer's Committee for Civil Rights Under Law et al. by *Michael L. Foreman*, *Kristen Clarke*, *Jon Greenbaum*, *Dariely Rodriguez*, and *Phylicia H. Hill*; for Members of Congress by *Elizabeth B. Wydra* and *Brianne J. Gorod*; for NAACP Legal Defense & Educational Fund, Inc., et al. by *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, *Jin Hee Lee*, *Kristen A. Johnson*, and *J. Zachery Morris*; and for W. Burlette Carter by *Ms. Carter, pro se*.

*Paul Hoffman* filed a brief for Tort Scholars as *amici curiae*.

rangement. But looking to this particular statute's text and history, we see no evidence of an exception.

## I

This case began after negotiations between two media companies failed. African-American entrepreneur Byron Allen owns Entertainment Studios Network (ESN), the operator of seven television networks—Justice Central.TV, Comedy.TV, ES.TV, Pets.TV, Recipe.TV, MyDestination.TV, and Cars.TV. For years, ESN sought to have Comcast, one of the Nation's largest cable television conglomerates, carry its channels. But Comcast refused, citing lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer.

With bargaining at an impasse, ESN sued. Seeking billions in damages, the company alleged that Comcast systematically disfavored "100% African American-owned media companies." ESN didn't dispute that, during negotiations, Comcast had offered legitimate business reasons for refusing to carry its channels. But, ESN contended, these reasons were merely pretextual. To help obscure its true discriminatory intentions and win favor with the Federal Communications Commission, ESN asserted, Comcast paid civil rights groups to advocate publicly on its behalf. As relevant here, ESN alleged that Comcast's behavior violated 42 U. S. C. § 1981(a), which guarantees, among other things, "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

Much motions practice followed. Comcast sought to dismiss ESN's complaint, and eventually the district court agreed, holding that ESN's pleading failed to state a claim as a matter of law. The district court twice allowed ESN a chance to remedy its complaint's deficiencies by identifying additional facts to support its case. But each time, the court

concluded, ESN's efforts fell short of plausibly showing that, but for racial animus, Comcast would have contracted with ESN. After three rounds of pleadings, motions, and dismissals, the district court decided that further amendments would prove futile and entered a final judgment for Comcast.

The Ninth Circuit reversed. As that court saw it, the district court used the wrong causation standard when assessing ESN's pleadings. A § 1981 plaintiff doesn't have to point to facts plausibly showing that racial animus was a "but for" cause of the defendant's conduct. Instead, the Ninth Circuit held, a plaintiff must only plead facts plausibly showing that race played "some role" in the defendant's decisionmaking process. 743 Fed. Appx. 106, 107 (2018); see also *National Assn. of African American-Owned Media* v. *Charter Communications, Inc.*, 915 F. 3d 617, 626 (CA9 2019) (describing the test as whether "discriminatory intent play[ed] *any* role"). And under this more forgiving causation standard, the court continued, ESN had pleaded a viable claim.

Other circuits dispute the Ninth Circuit's understanding of § 1981. Like the district court in this case, for example, the Seventh Circuit has held that "to be actionable, racial prejudice must be a but-for cause . . . of the refusal to transact." *Bachman* v. *St. Monica's Congregation*, 902 F. 2d 1259, 1262–1263 (1990). To resolve the disagreement among the circuits over § 1981's causation requirement, we agreed to hear this case. 587 U. S. 1051 (2019).

## II

It is "textbook tort law" that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 347 (2013) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). Under this standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred.

This ancient and simple "but for" common law causation test, we have held, supplies the "default" or "background" rule against which Congress is normally presumed to have legislated when creating its own new causes of action. 570 U. S., at 346–347 (citing *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978)). That includes when it comes to federal antidiscrimination laws like § 1981. See 570 U. S., at 346–347 (Title VII retaliation); *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176–177 (2009) (Age Discrimination in Employment Act of 1967).

Normally, too, the essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change. So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end. See, *e. g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346–347 (2005); *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678–679 (2009).

ESN doesn't seriously dispute these general principles. Instead, it suggests § 1981 creates an exception to one or both of them. At times, ESN seems to argue that a § 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision, not a but-for cause of its injury. At others, ESN appears to concede that a § 1981 plaintiff does have to prove but-for causation at trial, but contends the rules should be different at the pleading stage. According to this version of ESN's argument, a plaintiff should be able to overcome at least a motion to dismiss if it can allege facts plausibly showing that race was a "motivating factor" in the defendant's decision. ESN admits this arrangement would allow some claims to proceed past the pleading stage that are destined to fail later as a matter of law. Still, the company insists, that is what the statute demands.

A

We don't doubt that most rules bear their exceptions. But, taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule. Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant.

Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves. Section 1 of that statute included the language found codified today in § 1981(a), promising that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." 42 U. S. C. § 1981; Civil Rights Act of 1866, 14 Stat. 27.

While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the "same" legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person. Nor does anything in the statute signal that this test should change its stripes (only) in the face of a motion to dismiss.

The larger structure and history of the Civil Rights Act of 1866 provide further clues. Nothing in the Act specifically authorizes private lawsuits to enforce the right to contract.

Instead, this Court created a judicially implied private right of action, definitively doing so for the first time in 1975. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975); see also *Jett* v. *Dallas Independent School Dist.*, 491 U. S. 701, 720 (1989). That was during a period when the Court often "assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose." *Ziglar* v. *Abbasi*, 582 U. S. 120, 132 (2017) (internal quotation marks omitted). With the passage of time, of course, we have come to appreciate that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress" and "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001) (internal quotation marks omitted). Yet, even in the era when this Court routinely implied causes of action, it usually insisted on legal elements at least as demanding as those Congress specified for analogous causes of action actually found in the statutory text. See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 736 (1975).

That rule supplies useful guidance here. Though Congress did not adopt a private enforcement mechanism for violations of § 1981, it did establish criminal sanctions in a neighboring section. That provision permitted the prosecution of anyone who "depriv[es]" a person of "any right" protected by the substantive provisions of the Civil Rights Act of 1866 "on account of" that person's prior "condition of slavery" or "by reason of" that person's "color or race." § 2, 14 Stat. 27. To prove a violation, then, the government had to show that the defendant's challenged actions were taken "'on account of'" or "'by reason of'" race—terms we have often held indicate a but-for causation requirement. *Gross*, 557 U. S., at 176–177. Nor did anything in the statute hint that a different and more forgiving rule might apply at one particular

stage in the litigation. In light of the causation standard Congress specified for the cause of action it expressly endorsed, it would be more than a little incongruous for us to employ the laxer rules ESN proposes for this Court's judicially implied cause of action.

Other provisions of the 1866 statute offer further guidance. Not only do we generally presume that Congress legislates against the backdrop of the common law. *Nassar*, 570 U. S., at 347. The Civil Rights Act of 1866 made this background presumption explicit, providing that "in all cases where [the laws of the United States] are not adapted to the object [of carrying the statute into effect] the common law . . . shall . . . govern said courts in the trial and disposition of such cause." § 3, 14 Stat. 27. And, while there were exceptions, the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit. See, *e. g.*, *Hayes* v. *Michigan Central R. Co.*, 111 U. S. 228, 241 (1884); Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 108–109 (1911); White, The Emergence and Doctrinal Development of Tort Law, 1870–1930, 11 U. St. Thomas L. J. 463, 464–465 (2014); 1 F. Hilliard, Law of Torts 78–79 (1866); 1 T. Sedgwick, Measure of Damages 199 (9th ed. 1912). Nor did this prerequisite normally wait long to make its appearance; if anything, pleadings standards back then were generally even stricter than they are in federal practice today. See generally, *e. g.*, Lugar, Common Law Pleading Modified Versus the Federal Rules, 52 W. Va. L. Rev. 137 (1950).

This Court's precedents confirm all that the statute's language and history indicate. When it first inferred a private cause of action under § 1981, this Court described it as "afford[ing] a federal remedy against discrimination . . . *on the basis of* race," language (again) strongly suggestive of a but-for causation standard. *Johnson*, 421 U. S., at 459–460 (emphasis added). Later, in *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375 (1982), the Court explained that § 1981 was "designed to eradicate blatant dep-

rivations of civil rights," such as where "a private offeror refuse[d] to extend to [an African-American], . . . because he is [an African-American], the same opportunity to enter into contracts as he extends to white offerees." *Id.*, at 388 (emphasis deleted; internal quotation marks omitted). Once more, the Court spoke of § 1981 using language—because of—often associated with but-for causation. *Nassar*, 570 U. S., at 350. Nor did anything in these decisions even gesture toward the possibility that this rule of causation sometimes might be overlooked or modified in the early stages of a case.

This Court's treatment of a neighboring provision, § 1982, supplies a final telling piece of evidence. Because § 1982 was also first enacted as part of the Civil Rights Act of 1866 and uses nearly identical language as § 1981, the Court's "precedents have . . . construed §§ 1981 and 1982 similarly." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 447 (2008). Section 1982 guarantees all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." And this Court has repeatedly held that a claim arises under § 1982 when a citizen is not allowed "to acquire property . . . *because of* color." *Buchanan* v. *Warley*, 245 U. S. 60, 78–79 (1917) (emphasis added); see also *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 419 (1968); *Runyon* v. *McCrary*, 427 U. S. 160, 170–171 (1976). If a § 1982 plaintiff must show the defendant's challenged conduct was "because of" race, it is unclear how we might demand less from a § 1981 plaintiff. Certainly ESN offers no compelling reason to read two such similar statutes so differently.

B

What does ESN offer in reply? The company asks us to draw on, and then innovate with, the "motivating factor" causation test found in Title VII of the Civil Rights Act of 1964. But a critical examination of Title VII's history re-

veals more than a few reasons to be wary of any invitation to import its motivating factor test into § 1981.

This Court first adopted Title VII's motivating factor test in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). There, a plurality and two Justices concurring in the judgment held that a Title VII plaintiff doesn't have to prove but-for causation; instead, it's enough to show that discrimination was a motivating factor in the defendant's decision. *Id.*, at 249–250 (plurality opinion); see also *id.*, at 258–259 (White, J., concurring in judgment); *id.*, at 268–269 (O'Connor, J., concurring in judgment). Once a plaintiff meets this lesser standard, the plurality continued, the defendant may defeat liability by establishing that it would have made the same decision even if it had not taken the plaintiff's race (or other protected trait) into account. In essence, *Price Waterhouse* took the burden of proving but-for causation from the plaintiff and handed it to the defendant as an affirmative defense. *Id.*, at 246.

But this arrangement didn't last long. Congress soon displaced *Price Waterhouse* in favor of its own version of the motivating factor test. In the Civil Rights Act of 1991, Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief. § 107, 105 Stat. 1075. A defendant may still invoke lack of but-for causation as an affirmative defense, but only to stave off damages and reinstatement, not liability in general. 42 U. S. C. §§ 2000e–2(m), 2000e–5(g)(2)(B); see also *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 94–95 (2003).

While this is all well and good for understanding Title VII, it's hard to see what any of it might tell us about § 1981. Title VII was enacted in 1964; this Court recognized its motivating factor test in 1989; and Congress replaced that rule with its own version two years later. Meanwhile, § 1981 dates back to 1866 and has never said a word about motivat-

ing factors. So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard. Worse yet, ESN's fallback position—that we should borrow the motivating factor concept only at the pleadings stage—is foreign even to Title VII practice. To accept ESN's invitation to consult, tinker with, and then engraft a test from a modern statute onto an old one would thus require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one.

What's more, it's not as if Congress forgot about § 1981 when it adopted the Civil Rights Act of 1991. At the same time that it added the motivating factor test to Title VII, Congress *also* amended § 1981. See Civil Rights Act of 1991, § 101, 105 Stat. 1072 (adding new subsections (b) and (c) to § 1981). But nowhere in its amendments to § 1981 did Congress so much as whisper about motivating factors. And where, as here, Congress has simultaneously chosen to amend one statute in one way and a second statute in another way, we normally assume the differences in language imply differences in meaning. *Gross*, 557 U. S., at 174–175; see also *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

Still, ESN tries to salvage something from the 1991 law. It reminds us that one of the amendments to § 1981 defined the term "make and enforce contracts" to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U. S. C. § 1981(b). In all this, ESN asks us to home in on one word, "making." By using this particular word, ESN says, Congress clarified that § 1981(a) guarantees not only the right to equivalent contractual *outcomes* (a contract with the same final terms), but also the right to an equivalent contracting *process* (no extra hurdles on the road to securing that contract). And, ESN continues, if the statute addresses the whole contracting process, not just its outcome, a motivating factor causation test fits more logically than the traditional but-for test.

Comcast and the government disagree. As they see it, the Civil Rights Act of 1866 unambiguously protected only outcomes—the right to contract, sue, be a party, and give evidence. When Congress sought to define some of these terms in 1991, it merely repeated one word from the original 1866 Act (make) in a different form (making). No reasonable reader, Comcast and the government contend, would think that the addition of the present participle form of a verb already in the statute carries such a radically different meaning and so extends § 1981 liability in the new directions ESN suggests. And, we are told, the statute's original and continuing focus on contractual *outcomes* (not processes) is more consistent with the traditional but-for test of causation.

This debate, we think, misses the point. Of course, Congress could write an employment discrimination statute to protect only outcomes or to provide broader protection. But, for our purposes today, none of this matters. The difficulty with ESN's argument lies in its mistaken premise that a process-oriented right necessarily pairs with a motivating factor causal standard. The inverse argument—that an outcome-oriented right implies a but-for causation standard—is just as flawed. *Either* causal standard could conceivably apply regardless of the legal right § 1981 protects. We need not and do not take any position on whether § 1981 as amended protects only outcomes or protects processes too, a question not passed on below or raised in the petition for certiorari. Our point is simply that a § 1981 plaintiff first must show that he was deprived of the protected right and then establish causation—and that these two steps are analytically distinct.*

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*The concurrence proceeds to offer a view on the nature of the right, while correctly noting that the Court reserves the question for another day. We reserve the question because "we are a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), and do not normally strain to address issues that are less than fully briefed and that the district and appellate courts have had no opportunity to consider. Such restraint is particularly appropriate here, where addressing the issue is entirely unnecessary to our resolution of the case.

Unable to latch onto either *Price Waterhouse* or the Civil Rights Act of 1991, ESN is left to cast about for some other hook to support its arguments about § 1981's operation. In a final effort, it asks us to consider the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, 804 (1973). Like the motivating factor test, *McDonnell Douglas* is a product of Title VII practice. Under its terms, once a plaintiff establishes a prima facie case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 257–258 (1981). This burden shifting, ESN contends, is comparable to the regime it proposes for § 1981.

It is nothing of the kind. Whether or not *McDonnell Douglas* has some useful role to play in § 1981 cases, it does not mention the motivating factor test, let alone endorse its use only at the pleadings stage. Nor can this come as a surprise: This Court didn't introduce the motivating factor test into Title VII practice until years *after McDonnell Douglas*. For its part, *McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination. See 411 U. S., at 802–805; see also *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978); Malamud, The Last Minuet: Disparate Treatment After *Hicks*, 93 Mich. L. Rev. 2229, 2259 (1995). Because *McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards. So nothing in the opinion involves ESN's preferred standard. Under *McDonnell Douglas*'s terms, too, only the burden of production ever shifts to the defendant, never the burden of persuasion. See *Burdine*, 450 U. S., at 254–255; *Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715–716 (1983). So *McDonnell Douglas* can provide no basis for allowing a complaint to

survive a motion to dismiss when it fails to allege essential elements of a plaintiff's claim.

## III

All the traditional tools of statutory interpretation persuade us that § 1981 follows the usual rules, not any exception. To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right. We do not, however, pass on whether ESN's operative amended complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face' " under the but-for causation standard. *Iqbal*, 556 U. S., at 678–679. The Ninth Circuit has yet to consider that question because it assessed ESN's pleadings under a different and mistaken test. To allow that court the chance to determine the sufficiency of ESN's pleadings under the correct legal rule in the first instance, we vacate the judgment of the court of appeals and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

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

I join the Court's opinion requiring a plaintiff who sues under 42 U. S. C. § 1981 to plead and prove race was a but-for cause of her injury.* In support of that holding, Comcast

*I have previously explained that a strict but-for causation standard is ill suited to discrimination cases and inconsistent with tort principles. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 383–385 (2013) (dissenting opinion). I recognize, however, that our precedent now establishes this form of causation as a "default rul[e]" in the present context. *Id.*, at 347 (majority opinion). See *ante*, at 331–332. Respondent Entertainment Studios accepts that § 1981 does not displace that rule, arguing only that a plaintiff's burden is lower at the pleading stage than it would be at summary judgment or at trial. See Tr. of Oral Arg. 36–37.

advances a narrow view of § 1981's scope. Section 1981's guarantee of "the same right . . . to make . . . contracts," Comcast urges, covers only the final decision whether to enter a contract, not earlier stages of the contract-formation process.

The Court devotes a page and a half to this important issue but declines to resolve it, as it does not bear on the choice of causation standards before us. *Ante*, at 338–339. I write separately to resist Comcast's attempt to cabin a "sweeping" law designed to "break down *all* discrimination between black men and white men" regarding "basic civil rights." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 432–433 (1968) (internal quotation marks omitted; emphasis in original).

Under Comcast's view, § 1981 countenances racial discrimination so long as it occurs in advance of the final contract-formation decision. Thus, a lender would not violate § 1981 by requiring prospective borrowers to provide one reference letter if they are white and five if they are black. Nor would an employer violate § 1981 by reimbursing expenses for white interviewees but requiring black applicants to pay their own way. The employer could even "refus[e] to consider applications" from black applicants at all. Brief for United States as *Amicus Curiae* 21.

That view cannot be squared with the statute. An equal "right . . . to make . . . contracts," § 1981(a), is an empty promise without equal opportunities to present or receive offers and negotiate over terms. A plaintiff hindered from enjoying those opportunities may be unable effectively to form a contract, and a defendant able to impair those opportunities can avoid contracting without refusing a contract outright. It is implausible that a law "intended to . . . secure . . . practical freedom," *Jones*, 392 U. S., at 431 (quoting Cong. Globe, 39th Cong., 1st Sess., 474 (1866)), would condone discriminatory barriers to contract formation.

Far from confining § 1981's guarantee to discrete moments, the language of the statute covers the entirety of the contracting process. The statute defines "make and enforce contracts" to "includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b). That encompassing definition ensures that § 1981 "applies to all phases and incidents of the contractual relationship." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 302 (1994). See also H. R. Rep. No. 102–40, pt. 2, p. 37 (1991) ("The Committee intends this provision to bar all racial discrimination in contracts. This list is intended to be illustrative and not exhaustive."). In line with the rest of the definition, the word "making" is most sensibly read to capture the entire *process* by which the contract is formed. American Heritage Dictionary 1086 (3d ed. 1992) ("The process of coming into being"); 9 Oxford English Dictionary 250 (2d ed. 1989) ("the process of being made").

Comcast's freeze-frame approach to § 1981 invites the Court to repeat an error it has committed before. In 1989, the Court "rea[d] § 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to" certain narrow "enumerated rights." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 181. According to *Patterson*, the right to "make" a contract "extend[ed] only to the formation of a contract," and the right to "enforce" it encompassed only "access to legal process." *Id.*, at 176–178. The Court thus declined to apply § 1981 to "postformation conduct," concluding that an employee had no recourse to § 1981 for racial harassment occurring after the employment contract's formation. *Id.*, at 178–179.

Congress promptly repudiated that interpretation. In 1991, "with the design to supersede *Patterson*," Congress enacted the expansive definition of "make and enforce contracts" now contained in § 1981(b). *CBOCS West, Inc.* v.

*Humphries*, 553 U. S. 442, 450 (2008). Postformation racial harassment violates § 1981, the amendment clarifies, because the right to "make and enforce" a contract includes the manner in which the contract is carried out. So too the manner in which the contract is made.

The complaint before us contains allegations of racial harassment during contract formation. In their negotiations, Entertainment Studios alleges, Comcast required of Entertainment Studios a series of tasks that served no purpose and on which Entertainment Studios "waste[d] hundreds of thousands of dollars." App. to Pet. for Cert. 49a–50a. The Court holds today that Entertainment Studios must plead and prove that race was the but-for cause of its injury—in other words, that Comcast would have acted differently if Entertainment Studios were not African-American owned. But if race indeed accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process. The Court has reserved that issue for consideration on remand, enabling me to join its opinion.

Per Curiam

# DAVIS v. UNITED STATES

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

No. 19–5421. Decided March 23, 2020

After his July 2016 encounter with police, Charles Davis entered a guilty plea for being a felon in possession of a firearm, 18 U. S. C. §§ 922(g)(1), 924(a)(2), and for possessing drugs with the intent to distribute them, 21 U. S. C. §§ 841(a)(1), (b)(1)(C). A presentence report noted that Davis was also facing pending drug and gun charges in Texas courts stemming from a separate 2015 state arrest. The District Court sentenced Davis to four years and nine months in prison and ordered that the federal sentence run consecutively to any sentences that the state courts might impose for his 2015 state offenses. Davis did not object. On appeal, Davis argued for the first time that the District Court erred by ordering his federal sentence to run consecutively to any sentences for his 2015 state offenses because the underlying offenses were part of the "same course of conduct" such that the sentences should have run concurrently under applicable sentencing guidelines. The Fifth Circuit characterized Davis' argument as raising factual issues and, based on Fifth Circuit precedent, refused to entertain Davis' argument. Almost every other Court of Appeals conducts plain-error review of unpreserved arguments, including unpreserved factual arguments. Davis challenges the Fifth Circuit's outlier practice in this Court.

*Held*: No legal basis exists for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error. Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Neither Rule 52(b) nor this Court's cases immunize factual errors from plain-error review.

Certiorari granted; 769 Fed. Appx. 129, vacated and remanded.

PER CURIAM.

In July 2016, police officers in Dallas, Texas, received a tip about a suspicious car parked outside of a house in the Dallas area. The officers approached the car and encountered Charles Davis in the driver's seat. They ordered him out of the car after smelling marijuana. As Davis exited the

car, the officers spotted a black semiautomatic handgun in the door compartment. They then searched Davis and found methamphetamine pills.

Davis had previously been convicted of two state felonies. In this case, a federal grand jury in the Northern District of Texas indicted Davis for being a felon in possession of a firearm, 18 U. S. C. §§ 922(g)(1), 924(a)(2), and for possessing drugs with the intent to distribute them, 21 U. S. C. §§ 841(a)(1), (b)(1)(C). Davis pleaded guilty to both counts. The presentence report prepared by the probation office noted that Davis was also facing pending drug and gun charges in Texas courts stemming from a separate 2015 state arrest. The District Court sentenced Davis to four years and nine months in prison and ordered that his sentence run consecutively to any sentences that the state courts might impose for his 2015 state offenses. Davis did not object to the sentence or to its consecutive nature.

Davis appealed to the U. S. Court of Appeals for the Fifth Circuit. On appeal, he argued for the first time that the District Court erred by ordering his federal sentence to run consecutively to any sentence that the state courts might impose for his 2015 state offenses. Davis contended that his 2015 state offenses and his 2016 federal offenses were part of the "same course of conduct," meaning under the Sentencing Guidelines that the sentences should have run concurrently, not consecutively. See United States Sentencing Commission, Guidelines Manual §§ 1B1.3(a)(2), 5G1.3(c) (Nov. 2018).

In the Fifth Circuit, Davis acknowledged that he had failed to raise that argument in the District Court. When a criminal defendant fails to raise an argument in the district court, an appellate court ordinarily may review the issue only for plain error. See Fed. Rule Crim. Proc. 52(b).

But the Fifth Circuit refused to entertain Davis' argument at all. The Fifth Circuit did not employ plain-error review because the court characterized Davis' argument as raising factual issues, and under Fifth Circuit precedent, "[q]uestions of fact capable of resolution by the district court upon

proper objection at sentencing can never constitute plain error." 769 Fed. Appx. 129 (2019) (*per curiam*) (quoting *United States* v. *Lopez*, 923 F. 2d 47, 50 (1991) (*per curiam*)). By contrast, almost every other Court of Appeals conducts plain-error review of unpreserved arguments, including unpreserved factual arguments. See, *e. g.*, *United States* v. *González-Castillo*, 562 F. 3d 80, 83–84 (CA1 2009); *United States* v. *Romeo*, 385 Fed. Appx. 45, 49–50 (CA2 2010); *United States* v. *Griffiths*, 504 Fed. Appx. 122, 126–127 (CA3 2012); *United States* v. *Wells*, 163 F. 3d 889, 900 (CA4 1998); *United States* v. *Sargent*, 19 Fed. Appx. 268, 272 (CA6 2001) (*per curiam*); *United States* v. *Durham*, 645 F. 3d 883, 899–900 (CA7 2011); *United States* v. *Sahakian*, 446 Fed. Appx. 861, 863 (CA9 2011); *United States* v. *Thomas*, 518 Fed. Appx. 610, 612–613 (CA11 2013) (*per curiam*); *United States* v. *Saro*, 24 F. 3d 283, 291 (CADC 1994).

In this Court, Davis challenges the Fifth Circuit's outlier practice of refusing to review certain unpreserved factual arguments for plain error. We agree with Davis, and we vacate the judgment of the Fifth Circuit.

Rule 52(b) states in full: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The text of Rule 52(b) does not immunize factual errors from plain-error review. Our cases likewise do not purport to shield any category of errors from plain-error review. See generally *Rosales-Mireles* v. *United States*, 585 U. S. 129 (2018); *United States* v. *Olano*, 507 U. S. 725 (1993). Put simply, there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted, the judgment of the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion. We express no opinion on whether Davis has satisfied the plain-error standard.

*It is so ordered.*

Syllabus

# CITGO ASPHALT REFINING CO. ET AL. *v.* FRESCATI SHIPPING CO., LTD., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18–565. Argued November 5, 2019—Decided March 30, 2020

Petitioners (collectively CARCO) sub-chartered the oil tanker M/T *Athos I* from tanker operator Star Tankers, which had chartered the tanker from respondent Frescati Shipping Company. In the final stretch of the tanker's journey from Venezuela to New Jersey, an abandoned ship anchor punctured the tanker's hull, causing 264,000 gallons of heavy crude oil to spill into the Delaware River. The Oil Pollution Act of 1990, 33 U. S. C. § 2702(a), required Frescati, the vessel's owner, to cover the cleanup costs in the first instance. Pursuant to the statute, Frescati's liability was limited to $45 million, and the Oil Spill Liability Trust Fund, operated by the Federal Government (also a respondent here), reimbursed Frescati for an additional $88 million in cleanup costs.

Frescati and the United States then sued CARCO to recover their respective portions of the cleanup costs. Both alleged that CARCO was ultimately at fault for the oil spill because CARCO had breached a contractual "safe-berth clause" in the subcharter agreement ("charter party") between CARCO and Star Tankers. According to Frescati and the United States, that clause obligated CARCO to select a "safe" berth that would allow the vessel to come and go "always safely afloat," and that obligation amounted to a warranty regarding the safety of the selected berth. After concluding that Frescati was an implied third-party beneficiary of the safe-berth clause, the Third Circuit held that the clause embodied an express warranty of safety made without regard to the charterer's diligence in selecting the berth.

*Held*: The plain language of the parties' safe-berth clause establishes a warranty of safety. Pp. 355–365.

(a) The Court's analysis begins and ends with the text of the safe-berth clause. As CARCO acknowledges, the clause imposes on the charterer a duty to select a safe berth. And given the unqualified language of the clause, the charterer's duty is absolute: The charterer must designate a berth that is "safe" and that allows the vessel to come and go "always" safely afloat. That absolute duty amounts to a warranty of safety.

That the safe-berth clause does not expressly invoke the term "warranty" does not alter the charterer's duty under the safe-berth clause. It is well settled that statements of material fact in a charter party are

warranties, regardless of their label. See, *e. g.*, *Davison* v. *Von Lingen*, 113 U. S. 40, 49–50. Here, it is plain on the face of the contract that the safe-berth clause sets forth a statement of "material" fact regarding the condition of the berth selected by the charterer. The charterer's assurance of a safe berth is the entire root of the safe-berth clause, and crucially, it is not subject to qualifications or conditions.

CARCO counters that the safe-berth clause merely imposes a duty of due diligence in selecting a safe berth. But as a general rule, tort concepts like due diligence have no place in contract analysis. Under basic precepts of contract law, an obligor is strictly liable for a breach of contract, without regard to fault or diligence. While parties are free to contract for limitations on liability, the parties here contracted for no such thing: There is no language in the safe-berth clause even hinting at due diligence. That omission is particularly notable in context, as the parties expressly contracted for due-diligence limitations on liability elsewhere in the charter party.

CARCO's arguments about other clauses in the charter party do not counsel in favor of a different result. The charter party's "general exceptions clause," which limits the charterer's liability for losses due to "perils of the seas," does not apply where, as here, another clause expressly provides for liability stemming from the designation of an unsafe berth. Nor does a clause requiring Star Tankers to obtain oil-pollution insurance relieve CARCO of liability under the safe-berth clause. The pollution-insurance clause covers risks beyond those resulting from the selection of an unsafe berth.

CARCO's alternative interpretation of the safe-berth clause, as simply requiring the charterer to pay any expenses resulting from the vessel master's refusal to enter an unsafe berth, is inapposite. Assuming that the charterer is liable for expenses when the vessel master justifiably refuses to enter an unsafe berth, that does not abate the scope of the charterer's liability when a vessel in fact enters an unsafe berth.

The dissent argues that reading the safe-berth clause to bind the charterer to a warranty of safety would necessarily imply that the safe-berth clause creates contradictory warranties of safety, one on the charterer and one on the vessel master. Because that conflict cannot be, the dissent continues, the safe-berth clause must not bind the charterer to a warranty of safety. The dissent's conclusion does not follow because the alleged conflict does not exist. Under the safe-berth clause, the charterer has a duty to select a safe berth, while the vessel master has a duty to load and discharge at the chosen safe berth. There is no tension between those two duties. Pp. 355–362.

(b) CARCO's arguments that other authorities have understood safe-berth clauses differently lack foothold in the text of the safe-berth clause

and are otherwise unconvincing. For instance, CARCO relies on a leading admiralty treatise that urges that safe-berth clauses ought not be interpreted as establishing a warranty of safety because charterers are not always in the best position to know the dangers attendant to a given berth. But whatever that treatise sought to prevail upon courts to adopt as a prescriptive matter does not alter the plain meaning of the safe-berth clause here.

Also unavailing is CARCO's contention that *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, determined that safe-berth clauses do not embody a warranty of safety. CARCO relies on a passing statement in *Atkins* that did not bear on this Court's ultimate holding that the vessel master in that case had waived the protection of the safe-berth clause.

Finally, CARCO points out that the Fifth Circuit has held that a similarly unqualified safe-berth clause merely imposed a duty of due diligence. *Orduna S. A.* v. *Zen-Noh Grain Corp.*, 913 F. 2d 1149. But the Fifth Circuit did not purport to interpret the language of the safe-berth clause at issue in that case and instead relied principally on tort law and policy considerations. The Second Circuit's long line of decisions interpreting the language of unqualified safe-berth clauses as embodying an express warranty of safety is more consistent with traditional contract analysis. See, *e. g.*, *Paragon Oil Co.* v. *Republic Tankers, S. A.*, 310 F. 2d 169. Pp. 362–364.

886 F. 3d 291, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 365.

*Carter G. Phillips* argued the cause for petitioners. With him on the briefs were *Jacqueline G. Cooper*, *Jordan B. Cherrick*, *John G. Bissell*, *Derek A. Walker*, *J. Dwight LeBlanc, Jr.*, *Douglas L. Grundmeyer*, and *Richard Q. Whelan*.

*Erica L. Ross* argued the cause for the United States. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Charles W. Scarborough*, and *Anne M. Murphy*.

*Thomas C. Goldstein* argued the cause for respondents Frescati Shipping Co., Ltd., et al. With him on the brief were *Sarah E. Harrington*, *Erica Oleszczuk Evans*, *John J.*

*Levy*, *Alfred J. Kuffler*, *Eugene J. O'Connor*, *Timothy J. Bergère*, and *Jack A. Greenbaum*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 2004, the M/T *Athos I*, a 748-foot oil tanker, allided[1] with a nine-ton anchor abandoned on the bed of the Delaware River. The anchor punctured the tanker's hull, causing 264,000 gallons of heavy crude oil to spill into the river. As required by federal statute, respondents Frescati Shipping Company—the *Athos I*'s owner—and the United States covered the costs of cleanup. They then sought to reclaim those costs from petitioners CITGO Asphalt Refining Company and others (collectively CARCO), which had chartered the *Athos I* for the voyage that occasioned the oil spill. According to Frescati and the United States, CARCO had breached a contractual "safe-berth clause" obligating CARCO to select a "safe" berth that would allow the *Athos I* to come and go "always safely afloat."

The question before us is whether the safe-berth clause is a warranty of safety, imposing liability for an unsafe berth regardless of CARCO's diligence in selecting the berth. We hold that it is.

## I

### A

During the relevant period, the *Athos I* was the subject of a series of contracts involving three parties: Frescati, Star

*Briefs of *amici curiae* urging reversal were filed for the American Fuel & Petrochemical Manufacturers Association et al. by *Brendan Collins*, *Edward D. Greenberg*, and *Richard Moskowitz*; for the North American Export Grain Association by *Benjamin Beaton* and *Lauren S. Kuley*; and for Tricon Energy, Ltd., by *George R. Diaz-Arrastia*.

Briefs of *amici curiae* urging affirmance were filed for BIMCO et al. by *Lizabeth L. Burrell* and *Christopher R. Nolan*; for Manfred W. Arnold by *Chester Douglas Hooper*; and for Bernard Eder by *M. Hamilton Whitman, Jr.*, and *Christopher M. Hannan*.

[1] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." Black's Law Dictionary 94 (11th ed. 2019).

Tankers, and CARCO. Frescati owned the *Athos I*. Star Tankers, an operator of tanker vessels, contracted with Frescati to charter the *Athos I* for a period of time. CARCO then contracted with Star Tankers to subcharter the *Athos I* for the inauspicious voyage resulting in the oil spill.

Pertinent here is the subcharter agreement between Star Tankers and CARCO. In admiralty, such contracts to charter a vessel are termed "charter parties." Like many modern charter parties, the agreement between Star Tankers and CARCO was based on a standard industry form contract. It drew essentially verbatim from a widely used template known as the ASBATANKVOY form, named after the Association of Ship Brokers & Agents (USA) Inc. (ASBA) trade association that publishes it.

At the core of the parties' dispute is a clause in the charter party requiring the charterer, CARCO, to designate a safe berth at which the vessel may load and discharge cargo. This provision, a standard feature of many charter parties, is customarily known as a safe-berth clause. The safe-berth clause here provides, as relevant, that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer." Addendum to Brief for Petitioners 8a.[2] The charter party separately requires CARCO to direct the *Athos I* to a "safe por[t]" along the Atlantic seaboard of the United States. *Id.*, at 24a.

[2] The parties agree that the safe-berth clause also encompasses what is often referred to as a "safe-port clause." The safe-port clause here provides that "[t]he vessel . . . shall, with all convenient dispatch, proceed as ordered to Loading Port(s) named . . . , or so near thereunto as she may safely get (always afloat), . . . and being so loaded shall forthwith proceed . . . direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo." Addendum to Brief for Petitioners 4a. The parties do not dispute that the two clauses should be read in conjunction.

Pursuant to the charter party, CARCO designated as the berth of discharge its asphalt refinery in Paulsboro, New Jersey, on the shore of the Delaware River. In November 2004, the *Athos I* set out on a 1,900-mile journey from Puerto Miranda, Venezuela, to Paulsboro, New Jersey, carrying a load of heavy crude oil. The vessel was in the final 900-foot stretch of its journey when an abandoned ship anchor in the Delaware River pierced two holes in the vessel's hull. Much of the *Athos I*'s freight drained into the river.

B

After the Exxon-Valdez oil spill in 1989, Congress passed the Oil Pollution Act of 1990 (OPA), 104 Stat. 484, 33 U. S. C. § 2701 *et seq.*, to promote the prompt cleanup of oil spills. To that end, OPA deems certain entities responsible for the costs of oil-spill cleanups, regardless of fault. § 2702(a). It then limits the liability of such "responsible part[ies]" if they (among other things) timely assist with cleanup efforts. § 2704. Responsible parties that comply with the statutory conditions receive a reimbursement from the Oil Spill Liability Trust Fund (Fund), operated by the Federal Government, for any cleanup costs exceeding a statutory limit. § 2708; see also § 2704.

Although a statutorily responsible party must pay cleanup costs without regard to fault, it may pursue legal claims against any entity allegedly at fault for an oil spill. §§ 2710, 2751(e). So may the Fund: By reimbursing a responsible party, the Fund becomes subrogated to the responsible party's rights (up to the amount reimbursed to the responsible party) against any third party allegedly at fault for the incident. §§ 2712(f), 2715(a).

As owner of the *Athos I*, Frescati was deemed a "responsible party" for the oil spill under OPA. Frescati worked with the U. S. Coast Guard in cleanup efforts and covered the costs of the cleanup. As a result, Frescati's liability was statutorily limited to $45 million, and the Fund reimbursed

Frescati for an additional $88 million that Frescati paid in cleanup costs.

C

Following the cleanup, Frescati and the United States each sought recovery against CARCO: Frescati sought to recover the cleanup costs not reimbursed by the Fund, while the United States sought to recover the amount disbursed by the Fund. As relevant here, both Frescati and the United States claimed that CARCO had breached the safe-berth clause by failing to designate a safe berth, and thus was at fault for the spill.

After a complicated series of proceedings—including a 41-day trial, a subsequent 31-day evidentiary hearing, and two appeals—the Court of Appeals for the Third Circuit found for Frescati and the United States. The court first concluded that Frescati was an implied third-party beneficiary of the safe-berth clause in the charter party between CARCO and Star Tankers, thereby allowing the breach-of-contract claims by Frescati and the United States to proceed against CARCO. *In re Frescati Shipping Co.*, 718 F. 3d 184, 200 (2013). The court then held that the safe-berth clause embodied an express warranty of safety "made without regard to the amount of diligence taken by the charterer," and that CARCO was liable to Frescati and the United States for breaching that warranty. *Id.*, at 203; *In re Frescati Shipping Co.*, 886 F. 3d 291, 300, 315 (2018) (case below).

We granted certiorari, 587 U. S. 960 (2019), to resolve whether the safe-berth clause at issue here merely imposes a duty of diligence, as the Fifth Circuit has held in a similar case, or establishes a warranty of safety, as the Second Circuit has held in other analogous cases. Compare *Orduna S. A.* v. *Zen-Noh Grain Corp.*, 913 F. 2d 1149 (CA5 1990), with, *e. g.*, *Paragon Oil Co.* v. *Republic Tankers, S. A.*, 310 F. 2d 169 (CA2 1962). The former interpretation allows a charterer to avoid liability by exercising due diligence in selecting a berth; the latter imposes liability for an unsafe

berth without regard to the care taken by the charterer. Because we find it plain from the language of the safe-berth clause that CARCO warranted the safety of the berth it designated, we affirm the judgment of the Third Circuit.

## II

Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 31 (2004); see also 2 T. Schoenbaum, Admiralty & Maritime Law § 11:2, p. 7 (6th ed. 2018) ("[F]ederal maritime law includes general principles of contract law"). "'Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.'" *M&G Polymers USA, LLC* v. *Tackett*, 574 U. S. 427, 435 (2015) (quoting 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012) (Williston)). In such circumstances, the parties' intent "can be determined from the face of the agreement" and "the language that they used to memorialize [that] agreement." *Id.*, at 97–98, 112–113. But "[w]hen a written contract is ambiguous, its meaning is a question of fact, requiring a determination of the intent of [the] parties in entering the contract"; that may involve examining "relevant extrinsic evidence of the parties' intent and the meaning of the words that they used." *Id.*, § 30:7, at 116–119, 124 (footnote omitted).

### A

Our analysis starts and ends with the language of the safe-berth clause. That clause provides, as relevant, that the charterer "shall . . . designat[e] and procur[e]" a "safe place or wharf," "provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Addendum to Brief for Petitioners 8a. As even CARCO acknowledges, the clause plainly imposes on the charterer at least some "duty to select a 'safe' berth." Brief for Petitioners

21. Given the unqualified language of the safe-berth clause, it is similarly plain that this acknowledged duty is absolute. The clause requires the charterer to designate a "safe" berth: That means a berth "free from harm or risk." Webster's Collegiate Dictionary 1030 (10th ed. 1994); see also New Oxford American Dictionary 1500 (E. Jewell & F. Abate eds. 2001) ("safe" means "protected from or not exposed to danger or risk"). And the berth must allow the vessel to come and go "always" safely afloat: That means afloat "at all times" and "in any event." Webster's Collegiate Dictionary, at 35; see also New Oxford American Dictionary, at 47 ("always" means "at all times; on all occasions"). Selecting a berth that does not satisfy those conditions constitutes a breach. The safe-berth clause, in other words, binds the charterer to a warranty of safety.[3]

No matter that the safe-berth clause does not expressly invoke the term "warranty." It is well settled as a matter of maritime contracts that "[s]tatements of fact contained in a charter party agreement relating to some material matter are called warranties," regardless of the label ascribed in the charter party. 22 Williston § 58.11, at 40–41 (2017); see also *Davison* v. *Von Lingen*, 113 U. S. 40, 49–50 (1885) (a stipula-

[3] The central pillar of the dissent is that the safe-berth clause merely bestows upon the charterer "the *right* to 'designat[e]'" the place of discharge, and thus apparently creates no duty to select a safe berth (much less a warranty of safety). *Post*, at 366 (opinion of THOMAS, J.) (quoting Addendum to Brief for Petitioners 8a; emphasis added); see also *post*, at 367 ("the charterer has a right of selection"). That sidesteps the safe-berth clause's plain terms, which prescribe that the charterer "*shall* . . . designat[e] and procur[e]" a "safe place or wharf." Addendum to Brief for Petitioners 8a (emphasis added). As we have said before, "the word 'shall' usually connotes a requirement." *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 171 (2016); see also, *e. g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). The text thus forecloses the dissent's permissive view that the charterer merely has an elective "right" to select a berth of discharge but no duty to do so. And even CARCO disclaims that atextual position. See Brief for Petitioners 21.

tion going to "substantive" and "material" parts of a charter party forms "a warranty"); *Behn* v. *Burness*, 3 B. & S. 751, 122 Eng. Rep. 281 (K. B. 1863) ("With respect to statements in a [charter party] descriptive of . . . some material incident . . . , if the descriptive statement was intended to be a substantive part of the [charter party], it is to be regarded as a warranty"). What matters, then, is that the safe-berth clause contains a statement of material fact regarding the condition of the berth selected by the charterer.

Here, the safety of the selected berth is the entire root of the safe-berth clause: It is the very reason for the clause's inclusion in the charter party. And crucially, the charterer's assurance of safety is not subject to qualifications or conditions. Under any conception of materiality and any view of the parties' intent, the charterer's assurance surely counts as material. That leaves no doubt that the safe-berth clause establishes a warranty of safety, on equal footing with any other provision of the charter party that invokes express warranty language.[4]

CARCO resists this plain reading of the safe-berth clause, arguing instead that the clause contains an implicit limitation: The clause does not impose "strict liability," says CARCO, or "liability without regard to fault." Brief for

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[4] Because the materiality of the charterer's assurance of safety is plain on the face of the charter party, the specific materiality issue here raises no question of fact for a jury to resolve. That is not to say that the materiality of a statement in a charter party is always a question of law. Nor does the materiality analysis here bear on wholly different materiality inquiries. For not all questions of materiality are alike: Sometimes materiality is a question of law. See, *e. g.*, 30 Williston § 75:30, at 108 (whether an alteration of a contract is material). Other times, it involves factual determinations uniquely suited for a jury. See, *e. g.*, *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 450 (1976) (whether a company's misstatements to the public are material for securities-fraud purposes). The dissent's insistence that materiality is a question of fact "'in other contexts'"—such as securities fraud—thus is inapposite. *Post*, at 372 (quoting *United States* v. *Gaudin*, 515 U. S. 506, 512 (1995)).

Petitioners 23, 25. In effect, CARCO interprets the safe-berth clause as imposing a mere duty of due diligence in the selection of the berth. See Tr. of Oral Arg. 19–20 (arguing that "[CARCO] did [its] due diligence" in "selecting the port or the berth"); *id.*, at 28 (suggesting that the safe-berth clause is constrained "as a matter of due diligence in tort concepts"); Reply Brief 5, n. 3 (asserting that a charterer's liability under the safe-berth clause "should be addressed through . . . sources of la[w] such as tort law"). But as a general rule, due diligence and fault-based concepts of tort liability have no place in the contract analysis required here. Under elemental precepts of contract law, an obligor is "liable in damages for breach of contract even if he is without fault." Restatement (Second) of Contracts, p. 309 (1979) (Restatement (Second)). To put that default contract-law principle in tort-law terms, "Contract liability *is* strict liability." *Ibid.* (emphasis added); see also 23 Williston § 63:8, at 499 (2018) ("Liability for a breach of contract is, prima facie, strict liability"). What CARCO thus protests is the straightforward application of contract liability to a breach of contract.

Although contract law generally does not, by its own force, limit liability based on tort concepts of fault, parties are of course free to contract for such limitations. See Restatement (Second), at 309 (obligor who wishes to avoid strict liability for breach may "limi[t] his obligation by agreement"). Here, however, the safe-berth clause is clear that the parties contracted for no such thing. CARCO does not identify—nor can we discern—any language in the clause hinting at "due diligence" or related concepts of "fault." That omission is particularly notable in context: Where the parties intended to limit obligations based on due diligence elsewhere in the charter party, they did so expressly. See Addendum to Brief for Petitioners 4a (providing that the vessel "b[e] seaworthy, and hav[e] all pipes, pumps and heater coils in good working order, . . . so far as the foregoing conditions

can be attained by the exercise of due diligence"); *id.*, at 13a (relieving vessel owner of responsibility for certain consequences of any "unseaworthiness existing . . . at the inception of the voyage [that] was discoverable by the exercise of due diligence"); *id.*, at 41a (requiring vessel owner to "exercise due diligence to ensure that [a drug and alcohol] policy [onboard the vessel] is complied with" (capitalization omitted)).[5] That the parties did not do so in the safe-berth clause specifically is further proof that they did not intend for such a liability limitation to inhere impliedly.[6]

Unable to identify any liability-limiting language in the safe-berth clause, CARCO points to a separate "general exceptions clause" in the charter party that exempts a charterer from liability for losses due to "perils of the seas." *Id.*, at 14a. According to CARCO, the "general exceptions clause" demonstrates that the parties did not intend the safe-berth clause to impose liability for a "peri[l] of the seas" like an abandoned anchor. That argument founders on a critical component of the "general exceptions clause": By its terms, it does not apply when liability is "otherwise . . . expressly provided" in the charter party. *Ibid.* The safe-berth clause, as explained above, expressly provides for liability stemming from the designation of an unsafe berth. The

[5] It also bears mention that many other industry form charter parties—not selected by CARCO and Star Tankers—explicitly limit the liability that may flow from a charterer's selection of a berth. See, *e. g.*, 2E J. Force & L. Lambert, Benedict on Admiralty, ch. XXVII, §27–567, ¶10 (rev. 7th ed. 2019) (INTERTANKVOY form specifies that "[c]harterers shall exercise due diligence to ascertain that any places to which they order the vessel are safe for the vessel and that she will lie there always afloat").

[6] After all, language that limits liability is necessary to overcome the default rule of strict liability for contractual breach. *Supra*, at 357–359. That stands in contrast to the established principle that charter parties can, at least in the circumstances here, create warranties without invoking express warranty language. *Supra*, at 356–357. The dissent overlooks this distinction when it claims that the absence of express warranty language in the safe-berth clause and the presence of it elsewhere in the charter party imply that no warranty may be found here. *Post*, at 368.

catchall "general exceptions clause" neither supersedes nor overlays it.[7]

Likewise immaterial is another clause of the charter party that requires Star Tankers to obtain oil-pollution insurance. According to CARCO, that clause evidences the parties' intent to relieve CARCO of oil-spill liability under the safe-berth clause. But the oil-pollution insurance that Star Tankers must obtain covers risks beyond simply those attendant to the selection of an unsafe berth. And CARCO's reading of the insurance clause (as relieving CARCO of oil-spill liability) does not square with its reading of the safe-berth clause (as imposing such liability when CARCO fails to exercise due diligence).

Finally, CARCO offers an alternative interpretation of the safe-berth clause that focuses on the vessel master's right instead of the charterer's duty. This alternative interpretation proceeds from the subclause specifying that the selected berth be one that the vessel may "proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage [*i. e.*, transfer of goods between vessels] being at the expense, risk and peril of the Charterer." *Id.*, at 8a. On CARCO's reading, that subclause means that the vessel master has a right to refuse entry into a berth that the master perceives to be unsafe, and the charterer must pay any expenses resulting from the refusal. We have, to be sure, recognized that similarly worded safe-berth clauses may implicitly denote a vessel master's right to refuse entry and the charterer's result-

[7] At oral argument, CARCO urged that the abandoned anchor was not only "a peril of the sea" but also "an abnormal occurrence." Tr. of Oral Arg. 28–29. CARCO's "abnormal occurrence" argument appears to rest on a recent decision by the Supreme Court of the United Kingdom interpreting a safe-berth clause not to impose liability if an "abnormal occurrence" rendered the selected berth unsafe. See *Gard Marine & Energy Ltd.* v. *China Nat. Chartering Co.*, [2017] UKSC 35 (*The Ocean Victory*). In its opening brief to this Court, however, CARCO did not cite *The Ocean Victory* or argue that the abandoned anchor here constituted an "abnormal occurrence."

ant obligation to bear the costs of that refusal. See *Mencke* v. *Cargo of Java Sugar*, 187 U. S. 248 (1902); *The Gazelle and Cargo*, 128 U. S. 474 (1888). But that a charterer may be liable for expenses when a vessel master justifiably refuses to enter an unsafe berth in no way abates the scope of the charterer's liability when a vessel in fact enters an unsafe berth. And a tacit recognition of a vessel master's right of refusal does not overwrite the safe-berth clause's express prescription of a warranty of safety.

The dissent, too, offers an alternative interpretation. It claims that if the safe-berth clause binds the charterer to a warranty of safety, the clause must bind the vessel master to effectively the same warranty—due to the clause's statement that "'[t]he vessel shall load and discharge at [a] safe place or wharf.'" *Post*, at 370 (quoting Addendum to Brief for Petitioners 8a). Because that would "creat[e] contradictory warranties of safety," the dissent continues, the safe-berth clause must not bind the charterer to a warranty of safety (or, apparently, impose an obligation on the charterer at all). *Post*, at 371. This conclusion does not follow because the conflict diagnosed by the dissent does not exist.

The safe-berth clause says that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer." Addendum to Brief for Petitioners 8a. Plainly, that means that the "safe place or wharf . . . shall be designated and procured by the Charterer." *Ibid.* The vessel master's duty is only to "load and discharge" at the chosen safe berth. *Ibid.* (Not, as the dissent urges, at any safe berth the vessel master so desires regardless of the charterer's contractually required selection. *Post*, at 370, n. 4.) On its face, the vessel master's duty creates no tension with the charterer's duty. And it strains common sense to insist (as the dissent does) that the vessel master implicitly has a separate, dueling obligation regarding the safety of the berth, when the clause explicitly assigns that responsibility to the charterer. *Post*, at 370–371. Perhaps

the dissent says it best: We must "rejec[t this] interpretation that . . . 'se[ts] up . . . two clauses in conflict with one another.'" *Post*, at 370 (quoting *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 64 (1995)).

We instead take the safe-berth clause at face value. It requires the charterer to select a safe berth, and that requirement here amounts to a warranty of safety.

B

CARCO's remaining arguments point to authorities that have purportedly construed safe-berth clauses to contain limitations on liability. These arguments find no foothold in the language of the charter party at issue here. And none is otherwise convincing.

CARCO asserts, for instance, that a leading admiralty treatise has urged that safe-berth clauses ought not be interpreted as establishing a warranty. See G. Gilmore & C. Black, Law of Admiralty §4–4, p. 205 (2d ed. 1975) (Gilmore & Black). Gilmore and Black's position, however, stemmed from their belief that vessel masters or vessel owners are generally better positioned than charterers to bear the liability of an unsafe berth. See *ibid.* (reasoning that charterers "may know nothing of the safety of ports and berths, and [are] much less certain to be insured against" liability for losses stemming from an unsafe berth).[8] Gil-

[8] The dissent's claim that Gilmore and Black looked to "'the very words of the usual clauses,'" *post*, at 367, n. 1 (quoting Gilmore & Black §4–4, at 204), relies on a discussion not of the charterer's obligation under the safe-berth clause but of the vessel master's lack of such obligation, *id.*, at 204–205. At most, Gilmore and Black "suggested" that interpreting safe-berth clauses to relieve vessel masters of any obligation to enter an unsafe berth "might easily be read to contradict" any "affirmative liability" on the part of the charterer "in case of mishap." See *id.*, at 205. But that supposition is at odds with the language of the safe-berth clause here, which (as even CARCO acknowledges) plainly contemplates at least some liability for the charterer's designation of an unsafe berth. *Supra*, at 355–357, and n. 3. And as explained, a vessel master's ability to refuse entry into an unsafe berth does not logically or

more and Black also acknowledged that, as of 1975, many courts had not interpreted safe-berth clauses in the manner that they proposed. See *id.*, at 204, and n. 34a, 206, and n. 36. Whatever Gilmore and Black sought to prevail upon courts to adopt as a prescriptive matter does not alter the plain meaning of the safe-berth clause here.

CARCO next contends that in *Atkins* v. *Disintegrating Co.*, 18 Wall. 272 (1874), this Court acknowledged that safe-berth clauses do not embody a warranty of safety. That greatly overreads *Atkins*. In that case, this Court affirmed a District Court's ruling that, although the berth selected by the charterer was not safe, the vessel master had "waived" the protection of the safe-berth clause. *Atkins* v. *Fibre Disintegrating Co.*, 2 F. Cas. 78, 79 (No. 601) (EDNY 1868); see *Atkins*, 18 Wall., at 299. No one posits that the District Court's waiver holding has any significance in this case. CARCO, however, points to language in the District Court's opinion observing that the "safe" berth referenced in the charter party "impl[ied one] which th[e] vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas." *Atkins*, 2 F. Cas., at 79. But the District Court's remark—that a berth may be safe even if certain perils lurk within—did not bear on its finding that the berth in question was *un*safe or its holding that the vessel master had "waived" the protection of the safe-berth clause. When this Court approved of the District Court's "views" and "conclusions," *Atkins*, 18 Wall., at 299, it did not adopt as controlling precedent—for all safe-berth clauses going forward—an observation that was not controlling even for the District Court.

Also misplaced is CARCO's reliance on *Orduna S. A.*, 913 F. 2d 1149. True, the Fifth Circuit there held that a similarly unqualified safe-berth clause imposed a duty of due diligence. *Id.*, at 1157. But in so holding, the court did not

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textually diminish a charterer's liability when the vessel master in fact enters an unsafe berth selected by the charterer. *Supra*, at 360–361.

purport to interpret the language of the safe-berth clause at issue in that case. *Id.*, at 1156–1157. Instead, it looked principally to tort law and policy considerations. See, *e. g.*, *id.*, at 1156 ("requiring negligence as a predicate for the charterer's liability does not increase the risk that the vessel will be exposed to an unsafe berth"); *id.*, at 1157 ("no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects"). Neither tort principles nor policy objectives, however, override the safe-berth clause's unambiguous meaning.

More consistent with traditional contract analysis is the Second Circuit's long line of decisions interpreting the language of unqualified safe-berth clauses to embody an express warranty of safety. See, *e. g.*, *Paragon Oil Co.*, 310 F. 2d, at 172–173 ("the express terms of [the] contract" established a "warranty" obliging the charterer "to furnish, not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat'" (some internal quotation marks omitted)); *Park S. S. Co.* v. *Cities Serv. Oil Co.*, 188 F. 2d 804, 805–806 (CA2 1951) ("the natural meaning of 'safe place' is a place entirely safe, not an area only part of which is safe," and "the charter party was an express assurance that the berth was safe"); *Cities Serv. Transp. Co.* v. *Gulf Refining Co.*, 79 F. 2d 521 (CA2 1935) (*per curiam*) (the "charter party was itself an express assurance . . . that at the berth 'indicated' the ship would be able to lie 'always afloat'"). Those decisions, which focused on the controlling contract language, all point in the same direction: When the language of a safe-berth clause obliges a charterer to select a safe berth without qualifying the charterer's duty or the assurance of safety that language establishes a warranty. That aligns with our decision today.[9]

[9] The parties also dispute whether the prevailing industry usage of safe-berth clauses supports reading the safe-berth clause here as a warranty or as a promise of due diligence. Because the express language of the safe-berth clause is susceptible to only one meaning, we need not address these arguments.

## III

We conclude that the language of the safe-berth clause here unambiguously establishes a warranty of safety, and that CARCO has identified "no reason to contravene the clause's obvious meaning." *Kirby*, 543 U. S., at 31–32. We emphasize, however, that our decision today "does no more than provide a legal backdrop against which future [charter parties] will be negotiated." *Id.*, at 36. Charterers remain free to contract around unqualified language that would otherwise establish a warranty of safety, by expressly limiting the extent of their obligations or liability.

* * *

For the foregoing reasons, we conclude that the plain language of the safe-berth clause establishes a warranty of safety and therefore affirm the judgment of the Third Circuit.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court concludes that the safe-berth clause in the contract at issue unambiguously created a warranty of safety by the charterer. Although this interpretation provides a clear background rule for the maritime industry to contract against, it is the wrong rule and finds no basis in the contract's plain text. I would hold that the plain language of the safe-berth clause contains no warranty of safety and remand for factfinding on whether industry custom and usage establish such a warranty in this case. Accordingly, I respectfully dissent.

## I

In 2001, Star Tankers Inc. (Star) entered into a voyage charter party with CITGO Asphalt Refining Company (CARCO). That contract included a safe-berth clause that provided:

> "SAFE BERTHING — SHIFTING. The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer." Addendum to Brief for Petitioners 8a.

I agree with the majority that we must interpret the safe-berth clause "by [its] terms and consistent with the intent of the parties." *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 31 (2004). Unlike the majority, however, I conclude that the plain meaning of the safe-berth clause does not include a warranty of safety.

A

The safe-berth clause sets out the rights and obligations of the vessel master and the charterer. The clause requires the vessel master to "load and discharge at [a] safe place or wharf," but it also gives the master the right to refuse to proceed if the vessel cannot "lie at, and depart therefrom always safely afloat." Addendum to Brief for Petitioners 8a. The charterer has the right to "designat[e]" a "safe place or wharf" for discharge. *Ibid.* That right, however, must be exercised by the charterer, see *ibid.* (using mandatory language), and the act of designation must be made in good faith, see Restatement (Second) of Contracts §205 (1979). The right to designate is limited to places that the vessel can reach, with the charterer bearing the "expense, risk and peril" of any "lighterage" (*i. e.*, transfer of cargo by means of another vessel) resulting from its selection. Addendum to Brief for Petitioners 8a. As the leading admiralty treatise succinctly explains, the safe-berth clause provides that "if the port or the berth is unsafe, the master is excused from taking his ship in, and the charterer must bear the extra expense . . . entailed by [a proper] refusal" of its selected

place of discharge. G. Gilmore & C. Black, Law of Admiralty § 4–4, p. 204 (2d ed. 1975).[1]

This reading is consistent with this Court's prior decisions. The Court has interpreted safe-berth clauses as providing a limit on the "right to select a dock." *Mencke* v. *Cargo of Java Sugar*, 187 U. S. 248, 253 (1902); see also *The Gazelle and Cargo*, 128 U. S. 474, 485–486 (1888) (holding that the right of selection is limited by the terms of the contract). And it has concluded that, if a charterer selects a place of discharge that cannot be safely reached, the charterer is liable for lighterage expenses. *Mencke*, 187 U. S., at 253–254.

Thus, under the plain language of the safe-berth clause, the vessel master has a duty of discharge and right of refusal, while the charterer has a right of selection and duty to pay for lighterage.

B

The majority does not disagree that the safe-berth clause confers these duties and rights. Quite the opposite. It recognizes our precedents as embracing this understanding. *Ante*, at 360–361. The majority concludes, however, that in addition to the rights of selection and refusal, the language of the safe-berth clause "unambiguously" establishes a warranty of safety by the charterer. *Ante*, at 365. With this, I cannot agree.

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[1] The majority states that the views of Gilmore and Black "stemmed from their belief that vessel masters or vessel owners are generally better positioned than charterers to bear the liability of an unsafe berth." *Ante*, at 362. While the treatise does contain policy-based arguments, it also looks to "the very words of the usual clauses" to conclude that the master's clear textual right to refuse to enter an unsafe port "might easily be read to contradict" an interpretation of a safe-berth clause that "creat[es] an affirmative liability of charterer to ship, in case of mishap." Gilmore & Black, Law of Admiralty § 4–4, at 204–205. Gilmore and Black's review of safe-berth clauses contains just as much, if not more, analysis of the text than the conclusory assertions of the majority. See *ante*, at 355–356.

1

The majority first concludes that the safe-berth clause contains an "express prescription of a warranty of safety." *Ante*, at 361; see also *ante*, at 355–356. This assertion finds no support whatsoever in the plain language of the clause.

First of all, the contract between Star and CARCO contains no express warranty of safety by the charterer, though the parties repeatedly used express language to create warranties elsewhere in the contract. See Addendum to Brief for Petitioners 26a ("Charterer's warrant . . . "), 30a ("Owners warrant . . . "), *ibid.* ("Owner warrants . . . "), 31a ("Owner warrants . . . "), 41a ("Owner warrants . . . "), 42a ("Owner warrants . . . "), 43a ("Owner warrants . . . "), 44a ("Owner warrants . . . "), 45a ("Owner warrants . . . ") (capitalization omitted). In contrast, they did not state that the charterer "warrants" the safety of the place of discharge in the safe-berth clause. As the majority obliquely recognizes—when trying to rebut a different argument—"[t]hat omission is particularly notable in context: Where the parties intended to [create warranties] elsewhere in the charter party, they did so expressly." *Ante*, at 358. "That the parties did not do so in the safe-berth clause specifically is . . . proof that they did not intend for such a . . . limitation to inhere impliedly." *Ante*, at 359.[2]

But even setting aside this evidence of the parties' intent (as the majority does), the safe-berth clause contains no lan-

[2] Attempting to avoid the inconsistent application of its own principle, the majority claims there is a distinction between language limiting liability and language creating liability. *Ante*, at 359, n. 6. In the majority's view, express language is "necessary" to limit liability, but the parties can create warranty liability in numerous ways. *Ibid.* Even assuming that is correct, it does not negate the proof of the parties' intent here. The majority can point to no example of the parties "creat[ing] warranties without invoking express warranty language" in this contract. *Ibid.* By contrast, the contract contains no fewer than nine clauses using express language to create a warranty. The commonsense conclusion is that, when the parties intended to create a warranty, they used express language to do so.

guage that can be construed to create a warranty of safety. Nor does the clause so much as suggest that the charterer is liable for all damages arising out of unsafe port conditions. In fact, the trade association that promulgated the ASBATANKVOY form used in this case specifically acknowledged that the language of "the clause *does not specify* whether the charterer absolutely warrants the safety of the berth." Brief for Maritime Law Association of the United States et al. as *Amici Curiae* on Pet. for Cert. 19 (emphasis added).

Notwithstanding this, the majority states that the clause "requires the charterer to designate a 'safe' berth" and that requirement "binds the charterer to a warranty of safety." *Ante*, at 356. But certainly not every obligation in a contract is a warranty. See *Brooks, Tarlton, Gilbert, Douglas & Kressler* v. *United States Fire Ins. Co.*, 832 F. 2d 1358, 1375, n. 14 (CA5 1987). Parties often agree to obligations that govern only their conduct without making any assurances as to an ultimate result. For example, "[a] promise to repair parts of [a] powertrain for six years is a promise that the manufacturer will behave in a certain way, not a warranty that the vehicle will behave in a certain way." *Cosman* v. *Ford Motor Co.*, 285 Ill. App. 3d 250, 257, 674 N. E. 2d 61, 66 (1996). The majority does not confront, or even acknowledge, this distinction. Instead, it indifferently conflates a duty to take a certain action—"designat[e]" a wharf understood to be safe—with a warranty guaranteeing a certain result—the ultimate safety of the berth.[3]

By conflating an action with an outcome, the majority converts every obligation tangentially related to safety into a warranty of safety. Consider the contract in this case, for example. If the language stating that the charterer "shall . . . designat[e] and procur[e]" a "safe place or wharf" creates

[3] I am skeptical that the phrase "place or wharf" can be read to include the entire berth. But CARCO failed to develop any argument related to the scope of this phrase, so I do not address the issue.

a warranty of safety, then so does the language stating that "[t]he vessel shall load and discharge at [a] safe place or wharf." Addendum to Brief for Petitioners 8a. There is no textual reason that an obligation to "designat[e]" is any different from an obligation to "discharge." *Ibid.* And policy-based rationalizations cannot justify a distinction because "[n]either tort principles nor policy objectives . . . override the safe-berth clause's unambiguous meaning." *Ante*, at 364. Thus, employing the majority's approach, the safe-berth clause contains two competing warranties of safety—one from the charterer and one from the vessel master—that could impose conflicting obligations.[4] Courts typically avoid construing contracts in such a manner. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 64 (1995) (rejecting an interpretation that the Court believed "se[t] up . . . two clauses in conflict with one another"); *United States* v. *Pielago*, 135 F. 3d 703, 710 (CA11 1998) ("It is a cardinal principle of contract law that no term of a contract should be construed to be in conflict with another unless no other reasonable construction is possible"). Setting aside this contract, the majority makes no attempt to limit its expan-

[4] To support its assertion that no conflict exists, the majority rewrites the text of the safe-berth clause. The majority asserts that "[t]he vessel master's duty is only to 'load and discharge' *at the chosen safe berth*." *Ante*, at 361 (emphasis added). But that is not what the clause says. The safe-berth clause states: "The vessel shall load and *discharge at any safe place or wharf*." Addendum to Brief for Petitioners 8a (emphasis added). And, by requiring the charterer to pay for lighterage expenses resulting from the designation of an unsafe port, the clause specifically contemplates the vessel master declining to discharge at a place or wharf that is not safe. *Ibid.*; see also *Mencke* v. *Cargo of Java Sugar*, 187 U. S. 248, 253 (1902) (requiring the charterer to pay lighterage expenses where vessel discharged at a location other than the chosen berth). The "which" clause in the provision—"which shall be designated and procured by the Charterer"—modifies "place or wharf," creating a separate obligation for the charterer. Addendum to Brief for Petitioners 8a. That separate obligation, however, does not negate the express obligation imposed on the vessel. *Ibid.*

sive interpretive approach or provide the barest of explanation as to why all obligations that involve the word "safe" should not be construed as warranties of safety.

In a contract replete with express language creating warranties, I would not construe the plain language of the safe-berth clause as indirectly creating contradictory warranties of safety. And I certainly cannot agree with the majority's conclusion that the safe-berth clause "unambiguously" establishes a warranty of safety by the charterer. *Ante*, at 365.

2

Perhaps recognizing the weakness of its assertion that the safe-berth clause contains a duty or warranty of safety, the majority pivots to an independent legal theory. It claims that the safe-berth clause constitutes a material statement of fact and therefore creates a warranty. *Ante*, at 357. The majority's invocation of this theory is puzzling, to say the least.

As an initial matter, this issue was not preserved in the Court of Appeals, which, understandably, did not address the question. *In re Frescati Shipping Co.*, 718 F. 3d 184, 200–203 (CA3 2013). Nor was the issue developed before this Court. All we have before us is one conclusory paragraph in the United States' brief. See Brief for United States 25. Accordingly, I would decline to address this unpreserved and undeveloped issue.

Even setting aside forfeiture, the majority's analysis is questionable in multiple respects. First, the majority asserts that "the safe-berth clause contains a statement of material fact regarding the condition of the berth selected by the charterer." *Ante*, at 357. Not so. The safe-berth clause says nothing about the safety of the port actually selected by CARCO (the Paulsboro berth), or any specific berth for that matter. It states only that the charterer "shall . . . designat[e]" a place or wharf. The majority infers from CARCO's selection of the Paulsboro berth that CARCO believed the

place or wharf was safe. But that is not a statement of fact; it is an inference. I hesitate to equate the two without briefing on the issue, or even a single example of a court adopting this approach.

Second, even assuming the safe-berth clause contains a statement of fact, it is not clear that the Court is in a position to decide whether that statement of fact is "material." Many jurisdictions appear to treat materiality as a question of fact when determining whether a statement creates a warranty. *Royal Bus. Machines, Inc.* v. *Lorraine Corp.*, 633 F. 2d 34, 43 (CA7 1980) ("Whether a seller affirmed a fact or made a promise amounting to a warranty is a question of fact reserved for the trier of fact"); *McDonnell Douglas Corp.* v. *Thiokol Corp.*, 124 F. 3d 1173, 1176 (CA9 1997) ("Whether the seller's representations formed part of the basis of the parties' bargain is a question of fact"); *Crothers* v. *Cohen*, 384 N. W. 2d 562, 563 (Minn. App. 1986) ("Whether a given representation constitutes a warranty is ordinarily a question of fact for the jury"); *General Supply & Equip. Co.* v. *Phillips*, 490 S. W. 2d 913, 917 (Tex. Civ. App. 1972) (citing cases from Illinois, Iowa, Alabama, and Ohio). And "our cases have recognized in other contexts that the materiality inquiry, involving as it does 'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw from a given set of facts and the significance of those inferences to him, [is] peculiarly on[e] for the trier of fact.'" *United States* v. *Gaudin*, 515 U. S. 506, 512 (1995). Although this Court has relied on factual findings to support a materiality conclusion, *Davison* v. *Von Lingen*, 113 U. S. 40, 50 (1885), I am not aware of a case in which this Court has treated the materiality inquiry as a pure question of law without relying on any factual findings whatsoever. Again, without briefing on this issue, I would hesitate to depart, without explanation, from the approach taken by many courts throughout the country.

Third, assuming the contract contains a statement of fact regarding the safety of the berth and further assuming that

materiality is a question of law, I am unpersuaded by the majority's materiality analysis. Materiality must turn at least in part on a statement's "tendency to induce the making of the contract." 22 R. Lord, Williston on Contracts § 58.11, p. 41 (4th ed. 2017). The majority's opinion says nothing about that (likely fact-driven) question. It first states that the safety of the selected berth is "the entire root of the safe-berth clause" and "the very reason for the clause's inclusion." *Ante*, at 357. Even accepting the majority's interpretation, merely proving that a statement is included in a contract does not mean that it is material. If that were the law, then every statement in a contract would be material and therefore constitute a warranty. That cannot be right. The majority next concludes that "[u]nder any conception of materiality and any view of the parties' intent, the charterer's assurance [of safety with no conditions] surely counts as material." *Ibid.* But what is the basis for this conclusion? The majority's experience negotiating maritime contracts? It defies reality to assert that a standard provision in a form contract—which has been subject to different interpretations for nearly three decades—induced *every single vessel master* using that form contract to enter into the agreement. We should recognize this for what it is: an unsupported judicial pronouncement on a question of fact.

The majority's attempt to shore up its analysis with its alternative statement-of-fact theory makes no difference to the outcome of this case, because the majority erroneously holds that the safe-berth clause contains an absolute duty that was breached. See *ante*, at 355–356; *supra*, at 368–371. But its unreasoned dicta will undoubtedly cause problems for lower courts and parties in the future.

## II

The lack of unambiguous language creating a warranty of safety in the safe-berth clause does not end our inquiry. "'In this endeavor, as with any other contract, the parties' intentions control.'" *M&G Polymers USA, LLC* v. *Tackett*,

574 U. S. 427, 435 (2015) (quoting *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 682 (2010)); see also *ante*, at 355. The vessel's owner and the United States argue that, setting aside the plain meaning of the contract's text, longstanding industry custom supports interpreting the safe-berth clause as a warranty of safety. I would remand for factfinding on this issue.

Under both "general maritime law" and ordinary principles of contract interpretation, evidence of an established "custom and usage" can be used as an aid to "determin[e] the parties' intent" and the meaning of the language included in the contract. *Stolt-Nielsen*, 559 U. S., at 674, n. 6 (internal quotation marks omitted); see also U. C. C. § 1–303 Comment 3 (2017); Restatement (Second) of Contracts § 220. But "the existence and scope of a particular usage is usually a question of fact." *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 732, n. 4 (1988); see also U. C. C. § 1–303(c); Restatement (Second) of Contracts § 219, Comment *a*; § 222(2). Here, we have no factual findings from the District Court to support a custom-or-usage argument. Such findings seem particularly necessary in this case: "A trade usage can of course be confined to a particular geographical area," 5 M. Kniffin, Corbin on Contracts § 24.13, p. 110 (J. Perillo ed., rev. 1998), and different areas of the country appeared to have different understandings of the safe-berth clause at the time of contracting. See *ante*, at 354–355 (recognizing Circuit split); Brief for North American Export Grain Association as *Amicus Curiae* 9 (stating that in "New Orleans . . . safe-berth clauses are understood to impose due diligence obligations"). Accordingly, I would remand for factual findings on the question whether the parties entered into the charter party with knowledge of an established custom or usage.

* * *

I appreciate the majority's desire to interpret the safe-berth clause in a manner that provides clarity to the mari-

time industry. The plain meaning of the contract's text, however, does not support the majority's interpretation. Fortunately, the majority's opinion applies only to this specific contract, and its assertions regarding a material statement of fact are but dicta. Because I would reverse the judgment of the Court of Appeals and remand for further proceedings, I respectfully dissent.

Syllabus

# KANSAS *v.* GLOVER

## CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 18–556. Argued November 4, 2019—Decided April 6, 2020

A Kansas deputy sheriff ran a license plate check on a pickup truck, discovering that the truck belonged to respondent Glover and that Glover's driver's license had been revoked. The deputy pulled the truck over because he assumed that Glover was driving. Glover was in fact driving and was charged with driving as a habitual violator. He moved to suppress all evidence from the stop, claiming that the deputy lacked reasonable suspicion. The District Court granted the motion, but the Court of Appeals reversed. The Kansas Supreme Court in turn reversed, holding that the deputy violated the Fourth Amendment by stopping Glover without reasonable suspicion of criminal activity.

*Held*: When the officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment. Pp. 380–386.

(a) An officer may initiate a brief investigative traffic stop when he has "a particularized and objective basis" to suspect legal wrongdoing. *United States* v. *Cortez*, 449 U. S. 411, 417. The level of suspicion required is less than that necessary for probable cause and "depends on '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'" *Prado Navarette* v. *California*, 572 U. S. 393, 402. Courts must therefore permit officers to make "commonsense judgments and inferences about human behavior." *Illinois* v. *Wardlow*, 528 U. S. 119, 125. Pp. 380–381.

(b) Here, the deputy's commonsense inference that the owner of a vehicle was likely the vehicle's driver provided more than reasonable suspicion to initiate the stop. That inference is not made unreasonable merely because a vehicle's driver is not always its registered owner or because Glover had a revoked license. Though common sense suffices to justify the officer's inference, empirical studies demonstrate that drivers with suspended or revoked licenses frequently continue to drive. And Kansas' license-revocation scheme, which covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive, reinforces the reasonableness of the inference that an individual with a revoked license will continue to drive. Pp. 381–383.

Syllabus

(c) Glover's counterarguments are unpersuasive. He argues that the deputy's inference was unreasonable because it was not grounded in his law enforcement training or experience. Such a requirement, however, is inconsistent with this Court's Fourth Amendment jurisprudence. See, *e. g.*, *Navarette*, 572 U. S., at 402. It would also place the burden on police officers to justify their inferences by referring to training materials or experience, and it would foreclose their ability to rely on common sense obtained outside of their work duties. Glover's argument that Kansas' view would permit officers to base reasonable suspicion exclusively on probabilities also carries little force. Officers, like jurors, may rely on probabilities in the reasonable suspicion context. See, *e. g.*, *United States* v. *Sokolow*, 490 U. S. 1, 8–9. Moreover, the deputy here did more than that: He combined facts obtained from a database and commonsense judgments to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity. Pp. 383–385.

(d) The scope of this holding is narrow. The reasonable suspicion standard "'takes into account the totality of the circumstances.'" *Navarette*, 572 U. S., at 397. The presence of additional facts might dispel reasonable suspicion, but here, the deputy possessed no information sufficient to rebut the reasonable inference that Glover was driving his own truck. Pp. 385–386.

308 Kan. 590, 422 P. 3d 64, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 387. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 391.

*Toby Crouse*, Solicitor General of Kansas, argued the cause for petitioner. With him on the briefs were *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Kristafer Ailslieger* and *Brant M. Laue*, Deputy Solicitors General, and *Natalie Chalmers*, *Bryan C. Clark*, *Dwight R. Carswell*, and *Jodi Litfin*, Assistant Solicitors General.

*Michael R. Huston* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Amanda B. Harris*.

*Sarah E. Harrington* argued the cause for respondent. With her on the brief were *Charles H. Davis*, *Erica Oleszczuk Evans*, *Daniel Woofter*, and *Elbridge Griffy IV*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

I

Kansas charged respondent Charles Glover, Jr., with driving as a habitual violator after a traffic stop revealed that he was driving with a revoked license. See Kan. Stat. Ann. § 8–285(a)(3) (2001). Glover filed a motion to suppress all evidence seized during the stop, claiming that the officer

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*Briefs of *amici curiae* urging reversal were filed for the State of Oklahoma et al. by *Mike Hunter*, Attorney General of Oklahoma, *Mithun Mansinghani*, Solicitor General, *Randall Yates*, Assistant Solicitor General, and *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Chris Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Andy Beshear* of Kentucky, *Doug Peterson* of Nebraska, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Dave Yost* of Ohio, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for the National District Attorneys Association by *Scott A. Keller* and *Benjamin A. Geslison*; and for the National Fraternal Order of Police by *Larry H. James*.

Briefs of *amici curiae* urging affirmance were filed for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Fines and Fees Justice Center et al. by *Seanna Brown*; for the National Association of Criminal Defense Lawyers by *David Debold*, *Brandon L. Boxler*, and *Barbara E. Bergman*; for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*; and for Andrew Manuel Crespo by *Mr. Crespo, pro se*.

lacked reasonable suspicion. Neither Glover nor the police officer testified at the suppression hearing. Instead, the parties stipulated to the following facts:

> "1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff's Office.
> "2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.
> "3. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck.
> "4. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.
> "5. Deputy Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr.
> "6. Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.
> "7. The driver of the truck was identified as the defendant, Charles Glover Jr." App. to Pet. for Cert. 60–61.

The District Court granted Glover's motion to suppress. The Court of Appeals reversed, holding that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion." 54 Kan. App. 2d 377, 385, 400 P. 3d 182, 188 (2017).

The Kansas Supreme Court reversed. According to the court, Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel

amounted to "only a hunch" that Glover was engaging in criminal activity. 308 Kan. 590, 591, 422 P. 3d 64, 66 (2018). The court further explained that Deputy Mehrer's "hunch" involved "applying and stacking unstated assumptions that are unreasonable without further factual basis," namely, that "the registered owner was likely the primary driver of the vehicle" and that "the owner will likely disregard the suspension or revocation order and continue to drive." *Id.*, at 595–597, 422 P. 3d, at 68–70. We granted Kansas' petition for a writ of certiorari, 587 U. S. 918 (2019), and now reverse.

## II

Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U. S. 411, 417–418 (1981); see also *Terry* v. *Ohio*, 392 U. S. 1, 21–22 (1968). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Prado Navarette* v. *California*, 572 U. S. 393, 397 (2014) (quotation altered); *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989).

Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." *Alabama* v. *White*, 496 U. S. 325, 330 (1990). The standard "depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act." *Navarette*, *supra*, at 402 (quoting *Ornelas* v. *United States*, 517 U. S. 690, 695 (1996); emphasis added; internal quotation marks omitted). Courts "cannot reasonably demand scientific certainty . . . where none exists." *Illinois* v. *Wardlow*, 528 U. S. 119, 125 (2000). Rather, they must permit officers to make "com-

monsense judgments and inferences about human behavior." *Ibid.*; see also *Navarette*, *supra*, at 403 (noting that an officer "'need not rule out the possibility of innocent conduct'").

## III

We have previously recognized that States have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed." *Delaware* v. *Prouse*, 440 U. S. 648, 658 (1979). With this in mind, we turn to whether the facts known to Deputy Mehrer at the time of the stop gave rise to reasonable suspicion. We conclude that they did.

Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy, see *United States* v. *Arvizu*, 534 U. S. 266, 274 (2002), for, as we have explained, "[t]o be reasonable is not to be perfect," *Heien* v. *North Carolina*, 574 U. S. 54, 60 (2014).

Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians. See, *e. g.*, 2 T. Neuman et al., National Coop. Hwy. Research Program Report 500: A Guide for Addressing Collisions In-

volving Unlicensed Drivers and Drivers With Suspended or Revoked Licenses, p. III–1 (2003) (noting that 75% of drivers with suspended or revoked licenses continue to drive); National Hwy. and Traffic Safety Admin., Research Note: Driver License Compliance Status in Fatal Crashes 2 (Oct. 2014) (noting that approximately 19% of motor vehicle fatalities from 2008–2012 "involved drivers with invalid licenses").

Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive. The Division of Vehicles of the Kansas Department of Revenue (Division) "shall" revoke a driver's license upon certain convictions for involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer, or conviction of a felony in which a motor vehicle is used. Kan. Stat. Ann. §§ 8–254(a), 8–252. Reckless driving is defined as "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." § 8–1566(a). The Division also has discretion to revoke a license if a driver "[h]as been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways," "has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period," "is incompetent to drive a motor vehicle," or "has been convicted of a moving traffic violation, committed at a time when the person's driving privileges were restricted, suspended[,] or revoked." §§ 8–255(a)(1)–(4). Other reasons include violating license restrictions, § 8–245(c), being under house arrest, § 21–6609(c), and being a habitual violator, § 8–286, which Kansas defines as a resident or nonresident who has been convicted three or more times within the past five years of certain enumerated driving offenses, § 8–285. The concerns motivating the

State's various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle.

## IV

Glover and the dissent respond with two arguments as to why Deputy Mehrer lacked reasonable suspicion. Neither is persuasive.

### A

First, Glover and the dissent argue that Deputy Mehrer's inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite. In *Navarette*, we noted a number of behaviors—including driving in the median, crossing the center line on a highway, and swerving—that as a matter of common sense provide "sound indicia of drunk driving." 572 U. S., at 402. In *Wardlow*, we made the unremarkable observation that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion" and therefore could factor into a police officer's reasonable suspicion determination. 528 U. S., at 124. And in *Sokolow*, we recognized that the defendant's method of payment for an airplane ticket contributed to the agents' reasonable suspicion of drug trafficking because we "fe[lt] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check" rather than cash. 490 U. S., at 8–9. So too here. The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.

The dissent reads our cases differently, contending that they permit an officer to use only the common sense derived from his "experiences in law enforcement." *Post*, at 395 (opinion of SOTOMAYOR, J.). Such a standard defies the "common

sense" understanding of common sense, *i. e.*, information that is accessible to people generally, not just some specialized subset of society. More importantly, this standard appears nowhere in our precedent. In fact, we have stated that reasonable suspicion is an "abstract" concept that cannot be reduced to "a neat set of legal rules," *Arvizu*, 534 U. S., at 274 (internal quotation marks omitted), and we have repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness, *ibid.*; *Sokolow*, *supra*, at 7–8. This is precisely what the dissent's rule would do by insisting that officers must be treated as bifurcated persons, completely precluded from drawing factual inferences based on the commonly held knowledge they have acquired in their everyday lives.

The dissent's rule would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes. And by removing common sense as a source of evidence, the dissent would considerably narrow the daylight between the showing required for probable cause and the "less stringent" showing required for reasonable suspicion. *Prouse*, 440 U. S., at 654; see *White*, 496 U. S., at 330. Finally, it would impermissibly tie a traffic stop's validity to the officer's length of service. See *Devenpeck* v. *Alford*, 543 U. S. 146, 154 (2004). Such requirements are inconsistent with our Fourth Amendment jurisprudence, and we decline to adopt them here.

In reaching this conclusion, we in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations. See, *e. g.*, *Arvizu*, *supra*, at 273–274. We simply hold that such experience is not *required* in every instance.

## B

Glover and the dissent also contend that adopting Kansas' view would eviscerate the need for officers to base reasonable suspicion on "specific and articulable facts" particular-

ized to the individual, see *Terry*, 392 U. S., at 21, because police could instead rely exclusively on probabilities. Their argument carries little force.

As an initial matter, we have previously stated that officers, like jurors, may rely on probabilities in the reasonable suspicion context. See *Sokolow*, *supra*, at 8–9; *Cortez*, 449 U. S., at 418. Moreover, as explained above, Deputy Mehrer did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity—driving with a revoked license. Traffic stops of this nature do not delegate to officers "broad and unlimited discretion" to stop drivers at random. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 882 (1975). Nor do they allow officers to stop drivers whose conduct is no different from any other driver's. See *Brown* v. *Texas*, 443 U. S. 47, 52 (1979). Accordingly, combining database information and commonsense judgments in this context is fully consonant with this Court's Fourth Amendment precedents.[1]

## V

This Court's precedents have repeatedly affirmed that "'the ultimate touchstone of the Fourth Amendment is "rea-

[1] The dissent contends that this approach "pave[s] the road to finding reasonable suspicion based on nothing more than a demographic profile." *Post*, at 397 (opinion of SOTOMAYOR, J.). To alleviate any doubt, we reiterate that the Fourth Amendment requires, and Deputy Mehrer had, an individualized suspicion that a particular citizen was engaged in a particular crime. Such a particularized suspicion would be lacking in the dissent's hypothetical scenario, which, in any event, is already prohibited by our precedents. See *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 876 (1975) (holding that it violated the Fourth Amendment to stop and "question [a vehicle's] occupants [about their immigration status] when the only ground for suspicion [was] that the occupants appear[ed] to be of Mexican ancestry").

sonableness."'" *Heien*, 574 U. S., at 60 (quoting *Riley* v. *California*, 573 U. S. 373, 381 (2014)). Under the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked.

We emphasize the narrow scope of our holding. Like all seizures, "[t]he officer's action must be '"justified at its inception."'" *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 185 (2004) (quoting *United States* v. *Sharpe*, 470 U. S. 675, 682 (1985)). "The standard takes into account the totality of the circumstances—the whole picture." *Navarette*, 572 U. S., at 397 (internal quotation marks omitted). As a result, the presence of additional facts might dispel reasonable suspicion. See *Terry*, *supra*, at 28. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Cortez*, *supra*, at 418; *Ornelas*, 517 U. S., at 696 ("'Each case is to be decided on its own facts and circumstances'" (quoting *Ker* v. *California*, 374 U. S. 23, 33 (1963))). Here, Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified.[2]

* * *

For the foregoing reasons, we reverse the judgment of the Kansas Supreme Court, and we remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

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[2] The dissent argues that this approach impermissibly places the burden of proof on the individual to negate the inference of reasonable suspicion. *Post*, at 380–381. Not so. As the above analysis makes clear, it is the information possessed by *the officer* at the time of the stop, not any information offered by the individual after the fact, that can negate the inference.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, concurring.

When you see a car coming down the street, your common sense tells you that the registered owner may well be behind the wheel. See *ante*, at 381, 386. Not always, of course. Families share cars; friends borrow them. Still, a person often buys a vehicle to drive it himself. So your suspicion that the owner is driving would be perfectly reasonable. See *ibid.*

Now, though, consider a wrinkle: Suppose you knew that the registered owner of the vehicle no longer had a valid driver's license. That added fact raises a new question. What are the odds that someone who has lost his license would continue to drive? The answer is by no means obvious. You might think that a person told not to drive on pain of criminal penalty would obey the order—so that if his car was on the road, someone else (a family member, a friend) must be doing the driving. Or you might have the opposite intuition—that a person's reasons for driving would overcome his worries about violating the law, no matter the possible punishment. But most likely (let's be honest), you just wouldn't know. Especially if you've not had your own license taken away, your everyday experience has given you little basis to assess the probabilities. Your common sense can therefore no longer guide you.

Even so, Deputy Mark Mehrer had reasonable suspicion to stop the truck in this case, and I join the Court's opinion holding as much. Crucially for me, Mehrer knew yet one more thing about the vehicle's registered owner, and it related to his proclivity for breaking driving laws. As the Court recounts, Mehrer learned from a state database that Charles Glover, the truck's owner, had had his license revoked under Kansas law. See *ante*, at 379. And Kansas almost never revokes a license except for serious or repeated driving offenses. See Kan. Stat. Ann. §8–254 (2001); *ante*, at 382. Crimes like vehicular homicide and manslaughter, or vehicular flight from a police officer, provoke a license revocation; so too do multiple convictions for moving traffic viola-

tions within a short time. See *ante*, at 382. In other words, a person with a revoked license has already shown a willingness to flout driving restrictions. That fact, as the Court states, provides a "reason[ ] to infer" that such a person will drive without a license—at least often enough to warrant an investigatory stop. *Ibid.* And there is nothing else here to call that inference into question. That is because the parties' unusually austere stipulation confined the case to the facts stated above—*i. e.*, that Mehrer stopped Glover's truck because he knew that Kansas had revoked Glover's license.

But as already suggested, I would find this a different case if Kansas had barred Glover from driving on a ground that provided no similar evidence of his penchant for ignoring driving laws. Consider, for example, if Kansas had suspended rather than revoked Glover's license. Along with many other States, Kansas suspends licenses for matters having nothing to do with road safety, such as failing to pay parking tickets, court fees, or child support. See Kan. Stat. Ann. §8–2110(b) (2018 Cum. Supp.); see also, *e. g.*, N. J. Stat. Ann. §39:4–139.10 (West Supp. 2019); Ark. Code Ann. §9–14–239 (Supp. 2019). Indeed, several studies have found that most license suspensions do not relate to driving at all; what they most relate to is being poor. See Brief for Fines and Fees Justice Center et al. as *Amici Curiae* 7. So the good reason the Court gives for thinking that someone with a revoked license will keep driving—that he has a history of disregarding driving rules—would no longer apply. And without that, the case for assuming that an unlicensed driver is at the wheel is hardly self-evident. It would have to rest on an idea about the frequency with which even those who had previously complied with driving laws would defy a State's penalty-backed command to stay off the roads. But where would that idea come from? As discussed above, I doubt whether our collective common sense could do the necessary work. See *supra*, at 387. Or otherwise said, I suspect that any common sense invoked in this altered context would

not much differ from a "mere 'hunch' "—and so "not create reasonable suspicion." *Prado Navarette* v. *California*, 572 U. S. 393, 397 (2014) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968)).

And even when, as under the revocation scheme here, a starting presumption of reasonable suspicion makes sense, the defendant may show that in his case additional information dictates the opposite result. The Court is clear on this point, emphasizing that under the applicable totality-of-the-circumstances test, "the presence of additional facts might dispel reasonable suspicion" even though an officer knows that a car on the road belongs to a person with a revoked license. *Ante*, at 386; see *ante*, at 378 (stating that further information may "negat[e] an inference that the owner is the driver of the vehicle"). Just as the Court once said of a trained drug-detection dog's "alert," the license-revocation signal is always subject to a defendant's challenge, whether through cross-examination of the officer or introduction of his own fact or expert witnesses. *Florida* v. *Harris*, 568 U. S. 237, 247 (2013).

That challenge may take any number of forms. The Court offers a clear example of observational evidence dispelling reasonable suspicion: if the officer knows the registered owner of a vehicle is an elderly man, but can see the driver is a young woman. See *ante*, at 386. Similarly (if not as cut-and-dry), when the officer learns a car has two or more registered owners, the balance of circumstances may tip away from reasonable suspicion that the one with the revoked license is driving. And so too, the attributes of the car may be relevant. Consider if a car bears the markings of a peer-to-peer carsharing service; or compare the likelihoods that someone other than the registered owner is driving (1) a family minivan and (2) a Ferrari. The officer himself may have a wealth of accumulated information about such matters, and the defendant may probe what that knowledge suggests about the stop at issue.

Such a challenge may also use statistical evidence, which is almost daily expanding in sophistication and scope. States or municipalities often keep information about "hit rates" in stops like this one—in other words, the frequency with which those stops discover unlicensed drivers behind the wheel. See generally Brief for Andrew Manuel Crespo as *Amicus Curiae* 23–27. Somewhat less direct but also useful are state and local data (collected by governments, insurance companies, and academics alike) about the average number of drivers for each registered automobile and the extent to which unlicensed persons continue to drive. See *id.*, at 13–18. (If, to use an extreme example, every car had 10 associated drivers, and losing a license reduced driving time by 90%, an officer would not have reasonable suspicion for a stop.) Here too, defendants may question testifying officers about such information. Indeed, an officer may have his own hit rate, which if low enough could itself negate reasonable suspicion. See, *e. g.*, *United States* v. *Cortez-Galaviz*, 495 F. 3d 1203, 1208–1209 (CA10 2007) (Gorsuch, J.) (considering, as part of the reasonable suspicion inquiry, the frequency of an officer's misses and the accuracy of the database on which he relied).*

In this strange case, contested on a barebones stipulation, the record contains no evidence of these kinds. There is but a single, simple fact: A police officer learned from a state database that a car on the road belonged to a person with a revoked license. Given that revocations in Kansas nearly

*Of course, aggregate statistics of this kind cannot substitute for the individualized suspicion that the Fourth Amendment requires. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 21, n. 18 (1968) ("Th[e] demand for specificity . . . is the central teaching of this Court's Fourth Amendment jurisprudence"). But in a case like this one, the officer's suspicion *is* individualized: It arises from the license status of the known owner of a specific car. The only question is whether that suspicion is reasonable—whether, in other words, there is enough to back up the officer's belief that the owner is driving the vehicle. As to that matter, statistics may be highly relevant, either to support or to cast doubt on the officer's judgment.

always stem from serious or repeated driving violations, I agree with the Court about the reasonableness of the officer's inference that the owner, "Glover[,] was driving while his license was revoked." *Ante*, at 386. And because Glover offered no rebuttal, there the matter stands. But that does not mean cases with more complete records will all wind up in the same place. A defendant like Glover may still be able to show that his case is different—that the "presence of additional facts" and circumstances "dispel[s] reasonable suspicion." *Ibid.* Which is to say that in more fully litigated cases, the license-revocation alert does not (as it did here) end the inquiry. It is but the first, though no doubt an important, step in assessing the reasonableness of the officer's suspicion.

JUSTICE SOTOMAYOR, dissenting.

In upholding routine stops of vehicles whose owners have revoked licenses, the Court ignores key foundations of our reasonable-suspicion jurisprudence and impermissibly and unnecessarily reduces the State's burden of proof. I therefore dissent.

I

I begin with common ground. The Fourth Amendment permits "brief investigatory" vehicle stops, *United States* v. *Cortez*, 449 U. S. 411, 417 (1981), on "facts that do not constitute probable cause," *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975). To assess whether an officer had the requisite suspicion to seize a driver, past cases have considered the "totality of the circumstances—the whole picture," *Cortez*, 449 U. S., at 417, and analyzed whether the officer assembled "fact on fact and clue on clue," *id.*, at 419.

The stop at issue here, however, rests on just one key fact: that the vehicle was owned by someone with a revoked license. The majority concludes—erroneously, in my view—that seizing this vehicle was constitutional on the record below because drivers with revoked licenses (as opposed to

suspended licenses) in Kansas "have already demonstrated a disregard for the law or are categorically unfit to drive." *Ante*, at 382. This analysis breaks from settled doctrine and dramatically alters both the quantum and nature of evidence a State may rely on to prove suspicion.

## A

The State bears the burden of justifying a seizure. *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion); *Brown* v. *Texas*, 443 U. S. 47, 51–52 (1979). This requires the government to articulate factors supporting its reasonable suspicion, usually through a trained agent. See *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996); see also *United States* v. *Sokolow*, 490 U. S. 1, 10 (1989). While the Court has not dictated precisely what evidence a government must produce, it has stressed that an officer must at least "articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." *Illinois* v. *Wardlow*, 528 U. S. 119, 123–124 (2000) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968)). That articulation must include both facts and an officer's "rational inferences from those facts." *Brignoni-Ponce*, 422 U. S., at 880, 884. A logical "gap as to any one matter" in this analysis may be overcome by "'a strong showing'" regarding "'other indicia of reliability.'" *Florida* v. *Harris*, 568 U. S. 237, 245 (2013). But gaps may not go unfilled.

Additionally, reasonable suspicion eschews judicial common sense, *ante*, at 382, in favor of the perspectives and inferences of a reasonable officer viewing "the facts through the lens of his police experience and expertise." *Ornelas*, 517 U. S., at 699; *Cortez*, 449 U. S., at 416–418 (explaining that the facts and inferences giving rise to a stop "must be seen and weighed . . . as understood by those versed in the field of law enforcement"); *Heien* v. *North Carolina*, 574 U. S. 54, 73 (2014) (SOTOMAYOR, J., dissenting) ("[O]ur enunciation of the reasonableness inquiry and our justification for it . . .

have always turned on an officer's factual conclusions and an officer's expertise with respect to those factual conclusions"). It is the reasonable officer's assessment, not the ordinary person's—or judge's—judgment, that matters.[1]

Finally, a stop must be individualized—that is, based on "a suspicion that the particular [subject] being stopped is engaged in wrongdoing." *Cortez*, 449 U. S., at 418; *Prado Navarette* v. *California*, 572 U. S. 393, 396–397 (2014). This does not mean that the officer must know the driver's identity. But a seizure must rest on more than the "likelihood that [a] given person" or particular vehicle is engaged in wrongdoing. *Brignoni-Ponce*, 422 U. S., at 886–887. The inquiry ordinarily involves some observation or report about the target's behavior—not merely the class to which he belongs. See, *e. g.*, *Navarette*, 572 U. S., at 398, 402 (upholding vehicle stop based on an anonymous tip about driver conduct, interpreted in light of the "accumulated experience of thousands of officers"); *Sokolow*, 490 U. S., at 10 (evaluating the collective facts giving rise to suspicion that an individual was transporting narcotics instead of relying on law enforcement's simplified drug courier " 'profile' ").

B

Faithful adherence to these precepts would yield a significantly different analysis and outcome than that offered by the majority.

For starters, the majority flips the burden of proof. It permits Kansas police officers to effectuate roadside stops

[1] *Cortez* explained why this is so. Law enforcement officers, behaving akin to "jurors as factfinders," have "formulated certain commonsense conclusions about human behavior" as it relates to "the field of law enforcement." 449 U. S., at 418. A trained officer thus "draws inferences and makes deductions—inferences and deductions that might well elude an untrained person." *Ibid.*; see also *United States* v. *Arvizu*, 534 U. S. 266, 276 (2002) (crediting officer assessment of driver behavior that was based on "his specialized training and familiarity with the customs of the area's inhabitants").

whenever they lack "information negating an inference" that a vehicle's unlicensed owner is its driver. *Ante*, at 378. This has it backwards: The State shoulders the burden to supply the key inference that tethers observation to suspicion. The majority repeatedly attributes such an inference to Deputy Mehrer. *Ante*, at 381, 383, 386. But that is an after-the-fact gloss on a seven-paragraph stipulation. Nowhere in his terse submission did Deputy Mehrer indicate that he had any informed belief about the propensity of unlicensed drivers to operate motor vehicles in the area—let alone that he relied on such a belief in seizing Glover. *Ante*, at 378–379.

The consequence of the majority's approach is to absolve officers from any responsibility to investigate the identity of a driver where feasible. But that is precisely what officers ought to do—and are more than capable of doing. Of course, some circumstances may not warrant an officer approaching a car to take a closer look at its occupants. But there are countless other instances where officers have been able to ascertain the identity of a driver from a distance and make out their approximate age and gender. Indeed, our cases are rife with examples of officers who have perceived more than just basic driver demographics. See, *e. g.*, *Heien*, 574 U. S., at 57 (officer thought that motorist was "'very stiff and nervous'"); *United States* v. *Arvizu*, 534 U. S. 266, 270 (2002) (officer observed an "adult man" driving who "appeared stiff"); *United States* v. *Ross*, 456 U. S 798, 801 (1982) (officer pulled alongside car and noticed that the driver matched a description from an informant); *Brignoni-Ponce*, 422 U. S., at 875 (officers stopped a vehicle whose occupants "appeared to be of Mexican descent"). The majority underestimates officers' capabilities and instead gives them free rein to stop a vehicle involved in no suspicious activity simply because it is registered to an unlicensed person. That stop is based merely on a guess or a "hunch" about the driver's identity. *Wardlow*, 528 U. S., at 124 (internal quotation marks omitted).

With no basis in the record to presume that unlicensed drivers routinely continue driving, the majority endeavors to fill the gap with its own "common sense." *Ante*, at 382. But simply labeling an inference "common sense" does not make it so, no matter how many times the majority repeats it. Cf. *ante*, at 382, 383, 384, 385. Whether the driver of a vehicle is likely to be its unlicensed owner is "by no means obvious." *Ante*, at 387 (KAGAN, J., concurring). And like the concurrence, I "doubt" that our collective judicial common sense could answer that question, even if our Fourth Amendment jurisprudence allowed us to do so. *Ante*, at 388.

Contrary to the majority's claims, *ante*, at 380–382, 384, the reasonable-suspicion inquiry does not accommodate the average person's intuition. Rather, it permits reliance on a particular type of common sense—that of the reasonable officer, developed through her experiences in law enforcement. *Cortez*, 449 U. S., at 418. This approach acknowledges that what may be "common sense" to a layperson may not be relevant (or correct) in a law enforcement context. Indeed, this case presents the type of geographically localized inquiry where an officer's "inferences and deductions that might well elude an untrained person" would come in handy. *Ibid.*; see also *Arvizu*, 534 U. S., at 276 (prizing an officer's "specialized training and familiarity with the customs of the area's inhabitants"). By relying on judicial inferences instead, the majority promotes broad, inflexible rules that overlook regional differences.

Allowing judges to offer their own brand of common sense where the State's proffered justifications for a search come up short also shifts police work to the judiciary. Our cases—including those the majority cites—have looked to officer sensibility to establish inferences about human behavior, even though they just as easily could have relied on the inferences "made by ordinary people on a daily basis." *Ante*, at 383. See, *e. g.*, *Navarette*, 572 U. S., at 402 (pointing to "the accumulated experience of thousands of officers" to

identify certain "erratic" behaviors "as sound indicia of drunk driving"); *Wardlow*, 528 U. S., at 124 (permitting officers to account for the relevant characteristics of a location when interpreting whether flight from police is "evasive"); *Sokolow*, 490 U. S., at 9–10 (crediting the evidentiary significance of facts "as seen by a trained agent" to identify a suspicious traveler). There is no reason to depart from that practice here.

Finally, to bolster its conclusion as grounded in "common experience," the majority cites "[e]mpirical studies." *Ante*, at 381. But its use of statistics illustrates the danger of relying on large-scale data to carry out what is supposed to be a particularized exercise. Neither of the referenced reports tells us the percentage of vehicle owners with revoked licenses in Kansas who continue to drive their cars. Neither report even offers a useful denominator: One lumps drivers with suspended and revoked licenses together, while the other examines the license status of only motorists involved in fatal collisions. The figures say nothing about how the behavior of revoked drivers measures up relative to their licensed counterparts—whether one group is more likely to be involved in accidents, or whether the incidences are comparable—which would inform a trooper's inferences about driver identity.

As the concurrence recognizes, while statistics may help a defendant challenge the reasonableness of an officer's actions, they "cannot substitute for the individualized suspicion that the Fourth Amendment requires." *Ante*, at 390, n. If courts do not scrutinize officer observation or expertise in the reasonable-suspicion analysis, then seizures may be made on large-scale data alone—data that say nothing about the individual save for the class to which he belongs. That analytical approach strays far from "acting upon observed violations" of law—which this Court has said is the "foremost method of enforcing traffic and vehicle safety regulations." *Delaware* v. *Prouse*, 440 U. S. 648, 659 (1979).

The majority today has paved the road to finding reasonable suspicion based on nothing more than a demographic profile. Its logic has thus made the State's task all but automatic. That has never been the law, and it never should be.

## II

The majority's justifications for this new approach have no foundation in fact or logic. It supposes that requiring officers to point to "training materials or field experiences" would demand "'scientific certainty.'" *Ante*, at 380–381. But that is no truer in this case than in other circumstances where the reasonable-suspicion inquiry applies. Indeed, the State here was invited to stipulate to the evidence it relied on to make the stop. It could have easily described the individual or "accumulated experience" of officers in the jurisdiction. Cf. *Navarette*, 572 U. S., at 402. The State chose not to present such evidence and has not shown that it could not have done so. Accordingly, it has proved no harm to itself.[2]

In fact, it is the majority's approach that makes scant policy sense. If the State need not set forth all the information its officers considered before forming suspicion, what conceivable evidence could be used to mount an effective challenge to a vehicle stop, as the concurrence imagines? *Ante*, at 381. Who could meaningfully interrogate an officer's action when all the officer has to say is that the vehicle was registered to an unlicensed driver? How would a driver counter that evidence—by stating that they were of a different age or gender than the owner and insisting that the officer could

[2] The majority suggests that requiring the State to supply the missing link between fact and suspicion would "considerably narrow the daylight" between the reasonable-suspicion showing and that required to establish probable cause. *Ante*, at 384. But that may simply be a feature of this unique context, where the difference between a permissible and impermissible stop turns on a single fact. Given that reasonable suspicion and probable cause are not "reducible to 'precise definition or quantification,'" *Florida* v. *Harris*, 568 U. S. 237, 243 (2013), the gradation between the two is bound to vary from case to case.

have easily discerned that? And where would a defendant bring his arguments if the trial judge makes the key inference, or by the same token, fails to make an inference that "might well elude" the untrained? *Cortez*, 449 U. S., at 418.

Moreover, the majority's distinction between revocation and suspension may not hold up in other jurisdictions. For one, whether drivers with suspended licenses have "demonstrated a disregard for the law or are categorically unfit to drive" is completely unknown. And in several States, the grounds for revocation include offenses unrelated to driving fitness, such as using a license to unlawfully buy alcohol. See, *e. g.*, Ky. Rev. Stat. Ann. § 186.560 (West Cum. Supp. 2019); Mont. Code Ann. § 61–5–206 (2019); R. I. Gen. Laws § 31–11–6 (2010). In yet other jurisdictions, "revocation" is the label assigned to a temporary sanction, which may be imposed for such infractions as the failure to comply with child support payments. Okla. Stat., Tit. 47, § 6–201.1 (2011). Whether the majority's "common sense" assumptions apply outside of Kansas is thus open to challenge.

* * *

Vehicle stops "interfere with freedom of movement, are inconvenient, and consume time." *Prouse*, 440 U. S., at 657. Worse still, they "may create substantial anxiety" through an "unsettling show of authority." *Ibid.* Before subjecting motorists to this type of investigation, the State must possess articulable facts and officer inferences to form suspicion. The State below left unexplained key components of the reasonable-suspicion inquiry. In an effort to uphold the conviction, the Court destroys Fourth Amendment jurisprudence that requires individualized suspicion. I respectfully dissent.

Syllabus

# BABB *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS

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

No. 18–882. Argued January 15, 2020—Decided April 6, 2020

Petitioner Noris Babb, a clinical pharmacist at a U. S. Department of Veterans Affairs Medical Center, sued the Secretary of Veterans Affairs (hereinafter VA) for, *inter alia*, age discrimination in various adverse personnel actions. The VA moved for summary judgment, offering nondiscriminatory reasons for the challenged actions. The District Court granted the VA's motion after finding that Babb had established a prima facie case, that the VA had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude that those reasons were pretextual. On appeal, Babb contended the District Court's requirement that age be a but-for cause of a personnel action *was* inappropriate under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA). Because most federal-sector "personnel actions" affecting individuals aged 40 and older must be made "free from any discrimination based on age," 29 U. S. C. § 633a(a), Babb argued, such a personnel action is unlawful if age is a factor in the challenged decision. Thus, even if the VA's proffered reasons in her case were not pretextual, it would not necessarily follow that age discrimination played no part. The Eleventh Circuit found Babb's argument foreclosed by Circuit precedent.

*Held*: The plain meaning of § 633a(a) demands that personnel actions be untainted by any consideration of age. To obtain reinstatement, damages, or other relief related to the end result of an employment decision, a showing that a personnel action would have been different if age had not been taken into account is necessary, but if age discrimination played a lesser part in the decision, other remedies may be appropriate. Pp. 404–414.

(a) The Government argues that the ADEA's federal-sector provision imposes liability only when age is a but-for cause of an employment decision, while Babb maintains that it prohibits any adverse consideration of age in the decision-making *process*. The plain meaning of the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation. Pp. 404–408.

(1) The ADEA does not define the term "personnel action," but a statutory provision governing federal employment, 5 U. S. C. § 2302(a)(2)(A), defines it to include most employment-related

decisions—an interpretation consistent with the term's general usage. The phrase "free from" means "untainted," and "any" underscores that phrase's scope. As for "discrimination," its "normal definition" is "differential treatment." *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 174. And "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship," *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 63, thus indicating that age must be a but-for cause of the discrimination alleged. The remaining phrase—"shall be made"—denotes a duty, emphasizing the importance of avoiding the taint. Pp. 405–406.

(2) Two matters of syntax are critical here. First, "based on age" is an adjectival phrase modifying the noun "discrimination," not the phrase "personnel actions." Thus, age must be a but-for cause of discrimination but not the personnel action itself. Second, "free from any discrimination" is an adverbial phrase that modifies the verb "made" and describes how a personnel action must be "made," namely, in a way that is not tainted by differential treatment based on age. Thus, the straightforward meaning of § 633a(a)'s terms is that the statute does not require proof that an employment decision would have turned out differently if age had not been taken into account. Instead, if age is a factor in an employment decision, the statute has been violated.

The Government has no answer to this parsing of the statutory text. It makes correct points about the meaning of particular words, but draws the unwarranted conclusion that the statutory text requires something more than a federal employer's mere consideration of age in personnel decisions. The Government's only other textual argument is that the term "made" refers to a particular moment in time, *i. e.*, the moment when the final employment decision is made. That interpretation, however, does not mean that age must be a but-for cause of the ultimate outcome. Pp. 406–408.

(b) Contrary to the Government's primary argument, this interpretation is not undermined by prior cases interpreting the Fair Credit Reporting Act, 15 U. S. C. § 1681m(a), see *Safeco Ins. Co. of America*, 551 U. S. 47; the ADEA's private-sector provision, 29 U. S. C. § 623(a)(1), see *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167; and Title VII's anti-retaliation provision, 42 U. S. C. § 2000e–3(a), see *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338. The language of § 633a(a) is markedly different from the language of those statutes; thus the holdings in those cases are entirely consistent with the holding here. And the traditional rule favoring but-for causation does not change the result: § 633a(a) requires proof of but-for causation, but the object of that causation is "discrimination," not the personnel action. Pp. 408–411.

(c) It is not anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments. See

Syllabus

§ 623(a). When Congress expanded the ADEA's scope beyond private employers, it added state and local governments to the definition of employers in the private-sector provision. But it "deliberately prescribed a distinct statutory scheme applicable only to the federal sector," *Lehman* v. *Nakshian*, 453 U. S. 156, 166, eschewing the private-sector provision language. That Congress would want to hold the Federal Government to a higher standard is not unusual. See, *e. g.*, 5 U. S. C. § 2301(b)(2). Regardless, where the statute's words are unambiguous, the judicial inquiry is complete. Pp. 411–413.

(d) But-for causation is nevertheless important in determining the appropriate remedy. Plaintiffs cannot obtain compensatory damages or other forms of relief related to the end result of an employment decision without showing that age discrimination was a but-for cause of the employment outcome. This conclusion is supported by basic principles long employed by this Court, see, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 103, and traditional principles of tort and remedies law. Remedies must be tailored to the injury. Plaintiffs who show that age was a but-for cause of differential treatment in an employment decision, but not a but-for cause of the decision itself, can still seek injunctive or other forward-looking relief. Pp. 413–414.

743 Fed. Appx. 280, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined, and in which GINSBURG, J., joined as to all but footnote 3. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 414. THOMAS, J., filed a dissenting opinion, *post*, p. 415.

*Roman Martinez* argued the cause for petitioner. With him on the briefs were *Margaret A. Upshaw* and *Joseph D. Magri*.

*Solicitor General Francisco* argued the cause for respondent. With him on the brief were *Assistant Attorneys General Hunt* and *Dreiband*, *Deputy Solicitor General Wall*, *Acting Principal Deputy Assistant Attorney General Davis*, *Erica L. Ross*, *Marleigh D. Dover*, *Stephanie R. Marcus*, and *Thomas E. Chandler*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Daniel B. Kohrman*, *Laurie A. McCann*, and *William Alvarado Rivera*; and for the National Treasury Employees Union by *Gregory O'Duden*, *Julie M. Wilson*, and *Paras N. Shah*.

JUSTICE ALITO delivered the opinion of the Court.*

The federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 88 Stat. 74, 29 U. S. C. § 633a(a), provides (with just a few exceptions) that "personnel actions" affecting individuals aged 40 and older "shall be made free from any discrimination based on age." We are asked to decide whether this provision imposes liability only when age is a "but-for cause" of the personnel action in question.

We hold that § 633a(a) goes further than that. The plain meaning of the critical statutory language ("made free from any discrimination based on age") demands that personnel actions be untainted by any consideration of age. This does not mean that a plaintiff may obtain all forms of relief that are generally available for a violation of § 633a(a), including hiring, reinstatement, backpay, and compensatory damages, without showing that a personnel action would have been different if age had not been taken into account. To obtain such relief, a plaintiff must show that age was a but-for cause of the challenged employment decision. But if age discrimination played a lesser part in the decision, other remedies may be appropriate.

## I

Noris Babb, who was born in 1960, is a clinical pharmacist at the U. S. Department of Veterans Affairs Medical Center in Bay Pines, Florida. Babb brought suit in 2014 against the Secretary of Veterans Affairs (hereinafter VA), claiming that she had been subjected to age and sex discrimination, as well as retaliation for engaging in activities protected by federal anti-discrimination law. Only her age-discrimination claims are now before us.

Those claims center on the following personnel actions. First, in 2013, the VA took away Babb's "advanced scope" designation, which had made her eligible for promotion on the Federal Government's General Scale from a GS–12 to a

*JUSTICE GINSBURG joins all but footnote 3 of this opinion.

GS–13.[1] Second, during this same time period, she was denied training opportunities and was passed over for positions in the hospital's anticoagulation clinic. Third, in 2014, she was placed in a new position, and while her grade was raised to GS–13, her holiday pay was reduced. All these actions, she maintains, involved age discrimination, and in support of her claims, she alleges, among other things, that supervisors made a variety of age-related comments.

The VA moved for summary judgment and offered nondiscriminatory reasons for the challenged actions, and the District Court granted that motion. Evaluating each of Babb's claims under the burden-shifting framework outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), the court found that Babb had established a prima facie case, that the Secretary had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude that those reasons were pretextual.

Babb appealed, contending that the District Court should not have used the *McDonnell Douglas* framework because it is not suited for "mixed motives" claims. She argued that under the terms of the ADEA's federal-sector provision, a personnel action is unlawful if age is a factor in the challenged decision. As a result, she explained that even if the VA's proffered reasons were not pretextual, it would not necessarily follow that age discrimination played no part.

The Eleventh Circuit panel that heard Babb's appeal found that her argument was "foreclosed" by Circuit precedent but added that it might have agreed with her if it were "writing on a clean slate." *Babb* v. *Secretary, Dept. of Veterans Affairs*, 743 Fed. Appx. 280, 287–288 (2018) (*per curiam*) (citing *Trask* v. *Secretary, Dept. of Veterans Affairs*, 822 F. 3d 1179 (CA11 2016)).

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[1] The General Schedule (GS) is a federal pay scale that is divided into 15 numbered grades. See 5 U. S. C. § 5104. "[A]s the number of the grade increases, so do pay and responsibilities." *United States* v. *Clark*, 454 U. S. 555, 557 (1982).

We granted certiorari, 588 U. S. 920 (2019), to resolve a Circuit split over the interpretation of § 633a(a).

## II

That provision of the ADEA states in relevant part: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U. S. C. § 633a(a).

The Government interprets this provision to impose liability only when age is a but-for cause of an employment decision. According to the Government, even if age played a part in such a decision, an employee or applicant for employment cannot obtain any relief unless it is shown that the decision would have been favorable if age had not been taken into account. This interpretation, the Government contends, follows both from the meaning of the statutory text and from the "default rule" that we have recognized in other employment discrimination cases, namely, that recovery for wrongful conduct is generally permitted only if the injury would not have occurred but for that conduct. See, *e. g.*, *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 346–347 (2013).

Babb interprets the provision differently. She maintains that its language prohibits any adverse consideration of age in the decision-making *process*. Accordingly, she argues proof that age was a but-for cause of a challenged employment decision is not needed.

### A

Which interpretation is correct? To decide, we start with the text of the statute, see *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 175 (2009), and as it turns out, it is not necessary to go any further. The plain meaning of the statutory text shows that age need not be a but-for cause of an employment decision in order for there to be a violation of § 633a(a). To explain the basis for our interpretation, we will first define the important terms in the statute and then consider how they relate to each other.

1

Section 633a(a) concerns "personnel actions," and while the ADEA does not define this term, its meaning is easy to understand. The Civil Service Reform Act of 1978, which governs federal employment, broadly defines a "personnel action" to include most employment-related decisions, such as appointment, promotion, work assignment, compensation, and performance reviews. See 5 U. S. C. §2302(a)(2)(A). That interpretation is consistent with the term's meaning in general usage, and we assume that it has the same meaning under the ADEA.

Under §633a(a), personnel actions must be made "free from" discrimination. The phrase "free from" means "untainted" or "[c]lear of (something which is regarded as objectionable)." Webster's Third New International Dictionary 905 (def. 4(a)(2)) (1976); 4 Oxford English Dictionary 521 (def. 12) (1933); see also American Heritage Dictionary 524 (def. 5(a)) (1969) (defining "free" "[u]sed with *from*" as "[n]ot affected or restricted by a given condition or circumstance"); Random House Dictionary of the English Language 565 (def. 12) (1966) (defining "free" as "exempt or released from something specified that controls, restrains, burdens, etc."). Thus, under §633a(a), a personnel action must be made "untainted" by discrimination based on age, and the addition of the term "any" ("free from *any* discrimination based on age") drives the point home.[2] And as for "discrimination," we assume that it carries its "'normal definition,'" which is "'differential treatment.'" *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 174 (2005).

Under §633a(a), the type of discrimination forbidden is "discrimination based on age," and "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship."

[2] We have repeatedly explained that "'the word "any" has an expansive meaning.'" *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997)). The standard dictionary definition of "any" is "[s]ome, regardless of quantity or number." American Heritage Dictionary 59 (def. 2) (1969).

*Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 63 (2007); cf. *Comcast Corp.* v. *National Assn. of African American-Owned Media*, 589 U. S. 327, 334–335 (2020). Therefore, § 633a(a) requires that age be a but-for cause of the discrimination alleged.

What remains is the phrase "shall be made." "[S]hall be made" is a form of the verb "to make," which means "to bring into existence," "to produce," to "render," and "to cause to be or become." Random House Dictionary of the English Language, at 866. Thus, "shall be made" means "shall be produced," etc. And the imperative mood, denoting a duty, see Black's Law Dictionary 1233 (5th ed. 1979), emphasizes the importance of avoiding the taint.

2

So much for the individual terms used in § 633a(a). What really matters for present purposes is the way these terms relate to each other. Two matters of syntax are critical. First, "based on age" is an adjectival phrase that modifies the noun "discrimination." It does not modify "personnel actions." The statute does not say that "it is unlawful to take personnel actions that are based on age"; it says that "personnel actions . . . shall be made free from any discrimination based on age." § 633a(a). As a result, age must be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself.

Second, "free from any discrimination" is an adverbial phrase that modifies the verb "made." *Ibid.* Thus, "free from any discrimination" describes how a personnel action must be "made," namely, in a way that is not tainted by differential treatment based on age. If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination.

This is the straightforward meaning of the terms of § 633a(a), and it indicates that the statute does not require

proof that an employment decision would have turned out differently if age had not been taken into account.

To see what this entails in practice, consider a simple example. Suppose that a decision-maker is trying to decide whether to promote employee A, who is 35 years old, or employee B, who is 55. Under the employer's policy, candidates for promotion are first given numerical scores based on non-discriminatory factors. Candidates over the age of 40 are then docked five points, and the employee with the highest score is promoted. Based on the non-discriminatory factors, employee A (the 35-year-old) is given a score of 90, and employee B (the 55-year-old) gets a score of 85. But employee B is then docked 5 points because of age and thus ends up with a final score of 80. The decision-maker looks at the candidates' final scores and, seeing that employee A has the higher score, promotes employee A.

This decision is not "made" "free from any discrimination" because employee B was treated differently (and less favorably) than employee A (because she was docked five points and A was not). And this discrimination was "based on age" because the five points would not have been taken away were it not for employee B's age.

It is true that this difference in treatment did not affect the outcome, and therefore age was not a but-for cause of the decision to promote employee A. Employee A would have won out even if age had not been considered and employee B had not lost five points, since A's score of 90 was higher than B's initial, legitimate score of 85. But under the language of § 633a(a), this does not preclude liability.

The Government has no answer to this parsing of the statutory text. It makes two correct points: first, that "'discrimination based on age'" "requires but-for causation," and, second, that "'discrimination'" means "'"differential treatment."'" Brief for Respondent 16–17. But based on these two points, the Government draws the unwarranted conclusion that "[i]t is thus not enough for a federal employer merely to *consider* age . . . if that consideration does not

actually cause the employer to make a less favorable personnel action than it would have made for a similarly situated person who is younger." *Id.*, at 17. That conclusion does not follow from the two correct points on which it claims to be based. What follows instead is that, under § 633a(a), age must be the but-for cause of *differential treatment*, not that age must be a but-for cause of *the ultimate decision*.[3]

B

The Government's primary argument rests not on the text of § 633a(a) but on prior cases interpreting different statutes.

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[3] Beyond this, the Government's only other textual argument is that the term "made" refers to a particular moment in time, *i. e.*, the moment when the final employment decision is made. We agree, but this does not mean that age must be a but-for cause of the ultimate outcome. If, at the time when the decision is actually made, age plays a part, then the decision is not made "free from" age discrimination.

It is not clear that Babb actually disagrees with the Government on this point, although the many references in her brief to the decision-making process could be read to mean that § 633a(a) can be violated even if age played no part whatsoever when the actual decision was made. If that is what Babb wants to suggest, however, we must disagree. It is entirely natural to regard an employment decision as being "made" at the time when the outcome is actually determined and not during events leading up to that decision. See American Heritage Dictionary, at 788 (def. 10) (defining "make" as "[t]o arrive at" a particular conclusion, *i. e.*, to "*make a decision*"). And holding that § 633a(a) is violated when the consideration of age plays no role in the final decision would have startling implications.

Consider this example: A decision-maker must decide whether to promote employee A, who is under 40, or employee B, who is over 40. A subordinate recommends employee A and says that the recommendation is based in part on employee B's age. The decision-maker rebukes this subordinate for taking age into account, disregards the recommendation, and makes the decision independently. Under an interpretation that read "made" expansively to encompass a broader personnel process, § 633a(a) would be violated even though age played no role whatsoever in the ultimate decision. Indeed, there might be a violation even if the decision-maker decided to promote employee B. We are aware of no other anti-discrimination statute that imposes liability under such circumstances, and we do not think that § 633a(a) should be understood as the first.

But contrary to the Government's argument, nothing in these past decisions undermines our interpretation of § 633a(a).

1. In *Safeco Ins. Co. of America* v. *Burr*, 551 U. S., at 63, we interpreted a provision of the Fair Credit Reporting Act (FCRA) requiring that notice be provided "[i]f any person takes any *adverse action* with respect to any consumer that is *based* in whole or in part *on any information contained in a consumer [credit] report.*" 15 U. S. C. § 1681m(a) (emphasis added). This language is quite different from that of 29 U. S. C. § 633a(a).

In § 1681m(a), the phrase "based . . . on any information contained in a consumer [credit] report" modifies "adverse action," and thus the information in question must be a but-for cause of the adverse action. By contrast, in § 633a(a), "based on" does not modify "personnel actions"; it modifies "discrimination," *i. e.*, differential treatment based on age.

The Government tries to find support in *Safeco*'s discussion of FCRA's reference to an adverse action that is "based . . . *in part*" on a credit report. 15 U. S. C. § 1681m(a) (emphasis added). The *Safeco* Court observed that the phrase "in part" could be read to mean that notice had to be given "whenever the report was considered in the rate-setting process," but it rejected this reading. 551 U. S., at 63. The Government suggests that the Court reached this conclusion because it thought that Congress would have "said so expressly" if it had meant to require notice in situations where consideration of a credit report was inconsequential. Brief for Respondent 19. Accordingly, the Government argues, because § 633a(a) does not say expressly that consideration of age is unlawful, we should conclude that mere consideration is insufficient to trigger liability. See *id.*, at 19–20.

This argument fails for two reasons. First, as explained above, the language of § 633a(a) *does* expressly impose liability if age discrimination plays a part in a federal employment decision. Second, *Safeco* did not invoke the sort of super-plain-statement rule that the Government now attributes to

it. Instead, the *Safeco* Court rejected the argument on other grounds, including its assessment of the particular statutory scheme at issue. See 551 U. S., at 63–64. That reasoning obviously has no application here.

2. In *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, we interpreted the private-sector provision of the ADEA, 29 U. S. C. § 623(a)(1), and held that it requires a plaintiff to prove that "age was the 'but-for' cause of the employer's adverse action." 557 U. S., at 177. But as we previously recognized, the ADEA's private- and public-sector provisions are "couched in very different terms." *Gómez-Pérez* v. *Potter*, 553 U. S. 474, 488 (2008).

Section 623(a)(1) makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Thus, the but-for causal language in § 623(a)(1)—"because of such individual's age"—is an adverbial phrase modifying the verbs ("to fail or refuse to hire," etc.) that specify the conduct that the provision regulates. For this reason, the syntax of § 623(a)(1) is critically different from that of § 633a(a), where, as noted, the but-for language modifies the noun "discrimination." This is important because all the verbs in § 623(a)(1)—failing or refusing to hire, discharging, or otherwise discriminating with respect to "compensation, terms, conditions, or privileges of employment"—refer to end results.[4] By contrast, the provision in our case, § 633a(a), prohibits any age discrimination in the "mak[ing]" of a personnel decision, not just with respect to end results.

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[4] Moreover, even if "discriminating with respect to compensation, terms, conditions, or privileges of employment" could be read more broadly to encompass things that occur before a final decision is made, the *ejusdem generis* canon would counsel a court to read that final phrase to refer—like the prior terms—to the final decision. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 163, and n. 19 (2012).

3. Finally, in *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, we interpreted Title VII's anti-retaliation provision, 42 U. S. C. § 2000e–3(a), as requiring retaliation to be a but-for cause of the end result of the employment decision. The Court saw no "meaningful textual difference between the text [of that provision] and the one in *Gross*," 570 U. S., at 352, and the Court found support for its interpretation in the rule that recovery for an intentional tort generally requires proof "'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct," *id.*, at 346–347 (quoting Restatement of Torts § 431, Comment *a*, pp. 1159–1160 (1934)).

That reasoning has no application in the present case. The wording of § 633a(a)—which refers expressly to the "mak[ing]" of personnel actions in a way that is "free from any discrimination based on age"—is markedly different from the language of the statutes at issue in *Gross* and *Nassar*, and the traditional rule favoring but-for causation does not dictate a contrary result. Section 633a(a) requires proof of but-for causation, but the object of that causation is "discrimination," *i. e.*, differential treatment, not the personnel action itself.

For these reasons, *Safeco*, *Gross*, and *Nassar* are entirely consistent with our holding in this case.

C

We are not persuaded by the argument that it is anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments. That is what the statutory language dictates, and if Congress had wanted to impose the same standard on all employers, it could have easily done so.

As first enacted, the ADEA "applied only to actions against private employers." *Lehman* v. *Nakshian*, 453 U. S. 156, 166 (1981). In 1974, "Congress expanded the scope of [the] ADEA" to reach both state and local governments and

the Federal Government. *Ibid.* To cover state and local governments, Congress simply added them to the definition of an "employer" in the ADEA's private-sector provision, see 29 U. S. C. § 630(b), and Congress could have easily done the same for the Federal Government. Indeed, the first proposal for expansion of the ADEA to government entities did precisely that. *Lehman*, 453 U. S., at 166, n. 14.

But Congress did not choose this route. Instead, it "deliberately prescribed a distinct statutory scheme applicable only to the federal sector," *id.*, at 166, and in doing so, it eschewed the language used in the private-sector provision, § 623(a). See *Gómez-Pérez*, 553 U. S., at 488. We generally ascribe significance to such a decision. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'").

That Congress would want to hold the Federal Government to a higher standard than state and private employers is not unusual. See Supp. Letter Brief for Respondent 1 ("The federal government has long adhered to anti-discrimination policies that are more expansive than those required by . . . the ADEA"); *e. g.*, Exec. Order No. 11478, § 1, 3 CFR 446 (1969) ("It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment . . . and to promote the full realization of equal employment opportunity through a continuing affirmative program"); Exec. Order No. 12106, § 1–102, 3 CFR 263 (1978) (amending Exec. Order No. 11478 to cover discrimination on the basis of age). And several years after adding § 633a(a) to the ADEA, Congress amended the civil service laws to prescribe similar standards. See 5 U. S. C. § 2301(b)(2) ("Federal personnel management should be implemented consistent with the . . . merit system princip[e that a]ll employees and applicants for employment should receive fair and equitable treatment in

all aspects of personnel management without regard to . . . age").

In any event, "where, as here, the words of [a] statute are unambiguous, the '"judicial inquiry is complete."'" *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 98 (2003) (quoting *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992)).

D

While Babb can establish that the VA violated § 633a(a) without proving that age was a but-for cause of the VA's personnel actions, she acknowledges—and we agree—that but-for causation is important in determining the appropriate remedy. It is bedrock law that "requested relief" must "redress the alleged injury." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 103 (1998). Thus, § 633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome.

We have long employed these basic principles. In *Texas* v. *Lesage*, 528 U. S. 18, 21–22 (1999) (*per curiam*), we applied this rule to a plaintiff who sought recovery under Rev. Stat. § 1979, 42 U. S. C. § 1983, for an alleged violation of the Equal Protection Clause. We explained: "[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting [damages] relief." 528 U. S., at 21. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285 (1977) (rejecting rule that "would require reinstatement . . . even if the same decision would have been reached had the incident not occurred").

Our conclusion is also supported by traditional principles of tort and remedies law. "Remedies generally seek to place the victim of a legal wrong . . . in the position that person

would have occupied if the wrong had not occurred." R. Weaver, E. Shoben, & M. Kelly, Principles of Remedies Law 5 (3d ed. 2017). Thus, "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Restatement (Third) of Torts § 29, p. 493 (2005). Remedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination. But this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result.

Although unable to obtain such relief, plaintiffs are not without a remedy if they show that age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself. In that situation, plaintiffs can seek injunctive or other forward-looking relief. Determining what relief, if any, is appropriate in the present case is a matter for the District Court to decide in the first instance if Babb succeeds in showing that § 633a(a) was violated.

* * *

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

*It is so ordered.*

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

I join the majority opinion because I agree that 29 U. S. C. § 633a imposes liability even when age is not a "'but-for cause'" of a personnel action. *Ante,* at 402. I write separately to make two observations.

First, the Court does not foreclose § 633a claims arising from discriminatory processes. Cf. *Comcast Corp.* v. *National Assn. of African American-Owned Media*, 589 U. S. 327, 342–344 (2020) (GINSBURG, J., concurring in part and concurring in judgment). If, for example, an employer

hires a 50-year-old person who passed a computer-aptitude test administered only to applicants above 40, clearly a question could arise as to whether the hiring decision was "made free from" differential treatment.

Second, this same example may suggest that § 633a permits damages remedies, even when the Government engages in nondispositive "age discrimination in the 'mak[ing]' of a personnel decision." *Ante*, at 410. If an applicant incurs costs to prepare for the discriminatorily administered aptitude test, a damages award compensating for such out-of-pocket expenses could restore the applicant to the "position tha[t] he or she would have enjoyed absent discrimination." *Ante*, at 414.

JUSTICE THOMAS, dissenting.

Until now, the rule for pleading a claim under a federal antidiscrimination statute was clear: A plaintiff had to plausibly allege that discrimination was the but-for cause of an adverse action, unless the statute's text unequivocally replaced that standard with a different one. Today, however, the Court departs from this rule, concluding that the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA) imposes liability if an agency's personnel actions are at all tainted by considerations of age. See *ante*, at 402. This rule is so broad that a plaintiff could bring a cause of action even if he is ultimately promoted or hired over a younger applicant. This novel "any consideration" standard does serious damage to our interpretation of antidiscrimination statutes and disrupts the settled expectations of federal employers and employees. I therefore respectfully dissent.

## I

### A

In my view, the default rule of but-for causation applies here because it is not clearly displaced by the text of the ADEA's federal-sector provision. Though the Court engages at length with the provision's text, it barely acknowl-

edges our default rule, which undergirds our antidiscrimination jurisprudence. Because the interpretation of an antidiscrimination statute must be assessed against the backdrop of this default rule, I begin by describing the rule in detail.

We have explained that "[c]ausation in fact—*i. e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim," including claims of discrimination. *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 346 (2013) (quoting various provisions of the Restatement of Torts (1934)). "In the usual course, this standard requires the plaintiff to show that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." 570 U. S., at 346–347 (internal quotation marks omitted). But-for causation is "the background against which Congress legislate[s]," and it is "the default rul[e Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.*, at 347 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984)). We have recognized as much when interpreting 42 U. S. C. § 1981's prohibition against racial discrimination in contracting, *Comcast Corp.* v. *National Assn. of African American-Owned Media*, 589 U. S. 327 (2020). Title VII's retaliation provision, *Nassar*, 570 U. S. 338, and the private-sector provision of the ADEA, *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167 (2009).

Given this established backdrop, the question becomes whether the federal-sector provision of the ADEA contains sufficiently clear language to overcome the default rule. The provision states: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U. S. C. § 633a(a).

I agree with the Court that discrimination means differential treatment, that "based on" connotes a but-for relation-

ship, and that "to make" typically means to produce or to become. *Ante*, at 406. But I disagree with the Court's overall interpretation of how these terms fit together. Specifically, the Court believes that "'based on age'" modifies only "'discrimination,'" not "'personnel actions.'" *Ibid.* From this, the Court concludes that the plain meaning of the text "demands that personnel actions be untainted by any consideration of age." *Ante*, at 402.

In my view, however, the provision is also susceptible of the Government's interpretation, *i. e.*, that the entire phrase "discrimination based on age" modifies "personnel actions." Under this reading, as the Government explains, the provision "prohibits agencies from engaging in 'discrimination *based on* age' in the making of personnel actions." Brief for Respondent 16. Because the only thing being "made" in the statute is a "personnel action," it is entirely reasonable to conclude that age must be the but-for cause of that personnel action.

At most, the substantive mandate against discrimination in § 633a(a) is ambiguous. And it goes without saying that an ambiguous provision does not contain the clear language necessary to displace the default rule. Accordingly, I would hold that the default rule of but-for causation applies here.

## B

The Court attempts to downplay the sweeping nature of its novel "any consideration" rule by discussing the limited remedies available under that rule. Specifically, the Court declares that a plaintiff can obtain compensatory damages, backpay, and reinstatement only if he proves that age was a but-for cause of an adverse personnel action. Otherwise, he can obtain only injunctive or prospective relief. See *ante*, at 413–414.

If the text of the ADEA contained this remedial scheme, it would support the Court's conclusion regarding causation. But the Court does not cite any remedial statutory provision.

Nor can it, as one does not exist. The Court also fails to cite any authority suggesting that its remedial scheme existed, at common law or otherwise, in 1974 when Congress added the federal-sector provision to the ADEA. § 28(b)(2), 88 Stat. 74–75.

Instead, the Court principally relies on *Texas* v. *Lesage*, 528 U. S. 18 (1999) (*per curiam*), which applied *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). See *Lesage*, 528 U. S., at 20–22. But *Mt. Healthy* and, by extension, *Lesage* do not assist the Court. In *Mt. Healthy*, the Court crafted, for the first time, a remedial scheme for constitutional claims brought under 42 U. S. C. § 1983. 429 U. S., at 285–287. Significantly, that decision postdates enactment of the federal-sector provision by three years. And *Mt. Healthy* did not import a remedial scheme from a previously existing statute or common-law rule. Rather, the Court cited other cases in which it had similarly fashioned a novel causation standard for constitutional claims—none of which concerned remedies—as "instructive in formulating the test to be applied." *Id.*, at 286–287. It is incongruous to suggest that Congress could have intended to incorporate a remedial scheme that appears not to have existed at the time the statute was passed. Moreover, *Mt. Healthy* concerned a constitutional injury, and the Court was tasked with creating a remedy for that injury in the face of § 1983's silence. The Court fails to provide any explanation as to why it is appropriate to rely on judicially fashioned remedies for constitutional injuries in this purely statutory context.

In sum, the Court implausibly concludes that, in the federal-sector provision of the ADEA, Congress created a novel "any consideration" causation standard but remained completely silent as to what remedies were available under that new rule. Just as implausibly, the Court assumes from this congressional silence that Congress intended for judges to craft a remedial scheme in which the available relief would vary depending on the inflicted injury, using an as-yet unknown scheme.

I would not follow such an unusual course. We have stated in the past that we must "read [the ADEA] the way Congress wrote it." *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U. S. 84, 102 (2008). The federal-sector provision contains no clear language displacing the default rule, and Congress has demonstrated that it knows how to do so when it wishes. See 42 U. S. C. § 2000e–2(m) (providing that an employer is liable if an employee establishes that a protected characteristic was a motivating factor in an employment action); § 2000e–5(g)(2)(B) (limiting the remedies available to plaintiffs who establish motivating factor liability).[1] Rather than supplementing a novel rule with a judicially crafted remedy, I would infer from the textual silence that Congress wrote the ADEA to conform to the default rule of but-for causation.

## II

Perhaps the most striking aspect of the Court's analysis is its failure to grapple with the sheer unworkability of its rule. The Court contends that a plaintiff may successfully bring a cause of action if age "taint[s]" the making of a personnel action, even if the agency would have reached the same outcome absent any age-based discrimination. *Ante*, at 406–407. Because § 633a(a)'s language also appears in the federal-sector provision of Title VII, 42 U. S. C. § 2000e–16(a), the Court's rule presumably applies to claims alleging discrimination based on sex, race, religion, color, and national origin as well.

The Court's rule might have some purchase if, as Babb contends, the Federal Government purposely set up a purely merit-based system for its personnel actions. But as anyone with knowledge of the Federal Government's hiring practices knows, this is hardly the case. Federal hiring is rid-

[1] Courts have followed similar reasoning when determining the standard of causation under the Americans with Disabilities Act. See, *e. g.*, *Natofsky* v. *New York*, 921 F. 3d 337, 346–348 (CA2 2019); *Gentry* v. *East West Partners Club Mgmt. Co.*, 816 F. 3d 228, 233–236 (CA4 2016); *Serwatka* v. *Rockwell Automation, Inc.*, 591 F. 3d 957, 961–964 (CA7 2010).

dled with exceptions and affirmative action programs, which by their very nature are not singularly focused on merit.

A few examples suffice to demonstrate this point. The Veterans Preference Act of 1944 entitles certain veterans, their spouses, and their parents to preferences in hiring and in retention during reductions in force. 5 U. S. C. §§ 2108(3), 3502, 3309; 5 CFR § 211.102 (2019). Affirmative action exists for people with disabilities, both in competitive and noncompetitive employment. See 29 U. S. C. § 791; 5 CFR § 213.3102(u); 29 CFR § 1614.203(d) (2019). The Federal Equal Opportunity Recruitment Program requires agencies to implement recruitment plans for women and certain underrepresented minorities. 5 U. S. C. § 7201; 5 CFR § 720.205. And Exec. Order No. 13171, § 2(a), 3 CFR 299 (2000), requires federal agencies to "provide a plan for recruiting Hispanics that creates a fully diverse workforce for the agency in the 21st century." Whatever the wisdom of these policies, they are not strictly merit-based hiring.

The Court's new rule is irreconcilable with these various programs because affirmative action initiatives always taint personnel actions with consideration of a protected characteristic. Consider Exec. Order No. 13583, § 1, 3 CFR 267 (2011), which directs agencies to "develop and implement a more comprehensive, integrated, and strategic focus on diversity and inclusion as a key component of their human resources strategies." To provide just one example of how agencies are implementing this requirement, Customs and Border Protection's plan commits the agency to "[i]ncreas[ing the] percentage of applicants from underrepresented groups for internships and fellowships," "[c]reat[ing] a targeted outreach campaign to underrepresented groups for career development programs at all levels," "[e]stablish[ing] and maintain[ing] strategic partnerships with diverse professional and affinity organizations," "[a]nalyz[ing] demographic data for new hires and employee separations to identify and assess potential barriers to workforce diversity," and "[d]evel-

op[ing] a diversity recruitment performance dashboard which provides relevant statistics and related performance metrics to evaluate progress towards achievement of recruitment goals." U. S. Customs and Border Protection, Privacy and Diversity Office, Diversity and Inclusion: Strategic Plan 2016–2020, pp. 11–15 (2015). Programs such as these intentionally inject race, sex, and national origin into agencies' hiring and promotion decisions at the express direction of the President or Congress.

A but-for (or even a motivating-factor[2]) standard of causation could coexist relatively easily with these affirmative action programs, as it would be difficult for a plaintiff to plausibly plead facts sufficient to establish the requisite causation. The Court's rule, by contrast, raises the possibility that agencies will be faced with a flood of investigations by the EEOC or litigation from dissatisfied federal employees. So long as those employees can show that their employer's decision to hire a particular job applicant was "tainted" because that applicant benefited in some way from an affirmative action program, their complaints to enjoin these programs can survive at least the pleadings stage.[3]

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[2] Many Courts of Appeals apply the motivating-factor standard to federal-sector Title VII claims. See, *e. g.*, *Ponce* v. *Billington*, 679 F. 3d 840, 844 (CADC 2012); *Makky* v. *Chertoff*, 541 F. 3d 205, 213–214 (CA3 2008). Even assuming this is a correct interpretation, see 42 U. S. C. § 2000e–16(d) (incorporating by reference the private-sector motivating-factor provisions), the Court's "any consideration" rule imposes an even lower bar. No party submitted briefing on the criteria that courts or the Equal Employment Opportunity Commission (EEOC) use to establish a motivating factor, but the cases from which this standard was derived indicate that it mirrored the tort concept of substantial cause. See, *e. g.*, *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 249 (1989) (plurality opinion); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977).

[3] On this score, it is worth mentioning that even the EEOC has not adopted the Court's low bar but instead employs a motivating-factor standard. See, *e. g.*, *Brenton W.* v. *Chao*, 2017 WL 2953878, *9 (June 29, 2017); *Arroyo* v. *Shinseki*, 2012 WL 2952078, *4 (July 11, 2012).

* * *

Today's decision is inconsistent with the default rule underlying our interpretation of antidiscrimination statutes and our precedents, which have consistently applied that rule. Perhaps just as important, the Court's holding unnecessarily risks imposing hardship on those tasked with managing thousands of employees within our numerous federal agencies. I respectfully dissent.

Per Curiam

# REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* DEMOCRATIC NATIONAL COMMITTEE ET AL.

ON APPLICATION FOR STAY

No. 19A1016. Decided April 6, 2020

Wisconsin decided to proceed with primary elections scheduled for April 7, 2020, during the COVID–19 pandemic. In federal litigation challenging voting procedures, a Federal District Court extended the deadline for municipal clerks to receive absentee ballots from April 7, 2020, to April 13, 2020. Then, five days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day be counted so long as they are received by April 13. Plaintiffs, in their preliminary injunction motions, did not ask the District Court for this relief.

*Held*: The District Court's order granting a preliminary injunction is stayed to the extent it requires the State to count absentee ballots postmarked after April 7, 2020. The District Court, by enjoining enforcement of a state statutory requirement that ballots for primary election be mailed by voters and postmarked by election day, afforded relief not sought in preliminary injunction motions, and violated the principle that lower federal courts should ordinarily not alter election rules on the eve of an election. See, *e. g.*, *Purcell* v. *Gonzalez*, 549 U. S. 1 (*per curiam*).

Preliminary injunction stayed in part.

PER CURIAM.

The application for stay presented to JUSTICE KAVANAUGH and by him referred to the Court is granted. The District Court's order granting a preliminary injunction is stayed to the extent it requires the State to count absentee ballots postmarked after April 7, 2020.

Wisconsin has decided to proceed with the elections scheduled for Tuesday, April 7. The wisdom of that decision is not the question before the Court. The question before the Court is a narrow, technical question about the absentee ballot process. In this Court, all agree that the deadline for the municipal clerks to receive absentee ballots has been extended from Tuesday, April 7, to Monday, April 13. That extension, which is not challenged in this Court, has afforded

Wisconsin voters several extra days in which to mail their absentee ballots. The sole question before the Court is whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13. Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots mailed and postmarked after election day, April 7, to be counted. That is a critical point in the case. Nonetheless, five days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited but that the plaintiffs themselves did not see the need to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell* v. *Gonzalez*, 549 U. S. 1 (2006) (*per curiam*); *Frank* v. *Walker*, 574 U. S. 929 (2014); *Veasey* v. *Perry*, 574 U. S. 951 (2014).

The unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day is perhaps best demonstrated by the fact that the District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day.

In doing so, the District Court in essence enjoined nonparties to this lawsuit. It is highly questionable, moreover, that this attempt to suppress disclosure of the election results for six days after election day would work. And if any information were released during that time, that would gravely affect the integrity of the election process. The District Court's order suppressing disclosure of election results showcases the unusual nature of the District Court's order allowing absentee ballots mailed and postmarked after election day to be counted. And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.

The dissent is quite wrong on several points. First, the dissent entirely disregards the critical point that the plaintiffs themselves did not ask for this additional relief in their preliminary injunction motions. Second, the dissent contends that this Court should not intervene at this late date. The Court would prefer not to do so, but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error. Third, the dissent refers to voters who have not yet received their absentee ballots. But even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots (which was this past Friday in this case) will usually receive their ballots on the day before or day of the election, which in this case would be today or tomorrow. The plaintiffs put forward no probative evidence in the District Court that these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots. In that regard, it bears mention that absentee voting has been underway for many weeks, and 1.2 million Wisconsin voters have requested and have been sent their absentee ballots, which is about five times the number of absentee ballots requested in the 2016 spring election. Fourth, the dissent's

rhetoric is entirely misplaced and completely overlooks the fact that the deadline for receiving ballots was already extended to accommodate Wisconsin voters, from April 7 to April 13. Again, that extension has the effect of extending the date for a voter to mail the ballot from, in effect, Saturday, April 4, to Tuesday, April 7. That extension was designed to ensure that the voters of Wisconsin can cast their ballots and have their votes count. That is the relief that the plaintiffs actually requested in their preliminary injunction motions. The District Court on its own ordered yet an additional extension, which would allow voters to mail their ballots after election day, which is extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election.

Therefore, subject to any further alterations that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (1) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4 p.m., or (2) hand delivered as provided under state law by April 7, 2020, at 8 p.m.

The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.

The stay is granted pending final disposition of the appeal by the United States Court of Appeals for the Seventh Circuit and the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

*It is so ordered.*

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

The District Court, acting in view of the dramatically evolving COVID–19 pandemic, entered a preliminary injunction to safeguard the availability of absentee voting in Wisconsin's spring election. This Court now intervenes at the eleventh hour to prevent voters who have timely requested absentee ballots from casting their votes. I would not disturb the District Court's disposition, which the Seventh Circuit allowed to stand.

## I

### A

Wisconsin's spring election is scheduled for tomorrow, Tuesday, April 7, 2020. At issue are the presidential primaries, a seat on the Wisconsin Supreme Court, three seats on the Wisconsin Court of Appeals, over 100 other judgeships, over 500 school board seats, and several thousand other positions. *Democratic National Committee* v. *Bostelmann*, 451 F. Supp. 3d 952, 959–960 (WD Wis. 2020).

In the weeks leading up to the election, the COVID–19 pandemic has become a "public health crisis." *Id.*, at 958. As of April 2, Wisconsin had 1,550 confirmed cases of COVID–19 and 24 deaths attributable to the disease, "with evidence of increasing community spread." *Id.*, at 960. On March 24, the Governor ordered Wisconsinites to stay at home until April 24 to slow the spread of the disease. *Ibid.*

Because gathering at the polling place now poses dire health risks, an unprecedented number of Wisconsin voters—at the encouragement of public officials—have turned to voting absentee. *Id.*, at 960–961. About one million more voters have requested absentee ballots in this election than in 2016. *Ibid.* Accommodating the

surge of absentee-ballot requests has heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters. *Id.*, at 961–962.

B

Several weeks ago, plaintiffs—comprising individual Wisconsin voters, community organizations, and the state and national Democratic parties—filed three lawsuits against members of the Wisconsin Elections Commission in the United States District Court for the Western District of Wisconsin.[1] The District Court consolidated the suits on March 28. The plaintiffs sought several forms of relief, all aimed at easing the effects of the COVID–19 pandemic on the upcoming election.

After holding an evidentiary hearing, the District Court issued a preliminary injunction on April 2. As relevant here, the court concluded that the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizens' right to vote. See *Burdick* v. *Takushi*, 504 U. S. 428, 434 (1992); *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983). To alleviate that burden, the court entered a twofold remedy. First, the District Court extended the deadline for voters to request absentee ballots from April 2 to April 3. Second, the District Court extended the deadline for election officials to receive completed absentee ballots. Previously, Wisconsin law required that absentee ballots be received by 8 p.m. on election day, April 7; under the preliminary injunction, the ballots would be accepted until 4 p.m. on April 13, regardless of the postmark date. The District Court also enjoined members of the Elections Commission and election inspectors from releasing any report of polling results before the new absentee-voting deadline, April 13.

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[1] The state and national Republican parties intervened as defendants. The District Court denied intervention by the state legislature, which the Seventh Circuit later allowed.

Although the members of the Wisconsin Elections Commission did not challenge the preliminary injunction, the intervening defendants applied to the Seventh Circuit for a partial stay. Of the twofold remedy just described, the stay applicants challenged only the second aspect, the extension of the deadline for returning absentee ballots. On April 3, the Seventh Circuit declined to modify the absentee-ballot deadline. The same applicants then sought a partial stay in this Court, which the Court today grants.

## II

### A

The Court's order requires absentee voters to postmark their ballots by election day, April 7—*i. e.*, tomorrow—even if they did not receive their ballots by that date. That is a novel requirement. Recall that absentee ballots were originally due back to election officials on April 7, which the District Court extended to April 13. Neither of those deadlines carried a postmark-by requirement.

While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received. Yet tens of thousands of voters who timely requested ballots are unlikely to receive them by April 7, the Court's postmark deadline. Rising concern about the COVID–19 pandemic has caused a late surge in absentee-ballot requests. 451 F. Supp. 3d, at 961–962. The Court's suggestion that the current situation is not "substantially different" from "an ordinary election" boggles the mind. *Ante*, at 425. Some 150,000 requests for absentee ballots have been processed since Thursday, state records indicate.[2] The surge in absentee-

[2] See Wisconsin Elections Commission, Absentee Ballot Report, Apr. 2, 2020, https://elections.wi.gov/node/6806; Wisconsin Elections Commission, Absentee Ballot Report, Apr. 3, 2020, https://elections.wi.gov/node/6808; Wisconsin Elections Commission, Absentee Ballot Report, Apr. 4, 2020,

ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots. 451 F. Supp. 3d, at 957, 961–962, 967, 976–977. As of Sunday morning, 12,000 ballots reportedly had not yet been mailed out.[3] It takes days for a mailed ballot to reach its recipient—the postal service recommends budgeting a week—even without accounting for pandemic-induced mail delays. *Id.*, at 962. It is therefore likely that ballots mailed in recent days will not reach voters by tomorrow; for ballots not yet mailed, late arrival is all but certain.[4] Under the District Court's order, an absentee voter who receives a ballot after tomorrow could still have voted, as long as she delivered it to election officials by April 13. Now, under this Court's order, tens of thousands of absentee voters, unlikely to receive their ballots in time to cast them, will be left quite literally without a vote.

This Court's intervention is thus ill advised, especially so at this late hour. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Election officials have spent the past few days establishing procedures and informing voters in accordance with the District Court's deadline. For this Court

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https://elections.wi.gov/node/6814; Wisconsin Elections Commission, Absentee Ballot Report, Apr. 5, 2020, https://elections.wi.gov/node/6815.

[3] See Wisconsin Elections Commission, Absentee Ballot Report, Apr. 5, 2020, https://elections.wi.gov/index.php/node/6815.

[4] See, *e. g.*, Tr. 18–19 (Apr. 1, 2020) (testimony that mail delivery "can take up to a week" or longer, threatening "the opportunity for the voter to receive [the absentee] ballot by mail"); *id.*, at 36 (testimony that the "transaction time from the time the clerk puts [an absentee ballot] in the mail to the voter receiving it could take up to a week"); *id.*, at 40 (testimony agreeing that "there will be some people who request . . . [an] absentee ballot [on April 2] who will not be receiving it in time to put it in the mail by April 7th"); Brief for City of Green Bay as *Amicus Curiae* in No. 3:20–cv–00249 (WD Wis.), p. 5 ("[D]elays at the post office are . . . affecting the speed with which voters receive their ballots . . . .").

to upend the process—a day before the April 7 postmark deadline—is sure to confound election officials and voters.

B

What concerns could justify consequences so grave? The Court's order first suggests a problem of forfeiture, noting that the plaintiffs' written preliminary-injunction motions did not ask that ballots postmarked after April 7 be counted. But unheeded by the Court, although initially silent, the plaintiffs specifically requested that remedy at the preliminary-injunction hearing in view of the ever-increasing demand for absentee ballots. See Tr. 102–103 (Apr. 1, 2020).

Second, the Court's order cites *Purcell*, apparently skeptical of the District Court's intervention shortly before an election. Nevermind that the District Court was reacting to a grave, rapidly developing public health crisis. If proximity to the election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate.

Third, the Court notes that the District Court's order allowed absentee voters to cast ballots after election day. If a voter already in line by the poll's closing time can still vote, why should Wisconsin's absentee voters, already in line to receive ballots, be denied the franchise? According to the stay applicants, election-distorting gamesmanship might occur if ballots could be cast after initial results are published. But obviating that harm, the District Court enjoined the publication of election results before April 13, the deadline for returning absentee ballots, and the Wisconsin Elections Commission directed election officials not to publish results before that date.[5]

[5] Memorandum from M. Wolfe, Administrator of the Wisconsin Elections Commission, to Wisconsin Municipal Clerks et al. (Apr. 3, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Clerk%20comm%20re.%20court%20decisions%204.3.pdf.

The concerns advanced by the Court and the applicants pale in comparison to the risk that tens of thousands of voters will be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern.

* * *

The majority of this Court declares that this case presents a "narrow, technical question." *Ante*, at 423. That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. Under the District Court's order, they would be able to do so. Even if they receive their absentee ballot in the days immediately following election day, they could return it. With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation.

## Reporter's Note

Orders commencing with February 26, 2020, begin with page 1248. The preceding orders in 589 U. S., from October 7, 2019, through February 24, 2020, were reported in Part 1, at 901–1247. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

## February 26, 2020

*Dismissal Under Rule 46*

No. 18–217. Mathena, Warden *v.* Malvo. C. A. 4th Cir. [Certiorari granted, 586 U. S. 1221.*] Writ of certiorari dismissed under this Court's Rule 46.1.

## March 2, 2020

*Certiorari Granted—Vacated and Remanded*

No. 18–309. Swartz *v.* Rodriguez, Individually and as the Surviving Mother and Personal Representative of

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*[Reporter's Note: Argued October 16, 2019. *Toby J. Heytens*, Solicitor General of Virginia, argued the cause for petitioner. With him on the briefs were *Mark R. Herring*, Attorney General, *Victoria N. Pearson*, Deputy Attorney General, *Matthew R. McGuire*, Principal Deputy Solicitor General, *Donald E. Jeffrey III*, Senior Assistant Attorney General, and *Michelle S. Kallen*, Deputy Solicitor General.

*Eric J. Feigin* argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Frederick Liu*, and *Robert A. Parker*.

*Danielle Spinelli* argued the cause for respondent. With her on the brief were *Catherine M. A. Carroll*, *Kevin M. Lamb*, *Janet R. Carter*, and *Craig S. Cooley*.

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, *Kian J. Hudson* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Jeff Landry* of Louisiana, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean Reyes* of Utah, and *Bridget Hill* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; for the Maryland Crime Victims' Resource Center, Inc., by *Russell P. Butler* and *Victor D. Stone*; and for Jonathan F. Mitchell et al. by *Taylor A. R. Meehan*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Judy Perry Martinez*, *Christopher M. Murphy*, and *Lawrence A. Wojcik*; for Current and Former Prosecutors et al. by *Mary B. McCord* and *Annie L. Owens*; for the Juvenile Law Center et al. by *Marsha L. Levick*, *Riya Saha Shah*, *Heather Renwick*, and *Rebecca Turner*; for David I. Bruck et al. by *Ashley C. Parrish*; for Erwin Chemerinsky et al. by *John Mills*, *Larry Yackle*, *David D. Cole*, *Deborah A. Jeon*, and *Sonia Kumar*; for Isa Nichols et al. by *Angela C. Vigil*; and for Former W. Va. Delegate John Ellem et al. by *Mr. Ellem*, *pro se*, *V. Lowry Snow*, *James L. Dodd*, and *Suzanne S. La Pierre*.]

J. A. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hernández* v. *Mesa*, 589 U. S. 93 (2020). Reported below: 899 F. 3d 719.

No. 18–9164. MURO *v.* UNITED STATES. C. A. 5th 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 *Holguin-Hernandez* v. *United States*, 589 U. S. 169 (2020). Reported below: 765 Fed. Appx. 57.

No. 19–5601. HICKS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 770 Fed. Appx. 215; and

No. 19–5789. MCMILLAN *v.* UNITED STATES. C. A. 3d Cir. Reported below: 774 Fed. Appx. 768. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rehaif* v. *United States*, 588 U. S. 225 (2019).

*Certiorari Granted—Vacated*

No. 19–675. BANK OF AMERICA CORP. ET AL. *v.* CITY OF MIAMI, FLORIDA; and

No. 19–688. WELLS FARGO & CO. ET AL. *v.* CITY OF MIAMI, FLORIDA. C. A. 11th Cir. Certiorari granted and judgment of the Court of Appeals vacated as moot. See *United States* v. *Munsingwear*, 340 U. S. 36, 39–40 (1950). Reported below: 923 F. 3d 1260.

*Certiorari Dismissed*

No. 19–7122. RAGHUBIR *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7186. YOUNG *v.* UNITED STATES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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. 19–7189. Moore *v.* United States. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 772 Fed. Appx. 235.

*Miscellaneous Orders*

No. 19A748. Goad *v.* Steel, Judge, et al. 274th Jud. Dist. Ct. Tex., Comal County. Application for stay, addressed to Justice Ginsburg and referred to the Court, denied.

No. 19M103. Elam et vir *v.* Aurora Loan Services, LLC, et al.; and

No. 19M106. Torres *v.* Continental Apartments et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 19M104. Hairston *v.* Department of Veterans Affairs. Motion for leave to proceed as a veteran denied.

No. 19M105. Miller *v.* United States. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 18–540. Rutledge, Attorney General of Arkansas *v.* Pharmaceutical Care Management Assn. C. A. 8th Cir. [Certiorari granted, 589 U. S. 1127.] Motion of petitioner for leave to file volume II of the joint appendix under seal granted.

No. 18–956. Google LLC *v.* Oracle America, Inc. C. A. Fed. Cir. [Certiorari granted, 589 U. S. 1066.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–465. Chiafalo et al. *v.* Washington. Sup. Ct. Wash.; and

No. 19–518. Colorado Department of State *v.* Baca et al. C. A. 10th Cir. [Certiorari granted, 589 U. S. 1165.] Motion of petitioners in No. 19–465 to dispense with printing joint appendix granted.

No. 19–7073. Thomas *v.* Kenmark Ventures, LLC. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 23, 2020, 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. 19–7564. IN RE SEIBERT; and
No. 19–7643. IN RE LEONARD. Petitions for writs of habeas corpus denied.

No. 19–7143. IN RE MCDONALD. Petition for writ of mandamus denied.

No. 19–7435. IN RE BROOKS. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 19–547. UNITED STATES FISH AND WILDLIFE SERVICE ET AL. *v.* SIERRA CLUB, INC. C. A. 9th Cir. Certiorari granted. Reported below: 925 F. 3d 1000.

No. 19–840. CALIFORNIA ET AL. *v.* TEXAS ET AL.; and
No. 19–1019. TEXAS ET AL. *v.* CALIFORNIA ET AL. C. A. 5th Cir. Motion of 33 State Hospital Associations for leave to file brief as *amici curiae* in No. 19–840 granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 945 F. 3d 355.

No. 19–5410. BORDEN *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 769 Fed. Appx. 266.

*Certiorari Denied*

No. 18–7105. HUNTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 811.

No. 18–7797. PATRICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 797.

No. 18–8380. PRESSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8447. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 930.

No. 18–9547. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–9772. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 767 Fed. Appx. 779.

No. 18–9796. JIMERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 950.

No. 19–28. DANIELS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 3d 148.

No. 19–229. C. D., BY AND THROUGH HER PARENTS, M. D. ET AL., ET AL. *v.* NATICK PUBLIC SCHOOL DISTRICT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 924 F. 3d 621.

No. 19–550. WATSO ET AL. *v.* HARPSTEAD, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 929 F. 3d 1024.

No. 19–572. SINGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 3d 1030.

No. 19–592. COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND *v.* MARYLAND DEPARTMENT OF THE ENVIRONMENT. Ct. App. Md. Certiorari denied. Reported below: 465 Md. 169, 214 A. 3d 61.

No. 19–689. CHAPMAN ET AL. *v.* ACE AMERICAN INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 556.

No. 19–714. PENNSYLVANIA *v.* LANDIS. Super. Ct. Pa. Certiorari denied. Reported below: 201 A. 3d 768.

No. 19–806. BARTH *v.* TOWNSHIP OF BERNARDS, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–808. LEIBUNDGUTH STORAGE & VAN SERVICE, INC. *v.* VILLAGE OF DOWNERS GROVE, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 939 F. 3d 859.

No. 19–810. BADWAL *v.* BADWAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 101.

No. 19–817. SHANDS *v.* LAKELAND CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 Fed. Appx. 121.

No. 19–821. NSEJJERE *v.* SMITH ET UX. Ct. App. Wash. Certiorari denied. Reported below: 8 Wash. App. 2d 1044.

No. 19–853. Sandra R. et al. *v.* Arizona Department of Child Safety. Ct. App. Ariz. Certiorari denied. Reported below: 246 Ariz. 180, 436 P. 3d 503.

No. 19–866. Ubinas-Brache *v.* Surgery Center of Texas, LP. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 19–898. Collins *v.* Thornton. C. A. 4th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 264.

No. 19–927. Klocke, Independent Administrator of the Estate of Klocke *v.* University of Texas at Arlington. C. A. 5th Cir. Certiorari denied. Reported below: 938 F. 3d 204.

No. 19–928. Johnson *v.* Darnell, Sheriff, Alachua County, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 961.

No. 19–929. Shuman et ux. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 813.

No. 19–942. Zuckerman, as Ancillary Administratrix of the Estate of Leffmann *v.* Metropolitan Museum of Art. C. A. 2d Cir. Certiorari denied. Reported below: 928 F. 3d 186.

No. 19–944. Seldin *v.* Seldin et al. C. A. 8th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 182.

No. 19–952. Goodwin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 196.

No. 19–954. Harriss *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 425.

No. 19–965. Edwards *v.* Atterberry et al. Sup. Ct. Ill. Certiorari denied.

No. 19–969. Marshall et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 565.

No. 19–973. Swanson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–5037. Villanueva *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–5247. HEDLUND *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 245 Ariz. 467, 431 P. 3d 181.

No. 19–5309. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 765 Fed. Appx. 103.

No. 19–5478. MADRIGAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 553.

No. 19–5480. DORSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–5575. YARBROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 214.

No. 19–5923. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 779 Fed. Appx. 574.

No. 19–6078. MCDANIEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 925 F. 3d 381.

No. 19–6148. WILSON *v.* GRIMES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 218.

No. 19–6213. BOOKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–6230. FINCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 929 F. 3d 501.

No. 19–6249. FAIRCLOTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 976.

No. 19–6405. VEREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 3d 1300.

No. 19–6426. RAMIREZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 110.

No. 19–6596. HETTINGA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 19–6675. BISHOP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 940 F. 3d 1242.

No. 19–6773. ORTEGA-LIMONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 222.

No. 19–6910. MOLIERE *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 574 S. W. 3d 21.

No. 19–7064. BEANBLOSSOM *v.* BAY DISTRICT SCHOOLS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 265 So. 3d 657.

No. 19–7091. CHAMPAGNE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 247 Ariz. 116, 447 P. 3d 297.

No. 19–7095. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 184.

No. 19–7101. NOWAKOWSKI *v.* E. E. AUSTIN & SON, INC., ET AL. Sup. Ct. Pa. Certiorari denied.

No. 19–7108. MOORE *v.* LEGRAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7110. JOHNSON *v.* MCMAHON, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–7111. JOHNSON *v.* PORTNOY ET AL. C. A. 5th Cir. Certiorari denied.

No. 19–7120. SANCHEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7124. BUTLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 19–7129. MOORE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–7135. HYE-YOUNG PARK *v.* SECOLSKY ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–7140. MEDRANO ORTIZ *v.* SOLOMON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 236.

No. 19–7150. WALTON *v.* KOWALSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7157. MOTHER *v.* LORAIN COUNTY CHILDREN SERVICES. Ct. App. Ohio, 9th App. Dist., Lorain County. Certiorari denied. Reported below: 2019-Ohio-1152.

No. 19–7158. MONTANEZ *v.* MCDEAN, LLC. C. A. 2d Cir. Certiorari denied. Reported below: 770 Fed. Appx. 592.

No. 19–7160. ESPINOZA *v.* ASHE ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7162. JUAN NEGRON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7166. KARNOFEL *v.* SUPERIOR WATERPROOFING, INC. Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2019-Ohio-1409.

No. 19–7168. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2019 IL App (3d) 170074–U.

No. 19–7181. BELL *v.* OREGON HEALTH & SCIENCE UNIVERSITY. Sup. Ct. Ore. Certiorari denied.

No. 19–7184. BREWER *v.* CUNNINGHAM, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 19–7241. COX *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2018–0769 (La. App. 1 Cir. 2/22/19), 272 So. 3d 597.

No. 19–7277. MOREIRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7284. WALLACE *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–7297. BURTON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 19–7329. WILLIAMS *v.* GENTRY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 616.

No. 19–7357. FORDHAM *v.* MANZOLA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 199.

No. 19–7372. TAYLOR *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 19–7376. TRAPPLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 173 App. Div. 3d 1334, 102 N. Y. S. 3d 756.

No. 19–7399. HARRIS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 19–7427. PEREZ-JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 381.

No. 19–7437. SPARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 3d 748.

No. 19–7446. ECHEVERRIA-BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 375.

No. 19–7450. STEELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 423.

No. 19–7454. BARFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 3d 757.

No. 19–7457. VILLARREAL-ESTEBIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 329.

No. 19–7460. WRIGHT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 937 F. 3d 8.

No. 19–7467. BEQIRAJ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 73.

No. 19–7477. MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 644.

No. 19–7478. PYE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 808.

No. 19–7490. ERNESTO HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 525.

No. 19–7492. JENSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 800.

No. 19–7494. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 518.

No. 19–7498. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 19–7502. PETERS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 19–7507. GURULE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 935 F. 3d 878.

No. 19–7510. BLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–7512. URIAS-MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 406.

No. 19–7514. ESSIEN *v.* PEERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 776.

No. 19–7518. REYES GARCIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 567.

No. 19–7519. HERNANDEZ-NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 633.

No. 19–7522. MATTHEWS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2018–1107 (La. App. 1 Cir. 2/25/19).

No. 19–7540. JACKSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 774.

No. 18–7833. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 19–296. GUEDES ET AL. *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 920 F. 3d 1.

Statement of JUSTICE GORSUCH respecting the denial of certiorari.

Does owning a bump stock expose a citizen to a decade in federal prison? For years, the government didn't think so. But recently the Bureau of Alcohol, Tobacco, Firearms and Explosives changed its mind. Now, according to a new interpretive rule from the agency, owning a bump stock is forbidden by a longstanding federal statute that outlaws the "possession [of] a machine-gun." 26 U. S. C. § 5685(b); 18 U. S. C. § 924(a)(2). Whether bump stocks can be fairly reclassified and effectively outlawed as machine-guns under existing statutory definitions, I do not know

and could not say without briefing and argument. Nor do I question that Congress might seek to enact new legislation directly regulating the use and possession of bump stocks. But at least one thing should be clear: Contrary to the court of appeals's decision in this case, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has nothing to say about the proper interpretation of the law before us.

In the first place, the government expressly waived reliance on *Chevron*. The government told the court of appeals that, if the validity of its rule (re)interpreting the machinegun statute "turns on the applicability of *Chevron*, it would prefer that the [r]ule be set aside rather than upheld." 920 F. 3d 1, 21 (CADC 2019) (*per curiam*). Yet, despite this concession, the court proceeded to uphold the agency's new rule *only* on the strength of *Chevron* deference. Think about it this way. The executive branch and affected citizens asked the court to do what courts usually do in statutory interpretation disputes: supply its best independent judgment about what the law means. But, instead of deciding the case the old-fashioned way, the court placed an uninvited thumb on the scale in favor of the government.

That was mistaken. This Court has often declined to apply *Chevron* deference when the government fails to invoke it. See Eskridge & Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From *Chevron* to *Hamdan*, 96 Geo. L. J. 1083, 1121–1124 (2008) (collecting cases); Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 982–984 (1992) (same); see *BNSF R. Co.* v. *Loos*, 586 U. S. 310 (2019). Even when *Chevron* deference is sought, this Court has found it inappropriate where "the Executive seems of two minds" about the result it prefers. *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 520 (2018). Nor is it a surprise that the government can lose the benefit of *Chevron* in situations like these and ours. If the justification for *Chevron* is that "'policy choices' should be left to Executive Branch officials 'directly accountable to the people,'" *Epic Systems*, 584 U. S., at 520 (quoting *Chevron*, 467 U. S., at 865), then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork.

To make matters worse, the law before us carries the possibility of criminal sanctions. And, as the government itself may have

recognized in offering its disclaimer, whatever else one thinks about *Chevron*, it has no role to play when liberty is at stake. Under our Constitution, "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States* v. *Davis*, 588 U. S. 445, 451 (2019) (quoting *United States* v. *Hudson*, 7 Cranch 32, 34 (1812)). Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct. A "reasonable" prosecutor's say-so is cold comfort in comparison. That's why this Court has "never held that the Government's reading of a criminal statute is entitled to any deference." *United States* v. *Apel*, 571 U. S. 359, 369 (2014). Instead, we have emphasized, courts bear an "obligation" to determine independently what the law allows and forbids. *Abramski* v. *United States*, 573 U. S. 169, 191 (2014); see also 920 F. 3d, at 39–40 (opinion of Henderson, J.); *Esquivel-Quintana* v. *Lynch*, 810 F. 3d 1019, 1027–1032 (CA6 2016) (Sutton, J., concurring in part and dissenting in part). That obligation went unfulfilled here.

*Chevron*'s application in this case may be doubtful for other reasons too. The agency used to tell everyone that bump stocks don't qualify as "machineguns." Now it says the opposite. The law hasn't changed, only an agency's interpretation of it. And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess *again* whether a later and opposing agency interpretation will *also* be held "reasonable"? And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?

Despite these concerns, I agree with my colleagues that the interlocutory petition before us does not merit review. The errors apparent in this preliminary ruling might yet be corrected before final judgment. Further, other courts of appeals are actively considering challenges to the same regulation. Before deciding whether to weigh in, we would benefit from hearing their considered judgments—provided, of course, that they are not af-

flicted with the same problems. But waiting should not be mistaken for lack of concern.

No. 19–7458. MYERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 786 Fed. Appx. 161.

No. 19–7486. LINDSAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 931 F. 3d 852.

No. 19–7489. DURAN *v.* DIAZ, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 19–6153. NELSON *v.* BURT, WARDEN, 589 U. S. 1107;

No. 19–6337. BIRCH-MIN *v.* MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES ET AL., 589 U. S. 1144;

No. 19–6457. D. B. *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, 589 U. S. 1147;

No. 19–6470. MARSHALL *v.* STEEH ET AL., 589 U. S. 1147; and

No. 19–6537. EVERSON *v.* LANTZ ET AL., 589 U. S. 1149. Petitions for rehearing denied.

No. 18–9296. IN RE DANNEWITZ, 589 U. S. 915. Motion for leave to file petition for rehearing denied.

MARCH 5, 2020

*Miscellaneous Order*

No. 19A984. WOODS *v.* STEWART, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

*Certiorari Denied*

No. 19–7880 (19A976). WOODS *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. The order heretofore entered by JUSTICE THOMAS is vacated. Reported below: 951 F. 3d 1288.

MARCH 6, 2020

*Miscellaneous Order*

No. 19A906. ACTAVIS HOLDCO U. S., INC., ET AL. *v.* CONNECTICUT ET AL. D. C. E. D. Pa. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, denied. The order heretofore entered by JUSTICE ALITO is vacated.

MARCH 9, 2020

*Certiorari Granted—Vacated and Remanded*

No. 19–566. PIERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rehaif* v. *United States*, 588 U. S. 225 (2019). Reported below: 925 F. 3d 913.

*Miscellaneous Orders*

No. 19M107. NATIONAL FOOTBALL LEAGUE ET AL. *v.* NINTH INNING, INC., ET AL. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 19M108. ANDERSON *v.* ROBITAILLE. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal denied. Motion for leave to proceed *in forma pauperis* with declaration of indigency under seal denied.

No. 19M109. APPLETON *v.* DLJ MORTGAGE CAPITAL, INC. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 19–292. TORRES *v.* MADRID ET AL. C. A. 10th Cir. [Certiorari granted, 589 U. S. 1126.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–431. LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME *v.* PENNSYLVANIA ET AL.; and

No. 19–454. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 589 U. S. 1165.] Motion of petitioners in No. 19–454 to dispense with printing joint appendix granted.

No. 19–6516. VETETO *v.* GRIFFIN, JUDGE, CIRCUIT COURT OF ALABAMA, MONTGOMERY COUNTY, ET AL. C. A. 11th Cir. Mo-

tion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1128] denied.

No. 19–6564. In re Wei Zhou. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1131] denied.

No. 19–7339. Jones *v.* Wells Fargo Bank, N. A., et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 30, 2020, 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. 19–7230. In re Lopez. Petition for writ of mandamus denied.

No. 19–7296. In re Martinez. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 18–1259. Jones *v.* Mississippi. Ct. App. Miss. Certiorari granted. Reported below: 285 So. 3d 626.

*Certiorari Denied*

No. 18–9546. Wills *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 19–320. Wade et ux. *v.* Kreisler Law, P. C. C. A. 7th Cir. Certiorari denied. Reported below: 926 F. 3d 447.

No. 19–549. Hannah P. *v.* Maguire, Acting Director, Office of the Director of National Intelligence. C. A. 4th Cir. Certiorari denied. Reported below: 916 F. 3d 327.

No. 19–670. Fleck *v.* Wetch et al. C. A. 8th Cir. Certiorari denied. Reported below: 937 F. 3d 1112.

No. 19–701. Johnson *v.* Rimmer et al. C. A. 7th Cir. Certiorari denied. Reported below: 936 F. 3d 695.

No. 19–708. Gold Value International Textile, Inc. *v.* Sanctuary Clothing, LLC, et al. C. A. 9th Cir. Certiorari denied.

No. 19–725. Guy *v.* Lampert, Director, Wyoming Department of Corrections, et al. Sup. Ct. Wyo. Certiorari denied. Reported below: 2019 WY 69, 444 P. 3d 652.

No. 19–820. McMahon, Sheriff of San Bernardino County, et al. *v.* Chemehuevi Indian Tribe et al. C. A. 9th Cir. Certiorari denied. Reported below: 934 F. 3d 1076.

No. 19–837. Kunkel et al. *v.* Northern Kentucky Independent Health District et al. Sup. Ct. Ky. Certiorari denied.

No. 19–842. Schwartz *v.* Clark County, Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 918.

No. 19–843. Holtzclaw *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2019 OK CR 17, 448 P. 3d 1134.

No. 19–844. Graham *v.* Wininger. Ct. App. Ind. Certiorari denied. Reported below: 131 N. E. 3d 187.

No. 19–892. United States ex rel. Gelbman *v.* City of New York et al. C. A. 2d Cir. Certiorari denied. Reported below: 790 Fed. Appx. 244.

No. 19–916. Risby *v.* Wolf, Acting Secretary of Homeland Security, et al. C. A. 9th Cir. Certiorari denied. Reported below: 768 Fed. Appx. 607.

No. 19–923. Barnes *v.* Chase Home Finance, LLC, et al. C. A. 9th Cir. Certiorari denied. Reported below: 934 F. 3d 901.

No. 19–962. Norwood *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 242 W. Va. 149, 832 S. E. 2d 75.

No. 19–971. James et al. *v.* JW Gaming Development, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 545.

No. 19–976. Edge et al. *v.* City of Everett, Washington. C. A. 9th Cir. Certiorari denied. Reported below: 929 F. 3d 657.

No. 19–999. Dugan *v.* Wyoming. Sup. Ct. Wyo. Certiorari denied. Reported below: 2019 WY 112, 451 P. 3d 731.

No. 19–1002. Automotive Body Parts Assn. *v.* Ford Global Technologies, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 930 F. 3d 1314.

No. 19–1018. GALLOP *v.* ADULT CORRECTIONAL INSTITUTIONS ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: 218 A. 3d 543.

No. 19–6151. ALI *v.* FOSS, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 580.

No. 19–6482. SMITH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 3d 313.

No. 19–6500. DOMINGUEZ-VILLALOBOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 226.

No. 19–6502. FIELDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 932 F. 3d 316.

No. 19–6546. GARCIA RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 758.

No. 19–6795. CONDE-HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 234.

No. 19–6796. CASTANON-RENTERIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 230.

No. 19–6825. GUERRERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 3d 895.

No. 19–6862. BETSINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–6877. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 19–7142. HAYMON *v.* JOHNSON. App. Div., Super. Ct. Cal., County of San Joaquin. Certiorari denied.

No. 19–7179. ARI *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 19–7190. BENAVIDES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7192. WALKER *v.* PASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–7195. WEATHERSPOON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 19–7196. ZIMMERMAN *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 19–7202. POWELL *v.* LAB CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 789 Fed. Appx. 237.

No. 19–7203. MCKINNEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 19–7204. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 878.

No. 19–7205. JOHNSON *v.* PROGRESSIVE CORPORATION INSURANCE CO. C. A. 2d Cir. Certiorari denied.

No. 19–7206. JOHNSON *v.* LAW OFFICES OF JENNIFER S. ADAMS ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–7210. CASH *v.* RUPERT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 110.

No. 19–7211. BROWN *v.* SAGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 941 F. 3d 655.

No. 19–7212. ALEXANDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7213. BANKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 19–7214. BROWN *v.* MACE-LIEBSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 779 Fed. Appx. 136.

No. 19–7219. CANALES *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 281 So. 3d 487.

No. 19–7229. LOWE *v.* PARRIS ET AL. Ct. App. Tenn. Certiorari denied.

No. 19–7232. PARRA *v.* LIZARRAGA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7240. ALLEN-BEY *v.* MICHIGAN STATE TREASURER. Ct. App. Mich. Certiorari denied.

No. 19–7244. ALANDT *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 2018 Ark. App. 493, 561 S. W. 3d 764.

No. 19–7252. JASON *v.* TANNER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 938 F. 3d 191.

No. 19–7267. SNOWTON *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 443.

No. 19–7273. RODRIGUEZ-PALOMINO *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2019 IL App (2d) 160361–B, 126 N. E. 3d 746.

No. 19–7287. BANKS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–7316. BOUGH *v.* HUTCHISON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7343. WILLIAMS *v.* HALL, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 19–7384. KING *v.* BENTON COUNTY SHERIFF'S OFFICE ET AL. Ct. App. Wash. Certiorari denied.

No. 19–7409. PRYOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 927 F. 3d 1042.

No. 19–7432. CALLIGAN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 123 N. E. 3d 724.

No. 19–7447. RUDENKO *v.* SHANLEY, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 19–7468. PHILLIPS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 19–7470. MARTINEZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 973.

No. 19–7480. LYNCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 904.

No. 19–7482. NUNEZ *v.* BOWERMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7485. AGUON *v.* MONTGOMERY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7497. SILVESTRI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–7521. HARLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 844.

No. 19–7533. SINANAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 209 A. 3d 519.

No. 19–7535. REED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 467.

No. 19–7539. KANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 19–7552. GUARASCIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 248.

No. 19–7557. YARBOUGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 785 Fed. Appx. 41.

No. 19–7561. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 748.

No. 19–7566. ASEFI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 449.

No. 19–7567. BEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 443.

No. 19–7568. BREWSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 455.

No. 19–7575. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 820.

No. 19–7581. TAYLOR ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 935 F. 3d 1279.

No. 19–7587. BURDUNICE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 19–7590. HOWELL *v.* HATTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7598. VALENCIA-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7610. CAMBEROS-VILLAPUDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–7622. ELLIOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 937 F. 3d 1310.

No. 19–7633. ALLEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 19–7653. BIGBEE *v.* LEBO, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–7659. RIOS ET VIR *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 242 W. Va. 581, 836 S. E. 2d 799.

No. 19–7671. BRADLEY *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 19–392. ARMSTRONG *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 767 Fed. Appx. 166.

No. 19–466. PITTMAN *v.* HARRIS. C. A. 4th Cir. Certiorari denied. JUSTICE ALITO would grant the petition for writ of certiorari. Reported below: 927 F. 3d 266.

No. 19–909. MALOUF *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 933 F. 3d 1248.

No. 19–958. MIKHAK *v.* UNIVERSITY OF PHOENIX, INC. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 768 Fed. Appx. 740.

No. 19–6878. BOLDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari before judgment denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 19–7525. SITZMANN *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: 893 F. 3d 811.

No. 19–7636. EILAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 19–125. ZAMORE *v.* DEUTSCHE BANK NATIONAL TRUST CO., INDIVIDUALLY AND AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007–CH5 ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2007–CH5, ET AL., 589 U. S. 1133;

No. 19–580. JUN XIAO *v.* REGENTS OF THE UNIVERSITY OF MINNESOTA ET AL., 589 U. S. 1137;

No. 19–599. MOHORNE *v.* BEAL BANK ET AL., 589 U. S. 1138;

No. 19–639. SHAO *v.* TSAN-KUEN WANG, 589 U. S. 1168;

No. 19–5957. HAYNES *v.* RIVERSIDE PRESBYTERIAN APARTMENTS, 589 U. S. 1072;

No. 19–6281. SANDERS *v.* OBAMA ET AL., 589 U. S. 1123;

No. 19–6386. XUE JIE HE *v.* GUTTENBERG NEW JERSEY POLICE ET AL., 589 U. S. 1145;

No. 19–6387. GRIFFIN *v.* AMERICAN ZURICH INSURANCE CO. ET AL., 589 U. S. 1145;

No. 19–6532. AMARO *v.* BALDERAS, ATTORNEY GENERAL OF NEW MEXICO, ET AL., 589 U. S. 1149;

No. 19–6542. HALL *v.* AUTHOR SOLUTIONS ET AL., 589 U. S. 1149

No. 19–6648. BARENZ *v.* ALASKA, 589 U. S. 1151;

No. 19–6744. MERCK *v.* MINNESOTA SUPREME COURT ET AL., 589 U. S. 1182; and

No. 19–6776. DAWSON *v.* WELLS, 589 U. S. 1155. Petitions for rehearing denied.

MARCH 10, 2020

*Miscellaneous Orders*

No. 19–465. CHIAFALO ET AL. *v.* WASHINGTON. Sup. Ct. Wash. [Certiorari granted, 589 U. S. 1165.] Case no longer consolidated with No. 19–518, *Colorado Department of State* v. Baca et al., and one hour is allotted for oral argument in this case.

No. 19–518. COLORADO DEPARTMENT OF STATE *v.* BACA ET AL. C. A. 10th Cir. [Certiorari granted, 589 U. S. 1165.] Case no

longer consolidated with No. 19–465, *Chiafalo* v. *Washington*, and one hour is allotted for oral argument in this case. JUSTICE SOTOMAYOR took no part in the consideration of this order.

MARCH 11, 2020

*Miscellaneous Order*

No. 19A960. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. *v.* INNOVATION LAW LAB ET AL. D. C. N. D. Cal. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted, and the District Court's April 8, 2019, order granting preliminary injunction is stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. JUSTICE SOTOMAYOR would deny the application.

MARCH 16, 2020

*Dismissals Under Rule 46*

No. 19–264. KELLY, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* WHITE. Sup. Ct. Ore. Certiorari dismissed under this Court's Rule 46.1. Reported below: 365 Ore. 1, 443 P. 3d 597.

No. 19–265. KELLY, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* WHITE. Sup. Ct. Ore. Certiorari dismissed under this Court's Rule 46.1. Reported below: 365 Ore. 21, 443 P. 3d 608.

MARCH 19, 2020

*Miscellaneous Order*

In light of the ongoing public health concerns relating to COVID–19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See this Court's Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the

Clerk as a matter of course if the grounds for the application are difficulties relating to COVID–19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID–19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

## March 23, 2020

*Dismissal Under Rule 46*

No. 19–730. McKesson *v.* Doe. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 945 F. 3d 818.

*Certiorari Granted—Vacated and Remanded.* (See also *Davis* v. *United States*, 589 U. S. 345 (2020) (*per curiam*).)

No. 19–6113. Bazan *v.* United States. C. A. 5th Cir. Reported below: 772 Fed. Appx. 214; and

No. 19–6431. Bazan *v.* United States. C. A. 5th Cir. Reported below: 773 Fed. Appx. 811. Motions of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Davis* v. *United States*, 589 U. S. 345 (2020) (*per curiam*).

*Certiorari Dismissed*

No. 19–6991. Lei Ke *v.* Drexel University. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As

petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 201 A. 3d 876.

No. 19–7254. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7403. SHOVE *v.* DAVIS, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 19M110. DOE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 19M111. MAYES *v.* WINDOM ET AL.; and
No. 19M112. MEDINA *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 19M113. CLOWERS *v.* CRADDUCK 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. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. [For earlier order herein, see, *e. g.*, 589 U. S. 1177.]

No. 19–267. OUR LADY OF GUADALUPE SCHOOL *v.* MORRISSEY-BERRU; and
No. 19–348. ST. JAMES SCHOOL *v.* BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BIEL. C. A. 9th Cir. [Certiorari granted, 589 U. S. 1126–1127.] Motion of Virginia et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–357. CITY OF CHICAGO, ILLINOIS *v.* FULTON ET AL. C. A. 7th Cir. [Certiorari granted, 589 U. S. 1126.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–431. LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME *v.* PENNSYLVANIA ET AL.; and

No. 19–454. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari granted, 589 U. S. 1165.] Motion of petitioner in No. 19–431 to dispense with printing joint appendix granted.

No. 19–635. TRUMP *v.* VANCE, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 589 U. S. 1120.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–715. TRUMP ET AL. *v.* MAZARS USA, LLP, ET AL. C. A. D. C. Cir.; and

No. 19–760. TRUMP ET AL. *v.* DEUTSCHE BANK AG ET AL. C. A. 2d Cir. [Certiorari granted, 589 U. S. 1120.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 19–6786. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1165] denied.

No. 19–7310. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 13, 2020, 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. 19–932. IN RE MURPHY. Petition for writ of habeas corpus denied.

No. 19–7351. IN RE THOMAS BEY; and

No. 19–7411. IN RE MCCRAY. Petitions for writs of mandamus denied.

No. 19–7374. IN RE WALLACE. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Denied*

No. 18–8804. Raymond *v.* Roy et al. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 19–484. Doe et al. *v.* Federal Election Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 920 F. 3d 866.

No. 19–497. Inclusive Communities Project, Inc. *v.* Lincoln Property Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 3d 890.

No. 19–500. Siddiqui *v.* NetJets Aviation, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 562.

No. 19–597. Reese *v.* Sprint Nextel Corp. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 774 Fed. Appx. 656.

No. 19–604. Francway *v.* Wilkie, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 940 F. 3d 1304.

No. 19–607. Woodcrest Homes, Inc. *v.* Carousel Farms Metropolitan District. Sup. Ct. Colo. Certiorari denied. Reported below: 442 P. 3d 402.

No. 19–646. Adkins et al. *v.* Collens. Sup. Ct. Alaska. Certiorari denied. Reported below: 444 P. 3d 187.

No. 19–735. Tong, Attorney General of Connecticut *v.* Tweed-New Haven Airport Authority et al. C. A. 2d Cir. Certiorari denied. Reported below: 930 F. 3d 65.

No. 19–756. Taylor *v.* Pima County, Arizona, et al. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 3d 930.

No. 19–763. Angino et al. *v.* TransUnion LLC. C. A. 3d Cir. Certiorari denied.

No. 19–765. Faust, Director, Arizona Department of Child Safety *v.* B. K., by Her Next Friend Tinsley, et al. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 3d 957.

No. 19–852. Maxell, Ltd. *v.* Fandango Media, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 779 Fed. Appx. 745.

No. 19–858. GemCap Lending I, LLC *v.* Quarles & Brady, LLP, et al. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 369.

No. 19–861. Shumski *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–876. Ramirez *v.* Hogue et al. Sup. Ct. N. D. Certiorari denied. Reported below: 2019 ND 245, 933 N. W. 2d 468.

No. 19–884. Caldwell et ux. *v.* Unum Life Insurance Company of America. C. A. 10th Cir. Certiorari denied.

No. 19–885. Swartz et al. *v.* Heartland Equine Rescue et al. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 3d 387.

No. 19–886. Negash et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 34.

No. 19–888. Longmire *v.* Warshaw Burstein Cohen Schlesinger & Kuh, LLP. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 106 App. Div. 3d 536, 965 N. Y. S. 3d 458.

No. 19–890. Jensen *v.* Blumenstiel, Judge, United States Bankruptcy Court for the Northern District of California, et al. C. A. 9th Cir. Certiorari denied.

No. 19–895. McDonald *v.* Bellco Credit Union. Ct. App. Colo. Certiorari denied.

No. 19–902. Ramon Ochoa *v.* Levine et al. Super. Ct. Pa. Certiorari denied.

No. 19–911. Castro *v.* Simon, Individually and in Her Official Capacity as Deputy Commissioner, et al. C. A. 2d Cir. Certiorari denied. Reported below: 778 Fed. Appx. 50.

No. 19–913. Siddiqui et vir, Individually and as Personal Representatives of the Estate of Siddiqui, Deceased *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 484.

No. 19–915. Scott et ux. *v.* U. S. Bank N. A. et al. C. A. 8th Cir. Certiorari denied.

No. 19–918. LUCERO *v.* KONCILJA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 786.

No. 19–921. PAZ *v.* DIRECTOR, NEW JERSEY DIVISION OF TAXATION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–938. CLARK *v.* NEW YORK COMMISSIONER OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 19–961. HASELRIG *v.* INSLEE. Ct. App. Wash. Certiorari denied. Reported below: 7 Wash. App. 2d 1052.

No. 19–964. LAWRENCE *v.* UNIVERSITY HOSPITAL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 577.

No. 19–979. CRICK *v.* KEY, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 19–989. JOHNSON, INDIVIDUALLY AND AS TRUSTEE OF THE ANNABELL M. PALMER FAMILY TRUST, ET AL. *v.* UBS AG. C. A. 2d Cir. Certiorari denied. Reported below: 791 Fed. Appx. 240.

No. 19–991. PRIMM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–1005. HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, ET AL. *v.* ENVIRONMENTAL RESEARCH CENTER, INC. C. A. 9th Cir. Certiorari denied.

No. 19–1007. ABDUL-AZIZ *v.* NATIONAL BASKETBALL ASSOCIATION PLAYERS' PENSION PLAN. C. A. 2d Cir. Certiorari denied. Reported below: 784 Fed. Appx. 46.

No. 19–1011. KELLY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied.

No. 19–1015. WALKER *v.* AMERIPRISE FINANCIAL SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 211.

No. 19–1017. SOLUTRAN, INC. *v.* ELAVON, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 931 F. 3d 1161.

No. 19–1025. CITY OF FERGUSON, MISSOURI *v.* FANT ET AL. C. A. 8th Cir. Certiorari denied.

No. 19–1027. CASWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 650.

No. 19–1032. WATERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 937 F. 3d 1344.

No. 19–1041. KHRAPKO *v.* SPLAIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–1068. INCHIERCHIERE *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–5487. NINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 589.

No. 19–5926. QUINTANAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 706.

No. 19–5995. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–6236. EICHLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 707.

No. 19–6282. SALAZAR-MARTINEZ *v.* UNITED STATES (Reported below: 774 Fed. Appx. 192); MORALES-GALLEGOS *v.* UNITED STATES (774 Fed. Appx. 191); and ROBLEDO-CUEVAS *v.* UNITED STATES (774 Fed. Appx. 919). C. A. 5th Cir. Certiorari denied.

No. 19–6296. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 1013.

No. 19–6361. MCKOWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 930 F. 3d 721.

No. 19–6363. PEARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–6370. BENNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 547.

No. 19–6464. GARCIA-JACOBO *v.* FEATHER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 771 Fed. Appx. 787.

No. 19–6465. JONES *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 3d 365.

No. 19–6710. BOWLING *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 3d 192.

No. 19–6740. RHOTON *v.* BROWN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 19–6901. BARRERA-MONTES *v.* UNITED STATES;
No. 19–6938. GARCIA-SOLAR *v.* UNITED STATES; and
No. 19–7484. PEREZ-CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 523.

No. 19–6906. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 860.

No. 19–6918. NANCE *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 3d 1298.

No. 19–6934. JOHNSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 935 F. 3d 284.

No. 19–6942. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 707.

No. 19–6965. KINCAIDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 908.

No. 19–7011. GOLDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 164.

No. 19–7021. HUNTER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 932 F. 3d 610.

No. 19–7022. CRUZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–7045. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 177.

No. 19–7222. RICHARDSON *v.* THOMAS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 930 F. 3d 587.

No. 19–7224. JONES *v.* GOLDBERG ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 241 Md. App. 740 and 743.

No. 19–7233. NASH *v.* KENNEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 784 Fed. Appx. 54.

No. 19–7262. MALLARI *v.* VESSIGAULT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 Fed. Appx. 835.

No. 19–7263. KHURANA *v.* IDAHO DEPARTMENT OF HEALTH AND WELFARE. Ct. App. Idaho. Certiorari denied.

No. 19–7279. OLIPHANT-JOHNS *v.* GOOD DEAL REMODELING. Sup. Ct. Pa. Certiorari denied.

No. 19–7280. JONES *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 1019.

No. 19–7281. GRANT *v.* MTGLQ INVESTORS, L. P. Ct. App. D. C. Certiorari denied.

No. 19–7282. ARNOLD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–7286. CALDWELL *v.* DOWNS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 183.

No. 19–7290. GARLAND *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1094, 114 N. E. 3d 1071.

No. 19–7295. JOHNSON *v.* NATIONWIDE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–7299. BARRERA *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7300. BOOKER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–7301. GOODRUM *v.* HUTCHISON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7302. SHAMPINE *v.* SARVER'S REALTY ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–7303. SMITH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 19–7306. PRONIN *v.* WRIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 181.

No. 19–7308. McGavitt *v.* Texas. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 19–7311. Frazier *v.* City of Omaha Police Department et al. C. A. 8th Cir. Certiorari denied.

No. 19–7317. Chailla *v.* Navient Department of Education et al. C. A. 2d Cir. Certiorari denied. Reported below: 791 Fed. Appx. 226.

No. 19–7319. Waters *v.* Stewart et al. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 134.

No. 19–7321. Snowton *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 472.

No. 19–7328. Taylor *v.* City of Colonial Heights, Virginia (Reported below: 775 Fed. Appx. 129); and Taylor *v.* Irving, Sheriff, City of Richmond, Virginia (777 Fed. Appx. 682). C. A. 4th Cir. Certiorari denied.

No. 19–7338. Moran *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 288 So. 3d 77.

No. 19–7340. Vazquez-Suarez *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 282 So. 3d 106.

No. 19–7342. Turner *v.* Cadney et al. C. A. 6th Cir. Certiorari denied.

No. 19–7344. Williams *v.* Jackson County, Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 312.

No. 19–7345. Sanchez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 936 F. 3d 300.

No. 19–7346. Clark *v.* Department of the Army et al. C. A. 5th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 168.

No. 19–7347. Marshall *v.* Texas (two judgments). Ct. App. Tex., 1st Dist. Certiorari denied.

No. 19–7348. ALSTON, aka AUSTIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 174 App. Div. 3d 1349, 105 N. Y. S. 3d 680.

No. 19–7349. OSORNIO *v.* SUPREME COURT OF THE UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7350. BATTENFIELD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 19–7353. OKON *v.* KNUTSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–7354. MARTIN *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 19–7355. GAINES *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–7358. HARRELL *v.* FAIRFIELD POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7360. SIMONTON *v.* GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–7362. REGALADO *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 19–7373. TYAGI *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 42.

No. 19–7377. ADGER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 170 App. Div. 3d 1619, 94 N. Y. S. 3d 471.

No. 19–7378. DIAZ *v.* SAN BERNARDINO COUNTY, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 790 Fed. Appx. 42.

No. 19–7379. CAPERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 5th 989, 446 P. 3d 726.

No. 19–7380. CONSTANCE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 19–7383. MAY *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 2019 Ark. App. 443, 587 S. W. 3d 257.

No. 19–7385. KIMBEL *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 19–7390. ELLIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 19–7395. CRUMP *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 765 Fed. Appx. 143.

No. 19–7397. HUDSON *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE. Sup. Ct. Pa. Certiorari denied. Reported below: 651 Pa. 308, 204 A. 3d 392.

No. 19–7398. GIBBONS *v.* KNUTSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–7407. BENNETT *v.* BREWER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 3d 279.

No. 19–7413. CLANCY *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 779.

No. 19–7414. WHITLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7415. DAVIS *v.* FAYETTE COUNTY APPRAISAL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 779.

No. 19–7428. O'LAUGHLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 934 F. 3d 840.

No. 19–7429. MITCHELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 5th 561, 443 P. 3d 1.

No. 19–7436. REEVES *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 851.

No. 19–7443. MILTON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 19–7449. SMITH *v.* OREOL. C. A. 9th Cir. Certiorari denied.

No. 19–7463. BURLISON *v.* ELLSPERMANN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CLERK OF COURT FOR MARION

COUNTY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 286 So. 3d 775.

No. 19–7471. BROWN *v.* SAN BERNARDINO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7515. NGUYEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 19–7516. MOSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 353.

No. 19–7517. PALACIOS-CORDERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 365.

No. 19–7520. FEENEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 393.

No. 19–7523. LAWSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 19–7526. SEGURA-RESENDIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 422.

No. 19–7528. SMITH *v.* JACKSON. C. A. 4th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 177.

No. 19–7530. THOMPSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 257 So. 3d 573.

No. 19–7536. SIMPSON *v.* BISHOP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 257.

No. 19–7543. OSBORN *v.* WILLIAMS ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–7547. CASHION *v.* TEXAS (two judgments). Ct. App. Tex., 6th Dist. Certiorari denied.

No. 19–7548. CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 450.

No. 19–7551. HERRINGTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–7558. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 769 Fed. Appx. 825.

No. 19–7562. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 131.

No. 19–7571. WILLIAMS *v.* MAYS, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–7574. BELTRAN *v.* UNITED STATES; and
No. 19–7594. LOPEZ-CABRERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 933 F. 3d 95.

No. 19–7580. CRISTO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 303.

No. 19–7584. YAZZIE *v.* MOHAVE COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 1018.

No. 19–7585. ELLIS *v.* BARLOW-HURST, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7586. DONAHUE *v.* PENNSYLVANIA CIVIL SERVICE COMMISSION. Commw. Ct. Pa. Certiorari denied. Reported below: 204 A. 3d 1064.

No. 19–7588. BIBLE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 783 Fed. Appx. 1039.

No. 19–7593. YOUNG YI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 19–7599. SMITH-KILPATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 942 F. 3d 734.

No. 19–7602. HARRELL *v.* BELYEA ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7606. MCKINNON *v.* FLORIDA (two judgments). Sup. Ct. Fla. Certiorari denied.

No. 19–7608. PEREZ-ROMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 464.

No. 19–7614. PERRY *v.* BROWN. C. A. 7th Cir. Certiorari denied.

No. 19–7616. BLAJOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7617. AMAYA-RIVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 671.

No. 19–7620. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 311.

No. 19–7623. SILKEUTSABAY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 538.

No. 19–7624. SHAW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 782 Fed. Appx. 74.

No. 19–7625. SWINTON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 289 So. 3d 469.

No. 19–7630. HOLLINGSHED *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 940 F. 3d 410.

No. 19–7631. WOLGAMOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 531.

No. 19–7634. HANKINS *v.* LOWE. C. A. 7th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 756.

No. 19–7635. COURTNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 444.

No. 19–7638. CRUZ PEREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 955.

No. 19–7640. CARRIER *v.* ROMERO, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 19–7646. FITZGERALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 935 F. 3d 814.

No. 19–7648. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 256.

No. 19–7650. D. W. *v.* WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES. Ct. App. Wash. Certiorari denied.

No. 19–7652. WHYTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 353.

No. 19–7654. ELOI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7656. HUNTOON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7661. DERVISHAJ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 787 Fed. Appx. 12.

No. 19–7662. ORELLANA *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 34.

No. 19–7663. LASALLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 410.

No. 19–7664. BARNETT *v.* UNITED STATES; and SESSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–7667. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 876.

No. 19–7675. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 19–7677. CODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7681. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 19–7682. BEVERLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 3d 225.

No. 19–7695. DELACRUZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 19–7697. LOVELL *v.* CHILDREN'S CORNER DAYCARE. C. A. 6th Cir. Certiorari denied.

No. 19–7698. CALDERON-ORTALEJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 281.

No. 19–7705. BURGHARDT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 939 F. 3d 397.

No. 19–7707. ARTHUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7711. VESCUSO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 666.

No. 19–7713. OUDEMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 234.

No. 19–7716. WALLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 937 F. 3d 130.

No. 19–7718. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 795 Fed. Appx. 10.

No. 19–7719. SHEAFE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 22.

No. 19–7720. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 889.

No. 19–7730. ALEXANDER *v.* BLOOMINGDALE'S, INC. C. A. 4th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 48.

No. 19–7733. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 19–7737. WOLFE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 566.

No. 19–7744. RAI CHOWDHURI *v.* SGT, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 171.

No. 19–7747. SUEIRO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 3d 637.

No. 19–7749. BRIDGES *v.* GRAY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7750. BROWN *v.* HUTCHISON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7752. OCHOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 3d 1074.

No. 19–7754. PEETERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 948.

No. 19–7757. POPOOLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 933 F. 3d 302.

No. 19–7760. ACHEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 3d 909.

No. 19–633. AVERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 741.

Statement of JUSTICE KAVANAUGH respecting the denial of certiorari.

Federal prisoners can seek postconviction relief by filing an application under 28 U. S. C. § 2255. State prisoners can seek federal postconviction relief by filing an application under § 2254.

The issue in this case concerns second-or-successive applications. As relevant here, the law provides that a "claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed." § 2244(b)(1) (emphasis added).

The text of that second-or-successive statute covers only applications filed by state prisoners under § 2254. Yet six Courts of Appeals have interpreted the statute to cover applications filed by state prisoners under § 2254 and by federal prisoners under § 2255, even though the text of the law refers only to § 2254. See *Gallagher* v. *United States*, 711 F. 3d 315 (CA2 2013); *United States* v. *Winkelman*, 746 F. 3d 134, 135–136 (CA3 2014); *In re Bourgeois*, 902 F. 3d 446, 447 (CA5 2018); *Taylor* v. *Gilkey*, 314 F. 3d 832, 836 (CA7 2002); *Winarske* v. *United States*, 913 F. 3d 765, 768–769 (CA8 2019); *In re Baptiste*, 828 F. 3d 1337, 1340 (CA11 2016).

After Avery's case was decided, the Sixth Circuit recently rejected the other Circuits' interpretation of the second-or-successive statute and held that the statute covers only applications filed by state prisoners under § 2254. *Williams* v. *United States*, 927 F. 3d 427 (2019).

Importantly, the United States now agrees with the Sixth Circuit that "Section 2244(b)(1) does not apply to Section 2255 motions" and that the contrary view is "inconsistent with the text of Section 2244." Brief in Opposition 10, 13. In other words, the Government now disagrees with the rulings of the six Courts of Appeals that had previously decided the issue in the Government's favor.

In a future case, I would grant certiorari to resolve the circuit split on this question of federal law.

No. 19–723. WHITE *v.* UNITED STATES. C. A. 4th Cir. Motion for leave to file brief in opposition under seal with redacted copies for the public record granted. Motion for leave to file reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 927 F. 3d 257.

No. 19–869. WEBER *v.* ALLERGAN, INC. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 940 F. 3d 1106.

No. 19–6589. NORMAN 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: 926 F. 3d 304.

No. 19–7589. MONZEL *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: 930 F. 3d 470.

No. 19–7604. LUMPKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

*Rehearing Denied*

No. 18–9645. BLACK *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 589 U. S. 1132;

No. 19–493. MAKSIMUK *v.* CONNOR SPORT COURT INTERNATIONAL, LLC, 589 U. S. 1135;

No. 19–552. SALZWEDEL *v.* CALIFORNIA ET AL., 589 U. S. 1136;

No. 19–582. EDMONDSON *v.* LILLISTON FORD INC. ET AL., 589 U. S. 1179;

No. 19–637. SERNA *v.* WEBSTER ET AL., 589 U. S. 1167;

No. 19–705. SHARPE *v.* UNITED STATES, 589 U. S. 1180;

No. 19–6329. BOYD *v.* MONROE ET AL., 589 U. S. 1144;

No. 19–6381. BROWN *v.* MICHIGAN, 589 U. S. 1144;

No. 19–6382. MARTINEZ-COVARRUBIAS *v.* BARR, ATTORNEY GENERAL, 589 U. S. 1144;

No. 19–6438. TAPIA-FIERRO *v.* BARR, ATTORNEY GENERAL, ET AL., 589 U. S. 1123;

No. 19–6439. LOPEZ *v.* MUFG UNION BANK, N. A., ET AL., 589 U. S. 1146;

No. 19–6495. SCHWERTZ *v.* JENNINGS, WARDEN, 589 U. S. 1148;

No. 19–6498. TOOTLE *v.* BEAUX ART INSTITUTE OF PLASTIC SURGERY ET AL., 589 U. S. 1148;

No. 19–6541. FORTES *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ET AL., 589 U. S. 1114;

No. 19–6563. WAZNEY *v.* SOUTH CAROLINA, 589 U. S. 1149;

No. 19–6575. ELLIOTT *v.* FLORIDA, 589 U. S. 1150;

No. 19–6579. SMITH *v.* NORTH CAROLINA ET AL., 589 U. S. 1150;

No. 19–6651. THOMPSON *v.* MCGINLEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, 589 U. S. 1152;

No. 19–6694. SUNDY *v.* CHRISTIAN, JUDGE, ET AL., 589 U. S. 1181;

No. 19–6698. MTAZA *v.* UNITED STATES, 589 U. S. 1153;

No. 19–6702. IN RE CALDERON-LOPEZ, 589 U. S. 1167;

No. 19–6887. IN RE EDMONDS, 589 U. S. 1131; and

No. 19–7047. IN RE SPENCER, 589 U. S. 1178. Petitions for rehearing denied.

## MARCH 30, 2020

*Certiorari Granted—Vacated and Remanded*

No. 18–1185. CHARTER COMMUNICATIONS, INC. *v.* NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Comcast Corp.* v. *National Assn. of African American-Owned Media*, 589 U. S. 327 (2020). THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 915 F. 3d 617.

No. 18–1255. ANGELES *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir.; and

No. 18–1454. LONDONO-GONZALEZ *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Reported below: 744 Fed. Appx. 898. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221 (2020).

*Certiorari Dismissed*

No. 19–7495. BADRUDDOZA *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 19A914. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Application to recall remittitur, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 19M114. O'CONNOR, AS NEXT FRIEND AND GUARDIAN OF O'CONNOR *v.* WRIGHT ET AL.;

No. 19M115. SMITH *v.* ILLINOIS DEPARTMENT OF TRANSPORTATION; and

No. 19M116. HODGE *v.* GENOVESE, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 19M117. JUVENILE MALE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with appendix available for the public record denied.

No. 18–9526. MCGIRT *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 589 U. S. 1119.] Motion of the parties, Muscogee (Creek) Nation, and the Solicitor General for enlargement of time for oral argument and for divided argument granted in part, and the time is divided as follows: 15 minutes for petitioner, 15 minutes for Muscogee (Creek) Nation, 15 minutes for respondent, and 15 minutes for the Solicitor General.

No. 19–23. ROCKWOOD CASUALTY INSURANCE CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL., 589 U. S. 1058. Motion of respondent Tony Kourianos for attorney's fees and expenses granted. The Court approves attorney's fees of $22,106.25 and expenses of $1,531.53.

No. 19–7425. HETTINGA *v.* ARCADIA MANAGEMENT SERVICES CO. Ct. App. Cal., 6th App. Dist.; and

No. 19–7607. WESTRUM *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 20, 2020, 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. 19–7944. IN RE BEEBE. Petition for writ of habeas corpus denied.

No. 19–7466. IN RE CALDERON LOPEZ. 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. 19–7550. IN RE GUICE. Petition for writ of mandamus and/or prohibition denied.

No. 19–7792. IN RE LOPEZ. Petition for writ of prohibition denied.

*Certiorari Granted*

No. 19–546. BROWNBACK ET AL. *v.* KING. C. A. 6th Cir. Certiorari granted. Reported below: 917 F. 3d 409.

*Certiorari Denied*

No. 19–442. PEREZ CASTILLO *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 501.

No. 19–557. MCDONALD *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 376.

No. 19–608. ELSTER ET AL. *v.* CITY OF SEATTLE, WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 193 Wash. 2d 638, 444 P. 3d 590.

No. 19–645. ARIZONA *v.* NUNEZ-DIAZ. Sup. Ct. Ariz. Certiorari denied. Reported below: 247 Ariz. 1, 444 P. 3d 250.

No. 19–661. TUN-COS ET AL. *v.* PERROTTE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 3d 514.

No. 19–667. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 3d 390.

No. 19–718. KING *v.* BROWNBACK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 3d 409.

No. 19–784. UNIVERSITY OF PENNSYLVANIA ET AL. *v.* SWEDA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 923 F. 3d 320.

No. 19–795. VOORHEES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: —— M. J. ——.

No. 19–797. CITY OF ST. LOUIS, MISSOURI, ET AL. *v.* MEIER. C. A. 8th Cir. Certiorari denied. Reported below: 934 F. 3d 824.

No. 19–798. BAY POINT PROPERTIES, INC. *v.* MISSISSIPPI TRANSPORTATION COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 937 F. 3d 454.

No. 19–802. EHRMAN *v.* COX COMMUNICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 3d 1223.

No. 19–903. RAMON OCHOA *v.* LEVINE ET AL. Super. Ct. Pa. Certiorari denied.

No. 19–904. RAMON OCHOA *v.* LEVINE ET AL. Super. Ct. Pa. Certiorari denied.

No. 19–905. RAMON OCHOA *v.* LEVINE ET AL. Super. Ct. Pa. Certiorari denied.

No. 19–919. BECKER ET AL. *v.* JANVEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 3d 830.

No. 19–931. FRIEDHEIM *v.* FIELD. C. A. 9th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 664.

No. 19–935. LEEPER *v.* HAMILTON COUNTY COAL, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 939 F. 3d 866.

No. 19–936. TRENTACOSTA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 337.

No. 19–941. RAULERSON *v.* WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON. C. A. 11th Cir. Certiorari denied. Reported below: 928 F. 3d 987.

No. 19–943. VAZIRABADI *v.* DENVER HEALTH AND HOSPITAL AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 681.

No. 19–945. PARDES *v.* DOAN. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 19–947. Xiu Jian Sun *v.* Chatigny. C. A. 2d Cir. Certiorari denied.

No. 19–948. Rechtzigel *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 19–951. Prasad *v.* General Electric Co. et al. C. A. 6th Cir. Certiorari denied.

No. 19–955. Hirshauer *v.* AQ Holdings, LLC, et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 716 and 722.

No. 19–977. Alfonso Gomez et al. *v.* Barr, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 516.

No. 19–981. English *v.* Perdue, Secretary of Agriculture. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 94.

No. 19–987. Winters, Judge, District Court of Louisiana, Fourth Judicial District, et al. *v.* Palowsky, Individually and On Behalf of Alternative Environmental Solutions, Inc. Sup. Ct. La. Certiorari denied. Reported below: 2018–1105 (La. 6/26/19), 285 So. 3d 466.

No. 19–1030. Bishop *v.* Palm Beach County, Florida. Cir. Ct. Palm Beach County, Fla. Certiorari denied.

No. 19–1050. Brooks *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 448 P. 3d 310.

No. 19–1055. Moss *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 936 F. 3d 52.

No. 19–1071. Carlson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 781.

No. 19–6062. Valdez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 3d 960.

No. 19–6389. Dennis *v.* Terris, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 927 F. 3d 955.

No. 19–6720. Myers *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 928 F. 3d 763.

No. 19–6747. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 778.

No. 19–6757. BOWENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 938 F. 3d 790.

No. 19–7071. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 931 F. 3d 570.

No. 19–7074. STITT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 295.

No. 19–7097. SANCHEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 5th 14, 439 P. 3d 772.

No. 19–7391. DAVIS *v.* TEGLEY ET AL. C. A. 8th Cir. Certiorari denied.

No. 19–7401. HOCKADAY *v.* CHRISTNER ET AL. C. A. 10th Cir. Certiorari denied.

No. 19–7402. SANDERS *v.* HENNEPIN COUNTY HUMAN SERVICE AND PUBLIC HEALTH DEPARTMENT CHILD SUPPORT ET AL. C. A. 8th Cir. Certiorari denied.

No. 19–7405. GRANT *v.* WILLIAMS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–7406. ANTONIO GUZMAN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–7418. GIFFORD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 281 So. 3d 484.

No. 19–7419. HARDIN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–7421. HENDERSON *v.* FRANKLIN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 866.

No. 19–7423. HAMILTON *v.* RAMEY, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 19–7424. HAM *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY, ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 19–7431. LOFLAND *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7441. RIDLEY *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 454.

No. 19–7442. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 585 S. W. 3d 478.

No. 19–7444. MUHAMMAD *v.* KOZELSKI ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 120.

No. 19–7445. PATTERSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 131.

No. 19–7448. RYDBOM *v.* AMES, SUPERINTENDENT, MOUNT OLIVE CORRECTIONAL COMPLEX. Sup. Ct. App. W. Va. Certiorari denied.

No. 19–7452. GOLIN ET UX. *v.* SAN ANDREAS REGIONAL CENTER ET AL.; and

No. 19–7453. DELANEY *v.* SAN ANDREAS REGIONAL CENTER ET AL. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 19–7459. PEYTON *v.* SIMS, WARDEN, ET AL. Ct. App. Ky. Certiorari denied. Reported below: 585 S. W. 3d 250.

No. 19–7461. CHEEKS *v.* JOYNER. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 796.

No. 19–7462. BANGURA *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 793 Fed. Appx. 142.

No. 19–7464. DAVIS *v.* RAYMOND LABORDE CORRECTIONAL CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 467.

No. 19–7465. ANTONIO CONTRERAS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 2d 1028.

No. 19–7473. BROWN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 19–7474. BANKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 19–7475. BALL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 19–7483. WASHINGTON *v.* DELEON ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7496. STRONER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–7499. SKIPP *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari denied.

No. 19–7500. SPENCER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 19–7503. BELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 284 So. 3d 400.

No. 19–7505. CRUMP *v.* BELTZ, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–7511. DEVILLE ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 19–7534. SCOTT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2019 Ark. 94, 571 S. W. 3d 451.

No. 19–7538. CARLSON ET VIR *v.* HARPSTEAD, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES, ET AL. Ct. App. Minn. Certiorari denied.

No. 19–7549. ELLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 470.

No. 19–7560. SWAIN *v.* FLORIDA COMMISSION ON OFFENDER REVIEW. C. A. 11th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 676.

No. 19–7570. TIERNEY-YOUNG *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied.

No. 19–7576. DAVIS *v.* ANGLETON INDEPENDENT SCHOOL DISTRICT ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 582 S. W. 3d 474.

No. 19–7578. BARRY *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7613. SMITH-JETER *v.* ARTSPACE EVERETT LOFTS CONDOMINIUM ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 1009.

No. 19–7618. WOODS *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied.

No. 19–7639. HARRIS *v.* CHAPMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7651. WHITE *v.* FOX, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 462.

No. 19–7657. SHERROD *v.* HARKELROAD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 377.

No. 19–7665. CHAPMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 352.

No. 19–7690. SHORT *v.* SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–7694. SANDERS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2019 WI App 52, 388 Wis. 2d 502, 933 N. W. 2d 670.

No. 19–7722. WATSON *v.* VIRGINIA (two judgments). Sup. Ct. Va. Certiorari denied. Reported below: 297 Va. 355, 827 S. E. 2d 778 (first judgment); 297 Va. 347, 827 S. E. 2d 782 (second judgment).

No. 19–7726. WATKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 940 F. 3d 152.

No. 19–7732. HANKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 783.

No. 19–7735. KEARBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 3d 969.

No. 19–7761. ARTEAGA *v.* CLARK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7765. REYES *v.* ERCOLE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 785 Fed. Appx. 26.

No. 19–7768. HERSI *v.* MAY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7771. BLANTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 390.

No. 19–7773. DENTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 3d 170.

No. 19–7775. ISABELLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 3d 816.

No. 19–7776. MARZOUK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 804.

No. 19–7777. HOYLE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 242 W. Va. 599, 836 S. E. 2d 817.

No. 19–7781. FORTNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 3d 1007.

No. 19–7782. MAYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7784. JENKINS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 19–7786. TEITELBAUM *v.* OHIO. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied.

No. 19–7796. HAWKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7797. HUBBARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–7798. CANTU HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 849.

No. 19–7800. BUSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 3d 189.

No. 19–7802. Ramirez Noria *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 847.

No. 19–7804. Flores *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 19–7811. Crum *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 934 F. 3d 963.

No. 19–7812. Lajaward Khan *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 797 Fed. Appx. 546.

No. 19–7816. Gay *v.* Foster, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 748.

No. 19–7817. Acosta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 96.

No. 19–7819. Dost *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 117.

No. 19–7820. Derby *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 638.

No. 19–7823. Weaver *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2019 IL App (4th) 170462–U.

No. 19–7824. Fisher *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 3d 809.

No. 19–7826. Miller *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–7833. Rodriguez-Juarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 487.

No. 19–7843. Buck *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 469.

No. 19–7844. White, aka Hoffman *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 990.

No. 19–7845. Weise *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–7848. Adams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 124.

No. 19–7853. MONZON-SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 671.

No. 19–7854. OVERSTREET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 203.

No. 19–7855. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 470.

No. 19–7857. ADAMS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 936 N. W. 2d 326.

No. 19–7863. KNIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–311. CANNON, SHERIFF, CHARLESTON COUNTY, SOUTH CAROLINA *v.* SEAY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE KAVANAUGH would grant the petition for writ of certiorari. Reported below: 927 F. 3d 776.

No. 19–807. BANK MELLI *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 778 Fed. Appx. 541.

No. 19–950. YUNG-KAI LU *v.* UNIVERSITY OF UTAH ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 790 Fed. Appx. 933.

No. 19–1060. THOMAS *v.* NEW YORK. Ct. App. N. Y. Motion of Cato Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 34 N. Y. 3d 545, 144 N. E. 3d 970.

No. 19–1073. ENZO LIFE SCIENCES, INC. *v.* ROCHE MOLECULAR SYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 928 F. 3d 1340.

No. 19–7755. PATRICK *v.* UNITED STATES (Reported below: 785 Fed. Appx. 424); NUNN *v.* UNITED STATES; COLASANTI *v.* UNITED STATES (787 Fed. Appx. 973); GILDERSLEEVE *v.* UNITED STATES

(788 Fed. Appx. 478); and BERALDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 951 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari). Recognizing that the Court has repeatedly declined to grant certiorari on this important issue—whether the right recognized in *Johnson* v. *United States*, 576 U. S. 591 (2015), applies to defendants sentenced under the mandatory Sentencing Guidelines—I will cease noting my dissent in future petitions presenting the question. I hope, however, that the Court will at some point reconsider its reluctance to answer it.

*Rehearing Denied*

No. 19–5526. LAKE *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS, 589 U. S. 1140;

No. 19–5676. JORDAN *v.* UNITED STATES, 589 U. S. 1083;

No. 19–6215. HAYNES *v.* ASSETS PROTECTION, INC., 589 U. S. 1109;

No. 19–6273. LUCAS *v.* FLORIDA, 589 U. S. 1143;

No. 19–6328. BROWN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 589 U. S. 1144;

No. 19–6577. SMITH *v.* HAYNES, 589 U. S. 1150;

No. 19–6578. SMITH *v.* WASHINGTON, 589 U. S. 1150;

No. 19–6598. HERCENBERGER *v.* MARTIN, 589 U. S. 1169;

No. 19–6782. MALLARD *v.* NEXT DAY TEMPS ET AL., 589 U. S. 1183; and

No. 19–6916. JEFFERSON *v.* SUPREME COURT OF GEORGIA, 589 U. S. 1215. Petitions for rehearing denied.

APRIL 2, 2020

*Dismissals Under Rule 46*

No. 18–1218. BUCHWALD CAPITAL ADVISORS LLC, LITIGATION TRUSTEE TO THE GREEKTOWN LITIGATION TRUST *v.* SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS ET AL. C. A. 6th Cir.

Certiorari dismissed under this Court's Rule 46.1. Reported below: 917 F. 3d 451.

No. 19–7903. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 786 Fed. Appx. 501.

No. 19–7914. MOSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 787 Fed. Appx. 225.

APRIL 6, 2020

*Certiorari Dismissed*

No. 19–7573. DONAHUE *v.* SCALIA, SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 789 Fed. Appx. 324.

No. 19–7597. WAZNEY *v.* NELSON, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 773 Fed. Appx. 768.

*Miscellaneous Orders.*

No. 19M119. WALSH *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 19M120. REBENSTORF *v.* GRANT;
No. 19M121. CRENSHAW *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;
No. 19M122. WARREN *v.* ORMOND, WARDEN, ET AL.; and
No. 19M123. LOWERY *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. 19M124. ARMSTRONG *v.* PENNSYLVANIA ET AL.;
No. 19M125. ARMSTRONG *v.* UNITED STATES ET AL.;
No. 19M126. ARMSTRONG *v.* AMTRAK POLICE; and
No. 19M127. ARMSTRONG *v.* GEICO INSURANCE. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 19–7894. In re Renchenski; and
No. 19–8026. In re Hampton. Petitions for writs of habeas corpus denied.

No. 19–7884. In re Frye. Petition for writ of mandamus denied.

*Certiorari Denied*

No. 19–573. Al-Amin *v.* Ward, Commissioner, Georgia Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 932 F. 3d 1291.

No. 19–659. Salgado *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 3d 1293.

No. 19–680. Sealey et al. *v.* Gilliam et al. C. A. 4th Cir. Certiorari denied. Reported below: 932 F. 3d 216.

No. 19–690. Neville *v.* Dhillon, Chair, Equal Employment Opportunity Commission, et al. C. A. 5th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 280.

No. 19–710. Connecticut Fine Wine & Spirits, LLC, dba Total Wine & More *v.* Seagull, Commissioner, Connecticut Department of Consumer Protection, et al. C. A. 2d Cir. Certiorari denied. Reported below: 932 F. 3d 22.

No. 19–956. Craig et al. *v.* O'Kelley, Individually and as Personal Representative of the Estate of Turner, et al. C. A. 11th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 888.

No. 19–986. Vosburgh et al. *v.* Burnt Hills-Ballston Lake Central School District et al. C. A. 2d Cir. Certiorari denied. Reported below: 778 Fed. Appx. 54.

No. 19–990. Southern Illinois Storm Shelters *v.* 4SEMO.COM, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 939 F. 3d 905.

No. 19–994. Hill *v.* Johnson et al. C. A. 11th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 604.

No. 19–996. Waters *v.* Georgia. Ct. App. Ga. Certiorari denied.

No. 19–998. Cook, Individually and as Natural Mother to Cook, et al. *v.* Hopkins et al. C. A. 5th Cir. Certiorari denied.

No. 19–1003. Kinuthia *v.* Velarde, Acting Chief, Administrative Appeals Office, et al. C. A. 1st Cir. Certiorari denied.

No. 19–1072. Rothstein *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 3d 1286.

No. 19–1075. Copeland *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–1102. Small *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 3d 490.

No. 19–1103. INO Therapeutics LLC et al. *v.* Praxair Distribution Inc. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 782 Fed. Appx. 1001.

No. 19–6410. Rager *v.* Augustine, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 947.

No. 19–6501. Felicianosoto *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 934 F. 3d 783.

No. 19–6800. Mitchell *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 227.

No. 19–6967. Boyd et al. *v.* California Public Utilities Commission et al. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 3d 929.

No. 19–7081. Adebowale *v.* Wolf, Acting Secretary of Homeland Security, et al. C. A. 7th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 510.

No. 19–7086. Prezioso *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 586.

No. 19–7088. Cortez-Rogel *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 761.

No. 19–7102. Mendez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 745.

No. 19–7104. PACHECO-ASTRUDILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 766.

No. 19–7112. GALINDO-SERRANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 925 F. 3d 40.

No. 19–7131. HANNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7493. KIRVIN *v.* GRANT ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7513. SMITH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 19–7529. WILLIAMS *v.* LITTON LOAN SERVICES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 819.

No. 19–7532. WELSH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 19–7537. SPICE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 19–7541. HURLES *v.* SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7542. PELMEAR ET AL. *v.* O'CONNOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–7545. PALMER *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 640.

No. 19–7546. JORGE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7554. HILLYGUS *v.* DOHERTY ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7556. JACOBS *v.* MARICOPA INTEGRATED HEALTH CARE SYSTEM. Ct. App. Ariz. Certiorari denied.

No. 19–7559. JACKSON *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7563. SPEED *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–7582. ARELLANO *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7583. BYRD *v.* BOUTTE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–7591. PAYNE *v.* MANGUM. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 187.

No. 19–7595. MAJOR *v.* BAKER, WARDEN. Ct. App. Nev. Certiorari denied.

No. 19–7600. SUNDY *v.* FRIENDSHIP PAVILION ACQUISITION CO., LLC. Ct. App. Ga. Certiorari denied.

No. 19–7605. KANE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 210 A. 3d 324.

No. 19–7609. MAURICIO CASTILLO *v.* BACA, WARDEN. Ct. App. Nev. Certiorari denied.

No. 19–7628. GUYN *v.* KENT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–7644. JONES *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–7660. WEST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 775 Fed. Appx. 38.

No. 19–7666. WOODS *v.* JOYNER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 823.

No. 19–7676. JACKSON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 284 So. 3d 515.

No. 19–7679. BROWNLEE *v.* HEARNS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 775 Fed. Appx. 35.

No. 19–7708. ALJINDI *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7723. BRAMMER *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7734. DENNIS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–7740. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 140.

No. 19–7759. EMERS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2019 IL App (4th) 170254–U.

No. 19–7762. AMERSON ET AL. *v.* ATLAS LAW FIRM, P. C., ET AL. Ct. App. Colo. Certiorari denied.

No. 19–7791. JACKSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 220 A. 3d 641.

No. 19–7813. JAMERSON *v.* LEWIS, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 19–7830. PANTALEON-AVILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 624.

No. 19–7835. RODRIGUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 19–7836. SALAHUDDIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 930 F. 3d 410.

No. 19–7838. SHOCKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 941 F. 3d 282.

No. 19–7839. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 492.

No. 19–7851. MARTINEZ-ALVARADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 829.

No. 19–7869. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 190.

No. 19–7873. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 19–7875. GAY *v.* DAFFENBACH, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 732.

No. 19–7876. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 795.

No. 19–7881. FARRINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 404.

No. 19–7886. MAHON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7887. JUVENILE FEMALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 786 Fed. Appx. 313.

No. 19–7896. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 388.

No. 19–7898. MURPHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 792 Fed. Appx. 232.

No. 19–7909. KILMARTIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 944 F. 3d 315.

No. 19–7911. CORNELIUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 70.

No. 19–7916. GELAZELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 898.

No. 19–7917. FELDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 931 F. 3d 1245.

No. 19–7934. BETTS *v.* UNITED AIRLINES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 768 Fed. Appx. 577.

No. 19–7940. FERNANDEZ MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7942. PARSONS *v.* BLADES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7949. DEVORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–7950. VALENTINE *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 27 Neb. App. 725, 936 N. W. 2d 16.

No. 19–7967. DURANT *v.* LAWRENCE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 19–7970. SHADE *v.* WASHBURN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–1455. ARCHDIOCESE OF WASHINGTON *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 897 F. 3d 314.

Statement of JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.

Because the full Court is unable to hear this case, it makes a poor candidate for our review. But for that complication, however, our intervention and a reversal would be warranted for reasons admirably explained by Judge Griffith in his dissent below and by Judge Hardiman in an opinion for the Third Circuit. See 910 F. 3d 1248, 1250–1254 (CADC 2018) (Griffith, J., dissenting from denial of rehearing en banc); *Northeastern Pa. Freethought Society* v. *Lackawanna Transit System*, 938 F. 3d 424, 435–437 (CA3 2019) (noting disagreement with D. C. Circuit).

At Christmastime a few years ago, the Catholic Church sought to place advertisements on the side of local buses in Washington, D. C. The proposed image was a simple one—a silhouette of three shepherds and sheep, along with the words "Find the Perfect Gift" and a church website address. No one disputes that, if Macy's had sought to place the same advertisement with its own website address, the Washington Metropolitan Area Transit Authority (WMATA) would have accepted the business gladly. Indeed, WMATA admits that it views Christmas as having "'a secular half'" and "'a religious half,'" and it has shown no hesitation in taking secular Christmas advertisements. Pet. for Cert. 1. Still, when it came to the church's proposal, WMATA balked.

That is viewpoint discrimination by a governmental entity and a violation of the First Amendment. In fact, this Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions over the last three decades. See *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993). In each case, the government opened a forum to discussion of a particular subject but then sought to ban discussion of that subject from a religious viewpoint. What WMATA did here is no different.

WMATA's response only underscores its error. WMATA suggests that its conduct comported with our decision in *Rosenberger*

because it banned religion as a *subject* rather than discriminated between religious and nonreligious *viewpoints*. But that reply rests on a misunderstanding of *Rosenberger*. There, the Court recognized that religion is not just a subject isolated to itself, but often also "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." 515 U. S., at 831. That means the government may minimize religious speech incidentally by reasonably limiting a forum like bus advertisement space to subjects where religious views are unlikely or rare. But once the government allows a subject to be discussed, it cannot silence religious views on that topic. See *Good News Club*, 533 U. S., at 110–112. So the government may designate a forum for art or music, but it cannot then forbid discussion of Michelangelo's David or Handel's Messiah. And once the government declares Christmas open for commentary, it can hardly turn around and mute religious speech on a subject that so naturally invites it.

That's not to say WMATA lacks a choice. The Constitution requires the government to respect religious speech, not to maximize advertising revenues. So if WMATA finds messages like the one here intolerable, it may close its buses to all advertisements. More modestly, it might restrict advertisement space to subjects where religious viewpoints are less likely to arise without running afoul of our free speech precedents. The one thing it cannot do is what it did here—permit a subject sure to inspire religious views, one that even WMATA admits is "half" religious in nature, and then suppress those views. The First Amendment requires governments to protect religious viewpoints, not single them out for silencing.

No. 19–446. VF Jeanswear LP *v.* Equal Employment Opportunity Commission. C. A. 9th Cir. Certiorari denied. Reported below: 769 Fed. Appx. 477.

Justice Thomas, dissenting.

This case presents the question whether the Equal Employment Opportunity Commission (EEOC) may continue to investigate an employer's purported wrongdoing after issuing a right-to-sue notice to a private party who, in turn, has initiated her own litigation. The Seventh and Ninth Circuits have determined that Title VII of the Civil Rights Act of 1964, 78 Stat. 253, grants the

EEOC that power. See *EEOC* v. *Union Pacific R. Co.*, 867 F. 3d 843, 848 (CA7 2017); *EEOC* v. *Federal Express Corp.*, 558 F. 3d 842, 851–852 (CA9 2009). The Fifth Circuit, on the other hand, has concluded that the plain text of Title VII prohibits such investigations. See *EEOC* v. *Hearst Corp.*, 103 F. 3d 462, 469 (1997).

Though this split in authority is shallow, it directly implicates the EEOC's core investigative powers. If the Fifth Circuit is correct that issuing a right-to-sue notice terminates the EEOC's ability to investigate, then the EEOC may be wielding ultra vires power, impermissibly subjecting employers to time-consuming investigations. I would grant certiorari to determine whether the agency is operating within the confines of the authority granted by Congress.

## I

### A

A preliminary analysis of the text suggests that the EEOC may lack the authority to continue an investigation after it has issued a right-to-sue notice. The basic provisions governing the EEOC's role in investigating discrimination claims are found in 42 U. S. C. §2000e–5. As relevant here, the EEOC's duties are triggered when it receives "a charge . . . filed by or on behalf of a person claiming to be aggrieved." §2000e–5(b); *University of Pa.* v. *EEOC*, 493 U. S. 182, 190 (1990). The EEOC must provide notice to the employer "within ten days, *and shall make an investigation* thereof." §2000e–5(b) (emphasis added). "If the Commission determines *after such investigation* that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* (emphasis added). Otherwise, it will dismiss the charge. *Ibid.* "The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." *Ibid.* But "[i]f a charge filed with the Commission pursuant to subsection (b) . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section[,] . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission

. . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge." § 2000e–(5)(f)(1); see also *Fort Bend County* v. *Davis*, 587 U. S. 541 (2019).

Regardless of how the EEOC may approach this process in practice, these statutory provisions set out a clear timetable and a sequential series of steps for the EEOC to follow. After giving notice to the employer, it must engage in an investigation that comes to a definitive end either because the EEOC has entered into a conciliation process or because it has dismissed the charge. Further, the EEOC must issue the right-to-sue notice after 180 days—60 days after the timeline contemplated by the statute for a reasonable cause determination, which triggers dismissal of a charge or conciliation efforts. Thus, at first glance, it appears that the more natural reading of these provisions is that Congress "expected the EEOC to complete investigations within 120 days[, l]eaving an additional 60 days for the EEOC to determine whether suit should be filed." *Hearst*, 103 F. 3d, at 467.

B

Whatever the correct interpretation of the text, however, the Ninth Circuit's approach in *Federal Express*, 558 F. 3d 842, is highly problematic. The Ninth Circuit began by asserting that it was bound to enforce an EEOC subpoena if the agency's jurisdiction was "plausible" and not "plainly lacking." *Id.*, at 848 (internal quotation marks omitted). Next, the court noted that the EEOC has, through regulation, interpreted its own statutory authority to allow the agency to continue processing a charge after it has issued a right-to-sue notice. *Id.*, at 850; see 29 CFR § 1601.28(a)(3) (2019). To cap off its analysis, the Ninth Circuit gave weight to the fact that the EEOC had further interpreted its own *regulation* allowing "'further processing [of] the charge'" after issuing notice to "includ[e] further investigation." *Federal Express*, 558 F. 3d, at 850 (citing EEOC Compliance Manual § 6.4 (2006)). Thus, under this dual layer of agency interpretation, the Ninth Circuit concluded that Title VII permitted the EEOC to continue with its investigation after issuing a right-to-sue notice. The Ninth Circuit acknowledged that its reading conflicted with the Fifth Circuit's decision in *Hearst*, 103 F. 3d 462. But it disagreed with the Fifth Circuit primarily because it viewed *Hearst* as conflicting with the EEOC's role in vindicating the public's

interest in eradicating employment discrimination.* *Federal Express*, 558 F. 3d, at 852.

The Ninth Circuit's analysis contains at least four flaws. Most egregiously, the Ninth Circuit failed to consider the most useful, and perhaps dispositive, evidence—the text of Title VII itself. Nor did it perform anything remotely resembling an independent assessment of that text. Even under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), courts are instructed to engage in their own analysis of the statute to determine whether any gap has been left for the agency to fill. *Id.*, at 843, n. 9; see also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 447–448 (1987). The Ninth Circuit, by contrast, bypassed the statutory text entirely.

Second, the Ninth Circuit's approach to jurisdiction was highly suspect, if not outright erroneous. As the Ninth Circuit has elsewhere recognized, all administrative agencies "are creatures of statute, bound to the confines of the statute that created them." *United States Fidelity & Guaranty Co.* v. *Lee*, 641 F. 3d 1126, 1135 (2011). This fundamental principle applies not only to substantive areas regulated by an agency but also to the agency's underlying jurisdiction. There is no basis for applying a "plainly lacking" standard when assessing the authority of an agency to act, let alone to issue wide-ranging subpoenas that consume the time and resources of employers.

Third, reliance on and deference to the EEOC's regulation also seems inappropriate under this Court's *Chevron* framework. The regulation was originally promulgated before this Court's decision in *Chevron*. See 29 CFR § 1601.28(a)(3) (1978). The associated rulemaking contains no indication that the agency invoked its interpretive authority or even believed it was interpreting the statute at all. See 42 Fed. Reg. 42025, 42030–42031, 47831 (1977); see also 37 Fed. Reg. 9214–9220 (1973). Thus, it is hardly self-evident that, even under our precedents, *Chevron* deference should apply. See *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002).

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*The Ninth Circuit also relied in part on this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279 (2002), where this Court held that an employee's agreement to arbitrate employment disputes did not prevent the EEOC from pursuing victim-specific relief in court. But that decision conflicts with the principle that the EEOC takes a plaintiff as it finds him. See *id.*, at 303–312 (THOMAS, J., dissenting).

Last but not least, the Ninth Circuit's invocation of the EEOC Compliance Manual not only assumes that the regulation is ambiguous—itself a dubious proposition—but also is premised on so-called *Auer* deference to the agency's interpretation of its own ambiguous regulation. *Auer* v. *Robbins*, 519 U. S. 452 (1997). This doctrine has rightly fallen out of favor in recent years, as it directly conflicts with the constitutional duty of a judge to faithfully and independently interpret the law. See *Kisor* v. *Wilkie*, 588 U. S. 558, 592 (2019) (GORSUCH, J., concurring in judgment); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 112 (2015) (THOMAS, J., concurring in judgment).

## II

Leaving the Seventh and Ninth Circuit's highly questionable interpretation undisturbed has wide-reaching ramifications for employers subject to litigation in those Circuits. In this case, for instance, a former salesperson employed by petitioner VF Jeanswear LP filed a charge with the EEOC, alleging that she was demoted on the basis of her sex and age in violation of Title VII. § 2000e–2(a)(1). After she filed a complaint in state court, the EEOC issued her a right-to-sue notice, indicating that it would not finish processing her charge within the allotted 180-day timeframe. The former employee proceeded to litigate her claims in federal court, and the EEOC did not intervene.

Meanwhile, the EEOC continued with its own, far broader investigation, including a subpoena directing VF Jeanswear to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities during the relevant period," including information such as the "position(s) held and date in each position" and, "if no longer employed, [the] date of termination, and reason for termination." 2017 WL 2861182, *2 (D Ariz., July 5, 2017). Thus, the EEOC not only subjected VF Jeanswear to a second investigation, but it also issued a subpoena covering material that departed significantly from the employee's original, individualized allegations. As the District Court noted in refusing to enforce the subpoena, the EEOC sought information regarding positions for which the employee never applied, and amounted to "a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party." *Id.*, at *6.

Because the textual argument against the EEOC's power to issue this subpoena seems strong, and the argument supporting it particularly weak, I respectfully dissent from the denial of certiorari.

No. 19–678. UNITED STATES EX REL. SCHNEIDER *v.* JPMORGAN CHASE BANK, N. A., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

No. 19–726. JONES ET AL. *v.* LAMKIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MARSHAL OF THE CIVIL AND MAGISTRATE COURT OF RICHMOND COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Motion of National Fraternal Order of Police for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 781 Fed. Appx. 865.

No. 19–6156. HALPRIN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 758.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The facts underlying this petition are deeply disturbing. I write to explain why I nevertheless do not dissent from the denial of certiorari.

In December 2000, petitioner Randy Ethan Halprin and six others escaped from a Texas prison and robbed a sporting-goods store. During the robbery, Officer Aubrey Hawkins responded to a distress call and was fatally shot. The State of Texas tried Halprin and the other escapees separately for their roles in Officer Hawkins' death. Presiding over most of those trials, including Halprin's, was Judge Vickers Cunningham.

In 2003, a jury found Halprin guilty of capital murder and recommended the death penalty, and then-Judge Cunningham announced a death sentence. For the next decade, Halprin unsuccessfully sought appellate and collateral relief in the state courts. In 2014, he petitioned for a writ of habeas corpus under 28 U. S. C. § 2254, to no avail.

Years after the trial, Cunningham—no longer a judge—ran for a position as a county commissioner. In May 2018, a news outlet published that Cunningham had created a living trust for his

children that would have withheld payments had they married nonwhite non-Christians. (Halprin is Jewish, a fact that featured prominently at his trial.) A former campaign staffer of Cunningham's also relayed to the news outlet that the former judge used the acronym "T.N.D."—short for "Typical N*** Deals"—to refer to criminal cases involving black defendants. Record 19–70016.1120.

These developments prompted Halprin's counsel to investigate whether Cunningham had harbored bias against Halprin. Witnesses recounted that, shortly after Halprin's trial, Cunningham had referred to Halprin with derogatory terms like "f***n' Jew"—and that the former judge had also referred to Halprin's accomplices using similar slurs. *Id.*, at 19–70016.1064. Halprin's counsel further discovered that Cunningham had told campaign staffers that he sought public office to "save" his city from "'n***s, wetbacks, Jews, and dirty Catholics.'" *Id.*, at 19–70016.1235.

On May 17, 2019, presented with this newly discovered evidence, Halprin filed another § 2254 petition in Federal District Court. He asserted that Cunningham's bias constituted structural error depriving Halprin of his constitutional right to a fair trial. Halprin also requested that the federal court stay the proceedings so that he could exhaust his claim in state court, and then filed an application for habeas relief in the Texas Court of Criminal Appeals. (That court has since stayed Halprin's execution to allow a trial court to consider the claim of judicial bias.)

Meanwhile, the District Court transferred Halprin's recent § 2254 petition to the Court of Appeals for the Fifth Circuit to determine whether it was an unauthorized "second or successive" petition. See 28 U. S. C. § 2244(b).* The Fifth Circuit recognized that Halprin had cited evidence of "horrible" "racism and bigotry" that, if true, would be "completely inappropriate for a

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*Section 2244(b)(2)(B) provides in pertinent part:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

judge." *In re Halprin*, 788 Fed. Appx. 941, 942, n. 2 (2019) (*per curiam*). Nevertheless, the Court of Appeals held, Halprin's filing was a second or successive petition under federal law because, "even if" Cunningham's prejudice were "unknown to Halprin at the time," the judicial-bias claim would have been "ripe" during the jury trial. *Id.*, at 943. The Fifth Circuit then concluded that Halprin could not satisfy § 2244(b)'s "'strict'" requirements for authorizing a second or successive § 2254 application. *Id.*, at 945. Granting Halprin's argument that judicial bias is "structural error" warranting an automatic retrial, the Fifth Circuit still found that Halprin could not show "by clear and convincing evidence that, absent such bias, no reasonable factfinder would have found Halprin guilty of the underlying offense." *Id.*, at 944–945.

In this Court, Halprin contests whether his recent federal petition is "second or successive" at all. Drawing on *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), and *Magwood* v. *Patterson*, 561 U. S. 320 (2010), Halprin contends that his federal habeas claim cannot count as "second or successive" under § 2244(b) because he never "'had a full and fair opportunity to raise the claim in [his] prior application'" to the Federal District Court. Pet. for Cert. 14. Halprin also urges the Court to exercise its "traditional equitable authority" to excuse defaulted claims that do not satisfy § 2244(b)'s literal text. *Id.*, at 15 (internal quotation marks omitted).

Despite these potent arguments, the Court declines to grant certiorari. I do not dissent for two reasons. First, state-court proceedings are underway to address—and, if appropriate, to remedy—Halprin's assertion that insidious racial and religious bias infected his trial. For its part, the State represents that "Halprin has not been deprived of an opportunity to bring his claim in state court" because the Texas Court of Criminal Appeals recently "stayed his execution and remanded his judicial bias claim to the trial court for review." Brief in Opposition 21–22; see also *id.*, at 28 ("[A]venues of relief remain, including state habeas proceedings"). Thus, were the Texas courts to agree with Halprin on the merits of his judicial-bias claim, this petition for a writ of certiorari about a federal procedural provision would become moot.

Second, this Court's denial "carries with it no implication whatever regarding the Court's views on the merits of" Halprin's claims. *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912,

919 (1950) (Frankfurter, J., respecting denial of certiorari). Though the Fifth Circuit has already interpreted § 2244 to deny Halprin authorization to file a § 2254 petition, this Court's denial of certiorari does not prevent Halprin from seeking direct review from a constitutional ruling by the Texas courts. Nor does it preclude Halprin from seeking an original writ of habeas corpus under this Court's Rule 20.

* * *

"[T]he Due Process Clause clearly requires a 'fair trial in a fair tribuna[l]' before a judge with no actual bias against the defendant." *Bracy* v. *Gramley*, 520 U. S. 899, 904–905 (1997) (citation omitted). I trust that the Texas courts considering Halprin's case are more than capable of guarding this fundamental guarantee.

*Rehearing Denied*

No. 19–6427. SMITH *v.* CHAPDELAINE, WARDEN, ET AL., 589 U. S. 1146;

No. 19–6762. WIMBERLEY *v.* SACRAMENTO, 589 U. S. 1183;

No. 19–6863. IN RE BONNELL, 589 U. S. 1201;

No. 19–6931. JOHNSON *v.* LINEBARGER GOGGAN BLAIR & SAMPSON, L. L. P., 589 U. S. 1215; and

No. 19–7095. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, 589 U. S. 1255. Petitions for rehearing denied.

No. 19–6846. RILEY *v.* METZGER, WARDEN, ET AL., 589 U. S. 1160; and

No. 19–6856. RILEY *v.* DELAWARE, 589 U. S. 1160. Petitions for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of these petitions.

APRIL 15, 2020

*Miscellaneous Order*

In light of the ongoing public health concerns relating to COVID–19:

IT IS ORDERED that with respect to every document filed in a case prior to a ruling on a petition for a writ of certiorari or petition for an extraordinary writ, or a decision to set an appeal for argument, a single paper copy of the document, formatted on 8½ × 11 inch paper, may be filed. The document may be format-

ted under the standards set forth in this Court's Rule 33.2, or under the standards set forth in Rule 33.1 but printed on 8½ × 11 inch paper. The Court may later request that a document initially submitted on 8½ × 11 inch paper be submitted in booklet format.

IT IS FURTHER ORDERED that the following types of documents should not be filed in paper form if they are submitted through the Court's electronic filing system: (1) motions for an extension of time under Rule 30.4; (2) waivers of the right to respond to a petition under Rule 15.5; (3) blanket consents to the filing of *amicus* briefs under Rules 37.2(a) and 37.3(a); and (4) motions to delay distribution of a cert. petition under the Court's order of March 19, 2020. Notwithstanding Rule 34.6 and paragraph 9 of the Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, these enumerated filings should be filed electronically in cases governed by Rule 34.6, although other types of documents in those cases should still be filed in paper form only.

IT IS FURTHER ORDERED that, notwithstanding Rule 29.3, parties may be relieved of the obligation to effect service of paper versions of filings upon other parties if they agree to electronic service; parties are strongly encouraged to use electronic service if feasible.

These modifications will remain in effect until further order of the Court.