590
2 of 2

PRELIMINARY PRINT

VOLUME 590 U. S. - PART 2
PAGES 432–830; 970–1043

OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 1 THROUGH JUNE 16, 2020

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE
AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE
AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE
AMENDMENT TO FEDERAL RULES OF EVIDENCE

END OF VOLUME

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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

Vol. 590 (Pp. 432–830; 970–1043)
UNITED STATES REPORTS
Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.
NEIL M. GORSUCH, ASSOCIATE JUSTICE.
BRETT M. KAVANAUGH, ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM P. BARR, ATTORNEY GENERAL.
NOEL J. FRANCISCO, SOLICITOR GENERAL.
SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 19, 2018, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

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

For the Sixth Circuit, Sonia Sotomayor, Associate Justice.

For the Seventh Circuit, Brett M. Kavanaugh, Associate Justice.

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

For the Ninth Circuit, Elena Kagan, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

October 19, 2018.

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

INDEX

(Vol. 590 U. S., Part 2)

CUMULATIVE TABLE OF CASES REPORTED

(Vol. 590 U. S., Parts 1 and 2)

NOTES:

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.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2019

Syllabus

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS *v.* OUTOKUMPU STAINLESS USA, LLC, ET AL.

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

No. 18–1048. Argued January 21, 2020—Decided June 1, 2020

ThyssenKrupp Stainless USA, LLC, entered into three contracts with F. L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each contract contained a clause requiring arbitration of any contract dispute. F. L. Industries then entered into a subcontractor agreement with petitioner (GE Energy) for the provision of nine motors to power the cold rolling mills. After the motors for the cold rolling mills allegedly failed, Outokumpu Stainless USA, LLC (which acquired ownership of the plant), and its insurers sued GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U. S. C. § 205. It then moved to dismiss and compel arbitration, relying on the arbitration clauses in the F. L. Industries and ThyssenKrupp contracts. The District Court granted the motion, concluding that both Outokumpu and GE Energy were parties to the agreement. The Eleventh Circuit reversed. It concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) allows enforcement of an arbitration agreement only by the parties that actually signed the agreement and that GE Energy was a nonsignatory. It also held that allowing GE Energy to rely on state-law equitable estoppel doctrines to enforce the arbitration agreement would conflict with the Convention's signatory requirement.

Held: The New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Pp. 437–445.

(a) Chapter 1 of the Federal Arbitration Act (FAA) does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630. The "'traditional principles' of state law" that apply under Chapter 1 include doctrines, like equitable estoppel, authorizing contract enforcement by a nonsignatory. *Id.*, at 631–632.

The New York Convention is a multilateral treaty addressing international arbitration. One article of the Convention addresses arbitration

agreements—Article II—and one provision of Article II addresses the enforcement of those agreements—Article II(3). Article II(3) provides that courts of a contracting state "shall . . . refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests such a referral.

Chapter 2 of the FAA grants federal courts jurisdiction over actions governed by the Convention. As relevant here, Chapter 2 provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." 9 U. S. C. § 208. Pp. 437–439.

(b) The application of familiar tools of treaty interpretation establishes that the state-law equitable estoppel doctrines permitted under Chapter 1 do not "conflict with . . . the Convention." § 208. Pp. 439–444.

(1) The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement. This silence is dispositive because nothing in the Convention's text could be read to conflict with the application of domestic equitable estoppel doctrines. Article II(3)—the only provision in the Convention addressing the enforcement of arbitration agreements—contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of such language. This interpretation is especially appropriate because Article II contemplates using domestic doctrines to fill gaps in the Convention. Pp. 439–441.

(2) This interpretation is confirmed by the Convention's negotiation and drafting history as well as "'the postratification understanding' of signatory nations," *Medellín* v. *Texas*, 552 U. S. 491, 507.

Cherry-picked generalizations from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. Here, to the extent that the Convention's drafting history sheds any light on the treaty's meaning, it shows only that the drafters sought to impose baseline requirements on contracting states so that signatories would "not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 520, n. 15.

The postratification understanding of other contracting states—as evidenced by the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175, and the "postratification conduct" of contracting state governments,

Zicherman v. *Korean Air Lines Co.*, 516 U. S. 217, 227—may also serve as an aid to this Court's interpretation. Here, numerous sources indicate that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. These sources, however, are from decades after the finalization of the New York Convention's text in 1958. This diminishes their value as evidence of the original understanding of the treaty's meaning.

Finally, because the Court's textual analysis and the Executive's interpretation of the Convention align here, there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114–115, n. 8. Pp. 441–444.

(c) The Court of Appeals may address on remand whether GE Energy can enforce the arbitration clauses under equitable estoppel principles and which body of law governs that determination. P. 445

902 F. 3d 1316, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 445.

Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *Caroline Edsall Littleton*, *Amanda K. Rice*, *Sara Anne Ford*, *Wesley B. Gilchrist*, *Amie A. Vague*, and *Jeffrey R. Johnson*.

Jonathan Y. Ellis argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Elizabeth B. Prelogar*, and *Sharon Swingle*.

Jonathan D. Hacker argued the cause for respondents. With him on the brief were *Samantha M. Goldstein*, *Anton Metlitsky*, *Cheri Turnage Gatlin*, *Melinda S. Kollross*, *Joseph J. Ferrini*, *James R. Swinehart*, *E. Travis Ramey*, *Devin C. Dolive*, *W. Gregory Aimonette*, *Kenneth R. Wysocki*, and *Kelly A. Jorgensen*.*

---

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Peter B. Rutledge*; for the Miami International Arbitration Society by *Carlos F. Concepción*, *Giovanni Angles*, and *Edward M. Mullins*; for the National Association of

JUSTICE THOMAS delivered the opinion of the Court.

The question in this case is whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U. S. T. 2517, T. I. A. S. No. 6997, conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. We hold that it does not.

I

In 2007, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F. L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each of the contracts contained an identical arbitration clause. The clause provided that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract . . . shall be submitted to arbitration for settlement." App. 171.

After executing these agreements, F. L. Industries, Inc., entered into a subcontractor agreement with petitioner GE Energy Power Conversion France SAS, Corp. (GE Energy), then known as Converteam SAS. Under that agreement, GE Energy agreed to design, manufacture, and supply motors for the cold rolling mills. Between 2011 and 2012, GE Energy delivered nine motors to the Alabama plant for installation. Soon thereafter, respondent Outokumpu Stainless USA, LLC, acquired ownership of the plant from ThyssenKrupp.

According to Outokumpu, GE Energy's motors failed by the summer of 2015, resulting in substantial damages. In

---

Manufacturers by *J. Michael Connolly*, *Thomas R. McCarthy*, *Peter C. Tolsdorf*, and *Leland P. Frost*; for the North America Branch of the Chartered Institute of Arbitrators by *Glenn P. Hendrix* and *Rebecca Lunceford Kolb*; and for George A. Bermann et al. by *Douglass Cassel*.

Briefs of *amici curiae* urging affirmance were filed for Public Citizen by *Scott L. Nelson*, *Allison M. Zieve*, and *Kaitlin E. Leary*; and for Benjamin G. Davis et al. by *Mr. Davis*, *pro se*, and *Raffi Melkonian*.

Karla Gilbride filed a brief of *amicus curiae* for Public Justice.

2016, Outokumpu and its insurers filed suit against GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U. S. C. § 205, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement . . . falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]." GE Energy then moved to dismiss and compel arbitration, relying on the arbitration clauses in the contracts between F. L. Industries, Inc., and ThyssenKrupp.

The District Court granted GE Energy's motion to dismiss and compel arbitration with Outokumpu and Sompo Japan Insurance Company of America. *Outokumpu Stainless USA LLC* v. *Converteam SAS*, 2017 WL 401951 (SD Ala., Jan. 30, 2017).[1] The court held that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors. *Id.*, at *4. Because the court concluded that both Outokumpu and GE Energy were parties to the agreements, it declined to address GE Energy's argument that the agreement was enforceable under equitable estoppel. *Id.*, at *1, n. 1.

The Eleventh Circuit reversed the District Court's order compelling arbitration. *Outokumpu Stainless USA, LLC* v. *Converteam SAS*, 902 F. 3d 1316 (2018). The court interpreted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) to include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." *Id.*, at 1326 (emphasis in original). The court concluded that this requirement was not satisfied because "GE Energy is undeniably not a signatory to the Contracts." *Ibid.* It then held that GE Energy could not rely on state-law equitable estoppel doctrines to enforce the

[1] The District Court later granted GE Energy's motion to compel arbitration with additional insurers. *Outokumpu Stainless USA LLC* v. *Converteam SAS*, 2017 WL 480716 (SD Ala., Feb. 3, 2017).

arbitration agreement as a nonsignatory because, in the court's view, equitable estoppel conflicts with the Convention's signatory requirement. *Id.*, at 1326–1327.

Given a conflict between the Courts of Appeals on this question,[2] we granted certiorari. 588 U. S. 918 (2019).

II

A

Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements. Section 2 of that chapter provides that an arbitration agreement in writing "shall be . . . enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. As we have explained, this provision requires federal courts to "place [arbitration] agreements '"upon the same footing as other contracts."'" *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989) (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974)). But it does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009).

The "traditional principles of state law" that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. *Id.*, at 631 (internal quotation marks omitted). For example, we have recognized that arbitration agreements may be enforced by nonsignatories through "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Ibid.* (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)).

---

[2] Compare 902 F. 3d 1316, 1326 (CA11 2018), and *Yang* v. *Majestic Blue Fisheries, LLC*, 876 F. 3d 996, 1001–1002 (CA9 2017), with *Aggarao* v. *MOL Ship Mgmt. Co.*, 675 F. 3d 355, 375 (CA4 2012), and *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F. 3d 38, 48 (CA1 2008).

This case implicates domestic equitable estoppel doctrines. Generally, in the arbitration context, "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Id.*, at 200 (2017). In *Arthur Andersen*, we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. 556 U. S., at 631–632.

B

The New York Convention is a multilateral treaty that addresses international arbitration. 21 U. S. T. 2517, T. I. A. S. No. 6997. It focuses almost entirely on arbitral awards. Article I(1) describes the Convention as applying only to "the recognition and enforcement of arbitral awards." *Id.*, at 2519. Articles III, IV, and V contain recognition and enforcement obligations related to arbitral awards for contracting states and for parties seeking the enforcement of arbitral awards. *Id.*, at 2519–2520. Article VI addresses when an award can be set aside or suspended. *Id.*, at 2520. And Article VII(1) states that the "Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." *Id.*, at 2520–2521.

Only one article of the Convention addresses arbitration agreements—Article II. That article contains only three provisions, each one sentence long. Article II(1) requires "[e]ach Contracting State [to] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." *Id.*, at 2519. Article

II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Ibid.* Finally, Article II(3) states that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Ibid.*

C

In 1970, the United States acceded to the New York Convention, and Congress enacted implementing legislation in Chapter 2 of the FAA. See 84 Stat. 692, 9 U. S. C. §§201–208. Chapter 2 grants federal courts jurisdiction over actions governed by the Convention, §203; establishes venue for such actions, §204; authorizes removal from state court, §205; and empowers courts to compel arbitration, §206. Chapter 2 also states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." §208.

III

We must determine whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA, see *supra*, at 437–438, "conflict with . . . the Convention." §208. Applying familiar tools of treaty interpretation, we conclude that they do not conflict.

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín* v. *Texas*, 552 U. S. 491, 506 (2008). The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable es-

toppel. The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines. Only one article of the Convention addresses arbitration agreements—Article II—and only one provision of Article II addresses the enforcement of those agreements—Article II(3). The text of Article II(3) states that courts of a contracting state "shall . . . refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration. The provision, however, does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. That is, Article II(3) provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements. Article II(3) contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language. Cf. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 380–384 (2013).

This interpretation is especially appropriate in the context of Article II. Far from displacing domestic law, the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention. For example, Article II(1) refers to disputes "capable of settlement by arbitration," but it does not identify what disputes are arbitrable, leaving that matter to domestic law. *Mitsubishi Motors Corp.* v. *Soler*

Chrysler-Plymouth, Inc., 473 U. S. 614, 639, n. 21 (1985). Similarly, Article II(3) states that it does not apply to agreements that are "null and void, inoperative or incapable of being performed," but it fails to define those terms. Again, the Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law.

In sum, the only provision of the Convention that addresses the enforcement of arbitration agreements is Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention "conflict[s] with" the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA. 9 U. S. C. § 208.

B

"Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellín*, 552 U. S., at 507 (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226 (1996)). These aids confirm our interpretation of the Convention's text.

1

Our precedents have looked to the "negotiating and drafting history" of a treaty as an aid in determining the shared understanding of the treaty. *Id.*, at 226. Invoking this interpretive aid, Outokumpu argues that the Convention's drafting history establishes a "rule of consent" that "displace[s] varying local laws." Brief for Respondents 27. We are unpersuaded. For one, nothing in the text of the Convention imposes a "rule of consent" that displaces domestic law—let alone a rule that allows some domestic-law doctrines and not others, as Outokumpu proposes. The only

time the Convention uses the word "consent" is in Article X(3), which addresses ratification and accession procedures. Moreover, the statements relied on by Outokumpu do not address the specific question whether the Convention prohibits the application of domestic law that would allow nonsignatories to compel arbitration. Cherry-picked "generalization[s]" from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. *Zicherman*, 516 U. S., at 227.

To the extent the drafting history sheds any light on the meaning of the Convention, it shows only that the drafters sought to impose baseline requirements on contracting states. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries . . . should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U. S., at 520, n. 15 (citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24–28 (1958)). Nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.

2

"[T]he postratification understanding" of other contracting states may also serve as an aid to our interpretation of a treaty's meaning. *Medellín*, 552 U. S., at 507 (internal quotation marks omitted). To discern this understanding, we have looked to the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175 (1999), as well as the "postrat-

ification conduct" of the governments of contracting states, *Zicherman*, 516 U. S., at 227.

Here, the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. The courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement. See 1 G. Born, International Commercial Arbitration § 10.02, pp. 1418–1484 (2d ed. 2014) (compiling cases). The United States identifies at least one contracting state with domestic legislation illustrating a similar understanding. See Brief for United States as *Amicus Curiae* 28 (discussing Peru's national legislation). And GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1) and (2). Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ¶¶1, 2, U. N. Doc. A/61/17, annex II (July 7, 2006) (UN recommendation).

These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention's text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty's meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties. See also *Yang* v. *Majestic Blue Fisheries, LLC*, 876 F. 3d 996, 1000–1001 (CA9 2017) (declining to give weight to the

2006 UN recommendation). But to the extent this evidence is given any weight, it confirms our interpretation of the Convention's text.

3

Finally, the parties dispute whether the Executive's interpretation of the New York Convention should affect our analysis. The United States claims that we should apply a "'canon of deference'" and give "'"great weight"'" to an interpretation set forth by the Executive in an *amicus* brief submitted to the D. C. Circuit in 2014. Brief for United States as *Amicus Curiae* 30 (quoting *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010)); see also Brief for United States as *Amicus Curiae* in No. 13–7004 (CADC), pp. 7, 9. GE Energy echoes this request. Outokumpu, on the other hand, argues that the Executive's noncontemporaneous interpretation sheds no light on the meaning of the treaty, asserting that the Executive expressed the "opposite . . . view at the time of the Convention's adoption." Brief for Respondents 33. Outokumpu asserts that this Court has repeatedly rejected executive interpretations that contradict the treaty's text or the political branches' previous understanding of a treaty. *Id.*, at 34–35 (citing, *e. g.*, *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S. 122, 136 (1989) (Brennan, J., concurring in judgment); *Perkins* v. *Elg*, 307 U. S. 325, 328, 337–349 (1939)).

We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114–115, n. 8 (2002) ("[T]here is no need to resolve deference issues when there is no need for deference").

IV

The Court of Appeals did not analyze whether Article II(3) of the New York Convention conflicts with equitable estoppel. Instead, the court held that Article II(1) and (2) include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." 902 F. 3d, at 1326. But those provisions address the recognition of arbitration agreements, not who is bound by a recognized agreement. Article II(1) simply requires contracting states to "recognize an agreement in writing," and Article II(2) defines the term "agreement in writing." Here, the three agreements at issue were both written and signed.[3] Only Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law. See *supra*, at 440–441.

Because the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination. Those questions can be addressed on remand. We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.

* * *

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

I agree with the Court that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10,

[3] We do not address whether Article II(2) requires a signed agreement.

1958, 21 U. S. T. 2517, T. I. A. S. No. 6997 (Convention), does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.

This limitation is part and parcel of the Federal Arbitration Act (FAA) itself. It is a "basic precept," *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 681 (2010), that "[a]rbitration under the [FAA] is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989); see also, *e. g.*, *Lamps Plus, Inc.* v. *Varela*, 587 U. S. 176, 184 (2019) ("Consent is essential under the FAA"); *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "). "We have emphasized th[is] 'foundational FAA principle' many times," *Lamps Plus*, 587 U. S., at 184 (quoting *Stolt-Nielsen*, 559 U. S., at 684) (citing cases), and even the parties find common ground on the point, see Tr. of Oral Arg. 7, 49; Brief for Respondents 2.

Because this consent principle governs the FAA on the whole, it constrains any domestic doctrines under Chapter 1 of the FAA that might "appl[y]" to Convention proceedings (to the extent they do not "conflict with" the Convention). 9 U. S. C. §208; cf. *ante*, at 439. Parties seeking to enforce arbitration agreements under Article II of the Convention thus may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate.

While the FAA's consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part be-

cause some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not. Cf. Brief for Respondents 45 (maintaining that courts have applied at least "three different versions" of GE Energy's equitable-estoppel theory, including one that allegedly "allows a non-party to force arbitration even of claims wholly unconnected to the agreement"). Lower courts must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction.*

Article II of the Convention leaves much to the contracting states to resolve on their own, and the FAA imposes few restrictions. Nevertheless, courts applying domestic nonsignatory doctrines to enforce arbitration agreements under the Convention must strictly adhere to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684. Because the Court's opinion is consistent with this limitation, I join it in full.

*In this case, however, I am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy. The contract provided that disputes arising between the buyer and seller in connection with the contract were subject to arbitration. App. 171. It also specified that the seller in the contract "shall be understood" to include "[s]ub-contractors." *Id.*, at 88–89. And it appended a list of potential subcontractors, one of which was GE Energy's predecessor, Converteam. *Id.*, at 184–185.

Syllabus

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO *v.* AURELIUS INVESTMENT, LLC, ET AL.

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

No. 18–1334. Argued October 15, 2019—Decided June 1, 2020*

In 2016, in response to a fiscal crisis in Puerto Rico, Congress invoked its Article IV power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," § 3, cl. 2, to enact the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). PROMESA created a Financial Oversight and Management Board, whose seven voting members are to be appointed by the President without the Senate's advice and consent. Congress authorized the Board to file for bankruptcy on behalf of Puerto Rico or its instrumentalities, to supervise and modify Puerto Rico's laws and budget, and to gather evidence and conduct investigations in support of these efforts.

After President Obama selected the Board's members, the Board filed bankruptcy petitions on behalf of the Commonwealth and five of its entities. Both court and Board had decided a number of matters when several creditors moved to dismiss the proceedings on the ground that the Board members' selection violated the Constitution's Appointments Clause, which says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States . . . ." Art. II, § 2, cl. 2. The court denied the motions, but the First Circuit reversed. It held that the Board members' selection violated the Appointments Clause but also concluded that any Board actions taken prior to its decision were valid under the "*de facto* officer" doctrine.

---

*Together with No. 18–1475, *Aurelius Investment, LLC, et al.* v. *Commonwealth of Puerto Rico et al.*, No. 18–1496, *Official Committee of Unsecured Creditors of All Title III Debtors Other Than COFINA* v. *Aurelius Investment, LLC, et al.*, No. 18–1514, *United States* v. *Aurelius Investment, LLC, et al.*, and No. 18–1521, *Unión de Trabajadores de la Industria Eléctrica y Riego, Inc.* v. *Financial Oversight and Management Board for Puerto Rico et al.*, also on certiorari to the same court.

Syllabus

Held:

1. The Appointments Clause constrains the appointments power as to all officers of the United States, even those who exercise power in or in relation to Puerto Rico. The Constitution's structure provides strong reason to believe that this is so. The Appointments Clause reflects an allocation of responsibility, between President and Senate, in cases involving appointment to high federal office. Concerned about possible manipulation of appointments, the Founders both concentrated the appointment power and distributed it, ensuring that primary responsibility for important nominations would fall on the President while also ensuring that the Senate's advice and consent power would provide a check on that power. Other, similar structural constraints in the Constitution apply to all exercises of federal power, including those related to Article IV entities. Cf., *e. g.*, *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 270–271 (*MWAA*). The objectives advanced by the Appointments Clause counsel strongly in favor of applying that Clause to all officers of the United States, even those with powers and duties related to Puerto Rico. Indeed, the Clause's text firmly indicates that it applies to the appointment of all "Officers of the United States." And history confirms this reading. Congress' longstanding practice of requiring the Senate's advice and consent for territorial Governors with important federal duties supports the inference that Congress expected the Appointments Clause to apply to at least some officials with supervisory authority over the Territories. Pp. 456–459.

2. The Appointments Clause does not restrict the appointment or selection of the Board members. Pp. 459–471.

(a) The Appointments Clause does not restrict the appointment of local officers that Congress vests with primarily local duties. The Clause's language suggests a distinction between federal officers—who exercise power of the National Government—and nonfederal officers—who exercise power of some other government. Pursuant to Article I, § 8, cl. 17, and Article IV, § 3, Congress has long legislated for entities that are not States—the District of Columbia and the Territories. In so doing, Congress has both made local law directly and also created local government structures, staffed by local officials, who themselves have made and enforced local law. This suggests that when Congress creates local offices using these two unique powers, the officers exercise power of the local government, not the Federal Government. Historical practice indicates that a federal law's creation of an office does not automatically make its holder an officer of the United States. Congress has for more than two centuries created local offices for the Territories

and District of Columbia that are filled through election or local executive appointment. And the history of Puerto Rico—whose public officials with important local responsibilities have been selected in ways that the Appointments Clause does not describe—is consistent with the history of other entities that fall within Article IV's scope and with the history of the District of Columbia. This historical practice indicates that when an officer of one of these local governments has primarily local duties, he is not an officer of the United States within the meaning of the Appointments Clause. Pp. 459–464.

(b) The Board members here have primarily local powers and duties. PROMESA says that the Board is "an entity within the territorial government" that "shall not be considered a department, agency, establishment, or instrumentality of the Federal Government," § 101(c), 130 Stat. 553, and Congress gave the Board a structure, duties, and related powers that are consistent with this statement. The Board's broad investigatory powers—administering oaths, issuing subpoenas, taking evidence, and demanding data from governments and creditors alike—are backed by Puerto Rican, not federal, law. Its powers to oversee the development of Puerto Rico's fiscal and budgetary plans are also quintessentially local. And in exercising its power to initiate bankruptcy proceedings, the Board acts on behalf of, and in the interests of, Puerto Rico. Pp. 465–467.

(c) *Buckley* v. *Valeo*, 424 U. S. 1, *Freytag* v. *Commissioner*, 501 U. S. 868, and *Lucia* v. *SEC*, 585 U. S. 237, do not provide the relevant legal test here, for each considered an Appointments Clause problem concerning the importance or significance of duties that were indisputably *federal* or national in nature. Nor do *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, or *MWAA*, 501 U. S. 252, help. *Lebron* considered whether Amtrak was a governmental or a private entity, but the fact that the Board is a Government entity does not answer the "primarily local versus primarily federal" question. And the *MWAA* Court expressly declined to address Appointments Clause questions. However, the Court's analysis in *O'Donoghue* v. *United States*, 289 U. S. 516, and *Palmore* v. *United States*, 411 U. S. 389, does provide a rough analogy. In *O'Donoghue*, the Court found that Article III's tenure and salary protections applied to judges of the District of Columbia courts because those courts exercised the judicial power of the United States. But the Court reached the seemingly opposite conclusion in *Palmore*, a case decided after Congress had altered the nature of the District of Columbia local courts so that its judges adjudicated primarily local issues. Pp. 467–471.

3. Given the conclusion reached here, there is no need to consider whether to overrule the "Insular Cases" and their progeny, see, *e. g.*,

Syllabus

Downes v. *Bidwell*, 182 U. S. 244, 287, to consider the application of the *de facto* officer doctrine, see *Ryder* v. *United States*, 515 U. S. 177, or to decide questions about the application of the Federal Relations Act and Public Law 600. Pp. 471–473.

915 F. 3d 838, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., *post*, p. 473, and SOTOMAYOR, J., *post*, p. 482, filed opinions concurring in the judgment.

Donald B. Verrilli, Jr., argued the cause for the Financial Oversight and Management Board for Puerto Rico. With him on the briefs were *Ginger D. Anders*, *Sarah G. Boyce*, *Adele M. El-Khouri*, *Rachel G. Miller-Ziegler*, *Jordan D. Segall*, *Martin J. Bienenstock*, *Timothy W. Mungoven*, *Mark D. Harris*, and *Chantel L. Febus*.

Deputy Solicitor General Wall argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Vivek Suri*, *Mark R. Freeman*, and *Michael S. Raab*.

Theodore B. Olson argued the cause for Aurelius Investment, LLC, et al. With him on the briefs were *Matthew D. McGill*, *Helgi C. Walker*, *Lucas C. Townsend*, *Lochlan F. Shelfer*, *Jeremy M. Christiansen*, and *Joshua M. Wesneski*.

Jessica E. Méndez-Colberg argued the cause for Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. With her on the briefs was *Rolando Emmanuelli-Jiménez*.

Kathleen M. Sullivan, *Susheel Kirpalani*, *Rafael Escalera*, and *Sylvia M. Anzmend* filed a brief for COFINA Senior Bondholders' Coalition.

Ian Heath Gershengorn, *Lindsay C. Harrison*, *Devi M. Rao*, and *Catherine Steege* filed briefs for Official Committee of Retired Employees of the Commonwealth of Puerto Rico.

Neal D. Mollen and *Stephen B. Kinnaird* filed briefs in all cases for the Official Committee of Unsecured Creditors of All Title III Debtors (Other Than COFINA).

Walter Dellinger, *Peter Friedman*, *William J. Sushon*, and *Yaira Dubin* filed briefs for Puerto Rico Fiscal Agency and Financial Advisory Authority.†

JUSTICE BREYER delivered the opinion of the Court.

The Constitution's Appointments Clause says that the President

> "shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States* . . . ." Art. II, § 2, cl. 2 (emphasis added).

---

†Briefs of *amici curiae* urging reversal in all cases were for DRA Entities by *Robert Loeb*, *Matthew R. Shahabian*, and *Arturo J. García-Solá*; for Elected Officers of the Commonwealth of Puerto Rico by *Jorge Martínez-Luciano* and *Emil Rodríguez-Escudero*; for the Pacific Legal Foundation by *Daniel M. Ortner*; and for Alan Mygatt-Tauber by *Mr. Mygatt-Tauber*, *pro se*.

Briefs of *amici curiae* urging affirmance in all cases were filed for the Virgin Islands Bar Association by *J. Russell B. Pate* and *Edward L. Barry*; and for Aníbal Acevedo-Vilá by *Mr. Acevedo-Vilá*, *pro se*, and *Joel A. Montalvo*.

Anthony Michael Sabino, *pro se*, filed a brief of *amicus curiae* urging affirmance in No. 18–1334.

Briefs of *amici curiae* were filed in all cases for the Autonomous Municipality of San Juan, Puerto Rico, by *Julissa Reynoso*, *Aldo Badini*, *Marcelo M. Blackburn*, and *Michael A. Fernández*; for the American Civil Liberties Union et al. by *Adriel I. Cepeda Derieux*, *Cecillia D. Wang*, *David D. Cole*, and *William Ramírez*; for the Cato Institute by *Ilya Shapiro*; filed for the Chamber of Commerce of the United States of America by *Ruthanne M. Deutsch* and *Hyland Hunt*; for the Equally American Legal Defense and Education Fund by *Steven S. Rosenthal* and *Neil C. Weare*; for Former Federal and Local Judges by *Gregory Dubinsky*; for Scholars of Constitutional Law et al. by *David N. Rosen*; and for the Washington Legal Foundation by *Richard A. Samp* and *Cory L. Andrews*.

José A. Hernández Mayoral filed a brief of *amici curiae* in Nos. 18–1334, 18–1496, and 18–1514 for Sila M. Calderon et al.

In 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). 130 Stat. 549, 48 U. S. C. § 2101 *et seq.* That Act created a Financial Oversight and Management Board, and it provided, as relevant here, that the President could appoint its seven members without "the advice and consent of the Senate," *i. e.*, without Senate confirmation.

The question before us is whether this method of appointment violates the Constitution's Senate-confirmation requirement. In our view, the Appointments Clause governs the appointments of all officers of the United States, including those located in Puerto Rico. Yet two provisions of the Constitution empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories. See Art. I, § 8, cl. 17; Art. IV, § 3, cl. 2. And the Clause's term "Officers of the United States" has never been understood to cover those whose powers and duties are primarily local in nature and derive from these two constitutional provisions. The Board's statutory responsibilities consist of primarily local duties, namely, representing Puerto Rico in bankruptcy proceedings and supervising aspects of Puerto Rico's fiscal and budgetary policies. We therefore find that the Board members are not "Officers of the United States." For that reason, the Appointments Clause does not dictate how the Board's members must be selected.

I

A

In 2006, tax advantages that had previously led major businesses to invest in Puerto Rico expired. See Small Business Job Protection Act of 1996, § 1601, 110 Stat. 1827. Many industries left the island. Emigration increased. And the public debt of Puerto Rico's government and its instrumentalities soared, rising from $39.2 billion in 2005 to $71 billion in 2016. See Dept. of Treasury, Puerto Rico's

Economic and Fiscal Crisis 1, 3, https://www.treasury.gov/connect/blog/Documents/Puerto_Ricos_fiscal_challenges.pdf; GAO, U. S. Territories: Public Debt Outlook 12 (GAO–18–160, 2017).

Puerto Rico found that it could not service that debt. Yet Puerto Rico could not easily restructure it. The Federal Bankruptcy Code's municipality-related Chapter 9 did not apply to Puerto Rico (or to the District of Columbia). See 11 U. S. C. §§ 109(c), 101(52). But at the same time, federal bankruptcy law invalidated Puerto Rico's own local "debt-restructuring" statutes. *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 579 U. S. 115 (2016). In 2016, in response to Puerto Rico's fiscal crisis, Congress enacted PROMESA. 130 Stat. 549, 48 U. S. C. § 2101 *et seq.*

PROMESA allows Puerto Rico and its entities to file for federal bankruptcy protection. See §§ 301, 302, 130 Stat. 577, 579; cf. 11 U. S. C. § 901 (related to bankruptcies of local governments). The filing and subsequent proceedings are to take place in the United States District Court for the District of Puerto Rico, before a federal judge selected by the Chief Justice of the United States. PROMESA §§ 307–308, 130 Stat. 582. PROMESA also created the Financial Oversight and Management Board—with seven members appointed by the President and with the Governor serving as an ex officio member. §§ 101(b), (e), *id.*, at 553, 554–555. PROMESA gives the Board authority to file for bankruptcy on behalf of Puerto Rico or its instrumentalities. § 304(a), *id.*, at 579. The Board can supervise and modify Puerto Rico's laws (and budget) to "achieve fiscal responsibility and access to the capital markets." § 201(b), *id.*, at 564; see §§ 201–207, *id.*, at 563–575. And it can gather evidence and conduct investigations in support of these efforts. § 104, *id.*, at 558–561.

As we have just said, PROMESA gives the President of the United States the power to appoint the Board's seven members without Senate confirmation, so long as he selects

six from lists prepared by congressional leaders. § 101(e)(2)(A), *id.*, at 554–555.

B

On August 31, 2016, President Obama selected the Board's seven members in the manner just described. The Board established offices in Puerto Rico and New York, and soon filed bankruptcy petitions on behalf of the Commonwealth and (eventually) five Commonwealth entities. Title III Petition in No. 17–BK–3283 (PR); see Order Pursuant to PROMESA Section 304(g), No. 17–BK–3283 (PR, Oct. 9, 2019), Doc. 8829 (consolidating petitions filed on behalf of the Commonwealth of Puerto Rico, the Puerto Rico Sales Tax Financing Corporation, the Puerto Rico Highways and Transportation Authority, the Employees Retirement System of the Government of the Commonwealth of Puerto Rico, the Puerto Rico Electric Power Authority, and the Puerto Rico Public Buildings Authority). And THE CHIEF JUSTICE then selected a federal judge to serve as bankruptcy judge for Puerto Rico. Designation of Presiding District Judge, No. 17–BK–3283 (PR, May 5, 2017), Doc. 4.

After both court and Board had decided a number of matters, several creditors moved to dismiss all proceedings on the ground that the Board members' selection violated the Appointments Clause. The court denied the motions. See *In re Financial Oversight and Management Bd. of Puerto Rico*, 318 F. Supp. 3d 537, 556–557 (PR 2018). The creditors appealed to the United States Court of Appeals for the First Circuit. That court reversed. It held that the selection of the Board's members violated the Appointments Clause. 915 F. 3d 838, 861 (2019). But it concluded that those Board actions taken prior to its decision remained valid under the "*de facto* officer" doctrine. *Id.*, at 862–863; see, *e. g.*, *McDowell* v. *United States*, 159 U. S. 596, 601 (1895) (judicial decisions could not later be attacked on ground that an un-

lawfully sitting judge presided); *Ball* v. *United States*, 140 U. S. 118, 128–129 (1891) (same).

The Board, the United States, and various creditors then filed petitions for certiorari in this Court, some arguing that the appointments were constitutionally valid, others that the *de facto* officer doctrine did not apply. Compare Pets. for Cert. in Nos. 18–1334, 18–1496, 18–1514 with Pets. for Cert. in Nos. 18–1475, 18–1521. In light of the importance of the questions, we granted certiorari in all the petitions and consolidated them for argument. 588 U. S. 901 (2019).

II

Congress created the Board pursuant to its power under Article IV of the Constitution to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." §3, cl. 2; see PROMESA §101(b)(2), 130 Stat. 553. Some have argued in these cases that the Appointments Clause simply does not apply in the context of Puerto Rico. But, like the Court of Appeals, we believe the Appointments Clause restricts the appointment of all officers of the United States, including those who carry out their powers and duties in or in relation to Puerto Rico.

The Constitution's structure provides strong reason to believe that is so. The Constitution separates the three basic powers of Government—legislative, executive, and judicial—with each branch serving different functions. But the Constitution requires cooperation among the three branches in specified areas. Thus, to become law, proposed legislation requires the agreement of both Congress and the President (or, a supermajority in Congress). See *INS* v. *Chadha*, 462 U. S. 919, 955 (1983) (noting that the Constitution prescribes only four specific actions that Congress can take without bicameralism and presentment). At the same time, legislation must be consistent with constitutional constraints, and we usually look to the Judiciary as the ultimate interpreter of those constraints.

The Appointments Clause reflects a similar allocation of responsibility, between President and Senate, in cases involving appointment to high federal office. That Clause reflects the Founders' reaction to "one of [their] generation's greatest grievances against [pre-Revolutionary] executive power," the manipulation of appointments. *Freytag* v. *Commissioner*, 501 U. S. 868, 883 (1991); see also The Federalist No. 76, p. 455 (C. Rossiter ed. 1961) (A. Hamilton) (the Appointments Clause helps to preserve democratic accountability). The Founders addressed their concerns with the appointment power by both concentrating it and distributing it. On the one hand, they ensured that primary responsibility for nominations would fall on the President, whom they deemed "less vulnerable to interest-group pressure and personal favoritism" than a collective body. *Edmond* v. *United States*, 520 U. S. 651, 659 (1997). See also The Federalist No. 76, at 455 ("The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation"). On the other hand, they ensured that the Senate's advice and consent power would provide "an excellent check upon a spirit of favoritism in the President and a guard against the appointment of unfit characters." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 293 (2017) (internal quotation marks omitted). By "limiting the appointment power" in this fashion, the Clause helps to "ensure that those who wielded [the appointments power] were accountable to political force and the will of the people." *Freytag*, *supra*, at 884; see also *Edmond*, 520 U. S., at 659. "The blame of a bad nomination would fall upon the president singly and absolutely," while "[t]he censure of rejecting a good one would lie entirely at the door of the senate." *Id.*, at 660 (internal quotation marks omitted).

These other structural constraints, designed in part to ensure political accountability, apply to all exercises of federal power, including those related to Article IV entities. Cf., *e. g.*, *Metropolitan Washington Airports Authority* v. *Citi-*

zens for Abatement of Aircraft Noise, Inc., 501 U. S. 252, 270–271 (1991) (*MWAA*) (separation-of-powers principles apply when Congress acts under its Article IV power to legislate "respecting . . . other Property"). See also, *e. g.*, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (the First Congress using bicameralism and presentment to make rules and regulations for the Northwest Territory). The objectives advanced by the Appointments Clause counsel strongly in favor of that Clause applying to the appointment of all "Officers of the United States." Why should it be different when such an officer's duties relate to Puerto Rico or other Article IV entities?

Indeed, the Appointments Clause has no Article IV exception. The Clause says in part that the President

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments . . . shall be established by Law . . . ." Art. II, § 2, cl. 2.

That text firmly indicates that it applies to the appointment of *all* "Officers of the United States." And history confirms this reading. Before the writing of the Constitution, Congress had enacted an ordinance that allowed Congress to appoint officers to govern the Northwest Territory. As soon as the Constitution became law, the First Congress "adapt[ed]" that ordinance "to the present Constitution of the United States," Act of Aug. 7, 1789, 1 Stat. 51, in large part by providing for an appointment process consistent with the constraints of the Appointments Clause. In particular, it provided for a Presidential-appointment, Senate-confirmation process for high-level territorial appointees who assumed federal, as well as local, duties. See *id.*, at 52, n. (*a*); § 1, *id.*, at 53 (appointment by President, and confirmation by Senate, of Governor, secretary, and members of

the upper house); Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 68 (Governor "discharg[ed]" the federal "duties of superintendent of Indian affairs"). Later Congresses took a similar approach to later territorial Governors with federal duties. See Act of June 6, 1900, § 10, 31 Stat. 325 (appointment of Governor of Territory of Alaska by President with confirmation by Senate); § 2, *id.*, at 322 (federal duties of Alaska territorial Governor include entering into contracts in name of the United States and granting reprieves for federal offenses); Act of Mar. 2, 1819, §§ 3, 10, 3 Stat. 494, 495 (similar for Governor of Arkansas). We do not mean to suggest that every time Congress chooses to require advice and consent procedures it does so because they are constitutionally required. At times, Congress may wish to require Senate confirmation for policy reasons. Even so, Congress' practice of requiring advice and consent for these Governors with important federal duties supports the inference that Congress expected the Appointments Clause to apply to at least some officials with supervisory authority over the Territories.

Given the Constitution's structure, this history, roughly analogous case law, and the absence of any conflicting authority, we conclude that the Appointments Clause constrains the appointments power as to all "Officers of the United States," even when those officers exercise power in or related to Puerto Rico.

III

A

The more difficult question before us is whether the Board members are officers of the United States such that the Appointments Clause requires Senate confirmation. If they are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them. (No one suggests that they are "Ambassadors," "other public Ministers and Consuls," or "Judges of the supreme Court.") And as we shall see, the answer to

this question turns on whether the Board members have primarily local powers and duties.

The language at issue does not offer us much guidance for understanding the key term "of the United States." The text suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government. The Constitution envisions a federalist structure, with the National Government exercising limited federal power and other, local governments—usually state governments—exercising more expansive power. But the Constitution recognizes that for certain localities, there will be no state government capable of exercising local power. Thus, two provisions of the Constitution, Article I, § 8, cl. 17, and Article IV, § 3, cl. 2, give Congress the power to legislate for those localities in ways "that would exceed its powers, or at least would be very unusual" in other contexts. *Palmore* v. *United States*, 411 U. S. 389, 398 (1973). Using these powers, Congress has long legislated for entities that are not States—the District of Columbia and the Territories. See *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100, 104–106 (1953). And, in doing so, Congress has both made local law directly and also created structures of local government, staffed by local officials, who themselves have made and enforced local law. Compare, *e. g.*, Act of Mar. 2, 1962, § 401, 76 Stat. 17 (changing D. C. liquor tax from $1.25 per gallon to $1.50 per gallon), with District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 774 (giving local D. C. government primary legislative control over local matters). This structure suggests that when Congress creates local offices using these two unique powers, the officers exercise power of the local government, not the Federal Government. Cf. *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828) (Marshall, C. J.) (territorial courts may exercise the judicial power of the Territories without the life tenure and salary protections mandated by

Article III for federal judges); *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323 (1937) (territorial legislators may exercise the legislative power of the Territories without violating the nondelegation doctrine).

History confirms what the Constitution's text and structure suggest. See *NLRB* v. *Noel Canning*, 573 U. S. 513, 524 (2014) (relying on history and structure in interpreting the Recess Appointments Clause). See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819) (emphasizing the utility of historical practice in interpreting constitutional provisions). Longstanding practice indicates that a federal law's creation of an office in this context does not automatically make its holder an "Officer of the United States." Rather, Congress has often used these two provisions to create local offices filled in ways other than those specified in the Appointments Clause. When the First Congress legislated for the Northwest Territories, for example, it created a House of Representatives for the Territory with members selected by election. It also created an upper house of the territorial legislature, whose members were appointed by the President (without Senate confirmation) from lists provided by the elected, lower house. And it created magistrates appointed by the Governor. See Act of Aug. 7, 1789, 1 Stat. 51, n. (*a*).

The practice of creating by federal law local offices for the Territories and District of Columbia that are filled through election or local executive appointment has continued unabated for more than two centuries. See, *e. g.*, *ibid.* (Northwest Territories local offices filled by election); Act of Apr. 7, 1798, § 3, 1 Stat. 550 (Mississippi, same); Act of May 7, 1800, § 2, 2 Stat. 59 (Indiana, same); Act of May 15, 1820, § 3, 3 Stat. 584 (District of Columbia, same); Act of Apr. 30, 1900, § 13, 31 Stat. 144 (Hawaii, same); Act of Aug. 24, 1912, § 4, 37 Stat. 513 (Alaska, same); Act of Aug. 23, 1968, § 4, 82 Stat. 837 (Virgin Islands, same); Act of Sept. 11, 1968, Pub. L. 90–497, § 1, 82 Stat. 842 (Guam, same); Act of May 4, 1812, § 3, 2 Stat. 723 (D. C. Mayor appoints "all offices"); Act of June 4,

1812, § 2, 2 Stat. 744 (Missouri Governor, similar); Act of Mar. 2, 1819, § 3, 3 Stat. 494 (Arkansas, similar); Act of June 6, 1900, § 2, 31 Stat. 322 (Alaska, similar); Act of Sept. 11, 1968, § 1, 82 Stat. 843 (Guam, similar). Like JUSTICE THOMAS, *post*, at 477 (opinion concurring in judgment), we think the practice of the First Congress is strong evidence of the original meaning of the Constitution. We find this subsequent history similarly illuminates the text's meaning.

Puerto Rico's history is no different. It reveals a longstanding practice of selecting public officials with important local responsibilities in ways that the Appointments Clause does not describe. In 1898, at the end of the Spanish-American War, the United States took responsibility for determining the civil rights of Puerto Ricans as well as Puerto Rico's political status. Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. In 1900, the Foraker Act provided for Presidential appointment (with Senate confirmation) of Puerto Rico's Governor, the heads of six departments, the legislature's upper house, and the justices of its high court. Organic Act of 1900, §§ 17, 18, 33, 31 Stat. 81, 84. But it also provided for the selection, through popular election, of a lower legislative house with the power (subject to upper house concurrence) to "alter, amend, modify, and repeal any and all laws . . . of every character." §§ 27, 32, *id.*, at 82, 84. There is no indication that anyone thought members of the lower house, wielding important local responsibilities, were "Officers of the United States."

Congress replaced the Foraker Act with the Jones Act in 1917. Organic Act of Puerto Rico, ch. 145, 39 Stat. 951. Under the Jones Act the Puerto Rican Senate was elected and consequently no longer satisfied the Appointments Clause criteria. See § 26, *id.*, at 958. Similarly, the Governor of Puerto Rico nominated four cabinet members, confirmed by the Senate of Puerto Rico. § 13, *id.*, at 955–956. The elected legislature retained "all local legislative pow-

ers," including the power to appropriate funds. §§25, 34, 37, *id.*, at 958, 962, 964.

Congress amended the Jones Act in 1947 to provide for an elected Governor of Puerto Rico, and granted that Governor the power to appoint all cabinet officials. See Act of Aug. 5, 1947, ch. 490, §§1, 3, 61 Stat. 770, 771. The President retained the power to appoint (with Federal Senate confirmation) judges, an auditor, and the new office of Coordinator of Federal Agencies, who was to supervise federal functions in Puerto Rico and recommend to higher federal officials ways to improve the quality of federal services. §6, *id.*, at 772.

In 1950, Congress enacted Public Law 600, "in the nature of a compact" with Puerto Rico and subject to approval by the voters of Puerto Rico. Act of July 3, 1950, ch. 446, §§1, 2, 64 Stat. 319. The Act adopted the Jones Act, as amended, as the Puerto Rican Federal Relations Act, and provided for the Jones Act's substantial (but not complete) repeal upon the effective adoption of a contemplated Puerto Rican constitution. §§4, 5, *id.*, at 319–320. Among the provisions of the Jones Act that Public Law 600 retained were several related to Puerto Rico's public debt. Congress retained, for example, the triple-tax-exempt nature of Puerto Rican bonds. Jones Act, §3, 39 Stat. 953. It also retained a (later repealed) cap on the amount of public debt Puerto Rico or its subdivisions could accumulate. *Ibid.* In a public referendum, the citizens of Puerto Rico approved Public Law 600—including the limits on debt in §3 of the Federal Relations Act—and then began the constitution-making process. Pub. L. 600, §§2, 3, 64 Stat. 319; see Act of July 3, 1952, 66 Stat. 327; A. Fernós-Isern, Original Intent in the Constitution of Puerto Rico 13 (2d ed. 2002).

Puerto Rico's popularly ratified Constitution, which Congress accepted with a few fairly minor changes, does not involve the President or the Senate in the appointment process for local officials. That Constitution provides for the elec-

tion of Puerto Rico's Governor and legislators. Art. III, § 1; Art. IV, § 1. And it provides for gubernatorial appointment (and Puerto Rican Senate confirmation) of cabinet officers. Art. IV, § 5.

The upshot is that Puerto Rico's history reflects long-standing use of various methods for selecting officials with primarily local responsibilities. This history is consistent with the history of other entities that fall within the scope of Article IV and with the history of the District of Columbia. See *supra*, at 461–462. And it comports with our precedents, which have long acknowledged that Congress may structure local governments under Article IV and Article I in ways that do not precisely mirror the constitutional blueprint for the National Government. See, *e. g.*, *Benner* v. *Porter*, 9 How. 235, 242 (1850). Cf. *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 546 (1962) (plurality opinion) (recognizing that local governments created by Congress could, like governments of the States, "dispense with protections deemed inherent in a separation of governmental powers"). Sometimes Congress has specified the use of methods that would satisfy the Appointments Clause, other times it has specified methods that would not satisfy the Appointments Clause, including elections and appointment by local officials. Officials with primarily local duties have often fallen into the latter categories. We know of no case endorsing an Appointments Clause based challenge to such selection methods. Indeed, to read Appointments Clause constraints as binding Puerto Rican officials with primarily local duties would work havoc with Puerto Rico's (federally ratified) democratic methods for selecting many of its officials.

We thus conclude that while the Appointments Clause *does* restrict the appointment of "Officers of the United States" with duties in or related to the District of Columbia or an Article IV entity, it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3, or Article I, § 8, cl. 17.

B

The question remains whether the Board members have primarily local powers and duties. We note that the Clause qualifies the phrase "Officers of the United States" with the words "whose Appointments . . . shall be established by Law." And we also note that PROMESA says that the Board is "an entity within the territorial government" and "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government." § 101(c), 130 Stat. 553. But the most these words show is that Congress did not intend to make the Board members "Officers of the United States." It does not prove that, insofar as the Constitution is concerned, they succeeded.

But we think they have. Congress did not simply state that the Board is part of the local Puerto Rican government. Rather, Congress also gave the Board a structure, a set of duties, and related powers all of which are consistent with this statement.

The government of Puerto Rico pays the Board's expenses, including the salaries of its employees (the members serve without pay). § 107, *id.*, at 562; see § 101(g), *id.*, at 556. The Board possesses investigatory powers. It can hold hearings. § 104(a), *id.*, at 558. It can issue subpoenas, subject to Puerto Rico's limits on personal jurisdiction and enforceable under Puerto Rico's laws. § 104(f), *id.*, at 559. And it can enforce those subpoenas in (and only in) Puerto Rico's courts. §§ 104(f)(2), 106(a), *id.*, at 559, 562.

From its own offices in or outside of Puerto Rico, the Board works with the elected government of Puerto Rico to develop a fiscal plan that provides "a method to achieve fiscal responsibility and access to the capital markets." § 201(b), *id.*, at 564. If it finds it necessary, the Board can develop its own budget for Puerto Rico which is "deemed . . . approved" and becomes the operative budget. § 202(e)(3), *id.*, at 568. It can ensure compliance with the plan and budget by reviewing the Puerto Rico government's laws and spending

and by "direct[ing]" corrections or taking "such [other] actions as it considers necessary," including preventing a law from taking effect. §§203(d), 204(a), *id.*, at 569, 571. The Board controls the issuance of new debt for Puerto Rico. §207, *id.*, at 575.

The Board also may initiate bankruptcy proceedings for Puerto Rico or its instrumentalities. §304(a), *id.*, at 579. It may take any related "action necessary on behalf of," and it serves as "the representative of," Puerto Rico or its instrumentalities. §315, *id.*, at 584. These proceedings take place in the U. S. District Court for Puerto Rico. §307, *id.*, at 582.

To repeat: The Board has broad investigatory powers: It can administer oaths, issue subpoenas, take evidence and demand data from governments and creditors alike. But these powers are backed by Puerto Rican, not federal, law: Subpoenas are governed by Puerto Rico's personal jurisdiction statute; false testimony is punishable under the law of Puerto Rico; the Board must seek enforcement of its subpoenas by filing in the courts of Puerto Rico. See §104, *id.*, at 558–561. These powers are primarily local in nature.

The Board also oversees the development of Puerto Rico's fiscal and budgetary plans. It receives and evaluates proposals from the elected Governor and legislature. It can create a budget "deemed" to be that of Puerto Rico. It can intervene when budgetary constraints are violated. And it has authority over the issuance of new debt. §§201–207, *id.*, at 563–575. These powers, too, are quintessentially local. Each concerns the finances of the Commonwealth, not of the United States. The Board members in this respect discharge duties ordinarily held by local officials.

Last, the Board has the power to initiate bankruptcy proceedings. But in doing so, it acts not on behalf of the United States, but on behalf of, and in the interests of, Puerto Rico. The proceedings take place in federal court; but the same is true of all persons or entities who seek bankruptcy protec-

tion. The Board here acts as a local government that might take precisely the same actions. See, *e. g.*, 11 U. S. C. §§ 109(c), 921 (related to bankruptcies of local governments).

Some Board actions, of course, may have nationwide consequences. But the same can be said of many actions taken by many Governors or other local officials. Taking actions with nationwide consequences does not automatically transform a local official into an "Officer of the United States." The challengers rely most heavily on the nationwide effects of the bankruptcy proceedings. *E. g.*, Brief for Aurelius et al. 31; Brief for Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. (UTIER) 49. But the same might be said of any major municipal, or even corporate, bankruptcy. *E. g.*, *In re Detroit*, 504 B. R. 97 (Bkrtcy. Ct. ED Mich. 2013) (restructuring $18 billion in municipal debt).

In short, the Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials. But this power primarily concerns local matters. Congress' law thus substitutes a different process for determining certain local policies (related to local fiscal responsibility) in respect to local matters. And that is the critical point for current purposes. The local nature of the legislation's expressed purposes, the representation of local interests in bankruptcy proceedings, the focus of the Board's powers upon local expenditures, the local logistical support, the reliance on local laws in aid of the Board's procedural powers—all these features when taken together and judged in the light of Puerto Rico's history (and that of the Territories and the District of Columbia)—make clear that the Board's members have primarily local duties, such that their selection is not subject to the constraints of the Appointments Clause.

IV

The Court of Appeals, pointing to three of this Court's cases, reached the opposite conclusion. See *Buckley* v.

Valeo, 424 U. S. 1 (1976) (*per curiam*), *Freytag* v. *Commissioner*, 501 U. S. 868, and *Lucia* v. *SEC*, 585 U. S. 237 (2018). It pointed out that the Court, in those cases, discussed the term "Officer of the United States," and it concluded that, for Appointments Clause purposes, an appointee is such an "officer" if "(1) the appointee occupies a 'continuing' position established by federal law; (2) the appointee 'exercis[es] significant authority'; and (3) the significant authority is exercised 'pursuant to the laws of the United States.'" 915 F. 3d, at 856. The Court of Appeals concluded that the Board members satisfied this test. See *id.*, at 856–857.

We do not believe these three cases set forth the critical legal test relevant here, however, and we do not apply any test they might enunciate. Each of the cases considered an Appointments Clause problem concerning the importance or significance of duties that were indisputably *federal* or national in nature. In *Buckley*, the question was whether members of the Federal Election Commission—appointees carrying out federal-election related duties—were "officers" for Appointments Clause purposes. In *Freytag*, the Court asked the same question about special federal trial judges serving on federal tax courts. And in *Lucia*, the Court asked the same question about federal administrative law judges carrying out Securities and Exchange Commission duties.

Here, PROMESA, a federal law, creates the Board and its duties, and no one doubts their significance. But we cannot stop there. To do so would ignore the history we have discussed—history stretching back to the founding. See *supra*, at 461–464. And failing to take account of the nature of an appointee's federally created duties, *i. e.*, whether they are *primarily local versus primarily federal*, would threaten interference with democratic (or local appointment) selection methods in numerous Article IV Territories and perhaps the District of Columbia as well. See, *e. g.*, 48 U. S. C. § 1422 (providing for an elected Governor of Guam);

§ 1591 (same for Virgin Islands); District of Columbia Self-Government Act, § 421, 87 Stat. 789 (same for D. C. Mayor); § 422(2), 87 Stat. 790 (describing D. C. Mayor's appointment powers); 48 U. S. C. § 1422c (same for Guam's Governor); § 1597(c) (same for Virgin Islands). There is no reason to understand the Appointments Clause—which, at least in part, seeks to advance democratic accountability and broaden appointments-related responsibility, see *supra*, at 457–458—as making it significantly more difficult for local residents of such areas to share responsibility for the implementation of (statutorily created) primarily local duties. Neither the text nor the history of the Clause commands such a result.

Neither do *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995), or *MWAA*, 501 U. S. 252, help those challenging the Board's constitutional legitimacy. *Lebron* considered whether, for First Amendment purposes, Amtrak was a governmental or a private entity. 513 U. S., at 379. All here agree that the Board is a Government entity, but that fact does not answer the "primarily local versus primarily federal" question. In *MWAA*, the Court held that separation-of-powers principles forbid Members of Congress to become members of a board that controls federally owned airports. 501 U. S., at 275–276 (relying on *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986), and *INS* v. *Chadha*, 462 U. S. 919, 952 (1983)). The Court expressly declined to answer any question related to the Appointments Clause. 501 U. S., at 277, n. 23.

While we have found no case from this Court directly on point, we believe that the Court's analysis in *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), and especially *Palmore* v. *United States*, 411 U. S. 389, provides a rough analogy. In *O'Donoghue*, the Court considered whether Article III's tenure and salary protections applied to judges of the courts in the District of Columbia. The Court held that they did. Those courts, it believed, were "'courts of the United States'" and "recipients of the judicial power of the United

States." 289 U. S., at 546, 548. The judges' salaries consequently could not be reduced. *Id.*, at 551.

In *Palmore*, however, the Court reached what might seem the precisely opposite conclusion. A criminal defendant, invoking *O'Donoghue*, argued that the D. C. Superior Court Judge could not constitutionally preside over the case because the judge lacked Article III's tenure protection, namely, life tenure. *Palmore*, *supra*, at 390. But the Court rejected the defendant's argument. Why? How did it explain *O'Donoghue*?

The difference, said the Court, lies in the fact that, in the meantime, Congress had changed the nature of the District of Columbia court. *Palmore*, *supra*, at 406–407; see District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473. Congress changed what had been a unified court system where judges adjudicated both local and federal issues into separate court systems, in one of which judges adjudicated primarily local issues. § 111, *id.*, at 475. Courts in that category had criminal jurisdiction over only those cases brought "'under any law applicable exclusively to the District of Columbia.'" *Id.*, at 486. Its judges served for 15-year terms. *Id.*, at 491.

This Court, in *Palmore*, considered a local judge presiding over a local court. Congress had created that court in the exercise of its Article I power to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. See Art. I, § 8, cl. 17. The "focus" of these courts was "primarily upon . . . matters of strictly local concern." 411 U. S., at 407. Hence, the nature of those courts was a "far cry" from that of the courts at issue in *O'Donoghue*. *Palmore*, 411 U. S., at 406.

The Court added that Congress had created non-Article III courts under its Article IV powers. It wrote that Congress could also create non-Article III courts under its Article I powers. *Id.*, at 403, 410. And it held that judges serv-

ing on those non-Article III courts lacked Article III protections. *Id.*, at 410.

Palmore concerned Article I of the Constitution, not Article IV. And it concerned "the judicial Power of the United States," not "Officers of the United States." But it provides a rough analogy. It holds that Article III protections do not apply to an Article I court "focus[ed]," unlike the courts at issue in *O'Donoghue*, primarily on local matters. Here, Congress expressly invoked a constitutional provision allowing it to make local debt-related law (Article IV); it expressly located the Board within the local government of Puerto Rico; it clearly indicated that it intended the Board's members to be local officials; and it gave them primarily local powers, duties, and responsibilities.

In his concurring opinion, JUSTICE THOMAS criticizes the inquiry we set out—whether an officer's duties are primarily local or primarily federal—as too "amorphous," *post*, at 480. But we think this is the test established by the Constitution's text, as illuminated by historical practice. And we cannot see how Congress could avoid the strictures of the Appointments Clause by adding to a federal officer's other obligations a large number of local duties. Indeed, we think that our test, tied as it is to both the text and the history of the Appointments Clause, is more rigorous than the bare inquiry into the "nature" of the officer's authority that JUSTICE THOMAS proposes, and we believe it is more faithful to the Clause's original meaning. *Ibid.*

V

We conclude, for the reasons stated, that the Constitution's Appointments Clause applies to the appointment of officers of the United States with powers and duties in and in relation to Puerto Rico, but that the congressionally mandated process for selecting members of the Financial Oversight and Management Board for Puerto Rico does not violate that

Clause. Given this conclusion, we need not consider the request by some of the parties that we overrule the much-criticized "Insular Cases" and their progeny. See, *e. g.*, *Downes* v. *Bidwell*, 182 U. S. 244, 287 (1901) (opinion of Brown, J.); *Balzac* v. *Porto Rico*, 258 U. S. 298, 309 (1922); *Reid* v. *Covert*, 354 U. S. 1, 14 (1957) (plurality opinion) (indicating that the Insular Cases should not be further extended); see also Brief for Official Committee of Unsecured Creditors of All Title III Debtors (Other than COFINA) 20–25 (arguing that the Insular Cases support reversal on the Appointments Clause issue); Brief for UTIER 64–66 (encouraging us to overrule the Insular Cases); Brief for Virgin Islands Bar Association as *Amicus Curiae* 13–18 (same); Cabranes, Citizenship and the American Empire, 127 U. Pa. L. Rev. 391, 436–442 (1978) (criticizing the Insular Cases); Littlefield, The Insular Cases, 15 Harv. L. Rev. 169 (1901) (same). Those cases did not reach this issue, and whatever their continued validity we will not extend them in these cases. See *Reid*, *supra*, at 14.

Neither, since we hold the appointment method valid, need we consider the application of the *de facto* officer doctrine. See *Ryder* v. *United States*, 515 U. S. 177 (1995) (discussing the doctrine); see also, *e. g.*, Brief for Aurelius et al. 48–69 (arguing the doctrine does not apply in this context); Brief for UTIER 69–85 (same); Reply Brief for United States 26–47 (insisting to the contrary); Brief for Cross-Respondent COFINA Senior Bondholders' Coalition 14–46 (same).

Finally, as JUSTICE SOTOMAYOR recognizes, *post*, at 488–489 (opinion concurring in judgment), we need not, and therefore do not, decide questions concerning the application of the Federal Relations Act and Public Law 600. No party has argued that those Acts bear any significant relation to the answer to the Appointments Clause question now before us.

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

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

The Court reaches the right conclusion: The appointment process for members of the Financial Oversight and Management Board for Puerto Rico (Board) does not violate the Appointments Clause. I cannot agree, however, with the ill-defined path that the Court takes to reach this result. I would resolve these cases based on the original public meaning of the phrase "Officers of the United States" in the Appointments Clause.

I

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Art. II, § 2, cl. 2. The Clause also permits Congress to vest the appointment of "inferior Officers" in "the President alone," "the Courts of Law," or "the Heads of Departments." *Ibid.*

As I have previously explained, the original public meaning of the phrase "Officers of the United States" includes "all federal civil officials who perform an ongoing, statutory duty." *Lucia* v. *SEC*, 585 U. S. 237, 254 (2018) (concurring opinion) (citing Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 454 (2018) (Mascott)). At the founding, the term "officer" referred to "anyone who performed a continuous public duty." 585 U. S., at 254. And the phrase "of the United States" limited the Appointments Clause to "federal" officers. *Ibid.*; see Mascott 471–479.

II

Territorial officials performing duties created under Article IV of the Constitution are not federal officers within the original meaning of the phrase "Officers of the United States." Since the founding, this Court has recognized a distinction between Article IV power and the powers of the National Government in Articles I, II, and III. The founding generation understood the phrase "Officers of the United States" to refer to officers exercising the powers of the National Government, not officers solely exercising Article IV territorial power. Because the Board's members perform duties pursuant to Article IV, they do not qualify as "Officers of the United States."

A

The Territory Clause of Article IV provides Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." §3, cl. 2. This power is "absolute and undisputed." *Sere* v. *Pitot*, 6 Cranch 332, 337 (1810). Congress has "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." *National Bank* v. *County of Yankton*, 101 U. S. 129, 133 (1880).

"No one has ever doubted the authority of congress to erect territorial governments within the territory of the United States, under the general language of the clause, 'to make all needful rules and regulations.'" 3 J. Story, Commentaries on the Constitution of the United States §1319, p. 195 (1833). These governments are "the creations, exclusively, of [Congress], and subject to its supervision and control." *Benner* v. *Porter*, 9 How. 235, 242 (1850).[1]

[1] The Court of Appeals attempted to draw a distinction between power exercised pursuant to territorial laws enacted by Congress and power exercised pursuant to territorial laws enacted by a territorial legislature. There is no meaningful distinction in this context. While the legislature of the Territory may establish laws for the Territories, Article IV

Because territorial governments "are not organized under the Constitution," they are not "subject to its complex distribution of the powers of government." *Ibid.* Congress may give Territories "a legislative, an executive, and a judiciary, with such powers as it has been their will to assign." *Sere*, 6 Cranch, at 337. And, since the founding, Congress has done so in ways that do not comport with the Constitution's restrictions on the National Government. For example, Congress has delegated Article IV legislative authority to territorial officials and legislatures,[2] which it could not do

---

remains the "ultimate source" of territorial power. *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 75 (2016) (internal quotation marks omitted). Congress is the source of the "entire dominion and sovereignty" of a Territory, *Simms* v. *Simms*, 175 U. S. 162, 168 (1899), and therefore all territorial laws, whether congressionally enacted or territorially enacted, derive from Article IV, *Sánchez Valle*, 579 U. S., at 75 (recognizing that the "most immediate source of [the] authority" does not change the nature of the power exercised).

[2] See, *e. g.*, Act of Aug. 7, 1789, 1 Stat. 51, and n. (*a*) (Northwest Territory); Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123 (Southwest Territory); Act of Apr. 7, 1798, § 3, 1 Stat. 550 (Mississippi); Act of May 7, 1800, §§ 2, 4, 2 Stat. 59 (Indiana); Act of Mar. 26, 1804, § 4, 2 Stat. 284 (Louisiana); Act of Jan. 11, 1805, ch. 5, § 2, 2 Stat. 309 (Michigan); Act of Mar. 2, 1805, §§ 1, 2, 2 Stat. 322 (Orleans); Act of Feb. 3, 1809, §§ 2, 4, 2 Stat. 515 (Illinois); Act of June 4, 1812, § 4, 2 Stat. 744 (Missouri); Act of Mar. 3, 1817, § 4, 3 Stat. 372 (Alabama); Act of Mar. 2, 1819, § 5, 3 Stat. 494 (Arkansas); Act of Mar. 30, 1822, § 5, 3 Stat. 655 (Florida); Act of Mar. 3, 1823, § 5, 3 Stat. 751 (Florida); Act of Apr. 20, 1836, § 4, 5 Stat. 12 (Wisconsin); Act of June 12, 1838, § 4, 5 Stat. 236 (Iowa); Act of Aug. 14, 1848, § 4, 9 Stat. 324 (Oregon); Act of Mar. 3, 1849, § 4, 9 Stat. 404 (Minnesota); Act of Sept. 9, 1850, § 5, 9 Stat. 448 (New Mexico); Act of Sept. 9, 1850, § 4, 9 Stat. 454 (Utah); Act of Mar. 2, 1853, § 4, 10 Stat. 173 (Washington); Act of May 30, 1854, §§ 4–6, 22–24, 10 Stat. 278–279, 284–285 (Nebraska and Kansas); Act of Feb. 28, 1861, § 4, 12 Stat. 173 (Colorado); Act of Mar. 2, 1861, § 4, 12 Stat. 210–211 (Nevada); Act of Mar. 2, 1861, § 4, 12 Stat. 240 (Dakota); Act of Feb. 24, 1863, ch. 56, § 2, 12 Stat. 665 (Arizona); Act of Mar. 3, 1863, § 4, 12 Stat. 809 (Idaho); Act of May 26, 1864, § 4, 13 Stat. 87 (Montana); Act of July 25, 1868, § 4, 15 Stat. 179 (Wyoming); Act of May 2, 1890, § 4, 26 Stat. 83 (Oklahoma); Act of Apr. 12, 1900, § 27, 31 Stat. 82 (Puerto Rico); Act of Apr. 30, 1900, § 12, 31 Stat. 144 (Hawaii); Act of July 1, 1902, § 7, 32

with Article I legislative power. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001); *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 67–88 (2015) (THOMAS, J., concurring in judgment). It has also established territorial courts that do not comply with Article III. See Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1525–1530 (2020) (analyzing territorial courts in early Territories).

The powers vested in territorial governments are distinct from the powers of the National Government. Territorial legislatures exercise the legislative power of the Territory, not Article I legislative power. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 322–323 (1937). Territorial officials exercise the executive power of the Territory, not Article II executive power. *Snow* v. *United States*, 18 Wall. 317, 321–322 (1873). And territorial courts exercise the judicial power of the Territory, not the "judicial power of the United States" under Article III. *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828); *Clinton* v. *Englebrecht*, 13 Wall. 434, 447 (1872).

B

Given the distinction between territorial and national powers, the question becomes whether officers exercising Article IV territorial power are officers "of the United States" under the original meaning of the Appointments Clause. They are not. Both the text of the Appointments Clause and historical practice support this conclusion.

1

The text of the Appointments Clause indicates that "Officers of the United States" refers to officers exercising the

---

Stat. 693–694 (Philippines); Act of Aug. 24, 1912, § 4, 37 Stat. 513 (Alaska); Act of June 22, 1936, § 5, 49 Stat. 1808 (Virgin Islands); Act of Aug. 1, 1950, § 10, 64 Stat. 387 (Guam).

powers of the National Government, not officers exercising territorial power. The Clause applies to the appointment of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." Art. II, § 2, cl. 2. Each of the officers specifically mentioned in the Clause—"Ambassadors," "public Ministers," "Consuls," and "Judges of the supreme Court"—holds an office that exercises national power. *Ibid.* Although not dispositive, this fact suggests that the phrase "and all other Officers of the United States" refers to "other" officers of the National Government. See *Beecham* v. *United States*, 511 U. S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well"); see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 195–198 (2012) (discussing the "associated-words canon," also known as *noscitur a sociis*).

2

Historical evidence from the founding era confirms that officers exercising Article IV territorial power are not "Officers of the United States." The Court acknowledges some of this evidence and surveys the history of appointments in Puerto Rico. *Ante*, at 459–464. I, however, would give more weight and focus to the practices of the First Congress, which provide "powerful evidence of the original understanding of the Constitution." *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 580 (2015) (THOMAS, J., dissenting) (compiling cases relying on the practices of the First Congress to interpret the Constitution).

Before the Constitution's ratification, the Northwest Ordinance of 1787 set up a territorial government for the Northwest Territory. Act of Aug. 7, 1789, 1 Stat. 51, n. (*a*) (reproducing the Northwest Ordinance of 1787 enacted by the Continental Congress). This ordinance granted Congress the power to appoint the Northwest Territory's Governor,

secretary, judges, and general militia officers. *Ibid.* And it provided the Governor the power to appoint "magistrates and other civil officers" of the Territory. *Ibid.*

In 1789, after the ratification of the Constitution, the First Congress amended the Northwest Ordinance "to adapt [it] to the present Constitution of the United States." *Id.*, at 51. One of these amendments provided that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him." *Id.*, at 53. The officers not previously designated for congressional appointment, including "magistrates and other civil officers," remained subject to appointment by the Governor. *Id.*, at 51, n. (*a*), and 53. These amendments (and lack thereof) provide strong evidence that the First Congress understood the distinction between territorial officers and officers of the National Government.

As the Court recognizes, Congress revised the Northwest Ordinance to require "a Presidential-appointment, Senate-confirmation process for high-level territorial appointees who assumed *federal, as well as local, duties*." *Ante,* at 458 (emphasis added). For example, Congress revised the appointment process for the Governor of the Northwest Territory, who performed duties under the powers of the National Government in addition to his Article IV territorial duties. The Governor "discharg[ed] the duties of superintendent of Indian affairs," Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 68, which required him to execute congressional regulations, manage trade with Indians, and obey instructions received from the Secretary of War with respect to his duties as superintendent. See Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786); see also F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834, p. 36 (1962). The Governor negoti-

ated treaties with Indians on behalf of the United States. See 2 The Papers of George Washington: Presidential Series 196–198 (D. Twohig ed. 1987); 33 Journals of the Continental Congress, 1774–1789, p. 711 (R. Hill ed. 1936). He even had the power to call on the militia of the States in the President's name to prevent "incursions of the hostile Indians." 2 The St. Clair Papers 125 (W. Smith ed. 1882). Thus, at least with respect to the Governor, who wielded powers of the National Government, the First Congress appears to have modified the Northwest Ordinance to ensure its compliance with the Appointments Clause.

In contrast, Congress did not revise the process for appointing "magistrates and other civil officers," who remained subject to appointment by the Governor. 1 Stat. 51, n. (*a*), and 53. The "magistrates and other civil officers" of the Northwest Territory included justices of the peace, clerks of the court, sheriffs, coroners, surveyors, and notaries. 3 The Territorial Papers of the United States: The Territory Northwest of the River Ohio, 1787–1803, pp. 304–307 (C. Carter ed. 1934). If these officials were exercising a statutory duty under the powers of the National Government, they would have certainly been considered "Officers of the United States" under the Appointments Clause. See Mascott 484–507, 510–515. "The Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)." *Lucia*, 585 U. S., at 254 (THOMAS, J., concurring). But "the powers and duties of magistrates and other civil officers [were] regulated and defined by the [territorial] assembly," 1 Stat. 51, n. (*a*), and therefore were necessarily exercised pursuant to Article IV, see *supra*, at 474–476. It is evident that the First Congress did not consider these officials to be "Officers of the United States," because it allowed appointment by an official who is not the "head of a department." See *United States* v. *Germaine*, 99 U. S. 508, 510 (1879).

One cannot plausibly conclude that the First Congress—seeking to "adapt" the Northwest Ordinance to the Constitution, 1 Stat. 51—prescribed methods of appointing territorial officers that violated the Appointments Clause. Rather, the First Congress recognized the distinction between territorial and national powers, see *supra*, at 477–479, and understood that officers performing duties pursuant to only Article IV territorial powers are not officers "of the United States." For these reasons, I would hold that the original meaning of the phrase "Officers of the United States" does not include territorial officers exercising only powers conferred under Article IV.

C

Under the original meaning of the Appointments Clause, the Board's members are not "Officers of the United States." They are territorial officers exercising power granted under Article IV.

The Board is "an entity within the territorial government," 48 U. S. C. §2121(c)(1), created "pursuant to article IV, section 3 of the Constitution of the United States," §2121(b)(2), and funded by the Territory, §2127(b). The members of the Board perform duties involving the oversight of Puerto Rico's finances and fiscal reform efforts, §§2141–2152, and the representation of Puerto Rico in debt restructuring proceedings, §§2161–2177. Because "they do not exercise the national executive power," "national judicial power," or national legislative power, the Board's members are "Article IV executives," not Officers of the United States under the Appointments Clause. See *Freytag* v. *Commissioner*, 501 U. S. 868, 913 (1991) (Scalia, J., concurring in part and concurring in judgment) (emphasis deleted).

The Court rightfully acknowledges the territorial nature of the Board's duties. *Ante*, at 465–471. But in the process, the Court sets up a dichotomy between officers with "primarily local versus primarily federal" duties. *Ante*, at 468 (emphasis deleted). I cannot agree with this amorphous test.

As an initial matter, the Court need not decide whether an officer exercising both national and Article IV powers qualifies as an "Officer of the United States." The Board's members have responsibility for ongoing statutory duties that are entirely within the scope of Article IV. See *ante*, at 465–471.

Resolving this unnecessary issue is especially problematic because the original meaning of the phrase "Officers of the United States" arguably includes all officers exercising the powers of the National Government, even if those officers also exercise power vested under Article IV. The Governor of the Northwest Territory, for example, seems to have performed "primarily local" duties, yet the First Congress believed the Governor was an "Officer of the United States" subject to the restrictions of the Appointments Clause. *Supra*, at 478–479; see also *ante*, at 458–459.

The Court fails to engage with this point. Indeed, it fails to provide any foundation at all for its "primarily local" rule. The only analysis to be found is a conclusory statement that *Palmore* v. *United States*, 411 U. S. 389 (1973), "provides a rough analogy." *Ante*, at 469. But drawing a rule from a case that is "no[t] . . . directly on point," *ibid.*, without even analyzing the underlying reasoning of that case, is not sound constitutional interpretation. And favoring a tangentially related decision from 1973 over the practices of the First Congress is certainly not "more faithful to the [Appointments] Clause's original meaning," *ante*, at 471.

Finally, the Court fails to provide any explanation for what makes an officer's duties "primarily local." *Ante*, at 465–471. Is it the relative importance of the duties? Or is it the number of duties exercised pursuant to each power? And what ratio is required for duties to be primarily local? The Court's opinion has no answers and does not even acknowledge the questions. And, regardless of how these questions are resolved, the primarily local test allows Congress to evade the requirements of the Appointments Clause by sup-

plementing an officer's federal duties with sufficient territorial duties, such that they become "primarily local," whatever that means.

* * *

Today's decision reaches the right outcome, but it does so in a roundabout way that departs from the original meaning of the Appointments Clause. I would hold that the Board's members are not "Officers of the United States" because they perform ongoing statutory duties under only Article IV. I therefore cannot join the Court's opinion and concur only in the judgment.

JUSTICE SOTOMAYOR, concurring in the judgment.

Nearly 60 years ago, the people of Puerto Rico "embark[ed] on [a] project of constitutional self-governance" after entering into a compact with the Federal Government. *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 64 (2016). At the conclusion of that endeavor, the people of Puerto Rico established, and the United States Congress recognized, a "republican form of government" "pursuant to a constitution of [the Puerto Rican population's] own adoption." Act of July 3, 1950, ch. 446, §§ 1, 2, 64 Stat. 319; see also Act of July 3, 1952, 66 Stat. 327. One would think the Puerto Rican home rule that resulted from that mutual enterprise might affect whether officers later installed by the Federal Government are properly considered officers of Puerto Rico rather than "Officers of the United States" subject to the Appointments Clause. U. S. Const., Art. II, § 2, cl. 2. Yet the parties do not address that weighty issue or any attendant questions it raises. I thus do not resolve those matters here and instead concur in the judgment.

I nevertheless write to explain why these unexplored issues may well call into doubt the Court's conclusion that the members of the Financial Oversight and Management Board for Puerto Rico are territorial officers not subject to the "significant structural safeguards" embodied in the Appoint-

ments Clause. *Edmond* v. *United States*, 520 U. S. 651, 659 (1997). Puerto Rico's compact with the Federal Government and its republican form of government may not alter its status as a Territory. But territorial status should not be wielded as a talismanic opt out of prior congressional commitments or constitutional constraints.

I

A

Puerto Rico became a Territory of the United States in 1898, pursuant to a treaty concluding the Spanish-American War. After a series of temporary military governing measures, Congress passed the Foraker Act of 1900, establishing a civil government exercising significant authority over Puerto Rico's internal territorial affairs. Organic Act of 1900, ch. 191, 31 Stat. 77. Over time, Congress put in place incremental measures of autonomy, such as by granting U. S. citizenship to the island's inhabitants in 1917 and providing for the popular election of certain territorial officials the same year. See *Sánchez Valle*, 579 U. S., at 63–64; Organic Act of 1917, ch. 145, 39 Stat. 951. Yet throughout the early years of Puerto Rico's territorial status, "Congress retained major elements of sovereignty," and "[i]n cases of conflict, Congressional statute, not Puerto Rico law, would apply no matter how local the subject." *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N. A.*, 649 F. 2d 36, 39 (CA1 1981) (Breyer, J., for the court).

By 1950, however, international and local "pressures for greater autonomy," *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 671 (1974), prompted Congress to pass Public Law 600, 64 Stat. 319, a measure "enabl[ing] Puerto Rico to embark on the project of constitutional self-governance," *Sánchez Valle*, 579 U. S., at 64. "'[R]ecognizing'" and "affirm[ing] the 'principle of government by consent,'" Public Law 600 "offered the Puerto Rican public a 'compact,' under which they could 'organize a government

pursuant to a constitution of their own adoption.'" *Id.*, at 64, 76 (quoting Act of July 3, 1950, § 1, 64 Stat. 319); see also 579 U. S., at 64 (Public Law 600 "[d]escrib[ed] itself as 'in the nature of a compact'" (quoting § 1, 64 Stat. 319)). Under the terms of the compact, Public Law 600 itself was submitted to the people of Puerto Rico, who voted to approve the law through a popular referendum. See Leibowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 222–223 (1967). Delegates were then elected to a constitutional convention to draft a constitution, and in a special referendum, the draft constitution was submitted to the people of Puerto Rico for approval. *Id.*, at 223.

In 1952, "both Puerto Rico and the United States ratified Puerto Rico's Constitution." *Sánchez Valle*, 579 U. S., at 87 (BREYER, J., dissenting). The people of Puerto Rico first approved the draft Constitution in a referendum. Congress then approved the draft Constitution with modifications, noting the caveat that it "shall become effective" only when Puerto Rico "declare[s] in a formal resolution its acceptance." 66 Stat. 327–328. Finally, the constitutional convention approved the modified Constitution, and the people of Puerto Rico subsequently ratified modifications in another referendum. Thus, although the terms of the compact provided for Congress' approval, "when such constitution did go into effect pursuant to the resolution of approval by the Congress, it became what the Congress called it, a 'constitution' under which the people of Puerto Rico organized a government of their own adoption." *Figueroa* v. *Puerto Rico*, 232 F. 2d 615, 620 (CA1 1956) (citation omitted). "The Commonwealth's power, the [Puerto Rico] Constitution proclaims, 'emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States.'" *Sánchez Valle*, 579 U. S., at 65.

With the passage of Public Law 600 and the adoption and recognition of the Puerto Rico Constitution, "the United

States and Puerto Rico . . . forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule." *Id.*, at 63; cf. *Calero-Toledo*, 416 U. S., at 672 (noting with approval the view that, after Public Law 600, Puerto Rico became "a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact" (quoting *Mora* v. *Mejias*, 206 F. 2d 377, 387 (CA1 1953))).

Of critical import here, the Federal Government "relinquished its control over [Puerto Rico's] local affairs[,] grant-[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 597 (1976). Indeed, the very "purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Id.*, at 594; see also S. Rep. No. 1779, 81st Cong., 2d Sess., 2 (1950) (Public Law 600 was "designed to complete the full measure of local self-government in" Puerto Rico); H. R. Rep. No. 2275, 81st Cong., 2d Sess., 6 (1950) (Public Law 600 was a "reaffirmation by the Congress of the self-government principle").[1] The upshot is that "Puerto Rico, like a State, is an autonomous political entity, '"sovereign over matters not ruled by the [Federal] Constitution."'" *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U. S., at 673). And only by holding out that guarantee to the United Nations has the Federal Government been able to disclaim certain continuing obligations it previously owed with respect

[1] To be sure, Public Law 600 reserved certain limited powers to Congress (some of which were soon repealed). See *ante*, at 463. But those narrow reservations of federal control did not purport to diminish the full measure of territorial self-governance conferred upon the people of Puerto Rico through Public Law 600 and the Puerto Rico Constitution. See 39 Stat. 953; 64 Stat. 319–320.

to Puerto Rico under the United Nations Charter. See *infra*, at 491–492.

B

In the decades that followed, Puerto Rico underwent further changes as a Commonwealth. For many years, the island experienced dynamic growth, increasing its gross national product more than fourfold from 1950 to 1971. Cheatham, Council on Foreign Relations, Puerto Rico: A U. S. Territory in Crisis (Feb. 13, 2020). In 1976, after the revised Federal Tax Code conferred preferential tax treatment on productive industries in Puerto Rico, Puerto Rico developed robust pharmaceutical and manufacturing sectors. Issacharoff, Bursak, Rennie, & Webley, What Is Puerto Rico? 94 Ind. L. J. 1, 27 (2019).

Eventually, however, the island and its people confronted several economic setbacks. Congress repealed Puerto Rico's favorable tax credits, and manufacturing growth deflated, precipitating a prolonged recession. Steady outmigration correlated with persistently high unemployment rates greater than 8 percent. Dept. of Labor, Bureau of Labor Statistics, Databases, Tables & Calculators by Subject (May 28, 2020). Deprived of its primary sources of income, the Commonwealth began borrowing heavily. The island's outstanding debts rose to approximately $70 billion, a sum greater than its annual economic output. Puerto Rico's credit ratings were downgraded to junk levels, D. Austin, Congressional Research Service, Puerto Rico's Current Fiscal Challenges 4, 13 (June 3, 2016), rendering borrowing practically impossible. Without any realistic ability to set its finances on the right course, the island declared bankruptcy in 2016.

Months later, Hurricane Maria made landfall, causing immense devastation and a humanitarian emergency the likes of which had not been seen in over a century. The island suffered thousands of casualties and an estimated $90 billion in damages. Most recently, significant earthquakes have

further rattled an already shaken population and economy still recovering from the impact of Hurricane Maria. Robles, Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside, N. Y. Times, Mar. 1, 2020.

C

Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 130 Stat. 549, 48 U. S. C. § 2101 *et seq.*, in the midst of Puerto Rico's dramatic reversal of fortune, with the aim of mitigating the island's "severe economic decline," see 48 U. S. C. § 2194(m)(1). To that end, the statute establishes a Financial Oversight and Management Board to oversee the island's finances and restructure its debts. See *ante*, at 454; Issacharoff, 94 Ind. L. J., at 30–31.

The Board's decisions have affected the island's entire population, particularly many of its most vulnerable citizens. The Board has ordered pensions to be reduced by as much as 8.5 percent, a measure that threatens the sole source of income for thousands of Puerto Rico's poor and elderly. Walsh & Russell, $129 Billion Puerto Rico Bankruptcy Plan Could Be Model for States, N. Y. Times, Sept. 29, 2019. Other proposed cuts take aim at already depleted healthcare and educational services. It is under the yoke of such austerity measures that the island's 3.2 million citizens now chafe.

PROMESA does not provide for the appointment of Board members according to the straightforward methods set out in the Appointments Clause. U. S. Const., Art. II, § 2, cl. 2 (requiring principal "Officers of the United States" to be nominated by the President, with Senate advice and consent). Instead, the statute prescribes a labyrinthine procedure by which the Speaker of the House, majority leader of the Senate, minority leader of the House, and minority leader of the Senate each submit to the President separate lists with any number of candidates; and the President, in turn,

selects individuals from each of those lists, plus an individual in his sole discretion. See § 101(e), 130 Stat. 554–555.[2] With only one exception, then, the President is not "singly and absolutely" responsible for any members of the Board. The Federalist No. 77, p. 461 (C. Rossiter ed. 1961) (A. Hamilton) (Appointments Clause ensures that "[t]he blame of a bad nomination . . . fall[s] upon the President singly and absolutely"). And with no exceptions, the Senate fails to advise or consent to the President's selections.

Despite the Board's wide-ranging, veto-free authority over Puerto Rico, the solitary role PROMESA contemplates for Puerto Rican-selected officials is this: The Governor of Puerto Rico sits as an ex officio Board member without any voting rights. § 101(e)(3), 130 Stat. 555. No individual within Puerto Rico's government plays any part in determining which seven members now decide matters critical to the island's financial fate.

II

A

In concluding that the Board members are territorial officers not subject to the strictures of the Appointments Clause, the Court does not meaningfully address Puerto Rico's history or status. Nor need it, as the parties do not discuss the potential consequences that Congress' recognition of

[2] Specifically, PROMESA provides that "[t]he Board shall be comprised of one Category A member, one Category B member, two Category C members, one Category D member, one Category E member, and one Category F member." § 101(e)(1)(B), 130 Stat. 554. The Speaker of the House submits "separate, non-overlapping list[s]" for the Category A and Category B members, the majority leader for the Senate submits a list for the two Category C members, the minority leader of the House submits a list for the Category D member, and the minority leader of the Senate submits a list for the Category E member. § 101(e)(2)(A), *id.*, at 554–555. Finally, "the Category F member may be selected in the President's sole discretion." § 101(e)(2)(A)(vi), *id.*, at 555. Many other conditions apply to the lists submitted and the individuals who may appear on them. See generally §§ 101(e)–(f), *id.*, at 554–556.

complete self-government decades ago may have on the Appointments Clause analysis. But in my view, however one distinguishes territorial officers from federal officers (whether under the Court's "primarily local" test, *ante*, at 467, or some other standard), the longstanding compact between the Federal Government and Puerto Rico raises grave doubts as to whether the Board members are territorial officers not subject to the Appointments Clause. When Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico's adoption, Congress explicitly left the authority to choose Puerto Rico's governmental officers to the people of Puerto Rico. That turn of events seems to give to Puerto Rico, through a voluntary concession by the Federal Government, the exclusive right to establish Puerto Rico's own territorial officers.

No less than the bedrock principles of government upon which this Nation was founded ground this proposition. When the Framers resolved to build this Nation on a republican form of government, they understood that the American people would have the authority to select their own governmental officers. See, *e. g.*, The Federalist No. 39, at 241 (J. Madison) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people"); A. Amar, America's Constitution: A Biography 278–279 (2005) ("[T]he general understanding of republicanism across America" at the founding embraced a concept of government "in which 'the people are sovereign'; in which 'the people are consequently the fountain of all power'; in which 'all authority should flow from the people'"). Core to the 1950s "compact" between the Federal Government and Puerto Rico was that Puerto Rico's eventual constitution "shall provide a republican form of government." §2, 64 Stat. 319 (codified in 48 U. S. C. §731c). Thus, "resonant of American founding principles," the Puerto Rico Constitution set forth a tripartite government "'republican in form' and 'subordinate to the sovereignty of

the people of Puerto Rico.'" *Sánchez Valle*, 579 U. S., at 65 (quoting P. R. Const., Art. I, § 2); see also *Torres* v. *Puerto Rico*, 442 U. S. 465, 470 (1979). "[T]he distinguishing feature" of such "republican form of government," this Court has recognized over and again, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan*, 139 U. S. 449, 461 (1891) (discussing the republican governments of the States); see also *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, 149 (1912) (same).

Thus, whatever authority the Federal Government exercised to select territorial officers for Puerto Rico before Congress recognized Puerto Rico's republican form of government, the authority "to choose [Puerto Rico's] own officers for governmental administration" now seems to belong to the people of Puerto Rico. *Duncan*, 139 U. S., at 461. Indeed, however directly responsible the Federal Government was for Puerto Rico's local affairs before Public Law 600, those matters might be said to "now procee[d]" in the first instance "from the Puerto Rico Constitution as 'ordain[ed] and establish[ed]' by 'the people.'" Cf. *Sánchez Valle*, 579 U. S., at 75 (quoting P. R. Const., Preamble) (acknowledging "that the Commonwealth's power to enact and enforce criminal law now proceeds . . . from the Puerto Rico Constitution," "mak[ing] the Puerto Rican populace . . . the most immediate source of such authority").

The developments of the early 1950s were not merely symbolic either; this Court has recognized that the paradigm shift in relations between Puerto Rico and the Federal Government carried legal consequences. In *Calero-Toledo*, for instance, this Court held that the "enactments of the Commonwealth of Puerto Rico" were "'State statute[s]'" within the meaning of a federal law requiring a three-judge court panel to consider any action seeking to enjoin a "'State stat-

ute.'" 416 U. S., at 675–676. The Court reasoned that Puerto Rico was entitled to similar treatment as the States under the federal law, due to "significant changes in Puerto Rico's governmental structure" in the early 1950s. See *id.*, at 670–674. For similar reasons, this Court has recognized on multiple other occasions that Puerto Rico is akin to a State in key respects. See, *e. g.*, *Flores de Otero*, 426 U. S., at 597 (Congress granted Puerto Rico "a measure of autonomy comparable to that possessed by the States"); *Rodriguez*, 457 U. S., at 8 ("Puerto Rico, like a state, is an autonomous political entity"); see also *Sánchez Valle*, 579 U. S., at 82 (BREYER, J., dissenting) ("[T]he parallels between admission of new States and the creation of the Commonwealth [of Puerto Rico] are significant").

The compact also had international ramifications, as the Federal Government repeatedly represented at the time. Shortly after the ratification and approval of the Puerto Rico Constitution, federal officials certified to the United Nations that, for Puerto Rico, the United States no longer needed to comply with certain reporting obligations under the United Nations Charter regarding territories "whose peoples have not yet attained a full measure of self-government." Charter of the United Nations, 59 Stat. 1048, Art. 73, June 26, 1945, T. S. No. 993 (U. N. Charter). According to federal officials, that was because the people of Puerto Rico now had "complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress." Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico, in A. Fernós-Isern, Original Intent in the Constitution of Puerto Rico 153 (2d ed. 2002). To the extent federal law had previously "directed or authorized interference with matters of local government by the Federal Government," federal officials elaborated, "[t]hose laws . . . ha[d] been re-

pealed." *Ibid.*; see also *ibid.* ("Congress has agreed that Puerto Rico shall have, under [the Puerto Rico] Constitution, freedom from control or interference by the Congress in respect of internal government and administration").

Based on those explicit representations, the United Nations General Assembly declared that the people of Puerto Rico "ha[d] been invested with attributes of political sovereignty which clearly identify the status of self-government attained . . . as that of an autonomous political entity." G. A. Res. 748, U. N. GAOR, 8th Sess., Supp. No. 17, U. N. Doc. A/2630 (Nov. 27, 1953). And consistent with that declaration, the Federal Government promptly stopped complying with the Charter's reporting obligations with respect to Puerto Rico (and has never since recommenced). Thus, in the eyes of the international community looking in, as well as of the Federal Government looking out, Puerto Rico has long enjoyed autonomous reign over its internal affairs. Indeed, were the Federal Government's representations to the United Nations merely aspirational, the United States' compliance with its international legal obligations would be in substantial doubt. See Lawson & Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 Boston College L. Rev. 1123, 1127 (2009) (arguing that if Puerto Rico remains "just another territory subject to Congress's plenary power under the Territories Clause," "the United States . . . is in violation of its international legal obligations vis-à-vis Puerto Rico").

There can be little question, then, that the compact altered the relationship between the Federal Government and Puerto Rico. At a minimum, the post-compact developments, including this Court's precedents, indicate that Congress placed in the hands of the Puerto Rican people the authority to establish their own government, replete with officers of their own choosing, and that this grant of self-government was not an empty promise. That history prompts serious questions as to whether the Board members

may be territorial officers of Puerto Rico when they are not elected or approved, directly or indirectly, by the people of Puerto Rico.

B

Of course, it might be argued that Congress is nevertheless free to repeal its grant of self-rule, including the grant of authority to the island to select its own governmental officers. And perhaps, it might further be said, that is exactly what Congress has done in PROMESA by declaring the Board "an entity within the territorial government" of Puerto Rico. § 101(c)(1), 130 Stat. 553. But that is not so certain.

This Court has "'repeatedly stated . . . that absent "a clearly expressed congressional intention"'" to repeal, "'[a]n implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute."'" *Carcieri* v. *Salazar*, 555 U. S. 379, 395 (2009) (quoting *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion)). Not so, it seems, with PROMESA on the one hand, and Congress' 1950 and 1952 legislations on the other. As written, PROMESA is a temporary bankruptcy measure intended to assist in restoring Puerto Rico to fiscal security. It is not an organic statute clearly or expressly purporting to renege on Congress' prior "gran[t to] Puerto Rico [of] a measure of autonomy comparable to that possessed by the States," *Flores de Otero*, 426 U. S., at 597, nor on the concomitant grant of authority to select officers of its own choosing. It would seem curious to interpret PROMESA as having done so indirectly, simply through its characterization of the Board "as an entity within the territorial government." § 101(c)(1), 130 Stat. 553.

Further, there is a legitimate question whether Congress could validly repeal any element of its earlier compact with Puerto Rico on its own initiative, even if it had been abundantly explicit in its intention to do so. The truism that

"one Congress cannot bind a later Congress," *Dorsey* v. *United States*, 567 U. S. 260, 274 (2012), appears to have its limits: As scholars have noted, certain congressional actions are not subject to recantation. See, *e. g.*, Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1, 14 (1953) (listing as examples the congressional grant of independence to the Philippine Islands and congressional grant of private title to public lands under homestead laws); Issacharoff, 94 Ind. L. J., at 14 ("Once a Congress has disposed of a territory, of necessity it binds future Congresses to the consequences of that decision"); T. Aleinikoff, Semblances of Sovereignty: The Constitution, the State, and American Citizenship 90 (2002) ("The granting of neither statehood nor independence may be revoked, nor may land grants or other 'vested interests' be called back by a subsequent Congress").

Plausible reasons may exist to treat Public Law 600 and the Federal Government's recognition of Puerto Rico's sovereignty as similarly irrevocable, at least in the absence of mutual consent. Congress made clear in Public Law 600 that the agreement between the Federal Government and Puerto Rico was "in the nature of a compact." 64 Stat. 319. That "solemn undertaking, based upon mutual consent, . . . of such profound character between the Federal Government and a community of U. S. citizens," has struck many as "incompatible with the concept of unilateral revocation." *E. g.*, Report of the United States-Puerto Rico Commission on the Status of Puerto Rico 12–13 (1966); see also A. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 172–173 (1989) (describing how "many in the Congress" understood Public Law 600 to constitute "an irrevocable grant of authority in local affairs with an understanding of mutual consent being required before Congress would resolve the ultimate status question or change the status of the Commonwealth"). Indeed, shortly after Congress approved the Puerto Rico Constitution, federal officials ex-

pressly represented to the United Nations that the compact was of a "bilateral nature," such that its "terms [could] be changed only by common consent." F. Bolton, U. S. Rep. to the Gen. Assembly, Statement to U. N. Committee IV (Trusteeship) (Nov. 3, 1953), reprinted in 29 Dept. State Bull. 802, 804 (1953); see also Press Release No. 1741, U. S. Mission to the United Nations, Statement by M. Sears, U. S. Rep. in the Comm. on Information From Non-Self Governing Territories 2 (Aug. 28, 1953) ("[A] compact . . . is far stronger than a treaty" because it "cannot be denounced by either party unless it has the permission of the other").[3]

All of this presses up against broader questions about Congress' power under the Territories Clause of Article IV, U. S. Const., Art. IV, § 3, cl. 2, the purported source of legislative authority for enacting PROMESA, see § 101(b)(2), 130 Stat. 553; *ante*, at 456. May Congress ever simply cede its power under that Clause to legislate for the Territories, and did it

[3] In opting to proceed with Puerto Rico's Commonwealth endeavor by way of compact, Public Law 600 was not entirely without precedent. When Congress enacted the Northwest Ordinance prior to ratification to govern the newly acquired Northwest Territory, it provided for a catalog of fundamental rights, styled as "articles of compact between the original States . . . and the people and States in the said territory" that would "forever remain unalterable, unless by common consent." Act of Aug. 7, 1789, 1 Stat. 52, n. (*a*) (reproducing the Northwest Ordinance of 1787). That understanding of a compact between the Federal Government and the Territories was the only extant precedent for the compact language in Public Law 600, and proponents of Public Law 600 were vocal in their reliance on the Northwest Ordinance as a model. See Lawson & Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 Boston College L. Rev. 1123, 1149, n. 142 (2009) (prior to Public Law 600, "[t]he term 'compact' . . . had seldom appeared in U. S. law," with the exception of the Northwest Ordinance and subsequent organic statutes modeled after the Northwest Ordinance); J. Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World 111 (1997) (discussing debate among the drafters of Public Law 600 about whether to adopt the precise compact language in the Northwest Ordinance).

do so nearly 60 years ago with respect to Puerto Rico? If so, is PROMESA itself invalid, at least insofar as it holds itself out as an exercise of Territories Clause authority? This Court has never squarely addressed such questions, except perhaps to acknowledge that Congress' authority under the Territories Clause may "continu[e] until granted away." *National Bank* v. *County of Yankton*, 101 U. S. 129, 133 (1880); cf. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 319 (1937) (recognizing that a statute preparing the Philippine Islands for independence from the United States "brought about a profound change in the status of the islands and in their relations to the United States," such that "the power of the United States has been modified," even while "it has not been abolished").

After all, the Territories Clause provides Congress not only the power to "make all needful Rules and Regulations respecting the Territor[ies]," but also the power to "dispose of" them, which necessarily encompasses the power to relinquish authority to legislate for them. U. S. Const., Art. IV, §3, cl. 2. And some have insisted that the power to cede authority exists no less in the absence of full "dispos[al]" through independence or Statehood. See Aleinikoff, Semblances of Sovereignty, at 77 ("It has been strongly argued that" with "the establishment of commonwealth status," "Congress lost general power to regulate the internal affairs of Puerto Rico").

Still, the parties here do not dispute Congress' ability to enact PROMESA under the Territories Clause in the first place; nor does it seem strictly necessary to call that matter into question to resolve the Appointments Clause concern presented here. Despite the "full measure of self-government" the island supposedly enjoys, U. N. Charter, Art. 73; see also *supra*, at 485–486, 489–493, Puerto Rico can well remain a "Territory" subject to some measure of Congress' Territories Clause authority. But even assuming that the Territories Clause thus enables Congress to enact federal

laws "respecting" Puerto Rico, U. S. Const., Art. IV, § 3, cl. 2, still some things the Clause does not necessarily do: It does not necessarily allow Congress to repeal by mere implication its prior grant of authority to the people of Puerto Rico to choose their own governmental officers. It does not necessarily give Congress license to revoke unilaterally an instrument that may be altered only with mutual consent. And it does not necessarily permit Congress to declare by fiat that the law must treat its exercise of authority under the Territories Clause as territorial rather than federal, irrespective of the compact it entered with the people of Puerto Rico leaving complete territorial authority to them. Cf. Hernández Colón, The Evolution of Democratic Governance Under the Territorial Clause of the U. S. Constitution, 50 Suffolk U. L. Rev. 587, 605 (2017) (after 1952, "Congress partially relinquished its territorial powers over Puerto Rico's *internal* affairs, as recognized in *Sanchez Valle*," even while "Congress continues to retain territorial powers in *federal* affairs" (emphasis added)).

III

Nor is it significant that Congress has historically provided for the appointment of officers who perform duties related to the Territories through methods other than those prescribed by the Appointments Clause. Those methods may be permissible up to a point in a Territory's development. But that historical practice does not, in my view, resolve the far more complex question whether Congress can continue to act in that manner indefinitely or long after granting Territories complete self-government.

Essentially none (if any) of the allegedly nonconforming appointments referenced by the parties occurred in circumstances where, as in the case of Puerto Rico, Congress previously granted the Territories complete home rule. See *infra*, at 499–501, and nn. 4–5. Instead, they largely occurred during the initial or transitional stages of a Territory's existence, when often the terms of the organic statute establish-

ing the Territory expressly provided for the Federal Government to act on behalf of the Territory. (After all, in newly established Territories, no recognized territorial government existed until the organic statute established one.) Because in that state of affairs, an organic statute plainly contemplated that *Congress* had authority to establish offices for the Territory, such congressionally established offices could fairly—indeed, necessarily—be treated as "territorial" to the extent they were tasked with territorial duties.

Does that necessarily remain the case if Congress later grants or establishes complete territorial self-government? As Puerto Rico's history may demonstrate, it is seemingly at that point that Congress purports to recognize that the Territory itself (not the Federal Government) wields authority over matters of the Territory, including the ability to select its own territorial officers. Perhaps it is also at that point that a distinction between territorial officers and federal officers crystallizes: Territorial officers are those who derive their authority from the people of the Territory; federal officers are those who derive their authority from the Federal Government. And here, the Board members indisputably are selected by the Federal Government, under a statute passed by Congress that specifies not just their governance responsibilities but also the priorities of their decisionmaking. See *ante*, at 453–455.

The scores of historical vignettes highlighted by petitioners, see, *e. g.*, Brief for Petitioner Financial Oversight and Management Board for Puerto Rico 28–33; Brief for Petitioner Official Committee of Retired Employees of the Commonwealth of Puerto Rico 10–17, do not appear to foreclose this possibility or even address the question. Rather, they seem consistent with a broader historical narrative about early territorial development: that Congress has traditionally exercised its power under the Territories Clause with the aim of promptly preparing newly established Territories to transition gradually to territorial self-government. To

the extent Congress deviated from the requirements of the Appointments Clause in establishing territorial governments, it generally did so either to facilitate temporary governments in the Territories before self-government was practically possible or to begin transferring appointment authority directly into the hands of the territorial population.

For example, Congress has often provided for territorial officials to be appointed by a (Presidentially nominated and Senate confirmed) territorial Governor, a method that the Appointments Clause does not appear to contemplate. See, *e. g.*, Brief for Petitioner Financial Oversight and Management Board for Puerto Rico 31, and n. 13. But those arrangements arose from the organic statutes establishing the Territories (and thus their initial territorial governments) in the first place.[4] The same is generally true of instances where Congress provided for Presidential appointment (without Senate confirmation) of territorial officials whose duties might otherwise make them principal officers under the Appointments Clause (requiring Senate confirmation). See, *e. g.*, Brief for Petitioner Official Committee of Retired Employees of the Commonwealth of Puerto Rico 11. Those scenarios broadly conformed with the template of the organic statute establishing the Louisiana Territory, 2 Stat. 245, which Congress passed as an "emergency provisio[n]" shortly after territorial acquisition in order "to preserve order until a proper government could be put in place," D. Currie, The Constitution in Congress, The Jeffersonians: 1801–1829, p. 112 (2001).[5]

[4] See, *e. g.*, 1 Stat. 51–52, and n. (*a*) (1789) (Northwest Territory); Act of Feb. 3, 1809, ch. 13, §§ 1, 2, 2 Stat. 514–515 (Illinois); Act of June 4, 1812, § 2, 2 Stat. 744 (Missouri); Act of Feb. 8, 1861, ch. 59, §§ 1, 7, 12 Stat. 172, 174 (Colorado); Act of May 26, 1864, ch. 95, §§ 1, 7, 13 Stat. 85, 88 (Montana); Act of July 25, 1868, ch. 235, §§ 1, 7, 15 Stat. 178, 180 (Wyoming); Act of May 2, 1890, ch. 182, §§ 1, 7, 26 Stat. 81, 85 (Oklahoma).

[5] See 2 Stat. 245 (1803) (Louisiana) (authorizing the President to "take possession of, and occupy the territory," to "employ any part of the army and navy of the United States" in doing so, and to establish a "temporary

As for the numerous instances where officers with territorial responsibilities were popularly elected or appointed by territorial officials, see *ante*, at 461–462, Congress typically transitioned to these arrangements after establishing an initial territorial government. The Northwest Ordinance, for example, allowed the Governor to appoint "magistrates and other civil officers" "during the continuance of [a] temporary government" established at the outset of the Northwest Territory's existence, as "necessary for the preservation of the peace and good order." Act of Aug. 7, 1789, ch. 8, 1 Stat. 51, n. (*a*). As soon as the Territory met a certain population threshold, however, the territorial population was to directly elect members of the lower house of the territorial legislature, which would in turn play a role in selecting the civil officers of the territorial government. *Ibid.* Following the Northwest Ordinance's lead, the organic statutes for many subsequent territories contemplated similar arrangements for "transition[ing]" quickly to forms of "representative government." J. Eblen, The First and Second United States Empires: Governors and Territorial Government, 1784–1912, pp. 54, 59 (1968); see also Leibowitz, Defining Status, at 6–7.

Congress' provision of limited or incremental home-rule measures, moreover, seems to reveal little about the restrictions the Appointments Clause imposes on officers selected by the Federal Government. By definition, selection by home rule does not track the methods outlined in the Appointments Clause. But perhaps that is because home-rule measures give to the Territory the ability to select its own

---

government" "until . . . provision for the temporary government . . . be sooner made by Congress"); cf. 3 Stat. 524 (1819) (Florida) (similar); 31 Stat. 910 (1901) (Philippines) (authorizing the establishment of a "temporary government" pending "the establishment of permanent civil government"); 33 Stat. 429 (1904) (Panama Canal Zone) (authorizing the President "[t]o provide for the temporary government" of the Territory "until . . . provision for the temporary government . . . be sooner made by Congress").

governing officers, which by necessity are territorial rather than federal. That the Territory selects its own governing officers, and that these officers are necessarily territorial, does not obviously imply that Congress may disregard the Appointments Clause when it later provides for the Federal Government to select officers carrying out territorial responsibilities.[6]

In all, then, it is not particularly surprising that many officers who acted for the Territories historically were appointed in a manner other than that set out in the Appointments Clause. Viewed in proper historical context, those officers' appointments may reflect nothing more than the necessary incidents of the transition to and establishment of full territorial self-government. For the overwhelming majority of Territories in this Nation's history, of course, that turning point coincided with Statehood. See Leibowitz, Defining Status, at 6–8 (describing the "transitory nature" of the early Territories' "evolutionary process culminat[ing] in Statehood" and "the establishment of popular self-government"); *District of Columbia* v. *Carter*, 409 U. S. 418, 431–432 (1973) ("From the moment of their creation, the Territories were destined for admission as States into the Union, and 'as a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of which was necessarily limited'" (quoting *O'Donoghue* v. *United States*, 289 U. S. 516, 537 (1933))). But critically, the transitional phase was never intended to last indefinitely. See Amar, America's Constitution, at 273 (describing the Founders' understanding that "[t]he older states would help their younger siblings grow up and would thereafter regard them as equals, rather than as permanent adolescents—the

[6] For that reason, no unavoidable tension seems to exist between requiring compliance with the Appointments Clause for the Board members and preserving complete home rule in Puerto Rico (or, for that matter, any of the other Territories).

status to which Mother England had wrongly relegated her own New World wards"). The historical examples thus reveal little, if anything, about Congress' ability to establish territorial officers in Territories that (much like Puerto Rico) have long operated under the full measure of self-government.

This Court's precedents do not speak to that circumstance either. No doubt the Court has said that the Territories Clause gives Congress "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." *County of Yankton*, 101 U. S., at 132–133; see also *id.*, at 133 ("Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government"); *Sere* v. *Pitot*, 6 Cranch 332, 337 (1810); *ante*, at 474–475 (THOMAS, J., concurring in judgment). But none of those cases had to do with the Appointments Clause. More important, none of them addressed the scope of Congress' authority with respect to a fully self-governing Territory. See Leibowitz, Defining Status, at 15 (observing that "the broad statements of Congressional power" in those cases "were made in the context of a territory's evolution toward statehood," and that "[t]his context was the 'restriction . . . necessarily implied in its terms' "). Much less do those cases inform whether and how Congress may validly act on behalf of a Territory like Puerto Rico, as to which Congress has expressly (and perhaps irrevocably in the absence of common consent) "relinquished . . . control over [territorial] affairs." *Flores de Otero*, 426 U. S., at 597; see also *Rodriguez*, 457 U. S., at 8 (describing Puerto Rico as "an autonomous political entity, 'sovereign over matters not ruled by the [Federal] Constitution' " (quoting *Calero-Toledo*, 416 U. S., at 673)). Indeed, as the same cases expressly acknowledged, Congress' authority under the Territories Clause may "continu[e]" only "until granted away." *County of Yankton*, 101 U. S., at 133; see also *supra*, at 495–496.

* * *

These cases raise serious questions about when, if ever, the Federal Government may constitutionally exercise authority to establish territorial officers in a Territory like Puerto Rico, where Congress seemingly ceded that authority long ago to Puerto Rico itself. The 1950s compact between the Federal Government and Puerto Rico undoubtedly carried ramifications for Puerto Rico's status under federal and international law; the same may be true of the Appointments Clause analysis here. After all, the long-awaited promise of Public Law 600's compact between Puerto Rico and the Federal Government seemed to be that the people of Puerto Rico may choose their own territorial officers, rather than have such officers foisted on the Territory by the Federal Government.

Viewed against that backdrop, the result of these cases seems anomalous. The Board members, tasked with determining the financial fate of a self-governing Territory, exist in a twilight zone of accountability, neither selected by Puerto Rico itself nor subject to the strictures of the Appointments Clause. I am skeptical that the Constitution countenances this freewheeling exercise of control over a population that the Federal Government has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing. Surely our Founders, having labored to attain such recognition of self-determination, would not view that same recognition with respect to Puerto Rico as a mere act of grace. Nevertheless, because these issues are not properly presented in these cases, I reluctantly concur in the judgment.

Syllabus

BANISTER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 18–6943. Argued December 4, 2019—Decided June 1, 2020

Federal Rule of Civil Procedure 59(e) allows a litigant to file a motion to alter or amend a district court's judgment within 28 days from the entry of judgment, with no possibility of an extension. The Rule enables a district court to "rectify its own mistakes in the period immediately following" its decision, *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 450, but not to address new arguments or evidence that the moving party could have raised before the decision. A timely filed motion suspends the finality of the original judgment for purposes of appeal, and only the district court's disposition of the motion restores finality and starts the 30-day appeal clock. If an appeal follows, the ruling on the motion merges with the original determination into a single judgment.

Title 28 U. S. C. § 2244(b), the so-called gatekeeping provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), governs federal habeas proceedings. Under AEDPA, a state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction. Section 2244(b), however, sets stringent limits on second or successive habeas applications. Among those restrictions, a prisoner may not reassert any claims "presented in a prior application," § 2244(b)(1), and may bring a new claim only in limited situations. Because habeas proceedings are civil in nature, the Federal Rules of Civil Procedure generally apply, but statutory habeas restrictions, including § 2244(b), trump any "inconsistent" Rule. § 2254 Rule 12.

Petitioner Gregory Banister was convicted by a Texas court of aggravated assault and sentenced to 30 years in prison. After exhausting his state remedies, he filed for federal habeas relief, which the District Court denied. Banister timely filed a Rule 59(e) motion, which the District Court also denied. He then filed a notice of appeal in accordance with the timeline for appealing a judgment after the denial of a Rule 59(e) motion. But the Fifth Circuit construed Banister's Rule 59(e) motion as a successive habeas petition and dismissed his appeal as untimely.

Syllabus

Held: Because a Rule 59(e) motion to alter or amend a habeas court's judgment is not a second or successive habeas petition under 28 U. S. C. § 2244(b), Banister's appeal was timely. Pp. 511–521.

(a) The phrase "second or successive application" is a term of art and does not "simply 'refe[r]' " to all habeas filings made " 'second or successively in time,' " following an initial application. *Magwood* v. *Patterson*, 561 U. S. 320, 332. In addressing what qualifies as second or successive, this Court has looked to historical habeas doctrine and practice and AEDPA's purposes. Here, both point toward permitting Rule 59(e) motions in habeas proceedings.

Prior to AEDPA, the Court held in *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, that Rule 59(e) applied in habeas proceedings. The Rule, the Court recounted, derived from courts' common-law power "to alter or amend [their] own judgments during[ ] the term of court in which [they were] rendered," prior to any appeal, including "in habeas corpus cases." *Id.*, at 270. Although the drafters of the Federal Rules eventually replaced the "term of court" power with Rule 59(e), the Court concluded that this did nothing to narrow the set of judgments amenable to alteration. The record of judicial decisions accords with that view. Pre-AEDPA, habeas courts were to dismiss repetitive applications except in "rare case[s]." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 451. Yet in the half century from Rule 59(e)'s adoption through *Browder* to AEDPA's enactment, there exists only one dismissal of a Rule 59(e) motion as impermissibly successive. In all other cases, the district courts resolved Rule 59(e) motions on the merits.

Congress passed AEDPA against this backdrop, and gave no indication that it meant to change what qualifies as a successive application. Nor do AEDPA's purposes of reducing delay, conserving judicial resources, and promoting finality suggest any different result. Rule 59(e) offers a narrow, 28-day window to ask for relief; limits requests for reconsideration to matters properly raised in the challenged judgment; and consolidates proceedings by producing a single final judgment for appeal. Indeed, the Rule may make habeas proceedings more efficient by enabling a district court to reverse a mistaken judgment or to clarify its reasoning so as to make an appeal unnecessary. Pp. 511–517.

(b) *Gonzalez* v. *Crosby*, 545 U. S. 524, which held that a Rule 60(b) motion counts as a second or successive habeas application if it "attacks the federal court's previous resolution of a claim on the merits," *id.*, at 532, does not alter that conclusion. Rule 60(b) differs from Rule 59(e) in just about every way that matters here. Whereas Rule 59(e) derives from a common-law court's plenary power to revise its judgment before anyone could appeal, Rule 60(b) codifies various writs used to collater-

Syllabus

ally attack a court's already completed judgment. That distinction was not lost on pre-AEDPA habeas courts, which routinely dismissed Rule 60(b) motions for raising repetitive claims. Next, the Rules' modern-day operations also diverge, with only Rule 60(b) undermining AEDPA's scheme to prevent delay and protect finality. That is because a Rule 60(b) motion, which can arise long after the denial of a prisoner's initial petition, generally goes beyond pointing out alleged errors in the just-issued decision. Still more, a Rule 60(b) motion "does not affect the [original] judgment's finality or suspend its operation" and is appealable as "a separate final order." *Stone* v. *INS*, 514 U. S. 386, 401. Left unchecked, a Rule 60(b) motion threatens serial habeas litigation, while a Rule 59(e) motion is a one-time effort to point out alleged errors in a just-issued decision before taking a single appeal. Pp. 517–521.

Reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, GORSUCH, and KAVANAUGH, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 521.

Brian T. Burgess argued the cause for petitioner. With him on the briefs were *Andrew Kim* and *Gerard J. Cedrone*.

Kyle D. Hawkins, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Matthew H. Frederick*, Deputy Solicitor General, *Natalie D. Thompson*, Assistant Solicitor General, and *Trevor W. Ezell*, Assistant Attorney General.

Benjamin W. Snyder argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Ann O'Connell Adams*.*

---

*Briefs of *amici curiae* urging reversal were filed for Law Professors with Expertise in Habeas Corpus et al. by *Charlotte H. Taylor*, *Kamaile A. N. Turčan*, and *Lee Kovarsky*, *pro se*; and for the National Association of Criminal Defense Lawyers by *Barbara E. Bergman*.

A brief of *amici curiae* urging affirmance was 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* and *Robert L. Yates*, Deputy Attorneys General, and

JUSTICE KAGAN delivered the opinion of the Court.

A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction. But he may not usually make a "second or successive habeas corpus application." 28 U. S. C. §2244(b). The question here is whether a motion brought under Federal Rule of Civil Procedure 59(e) to alter or amend a habeas court's judgment qualifies as such a successive petition. We hold it does not. A Rule 59(e) motion is instead part and parcel of the first habeas proceeding.

I

This case is about two procedural rules. First, Rule 59(e) applies in federal civil litigation generally. (Habeas proceedings, for those new to the area, are civil in nature. See *Fisher* v. *Baker*, 203 U. S. 174, 181 (1906).) The Rule enables a party to request that a district court reconsider a just-issued judgment. Second, the so-called gatekeeping provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U. S. C. §2244(b), governs federal habeas proceedings. It sets stringent limits on second or successive habeas applications. We say a few words about each before describing how the courts below applied them here.

A

Rule 59(e) allows a litigant to file a "motion to alter or amend a judgment."[1] The time for doing so is short—28 days from entry of the judgment, with no possibility of an

by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Clare E. Connors* of Hawaii, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, and *Herbert H. Slatery III* of Tennessee.

[1] The complete text of the Rule reads: "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

extension. See Fed. Rule Civ. Proc. 6(b)(2) (prohibiting extensions to Rule 59(e)'s deadline). The Rule gives a district court the chance "to rectify its own mistakes in the period immediately following" its decision. *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 450 (1982). In keeping with that corrective function, "federal courts generally have [used] Rule 59(e) only" to "reconsider[ ] matters properly encompassed in a decision on the merits." *Id.*, at 451. In particular, courts will not address new arguments or evidence that the moving party could have raised before the decision issued. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2810.1, pp. 163–164 (3d ed. 2012) (Wright & Miller); accord, *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 485–486, n. 5 (2008) (quoting prior edition).[2] The motion is therefore tightly tied to the underlying judgment.

The filing of a Rule 59(e) motion within the 28-day period "suspends the finality of the original judgment" for purposes of an appeal. *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 373, n. 10 (1984) (internal quotation marks and alterations omitted). Without such a motion, a litigant must take an appeal no later than 30 days from the district court's entry of judgment. See Fed. Rule App. Proc. (FRAP) 4(a)(1)(A). But if he timely submits a Rule 59(e) motion, there is no longer a final judgment to appeal from. See *Osterneck* v. *Ernst & Whinney*, 489 U. S. 169, 174 (1989). Only the disposition of that motion "restores th[e] finality" of the original judgment, thus starting the 30-day appeal clock. *League of Women Voters*, 468 U. S., at 373, n. 10 (internal quotation marks omitted); see FRAP 4(a)(4)(A)(iv) (A party's "time to file an appeal runs" from "the entry of the order

[2] By contrast, courts may consider new arguments based on an "intervening change in controlling law" and "newly discovered or previously unavailable evidence." 11 Wright & Miller § 2810.1, at 161–162 (3d ed. 2012). But it is rare for such arguments or evidence to emerge within Rule 59(e)'s strict 28-day timeframe.

disposing of the [Rule 59(e)] motion"). And if an appeal follows, the ruling on the Rule 59(e) motion merges with the prior determination, so that the reviewing court takes up only one judgment. See 11 Wright & Miller § 2818, at 246; *Foman* v. *Davis*, 371 U. S. 178, 181 (1962). The court thus addresses any attack on the Rule 59(e) ruling as part of its review of the underlying decision.

Now turn to § 2244(b)'s restrictions on second or successive habeas petitions. Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction. See *Magwood* v. *Patterson*, 561 U. S. 320, 333–334 (2010). But after that, the road gets rockier. To file a second or successive application in a district court, a prisoner must first obtain leave from the court of appeals based on a "prima facie showing" that his petition satisfies the statute's gatekeeping requirements. 28 U. S. C. § 2244(b)(3)(C). Under those provisions, which bind the district court even when leave is given, a prisoner may not reassert any claims "presented in a prior application." § 2244(b)(1). And he may bring a new claim only if it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish his innocence. See § 2244(b)(2). Still more: Those restrictions, like all statutes and rules pertaining to habeas, trump any "inconsistent" Federal Rule of Civil Procedure otherwise applicable to habeas proceedings. 28 U. S. C. § 2254 Rule 12.

B

This case began when, nearly two decades ago, petitioner Gregory Banister struck and killed a bicyclist while driving a car. Texas charged him with the crime of aggravated assault with a deadly weapon. A jury found him guilty, and he was sentenced to 30 years in prison. State courts upheld the conviction on direct appeal and in collateral proceedings. Banister then turned to federal district court for habeas re-

lief. Although raising many claims, his petition mainly argued that his trial and appellate counsel provided him with constitutionally ineffective assistance. The District Court disagreed and entered judgment denying the application.

At that point, Banister timely filed a Rule 59(e) motion asking the District Court to alter its judgment. Consistent with the Rule's corrective purpose, Banister urged the court to fix what he saw as "manifest errors of law and fact." App. 219. Five days later and without requiring a response from the State, the court issued a one-paragraph order explaining that it had reviewed all relevant materials and stood by its decision. See *id.*, at 254. In accordance with the timeline for appealing a judgment after the denial of a Rule 59(e) motion, see *supra*, at 508, Banister then filed a notice of appeal (along with a request for a certificate of appealability) to challenge the District Court's rejection of his habeas application.

Yet the Court of Appeals for the Fifth Circuit dismissed the appeal as untimely. That ruling rested on the view that Banister's Rule 59(e) motion, although captioned as such, was not really a Rule 59(e) motion at all. Because it "attack[ed] the federal court's previous resolution of [his] claim on the merits," the Fifth Circuit held that the motion must be "construed as a successive habeas petition." App. 305 (internal quotation marks omitted). In any future case, that holding would prohibit a habeas court from considering claims made in a self-styled Rule 59(e) motion except in rare circumstances—that is, when a court of appeals gave permission and the claim fell within one of § 2244(b)'s two slender categories. See *supra*, at 509. In Banister's own case, that bar was of no moment because the District Court had already addressed his motion's merits. But viewing a Rule 59(e) motion as a successive habeas petition also had another consequence, and this one would affect him. Unlike a Rule 59(e) motion, the Court of Appeals noted, a successive habeas application does not postpone the time to file an appeal.

That meant the clock started ticking when the District Court denied Banister's habeas application (rather than his subsequent motion)—and so Banister's appeal was several weeks late.

We granted certiorari to resolve a Circuit split about whether a Rule 59(e) motion to alter or amend a habeas court's judgment counts as a second or successive habeas application. 588 U. S. 905 (2019). We hold it does not, and reverse.

II

This case requires us to choose between two rules—more specifically, to decide whether AEDPA's § 2244(b) displaces Rule 59(e) in federal habeas litigation. The Federal Rules of Civil Procedure generally govern habeas proceedings. See Fed. Rule Civ. Proc. 81(a)(4). They give way, however, if and to the extent "inconsistent with any statutory provisions or [habeas-specific] rules." 28 U. S. C. § 2254 Rule 12; see *supra*, at 509. Here, the Fifth Circuit concluded and Texas now contends that AEDPA's limitation of repetitive habeas applications conflicts with Rule 59(e)'s ordinary operation. That argument in turn hinges on viewing a Rule 59(e) motion in a habeas case as a "second or successive application." § 2244(b); see Brief for Respondent 10. If such a motion constitutes a second or successive petition, then all of § 2244(b)'s restrictions kick in—limiting the filings Rule 59(e) would allow. But if a Rule 59(e) motion is not so understood—if it is instead part of resolving a prisoner's first habeas application—then § 2244(b)'s requirements never come into the picture.

The phrase "second or successive application," on which all this rides, is a "term of art," which "is not self-defining." *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000); *Panetti* v. *Quarterman*, 551 U. S. 930, 943 (2007). We have often made clear that it does not "simply 'refer' " to all habeas filings made " 'second or successively in time,' " following an initial application. *Magwood*, 561 U. S., at 332 (quoting *Panetti*, 551

U. S., at 944 (alteration omitted)). For example, the courts of appeals agree (as do both parties) that an amended petition, filed after the initial one but before judgment, is not second or successive. See 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 28.1, pp. 1656–1657, n. 4 (7th ed. 2017) (collecting cases); Brief for Petitioner 20–21; Brief for Respondent 16. So too, appeals from the habeas court's judgment (or still later petitions to this Court) are not second or successive; rather, they are further iterations of the first habeas application.[3] Chronology here is by no means all.

In addressing what qualifies as second or successive, this Court has looked for guidance in two main places. First, we have explored historical habeas doctrine and practice. The phrase "second or successive application," we have explained, is "given substance in our prior habeas corpus cases," including those "predating [AEDPA's] enactment." *Slack*, 529 U. S., at 486; *Panetti*, 551 U. S., at 944; see *id.*, at 943 (stating that the phrase "takes its full meaning from our case law"). In particular, we have asked whether a type of later-in-time filing would have "constituted an abuse of the writ, as that concept is explained in our [pre-AEDPA] cases." *Id.*, at 947. If so, it is successive; if not, likely not. Second, we have considered AEDPA's own purposes. The point of § 2244(b)'s restrictions, we have stated, is to "conserve judicial resources, reduc[e] piecemeal litigation," and "lend[ ] finality to state court judgments within a reasonable time." *Id.*, at 945–946 (internal quotation marks omitted). With those goals in mind, we have considered "the implications for habeas practice" of allowing a type of filing, to assess

[3] For additional examples, see *Slack* v. *McDaniel*, 529 U. S. 473, 487 (2000) (allowing a prisoner to file a second-in-time, post-judgment application to assert claims earlier dismissed for failure to exhaust), and *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 643–644 (1998) (permitting a prisoner to file a second-in-time, post-judgment application to argue that he was incompetent to be executed).

whether Congress would have viewed it as successive. *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644 (1998). Here, both historical precedents and statutory aims point in the same direction—toward permitting Rule 59(e) motions in habeas proceedings. And nothing cuts the opposite way.

A

This Court has already held that history supports a habeas court's consideration of a Rule 59(e) motion. In *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257 (1978), we addressed prior to AEDPA "the applicability of Federal Rule [59(e)] in habeas corpus proceedings." *Id.*, at 258. In deciding that the Rule applied in habeas—that "a prompt motion for reconsideration" was "thoroughly consistent" with habeas law and "well suited to the special problems and character of [habeas] proceedings"—we mainly looked to historical practice. *Id.*, at 271 (internal quotation marks omitted). Rule 59(e), we recounted, derived from a court's common-law power "to alter or amend its own judgments during[ ] the term of court in which [they were] rendered," prior to any appeal. *Id.*, at 270; see *Zimmern* v. *United States*, 298 U. S. 167, 169–170 (1936) ("The judge had plenary power while the term was in existence to modify his judgment [or] revoke it altogether").[4] Courts exercised that authority, we explained, "in habeas corpus cases" just as "in other civil proceedings." *Browder*, 434 U. S., at 270. In 1946, the drafters of the Federal Rules replaced the "term of court" power with Rule 59(e), thus prescribing a set number of days (then 10, now 28) in which a party could move to amend a judgment. See *id.*, at 271. But in our view, that change did nothing to narrow the set of judgments amenable to alteration. See *id.*, at 270–271. After Rule 59(e), just as

[4] A term of court in those days was simply a period in which a court was open for business. A statute or rule set the date of its commencement, and the court itself determined the date to adjourn. See *United States* v. *Pitman*, 147 U. S. 669, 670–671 (1893).

before, a district court could "reconsider the grant or denial of habeas corpus relief" in the same way it could review any other decision. *Id.*, at 270; see *id.*, at 271. A timely Rule 59(e) motion, we held, "suspend[ed] the finality" of any judgment, including one in habeas—thus enabling a district court to address the matter again. *Id.*, at 267 (internal quotation marks omitted).[5]

The record of judicial decisions accords with *Browder*'s view of the use of Rule 59(e) in habeas practice. Before AEDPA, "abuse-of-the-writ principles limit[ed] a [habeas applicant's] ability to file repetitive petitions." *McCleskey* v. *Zant*, 499 U. S. 467, 483 (1991). That doctrine was more forgiving than AEDPA's gatekeeping provision—for example, enabling courts to hear a second or successive petition if the "ends of justice" warranted doing so. *Id.*, at 485. But the rule against repetitive litigation still had plenty of bite. It demanded the dismissal of successive applications except in "rare case[s]." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 451 (1986) (plurality opinion). So if courts had viewed Rule 59(e) motions as successive, there should be lots of decisions dismissing them on that basis. But nothing of the kind exists. In the half century from Rule 59(e)'s adoption (1946) through *Browder* (1978) to AEDPA's enactment (1996), we

[5] The dissent's attempt to dismiss *Browder* is impossible to square with the opinion. Mostly, the dissent claims that *Browder* is just a case about "time limits." *Post*, at 530–531 (opinion of ALITO, J.). But *Browder* is about time limits only in the sense that this case is about time limits: There, as here, the timeliness of a motion depended on the broader question whether Rule 59(e) applied in habeas proceedings. See 434 U. S., at 258 ("In order to resolve th[e] question" whether the "appeal was untimely," "we must consider the applicability of Federal Rule[ ] 59 in habeas corpus proceedings"). The dissent also intimates that *Browder* was different because there the prison warden rather than the prisoner moved for reconsideration of the habeas ruling. See *post*, at 530–531, and n. 2. But the Court's decision explicitly addressed "motion[s] to reconsider the grant *or* denial of habeas corpus relief." 434 U. S., at 270 (emphasis added). In other words, the identity of the movant—whether warden or prisoner—was irrelevant.

(and the parties) have found only one such dismissal. See *Bannister* v. *Armontrout*, 4 F. 3d 1434, 1445 (CA8 1993). In every other case, courts resolved Rule 59(e) motions on the merits—and without any comment about repetitive litigation. Mostly, courts denied the motions and adhered to their original judgments. See, *e. g.*, *Gajewski* v. *Stevens*, 346 F. 2d 1000, 1001 (CA8 1965) (*per curiam*). Occasionally, courts decided they had erred in those decisions. See, *e. g.*, *York* v. *Tate*, 858 F. 2d 322, 325 (CA6 1988) (*per curiam*). The win-loss rate is for this point irrelevant. What matters is that they all (but one) treated Rule 59(e) motions not as successive, but as attendant on the initial habeas application.

Congress passed AEDPA against this legal backdrop, and did nothing to change it. AEDPA of course made the limits on entertaining second or successive habeas applications more stringent than before. See *supra*, at 509. But the statute did not redefine what qualifies as a successive petition, much less place Rule 59(e) motions in that category. Cf. *Magwood*, 561 U. S., at 336–337 (distinguishing between two questions: "§ 2244(b)'s threshold inquiry into whether an application is 'second or successive,' and its subsequent inquiry into whether [to dismiss] a successive application"). When Congress "intends to effect a change" in existing law—in particular, a holding of this Court—it usually provides a clear statement of that objective. *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 581 U. S. 258, 268 (2017). AEDPA offers no such indication that Congress meant to change the historical practice *Browder* endorsed of applying Rule 59(e) in habeas proceedings.

Nor do AEDPA's purposes demand a change in that tradition. As explained earlier, AEDPA aimed to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality. See *supra*, at 512. Nothing in Rule 59(e)—a rule *Browder* described as itself "based on an interest in speedy disposition and finality," 434 U. S., at 271 (internal quotation

marks omitted)—conflicts with those goals. Recall everything said above about the Rule's operation. See *supra*, at 507–509. To begin with, Rule 59(e) gives a prisoner only a narrow window to ask for relief—28 days, with no extensions. Next, a prisoner may invoke the rule only to request "reconsideration of matters properly encompassed" in the challenged judgment. *White*, 455 U. S., at 451. And "reconsideration" means just that: Courts will not entertain arguments that could have been but were not raised before the just-issued decision. A Rule 59(e) motion is therefore backward-looking; and because that is so, it maintains a prisoner's incentives to consolidate all of his claims in his initial application. Yet more, the Rule consolidates appellate proceedings. A Rule 59(e) motion briefly suspends finality to enable a district court to fix any mistakes and thereby perfect its judgment before a possible appeal. The motion's disposition then merges into the final judgment that the prisoner may take to the next level. In that way, the Rule avoids "piecemeal appellate review." *Osterneck*, 489 U. S., at 177. Its operation, rather than allowing repeated attacks on a decision, helps produce a single final judgment for appeal.

Indeed, the availability of Rule 59(e) may make habeas proceedings more efficient. Most obviously, the Rule enables a district court to reverse a mistaken judgment, and so make an appeal altogether unnecessary. See *United States* v. *Ibarra*, 502 U. S. 1, 5 (1991) (*per curiam*) (noting that giving district courts a short time to correct their own errors "prevents unnecessary burdens being placed on the courts of appeals"). Of course, Rule 59(e) motions seldom change judicial outcomes. But even when they do not, they give habeas courts the chance to clarify their reasoning or address arguments (often made in less-than-limpid *pro se* petitions) passed over or misunderstood before. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 12–20 (describing examples). That opportunity, too, promotes an economic and effective appellate process, as the

reviewing court gets "the benefit of the district court's plenary findings." *Osterneck*, 489 U. S., at 177. And when a district court sees no need to change a decision, the costs of permitting a Rule 59(e) motion are typically slight. A judge familiar with a habeas applicant's claims can usually make quick work of a meritless motion. This case may well provide an example: The District Court declined to make the State respond to Banister's motion and decided it within five days. Nothing in such a process conflicts with AEDPA's goal of streamlining habeas cases.

The upshot, after AEDPA as before, is that Rule 59(e) motions are not second or successive petitions, but instead a part of a prisoner's first habeas proceeding. In timing and substance, a Rule 59(e) motion hews closely to the initial application; and the habeas court's disposition of the former fuses with its decision on the latter. Such a motion does not enable a prisoner to abuse the habeas process by stringing out his claims over the years. It instead gives the court a brief chance to fix mistakes before its (single) judgment on a (single) habeas application becomes final and thereby triggers the time for appeal. No surprise, then, that habeas courts historically entertained Rule 59(e) motions, rather than dismiss them as successive. Or that Congress said not a word about changing that familiar practice even when enacting other habeas restrictions.

B

Texas (along with the dissent) resists this conclusion on one main ground: this Court's prior decision in *Gonzalez* v. *Crosby*, 545 U. S. 524 (2005). The question there was whether a Rule 60(b) motion for "relie[f] from a final judgment" denying habeas relief counts as a second or successive habeas application. Fed. Rule Civ. Proc. 60(b).[6] We said

[6] Under Rule 60(b), a court may relieve a party in civil litigation from a final judgment if the party can show (1) mistake, inadvertence, surprise, or excusable neglect; (2) certain newly discovered evidence; (3) fraud, mis-

that it does, so long as the motion "attacks the federal court's previous resolution of a claim on the merits." 545 U. S., at 532 (emphasis deleted).[7] Texas thinks the "*Gonzalez* principle applies with equal force to Rule 59(e) motions." Brief for Respondent 8. After all, the State argues, both Rule 59(e) and Rule 60(b) provide "vehicles for asserting habeas claims" after a district court has entered judgment denying relief. *Id.*, at 2. And if *Gonzalez* does apply, Texas concludes, Banister must lose because (as everyone agrees) his Rule 59(e) motion pressed only merits-based claims.

But Rule 60(b) differs from Rule 59(e) in just about every way that matters to the inquiry here. (Contra the dissent's refrain, see *post*, at 522, 524, 526, 531, 534, the variance goes far beyond their "labels.") Begin, again, with history. Recall that Rule 59(e) derives from a common-law court's plenary power to revise its judgment during a single term of court, before anyone could appeal. See *supra*, at 513–514. By contrast, Rule 60(b) codifies various writs used to seek relief from a judgment at any time after the term's expiration—even after an appeal had (long since) concluded. Those mechanisms did not (as the term rule did) aid the trial court to get its decision right in the first instance; rather, they served to collaterally attack its already completed

representation, or misconduct by an opposing party; (4) voidness of the judgment; (5) certain events that would cast doubt on the validity or equity of continuing to apply the judgment; or (6) "any other reason that justifies relief." Fed. Rule Civ. Proc. 60(b)(1)–(6).

[7] By contrast, *Gonzalez* held, a Rule 60(b) motion that attacks "some defect in the integrity of the federal habeas proceedings"—like the mistaken application of a statute of limitations—does not count as a habeas petition at all, and so can proceed. 545 U. S., at 532. Texas concedes that if *Gonzalez* controls Rule 59(e) motions, that decision's distinction between merits-based motions and integrity-based motions would have to apply. See Brief for Respondent 37. The need for a habeas court to make that not-always-easy threshold determination further undermines the notion—already on shaky ground, see *supra*, at 515–516—that Texas's position would lead to any efficiency gains.

judgment. See Advisory Committee's 1946 Notes on Amendments to Fed. Rule Civ. Proc. 60; Mann, Note, History and Interpretation of Federal Rule 60(b), 25 Temp. L. Q. 77, 78 (1951). And that distinction was not lost on pre-AEDPA habeas courts applying the two Rules. As discussed earlier, it is practically impossible to find a case dismissing a Rule 59(e) motion for raising repetitive claims. See *supra*, at 514–515. But decisions abound dismissing Rule 60(b) motions for that reason. See, *e. g.*, *Williamson* v. *Rison*, 1993 WL 262632 (CA9, July 9, 1993); see also *Brewer* v. *Ward*, 1996 WL 194830, *1 (CA10, Apr. 22, 1996) (collecting cases from multiple Circuits). That is because those courts recognized Rule 60(b)—as contrasted to Rule 59(e)—as threatening an already final judgment with successive litigation.[8]

The modern-day operations of the two Rules also diverge, with only Rule 60(b) undermining AEDPA's scheme to prevent delay and protect finality. Unlike Rule 59(e) motions with their fixed 28-day window, Rule 60(b) motions can arise long after the denial of a prisoner's initial petition—depending on the reason given for relief, within either a year or a more open-ended "reasonable time." Fed. Rule Civ. Proc. 60(c)(1). In *Gonzalez* itself, the prisoner made his motion nearly three years after the habeas court's denial of relief,

[8] The dissent's alternative explanation for this disparity does not pass muster. According to the dissent, habeas courts "might have been more inclined" to rule on the merits of Rule 59(e) motions because doing so was easier: after all, they (but not Rule 60(b) motions) always challenge a just-issued decision. *Post*, at 532. But another course would have been easier still: throwing out the motion for raising repetitive claims. And even more to the point, that course would usually have been required if the dissent were right that Rule 59(e) motions counted as successive. Although pre-AEDPA courts had some discretion around the edges, the consideration of successive petitions was supposed to be "rare." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 451 (1986) (plurality opinion); see *supra*, at 514. It is a "tall order," *post*, at 533, then, to think that a half century's worth of habeas courts would have resolved Rule 59(e) motions on the merits if they thought of those motions as successive. The only plausible account of their actions is that they did not.

and more than one year after his appeal ended. See 545 U. S., at 527. Given that extended timespan, Rule 60(b) inevitably elicits motions that go beyond Rule 59(e)'s mission of pointing out the alleged errors in the habeas court's decision. See, *e. g.*, *Lopez* v. *Douglas*, 141 F. 3d 974, 975 (CA10 1998) (*per curiam*) (seeking relief in light of a Supreme Court decision issued a decade after judgment); *Tyler* v. *Anderson*, 749 F. 3d 499, 504–505 (CA6 2014) (seeking to raise claims that former counsel had neglected in a years-old habeas application). Still more, the appeal of a Rule 60(b) denial is independent of the appeal of the original petition. Recall that a Rule 59(e) motion suspends the finality of the habeas judgment, and a decision on the former merges into the latter for appellate review. See *supra*, at 508–509, 515–516. By contrast, a Rule 60(b) motion "does not affect the [original] judgment's finality or suspend its operation." Fed. Rule Civ. Proc. 60(c)(2). And an appeal from the denial of Rule 60(b) relief "does not bring up the underlying judgment for review." *Browder*, 434 U. S., at 263, n. 7. Instead, that denial is appealed as "a separate final order." *Stone* v. *INS*, 514 U. S. 386, 401 (1995).[9]

In short, a Rule 60(b) motion differs from a Rule 59(e) motion in its remove from the initial habeas proceeding. A Rule 60(b) motion—often distant in time and scope and always giving rise to a separate appeal—attacks an already

[9] Texas objects that if a Rule 60(b) motion is filed within 28 days, it too suspends the finality of the underlying judgment so that the denial of the motion merges with that judgment on appeal. See Brief for Respondent 25, 28. But that is only because courts of appeals have long treated Rule 60(b) motions filed within 28 days as . . . Rule 59(e) motions. See, *e. g.*, *Skagerberg* v. *Oklahoma*, 797 F. 2d 881, 882–883 (CA10 1986) (*per curiam*) ("[A] post-judgment motion made within [28] days of the entry of judgment that questions the correctness of a judgment," however denominated, "is properly construed as a motion to alter or amend judgment under [Rule] 59(e)"); see also Fed. Rule App. Proc. 4(a)(4)(A)(vi) (codifying that approach by setting the same appeals clock for self-styled Rule 60(b) motions filed within 28 days as for Rule 59(e) motions).

completed judgment. Its availability threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly. By contrast, a Rule 59(e) motion is a one-time effort to bring alleged errors in a just-issued decision to a habeas court's attention, before taking a single appeal. It is a limited continuation of the original proceeding—indeed, a part of producing the final judgment granting or denying habeas relief. For those reasons, *Gonzalez* does not govern here. A Rule 59(e) motion, unlike a Rule 60(b) motion, does not count as a second or successive habeas application.

III

Our holding means that the Court of Appeals should not have dismissed Banister's appeal as untimely. Banister properly brought a Rule 59(e) motion in the District Court. As noted earlier, the 30-day appeals clock runs from the disposition of such a motion, rather than from the initial entry of judgment. See *supra*, at 508. And Banister filed his notice of appeal within that time. The Fifth Circuit reached a contrary conclusion because it thought that Banister's motion was really a second or successive habeas application, and so did not reset the appeals clock. For all the reasons we have given, that understanding of a Rule 59(e) motion is wrong. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

Gregory Banister, a state prisoner, filed a federal habeas petition arguing that his conviction was invalid for 53 reasons. His arguments spanned almost 300 pages and featured an imagined retelling of the jury deliberations in the form of stage dialogue. After the District Court deter-

mined that all his claims lacked merit, he filed a motion rearguing many of them.

If Banister had labeled this motion what it was in substance—another habeas petition—it would have been summarily dismissed under 28 U. S. C. § 2244(b)(1). If he had labeled it a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), it would also have been subject to dismissal under our decision in *Gonzalez* v. *Crosby*, 545 U. S. 524 (2005). Instead, he gave it a different label, styling it as a motion to alter the judgment under Rule 59(e), and the Court now holds this label makes all the difference.

The question in this case is whether a state prisoner can evade the federal habeas statute's restrictions on second or successive habeas petitions by affixing a Rule 59(e) label. The answer follows from our decision in *Gonzalez*, and the answer is no. If a Rule 59(e) motion asserts a habeas claim, the motion functions as a second or successive habeas petition and should be treated as such.

I

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "streamlin[es] federal habeas corpus proceedings." *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005). A state prisoner is generally limited to a single federal habeas petition, which usually must be filed within one year after the end of direct review; the district court must give this petition "priority"; if the prisoner is dissatisfied with the district court's decision and wants to appeal, he must seek permission from the appropriate court of appeals and must set out the errors he thinks the district court made; and the appeal can go forward only if a specified standard is met. §§ 2244(d), 2253(c), 2254(a), 2266(a). As we have frequently said, this design was crafted to promote comity, finality, federalism, and judicial efficiency. See, *e. g.*, *Panetti* v. *Quarterman*, 551 U. S. 930, 945 (2007).

Habeas petitions occupy an outsized place on federal dockets. See *infra*, at 533–534. Their efficient resolution not only preserves federal judicial capacity but removes the cloud of federal review from state-court judgments. The federal habeas provisions create a procedural regime that differs sharply from the regime that generally applies in civil cases, and the habeas statute displaces any Federal Rule of Civil Procedure that is "inconsistent with" its provisions. 28 U. S. C. § 2254 Rule 12 (Habeas Rule 12).

Integral to AEDPA's design are its restrictions on "second or successive" habeas petitions, which, prior to AEDPA, sometimes led to very lengthy delays. See, *e. g.*, *Kuhlmann* v. *Wilson*, 477 U. S. 436, 453, and n. 15 (1986) (plurality opinion). A provision added by AEDPA, 28 U. S. C. § 2244(b), is designed to prevent this. Under § 2244(b)(1), a second or successive petition may not duplicate the initial petition. Thus, any claim "that was presented in a prior application shall be dismissed." § 2244(b)(1). In addition, second or successive petitions usually may not raise new claims either. Any claim "that was not presented in a prior application shall be dismissed unless" it meets stringent standards contained in § 2244(b)(2). Specifically, to avoid dismissal, a new claim must rely on (1) "a new rule of constitutional law" that this Court has made applicable in habeas proceedings or (2) a fact that "could not have been discovered previously through the exercise of due diligence" and that now makes the petitioner's innocence "clear and convincing." §§ 2244(b)(2)(A)–(B).

A prisoner wishing to file a second or successive petition must apply to a court of appeals for permission to do so, and the court of appeals cannot authorize the filing unless the petition makes a prima facie showing that it meets § 2244(b)(2)'s standards. § 2244(b)(3). If a court of appeals allows the second or successive petition to be filed, the district court must nevertheless review its claims and dismiss

any that turns out not to meet § 2244(b)(2)'s standards. § 2244(b)(4).

II

In *Gonzalez*, we considered how § 2244(b) applies to a filing that is in essence a second or successive habeas petition but bears a different label. The filing there was a motion under Rule 60(b), which allows a court to relieve a party of an earlier judgment. Every Member of the *Gonzalez* Court, including those in dissent, recognized that whether a Rule 60(b) motion should be treated as a habeas petition depends on the nature of the relief the motion seeks, not the label slapped onto it. 545 U. S., at 532 (opinion of the Court); *id.*, at 538 (BREYER, J., concurring); *id.*, at 539 (Stevens, J., dissenting). And in considering whether a Rule 60(b) motion asserts the type of relief that requires it to be treated as a habeas petition, the critical question is whether the motion in essence asserts a habeas claim, that is, a claim that propounds a "federal basis for relief from a state court's judgment of conviction." *Id.*, at 530 (opinion of the Court). If the motion "seeks to add a new ground for" that relief, it "will of course qualify" as a second or successive habeas petition. *Id.*, at 532. It will also qualify "if it attacks the federal court's previous resolution of a [habeas] claim *on the merits*." *Ibid.*

To see how this analysis plays out, imagine a case in which a state prisoner files a Rule 60(b) motion alleging that he was denied the effective assistance of counsel at trial. If that claim was not in his initial habeas petition, the motion constitutes a second or successive habeas petition because it asserts a new reason why he is entitled to habeas relief. And if that claim was in his initial habeas petition but he now alleges that the court erroneously denied the claim, the motion is still a second or successive habeas petition since it alleges that the court should have granted him habeas relief, an argument that is "effectively indistinguishable" from the claim that he was entitled to that relief in the first place.

Ibid. In either event, we held in *Gonzalez*, "failing to subject" the motion to § 2244(b) "would be inconsistent with" AEDPA. *Id.*, at 531 (internal quotation marks omitted).

Although *Gonzalez* concerned a motion under Rule 60(b), nothing in its reasoning was tied to any specific characteristics of such a motion, and accordingly, there is no good reason why a Rule 59(e) motion should not be subject to the same rules. Indeed, the application of *Gonzalez*'s reasoning is even more clear-cut when a habeas petitioner files a Rule 59(e) motion. Like its neighbor, Rule 59(e) provides a way for a civil litigant to get relief after the entry of judgment, but a Rule 59(e) motion can seek only "reconsideration of matters properly encompassed in a decision on the merits." *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451 (1982); accord, *ante*, at 516. And a claim that "attacks the federal court's previous resolution of a claim *on the merits*" is exactly the type of claim that, under *Gonzalez*, is subject to § 2244(b)(1) and must therefore be dismissed. 545 U. S., at 532.[1]

Today's opinion thus permits precisely the type of circumvention that *Gonzalez* prevents. Consider again the habeas petitioner with the allegedly bad trial lawyer. Suppose that, after the district court denies an ineffective-assistance claim in his initial petition, he submits three effectively indistinguishable filings under different headers: a second habeas petition asserting the same claim again; a Rule 60(b) motion disputing the court's resolution of the claim; and a Rule 59(e) motion doing the same. The first two will face dismissal under § 2244(b)(1). But, under today's decision, the third may proceed. And not only that, if a *pro se* litigant does not

---

[1] Rule 59(e) motions can also assert "newly discovered or previously unavailable evidence" and "intervening change[s] in controlling law." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2810.1 (3d ed. Supp. 2020). Banister's motion did neither, see Brief for Petitioner 47, so this case concerns only the types of claims that require automatic dismissal under 28 U. S. C. § 2244(b)(1).

appreciate that he can get around § 2244(b)(1) by calling his second or successive petition a Rule 59(e) motion, a court may "ignore the legal label that [the] *pro se* litigant attaches to" his filing, treat the petition as a Rule 59(e) motion, and voilà, § 2244(b) disappears from view. *Castro* v. *United States*, 540 U. S. 375, 381 (2003). This allows a habeas petitioner to obtain "a second chance to have the merits determined favorably" in contravention of AEDPA and our reasoning in *Gonzalez*, 545 U. S., at 533, n. 5.

III

The Court provides a variety of reasons for refusing to follow *Gonzalez*, but none is sound.

A

The Court begins by saying that a Rule 59(e) motion is part of a petitioner's "one fair opportunity to seek federal habeas relief," *ante*, at 507, but if there is a reason why a Rule 60(b) motion could not also be called part of that "opportunity," the Court does not offer one. A repetitive habeas claim is as much a repetitive habeas claim if filed under Rule 59(e) in 28 days or under Rule 60(b) at, say, day 29. The label is the only "variance" that explains why one is now allowed but not the other. *Ante*, at 518.

B

The Court proclaims that Rules 59(e) and 60(b) differ "in just about every way that matters to the inquiry here," *ibid.*, but none of the differences that the Court cites matters under *Gonzalez*'s reasoning, which relies on the nature of the claim asserted in the post-judgment motion. Under that reasoning, it makes no difference that a Rule 60(b) motion may be filed later than a Rule 59(e) motion, that a Rule 59(e) motion (but not a later-filed Rule 60(b) motion) suspends a judgment's finality for purposes of appeal, or that an order denying a Rule 59(e) motion merges with the judgment for

purposes of appeal, whereas a Rule 60(b) denial is separately appealable. *Ante*, at 519–520. *Gonzalez* did not rely on a single one of the Rule 60(b) characteristics mentioned by the Court here, and none matters under *Gonzalez*'s reasoning. On the contrary, *Gonzalez*'s logic was simple: If a motion advances a habeas claim, it counts as a habeas petition.

C

The Court looks to the history of motions to alter or amend a judgment, see *ante*, at 513–514, but it is hard to see how that history has a bearing on the issue in this case. As the Court notes, trial courts once had the power to correct errors in their judgments during but not after the term in which the judgment was handed down, but how this is relevant to our issue is a mystery. The point in time at which a court's power to alter or amend a judgment ends (whether at the conclusion of a court term or at a specified point after the entry of the judgment) is used to determine whether a motion to alter or amend is timely. But the issue before us is not whether Banister filed his Rule 59(e) motion within the time allowed for such motions (he did) but whether his motion counts as a habeas petition. The question would be exactly the same if district courts still had terms of court and his motion was filed before the term ended.

D

In arguing that "[t]his case requires us to choose between" § 2244(b) and Rule 59(e), *ante*, at 511, the Court invokes Habeas Rule 12, which states that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." According to the Court, AEDPA does not "place Rule 59(e) motions in th[e] category" of second or successive petitions, and therefore AEDPA does not alter Rule 59(e)'s role. *Ante*, at 515.

This argument greatly exaggerates the very limited role of Habeas Rule 12. Although "habeas corpus proceedings are characterized as 'civil,'" "the label is gross and inexact." *Harris* v. *Nelson*, 394 U. S. 286, 293–294 (1969). They are "unique," and even before AEDPA they "conformed with civil practice only in a general sense." *Id.*, at 294. Thus, we have contrasted a "civil action, governed by the full panoply of the Federal Rules of Civil Procedure," with the "swift, flexible, and summary determination" of a habeas claim. *Preiser* v. *Rodriguez*, 411 U. S. 475, 495–496 (1973). The Civil Rules themselves give AEDPA precedence. They "apply to proceedings for habeas corpus" only insofar as "the practice in those proceedings . . . is not specified in a federal statute" or the Habeas Rules and "has previously conformed to the practice in civil actions." Fed. Rule Civ. Proc. 81(a)(4). And as we have observed, "[s]uch specific evidence as there is with respect to the intent of the draftsmen of the [civil] rules indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings." *Harris*, 394 U. S., at 295.

Let's count some of the ways in which habeas proceedings deviate from the Civil Rules. Discovery rules, which are central to civil litigation, do not apply "as a matter of right" in habeas proceedings. *Ibid.* Instead, a court's leave is required for factual development. See Habeas Rule 6(a); see also *Bracy* v. *Gramley*, 520 U. S. 899, 908–909 (1997). Another civil mainstay, the Rule 12(b)(6) motion to dismiss, also has no place in habeas. See *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 269, n. 14 (1978); see also Habeas Rule 4 (responsive pleading not required unless the court directs). Indeed, the entire "civil action procedural sequencing—from a motion to dismiss, to an answer, to discovery, and ultimately to trial—[i]s not applicable in habeas cases." *O'Brien* v. *Moore*, 395 F. 3d 499, 506 (CA4 2005) (discussing *Browder*, 434 U. S., at 269, n. 14). Even nation-

wide service of process authorized by statute, rather than the Civil Rules, is unavailable in habeas. See *Schlanger* v. *Seamans*, 401 U. S. 487, 489–491, and n. 4 (1971). And though courts have long applied "noncontroversial rules in habeas corpus proceedings," *Harris*, 394 U. S., at 294, n. 5, the mixed bag shows habeas's hybrid nature. See 4 C. Wright, A. Miller, & A. Steinman, Federal Practice and Procedure § 1021, n. 6 (4th ed. Supp. 2020) (Wright & Miller) (cataloging other rules that courts have and have not applied).

Our decisions rejecting some of the Civil Rules' procedural "formalisms" have often inured to the benefit of habeas petitioners. *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U. S. 345, 350 (1973). In *O'Neal* v. *McAninch*, 513 U. S. 432 (1995), we rejected a State's argument that Rule 61 put the burden on habeas petitioners to resolve doubts about whether trial errors were harmless, and we reached that conclusion primarily because habeas proceedings are "[u]nlike the civil cases cited by the State." *Id.*, at 440. In *Holiday* v. *Johnston*, 313 U. S. 342 (1941), the petitioner sought habeas relief from a district court but received a hearing before an Alcatraz commissioner. We held that Rule 53, which allows a court to send some issues to a "master," did not justify that practice in habeas cases; the federal habeas statute contemplated proceedings before judges, giving Rule 53 "no application." *Id.*, at 353. In so holding, we rejected the argument that the practice at issue was permissible because it was "a convenient one," *id.*, at 352, the same claim that the Court makes about Rule 59(e), *ante*, at 516–517. Instead, we held that a court "may not substitute another more convenient mode" from civil practice if it contravenes "the Congressional policy" reflected "in the Habeas Corpus Act." *Holiday*, 313 U. S., at 352.

AEDPA has only widened the gap between habeas and other civil proceedings, see *Felker* v. *Turpin*, 518 U. S. 651,

664 (1996), and *Gonzalez* illustrates the point. Like Rule 59(e) and the other Rules just discussed, no federal habeas provision "expressly circumscribe[s]" the application of Rule 60(b) in habeas cases. 545 U. S., at 529. And like Rule 59(e) but unlike the discovery rules, which were "innovations," *Hickman* v. *Taylor*, 329 U. S. 495, 500 (1947), Rule 60(b) descends from "ancient" civil practice, 11 Wright & Miller § 2851. But AEDPA so "dramatically" reshaped federal habeas procedure, *Rhines*, 544 U. S., at 274, that courts must proceed "in a manner consistent with the objects of the statute" even where it does not address a given detail, *Calderon* v. *Thompson*, 523 U. S. 538, 554 (1998). Where a Civil Rule does conflict with a specific AEDPA provision like § 2244(b), AEDPA necessarily prevails.

On its own, then, Habeas Rule 12 cannot do the work that Banister needs. He must show that AEDPA itself contains the loophole he seeks to exploit, and he has not done so. The refrain echoed by the Court—that a Rule 59(e) motion comes included with a petitioner's "one full and fair opportunity" for habeas relief, Brief for Petitioner 1; see *ante*, at 507—simply begs the question that AEDPA answers: namely, what that opportunity entails. It does not entail "a second chance to have the merits" of a habeas claim "determined favorably." *Gonzalez*, 545 U. S., at 533, n. 5.

Lifting partial quotations from our decision in *Browder*, 434 U. S., at 271, the Court states that we have "already held" that Rule 59(e) is "'thoroughly consistent' with habeas law," *ante*, at 513, but the partial quotations are highly misleading. The case had nothing to do with the interplay between Rule 59(e) and restrictions on filing a second or successive habeas petition.

In *Browder*, a prison warden moved for reconsideration of a judgment granting habeas relief, but he did not do so within the time allowed by Rule 59 and Rule 52(b), which sets the same deadline for a motion to amend factual findings. All that the Court held was that those "time limits"

were "thoroughly consistent with the spirit of the habeas corpus statutes," which did not address the "timeliness" of such a motion. 434 U. S., at 270–271.

Browder in no way establishes that it is "thoroughly consistent with" AEDPA to allow a petitioner to accomplish via a Rule 59(e) motion what the prisoner could not achieve by honestly labeling his motion as a habeas petition.[2] The warden, of course, was not seeking habeas relief, so his Rule 59(e) motion could not have constituted a successive habeas petition.

E

This brings us to the Court's final redoubt, pre-AEDPA practice. We have sometimes looked there in interpreting AEDPA's terms. See *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000). But assuming pre-AEDPA practice can inform our understanding of AEDPA, history lends no real support to the Court's holding that a Rule 59(e) motion cannot count as a second or successive habeas petition. Research has found exactly one decision that directly addresses that question, and its holding is contrary to the Court's position.

In *Bannister* v. *Armontrout*, 4 F. 3d 1434 (CA8 1993), after the District Court denied a habeas petition, the prisoner filed a Rule 59(e) motion asserting a new claim. The Eighth Circuit held that this motion "was the functional equivalent of a second petition" and rejected it on that ground. *Id.*, at 1445. The Court does not attempt to distinguish that case, and cannot cite a single pre-AEDPA case that directly substantiates its claim about pre-AEDPA practice.

Without any direct support, the Court reads volumes into what it sees as the disparate treatment of habeas petitioners'

---

[2] *Browder* cites two cases for the proposition that courts had power to alter their judgments "in habeas corpus cases." 434 U. S., at 270. Neither did so at the habeas petitioner's request. See *Aderhold* v. *Murphy*, 103 F. 2d 492, 493 (CA10 1939) (*sua sponte* alteration deemed void on appeal); *Tiberg* v. *Warren*, 192 F. 458, 462 (CA9 1911) (government motion).

Rule 60(b) and 59(e) motions in pre-AEDPA days. Pre-AEDPA courts often, though not always, treated prisoners' Rule 60(b) motions as successive habeas petitions. See *Brewer* v. *Ward*, 1996 WL 194830, *1 (CA10, Apr. 22, 1996) (noting the trend as to motions "raising new claims" but affirming a denial of Rule 60(b) relief on the merits). By contrast, only *Bannister* denied a Rule 59(e) motion on that basis, and a handful of cases denied (or reversed lower-court decisions granting) habeas petitioners' Rule 59(e) motions on other grounds. *Ante*, at 514–515. From this state of affairs, the Court infers that Rule 59(e) motions were generally regarded as free from the pre-AEDPA strictures on second or successive petitions. In other words, the Court infers that judges thought that they were required to decide Rule 59(e) motions on the merits even if they were second or successive habeas petitions in substance.

This is nothing but speculation, and there is a more likely explanation for the disparity between reported cases dismissing Rule 60(b) and Rule 59(e) motions as second or successive. Before AEDPA, whether to entertain a successive habeas petition was left to "the sound discretion of the federal trial judges," *Sanders* v. *United States*, 373 U. S. 1, 18 (1963), and therefore the disparity may be attributable, not to what judges thought they were required to do, but to what they chose to do as a matter of discretion. And the Court provides the obvious reasons why judges might have been more inclined to reach the merits in Rule 59(e) cases. A Rule 59(e) motion raises claims that the judge recently decided; a Rule 60(b) motion may raise entirely new claims and may be filed later. For these reasons, judges might have found it more attractive to decide the merits in Rule 59(e) cases when they had the discretion to do so.

The important point, however, is that the Court can only speculate. But based on that speculation, the Court is willing to conclude that in the days before AEDPA, judges thought that they were legally required to decide the merits

of second or successive habeas petitions if they were labeled as Rule 59(e) motions and that AEDPA's express and tight restrictions on second or successive petitions were enacted on the understanding that this feature of pre-AEDPA practice would not be disturbed. That is a tall order indeed, and this inconclusive case law does not suffice. See, *e. g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952) ("Statutes . . . are to be read with a presumption favoring the retention of long-established and familiar principles").

IV

A

The Court muses that its opinion "may make habeas proceedings more efficient," *ante*, at 516, but improving statutes is not our job, and in any event, the Court's assessment of the consequences of its decision is dubious.

State prisoners file thousands of federal habeas petitions per year.[3] After a petition is denied, as most are, the Court suggests that Rule 59(e) gives federal habeas courts a chance "to correct their own errors" or "to clarify their reasoning," but the value of this opportunity is questionable since, as the Court admits, "Rule 59(e) motions seldom change judicial outcomes." *Ibid.* Statistics agree that, in the main, district courts resolve habeas petitions correctly. In 2019, appeals courts reversed in only a miniscule percentage of appeals in cases involving state prisoners' habeas claims.[4]

The Court is probably right that, once in a while, a Rule 59(e) motion could save the need for an appeal. But that positive effect is very likely outweighed by the burden imposed by the entirely meritless Rule 59(e) motions that

---

[3] See Administrative Office of the U. S. Courts, Federal Judicial Caseload Statistics, U. S. District Courts–Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2019) (Table C–2). State prisoners' habeas petitions are listed under the "Federal Question" category of "Private Cases."

[4] See *id.*, Table B–5.

today's decision will give prisoners an incentive to file. Not only will prisoners file such motions on the off chance of winning, but some may file simply to toll the deadline for filing an appeal, Fed. Rule App. Proc. 4(a)(4)(A)(iv). The burden of wading through these motions will not always be "slight." *Ante*, at 517; see App. 219–253 (Banister's motion). And the aggregate burden on the district courts may actually be quite substantial.

The Court's decision would be more understandable if it offered any real benefit for habeas petitioners, but it does not. As Banister concedes, see Brief for Petitioner 33, the standard for Rule 59(e) relief from an erroneous judgment is higher than the standard for permission to appeal. Compare *Miller-El* v. *Cockrell*, 537 U. S. 322, 336 (2003) ("reasonable debate" standard for a certificate of appealability), with 11 Wright & Miller § 2810.1 ("manifest error" standard for Rule 59(e) relief). So if a prisoner has a claim that can prevail under Rule 59(e), there should be no problem in obtaining permission to appeal. That is the procedure prescribed by AEDPA, and it is an entirely reasonable one that does not prejudice habeas petitioners.

B

If treated according to their substance rather than their label, Rule 59(e) motions would still have "an unquestionably valid role to play" in habeas cases. *Gonzalez*, 545 U. S., at 534. The construction of AEDPA in *Gonzalez* did not doom the Rule 60(b) motion at issue in that case. Although deficient for other reasons, that motion challenged "a nonmerits aspect of the first federal habeas proceeding," the denial of the habeas petition on timeliness grounds. *Ibid.* That sort of claim is not the equivalent of a habeas claim. It does not assert a federal basis for relief from the state-court judgment; rather, it seeks to cure a "defect" in the federal habeas proceeding itself. *Id.*, at 532.

Rule 59(e) motions can do the same. Through that Rule, a petitioner can flag manifest errors in a district court's application of AEDPA's statute of limitations, AEDPA's exhaustion requirement, or the rules of procedural default. See *Webb* v. *Davis*, 940 F. 3d 892, 898 (CA5 2019) (*per curiam*) (adding "the district court's denial of funding, the district court's dismissal of claims without conducting an evidentiary hearing, . . . the district court's failure to consider claims presented in the habeas application," and "the denial of a claim based on a valid appeal waiver" (internal quotation marks omitted)). These challenges relate only to a petitioner's ability to assert a claim, not the merits of the claim itself. Under *Gonzalez*, a petitioner could seek reconsideration of them unencumbered by § 2244(b).

That is not what Banister sought. In substance, his Rule 59(e) motion was simply a repackaged version of his petition, and since the Fifth Circuit had not authorized him to file it, the District Court had no jurisdiction to consider it. See *Burton* v. *Stewart*, 549 U. S. 147, 153 (2007) (*per curiam*).

V

The question remains whether Banister's Rule 59(e) motion tolled his appeal deadline. Under 28 U. S. C. § 2107(a), the Fifth Circuit could hear his appeal only if he filed it within 30 days of the District Court's judgment. See *Hamer* v. *Neighborhood Housing Servs. of Chicago*, 583 U. S. 17, 19 (2017). During that time, Banister filed his Rule 59(e) motion, but he did not file his appeal until 66 days after the court denied his habeas petition.

Appellate Rule 4(a) provides that "the time to file an appeal runs for all parties from the entry of the order disposing of," among other things, a Rule 59(e) motion. Fed. Rule App. Proc. 4(a)(4)(A)(iv). Not on that list: successive habeas petitions. Since that is what Banister's Rule 59(e) motion was in substance, it did not toll his appeal deadline.

Banister contends that, even if his Rule 59(e) motion constituted a habeas petition, the simple act of filing it gave him more time to appeal. He points to the statement in *Artuz* v. *Bennett*, 531 U. S. 4 (2000), that an application is commonly regarded as having been "'filed'" if "it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Id.*, at 8. Under this definition, he argues, his motion was filed, and therefore, the time to take an appeal was tolled until it was denied.

This argument fails because the timeliness of Banister's appeal does not depend on whether what Banister labeled a Rule 59(e) motion was "filed" in the District Court. Under Appellate Rule 4(a), the time to appeal runs from the date when the district court finally disposes of a motion falling within one of six categories, including motions to alter or amend the judgment under Rule 59. And whether a motion falls into one of those categories depends on the substance of the motion, not the label that is affixed to it. See, *e. g.*, *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196, 199–200, 203 (1988) (a motion for attorney's fees is not equivalent to a Rule 59(e) motion and did not toll the time to appeal); *State Nat. Ins. Co.* v. *County of Camden*, 824 F. 3d 399, 410 (CA3 2016); *Yost* v. *Stout*, 607 F. 3d 1239, 1243 (CA10 2010); *Borrero* v. *Chicago*, 456 F. 3d 698, 700 (CA7 2006); *Moody Nat. Bank of Galveston* v. *GE Life & Annuity Assurance Co.*, 383 F. 3d 249, 251 (CA5 2004); *Jones* v. *UNUM Life Ins. Co. of America*, 223 F. 3d 130, 136 (CA2 2000). Thus, to toll the time to appeal, Banister's motion had to be a motion to alter or amend, and because § 2244(b) dictates that his motion be treated as a habeas petition, it cannot be allowed to toll the time to appeal.

* * *

I would hold that a Rule 59(e) motion that constitutes a second or successive habeas petition is subject to § 2244(b) and that such a motion does not toll the time to appeal. I

therefore conclude that the Fifth Circuit was correct to dismiss Banister's untimely appeal. Because the Court holds to the contrary, I respectfully dissent.

Syllabus

THOLE ET AL. *v.* U. S. BANK N. A. ET AL.

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

No. 17–1712. Argued January 13, 2020—Decided June 1, 2020

Plaintiffs James Thole and Sherry Smith are retired participants in U. S. Bank's defined-benefit retirement plan, which guarantees them a fixed payment each month regardless of the plan's value or its fiduciaries' good or bad investment decisions. Both have been paid all of their monthly pension benefits so far and are legally and contractually entitled to those payments for the rest of their lives. Nevertheless, they filed a putative class-action suit against U. S. Bank and others (collectively, U. S. Bank) under the Employee Retirement Income Security Act of 1974 (ERISA), alleging that the defendants violated ERISA's duties of loyalty and prudence by poorly investing the plan's assets. They request the repayment of approximately $750 million to the plan in losses suffered due to mismanagement; injunctive relief, including replacement of the plan's fiduciaries; and attorney's fees. The District Court dismissed the case, and the Eighth Circuit affirmed on the ground that the plaintiffs lack statutory standing.

Held: Because Thole and Smith have no concrete stake in the lawsuit, they lack Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. Win or lose, they would still receive the exact same monthly benefits they are already entitled to receive.

None of the plaintiffs' arguments suffices to establish Article III standing. First, the plaintiffs rely on a trust analogy in arguing that an ERISA participant has an equitable or property interest in the plan and that injuries to the plan are therefore injuries to the participants. But participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to participants in a defined-contribution plan, and they possess no equitable or property interest in the plan, see *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 439–441. Second, the plaintiffs cannot assert representative standing based on injuries to the plan where they themselves have not "suffered an injury in fact," *Hollingsworth* v. *Perry*, 570 U. S. 693, 708, or been legally or contractually appointed to represent the plan. Third, the fact that ERISA affords all participants—including defined-benefit plan participants—a cause of action to sue does not satisfy the injury-in-fact requirement here. "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc.* v. *Robins*, 578

Syllabus

U. S. 330, 341. Fourth, the plaintiffs contend that meaningful regulation of plan fiduciaries is possible only if they may sue to target perceived fiduciary misconduct. But this Court has long rejected that argument for Article III standing, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489, and defined-benefit plans are regulated and monitored in multiple ways.

The plaintiffs' *amici* assert that defined-benefit plan participants have standing to sue if the plan's mismanagement was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future benefits. The plaintiffs do not assert that theory of standing here, nor did their complaint allege that level of mismanagement. Pp. 541–547.

873 F. 3d 617, affirmed.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 547. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 549.

Peter K. Stris argued the cause for petitioners. With him on the briefs were *Brendan S. Maher*, *Rachana A. Pathak*, *Douglas D. Geyser*, *John Stokes*, *Karen L. Handorf*, *Michelle C. Yau*, and *Mary J. Bortscheller*.

Sopan Joshi argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Kneedler*, and *G. William Scott*.

Joseph R. Palmore argued the cause for respondents. With him on the brief were *Deanne E. Maynard*, *James R. Sigel*, *Stephen P. Lucke*, and *Andrew Holly*.*

---

*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Dara S. Smith* and *William Alvarado Rivera*; for Law Professors by *Erin M. Riley*, *Matt Gerend*, and *David S. Preminger*; for the Pension Rights Center by *Elizabeth Hopkins* and *Karen W. Ferguson*; and for Public Citizen by *Nandan M. Joshi* and *Scott L. Nelson*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America et al. by *Andrew J. Pincus*, *Brian D. Netter*, *Nancy G. Ross*, *Jed W. Glickstein*, *Daryl Joseffer*, *An-*

JUSTICE KAVANAUGH delivered the opinion of the Court.

To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992).

Plaintiffs James Thole and Sherry Smith are two retired participants in U. S. Bank's retirement plan. Of decisive importance to this case, the plaintiffs' retirement plan is a defined-benefit plan, not a defined-contribution plan. In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions. By contrast, in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions. See *Beck* v. *PACE Int'l Union*, 551 U. S. 96, 98 (2007); *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 439–440 (1999).

As retirees and vested participants in U. S. Bank's defined-benefit plan, Thole receives $2,198.38 per month, and Smith receives $42.26 per month, regardless of the plan's value at any one moment and regardless of the investment decisions of the plan's fiduciaries. Thole and Smith have been paid all of their monthly pension benefits so far, and they are legally and contractually entitled to receive those same monthly payments for the rest of their lives.

Even though the plaintiffs have not sustained any monetary injury, they filed a putative class-action suit against

---

thony F. Shelley, and *Theresa S. Gee*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for the Washington Legal Foundation by *Richard A. Samp* and *Cory L. Andrews*.

Thomas J. Ward and *Amy C. Chai* filed a brief for the National Association of Home Builders of the United States as *amicus curiae*.

U. S. Bank and others (collectively, U. S. Bank) for alleged mismanagement of the defined-benefit plan. The alleged mismanagement occurred more than a decade ago, from 2007 to 2010. The plaintiffs sued under ERISA, the aptly named Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* The plaintiffs claimed that the defendants violated ERISA's duties of loyalty and prudence by poorly investing the assets of the plan. The plaintiffs requested that U. S. Bank repay the plan approximately $750 million in losses that the plan allegedly suffered. The plaintiffs also asked for injunctive relief, including replacement of the plan's fiduciaries. See ERISA §§ 502(a)(2), (3), 29 U. S. C. §§ 1132(a)(2), (3).

No small thing, the plaintiffs also sought attorney's fees. In the District Court, the plaintiffs' attorneys requested at least $31 million in attorney's fees.

The U. S. District Court for the District of Minnesota dismissed the case, and the U. S. Court of Appeals for the Eighth Circuit affirmed on the ground that the plaintiffs lack statutory standing. 873 F. 3d 617 (2017). We granted certiorari. 588 U. S. 919 (2019).

We affirm the judgment of the U. S. Court of Appeals for the Eighth Circuit on the ground that the plaintiffs lack Article III standing. Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to *lose* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to *win* this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit. To be sure, their attorneys have a stake in the lawsuit, but an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."

Lewis v. *Continental Bank Corp.*, 494 U. S. 472, 480 (1990); see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 107 (1998) (same). Because the plaintiffs themselves have no concrete stake in the lawsuit, they lack Article III standing.

* * *

If Thole and Smith had not received their vested pension benefits, they would of course have Article III standing to sue and a cause of action under ERISA § 502(a)(1)(B) to recover the benefits due to them. See 29 U. S. C. § 1132(a)(1)(B). But Thole and Smith have received all of their monthly pension benefits so far, and they will receive those same monthly payments for the rest of their lives.

To nonetheless try to demonstrate their standing to challenge alleged plan mismanagement, the plaintiffs have advanced four alternative arguments.

First, analogizing to trust law, Thole and Smith contend that an ERISA defined-benefit plan participant possesses an equitable or property interest in the plan, meaning in essence that injuries to the plan are by definition injuries to the plan participants. Thole and Smith contend, in other words, that a plan fiduciary's breach of a trust-law duty of prudence or duty of loyalty itself harms ERISA defined-benefit plan participants, even if the participants themselves have not suffered (and will not suffer) any monetary losses.

The basic flaw in the plaintiffs' trust-based theory of standing is that the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan. See *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996) (trust law informs but does not control interpretation of ERISA). In the private trust context, the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk. By contrast, a defined-benefit plan is more in the nature of a

contract. The plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed. The benefits paid to the participants in a defined-benefit plan are not tied to the value of the plan. Moreover, the employer, not plan participants, receives any surplus left over after all of the benefits are paid; the employer, not plan participants, is on the hook for plan shortfalls. See *Beck*, 551 U. S., at 98–99. As this Court has stated before, plan participants possess no equitable or property interest in the plan. See *Hughes Aircraft Co.*, 525 U. S., at 439–441; see also *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U. S. 248, 254–256 (2008). The trust-law analogy therefore does not fit this case and does not support Article III standing for plaintiffs who allege mismanagement of a defined-benefit plan.

Second, Thole and Smith assert standing as representatives of the plan itself. But in order to claim "the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving" them "a sufficiently concrete interest in the outcome of the issue in dispute." *Hollingsworth* v. *Perry*, 570 U. S. 693, 708 (2013) (internal quotation marks omitted); cf. *Gollust* v. *Mendell*, 501 U. S. 115, 125–126 (1991) (suggesting that shareholder must "maintain some continuing financial stake in the litigation" in order to have Article III standing to bring an insider trading suit on behalf of the corporation); *Craig* v. *Boren*, 429 U. S. 190, 194–195 (1976) (vendor who "independently" suffered an Article III injury in fact could then assert the rights of her customers). The plaintiffs themselves do not have a concrete stake in this suit.

The plaintiffs point to the Court's decisions upholding the Article III standing of assignees—that is, where a party's right to sue has been legally or contractually assigned to another party. But here, the plan's claims have not been legally or contractually assigned to Thole or Smith. Cf. *Sprint Communications Co.* v. *APCC Services, Inc.*, 554

U. S. 269, 290 (2008); *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 771–774 (2000) (*qui tam* statute makes a relator a partial assignee and "gives the relator himself an interest in the lawsuit") (emphasis deleted). The plaintiffs' invocation of cases involving guardians, receivers, and executors falls short for basically the same reason. The plaintiffs have not been legally or contractually appointed to represent the plan.

Third, in arguing for standing, Thole and Smith stress that ERISA affords the Secretary of Labor, fiduciaries, beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sue for restoration of plan losses and other equitable relief. See ERISA §§ 502(a)(2), (3), 29 U. S. C. §§ 1132(a)(2), (3). But the cause of action does not affect the Article III standing analysis. This Court has rejected the argument that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341 (2016); see *Raines* v. *Byrd*, 521 U. S. 811, 820, n. 3 (1997). The Court has emphasized that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 578 U. S., at 341. Here, the plaintiffs have failed to plausibly and clearly allege a concrete injury.[1]

Fourth, Thole and Smith contend that if defined-benefit plan participants may not sue to target perceived fiduciary misconduct, no one will meaningfully regulate plan fiduciaries. For that reason, the plaintiffs suggest that defined-benefit plan participants must have standing to sue. But this Court has long rejected that kind of argument for Article III standing. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489 (1982) (the "'assumption that if respond-

[1] To be clear, our decision today does not concern suits to obtain plan information. See, *e. g.*, ERISA § 502(a)(1)(A), 29 U. S. C. § 1132(a)(1)(A).

ents have no standing to sue, no one would have standing, is not a reason to find standing' ") (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974)).

In any event, the argument rests on a faulty premise in this case because defined-benefit plans are regulated and monitored in multiple ways. To begin with, employers and their shareholders often possess strong incentives to root out fiduciary misconduct because the employers are entitled to the plan surplus and are often on the hook for plan shortfalls. Therefore, about the last thing a rational employer wants or needs is a mismanaged retirement plan. Cf. ERISA § 4062(a), 29 U. S. C. § 1362(a). Moreover, ERISA expressly authorizes the Department of Labor to enforce ERISA's fiduciary obligations. See ERISA § 502(a)(2), 29 U. S. C. § 1132(a)(2). And the Department of Labor has a substantial motive to aggressively pursue fiduciary misconduct, particularly to avoid the financial burden of failed defined-benefit plans being backloaded onto the Federal Government. When a defined-benefit plan fails and is unable to pay benefits to retirees, the federal Pension Benefit Guaranty Corporation is required by law to pay the vested pension benefits of the retirees, often in full. The Department of Labor is well positioned to understand the relationship between plan failure and the PBGC because, by law, the PBGC operates within the Department of Labor, and the Secretary of Labor chairs the Board of the PBGC. See ERISA §§ 4002(a), (d), 29 U. S. C. §§ 1302(a), (d). On top of all that, fiduciaries (including trustees who are fiduciaries) can sue other fiduciaries—and they would have good reason to sue if, as Thole and Smith posit, one fiduciary were using the plan's assets as a "personal piggybank." Brief for Petitioners 2. In addition, depending on the nature of the fiduciary misconduct, state and federal criminal laws may apply. See, *e. g.*, 18 U. S. C. §§ 664, 1954; ERISA § 514(b)(4), 29 U. S. C. § 1144(b)(4). In short, under ERISA, fiduciaries who manage defined-benefit plans face a regulatory phalanx.

In sum, none of the plaintiffs' four theories supports their Article III standing in this case.

One last wrinkle remains. According to the plaintiffs' *amici*, plan participants in a defined-benefit plan have standing to sue if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits. Cf. *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 414, n. 5 (2013); *Lee* v. *Verizon Communications, Inc.*, 837 F. 3d 523, 545–546 (CA5 2016); *David* v. *Alphin*, 704 F. 3d 327, 336–338 (CA4 2013). But the plaintiffs do not assert that theory of standing in this Court. In any event, the plaintiffs' complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits. It is true that the plaintiffs' complaint alleged that the plan was underfunded for a period of time. But a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail. Cf. *LaRue*, 552 U. S., at 255 ("Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan").[2]

[2] Even if a defined-benefit plan is mismanaged into plan termination, the federal PBGC by law acts as a backstop and covers the vested pension benefits up to a certain amount and often in full. For example, if the plan and the employer in this case were to fail, the PBGC would be required to pay these two plaintiffs all of their vested pension benefits in full. See ERISA §§ 4022(a), (b), 29 U. S. C. §§ 1322(a), (b); Tr. of Oral Arg. 18–19; see also Congressional Research Service, Pension Benefit Guaranty Corporation (PBGC): A Primer 1 (2019); PBGC, General FAQs About PBGC, https://www.pbgc.gov/about/faq/general-faqs-about-pbgc. Any increased-risk-of-harm theory of standing therefore might not be available for plan participants whose benefits are guaranteed in full by the PBGC. But we need not decide that question in this case.

* * *

Courts sometimes make standing law more complicated than it needs to be. There is no ERISA exception to Article III. And under ordinary Article III standing analysis, the plaintiffs lack Article III standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing. We affirm the judgment of the U. S. Court of Appeals for the Eighth Circuit.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court's opinion, which correctly applies our precedents and concludes that petitioners lack standing. I also agree that "[c]ourts sometimes make standing law more complicated than it needs to be." *Ante*, at 547. I write separately to observe that by requiring us to engage with petitioners' analogies to trust law, our precedents unnecessarily complicate this case.

The historical restrictions on standing provide a simpler framework. Article III vests "[t]he judicial Power of the United States" in the federal courts and specifies that it shall extend to enumerated categories of "Cases" and "Controversies." §§1, 2. "To understand the limits that standing imposes on 'the judicial Power,' . . . we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.'" *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344 (2016) (THOMAS, J., concurring) (quoting *Honig* v. *Doe*, 484 U. S. 305, 340 (1988) (Scalia, J., dissenting)); see also *Muskrat* v. *United States*, 219 U. S. 346, 356–357 (1911) (observing that the "judicial power with the right to determine

'cases' and 'controversies' " has long referred to "suit[s] instituted according to the regular course of judicial procedure").

"Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate." *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring). Rights were typically divided into private rights and public rights. Private rights are those " 'belonging to individuals, considered as individuals.' " *Ibid.* (quoting 3 W. Blackstone, Commentaries *2); see also Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 693 (2004). Public rights are "owed 'to the whole community, considered as a community, in its social aggregate capacity.' " *Spokeo*, *supra*, at 345 (THOMAS, J., concurring) (quoting 4 Blackstone, *supra*, at *5); see also Woolhandler & Nelson, *supra*, at 693.

Petitioners claim violations of private rights under the Employee Retirement Income Security Act of 1974 (ERISA). "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded." *Spokeo*, *supra*, at 344 (THOMAS, J., concurring). In this case, however, none of the rights identified by petitioners belong to them. The fiduciary duties created by ERISA are owed to the plan, not petitioners. See 29 U. S. C. §§ 1104(a)(1), 1105(a), 1106(a)(1), 1106(b), 1109(a). As participants in a defined benefit plan, petitioners have no legal or equitable ownership interest in the plan assets. See *ante*, at 543. There has been no assignment of the plan's rights by ERISA or any contract. See *ante*, at 543–544. And petitioners cannot rely on ERISA § 502(a). Although it establishes certain causes of action, it creates no private right. See § 1132(a).

There is thus no need to analogize petitioners' complaint to trust law actions, derivative actions, *qui tam* actions, or anything else. We need only recognize that the private rights that were allegedly violated do not belong to petitioners under ERISA or any contract.

Our ERISA precedents have especially complicated the question of standing in this case due to their misinterpretations of the statute. I continue to object to this Court's practice of using the common law of trusts as the "starting point" for interpreting ERISA. *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996). "[I]n 'every case involving construction of a statute,' the 'starting point . . . is the language itself.' " *Id.*, at 528 (THOMAS, J., dissenting) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197 (1976); ellipsis in original). This is especially true for ERISA because its "statutory definition of a fiduciary departs from the common law." *Varity*, *supra*, at 528. The Court correctly applies *Varity* here, but in an appropriate case, we should reconsider our reliance on loose analogies in both our standing and ERISA jurisprudence.

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

The Court holds that the Constitution prevents millions of pensioners from enforcing their rights to prudent and loyal management of their retirement trusts. Indeed, the Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default. This conclusion conflicts with common sense and longstanding precedent.

I

A

ERISA[1] protects "the interests of participants in employee benefit plans and their beneficiaries." 29 U. S. C. § 1001(b). Chief among these safeguards is that "all assets of an employee benefit plan" must "be held in trust by one or more trustees" for "the exclusive purposes of providing

[1] Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*

benefits to participants in the plan and their beneficiaries." §§1103(a), (c)(1). A retirement plan's assets "shall never inure to the benefit of any employer." §1103(c)(1).

Because ERISA requires that retirement-plan assets be held in trust, it imposes on the trustees and other plan managers "'strict standards'" of conduct "'derived from the common law of trusts.'" *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U. S. 409, 416 (2014) (quoting *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985)). These "fiduciary duties" obligate the trustees and managers to act prudently and loyally, looking out solely for the best interest of the plan's participants and beneficiaries—typically, the employees who sacrifice wages today to secure their retirements tomorrow. §§1104, 1106. Not surprisingly, ERISA fiduciaries owe duties not only to the plan they manage, but also "to the beneficiaries" and participants for whom they manage it. *Harris Trust and Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U. S. 238, 241–242, 250 (2000).

If a fiduciary flouts these stringent standards, ERISA provides a cause of action and makes the fiduciary personally liable. §§1109, 1132. The United States Secretary of Labor, a plan participant or beneficiary, or another fiduciary may sue for "appropriate relief under section 1109." §1132(a)(2); see also §1132(a)(3) (permitting participants, beneficiaries, or fiduciaries to bring suit "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan"). Section 1109's remedies include restoration of lost assets, disgorgement of ill-gained profits, and removal of the offending fiduciaries. §1109(a).

B

Petitioners allege that, as of 2007, respondents breached their fiduciary duty of loyalty by investing pension-plan assets in respondents' own mutual funds and by paying themselves excessive management fees. (Petitioners fur-

ther contend that this self-dealing persists today.) According to the complaint, the fiduciaries also made imprudent investments that allowed them to manipulate accounting rules, boost their reported incomes, inflate their stock prices, and exercise lucrative stock options to their own (and their shareholders') benefit.

Then came the Great Recession. In 2008, the retirement plan lost $1.1 billion, allegedly $748 million more than a properly managed plan would have lost. So some of the plan's participants sued under 29 U. S. C. § 1132(a) for the relief Congress contemplated: restoration of losses, disgorgement of respondents' ill-gotten profits and fees, removal of the disloyal fiduciaries, and an injunction to stop the ongoing breaches. Faced with this lawsuit, respondents returned to the plan about $311 million (less than half of what the plan had lost) and none of the profits respondents had unlawfully gained. See 873 F. 3d 617, 630–631 (CA8 2018).

II

In the Court's words, the question here is whether petitioners have alleged a "concrete" injury to support their constitutional standing to sue. *Ante*, at 541–542. They have for at least three independent reasons.

A

First, petitioners have an interest in their retirement plan's financial integrity, exactly like private trust beneficiaries have in protecting their trust. By alleging a $750 million injury to that interest, petitioners have established their standing.

1

This Court typically recognizes an "injury in fact" where the alleged harm "has a close relationship to" one "that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 341 (2016). Thus, the Court acknowledges that

"private trust" beneficiaries have standing to protect the assets in which they have an "equitable" interest. *Ante*, at 542. The critical question, then, is whether petitioners have an equitable interest in their retirement plan's assets even though their pension payments are fixed.

They do. ERISA expressly required the creation of a trust in which petitioners are the beneficiaries: "[A]ll assets" of the plan "shall be held in trust" for petitioners' "exclusive" benefit. 29 U. S. C. §§ 1103(a), (c)(1); see also § 1104(a)(1).[2] These requirements exist regardless whether the employer establishes a defined-benefit or defined-contribution plan. § 1101(a). Similarly, the Plan Document governing petitioners' defined-benefit plan states that, at "'all times,'" all plan assets "'shall'" be in a "'trust fund'" managed for the participants' and beneficiaries' "'exclusive benefit.'" App. 60–61. The Plan Document also gives petitioners a residual interest in the trust fund's assets: It instructs that, "[u]pon termination of the Plan, each Participant [and] Beneficiary" shall look to "the assets of the [trust f]und" to "provide the benefits otherwise apparently promised in this Plan." Record in No. 13–cv–2687 (D Minn.), Doc. 107–1, p. 75. This arrangement confers on the "participants [and] beneficiaries" of a defined-benefit plan an equitable stake, or a "common interest," in "the financial integrity of the plan." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 142, n. 9 (1985).

Petitioners' equitable interest finds ample support in traditional trust law. "The creation of a trust," like the one here, provides beneficiaries "an equitable interest in the subject matter of the trust." Restatement (Second) of Trusts § 74, Comment *a*, p. 192 (1957); see *Blair* v. *Commissioner*, 300

---

[2] Generally, "a trust is created when one person (a 'settlor' or 'grantor') transfers property to a third party (a 'trustee') to administer for the benefit of another (a 'beneficiary')." *North Carolina Dept. of Revenue* v. *Kimberley Rice Kaestner 1992 Family Trust*, 588 U. S. 262, 265 (2019); see also Restatement (Second) of Trusts § 2 (1957). Neither the Court nor respondents dispute that petitioners' pension fund meets these elements.

U. S. 5, 13 (1937). Courts have long recognized that this equitable interest gives beneficiaries a basis to "have a breach of trust enjoined and . . . redress[ed]." *Ibid.*; see also *Spokeo*, 578 U. S., at 341. That is, a beneficiary's equitable interest allows her to "maintain a suit" to "compel the trustee to perform his duties," to "enjoin the trustee from committing a breach of trust," to "compel the trustee to redress a breach of trust," and to "remove the trustee." Restatement (Second) of Trusts § 199; see also *id.*, § 205 (beneficiary may require a trustee to restore "any loss or depreciation in value of the trust estate" and "any profit made by [the trustee] through the breach of trust").[3]

So too here. Because respondents' alleged mismanagement lost the pension fund hundreds of millions of dollars, petitioners have stated an injury to their equitable property interest in that trust.

2

The Court, by contrast, holds that participants and beneficiaries in a defined-benefit plan have no stake in their plan's assets. *Ante*, at 542–543. In other words, the Court treats beneficiaries as mere bystanders to their own pensions.

That is wrong on several scores. For starters, it creates a paradox: In one breath, the Court determines that petitioners have "no equitable or property interest" in their plan's assets, *ante*, at 543; in another, the Court concedes that petitioners have an enforceable interest in receiving their "monthly pension benefits," *ante*, at 540. Benefits paid from where? The plan's assets, obviously. Precisely because petitioners have an interest in payments from their trust fund, they have an interest in the integrity of the assets

[3] Even contingent and discretionary beneficiaries (those who might not ever receive any assets from the trust) can sue to protect the trust absent a personal financial loss (or an imminent risk of loss). See A. Hess, G. Bogert, & G. Bogert, Law of Trusts and Trustees § 871 (3d ed. Supp. 2019) (Bogert & Bogert) (listing cases).

from which those payments come. See *Russell*, 473 U. S., at 142, n. 9.

The Court's contrary conclusion is unrecognizable in the fundamental trust law that both ERISA and the Plan Document expressly incorporated. If the participants and beneficiaries in a defined-benefit plan did not have equitable title to the plan's assets, then no one would. Yet that would mean that no "trust" exists, contrary to the plain terms of both ERISA and the Plan Document. See 29 U. S. C. § 1103(a); App. 60; see also n. 2, *supra*; *Blair*, 300 U. S., at 13; Bogert & Bogert § 1; Restatement (Second) of Trusts § 74, Comment *a*, at 192.

Recognizing this problem, the Court asserts that, despite our case law, ERISA's text, and petitioners' Plan Document, trust law is not relevant at all. The Court announces that all "plaintiffs who allege mismanagement of a defined-benefit plan," regardless of their plan terms, cannot invoke a "trust-law analogy" to "support Article III standing." *Ante*, at 543.

That categorical conclusion has no basis in logic or law. Logically, the Court's reasoning relies on tautology. To distinguish an ERISA trust fund from a private trust fund, the Court observes that petitioners' payments have not "fluctuate[d] with the value of the plan or because of the plan fiduciaries' good or bad investment decisions" in the past, *ante*, at 540, so petitioners will necessarily continue to receive full payments "for the rest of their lives," no matter the outcome of this suit, *ante*, at 542. But that is circular: Petitioners will receive benefits indefinitely because they receive benefits now? The Court does not explain how the pension could satisfy its monthly obligation if, as petitioners allege, the plan fiduciaries drain the pool from which petitioners' fixed income streams flow.

Legally, the Court's analysis lists distinctions without a difference. First, the Court writes that a trust promising fixed payments is not a trust because the promise "will not change, regardless of how well or poorly the [trust] is man-

aged." *Ante,* at 543. That does not follow (a promise of payment differs from an actual payment) and it does not disprove a trust. Trusts vary in their terms, to be sure. See Bogert & Bogert § 181 ("The settlor has great freedom in the selection of the beneficiaries and their interests"). But regardless whether a trust creates a "present interest" in "immediate enjoyment" of the trust property or "a future interest" in "receiv[ing] trust assets or benefits at a later time," the beneficiary "always" has an "equitable" stake. *Ibid.*

Second, the Court states that "the employer, not plan participants, receives any surplus left over after all of the benefits are paid" and "the employer, not plan participants, is on the hook for plan shortfalls." *Ante,* at 543; see also *ante,* at 545 (noting that "the federal Pension Benefit Guaranty Corporation is required by law to pay" some benefits if a plan fails). But that does not distinguish ERISA from standard trust law, either. It does not matter that other parties besides beneficiaries may have a residual stake in trust assets; a beneficiary with a life-estate interest in payments from a trust still has an equitable interest. See Bogert & Bogert § 706. Even life-beneficiaries may "requir[e]" the trustee "to pay the trust the amount necessary to place the trust account in the position in which it would have been, had the [trustee's fiduciary] duty been performed." *Ibid.* If anything, petitioners' equitable interests are stronger than those of their common-law counterparts; the Plan Document provides petitioners a residual interest in the pension fund's assets even after the trust terminates. See Record in No. 13–cv–2687, Doc. 107–1, at 75.

Nor is it relevant whether additional parties (including an insurance carrier) are "on the hook" for plan shortfalls after a loss occurs. Cf. *ante,* at 543, 545, 546, n. 2. The Court appears to conclude that insurance (or other protections to remedy trust losses) would deprive beneficiaries of their equitable interests in their trusts. See *ibid.* But the Court cites

nothing supporting that proposition. To the contrary, it is well settled that beneficiaries retain equitable interests in trust assets even when those assets are insured or replenished. See Bogert & Bogert § 599. Some States and trusts require that the "property of a trust . . . be insured" or similarly protected; indeed, some jurisdictions impose on trustees a fiduciary "duty to insure." *Ibid.* (collecting authorities). None of those authorities suggests that beneficiaries lose their equitable interests as a result, and none suggests that the law excuses a fiduciary's malfeasance simply because other sources may help provide relief. The Court's opposing view—that employer liability and insurance pardon a trustee's wrongdoing from a beneficiary's suit—has no support in law.

Third, the Court draws a line between a trust and a contract, *ante*, at 542–543, but this too is insignificant here. The Court declares that petitioners' pension plan "is more in the nature of a contract," *ibid.*, but then overlooks that the so-called contract creates a trust. The Plan Document expressly requires that petitioners' pension funds be held in a "trust" exclusively for petitioners' benefit. App. 60–61. The Court's statement that "the employer, not plan participants, receives any surplus left over after all of the benefits are paid," *ante*, at 543, actually proves that a trust exists. The reason the employer does not receive any residual until "after all of the benefits are paid," *ibid.*, is because the Plan Document provides petitioners an enforceable residual interest, Record in No. 13–cv–2687, Doc. 107–1, at 75. It is telling that the Court does not cite, let alone analyze, the "contract" governing petitioners' trust fund.

Last, the Court cites inapposite case law. It asserts that "this Court has stated" that "plan participants possess no equitable or property interest in the plan." *Ante*, at 543 (citing *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432 (1999), and *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U. S. 248 (2008)). But precedent has said no such thing. Quite

the opposite: *Russell* explained that defined-benefit-plan beneficiaries have a "common interest" in the "financial integrity" of their defined-benefit plan. 473 U. S., at 142, n. 9.

Neither *Hughes* nor *LaRue* suggests otherwise. *Hughes* explained that a defined-benefit-plan beneficiary does not have "a claim to any particular asset that composes a part of the plan's general asset pool." 525 U. S., at 440. But that statement concerned whether the beneficiaries had a legal right to extra payments after the plan's assets grew. *Id.*, at 436–437. Whether a beneficiary has a legal claim to payment when a plan gains money says nothing about whether a beneficiary has an equitable interest to restore assets when a plan loses money. *Hughes*, in fact, invited a suit like petitioners': The Court suggested that the plaintiffs could have prevailed had they "allege[d] that [the employer] used any of the assets for a purpose other than to pay its obligations to the Plan's beneficiaries." *Id.*, at 442–443. Equally telling is that *Hughes* resolved the beneficiaries' breach-of-fiduciary claims on the merits without doubting whether the plaintiffs had standing to assert them. See *id.*, at 443–446; *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998) (explaining this Court's independent duty to assure itself of Article III standing).

LaRue is even less helpful to today's Court. That case involved a defined-contribution plan, not a defined-benefit plan. 552 U. S., at 250. It was about remedies, not rights. See *id.*, at 256. And it stated that although "individual injuries" may occur from ERISA plan mismanagement, the statutory provision at issue required that the remedy go to the plan. *Ibid.* (discussing 29 U. S. C. § 1132(a)(2)). *LaRue* said nothing about standing and nothing about ERISA's other statutory remedies.[4] In fact, *LaRue* confirmed that ERISA beneficiaries like petitioners may sue fiduciaries for "'any

[4] The Court expressly declined to address other relief like that provided under § 1132(a)(3), see *LaRue*, 552 U. S., at 252, a provision that petitioners invoke here.

profit which would have accrued to the [plan] if there had been no breach of trust,'" 552 U. S., at 254, n. 4, or where "fiduciary breaches . . . impair the value of plan assets," *id.*, at 256. Because petitioners bring those kinds of claims, *LaRue* supports their standing.

B

Second, petitioners have standing because a breach of fiduciary duty is a cognizable injury, regardless whether that breach caused financial harm or increased a risk of nonpayment.

1

A beneficiary has a concrete interest in a fiduciary's loyalty and prudence. For over a century, trust law has provided that breach of "a fiduciary or trust relation" makes the trustee "suable in equity." *Clews* v. *Jamieson*, 182 U. S. 461, 480–481 (1901). That is because beneficiaries have an enforceable "right that the trustee shall perform the trust in accordance with the directions of the trust instrument and the rules of equity." Bogert & Bogert § 861; see also Restatement (Second) of Trusts § 199 (trust beneficiary may "maintain a suit" for breach of fiduciary duty).

That interest is concrete regardless whether the beneficiary suffers personal financial loss. A beneficiary may sue a trustee for restitution or disgorgement, remedies that recognize the relevant harm as the trustee's wrongful gain. Through restitution law, trustees are "subject to liability" if they are unjustly enriched by a "'violation of [a beneficiary]'s legally protected rights,'" like a breach of fiduciary duty. Restatement (Third) of Restitution and Unjust Enrichment § 1, and Comment *a*, p. 3 (2010). Similarly, disgorgement allows a beneficiary to "stri[p]" the trustee of "a wrongful gain." *Id.*, § 3, Comment *a*, at 22. Our Court drew on these principles almost 200 years ago when it stated that a trustee's breach of loyalty supports a cause of action "without any further inquiry" into gain or loss to a trust or its beneficiar-

ies. *Michoud* v. *Girod*, 4 How. 503, 553 (1846); see also, *e. g.*, *id.*, at 556–557 (noting this rule's roots in "English courts of chancery from an early day"); see also *Magruder* v. *Drury*, 235 U. S. 106, 120 (1914) (under "the principles governing the duty of a trustee," it "makes no difference that the [trust] estate was not a loser in the transaction"); Bogert & Bogert § 543 (similar). Put another way, "traditional remedies" like "unjust enrichment . . . are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring).

Nor does it matter whether the beneficiaries receive the remedy themselves. A beneficiary may require a trustee to "restore" assets directly "to the trust fund." Bogert & Bogert § 861; see also Restatement (Second) of Trusts § 205. In fact, because fiduciary duties are so paramount, the remedy need not involve money at all. A beneficiary may sue to "enjoin the trustee from committing a breach of trust" and to "remove the trustee." *Id.*, § 199.

Congress built on this tradition by making plan fiduciaries expressly liable to restore to the plan wrongful profits and any losses their breach caused, and by providing for injunctive relief to stop the misconduct and remove the wrongdoers. See 29 U. S. C. §§ 1109, 1132(a)(2), (3). In doing so, Congress rejected the Court's statement that a "trust-law analogy . . . does not" apply to "plaintiffs who allege mismanagement of a defined-benefit plan." Cf. *ante*, at 543. To the contrary, ERISA imposes "trust-like fiduciary standards," *Varity Corp.* v. *Howe*, 516 U. S. 489, 497 (1996), to "[r]espon[d] to deficiencies in prior law regulating [retirement] plan fiduciaries" and to provide even greater protections for defined-benefit-plan beneficiaries, *Harris Trust*, 530 U. S., at 241–242; see also *Spokeo*, 578 U. S., at 340–341 (historical and congressionally recognized injuries often support standing).

Given all that history and ERISA's text, this Court itself has noted, in the defined-benefit-plan context, "that when a

trustee" breaches "his fiduciary duty to the beneficiaries," the "beneficiaries may then maintain an action for restitution . . . or disgorgement." *Harris Trust*, 530 U. S., at 250. *Harris Trust* confirms that ERISA incorporated "[t]he common law of trusts" to allow defined-benefit-plan beneficiaries to seek relief from fiduciary breaches. *Ibid.*; see also *id.*, at 241–242 (noting that certain ERISA provisions "supplemen[t] the fiduciary's general duty of loyalty to the plan's beneficiaries").[5]

2

The Court offers no reply to all the historical and statutory evidence showing petitioners' concrete interest in prudent and loyal fiduciaries.

Instead, the Court insists again that "participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust," *ante*, at 542, and that the "complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits," *ante*, at 546.

The first observation is incorrect for the reasons stated above. But even were the Court correct that petitioners' rights do not sound in trust law, petitioners would still have standing. The Court reasons that petitioners have an enforceable right to "monthly payments for the rest of their lives" because their plan confers a "contractua[l] entitle-[ment]." *Ante*, at 540. Under that view, the plan also con-

---

[5] Curiously, today's Court suggests that ERISA's efforts to bolster trust-law fiduciary duties actually degraded them instead. See *ante*, at 542 (justifying a narrow construction of ERISA protections because "trust law informs but does not control interpretation of ERISA"). Yet the case the Court cites, *Varity Corp.* v. *Howe*, 516 U. S. 489 (1996), relied on trust law to establish the minimum obligations ERISA imposes on plan fiduciaries. See *id.*, at 506 (confirming that the "ERISA fiduciary duty includes [the] common law duty of loyalty"). Today's Court mistakes the floor for the ceiling. See *ibid.*; see also *Harris Trust*, 530 U. S., at 241–242.

fers contractual rights to loyal and prudent plan management. See App. 60–61; 29 U. S. C. §§ 1104, 1109.

Thus, for the same reason petitioners could bring suit if they did not receive payments from their plan, they could bring suit if they did not receive loyalty and prudence from their fiduciaries. After all, it is well settled that breach of "a contract to act diligently and skil[l]fully" provides a "ground of action" in federal court. *Wilcox* v. *Executors of Plummer*, 4 Pet. 172, 181–182 (1830). It is also undisputed that "[a] breach of contract always creates a right of action," even when no financial "harm was caused." Restatement (First) of Contracts § 328, and Comment *a*, pp. 502–503 (1932); see also *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring) ("[C]ourts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded" even without any "allegation of damages"). Petitioners would thus have standing even were they to accept the Court's flawed premise.

The Court's second statement, that petitioners have not alleged a substantial risk of missed payments, *ante*, at 546, is orthogonal to the issues at hand. A breach-of-fiduciary-duty claim exists regardless of the beneficiary's personal gain, loss, or recovery. In rejecting petitioners' standing and maintaining that "this suit would not change [petitioners'] monthly pension benefits," *ante*, at 547, the Court fails to distinguish the different rights on which pension-plan beneficiaries may sue. They have a right not just to their pension benefits, but also to loyal and prudent fiduciaries. See *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975) (the standing inquiry "turns on the nature and source of the claim asserted"). Petitioners seek relief tailored to the second category, including restitution, disgorgement, and injunctive remedies. Cf. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 215–216 (2002) (explaining the various historical bases for ERISA's remedies). The Court does not even try to explain ERISA's (or the Plan Document's) text imposing fidu-

ciary duties, let alone this Court's decision in *Harris Trust* supporting petitioners' standing. And even though the Court briefly mentions that petitioners seek "injunctive relief, including replacement of the plan's fiduciaries," *ante*, at 541, it offers no analysis on that issue. Put differently, the Court denies petitioners standing to sue without analyzing all their claims to relief.

With its focus on fiscal harm, the Court seems to suggest that pecuniary injury is the *sine qua non* of standing. The Court emphasizes that petitioners themselves have not "sustained any monetary injury" apart from their trust fund's losses. *Ante*, at 540; see also *ante*, at 542.

But injury to a plaintiff's wallet is not, and has never been, a prerequisite for standing. The Constitution permits federal courts to hear disputes over nonfinancial injuries like the harms alleged here. *Spokeo*, 578 U. S., at 340–341; see also, *e. g.*, *id.*, at 344–345 (THOMAS, J., concurring); *Tennessee Elec. Power Co.* v. *TVA*, 306 U. S. 118, 137–138 (1939).[6] In *Heckler* v. *Mathews*, 465 U. S. 728 (1984), for instance, this Court recognized a plaintiff's standing to assert a "noneco-

[6] This Court has found standing in myriad cases involving noneconomic injuries. Examples include the denial or threatened impairment of: equal treatment, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 211 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993); "truthful information concerning the availability of housing," *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 373 (1982); esthetic and recreational interests, *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 181–182 (2000); "information which must be publicly disclosed pursuant to a statute," *Federal Election Comm'n* v. *Akins*, 524 U. S. 11, 21 (1998); one's "personal, political, and professional reputation," *Meese* v. *Keene*, 481 U. S. 465, 473 (1987); and the right to speak, *Spokeo*, 578 U. S., at 340 (citing *Pleasant Grove City* v. *Summum*, 555 U. S. 460 (2009)). This Court has even said that a for-profit business has standing to assert religious injuries. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 715, and n. 26 (2014). Today's Court does not reconcile these cases with its novel financial-harm requirement; nor does the Court explain why a breach of fiduciary duty is less concrete than the injuries listed above.

nomic" injury for discriminatory distribution of his Social Security benefits, even though he did not have "a substantive right to any particular amount of benefits." *Id.*, at 737, 739. Petitioners' standing here is even sturdier: They assert a noneconomic injury for unlawful management of their retirement plan and, unlike the plaintiff in *Heckler*, petitioners do have a substantive right to a particular amount of benefits. Cf. *ante*, at 540 (acknowledging that petitioners' benefits are "vested" and that payments are "legally and contractually" required).

None of this is disputed. In fact, the Court seems to concede all this reasoning in a footnote. See *ante*, at 544, n. 1. The Court appears to acknowledge that an ERISA beneficiary's noneconomic right to information from the fiduciaries would support standing. See *ibid.* (citing 29 U. S. C. § 1132(a)(1)(A)). Yet the Court offers no reason to think that a beneficiary's noneconomic right to loyalty and prudence from the fiduciaries is meaningfully different.

For its part, the concurrence attempts to fill the Court's gaps by adding that "[t]he fiduciary duties created by ERISA are owed to the plan, not petitioners." *Ante*, at 548 (opinion of THOMAS, J.). But this Court has already rejected that view. Compare *Varity Corp.*, 516 U. S., at 507 ("This argument fails"), with *id.*, at 516 (THOMAS, J., dissenting).

Nor is that argument persuasive on its own terms. The concurrence relies on a compound prepositional phrase taken out of context, collecting ERISA provisions saying that a fiduciary acts "with respect to" a plan. See *ante*, at 548 (opinion of THOMAS, J.). Of course a plan fiduciary performs her duties "with respect to a plan." 29 U. S. C. § 1104(a)(1). After all, she manages the plan. § 1102(a). But she does so "solely in the interest" and "for the exclusive purposes" of the plan's "participants and beneficiaries." §§ 1103(a), (c)(1), 1104(a)(1).

In short, the concurrence gets it backwards. Congress did not enact ERISA to protect plans as artificial entities.

It enacted ERISA (and required trusts in the first place) to protect the plan "participants" and "their beneficiaries." § 1001(b). Thus, ERISA fiduciary duties run where the statute says: to the participants and their beneficiaries.

C

Last, petitioners have standing to sue on their retirement plan's behalf.

1

Even if petitioners had no suable interest in their plan's financial integrity or its competent supervision, the plan itself would. There is no disputing at this stage that respondents' "mismanagement" caused the plan "approximately $750 million in losses" still not fully reimbursed. *Ante*, at 541 (majority opinion). And even under the concurrence's view, respondents' fiduciary duties "are owed to the plan." *Ante*, at 548 (opinion of THOMAS, J.). The plan thus would have standing to sue under either theory discussed above.

The problem is that the plan is a legal fiction: Although ERISA provides that a retirement plan "may sue . . . as an entity," 29 U. S. C. § 1132(d)(1), someone must still do so on the plan's behalf. Typically that is the fiduciary's job. See § 1102(a)(1) (fiduciaries have "authority to control and manage the operation and administration of the plan"). But imagine a case like this one, where the fiduciaries refuse to sue because they would be the defendants. Does the Constitution compel a pension plan to let a fox guard the henhouse?

Of course not. This Court's representational-standing doctrine permits petitioners to sue on their plan's behalf. See *Food and Commercial Workers* v. *Brown Group, Inc.*, 517 U. S. 544, 557 (1996). This doctrine "rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties." *Ibid.* (footnotes omitted). This is especially so where, as

here, there is "some sort of impediment" to the other party's "effective assertion of their own rights." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 158 (6th ed. 2009); see also *Powers* v. *Ohio*, 499 U. S. 400, 410–411 (1991).

The common law has long regarded a beneficiary's representational suit as a proper "basis for a lawsuit in English or American courts." *Spokeo*, 578 U. S., at 341. When "the trustee cannot or will not" sue, a beneficiary may do so "as a temporary representative of the trust." Bogert & Bogert § 869. The common law also allows "the terms of a trust" to "confer upon others the power to enforce the trust," giving that person "standing" to "bring suit against the trustee." Restatement (Third) of Trusts § 94, Comment *d(1)*, at 7.

ERISA embraces this tradition. Sections 1132(a)(2) and (a)(3) authorize participants and beneficiaries to sue "in a representative capacity on behalf of the plan as a whole," *Russell*, 473 U. S., at 142, n. 9, so that any "recovery" arising from the action "inures to the benefit of the plan as a whole," *id.*, at 140. Perhaps for this reason, and adding to the incongruity in today's outcome, some Members of this Court have insisted that lawsuits to enforce ERISA's fiduciary duties "must" be brought "in a representative capacity." *Varity Corp.*, 516 U. S., at 516 (THOMAS, J., dissenting) (internal quotation marks omitted).

Permitting beneficiaries to enforce their plan's rights finds plenty of support in our constitutional case law. Take associational standing: An association may file suit "to redress its members' injuries, even without a showing of injury to the association itself." *Food and Commercial Workers*, 517 U. S., at 552. All Article III requires is that a member "'would otherwise have standing to sue in their own right'" and that "'the interests [the association] seeks to protect are germane to the organization's purpose.'" *Id.*, at 553. Petitioners' suit here is the other side of the same coin: The plan

would have standing to sue in its own right, and petitioners' interest is to disgorge wrongful profits and reimburse the trust for losses, thereby preserving trust assets held for their exclusive benefit.

Next-friend standing is another apt analog. Long "accepted [as a] basis for jurisdiction," this doctrine allows a party to "appear in [federal] court on behalf of detained prisoners who are unable . . . to seek relief themselves." *Whitmore* v. *Arkansas*, 495 U. S. 149, 162 (1990) (tracing the doctrine's roots to the 17th century). Here, of course, petitioners' plan cannot access the courts itself because the parties the Court thinks should file suit (the fiduciaries) are the defendants. Like a "next friend," moreover, petitioners are "dedicated to the best interests" of the party they seek to protect, *id.*, at 163, because the plan's interests are petitioners' interests.[7]

Congress was on well-established ground when it allowed pension participants and beneficiaries to sue on their retirement plan's behalf.

2

The Court's conflicting conclusion starts with inapposite cases. It invokes *Hollingsworth* v. *Perry*, 570 U. S. 693, 708 (2013), reasoning that "to claim 'the interests of others, the litigants themselves still must have suffered an injury in fact.'" *Ante*, at 543. *Perry*, a case about a California ballot initiative, is a far cry from this one. *Perry* found that "private parties" with no stake in the litigation "distinguishable from the general interest of every citizen" were not proper

[7] Other examples include guardians ad litem and, of course, trustees. *E. g.*, *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U. S. 269, 287 (2008) (noting in the Article III standing context that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit," such as when "[t]rustees bring suits to benefit their trusts"); see also *id.*, at 304–305, n. 2 (ROBERTS, C. J., dissenting) ("[T]rustees, guardians ad litem, executors, and the like make up a settled, continuous practice 'of the sort traditionally amenable to, and resolved by, the judicial process'").

representatives of the State. 570 U. S., at 707, 710. If anything, *Perry* supports petitioners here: This Court found "readily distinguishable" other representational-standing cases by underscoring their sound traditions. *Id.*, at 711 (distinguishing assignee and next-friend standing).[8] A traditional beneficiary-versus-trustee claim like petitioners' is exactly such a suit.

Next, the Court maintains that petitioners "have not been legally or contractually assigned" or "appointed" to represent the plan. *Ante*, at 543–544. Although a formal assignment or appointment suffices for standing, it is not necessary. See, *e. g.*, *Food and Commercial Workers*, 517 U. S., at 552; *Whitmore*, 495 U. S., at 162. Regardless, Congress expressly and thereby legally assigned pension-plan participants and beneficiaries the right to represent their plan, including in lawsuits where the other would-be representative is the defendant. 29 U. S. C. §§1132(a)(2), (3); see also, *e. g.*, Restatement (Third) of Trusts §94, Comment *d(1)*, at 7 (trust terms may confer standing to sue the trustee). ERISA was "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan." *Russell*, 473 U. S., at 142; see also *id.*, at 140–142, nn. 8–9.[9] Far from "'automatically'" conferring petitioners

[8] The Court cites two more cases: *Gollust* v. *Mendell*, 501 U. S. 115 (1991), and *Craig* v. *Boren*, 429 U. S. 190 (1976). But both endorsed expansive views of standing. See *Gollust*, 501 U. S., at 125–127 (allowing indirect owners of a corporation to sue under federal securities laws); *Craig*, 429 U. S., at 194–195 (holding that a plaintiff had representational standing to assert an equal protection claim on a business patron's behalf). To the extent the Court suggests that a financial loss is necessary (or that a breach of fiduciary duty is insufficient) for standing, that is incorrect. See Part II–B, *supra*.

[9] Neither *Sprint*, 554 U. S. 269, nor *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765 (2000), is to the contrary. Cf. *ante*, at 543–544. Both decisions undermine today's result. See *Sprint*, 554 U. S., at 280, 287 (noting in the Article III context that "'naked legal title'" has long permitted suit and that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit," such as when "[t]rustees bring suits to benefit

standing to sue or creating an injury from whole cloth, cf. *ante*, at 544, ERISA assigns the right to sue on the plan's unquestionably cognizable harm: here, fiduciary breaches causing wrongful gains and hundreds of millions of dollars in losses. So even under the Court's framing, it does not matter whether petitioners "sustained any monetary injury," *ante*, at 540, because their pension plan did.

To support standing, a statute may (but need not) legally designate a party to sue on another's behalf. Because ERISA does so here, petitioners should be permitted to sue for their pension plan's sake.

III

The Court also notes that "[e]ven if a defined-benefit plan is mismanaged into plan termination, the federal [Pension Benefit Guaranty Corporation] by law acts as a backstop and covers the vested pension benefits up to a certain amount and often in full." *Ante*, at 546, n. 2. The Court then suggests that the only way beneficiaries of a mismanaged plan could sue is if their benefits were not "guaranteed in full by the PBGC." *Ibid.*

Those statements underscore the problem in today's decision. Whereas ERISA and petitioners' Plan Document explicitly mandate that all plan assets be handled prudently and loyally for petitioners' exclusive benefit, the Court suggests that beneficiaries should endure disloyalty, imprudence, and plan mismanagement so long as the Federal Government is there to pick up the bill when "the plan and the employer" "fail." *Ibid.*

But the purpose of ERISA and fiduciary duties is to prevent retirement-plan failure in the first place. 29 U. S. C. § 1001. In barely more than a decade, the country (indeed the world) has experienced two unexpected financial crises

---

their trusts"); *Vermont Agency*, 529 U. S., at 774 (showing that even a partial statutory assignment grants constitutional standing to sue on another's behalf).

that have rocked the existence and stability of many employers once thought incapable of failing. ERISA deliberately provides protection regardless whether an employer is on sound financial footing one day because it may not be so stable the next. See *ibid.*[10]

The Court's references to Government insurance also overlook sobering truths about the PBGC. The Government Accountability Office recently relisted the PBGC as one of the "High Risk" Government programs most likely to become insolvent. See GAO, Report to Congressional Committees, High-Risk Series: Substantial Efforts Needed To Achieve Greater Progress on High-Risk Areas (GAO–19–157SP, 2019) (GAO High-Risk Report). Noting the insolvency of defined-benefit plans that the PBGC insures and the "significant financial risk and governance challenges that PBGC faces," the GAO High-Risk Report warns that "the retirement benefits of millions of American workers and retirees could be at risk of dramatic reductions" within four years. *Id.*, at 56–57. At last count, the PBGC's "net accumulated financial deficit" was "over $51 billion" and its "exposure to potential future losses for underfunded plans" was "nearly $185 billion." *Id.*, at 267. Notably, the GAO had issued these warnings before the current financial crisis struck. Exchanging ERISA's fiduciary duties for Government insurance would only add to the PBGC's plight and require taxpayers to bail out pension plans.

IV

It is hard to overstate the harmful consequences of the Court's conclusion. With ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Russell*, 473 U. S., at 141, n. 8. In imposing fiduciary duties and providing a private right of

[10] This also explains why a material risk of loss is not a prerequisite for standing, least of all for retirees relying on their retirement plan for income. Cf. *ante*, at 546.

action, Congress "designed" the statute "to prevent these abuses in the future." *Ibid.* Yet today's outcome encourages the very mischief ERISA meant to end.

After today's decision, about 35 million people with defined-benefit plans[11] will be vulnerable to fiduciary misconduct. The Court's reasoning allows fiduciaries to misuse pension funds so long as the employer has a strong enough balance sheet during (or, as alleged here, because of) the misbehavior. Indeed, the Court holds that the Constitution forbids retirees to remedy or prevent fiduciary breaches in federal court until their retirement plan or employer is on the brink of financial ruin. See *ante*, at 546. This is a remarkable result, and not only because this case is bookended by two financial crises. There is no denying that the Great Recession contributed to the plan's massive losses and statutory underfunding, or that the present pandemic punctuates the perils of imprudent and disloyal financial management.

Today's result also disrupts the purpose of ERISA and the trust funds it requires. Trusts have trustees and fiduciary duties to protect the assets and the beneficiaries from the vicissitudes of fortune. Fiduciary duties, especially loyalty, are potent prophylactic rules that restrain trustees "tempted to exploit [a] trust." Bogert & Bogert § 543. Congress thus recognized that one of the best ways to protect retirement plans was to codify the same fiduciary duties and beneficiary-enforcement powers that have existed for centuries. *E. g.*, 29 U. S. C. §§ 1001(b), 1109, 1132. Along those lines, courts once held fiduciaries to a higher standard: "Not honesty alone, but the punctilio of an honor the most sensitive." *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928) (Cardozo, C. J.). Not so today.

---

[11] See Dept. of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, 1975–2017 (Sept. 2019) (Table E4), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

Nor can petitioners take comfort in the so-called "regulatory phalanx" guarding defined-benefit plans from mismanagement. *Ante*, at 545. Having divested ERISA of enforceable fiduciary duties and beneficiaries of their right to sue, the Court lists "employers and their shareholders," other fiduciaries, and the "Department of Labor" as parties on whom retirees should rely. *Ibid.* But there are serious holes in the Court's proffered line of defense.

The Court's proposed solutions offer nothing in a case like this one. The employer, its shareholders, and the plan's cofiduciaries here have no reason to bring suit because they either committed or profited from the misconduct. Recall the allegations: Respondents misused a pension plan's assets to invest in their own mutual funds, pay themselves excessive fees, and swell the employer's income and stock prices. Nor is the Court's suggestion workable in the mine run of cases. The reason the Court gives for trusting employers and shareholders to look out for beneficiaries—"because the employers are entitled to the plan surplus and are often on the hook for plan shortfalls," *ibid.*—is what commentators call a conflict of interest.[12]

Neither is the Federal Government's enforcement power a palliative. "ERISA makes clear that Congress did not intend for Government enforcement powers to lessen the responsibilities of plan fiduciaries." *Central States*, 472 U. S., at 578. The Secretary of Labor, moreover, signed a brief (in support of petitioners) verifying that the Federal Government cannot "monitor every [ERISA] plan in the coun-

[12] *E. g.*, Fischel & Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. Chi. L. Rev. 1105, 1121 (1988). This conflict exists because, contrary to the Court's assertion, the employer and its shareholders are not "entitled to the plan surplus" until after the plan terminates and after all vested benefits have been paid from the trust fund's assets. Compare *ante*, at 545, with 29 U. S. C. § 1103(c)(1) (ERISA plan assets "shall never inure to the benefit of any employer" while the trust exists); see also App. 61; Record in No. 13–cv–2687 (D Minn.), Doc. 107–1, p. 75.

try." Brief for United States as *Amicus Curiae* 26. Even when the Government can sue (in a representational capacity, of course), it cannot seek all the relief that a participant or beneficiary could. Compare 29 U. S. C. § 1132(a)(2) with § 1132(a)(3). At bottom, the Court rejects ERISA's private-enforcement scheme and suggests a preference that taxpayers fund the monitoring (and perhaps the bailing out) of pension plans. See *ante*, at 545–546, and n. 2.

Finally, in justifying today's outcome, the Court discusses attorney's fees. Twice the Court underlines that attorneys have a "$31 million" "stake" in this case. *Ante*, at 541. But no one in this litigation has suggested attorney's fees as a basis for standing. As the Court appears to admit, its focus on fees is about optics, not law. See *ante*, at 541–542 (acknowledging that attorney's fees do not advance the standing inquiry).

The Court's aside about attorneys is not only misplaced, it is also mistaken. Missing from the Court's opinion is any recognition that Congress found private-enforcement suits and fiduciary duties critical to policing retirement plans; that it was after this litigation was initiated that respondents restored $311 million to the plan in compliance with statutorily required funding levels; and that counsel justified their fee request as a below-market percentage of the $311 million employer infusion that this lawsuit allegedly precipitated.

* * *

The Constitution, the common law, and the Court's cases confirm what common sense tells us: People may protect their pensions. "Courts," the majority surmises, "sometimes make standing law more complicated than it needs to be." *Ante*, at 547. Indeed. Only by overruling, ignoring, or misstating centuries of law could the Court hold that the Constitution requires beneficiaries to watch idly as their supposed fiduciaries misappropriate their pension funds. I respectfully dissent.

Syllabus

NASRALLAH *v.* BARR, ATTORNEY GENERAL

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

No. 18–1432. Argued March 2, 2020—Decided June 1, 2020

Under federal immigration law, noncitizens who commit certain crimes are removable from the United States. During removal proceedings, a noncitizen who demonstrates a likelihood of torture in the designated country of removal is entitled to relief under the international Convention Against Torture (CAT) and may not be removed to that country. If an immigration judge orders removal and denies CAT relief, the noncitizen may appeal both orders to the Board of Immigration Appeals and then to a federal court of appeals. But if the noncitizen has committed any crime specified in 8 U. S. C. § 1252(a)(2)(C), the scope of judicial review of the removal order is limited to constitutional and legal challenges. See § 1252(a)(2)(D).

The Government sought to remove petitioner Nidal Khalid Nasrallah after he pled guilty to receiving stolen property. Nasrallah applied for CAT relief to prevent his removal to Lebanon. The Immigration Judge ordered Nasrallah removed and granted CAT relief. On appeal, the Board of Immigration Appeals vacated the CAT relief order and ordered Nasrallah removed to Lebanon. The Eleventh Circuit declined to review Nasrallah's factual challenges to the CAT order because Nasrallah had committed a § 1252(a)(2)(C) crime and Circuit precedent precluded judicial review of factual challenges to both the final order of removal and the CAT order in such cases.

Held: Sections 1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order. Pp. 579–587.

(a) Three interlocking statutes establish that CAT orders may be reviewed together with final orders of removal in a court of appeals. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorizes noncitizens to obtain direct "review of a final order of removal" in a court of appeals, § 1252(a)(1), and requires that all challenges arising from the removal proceeding be consolidated for review, § 1252(b)(9). The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) implements Article 3 of CAT and provides for judicial review of CAT claims "as part of the review of a final order of removal." § 2242(d). And the REAL ID Act of 2005 clarifies that final orders of removal and CAT orders may be reviewed only in the courts of appeals. §§ 1252(a)(4)–(5). Pp. 579–581.

(b) Sections 1252(a)(2)(C) and (D) preclude judicial review of factual challenges only to final orders of removal. A CAT order is not a final "order of removal," which in this context is defined as an order "concluding that the alien is deportable or ordering deportation," § 1101(a)(47)(A). Nor does a CAT order merge into a final order of removal, because a CAT order does not affect the validity of a final order of removal. See *INS* v. *Chadha*, 462 U. S. 919, 938. FARRA provides that a CAT order is reviewable "as part of the review of a final order of removal," not that it is the same as, or affects the validity of, a final order of removal. Had Congress wished to preclude judicial review of factual challenges to CAT orders, it could have easily done so. Pp. 581–583.

(c) The standard of review for factual challenges to CAT orders is substantial evidence—*i. e.*, the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." § 1252(b)(4)(B).

The Government insists that the statute supplies no judicial review of factual challenges to CAT orders, but its arguments are unpersuasive. First, the holding in *Foti* v. *INS*, 375 U. S. 217, depends on an outdated interpretation of "final orders of deportation" and so does not control here. Second, the Government argues that § 1252(a)(1) supplies judicial review only of final orders of removal, and if a CAT order is not merged into that final order, then no statute authorizes review of the CAT claim. But both FARRA and the REAL ID Act provide for direct review of CAT orders in the courts of appeals. Third, the Government's assertion that Congress would not bar review of factual challenges to a removal order and allow such challenges to a CAT order ignores the importance of adherence to the statutory text as well as the good reason Congress had for distinguishing the two—the facts that rendered the noncitizen removable are often not in serious dispute, while the issues related to a CAT order will not typically have been litigated prior to the alien's removal proceedings. Fourth, the Government's policy argument—that judicial review of the factual components of a CAT order would unduly delay removal proceedings—has not been borne out in practice in those Circuits that have allowed factual challenges to CAT orders. Fifth, the Government fears that a decision allowing factual review of CAT orders would lead to factual challenges to other orders in the courts of appeals. But orders denying discretionary relief under § 1252(a)(2)(B) are not affected by this decision, and the question whether factual challenges to statutory withholding orders under § 1231(b)(3)(A) are subject to judicial review is not presented here. Pp. 583–587.

762 Fed. Appx. 638, reversed.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 587.

Paul W. Hughes argued the cause for petitioner. With him on the briefs were *Michael B. Kimberly*, *Andrew A. Lyons-Berg*, *Helen L. Parsonage*, *Eugene R. Fidell*, *Andrew J. Pincus*, *Charles A. Rothfeld*, and *Brian Wolfman*.

Matthew Guarnieri 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 *Andrew C. MacLachlan*.*

JUSTICE KAVANAUGH delivered the opinion of the Court.

Under federal immigration law, noncitizens who commit certain crimes are removable from the United States. During removal proceedings, a noncitizen may raise claims under the international Convention Against Torture, known as CAT. If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country (although he still may be removed to other countries).

If the immigration judge orders removal and denies CAT relief, the noncitizen may appeal to the Board of Immigration Appeals. If the Board of Immigration Appeals orders removal and denies CAT relief, the noncitizen may obtain judicial review in a federal court of appeals of both the final order of removal and the CAT order.

---

*Briefs of *amici curiae* urging reversal were filed for Former Executive Office of Immigration Review Judges by *Richard W. Mark* and *Amer S. Ahmed*; for Law Professors by *Holly L. Henderson-Fisher* and *David E. Carney*; and for Legal Service Providers by *Charles G. Roth*, *Aaron Karl Block*, and *Cassandra Kerkhoff Johnson*.

In the court of appeals, for cases involving noncitizens who have committed any crime specified in 8 U. S. C. § 1252(a)(2)(C), federal law limits the scope of judicial review. Those noncitizens may obtain judicial review of constitutional and legal challenges to the final order of removal, but not of factual challenges to the final order of removal.

Everyone agrees on all of the above. The dispute here concerns the scope of judicial review of CAT orders for those noncitizens who have committed crimes specified in § 1252(a)(2)(C). The Government argues that judicial review of a CAT order is analogous to judicial review of a final order of removal. The Government contends, in other words, that the court of appeals may review the noncitizen's constitutional and legal challenges to a CAT order, but not the noncitizen's factual challenges to the CAT order. Nasrallah responds that the court of appeals may review the noncitizen's constitutional, legal, *and* factual challenges to the CAT order, although Nasrallah acknowledges that judicial review of factual challenges to CAT orders must be highly deferential.

So the narrow question before the Court is whether, in a case involving a noncitizen who committed a crime specified in § 1252(a)(2)(C), the court of appeals should review the noncitizen's factual challenges to the CAT order (i) not at all or (ii) deferentially. Based on the text of the statute, we conclude that the court of appeals should review factual challenges to the CAT order deferentially. We therefore reverse the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

I

Nidal Khalid Nasrallah is a native and citizen of Lebanon. In 2006, when he was 17 years old, Nasrallah came to the United States on a tourist visa. In 2007, he became a lawful permanent resident. In 2013, Nasrallah pled guilty to two counts of receiving stolen property. The U. S. District

Court for the Western District of North Carolina sentenced Nasrallah to 364 days in prison.

Based on Nasrallah's conviction, the Government initiated deportation proceedings. See 8 U. S. C. § 1227(a)(2)(A)(i). In those proceedings, Nasrallah applied for CAT relief to prevent his removal to Lebanon. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 114. Nasrallah alleged that he was a member of the Druze religion, and that he had been tortured by Hezbollah before he came to the United States. Nasrallah argued that he would be tortured again if returned to Lebanon.[1]

The Immigration Judge determined that Nasrallah was removable. As to the CAT claim, the Immigration Judge found that Nasrallah had previously suffered torture at the hands of Hezbollah. Based on Nasrallah's past experience and the current political conditions in Lebanon, the Immigration Judge concluded that Nasrallah likely would be tortured again if returned to Lebanon. The Immigration Judge ordered Nasrallah removed, but also granted CAT relief and thereby blocked Nasrallah's removal to Lebanon.

On appeal, the Board of Immigration Appeals disagreed that Nasrallah likely would be tortured in Lebanon. The Board therefore vacated the order granting CAT relief and ordered Nasrallah removed to Lebanon.

Nasrallah filed a petition for review in the U. S. Court of Appeals for the Eleventh Circuit, claiming (among other things) that the Board of Immigration Appeals erred in finding that he would not likely be tortured in Lebanon. Nasrallah raised factual challenges to the Board's CAT order. Applying Circuit precedent, the Eleventh Circuit declined to

---

[1] To qualify as torture, actions must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 CFR § 1208.18(a)(1) (2019).

review Nasrallah's factual challenges. *Nasrallah* v. *United States Attorney General*, 762 Fed. Appx. 638 (2019). The court explained that Nasrallah had been convicted of a crime specified in 8 U. S. C. § 1252(a)(2)(C). Noncitizens convicted of § 1252(a)(2)(C) crimes may not obtain judicial review of factual challenges to a "final order of removal." §§ 1252(a)(2)(C)–(D). Under Eleventh Circuit precedent, that statute also precludes judicial review of factual challenges to the CAT order.[2]

Nasrallah contends that the Eleventh Circuit should have reviewed his factual challenges to the CAT order because the statute bars review only of factual challenges to a "final order of removal." According to Nasrallah, a CAT order is not a "final order of removal" and does not affect the validity of a final order of removal. Therefore, Nasrallah argues, the statute by its terms does not bar judicial review of factual challenges to a CAT order.

The Courts of Appeals are divided over whether §§ 1252(a)(2)(C) and (D) preclude judicial review of factual challenges to a CAT order. Most Courts of Appeals have sided with the Government; the Seventh and Ninth Circuits have gone the other way. Compare *Gourdet* v. *Holder*, 587 F. 3d 1, 5 (CA1 2009); *Ortiz-Franco* v. *Holder*, 782 F. 3d 81, 88 (CA2 2015); *Pieschacon-Villegas* v. *Attorney General of U. S.*, 671 F. 3d 303, 309–310 (CA3 2011); *Oxygene* v. *Lynch*, 813 F. 3d 541, 545 (CA4 2016); *Escudero-Arciniega* v. *Holder*, 702 F. 3d 781, 785 (CA5 2012); *Tran* v. *Gonzales*, 447 F. 3d 937, 943 (CA6 2006); *Lovan* v. *Holder*, 574 F. 3d 990, 998 (CA8 2009); *Cole* v. *United States Attorney General*, 712 F. 3d 517, 532 (CA11 2013), with *Wanjiru* v. *Holder*, 705 F. 3d 258, 264 (CA7 2013); *Vinh Tan Nguyen* v. *Holder*, 763 F. 3d 1022, 1029 (CA9 2014).

---

[2] This opinion uses the term "noncitizen" as equivalent to the statutory term "alien." See 8 U. S. C. § 1101(a)(3).

In light of the Circuit split on this important question of federal law, we granted certiorari. 589 U. S. 1030 (2019).[3]

II

When a noncitizen is removable because he committed a crime specified in § 1252(a)(2)(C), immigration law bars judicial review of the noncitizen's factual challenges to his final order of removal. In the Government's view, the law also bars judicial review of the noncitizen's factual challenges to a CAT order. Nasrallah disagrees. We conclude that Nasrallah has the better of the statutory argument.

A

We begin by describing the three interlocking statutes that provide for judicial review of final orders of removal and CAT orders.

The first relevant statute is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That Act authorizes noncitizens to obtain direct "review of a final order of removal" in a court of appeals. 110 Stat. 3009–607, 8 U. S. C. § 1252(a)(1). As the parties agree, in the deportation context, a "final order of removal" is a final order "concluding that the alien is deportable or ordering deportation." § 1101(a)(47)(A); see § 309(d)(2), 110 Stat. 3009–627; *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001). The Act also states that judicial review "of all questions of law and

[3] This case comes to us on the premise that Nasrallah committed a crime specified in § 1252(a)(2)(C). That said, courts are divided on the question whether §§ 1252(a)(2)(C)–(D)'s limitation on judicial review applies when a noncitizen has committed only a single crime of moral turpitude. But that issue is not the question presented in this Court, and we do not address it. Compare *Keungne* v. *United States Attorney General*, 561 F. 3d 1281, 1283 (CA11 2009), with *Yeremin* v. *Holder*, 738 F. 3d 708, 713 (CA6 2013); *Wanjiru* v. *Holder*, 705 F. 3d 258, 262–263 (CA7 2013); *Lee* v. *Gonzales*, 410 F. 3d 778, 781–782 (CA5 2005).

fact . . . arising from any action taken or proceeding brought 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." 8 U. S. C. § 1252(b)(9); see 110 Stat. 3009–610. In other words, a noncitizen's various challenges arising from the removal proceeding must be "consolidated in a petition for review and considered by the courts of appeals." *INS* v. *St. Cyr*, 533 U. S. 289, 313, and n. 37 (2001). By consolidating the issues arising from a final order of removal, eliminating review in the district courts, and supplying direct review in the courts of appeals, the Act expedites judicial review of final orders of removal.

The second relevant statute is the Foreign Affairs Reform and Restructuring Act of 1998, known as FARRA. FARRA implements Article 3 of the international Convention Against Torture, known as CAT. As relevant here, CAT prohibits removal of a noncitizen to a country where the noncitizen likely would be tortured. Importantly for present purposes, § 2242(d) of FARRA provides for judicial review of CAT claims "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U. S. C. 1252)." 112 Stat. 2681–822, note following 8 U. S. C. § 1231.

The third relevant statute is the REAL ID Act of 2005. As relevant here, that Act responded to this Court's 2001 decision in *St. Cyr*. In *St. Cyr*, this Court ruled that the 1996 Act, although purporting to eliminate district court review of final orders of removal, did not eliminate district court review *via habeas corpus* of constitutional or legal challenges to final orders of removal. 533 U. S., at 312–313. The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals. See 119 Stat. 310, 8 U. S. C. § 1252(a)(5). The REAL ID Act also provided that CAT orders likewise may not be reviewed in district courts, even via habeas corpus, and may be reviewed

only in the courts of appeals. See 119 Stat. 310, 8 U. S. C. § 1252(a)(4).

B

Those three Acts establish that CAT orders may be reviewed together with final orders of removal in a court of appeals. But judicial review of final orders of removal is somewhat limited in cases (such as Nasrallah's) involving noncitizens convicted of crimes specified in § 1252(a)(2)(C). In those cases, a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal. §§ 1252(a)(2)(C)–(D); see *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221, 234–236 (2020).

The question in this case is the following: By precluding judicial review of factual challenges to final orders of removal, does the law also preclude judicial review of factual challenges to CAT orders? We conclude that it does not.

The relevant statutory text precludes judicial review of factual challenges to final orders of removal—and only to final orders of removal. In the deportation context, a final "order of removal" is a final order "concluding that the alien is deportable or ordering deportation." § 1101(a)(47)(A).[4]

---

[4] Title 8 U. S. C. § 1252(a)(2)(C) provides:

"Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), *no court shall have jurisdiction to review any final order of removal* against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title." (Emphasis added.)

Section 1252(a)(2)(D) provides:

"Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review,

A CAT order is not itself a final order of removal because it is not an order "concluding that the alien is deportable or ordering deportation." As the Government acknowledges, a CAT order does not disturb the final order of removal. Brief for Respondent 26. An order granting CAT relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country. But the noncitizen still "may be removed at any time to another country where he or she is not likely to be tortured." 8 CFR §§ 1208.17(b)(2), 1208.16(f).

Even though CAT orders are not *the same* as final orders of removal, a question remains: Do CAT orders merge into final orders of removal in the same way as, say, an immigration judge's evidentiary rulings merge into final orders of removal? The answer is no. For purposes of this statute, final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal. As this Court phrased it in *INS* v. *Chadha*, review of a final order of removal "includes all matters on which the validity of the final order is contingent." 462 U. S. 919, 938 (1983) (internal quotation marks omitted). The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review. But the immigration judge's or the Board's ruling on a CAT claim does not affect the validity of the final order of removal and therefore does not merge into the final order of removal.

To be sure, as noted above, FARRA provides that a CAT order is reviewable "as part of the review of a final order of removal" under 8 U. S. C. § 1252. § 2242(d), 112 Stat. 2681–822; see also 8 U. S. C. § 1252(a)(4). Likewise, § 1252(b)(9) provides that "[j]udicial review of all questions of law and

---

shall be construed as precluding review of *constitutional claims or questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." (Emphasis added.)

fact . . . arising from any action taken or proceeding brought 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). But FARRA and § 1252(b)(9) simply establish that a CAT order may be reviewed together with the final order of removal, not that a CAT order is the same as, or affects the validity of, a final order of removal.

Consider an analogy. Suppose a statute furnishes appellate review of convictions and sentences in a single appellate proceeding. Suppose that the statute also precludes appellate review of certain factual challenges to the sentence. Would that statute bar appellate review of factual challenges to the conviction, just because the conviction and sentence are reviewed together? No. The same is true here. A CAT order may be reviewed together with the final order of removal. But a CAT order is distinct from a final order of removal and does not affect the validity of the final order of removal. The CAT order therefore does not merge into the final order of removal for purposes of §§ 1252(a)(2)(C)–(D)'s limitation on the scope of judicial review. In short, as a matter of straightforward statutory interpretation, Congress's decision to bar judicial review of factual challenges to final orders of removal does not bar judicial review of factual challenges to CAT orders.

It would be easy enough for Congress to preclude judicial review of factual challenges to CAT orders, just as Congress has precluded judicial review of factual challenges to certain final orders of removal. But Congress has not done so, and it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President.

C

Although a noncitizen may obtain judicial review of factual challenges to CAT orders, that review is highly deferential, as Nasrallah acknowledges. See Reply Brief 19–20; Tr. of

Oral Arg. 5. The standard of review is the substantial-evidence standard: The agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." § 1252(b)(4)(B); see *Kenyeres* v. *Ashcroft*, 538 U. S. 1301, 1306 (2003) (Kennedy, J., in chambers); *INS* v. *Elias-Zacarias*, 502 U. S. 478, 481, n. 1, 483–484 (1992).

But the Government still insists that the statute supplies no judicial review of factual challenges to CAT orders. The Government advances a slew of arguments, but none persuades us.

First, the Government raises an argument based on precedent. In *Foti* v. *INS*, 375 U. S. 217 (1963), this Court interpreted the statutory term "final orders of deportation" in the Immigration and Nationality Act of 1952, as amended in 1961, to encompass "all determinations made during and incident to the administrative proceeding" on removability. *Id.*, at 229. The Government points out (correctly) that the *Foti* definition of a final order—if it still applied here—would cover CAT orders and therefore would bar judicial review of factual challenges to CAT orders. But *Foti*'s interpretation of the INA as it existed as of 1963 no longer applies. Since 1996, the INA has defined final "order of deportation" more narrowly than this Court interpreted the term in *Foti*. A final order of deportation is now defined as a final order "concluding that the alien is deportable or ordering deportation." 8 U. S. C. § 1101(a)(47)(A); Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1277; see § 309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–627. And as we have explained, an order denying CAT relief does not fall within the statutory definition of an "order of deportation" because it is not an order "concluding that the alien is deportable or ordering deportation." Therefore, *Foti* does not control here.

Second, the Government puts forward a structural argument. As the Government sees it, if a CAT order is not

merged into a final order of removal, then no statute would authorize a court of appeals to review a CAT order in the first place. That is because, in the Government's view, the only statute that supplies judicial review of CAT claims is the statute that provides for judicial review of final orders of removal. See § 1252(a)(1). The premise of that argument is incorrect. Section 2242(d) of FARRA, enacted in 1998, expressly provides for judicial review of CAT claims together with the review of final orders of removal. Moreover, as a result of the 2005 REAL ID Act, § 1252(a)(4) now provides for direct review of CAT orders in the courts of appeals. See also 8 U. S. C. § 1252(b)(9). In short, our decision does not affect the authority of the courts of appeals to review CAT orders.

Third, the Government asserts a congressional intent argument: Why would Congress bar review of factual challenges to a removal order, but allow factual challenges to a CAT order? To begin with, we must adhere to the statutory text, which differentiates between the two kinds of orders for those purposes. In any event, Congress had good reason to distinguish the two. For noncitizens who have committed crimes that subject them to removal, the facts that rendered the noncitizen removable are often not in serious dispute. The relevant facts will usually just be the existence of the noncitizen's prior criminal convictions. By barring review of factual challenges to final orders of removal, Congress prevented further relitigation of the underlying factual bases for those criminal convictions—a point that Senator Abraham, a key proponent of the statutory bar to judicial review, stressed back in 1996. See 142 Cong. Rec. 7348–7350 (1996).

By contrast, the issues related to a CAT order will not typically have been litigated prior to the alien's removal proceedings. Those factual issues may range from the noncitizen's past experiences in the designated country of removal, to the noncitizen's credibility, to the political or other current conditions in that country. Because the factual components

of CAT orders will not previously have been litigated in court and because those factual issues may be critical to determining whether the noncitizen is likely to be tortured if returned, it makes some sense that Congress would provide an opportunity for judicial review, albeit deferential judicial review, of the factual components of a CAT order.

Fourth, the Government advances a policy argument—that judicial review of the factual components of a CAT order would unduly delay removal proceedings. But today's decision does not affect *whether* the noncitizen is entitled to judicial review of a CAT order and does not add a new layer of judicial review. All agree that a noncitizen facing removal under these provisions may already seek judicial review in a court of appeals of constitutional and legal claims relating to both the final order of removal and the CAT order. Our holding today means only that, in that same case in the court of appeals, the court may also review the noncitizen's factual challenges to the CAT order under the deferential substantial-evidence standard. For many years, the Seventh and Ninth Circuits have allowed factual challenges to CAT orders, and the Government has not informed this Court of any significant problems stemming from review in those Circuits.

Fifth, what about the slippery slope? If factual challenges to CAT orders may be reviewed, what other orders will now be subject to factual challenges in the courts of appeals? Importantly, another jurisdiction-stripping provision, § 1252(a)(2)(B), states that a noncitizen may not bring a factual challenge to orders denying discretionary relief, including cancellation of removal, voluntary departure, adjustment of status, certain inadmissibility waivers, and other determinations "made discretionary by statute." *Kucana* v. *Holder*, 558 U. S. 233, 248 (2010). Our decision today therefore has no effect on judicial review of those discretionary determinations.[5]

[5] In *expedited* removal proceedings, the immigration laws do not provide for any judicial review of CAT claims. See 8 U. S. C. §§ 1225(b)(1)(B)(iii), 1252(a)(2)(A), and 1252(e). Our ruling today does not affect that law.

The Government suggests that our decision here might lead to judicial review of factual challenges to statutory withholding orders. A statutory withholding order prevents the removal of a noncitizen to a country where the noncitizen's "life or freedom would be threatened" because of the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion." 8 U. S. C. § 1231(b)(3)(A). That question is not presented in this case, and we therefore leave its resolution for another day.

* * *

In cases where a noncitizen has committed a crime specified in 8 U. S. C. § 1252(a)(2)(C), §§ 1252(a)(2)(C) and (D) preclude judicial review of the noncitizen's factual challenges to a final order of removal. A CAT order is distinct from a final order of removal and does not affect the validity of a final order of removal. Therefore, §§ 1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order. We reverse the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The majority holds that the federal courts of appeals have jurisdiction to review factual challenges to orders resolving claims brought under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Because I disagree with this interpretation of the relevant immigration laws, I respectfully dissent.

I

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or Convention) is an international human rights treaty that, as its

name implies, obligates signatories to work to eradicate torture. The Convention was sent to the Senate for its advice and consent in 1990. Although the Senate ultimately ratified the treaty, it also determined that the first 16 articles of the Convention were not self-executing. See S. Exec. Rep. No. 101–30, p. 31 (1990). As such, those articles required implementing legislation before their obligations could become effective as domestic law. See *Medellín* v. *Texas*, 552 U. S. 491, 505, n. 2 (2008).

After the treaty was ratified, Congress enacted legislation implementing Article III of the Convention by means of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). See § 2242, 112 Stat. 2681–822, note following 8 U. S. C. § 1231. Article III of the Convention prohibits its signatories from "expel[ling], return[ing] or extradit[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 114. Rather than providing detailed guidance on the United States' Article III obligations, FARRA merely restated the treaty's language and perfunctorily declared that "the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3." § 2242(b).[1] Congress also provided that no court would have "jurisdiction to consider or review claims raised under the Convention . . . except as part of the review of a final order of removal pursuant to . . . (8 U. S. C. § 1252)." § 2242(d).

[1] In spite of the weighty interests in not returning aliens to countries where they would likely be tortured or killed, Congress largely left the relevant issues—most notably, the interaction between CAT and removal orders—to be resolved by agency regulations. See *ante*, at 582–583. These important questions also include the definition of torture, 8 CFR § 1208.18 (2020); available forms of relief, §§ 1208.16(c), 1208.17; and the standards that immigration judges should use to decide whether an applicant has carried his burden, § 1208.16(c).

Section 1252, in turn, grants federal courts of appeals jurisdiction to review final orders of removal. 8 U. S. C. § 1252(a)(1). It also specifies that "the sole and exclusive means for judicial review of an order of removal" is through "a petition for review filed . . . in accordance with this section." § 1252(a)(5). Section 1252 also contains a "zipper clause," which states that "all questions of law or fact . . . arising from any action taken or proceeding brought to remove an alien" shall be consolidated and "available only in judicial review of a final order under this section." § 1252(b)(9).

At the same time, petitions for review are subject to a number of limitations, one of which is in § 1252(a)(2)(C). That provision—often referred to as the "criminal-alien bar"—states that "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 offenses.

II

A

This case concerns whether CAT claims brought during a criminal alien's removal proceeding are covered by the criminal-alien bar in § 1252(a)(2)(C). The most important provision for determining whether these CAT orders are subject to § 1252(a)(2)(C) is the zipper clause. If orders deeming a criminal alien ineligible for CAT relief fall within that clause, then the bar in § 1252(a)(2)(C) prevents review; if they do not, then the courts have jurisdiction to review factual challenges related to these orders. I would conclude that CAT orders fall within the zipper clause.

The zipper clause states that "all questions of law and fact . . . *arising from* any action taken or proceeding brought to remove an alien . . . shall be available *only* in judicial review of a final order under this section." § 1252(b)(9) (emphasis added). To "arise" means "to originate from a specified

source" or "to come into being." Webster's Third New International Dictionary 117 (1976). And "from" most naturally refers here to the "ground, reason, or basis" for something. *Id.*, at 913. Thus, § 1252(b)(9) covers all "questions of law and fact" that an immigration judge must decide as a result of the Government's decision to initiate removal proceedings against an alien. See also *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 482 (1999) (stating that the zipper clause applies to the "many . . . decisions or actions that may be part of the [removal] process").[2]

The plain text clearly covers CAT claims such as the one petitioner raised. The Government initiated removal proceedings, alleging that petitioner had been convicted of a "crime involving moral turpitude." See § 1227(a)(2)(A)(i). As a direct result, petitioner applied for CAT relief to prevent his removal. He was denied CAT withholding because the Immigration Judge, during the removal proceeding, determined that petitioner had been convicted of a "particularly serious crime." § 1158(b)(2)(A)(ii). On appeal, the Board of Immigration Appeals likewise denied CAT deferral in that selfsame removal proceeding. It is beyond dispute that petitioner's eligibility for CAT relief involved "questions of law and fact" that directly "ar[ose] from" the Government's initiation of removal proceedings against him. § 1252(b)(9). The very forms of relief for which petitioner applied—withholding of removal and deferral of removal—confirm that this relief arose directly from the Government-initiated removal proceeding.

Because the CAT claim falls within the zipper clause, all of § 1252's other limitations and procedural requirements imposed on final orders of removal, including § 1252(a)(2)(C)'s

[2] As I have previously explained, the zipper clause is actually far broader, covering all claims "related to" removal proceedings. *Jennings* v. *Rodriguez*, 583 U. S. 281, 316 (2018) (opinion concurring in part and concurring in judgment).

criminal-alien bar, also apply. Accordingly, courts have no jurisdiction to review factual challenges to CAT claims brought in the course of a criminal alien's removal proceeding.

B

My analysis would begin and end with the plain meaning of the zipper clause. Rather than focusing on that clause, however, the majority bases its textual analysis almost exclusively on the fact that Congress has defined an "'order of [removal]'" as an order "concluding that the alien is deportable or ordering deportation." § 1101(a)(47)(A). The majority correctly notes that a CAT order does not fall within this definition. See *ante*, at 582. But it uses that definition to alter the scope of the zipper clause, asserting that the provision only consolidates "[t]he rulings that affect the validity of the final order of removal." *Ibid.*

As just explained, this conclusion contradicts the statute's plain text. The zipper clause does not consolidate all questions of law and fact that "affect the validity of the final order of removal." *Ibid.* It instead consolidates "all questions of law and fact . . . *arising from* any action taken or proceeding brought to remove an alien." § 1252(b)(9) (emphasis added). "Arising from" covers a broader category of claims than those that simply impact the validity of the order, including petitioner's claim. Thus, the majority's overreliance on the definition of final order of removal is misplaced.

The majority nevertheless contends that its reading is supported by § 1252(a)(4). That provision states that CAT claims may be reviewed through a petition for review. According to the majority, this paragraph "provides for direct review of CAT orders in the courts of appeals." *Ante*, at 585. That is, the majority views § 1252(a)(4) as a specific grant of jurisdiction over CAT claims. Working from that interpretation, the majority contends that the zipper clause and FARRA merely confirm that CAT orders "may be reviewed together with the final order of removal." *Ante*, at 583.

This is incorrect. Jurisdiction over CAT claims comes from FARRA § 2242(d), which states that courts cannot review CAT claims "*except* as part of the review of a final order of removal pursuant to . . . (8 U. S. C. § 1252)." In other words, a final order of removal is required if a court is to review a CAT order at all. The CAT order then becomes reviewable "as part of" that final order of removal through the zipper clause. And, because FARRA funnels exclusive review of CAT orders through § 1252, all of that section's limitations on final orders of removal apply equally to CAT orders, including § 1252(a)(2)(C).

Section 1252(a)(4), on the other hand, serves a far simpler function. That provision simply confirms that, because CAT claims can be reviewed only as part of a final order of removal, and final orders of removal can be reviewed only if a petitioner files a petition for review, a CAT claim likewise can be reviewed only if petitioner files a petition for review. See *Ortiz-Franco* v. *Holder*, 782 F. 3d 81, 88–89 (CA2 2015); *Lovan* v. *Holder*, 574 F. 3d 990, 998 (CA8 2009). My reading of the statute makes sense of § 1252(a)(4), while still giving the zipper clause its ordinary meaning.[3]

C

The majority's interpretation will bring about a sea change in immigration law. Though today's case involves CAT claims, there is good reason to think that the majority's rule will apply equally to statutory withholding of removal. Statutory withholding, a frequently sought form of relief, is available if "the alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

[3] Reading § 1252(a)(4) as a grant of jurisdiction would also require reading § 1252(a)(5), which contains very similar language to § 1252(a)(4), as a grant of jurisdiction over "order[s] of removal." But that interpretation would render § 1252(a)(5) superfluous, since § 1252(a)(1) already grants jurisdiction over such orders.

§ 1231(b)(3)(A); see also 8 CFR § 208.16(b) (2020). Like CAT withholding, statutory withholding is unavailable to aliens who have committed certain crimes. § 1231(b)(3)(B)(ii). And like CAT relief, statutory withholding seeks to prevent removability and is considered after the alien has been deemed removable. See, *e. g.*, *Kouambo* v. *Barr*, 943 F. 3d 205, 210 (CA4 2019). Thus, statutory withholding claims also do not affect the validity of the underlying removal order and, in the majority's view, would not be subject to § 1252(a)(2)(C).

The Government persuasively argues that adopting petitioner's rule will disturb the courts of appeals' longstanding practice of subjecting criminal aliens' statutory withholding claims to § 1252(a)(2)(C). See, *e. g.*, *Rendon* v. *Barr*, 952 F. 3d 963, 970 (CA8 2020); *Pierre-Paul* v. *Barr*, 930 F. 3d 684, 693–694 (CA5 2019); *Gutierrez* v. *Lynch*, 834 F. 3d 800, 804 (CA7 2016); *Jeune* v. *United States Atty. Gen.*, 810 F. 3d 792, 806, nn. 3, 12 (CA11 2016); *Pechenkov* v. *Holder*, 705 F. 3d 444, 448 (CA9 2012). And at oral argument, petitioner all but conceded that the Government is correct on that score. See Tr. of Oral Arg. 20–21. Whistling past the graveyard, the majority attempts to avoid confronting this result by simply stating that the question is not currently before us. *Ante*, at 587. But the Court cannot evade the implications of its decision so easily. We have been presented with two competing statutory interpretations—one of which makes sense of all relevant provisions without upending settled practice, and one of which significantly undermines § 1252(a)(2)(C) by removing a vast swath of claims from its reach. If the majority insists on choosing the latter interpretation, it should justify that choice and candidly confront its implications.

III

At bottom, petitioner's argument is largely driven by policy considerations. He contends that the United States has obligated itself not to return any alien, even a criminal alien,

to a country where he may be tortured or killed. According to petitioner, if CAT claims cannot be reviewed by courts of appeals, then a vital check on erroneous refoulement will be lost. Petitioner's arguments are not without rhetorical and emotional force. But, like so many other questions related to CAT obligations, Congress chose not to address them through the legislation involved here.

What Congress has done is enact § 1252(a)(2)(C), which strips jurisdiction over certain claims of criminal aliens. That is what is before us, not the broader policy considerations. As has been the case for decades now, the decisions of this Court continue to systematically chip away at this statute and other jurisdictional limitations on immigration claims, thus thwarting Congress' intent. See *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221, 236–237 (2020) (THOMAS, J., dissenting); *INS* v. *St. Cyr*, 533 U. S. 289, 328–330 (2001) (Scalia, J., dissenting). Because today's erroneous result further weakens a duly enacted statute, I respectfully dissent.

Syllabus

LOMAX *v.* ORTIZ-MARQUEZ ET AL.

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

No. 18–8369. Argued February 26, 2020—Decided June 8, 2020

The Prison Litigation Reform Act of 1995 (PLRA) established what has become known as the three-strikes rule, which generally prevents a prisoner from bringing suit *in forma pauperis* (IFP) if he has had three or more prior suits "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U. S. C. § 1915(g).

Petitioner Arthur Lomax, an inmate in a Colorado prison, filed this suit against respondent prison officials to challenge his expulsion from the facility's sex-offender treatment program. He also moved for IFP status, but he had already brought three unsuccessful legal actions during his time in prison. If the dispositions of those cases qualify as strikes under Section 1915(g), Lomax may not now proceed IFP. The courts below concluded that they did, rejecting Lomax's argument that two of the dismissals should not count as strikes because they were without prejudice.

Held: Section 1915(g)'s three-strikes provision refers to any dismissal for failure to state a claim, whether with prejudice or without.

This case begins, and pretty much ends, with Section 1915(g)'s text. The provision's broad language covers all dismissals for failure to state a claim, whether issued with or without prejudice to a plaintiff's ability to reassert his claim in a later action. A strike-call under Section 1915(g) thus hinges exclusively on the basis for the dismissal, regardless of the decision's prejudicial effect. To reach the opposite result would require reading the word "dismissed" in Section 1915(g) as "dismissed with prejudice." Doing so would also introduce inconsistencies into the PLRA, which has three other provisions mentioning "dismiss[als]" for "fail[ure] to state a claim." §§ 1915(e)(2)(B)(ii), 1915A(b); 42 U. S. C. § 1997e(c). As the parties agree, those provisions do not deprive courts of the ability to dismiss suits without prejudice.

Lomax nonetheless maintains that Section 1915(g)'s phrase "dismissed [for] fail[ure] to state a claim" is a "legal term of art" referring only to dismissals with prejudice. To support this view, he points to Federal Rule of Civil Procedure 41(b), which tells courts to treat a dismissal "as an adjudication on the merits"—meaning a dismissal with prejudice—where the dismissal order does not specify. But Rule 41(b) is necessary

precisely because "dismissed for failure to state a claim" refers to dismissals both with and without prejudice. The existence of the rule thus undercuts Lomax's position.

Lomax also argues that the Court should interpret the phrase "failure to state a claim" based on the other two grounds for dismissal listed in Section 1915(g). But contra Lomax's view, courts can and sometimes do dismiss at least frivolous actions without prejudice. Still more fundamentally, interpreting the phrase "failure to state a claim" based on the pre-existing terms "frivolous" and "malicious" would defeat the PLRA's expansion of the statute beyond what was already there. Pp. 599–603.

754 Fed. Appx. 756, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, GORSUCH, and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined as to all but footnote 4.

Brian T. Burgess argued the cause for petitioner. With him on the briefs was *Eric D. Lawson*.

Eric R. Olson, Solicitor General of Colorado, argued the cause for respondents. With him on the brief were *Philip J. Weiser*, Attorney General of Colorado, *Nicole Gellar*, First Assistant Attorney General, *Grant T. Sullivan*, Assistant Solicitor General, and *Josh Urquhart*, *Alexa D. Jones*, and *Daniel J. De Cecco*, Assistant Attorneys General.

Deputy Attorney General Rosen argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Colleen E. Roh Sinzdak*, *Barbara L. Herwig*, and *Caroline D. Lopez*.*

---

*A brief of *amicus curiae* urging reversal was filed for the National Association of Criminal Defense Lawyers by *Anthony F. Shelley*, *Dawn E. Murphy-Johnson*, and *Barbara E. Bergman*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Oramel H. Skinner*, Solicitor General, *Drew C. Ensign*, Deputy Solicitor General, and *Robert J. Makar*, Assistant Attorney General, by *William Tong*, Attorney General of Connecticut, *Clare E. Kindall*, Solicitor General, and *James Donohue*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Ala-

JUSTICE KAGAN delivered the opinion of the Court.†

To help staunch a "flood of nonmeritorious" prisoner litigation, the Prison Litigation Reform Act of 1995 (PLRA) established what has become known as the three-strikes rule. *Jones* v. *Bock*, 549 U. S. 199, 203 (2007). That rule generally prevents a prisoner from bringing suit *in forma pauperis* (IFP)—that is, without first paying the filing fee—if he has had three or more prior suits "dismissed on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." 28 U. S. C. § 1915(g). Today we address whether a suit dismissed for failure to state a claim counts as a strike when the dismissal was without prejudice. We conclude that it does: The text of Section 1915(g)'s three-strikes provision refers to any dismissal for failure to state a claim, whether with prejudice or without.

I

Petitioner Arthur Lomax is an inmate in a Colorado prison. He filed this suit against respondent prison officials to challenge his expulsion from the facility's sex-offender

---

bama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Clare E. Connors* of Hawaii, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Daniel Cameron* of Kentucky, *Jeff Landry* of Louisiana, *Aaron M. Frey* of Maine, *Dana Nessel* of Michigan, *Eric S. Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Robert W. Ferguson* of Washington; and for the Council of State Governments et al. by *Misha Tseytlin*, *Elizabeth Holt Andrews*, and *Lisa Soronen*.

A brief of *amicus curiae* was filed for the Roderick and Solange MacArthur Justice Center by *David M. Shapiro*.

†JUSTICE THOMAS joins all but footnote 4 of this opinion.

treatment program. As is common in prison litigation, he also moved for IFP status to allow his suit to go forward before he pays the $400 filing fee. For that motion to succeed, Lomax must avoid Section 1915(g). That provision bars further IFP litigation once a prisoner has had at least three prior suits dismissed on specified grounds.[1] And Lomax is no rookie litigant. During his time in prison, he has already brought three unsuccessful legal actions (against various corrections officers, prosecutors, and judges). If the dispositions of those cases qualify as strikes under Section 1915(g), Lomax may not now proceed IFP.

The courts below ruled that Lomax had struck out. The District Court denied his motion for IFP status, finding that all three of his prior suits had been dismissed for failure to state a claim—one of the grounds specified in Section 1915(g). See App. 65–66.[2] On appeal, Lomax argued that two of those dismissals should not count as strikes because they were without prejudice, thus allowing him to file a later suit on the same claim. The Court of Appeals for the Tenth Circuit rejected that argument. Relying on Circuit precedent, the Court held it "immaterial to the strikes analysis"

[1] The full text of the three-strikes provision reads:

"In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U. S. C. § 1915(g).

[2] Two of the cases were dismissed under *Heck* v. *Humphrey*, 512 U. S. 477 (1994), which holds that a claim challenging the validity of a conviction or sentence under 42 U. S. C. § 1983 "does not accrue until the conviction or sentence has been invalidated." 512 U. S., at 490. In concluding that those two *Heck* dismissals were for failure to state a claim, the District Court followed Circuit precedent. See *Smith* v. *Veterans Admin.*, 636 F. 3d 1306, 1312 (CA10 2011). Not all Courts of Appeals accept that view. See, *e. g.*, *Mejia* v. *Harrington*, 541 Fed. Appx. 709, 710 (CA7 2013). But Lomax did not raise that issue, and we therefore do not address it.

whether a dismissal was with or without prejudice. 754 Fed. Appx. 756, 759 (2018) (quoting *Childs* v. *Miller*, 713 F. 3d 1262, 1266 (CA10 2013)).

The Courts of Appeals have long divided over whether a dismissal without prejudice for failure to state a claim qualifies as a strike under Section 1915(g).[3] In line with our duty to call balls and strikes, we granted certiorari to resolve the split, 589 U. S. 1031 (2019), and we now affirm.

II

This case begins, and pretty much ends, with the text of Section 1915(g). Under that provision, a prisoner accrues a strike for any action "dismissed on the ground[ ] that it . . . fails to state a claim upon which relief may be granted." That broad language covers all such dismissals: It applies to those issued both with and without prejudice to a plaintiff's ability to reassert his claim in a later action.[4] A strike-call under Section 1915(g) thus hinges exclusively on the basis for the dismissal, regardless of the decision's prejudicial effect. To reach the opposite result—counting prejudicial orders alone as strikes—we would have to read the simple

[3] Four Circuits treat dismissals without prejudice for failure to state a claim as strikes. See *Orr* v. *Clements*, 688 F. 3d 463, 465 (CA8 2012); *Paul* v. *Marberry*, 658 F. 3d 702, 704 (CA7 2011); *O'Neal* v. *Price*, 531 F. 3d 1146, 1154 (CA9 2008); *Day* v. *Maynard*, 200 F. 3d 665, 667 (CA10 1999) (*per curiam*). Two Circuits do the opposite. See *Millhouse* v. *Heath*, 866 F. 3d 152, 162–163 (CA3 2017); *McLean* v. *United States*, 566 F. 3d 391, 396–397 (CA4 2009).

[4] Note, however, that the provision does not apply when a court gives a plaintiff leave to amend his complaint. Courts often take that path if there is a chance that amendment can cure a deficient complaint. See Fed. Rule Civ. Proc. 15(a) (discussing amendments to pleadings). In that event, because the suit continues, the court's action falls outside of Section 1915(g) and no strike accrues. See Brief for Respondents 31–35 (noting that flexible amendment practices "ensure that potentially meritorious prisoner suits are not hastily dismissed with a strike"); Brief for United States as *Amicus Curiae* 27–28 (similar); Tr. of Oral Arg. 32–34, 44 (similar).

word "dismissed" in Section 1915(g) as "dismissed with prejudice." But this Court may not narrow a provision's reach by inserting words Congress chose to omit. See, *e. g.*, *Virginia Uranium, Inc.* v. *Warren*, 587 U. S. 761, 765 (2019) (lead opinion of GORSUCH, J.).

Indeed, to do so would violate yet another rule of statutory construction: "In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning" across a statute. *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 587 U. S. 262, 268 (2019). The PLRA includes three other provisions mentioning "dismiss[als]" for "fail[ure] to state a claim"—each enabling courts to dismiss *sua sponte* certain prisoner suits on that ground. §§ 1915(e)(2)(B)(ii), 1915A(b); 42 U. S. C. § 1997e(c). No one here thinks those provisions deprive courts of the ability to dismiss those suits without prejudice. See Reply Brief 15; Brief for Respondents 21–24; Brief for United States as *Amicus Curiae* 21–22. Nor would that be a plausible position. The broad statutory language—on its face covering dismissals both with and without prejudice—tracks courts' ordinary authority to decide whether a dismissal for failure to state a claim should have preclusive effect. So reading the PLRA's three-strikes rule to apply only to dismissals with prejudice would introduce inconsistencies into the statute. The identical phrase would then bear different meanings in provisions almost next-door to each other.

Still, Lomax maintains that the phrase "dismissed [for] fail[ure] to state a claim" in Section 1915(g) is a "legal term of art" referring only to dismissals with prejudice. Reply Brief 4. To support that view, he relies on a procedural rule used to answer a different question. When a court dismisses a case for failure to state a claim, but neglects to specify whether the order is with or without prejudice, how should a later court determine its preclusive effect? Federal Rule of Civil Procedure 41(b), codifying an old equitable principle, supplies the answer: It tells courts to treat the

dismissal "as an adjudication on the merits"—meaning a dismissal with prejudice. See *Durant* v. *Essex Co.*, 7 Wall. 107, 109 (1869). According to Lomax, "Section 1915(g) should be interpreted in light of this legal backdrop." Brief for Petitioner 17. He reasons: Because Rule 41(b) presumes that an order stating only "dismissed for failure to state a claim" is with prejudice, the same language when used in Section 1915(g) should bear that same meaning. And if so, the provision would assign a strike to only with-prejudice dismissals for failure to state a claim.

But that argument gets things backwards. The Rule 41(b) presumption (like its older equitable counterpart) does not convert the phrase "dismissed for failure to state a claim" into a legal term of art meaning "dismissed with prejudice" on that ground. To the contrary, Rule 41(b) is necessary because that phrase means only what it says: "dismissed for failure to state a claim"—whether or not with prejudice. In other words, the phrase's indifference to prejudicial effect is what creates the need for a default rule to determine the import of a dismissal when a court fails to make that clear. Rule 41(b), then, actually undercuts Lomax's position: Its very existence is a form of proof that the language used in Section 1915(g) covers dismissals both with and without prejudice. And here too, confirmation of the point comes from the PLRA's other provisions referring to "dismiss[als]" for "fail[ure] to state a claim." See *supra*, at 600. If that phrase had really become a legal term of art implying "with prejudice," then those provisions would prevent courts from dismissing prisoner suits without prejudice for failure to state a claim. But Lomax himself does not accept that improbable reading. See *ibid.* His supposed "term of art" is strangely free-floating, transforming ordinary meaning in one place while leaving it alone in all others.

Lomax also makes an argument based on the two other grounds for dismissal listed in Section 1915(g). Recall that the provision counts as strikes dismissals of actions that are

"frivolous" or "malicious," along with those that fail to state a claim. See *supra*, at 598, n. 1. In Lomax's view, the first two kinds of dismissals "reflect a judicial determination that a claim is irremediably defective"—that it "cannot succeed and should not return to court." Brief for Petitioner 11, 22 (internal quotation marks omitted). To "harmonize [all] three grounds for strikes," he continues, the same must be true of dismissals for failure to state a claim. *Id.*, at 23; see *id.*, at 21 (invoking the "interpretive canon *noscitur a sociis*, a word is known by the company it keeps" (internal quotation marks omitted)). So Section 1915(g), Lomax concludes, must capture only the subset of those dismissals that are issued with prejudice—the ones disposing of "irredeemable" suits. *Id.*, at 21.

As an initial matter, the very premise of that argument is mistaken. Contra Lomax's view, courts can and sometimes do conclude that frivolous actions are not "irremediably defective," and thus dismiss them without prejudice. See, *e. g.*, *Marts* v. *Hines*, 117 F. 3d 1504, 1505 (CA5 1997); see also *Jackson* v. *Florida Dept. of Financial Servs.*, 479 Fed. Appx. 289, 292 (CA11 2012) (similarly if less commonly, dismissing a malicious action without prejudice). Indeed, this Court has suggested that a trial court might abuse its discretion by dismissing an IFP suit *with prejudice* if "frivolous factual allegations [can] be remedied through more specific pleading." *Denton* v. *Hernandez*, 504 U. S. 25, 34 (1992). So on Lomax's own metric—whether down the road the plaintiff's claim might return—the dismissals he claims would be outliers in Section 1915(g) in fact would have company. And because that is true, his reason for excluding those decisions from the provision collapses. If dismissals without prejudice for frivolousness count as a strike under Section 1915(g), then why not for failure to state a claim too?

Still more fundamentally, Lomax is wrong to suggest that every dismissed action encompassed in Section 1915(g) must closely resemble frivolous or malicious ones. The point of

the PLRA, as its terms show, was to cabin not only abusive but also simply meritless prisoner suits. Before the PLRA, the statute governing IFP claims targeted frivolous and malicious actions, but no others. See *Neitzke* v. *Williams*, 490 U. S. 319, 328 (1989). In the PLRA, Congress chose to go further—precisely by aiming as well at actions that failed to state a claim. The theory was that a "flood of nonmeritorious claims," even if not in any way abusive, was "effectively preclud[ing] consideration of" suits more likely to succeed. *Jones*, 549 U. S., at 203. So we cannot, in the interest of "harmonization," interpret the phrase "failure to state a claim" based on the pre-existing terms "frivolous" and "malicious." Cf. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 702, 705 (1995) (rejecting use of the *noscitur* canon when "the Senate went out of its way to add" a "broad word" to a statute). That would defeat the PLRA's *expansion* of the statute beyond what was already there.

III

The text of the PLRA's three-strikes provision makes this case an easy call. A dismissal of a suit for failure to state a claim counts as a strike, whether or not with prejudice. We therefore affirm the judgment below.

It is so ordered.

Syllabus

UNITED STATES FOREST SERVICE ET AL. *v.* COWPASTURE RIVER PRESERVATION ASSOCIATION ET AL.

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

No. 18–1584. Argued February 24, 2020—Decided June 15, 2020*

Petitioner Atlantic Coast Pipeline, LLC (Atlantic), sought to construct an approximately 604-mile natural gas pipeline from West Virginia to North Carolina along a route that traversed 16 miles of land within the George Washington National Forest. As relevant here, Atlantic secured a special use permit from the United States Forest Service, obtaining a right-of-way for a 0.1-mile segment of pipe some 600 feet below a portion of the Appalachian National Scenic Trail (Appalachian Trail or Trail), which also crosses the National Forest. Respondents filed a petition for review in the Fourth Circuit, contending, *inter alia*, that the issuance of the special use permit for the right-of-way under the Trail violated the Mineral Leasing Act (Leasing Act). Atlantic intervened. The Fourth Circuit vacated the permit, holding that the Leasing Act did not empower the Forest Service to grant the right-of-way because the Trail became part of the National Park System when the Secretary of the Interior delegated its authority over the Trail's administration to the National Park Service, and that the Leasing Act prohibits pipeline rights-of-way through lands in the National Park System.

Held: Because the Department of the Interior's decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the land over which the Trail passes into land within the National Park System, the Forest Service had the authority to issue the special use permit. Pp. 609–624.

(a) These cases involve the interaction of multiple federal laws. The Weeks Act provided for the acquisition of lands for inclusion in the National Forest System, stating that such lands "shall be permanently reserved, held, and administered as national forest lands." 16 U. S. C. § 521. The Forest Service, with authority granted by the Secretary of Agriculture, has jurisdiction over the National Forest System, including the George Washington National Forest. The National Trails System

---

*Together with No. 18–1587, *Atlantic Coast Pipeline, LLC* v. *Cowpasture River Preservation Association et al.*, also on certiorari to the same court.

Syllabus

Act (Trails Act) establishes national scenic and national historic trails, 16 U. S. C. § 1244(a), including the Appalachian Trail, § 1244(a)(1). It also empowers the Secretary of the Interior to establish the Trail's location and width by entering into "rights-of-way" agreements with other federal agencies, States, local governments, and private landowners. §§ 1246(a)(2), (d), (e). The Leasing Act enables any "appropriate agency head" to grant "[r]ights-of-way through any Federal lands . . . for pipeline purposes," 30 U. S. C. § 185(a), defining "Federal lands" as "all lands owned by the United States," except (as relevant) lands in the National Park System, § 185(b). The National Park System is, in turn, defined as "any area of land and water now and hereafter administered by the Secretary of the Interior, through the National Park Service for park, monument, historic, parkway, recreational, or other purposes." 54 U. S. C. § 100501. Pp. 609–612.

(b) An examination of the interests and authority granted under the Trails Act shows that the Forest Service "right-of-way" agreements with the National Park Service for the Appalachian Trail did not convert "Federal lands" under the Leasing Act into "lands" within the "National Park System." Pp. 612–619.

(1) A right-of-way is a type of easement. And easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement: They are not land; they merely burden land that continues to be owned by another. The same principles that apply to right-of-way agreements between private parties apply here, even though the Federal Government owns all lands involved. A right-of-way between two agencies grants only an easement across the land, not jurisdiction over the land itself. Read in light of basic property law principles, then, the plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands crossed by the Trail. Pp. 613–616.

(2) The various duties described in the Trails Act—that the Secretary of the Interior (through the National Park Service) administers the Trail "primarily as a footpath," 16 U. S. C. § 1244(a)(1); can designate Trail uses, provide Trail markers, and establish interpretative and informational sites, § 1246(c); and can regulate the Trail's "protection, management, development, and administration," § 1246(i)—reinforce the conclusion that the agency responsible for the Trail has the limited role of administering a trail easement, but that the underlying land remains within the Forest Service's jurisdiction. P. 617.

(3) This conclusion is also reinforced by the fact that Congress spoke in terms of rights-of-way in the Trails Act rather than in terms of land transfers, as it has unequivocally and directly done in multiple other statutes when it has intended to transfer land from one agency to

another. See, *e. g.*, Wild and Scenic Rivers Act, 16 U. S. C. § 1281(c). Pp. 618–619.

(c) Respondents' theory—that the National Park Service administers the Trail, and therefore the lands that the Trail crosses—depends on presuming, with no clear congressional command, a vast expansion of the Park Service's jurisdiction and a significant curtailment of the Forest Service's express authority to grant pipeline rights-of-way on "lands owned by the United States." 30 U. S. C. § 185(b). It also has striking implications for federalism and private property rights, especially given that Congress has used express language in other statutes when it has intended to transfer lands between agencies. Pp. 619–623.

911 F. 3d 150, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, GORSUCH, and KAVANAUGH, JJ., joined, and in which GINSBURG, J., joined except as to Part III–B–2. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 624.

Anthony A. Yang argued the cause for petitioners in No. 18–1584. With him on the briefs were *Solicitor General Francisco*, *Deputy Assistant Attorney General Grant*, *Deputy Solicitor General Kneedler*, *Andrew C. Mergen*, *J. David Gunter II*, *Avi M. Kupfer*, *Sarah Kathmann*, and *John M. Henson*. *Paul D. Clement* argued the cause for petitioner in No. 18–1587. With him on the briefs was *Erin E. Murphy*.

Michael K. Kellogg argued the cause for respondents in both cases. With him on the brief were *Gregory G. Rapawy*, *Bradley E. Oppenheimer*, *Austin D. Gerken, Jr.*, *Amelia Burnette*, *J. Patrick Hunter*, *Gregory Buppert*, and *Nathan Matthews*.†

---

†Briefs of *amici curiae* urging reversal in both cases were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Lindsay S. See*, Solicitor General, and *Thomas T. Lampman*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama; *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Martin Landry* of Louisiana, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota,

JUSTICE THOMAS delivered the opinion of the Court.*

We granted certiorari in these consolidated cases to decide whether the United States Forest Service has authority

---

Dave Yost of Ohio, *Mike Hunter* of Oklahoma, *Jason R. Ravnsborg* of South Dakota, *Ken Paxton* of Texas, *Sean Reyes* of Utah, and *Bridget Hill* of Wyoming; for the American Forest Resource Council et al. by *Lawson E. Fite*; for Mountain Valley Pipeline, LLC, by *Thomas C. Jensen*, *Theodore B. Olson*, and *Amir C. Tayrani*; for the National Association of Manufacturers et al. by *John C. Cruden*, *Peter J. Schaumberg*, *Peter Tolsdorf*, *Paul G. Afonso*, *Richard S. Moskowitz*, *Sandra Y. Snyder*, *Daryl Joseffer*, and *Michael Murray*; for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, et al. by *Ellen O. Boardman* and *Jennifer R. Simon*; and for Rep. Jeff Duncan et al. by *E. Travis Ramey* and *William Grayson Lambert*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Vermont et al. by *Thomas J. Donovan*, Attorney General of Vermont, *Benjamin D. Battles*, Solicitor General, and *Eleanor L. P. Spottswood* and *Rachel E. Smith*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Kwame Raoul* of Illinois, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Keith Ellison* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Letitia James* of New York, *Ellen F. Rosenblum* of Oregon, and *Peter F. Neronha* of Rhode Island; for the Commonwealth of Virginia by *Mark R. Herring*, Attorney General of Virginia, *Donald D. Anderson*, Deputy Attorney General, *Toby J. Heytens*, Solicitor General, *Martine E. Cicconi* and *Michelle S. Kallen*, Deputy Solicitors General, and *Jessica M. Samuels*, Assistant Solicitor General; for the Citizens Equal Rights Foundation by *James J. Devine, Jr.*; for the City of Staunton et al. by *Douglas Guynn* and *Cale Jaffe*; for the Natural Resources Defense Council et al. by *Sarah E. Harrington*, *Erica Oleszczuk Evans*, and *Sharon Buccino*; for The Rutherford Institute by *John W. Whitehead*; for the Wintergreen Property Owners Association et al. by *Daniel L. Geyser*, *Carolyn Elefant*, and *Michael J. Hirrel*; and for Pamela Underhill et al. by *William S. Eubanks II* and *Kristin H. Gladd*.

Briefs of *amici curiae* were filed in both cases for the Appalachian Trail Conservancy by *Keith Bradley, Peter S. Gould*, *Kelly Mihocik*, *Benjamin Beaton*, and *Brendan Mysliwiec*; for the Niskanen Center by *David Bookbinder*; and for Richard J. Pierce, Jr., by *Mr. Pierce*, *pro se*.

*JUSTICE GINSBURG joins all but Part III–B–2 of this opinion.

under the Mineral Leasing Act, 30 U. S. C. § 181 *et seq.*, to grant rights-of-way through lands within national forests traversed by the Appalachian Trail. 588 U. S. 948 (2019). We hold that the Mineral Leasing Act does grant the Forest Service that authority and therefore reverse the judgment of the Court of Appeals for the Fourth Circuit.

I

A

In 2015, petitioner Atlantic Coast Pipeline, LLC (Atlantic) filed an application with the Federal Energy Regulatory Commission to construct and operate an approximately 604-mile natural gas pipeline extending from West Virginia to North Carolina. The pipeline's proposed route traverses 16 miles of land within the George Washington National Forest. The Appalachian National Scenic Trail (Appalachian Trail or Trail) also crosses parts of the George Washington National Forest.

To construct the pipeline, Atlantic needed to obtain special use permits from the United States Forest Service for the portions of the pipeline that would pass through lands under the Forest Service's jurisdiction. In 2018, the Forest Service issued these permits and granted a right-of-way that would allow Atlantic to place a 0.1-mile segment of pipe approximately 600 feet below the Appalachian Trail in the George Washington National Forest.

B

Respondents Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia filed a petition for review in the Fourth Circuit. They contended that the issuance of the special use permit for the right-of-way under the Trail, as well as numerous other aspects of the Forest Service's regulatory process, violated the

Mineral Leasing Act (Leasing Act), 41 Stat. 437, 30 U. S. C. § 181 *et seq.*, the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, the National Forest Management Act of 1976, 90 Stat. 2952, 16 U. S. C. § 1604, and the Administrative Procedure Act, 5 U. S. C. § 500 *et seq.* Atlantic intervened in the suit.

The Fourth Circuit vacated the Forest Service's special use permit after holding that the Leasing Act did not empower the Forest Service to grant the pipeline right-of-way beneath the Trail. As relevant here, the court concluded that the Appalachian Trail had become part of the National Park System because, though originally charged with the Trail's administration, 16 U. S. C. § 1244(a)(1), the Secretary of the Interior delegated that duty to the National Park Service, 34 Fed. Reg. 14337 (1969). In the Fourth Circuit's view, this delegation made the Trail part of the National Park System because the Trail was now an "area of land . . . administered by the Secretary [of the Interior] acting through the Director [of the National Park Service]." 54 U. S. C. § 100501. Because it concluded the Trail was now within the National Park System, the court held that the Trail was beyond the authority of "the Secretary of the Interior or appropriate agency head" to grant pipeline rights-of-way under the Leasing Act. 30 U. S. C. § 185(a). See 911 F. 3d 150, 179–181 (CA4 2018).[1]

II

These cases involve the interaction of multiple federal laws. We therefore begin by summarizing the relevant statutory and regulatory background.

A

Congress enacted the Weeks Act in 1911, Pub. L. 61–435, 36 Stat. 961, which provided for the acquisition of lands for

[1]The Fourth Circuit also ruled for respondents on their other statutory claims.

inclusion in the National Forest System, see 16 U. S. C. §§ 516–517. The Weeks Act also directed that lands acquired for the National Forest System "shall be permanently reserved, held, and administered as national forest lands." § 521. Though Congress initially granted the Secretary of Agriculture the authority to administer national forest lands, § 472, the Secretary has delegated that authority to the Forest Service, 36 CFR § 200.3(b)(2)(i) (2019).

What is now known as the George Washington National Forest was established as a national forest in 1918, see Proclamation No. 1448, 40 Stat. 1779, and renamed the George Washington National Forest in 1932, Exec. Order No. 5867. No party here disputes that the George Washington National Forest was acquired for inclusion in the National Forest System and that it is under the jurisdiction of the Forest Service. See 16 U. S. C. § 1609.

B

Enacted in 1968, the National Trails System Act (Trails Act), among other things, establishes national scenic and national historic trails. 16 U. S. C. § 1244(a). See 82 Stat. 919, codified at 16 U. S. C. § 1241 *et seq.* The Appalachian Trail was one of the first two trails created under the Act. § 1244(a)(1).

Under the statute, the Appalachian Trail "shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture." *Ibid.* The statute empowers the Secretary of the Interior to establish the location and width of the Appalachian Trail by entering into "rights-of-way" agreements with other federal agencies as well as States, local governments, and private landowners. §§ 1246(a)(2), (d), (e). However, the Trails Act also contains a proviso stating that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands

which are components of the National Trails System." § 1246(a)(1)(A).

The Trails Act currently establishes 30 national historic and national scenic trails. See §§ 1244(a)(1)–(30). It assigns responsibility for most of those trails to the Secretary of the Interior. *Ibid.* Though the Act is silent on the issue of delegation, the Department of the Interior has delegated the administrative responsibility over each of those trails to either the National Park Service or the Bureau of Land Management, both of which are housed within the Department of the Interior. Congressional Research Service, M. De Santis & S. Johnson, The National Trails System: A Brief Overview 2–3 (Table 1), 4 (Fig. 1) (2020). Currently, the National Park Service administers 21 trails, the Bureau of Land Management administers 1 trail, and the two agencies co-administer 2 trails. *Ibid.* The Secretary of the Interior delegated his authority over the Appalachian Trail to the National Park Service in 1969. 34 Fed. Reg. 14337.

C

In 1920, Congress passed the Leasing Act, which enabled the Secretary of the Interior to grant pipeline rights-of-way through "public lands, including the forest reserves," § 28, 41 Stat. 449. Congress amended the Leasing Act in 1973 to provide that not only the Secretary of the Interior but also any "appropriate agency head" may grant "[r]ights-of-way through any Federal lands . . . for pipeline purposes." Pub. L. 93–153, 87 Stat. 576, codified at 30 U. S. C. § 185(a). Notably, the 1973 amendment also defined "Federal lands" to include "all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 87 Stat. 577, codified at 30 U. S. C. § 185(b). In 1970, Congress defined the National Park System as "any area of land and water now and hereafter administered by the Secretary

of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes." § 2(b), 84 Stat. 826, codified at 54 U. S. C. § 100501.

III

We are tasked with determining whether the Leasing Act enables the Forest Service to grant a subterranean pipeline right-of-way some 600 feet under the Appalachian Trail. To do this, we first focus on the distinction between the *lands* that the Trail traverses and the Trail itself, because the lands (not the Trail) are the object of the relevant statutes.

Under the Leasing Act, the "Secretary of the Interior or appropriate agency head" may grant pipeline rights-of-way across "Federal *lands*." 30 U. S. C. § 185(a) (emphasis added). The Forest Service is an "appropriate agency head" for "Federal lands" over "which [it] has jurisdiction." § 185(b)(3). As stated above, it is undisputed that the Forest Service has jurisdiction over the "Federal lands" within the George Washington National Forest. The question before us, then, becomes whether these *lands* within the forest have been removed from the Forest Service's jurisdiction and placed under the Park Service's control because the Trail crosses them. If no transfer of jurisdiction has occurred, then the lands remain National Forest lands, *i. e.*, "Federal lands" subject to the grant of a pipeline right-of-way. If, on the other hand, jurisdiction over the lands has been transferred to the Park Service, then the lands fall under the Leasing Act's carveout for "*lands* in the National Park System," thus precluding the grant of the right-of-way. § 185(b)(1) (emphasis added).

We conclude that the lands that the Trail crosses remain under the Forest Service's jurisdiction and, thus, continue to be "Federal lands" under the Leasing Act.

A

We begin our analysis by examining the interests and authority granted under the Trails Act. Pursuant to the Trails

Act, the Forest Service entered into "right-of-way" agreements with the National Park Service "for [the] approximately 780 miles of Appalachian Trail route within national forests," including the George Washington National Forest. 36 Fed. Reg. 2676 (1971); see also 16 U. S. C. § 1246(a)(2); 36 Fed. Reg. 19805.[2] These "right-of-way" agreements did not convert "Federal lands" into "lands" within the "National Park System."

1

A right-of-way is a type of easement. In 1968, as now, principles of property law defined a right-of-way easement as granting a nonowner a limited privilege to "use the lands of another." *Kelly* v. *Rainelle Coal Co.*, 135 W. Va. 594, 604, 64 S. E. 2d 606, 613 (1951); *Builders Supplies Co. of Goldsboro, N. C., Inc.* v. *Gainey*, 282 N. C. 261, 266, 192 S. E. 2d 449, 453 (1972); see also R. Powell & P. Rohan, Real Property § 405 (1968); Restatement (First) of Property § 450 (1944). Specifically, a right-of-way grants the limited "right to pass . . . through the estate of another." Black's Law Dictionary 1489 (4th ed. 1968). Courts at the time of the Trails Act's enactment acknowledged that easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement. See, *e. g.*, *Bunn* v. *Offutt*, 216 Va. 681, 684, 222 S. E. 2d 522, 525 (1976). And because an easement does not dispossess the original owner, *Barnard* v. *Gaumer*, 146 Colo. 409, 412, 361 P. 2d 778, 780 (1961), "a possessor and an easement holder can simultaneously utilize the same parcel of land," J. Bruce & J. Ely, Law of Easements and Licenses in Land § 1:1, p. 1–5 (2015). Thus, it was, and is, elementary that the grantor of the easement retains ownership over "*the land itself*." *Minneapolis Athletic Club* v. *Cohler*, 287 Minn. 254, 257, 177 N. W. 2d 786, 789 (1970) (emphasis added). Stated more plainly, easements are not land,

[2]The specifics of the agreement between the two agencies is not in the record before us.

they merely burden land that continues to be owned by another. See Bruce, Law of Easements and Licenses in Land § 1:1, at 1–2.

If analyzed as a right-of-way between two private landowners, determining whether any land had been transferred would be simple. If a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land. Nor would anyone think that the rancher had ceded his own right to use his land in other ways, including by running a water line underneath the trail that connects to his house. He could, however, make the easement grantee responsible for administering the easement apart from the land. Likewise, when a company obtains a right-of-way to lay a segment of pipeline through a private owner's land, no one would think that the company had obtained ownership over the land through which the pipeline passes.

Although the Federal Government owns all lands involved here, the same general principles apply. We must ascertain whether one federal agency has transferred jurisdiction over lands—meaning "jurisdiction to exercise the incidents of ownership"—to another federal agency. Brief for Petitioner Atlantic Coast Pipeline, LLC, 22–23, n. 2. The Trails Act refers to the granted interests as "rights-of-way," both when describing agreements with the Federal Government and with private and state property owners. 16 U. S. C. §§ 1246(a)(2), (e). When applied to a private or state property owner, "right-of-way" would carry its ordinary meaning of a limited right to enjoy another's land. Nothing in the statute suggests that the term adopts a more expansive meaning when the right is granted to a federal agency, and we do "not lightly assume that Congress silently attaches different meanings to the same term in the same . . . statut[e]," *Azar* v. *Allina Health Services*, 587 U. S. 566, 574 (2019). Accordingly, as would be the case with private or

state property owners, a right-of-way between two agencies grants only an easement across the land, not jurisdiction over the land itself.[3]

The dissent notes that the Federal Government has referred to the Trail as an "area" and a "unit" and has described the Trail in terms of "acres." See *post*, at 630–633, 635–636 (opinion of SOTOMAYOR, J.). In the dissent's view, this indicates that the Trail and the land are the same. This is not so. Like other right-of-way easements, the Trail burdens "a particular parcel of land." Bruce, Law of Easements and Licenses in Land § 1:1, at 1–6. It is thus not surprising that the Government might refer to the Trail as an "area," much as one might mark out on his property the "area" of land burdened by a sewage easement. The fact remains that the land and the easement are still separate.

The dissent also cites provisions of the Trails Act that discuss "lands" to be included in the Trail. See *post*, at 634–635. But this, too, is consistent with our conclusion that the Trail is an easement. Like all easements, the parcel of land burdened by the easement has particular metes and bounds. See, *e. g.*, *Carnemella* v. *Sadowy*, 147 App. Div. 2d 874, 876, 538 N. Y. S. 2d 96, 98 (1989) ("[T]he subject easement . . . reasonably described the portion of the property where the easement existed"); *Sorrell* v. *Tennessee Gas Transmission Co.*, 314 S. W. 2d 193, 195–196 (Ky. 1958). In fact, without such descriptions, parties to an easement agreement would be unable to understand their rights or enforce another par-

[3] It is of no moment that the Trails Act also permits the agency responsible for the Trail to grant "rights-of-way upon, over, under, across, or along any component of the national trails system." 16 U. S. C. § 1248(a). See *post*, at 635 (SOTOMAYOR, J., dissenting). This provision merely extends a positive grant of authority to the agency responsible for the Trail; it does not divest the original agency of that same authority. See J. Bruce & J. Ely, The Law of Easements and Licenses in Land § 1:1, p. 1–5 (2015) (noting that "a possessor and an easement holder can simultaneously utilize the same parcel of land").

ty's obligations under the easement agreement. Thus, there is nothing noteworthy about the fact that the Trails Act discusses whether particular lands should be included within the metes and bounds of the tracts of land burdened by the easement. In short, none of the characterizations identified by the dissent changes the fact that the burden on the land and the land itself remain separate.[4]

In sum, read in light of basic property law principles, the plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands that the Trail crosses. It gave the Department of the Interior (and by delegation the National Park Service) an easement for the specified and limited purpose of establishing and administering a Trail, but the land itself remained under the jurisdiction of the Forest Service. To restate this conclusion in the parlance of the Leasing Act, the lands that the Trail crosses are still "Federal lands," 30 U. S. C. § 185(a), and the Forest Service may grant a pipeline right-of-way through them—just as it granted a right-of-way for the Trail. Sometimes a complicated regulatory scheme may cause us to miss the forest for the trees, but at bottom, these cases boil down to a simple proposition: A trail is a trail, and land is land.

---

[4]The dissent suggests that we are not engaging in statutory interpretation and that, relatedly, we should not look to state law for our analysis. See *post*, at 631, n. 8, 635, n. 9. Neither criticism is warranted. We are principally concerned with the meaning of the term "right-of-way," which, as the dissent's own authority acknowledges, carries the same meaning whether it appears in federal or state law. In *New Mexico* v. *United States Trust Co.*, 172 U. S. 171 (1898), for instance, the Court interpreted the term in a federal statute. There, the Court acknowledged that there is a difference between "'an easement in land [and] the land itself'" and that a "right of way . . . constitute[s] no . . . right of possession of the land itself." *Id.*, at 182, 184. We have more recently confirmed that it is appropriate to look to "basic common law principles" when interpreting the terms right-of-way and easement. See *Marvin M. Brandt Revocable Trust* v. *United States*, 572 U. S. 93, 106 (2014); *id.*, at 105, n. 4.

The various duties described in the Trails Act reinforce that the agency responsible for the Trail has a limited role of administering a trail easement, but that the underlying land remains within the jurisdiction of the Forest Service. The Trails Act states that the Secretary of the Interior (and by delegation the National Park Service) shall "administe[r]" the Trail "primarily as a footpath." 16 U. S. C. § 1244(a)(1). The Secretary is charged with designating Trail uses, providing Trail markers, and establishing interpretative and informational sites "to present information to the public about the [T]rail." § 1246(c). He also has the authority to pass regulations governing Trail protection and good conduct and can regulate the "protection, management, development, and administration" of the Trail. § 1246(i). Though the Trails Act states that the responsible agency shall "*provide* for" the maintenance of the Trail, § 1246(h)(1) (emphasis added), it is the Forest Service that *performs* the necessary physical work. As the Government explained at oral argument (and as respondents did not dispute), "[i]f a tree falls on forest lands over the trail, it's the Forest Service that's responsible for it. You don't call the nine [National] Park Service employees at Harpers Ferry [in West Virginia] and ask them to come out and fix the tree." Tr. of Oral Arg. 5. These statutory duties refer to the Trail easement, not the lands over which the easement passes.

The dissent resists this conclusion by asserting that the National Park Service "administers" the Trail, and that so long as that is true, the Trail is land within the National Park System. See *post*, at 637–638. But the National Park Service does not administer the "land" crossed by the Trail. It administers the *Trail* as an easement—an easement that is separate from the underlying land.[5]

[5]The dissent argues that its position is supported by the fact that the terms "administer" and "manage" are "terms of art." *Post*, at 637. The dissent, however, does not demonstrate that either term carries a "widely

3

Finally, Congress has used unequivocal and direct language in multiple statutes when it wished to transfer land from one agency to another, just as one would expect if a property owner conveyed land in fee simple to another private property owner. In the Wild and Scenic Rivers Act, for instance, which was enacted the same day as the Trails Act, Congress specified that "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service *shall become a part of the [N]ational [P]ark [S]ystem.*" § 10(c), 82 Stat. 916, codified at 16 U. S. C. § 1281(c) (emphasis added). That statute also explicitly permits the head of an agency "to transfer to the appropriate secretary *jurisdiction over such lands.*" § 6(e), 82 Stat. 912–913, codified at 16 U. S. C. § 1277(e) (emphasis added). Congress has also authorized the Department of the Interior "to transfer to the jurisdiction of the Secretary of Agriculture for national forest purposes *lands* or *interests in lands* acquired for or in connection with the Blue Ridge Parkway" and specifies that "[l]ands transferred under this Act shall become national forest lands." Pub. L. 82–336, 66 Stat. 69 (emphasis added). Similar language appears in a host of other statutes. See §§ 5(a)(2), 8(c)(2), 114 Stat. 2529, 2533; Pub. L. 89–446, 80 Stat. 199; § 7(c), 79 Stat. 217; Pub. L. 88–415, 78 Stat. 388. The fact that Congress chose to speak in terms of rights-of-way in the Trails Act, rather than in terms of land transfers, reinforces the conclusion that the Park Service has a limited role over only the Trail, not the lands that the Trail crosses. See *Reves* v. *Ernst & Young*, 507 U. S. 170, 178–179 (1993).

---

accepted . . . meaning," *FCC* v. *AT&T Inc.*, 562 U. S. 397, 405 (2011) (internal quotation marks omitted), let alone that Congress "borrow[ed] terms of art in which are accumulated the legal tradition and meaning of centuries of practice," *Carter* v. *United States*, 530 U. S. 255, 264 (2000) (internal quotation marks omitted; emphasis deleted).

For these reasons, we hold that the Trails Act did not transfer jurisdiction of the lands crossed by the Trail from the Forest Service to the Department of the Interior. It created a trail easement and gave the Department of the Interior the administrative responsibilities concomitant with administering the Trail as a trail. Accordingly, because the Department of the Interior had no jurisdiction over any lands, its delegation to the National Park Service did not convert the Trail into "*lands* in the National Park System," 30 U. S. C. §185(b)(1) (emphasis added)—*i. e.*, an "*area of land* . . . administered by the Secretary [of the Interior] acting through the Director [of the National Park Service]." 54 U. S. C. §100501 (emphasis added). The Forest Service therefore retained the authority to grant Atlantic a pipeline right-of-way.

B

1

Respondents take a markedly different view, which is shared by the dissent. According to respondents, the Trail cannot be separated from the underlying land. In their view, if the National Park Service administers the Trail, then it also administers the lands that the Trail crosses, and no pipeline rights-of-way may be granted.

Respondents' argument that the National Park Service administers the Trail (and therefore the lands that the Trail crosses) proceeds in four steps. First, the Trails Act granted the Department of the Interior the authority to administer the Trail. 16 U. S. C. §1244(a)(1). Second, the Department of the Interior delegated those responsibilities to the National Park Service in 1969. 34 Fed. Reg. 14337. Third, in 1970, Congress defined the National Park System to include "any area of land and water administered by the Secretary [of the Interior] acting through the Director [of the National Park Service]." 54 U. S. C. §100501. Under respondents' view, the 1970 National Park System definition

made the Trail part of the National Park System. But one more step was still required to place the Trail outside the Forest Service's Leasing Act pipeline authority. That final step occurred in 1973, when the amendment to the Leasing Act carved out lands in the National Park System from the definition of the "Federal lands" through which pipeline rights-of-way could be granted. 30 U. S. C. § 185(b)(1). Because the Trail had become part of the National Park Service in 1970, respondents conclude that the 1973 carveout applied to the Trail. Therefore, in their view, the Forest Service cannot grant pipeline rights-of-way under the parcels on which there is a right-of-way for the Appalachian Trail.

This circuitous path misses the mark. As described above, under the plain language of the Trails Act and basic property principles, responsibility for the Trail and jurisdiction over the lands that the Trail crosses can and must be separated for purposes of determining whether the Forest Service can grant a right-of-way. See *supra*, at 612–616.

2

Even accepting respondents' argument on its own terms, however, we remain unpersuaded. Respondents' entire theory depends on an administrative action about which the statutes at issue are completely silent: the Department of the Interior's voluntary decision to assign responsibility over a given trail to the National Park Service rather than to the Bureau of Land Management. To reiterate, respondents contend that the Department of the Interior's decision to delegate responsibility over a trail to the National Park Service renders that trail an "area of land . . . administered by the Secretary [of the Interior], acting through the [Park Service.]" 54 U. S. C. § 100501. Respondents' theory requires us to accept that, without a word from Congress, the Department of the Interior has the power to vastly expand the scope of the National Park Service's jurisdiction through its delegation choices. See Addendum to Reply Brief for Peti-

tioner Atlantic Coast Pipeline, LLC, 1a–2a. After all, respondents' view would not just apply to the approximately 2,000-mile-long Appalachian Trail. It would apply equally to all 21 national historic and national scenic trails currently administered by the National Park Service. See Congressional Research Service, National Trails System. Under our precedents, when Congress wishes to "'alter the fundamental details of a regulatory scheme,'" as respondents contend it did here through delegation, we would expect it to speak with the requisite clarity to place that intent beyond dispute. See *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 515 (2018) (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001)). We will not presume that the act of delegation, rather than clear congressional command, worked this vast expansion of the Park Service's jurisdiction and significant curtailment of the Forest Service's express authority to grant pipeline rights-of-way on "lands owned by the United States." 30 U. S. C. § 185(b).

Respondents' theory also has striking implications for federalism and private property rights. Respondents do not contest that, in addition to federal lands, these 21 trails cross lands owned by States, local governments, and private landowners. See also *post*, at 643 (acknowledging that the Trail alone "comprises 58,110.94 acres of Non-Federal land, including 8,815.98 acres of Private land" (internal quotation marks omitted)). Under respondents' view, these privately owned and state-owned lands would also become lands in the National Park System.[6] Our precedents require Congress to

[6]The dissent contends that this concern is misplaced because, under its view, though the National Park Service will be administering the thousands of miles of land that the 21 trails cross, the Federal Government will not have ownership over it. See *post*, at 641–642. As explained *supra*, at 612–616, this argument suffers from the same flaw—namely, that the Trail easement and the land that the Trail crosses are one and the same. Moreover, under the dissent's view, the National Park Service would still gain power over numerous tracts of privately owned and state-owned land. The dissent cites no authority to explain why this assertion of "administra-

enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property. Cf. *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991).

Finally, reliance on the Department of the Interior's delegation of its Trails Act authority is especially questionable here, given that Congress has used express language in other statutes when it wished to transfer lands between agencies. See *supra*, at 618. Congress not only failed to enact similar language in the Trails Act, but it clearly expressed the opposite view. The entire Trails Act must be

---

tive" jurisdiction would not pose many of the same difficulties as outright ownership. For instance, the National Park Service provides for the maintenance of the Trail where it crosses federal lands. 16 U. S. C. § 1246(h)(1). Over half of the States through which the Trail passes have analogous laws for state-owned lands. See, *e. g.*, N. C. Gen. Stat. Ann. § 143B–135.76 (2019); Tenn. Code Ann. §§ 11–11–106, 11–11–117 (2012); Va. Code Ann. § 10.1–203 (2018); Md. Nat. Res. Code Ann. § 5–1001 (2018); 64 Pa. Cons. Stat. § 803(b) (2010); N. J. Stat. Ann. § 13:8–39 (West 2003); Mass. Gen. Laws, ch. 132A, § 12 (2018); Conn. Gen. Stat. §§ 23–69, 23–70 (2017); N. H. Rev. Stat. Ann. § 216–D:2 (2019); Me. Rev. Stat. Ann., Tit. 12, § 1892 (2020 Cum. Supp.). The dissent's view would allow the Federal Government to displace all such laws. Attempting to downplay the implications of its position, the dissent asserts that the National Park Service already has such jurisdiction under the Trails Act and its implementing regulations. See *post*, at 641, n. 13. This, too, is incorrect. Recognizing the fact that "[National Park Service] lands are intermingled with private, local, [and] state" lands, 67 Fed. Reg. 8479 (2002), the National Park Service has concluded that the regulations governing the Trail pointed to by the dissent "do not apply on non-federally owned lands," 36 CFR § 1.2(b) (2019); see also 48 Fed. Reg. 30253 (1983); Dept. of Interior, W. Janssen, Appalachian National Scenic Trail, Superintendent's Compendium of Designations, Closures, Permit Requirements and Other Restrictions Imposed Under Discretionary Authority § 5, p. 3 (2019) ("The rules contained in this Compendium apply to all persons entering, using, visiting or otherwise present on federally owned lands"). Thus, the dissent points to nothing indicating that the National Park Service has ever adopted its novel theory, with its attendant federalism concerns.

read against the backdrop of the Weeks Act, which states that lands acquired for the National Forest System—including the George Washington National Forest—"shall be permanently reserved, held, and administered as national forest lands." 16 U. S. C. § 521. The Trails Act further provides that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." § 1246(a)(1)(A). These two provisions, when combined with the Trails Act's use of the term "rights-of-way" and the administrative duties set out in the Trails Act, provide much clearer—and more textual—guides to Congress' intent than an agency's silent decision to delegate responsibilities to the National Park Service.

In sum, we conclude that the Department of the Interior's unexplained decision to assign responsibility over certain trails to the National Parks System and the Leasing Act's definition of federal lands simply cannot bear the weight of respondents' interpretation.

IV

We hold that the Department of the Interior's decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the land over which the Trail passes into land within the National Park System. Accordingly, the Forest Service had the authority to issue the permit here.[7]

[7] Objections that a pipeline segment interferes with rights of use enjoyed by the National Park Service would present a different issue. See Bruce, Law of Easements and Licenses in Land § 1:1. These cases do not present anything resembling such a scenario. Under the current proposal, the workstations for laying the challenged segment of the pipeline will be located on private land, approximately 1,400 feet and 3,400 feet respectively from the Trail. Atlantic plans to use a method of drilling that will not require the company to clear any land or dig on the Trail's

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

The majority's complicated discussion of private-law easements, footpath maintenance, differently worded statutes, and policy masks the simple (and only) dispute here. Is the Appalachian National Scenic Trail "lan[d] in the National Park System"? 30 U. S. C. § 185(b)(1). If it is, then the Forest Service may not grant a natural-gas pipeline right-of-way that crosses the Trail on federally owned land. So says the Mineral Leasing Act, and the parties do not disagree. See Brief for Petitioner Atlantic Coast Pipeline, LLC, 10; Brief for Federal Petitioners 3; Brief for Respondents 1.

By definition, lands in the National Park System include "any area of land" "administered" by the Park Service for "park, monument, historic, parkway, recreational, or other purposes." 54 U. S. C. § 100501. So says the National Park Service Organic Act, and the parties agree. See Brief for Petitioner Atlantic Coast Pipeline, LLC, 38; Brief for Federal Petitioners 45–46; Brief for Respondents 5–6.

The Appalachian Trail, in turn, is "administered" by the Park Service to ensure "outdoor recreation" and to conserve "nationally significant scenic, historic, natural, or cultural qualities." §§ 3(b), 5(a)(1), 82 Stat. 919–920; see also 34 Fed. Reg. 14337 (1969). So say the National Trails System Act and relevant regulations, and again the parties agree. See Brief for Petitioner Atlantic Coast Pipeline, LLC, 6, 8–9; Brief for Federal Petitioners 9, 26; Brief for Respondents 5.

---

surface. The entry and exit sites will not be visible from the Trail, nor will any detour be required. And, the final pipeline will lie approximately 600 feet below the Trail.

Thus, as the Government puts it, the only question here is whether parts of the Appalachian Trail are "'lands'" within the meaning of those statutes. Brief for Federal Petitioners 3. Those laws, a half century of agency understanding, and common sense confirm that the Trail is land, land on which generations of people have walked. Indeed, for 50 years the "Federal Government has referred to the Trail" as a "'unit'" of the National Park System. *Ante*, at 615; see Part I–C, *infra*. A "unit" of the Park System is by definition either "land" or "water" in the Park System. 54 U. S. C. §§ 100102(6), 100501. Federal law does not distinguish "land" from the Trail any more than it distinguishes "land" from the many monuments, historic buildings, parkways, and recreational areas that are also units of the Park System. Because the Trail is land in the Park System, "no federal agency" has "authority under the Mineral Leasing Act to grant a pipeline right-of-way across such lands." Brief for Federal Petitioners 3.

By contrast, today's Court suggests that the Trail is not "land" in the Park System at all. The Court strives to separate "the *lands* that the Trail traverses" from "the Trail itself," reasoning that the Trail is simply an "easement," "not land." *Ante*, at 612, 613. In doing so, however, the Court relies on anything except the provisions that actually answer the question presented. Because today's Court condones the placement of a pipeline that subverts the plain text of the statutes governing the Appalachian Trail, I respectfully dissent.

I

Petitioner Atlantic Coast Pipeline, LLC, seeks to construct a natural-gas pipeline across the George Washington National Forest. The proposed route traverses 21 miles of national forests and requires crossing 57 rivers, streams, and lakes within those forests. See 911 F. 3d 150, 155 (CA4 2018) (case below in No. 18–1584); App. in No. 18–1144 (CA4), p. 1659. The plan calls for "clearing trees and other vegeta-

tion from a 125-foot right of way (reduced to 75 feet in wetlands) through the national forests, digging a trench to bury the pipeline, and blasting and flattening ridgelines in mountainous terrains." 911 F. 3d, at 155. Construction noise will affect Appalachian Trail use 24 hours a day. See App. 79–80. Atlantic's machinery (including the artificial lights required to work all night) will dim the stars visible from the Trail. See *id.*, at 80. As relevant here, at one stretch the pipeline would cross the Trail.[1]

A

Three interlocking statutes foreclose this proposal. The Mineral Leasing Act authorizes the Secretary of the Interior "or appropriate agency head" to grant rights-of-way for natural-gas pipelines "through any Federal lands." 30 U. S. C. § 185(a); see also § 185(q) (governing renewals of pre-existing pipeline rights-of-way "across Federal lands").[2] "For the purposes of" § 185, however, "'Federal lands'" exclude "lands in the National Park System." § 185(b). Thus, as all acknowledge, if a proposed pipeline would cross any land in the Park System, then no federal agency would have "authority under the Mineral Leasing Act to grant" a "right-of-way across" that land. Brief for Federal Petitioners 3;

[1] The Court of Appeals for the Fourth Circuit also found that Atlantic's proposal may conflict with several environmental laws, including the National Forest Management Act and the National Environmental Policy Act. See 911 F. 3d, at 154–155, 160–179 (remanding for further agency review). Those aspects of the Fourth Circuit's decision are not before this Court.

[2] If the "surface" of "all of the Federal lands involved" is "under the jurisdiction of one Federal agency," then the head of that agency (rather than the Secretary of the Interior) has authority to grant the right-of-way across federal land. 30 U. S. C. § 185(c)(1). If, by contrast, the surface of that land "is administered by the Secretary [of the Interior] or by two or more Federal agencies," then only the Secretary may grant the right-of-way. § 185(c)(2).

see also Brief for Petitioner Atlantic Coast Pipeline, LLC, 10; Brief for Respondents 1.[3]

Although the Mineral Leasing Act does not define "lands in the National Park System," the Park Service Organic Act does. Under the Organic Act, the Park System and any "unit" of the Park System "include any area of land and water administered by the Secretary" of the Interior, "acting through the Director" of the Park Service, for "park, monument, historic, parkway, recreational, or other purposes." 54 U. S. C. §§ 100102, 100501. That definition is sweeping; whether land or water, "any area" so "administered" by the Park Service is in the Park System. § 100501.[4]

In turn, the National Trails System Act of 1968 (Trails Act), 82 Stat. 919, provides that the Appalachian Trail "shall be administered" "by the Secretary of the Interior" to "provide for maximum outdoor recreation potential and for the conservation and enjoyment" of "nationally significant scenic, historic, natural, or cultural qualities." §§ 3(b), 5(a)(1), *id.*, at 919–920; see also 16 U. S. C. §§ 1242(a)(2), 1244(a)(1). The Trails Act provides that the Secretary of the Interior has authority to "grant easements and rights-of-way," among other things, "under" the Appalachian Trail's surface.

[3] Although the Mineral Leasing Act's right-of-way authority excludes lands in the Park System, Congress may enact separate legislation permitting natural-gas pipelines across such lands. See, *e. g.*, § 1(a), 126 Stat. 2441 (providing that "[t]he Secretary of the Interior may issue right-of-way permits" for certain natural-gas pipelines across Glacier National Park). Here, however, Atlantic and the Government have identified no other permitting authority besides the Mineral Leasing Act.

[4] The legal meaning of "land" when Congress enacted the relevant statutes was "any ground, soil, or earth whatsoever." Black's Law Dictionary 1019 (4th ed. 1968). The ordinary meaning of land was much the same. Webster's New International Dictionary 1388 (2d ed. 1949) ("The solid part of the surface of the earth, as distinguished from water"; "Any ground, soil, or earth whatsoever . . . and everything annexed to it, whether by nature . . . or by man").

§ 9(a), 82 Stat. 925; see also 16 U. S. C. § 1248(a).[5] In 1969, the Secretary of the Interior assigned all these powers to the Park Service, naming it the Trail's "land administering bureau." 34 Fed. Reg. 14337. Since then, the Federal Government has consistently identified the Trail as a "'unit'" of, and thus land in, the National Park System. 54 U. S. C. §§ 100102(6), 100501; see also, *e. g.*, *ante*, at 615; Part I–C, *infra*.

By statutory definition, the Appalachian Trail is land in the National Park System, and the Mineral Leasing Act does not permit pipeline rights-of-way across it.

B

Statutory history reinforces that the Appalachian Trail is land in the National Park System. When the Trails Act designated the Appalachian Trail in 1968, then-existing law provided that "all federally owned or controlled lands" administered by the Park Service for certain purposes were within the Park System. § 2(a), 67 Stat. 496. At the time, though, many "lands" owned by the Federal Government were "supervis[ed]" by the Park Service "pursuant to cooperative agreement[s]" but technically "under the administrative jurisdiction" of other federal agencies. § 2(b), *ibid.* The law defined these as "'miscellaneous areas'" outside of the Park System. *Ibid.*

In 1970, after the Park Service had begun its role as the Trail's land-administering bureau, Congress enacted the General Authorities Act. This Act declared that the Park System had "grown to include superlative natural, historic, and recreation areas in every major region" and Territory of the United States, and that the Act's "purpose" was "to include all such areas in the [Park] System and to clarify the authorities applicable to the system." Pub. L. 91–383, § 1, 84 Stat. 825. To that end, Congress eliminated the "'miscel-

[5] It is undisputed that 16 U. S. C. § 1248 does not authorize rights-of-way for natural-gas pipelines. Atlantic therefore does not rely on this provision.

laneous areas'" classification, see § 2(a), *id.*, at 826, and amended the Park Service Organic Statute to define the National Park System as "'any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service.'" § 2(b), *ibid.*; see also 54 U. S. C. §§ 100102(2), (5), (6), 100501. Of course, the Appalachian Trail was then (and "'[t]hereafter'") "'administered by the Secretary of the Interior through the National Park Service.'" § 2(b), 84 Stat. 826.

In 1973, having broadly defined lands in the Park System, Congress amended the Mineral Leasing Act by eliminating authority to grant rights-of-way across those lands. Before then, the Mineral Leasing Act had provided limited permission to grant rights-of-way through "public lands," § 28, 41 Stat. 449, a term of art referring to certain federally owned land that had never been owned by a State or private individual, see *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 65, and n. 2 (1966). The 1973 amendments replaced the Mineral Leasing Act's reference to "public lands" with "'all lands owned by the United States'" and carved out "'lands in the National Park System.'" § 101, 87 Stat. 577; see also 30 U. S. C. § 185(b). This carveout meant that parties seeking to build natural-gas pipelines across federally owned land in the Park System could not rely on the Mineral Leasing Act. § 101, 87 Stat. 577; 30 U. S. C. § 185(b).[6]

Put simply, "any area of land and water administered by" the Park Service is a unit of the Park System and must be "regulate[d]" through "means and measures" that "conserve" and "provide for the enjoyment of the scenery, natural and historic objects, and wild life" in ways "as will leave them unimpaired for the enjoyment of future generations." 54

---

[6] Congress reiterated that the Trail is land in the Park System in 1983. It amended the Trails Act to provide that the Secretary of the Interior's "'administrative responsibilities'" over the Appalachian Trail would be "'carr[ied] out'" by "'utiliz[ing] authorities related to units of the national park system.'" § 207(h), 97 Stat. 47; see also 16 U. S. C. § 1246(i).

U. S. C. §§ 100101, 100501. By 1970, the Appalachian Trail was no doubt such an area, as Congress knew when it excluded all federally owned land "in the National Park System" from the Mineral Leasing Act in 1973.[7] Because the proposed pipeline here would cross that park land, Atlantic cannot rely on the Mineral Leasing Act to authorize its proposal.

C

Agency practice confirms this conclusion. For a half century the Park Service has acknowledged that the Appalachian Trail is a unit of (and land in) the Park System. Recall that a year after the Trails Act's enactment, the Secretary of the Interior named the Park Service the "land administering bureau" for the Appalachian Trail. 34 Fed. Reg. 14337. In 1972, the Park Service identified the Trail as a "recreational are[a]" that it "administered." National Park Service (NPS), National Parks & Landmarks 88 (capitalization deleted). Similarly, as the administrator of that land, the Park Service issued regulations for the Trail under the umbrella, "Areas of the National Park System." 36 CFR pt. 7 (1983) (capitalization deleted); see also *id.*, § 7.100; 48 Fed. Reg. 30252 (1983). When it did so, the Park Service explained that "[t]hese regulations will be utilized to fulfill the statutory purposes of units of the National Park System." 36 CFR § 1.1; 48 Fed. Reg. 30275. All those terms—land, area, administer, recreation, unit of the National Park System—

[7] See § 2(b), 84 Stat. 826 (General Authorities Act); H. R. Rep. No. 91–1265, p. 2 (1970) ("The national park system which we know and cherish today has grown and matured over the years [and] has broadened to include . . . areas primarily significant for their outdoor recreation potential"); *ibid.* (explaining that amendments to the Park Service Organic Act "reference . . . more recent concepts like national recreation areas" as "units of the national park system"); see also § 101, 87 Stat. 576–577 (Mineral Leasing Act); S. Rep. No. 93–207, p. 29 (1973) (explaining that the Mineral Leasing Act "is not intended to grant rights-of-way through the National Park System" and citing the recently revised Park Service Organic Act).

trace the Organic Act's definition of land in the Park System. See, *e. g.*, 54 U. S. C. §§ 100102(6), 100501.[8]

More recently, a 2005 Park Service history stated that the Appalachian Trail was "brought into the National Park System" by the Trails Act and that, with the Trail's "inclusion in the System, the [Park Service] became responsible for its protection and maintenance within federally administered areas." NPS, The National Parks: Shaping the System 77. A 2006 Park Service handbook stated that "[s]everal components of the National Trails System which are administered by the [Park] Service," including the Appalachian Trail, "have been designated as units of the national park system" and "are therefore managed as national park areas." NPS, Management Policies 2006, § 9.2.2.7, p. 134. A 2016 Park Service index similarly listed the Trail as "a unit of the National Park System." NPS, The National Parks: Index 2012–2016, p. 142 (NPS Index).

Still taking cues from statutory text, the Park Service continues to refer to the Appalachian Trail as land in the Park System. Just last year, the Park Service issued a reference manual describing the Appalachian Trail as a "land protection project" that has "been formally declared [a] uni[t] of the National Park System." NPS, National Trails System: Reference Manual 45, pp. 28, 221 (2019) (NPS, Reference Manual 45). The Park Service's compendium of regulations similarly explains that the General Authorities Act "brought all areas administered by the [Park Service] into one National Park System." NPS, Appalachian Trail Superintendent's Compendium 2 (2019). Even the Park Service's recent

---

[8] The Court acknowledges that "the Government might refer to the Trail" as "'area' of land," but concludes that those references must pertain only to easements as defined by state law. *Ante*, at 615 (analogizing to sewage easements and citing state law). That view strays far from the federal statutes at issue. The simpler conclusion is that when the Government uses terms that define land in the Park System, the Government refers to land in the Park System.

budget justification to Congress identified the Appalachian Trail as a "Park Base Uni[t]," a "Park Uni[t]," and a national "par[k]." Dept. of Interior, Budget Justifications and Performance Information—Fiscal Year 2020: National Park Service, at Overview–16, ONPS–89, –105 (Budget Justifications) (capitalization deleted).

The Government has even brought this understanding to bear against private citizens. For example, the Government (including the Park Service and the Forest Service) filed a damages lawsuit against an individual, invoking the Organic Act and asserting that a segment of the Appalachian Trail passing through Forest Service lands was a unit of the National Park System. See Record in *United States* v. *Reed*, No. 1:05–cv–00010 (WD Va.), Doc. 1, p. 2 ("The United States . . . has established the Appalachian National Scenic Trail . . . as [a] uni[t] of the National Park Service"). In that case, the Government obtained a jury verdict against someone who had caused a fire on a Trail segment that was, as the Government alleged, land in the Park System. See *ibid.*; see also *id.*, Doc. 31 (judgment).

Here, at least before they reached this Court, both the Park Service and Forest Service explained in proceedings below that the Trail is land in the Park System. The Park Service noted that the Appalachian Trail is a "protected corridor (a swath of land averaging about 1,000 feet in width . . .)" that the Park Service "administers." App. 97. Thus, the Park Service detailed, "the entire Trail corridor" is a "park unit." *Ibid.* For its part, the Forest Service acknowledged that the Park Service "is the lead federal administrator agency for the entire [Appalachian Trail], regardless of land ownership." *Id.*, at 126. Again, this statement echoes the Organic Act's definition of land in the Park System, see 54 U. S. C. § 100501, further reflecting that the Trail is land in the Park System.

The agencies' common ground does not stop there. The Park Service's Land Resources Division estimates that the

Appalachian Trail corridor constitutes nearly 240,000 acres. NPS, Land Resources Div., Acreage Reports, Listing of Acreage, p. 1 (Dec. 31, 2019) (NPS, 2019 Acreage Report). The Forest Service concurs. See Dept. of Agriculture, Revised Land and Resource Mgmt. Plan–George Washington Nat. Forest 4–42 (2014) (Forest Service Land Plan). In its own management plan, the Forest Service explained that the Secretary of the Interior "administer[s]" in the George Washington National Forest "about 9,000 acres." *Ibid.* Acres of land, that is.

As federally owned land administered by the Park Service, the Trail segment that Atlantic aims to cross is exempt from the Mineral Leasing Act's grant of right-of-way authority.

II

The Court resists this conclusion for three principal reasons. Each tries to detach the Appalachian Trail from land, but none adheres to the plain text and history described above.

A

First, the Court posits that the Forest Service granted the Park Service only an "easement" for the Trail's route through the George Washington National Forest. See *ante*, at 613–616. Because private-law "easements are not land," the Court reasons, nothing "divest[ed] the Forest Service of jurisdiction over the lands that the Trail crosses." *Ante*, at 613, 616.

That reasoning is self-defeating. Despite recognizing that the Park Service "administers the *Trail*," the Court insists that this administration excludes "the underlying land" constituting the Trail. *Ante*, at 617. But the Court does not disclose how the Park Service could administer the Trail without administering the land that forms it.

Neither does the Court explain how the Trail could be a unit of the Park System if it is not land. The Court declares that the Trail's status as a System "'unit'" does not "indi-

cat[e] that the Trail and the land are the same." *Ante*, at 615. But the Court cites no statutory authority for this view. Nor could it. The Organic Act says the opposite: A "'System unit'" is by definition "land" or "water." 54 U. S. C. §§ 100102(6), 100501. Unless the Court means to imply that the Appalachian Trail is water, the Trail must be land in the Park System. Indeed, the Court's atextual reading unsettles much of the Park System as we know it. Other System units include the Booker T. Washington National Monument, George Washington's birthplace, the Harriet Tubman Underground Railroad National Historical Park, the Blue Ridge Parkway, and the Golden Gate National Recreation Area. See, *e. g.*, Budget Justifications, ONPS–89, –92, –109; accord, NPS Index, at 32, 61, 85, 104, 105. These monuments, houses, roads, and recreational areas are just as much "land" in the Park System as is a foot trail worn into the earth.

The Court's analysis of private-law easements is also unconvincing. In the Court's words, a private-law easement is "a limited privilege" granted to "a nonowner" of land. *Ante*, at 613; see also 613–614 (adding that "the grantor of [an] easement retains ownership" over the land and that "easements are not land, they merely burden land that continues to be owned by another"). But as the Court recognizes, "the Federal Government owns all lands involved here," *ante*, at 614, so private law is inapposite. Precisely because the Government owns all the lands at issue, it makes little sense to ask whether the Government granted itself an easement over its own land under state-law principles. Between agencies of the Federal Government, federal statutory commands, not private-law analogies, govern.

In any event, the Trails Act provides that the "rights-of-way" for the Appalachian Trail "shall include lands protected for it" where "practicable." 16 U. S. C. § 1244(a)(1); cf. § 1246(d) (listing the "areas . . . included" in a right-of-way); § 1246(e) (providing that the Government may "acquire such lands or interests therein to be utilized as segments of" a

trail and that "lands involved in such rights-of-way should be acquired in fee").[9] Thus, even with a so-called "easement" through a federal forest, the Park Service still administers land "acquire[d]" and "protected" for the Trail.[10] That is why the Park Service refers to the Trail as a "swath of land," App. 97; why the Forest Service admits that the Park Service administers those "acres," Forest Service Land Plan 4–42; and why the Secretary of the Interior has authority to grant rights-of-way "under" the Trail's surface, § 1248(a).

Tellingly, the Court recognizes that § 1248(a) "extends a positive grant of authority to the agency responsible for the Trail." *Ante*, at 615, n. 3. Indeed. That only scratches the surface. The Park Service may control what happens under the Trail consistent with "units of the national park system." § 1246(i). The Park Service also determines which "uses along the trail" to permit, § 1246(c), and provides for the Trail's "protection, management, development, and administration," § 1246(i). But under the Court's atextual reading of the relevant statutes, the agency tasked with protecting

[9] The Court maintains that these provisions are also "consistent with" its private-law paradigm, *ante*, at 615, but private law does not override the plain text of the relevant statutes. See Part I–A, *supra*. The Court simply works backwards from state law, even though statutory interpretation is supposed to start with statutory text. See, *e. g.*, *Rotkiske* v. *Klemm*, 589 U. S. 8, 13 (2019). Indeed, the Court offers almost no analysis on the language of the General Authorities Act or the Park Service Organic Act.

[10] A right-of-way may include not just a right of passage, but also the land itself. See, *e. g.*, 16 U. S. C. § 521e(3) (providing that certain "rights-of-way" are "lands"); Black's Law Dictionary 1587 (11th ed. 2019) ("right-of-way" can refer to "[t]he strip of land"); Black's Law Dictionary 1489 (4th ed. 1968) (similar); see also *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 181–182 (1898) (discussing these two definitions and explaining that the "intention of the legislature" controls). Although the Court quotes *New Mexico* for the proposition that a " 'right of way' " cannot constitute " 'possession of the land itself,' " *ante*, at 616, n. 4, that passage had to do with a "*naked* right of way," *i. e.*, a simple right of passage, 172 U. S., at 184 (emphasis added).

the Trail (and empowered to grant rights-of-way under it) could be excluded from determining whether a pipeline bores across the Trail. The Court's interpretation means that the Mineral Leasing Act would not even stop Atlantic from building a pipeline on top of an undisputed unit of the Park System. Cf. *ante*, at 623–624, n. 7. That cannot be right.

The Court also appears to assume that the Park Service's administrative jurisdiction over lands making up the Appalachian Trail must be mutually exclusive with the Forest Service's jurisdiction. See *ante*, at 613–616 (focusing on whether "jurisdiction over the lands" making up the Trail was "transferred," "convert[ed]," or "divest[ed]"). But this is not a zero-sum inquiry. The question is "not whether those portions of the [Appalachian Trail] were *removed* from the George Washington National Forest; the question is whether they were *added* to the National Park System." Brief for Natural Resources Defense Council et al. as *Amici Curiae* 2. As explained above, the lands making up the Appalachian Trail were indeed added to the National Park System.

That the Trail may fall within both the Forest System and the Park System is not surprising. The Trails Act recognizes that two agencies may have overlapping authority over the Appalachian Trail. See 16 U. S. C. § 1244(a)(1) (giving the Secretary of the Interior administrative authority "in consultation with the Secretary of Agriculture"); § 1246(a)(2) ("Development and management of each segment of the National Trails System shall be designed to harmonize with and complement any established multiple-use plans for that specific area"). So too the Mineral Leasing Act contemplates that multiple agencies may share authority over federally owned land implicated in proposed rights-of-way. See 30 U. S. C. § 185(c); see also n. 2, *supra*. The Court appears to recognize this point, see *ante*, at 615, n. 3, but does not follow it to its logical conclusion: that land may be in both the Park Service and the Forest Service and thus excluded from the Mineral Leasing Act's right-of-way authority. The Mineral

Leasing Act's carveout simply asks whether the federally owned land is in the Park System at all. See § 185(b). If it is, then (as the parties recognize) the Mineral Leasing Act does not permit pipelines to cross that park land.

The Court also cites a 1983 amendment to the Trails Act for the proposition that the lands making up the Appalachian Trail are not administered by the Park Service. See *ante*, at 623 (citing 16 U. S. C. § 1246(a)(1)(A)). This provision states that "[n]othing" in the Trails Act "shall be deemed to transfer among Federal agencies any management responsibilities . . . for federally administered lands which are components of the National Trails System." § 1246(a)(1)(A); see also § 207, 97 Stat. 45–46. It does not aid the Court's analysis.

For one thing, § 1246(a)(1)(A) undercuts the Court's distinction between a trail and land: The statute equates "components of the National Trails System" like the Appalachian Trail with "lands." *Ibid.*; see also § 1241(b) (Appalachian Trail is a "componen[t]" of the National Trails System). For another, in relying on this provision, the Court elides two terms of art: "administering" land and "managing" it. See *ante*, at 617, 623. "Trail administration is distinguished from on-the-ground trail management." NPS, Reference Manual 45, at 21.[11] Section 1246(a)(1)(A) itself differentiates the terms because it uses both, but disclaims only the transfer of "management," not "administration." When, as here, "'"Congress includes particular language in one section of a statute but omits it in another,"'" this Court "generally

[11] The Park Service Reference Manual defines "Administration" as a term referencing the agency broadly "responsible for Federal funding and staffing necessary to operate the trail and exercising trailwide authorities from the [Trails Act] and [the administering agency's] own organic legislation." NPS, Reference Manual 45, at 8; see also *ibid.* ("Trail administration provides trailwide coordination and consistency"). "Management," by contrast, refers to localized matters like "local visitor services," "law enforcement," "site-specific compliance," "site interpretation," "trail maintenance" and "marking," "resource preservation and protection," and "viewshed protection." *Id.*, at 10.

presumes" that "Congress '"intended a difference in meaning."'" *Maine Community Health Options* v. *United States*, 590 U. S. 296, 314 (2020).

This distinction between administration and management tracks the Park Service Organic Act. The Organic Act defines the Park System as land "administered" by the Park Service. 54 U. S. C. §100501; see also §100502 (reflecting difference between administration and management). Similarly, the rest of the Trails Act differentiates the two terms by giving the Secretary of the Interior (and by extension the Park Service) power to "administe[r]" the lands making up the Appalachian Trail, §5(a)(1), 82 Stat. 920, in consultation with other parties about proper Trail "management," §7(i), *id.*, at 925. Even the Mineral Leasing Act echoes this difference by equating land "under the jurisdiction of [a] Federal agency" with land "administered" by that agency. 30 U. S. C. §§185(c)(1), (2). The Court may be right that the Park Service "'*provide[s]* for' the maintenance of the Trail" while the Forest Service "*performs* the necessary physical work," *ante*, at 617, but that only punctuates the contrast between administration and management. See, *e. g.*, NPS, Reference Manual 45, at 8, 10, 21. There is no disputing that the Park Service administers the Appalachian Trail, even if the Forest Service manages it.[12]

At bottom, 16 U. S. C. §1246(a)(1)(A) does not change the fact that the Park Service administers the Appalachian Trail as a unit of the Park System. Nor does it supersede the Park Service Organic Act's definition of Park System lands or the Mineral Leasing Act's exclusion of those lands.

---

[12] Mere months after Congress had enacted §1246(a)(1)(A) to clarify that it had not transferred "management responsibilities," the Park Service issued a final rule for "General Regulations for Areas Administered by the National Park Service," reaffirming that the Appalachian Trail was land in the Park System. See 48 Fed. Reg. 30252. That agency action makes little sense under the Court's view.

B

Second, the Court maintains that Congress should have used "unequivocal and direct language" had it intended for the Trail to be land in the Park System. *Ante*, at 618. The Court cites the Wild and Scenic Rivers Act (Rivers Act) and the Blue Ridge Parkway statutes, noting that Congress "failed to enact similar language in the Trails Act." *Ante*, at 622. But as the Government explained, "[m]agic words such as 'transfer jurisdiction' are unnecessary." Reply Brief for Federal Petitioners 9 (citation omitted).

Indeed, neither example lends the Court much support. Certainly the Rivers Act, 82 Stat. 906, stated that any component of the Rivers System would "become a part of" the National Park System. § 10(c), *id.*, at 916. But this shows that Congress has many means to make land a unit of the Park System. Congress charted another path for the Appalachian Trail by enacting the General Authorities Act, a statute just as explicit as the Rivers Act. Again, it was after the Park Service had become the Trail's "land administering bureau," 34 Fed. Reg. 14337, that Congress provided that "'any area of land . . . now or hereafter administered by the Secretary of the Interior through the National Park Service'" is land in the Park System, § 2(b), 84 Stat. 826; see also 54 U. S. C. §§ 100102(2), (6), 100501. Resembling the Rivers Act, the General Authorities Act unambiguously provided that a component of the Trails System would become land in the National Park System.

The Blue Ridge Parkway statutes also undermine the Court's conclusion. The Court cites a 1952 statute and some more recent laws, see *ante*, at 618, but the enactments that originally created the Blue Ridge Parkway did not include language about "transferring" land from one agency to another. Rather, they stated that the parkway "shall be administered and maintained by the Secretary of the Interior through the National Park Service" and be "subject to" the

Park Service Organic Act, even though the relevant lands included national forests. See 49 Stat. 2041; ch. 277, 54 Stat. 249–250; NPS, Blue Ridge Parkway: Virginia and North Carolina Final General Management Plan 12 (2013). The only salient difference between the original Blue Ridge Parkway statutes and the Trails Act is that, for the latter, Congress took an additional step by enacting the General Authorities Act.

For similar reasons, it is not significant that the National Trails Act allowed the Secretary of the Interior to decide which agency in the Interior Department would administer the Appalachian Trail. Cf. *ante*, at 620–623. That was a choice for Congress and the Executive Branch, not the Judiciary. See § 5(a), 82 Stat. 920. More important, this designation had occurred before Congress enacted the General Authorities Act and amended the Mineral Leasing Act, and Congress was aware that the Park Service had already been selected to administer the land. The Court is therefore incorrect to suggest that Congress altered a regulatory scheme "through delegation." *Ante*, at 621. Congress did so instead explicitly through legislation and ratification.

C

Last, the Court objects on policy grounds that hewing to the statutes' plain meaning would have "striking implications for federalism and private property rights." *Ibid.*

Not so. For starters, the pertinent provisions under the Mineral Leasing Act apply only to "lands owned by the United States." 30 U. S. C. § 185(b)(1). That statute does not address a State or private landowner's ability to grant rights-of-way for pipelines. Congress, moreover, already addressed the Court's concerns. The Trails Act prescribed the means by which nonfederal "land necessary for [the Trail] may be acquired": by voluntary arrangements or, if "all voluntary means for acquiring the property fail," through "condemnation proceedings." *Preseault* v. *ICC*, 494

U. S. 1, 5, n. 1 (1990) (citing 16 U. S. C. §§ 1246(e), (g)). "Where practicable," the Trails Act incorporated pre-existing cooperative agreements. § 1244(a)(1). And as the Park Service has explained, it took the cooperative path to acquire private and state land for the Trail. See, *e. g.*, NPS, Reference Manual 45, at 41 (extolling the Trail's cooperative agreements that became "a laboratory for developing sustainable partnerships that can care for and protect interstate trails").

True, that the Appalachian Trail is land in the Park System means the Park Service has some power to regulate nonfederal property. But that authority is not new. For decades the Park Service has regulated waste disposal on "all lands and waters within the boundaries of all units of the National Park System, whether federally or nonfederally owned." 36 CFR § 6.2 (1995). It also has power to regulate the entire Appalachian Trail, including lands that the Government does not own. 16 U. S. C. § 1246(c) (requiring private landowners to act "in accordance with regulations" governing "the use of motorized vehicles" on the Trail).[13]

[13] The Court predicts that "difficulties" would arise if the Trail were land in the Park System, asserting that the Park Service's "'administrative'" authority could allow the Government to "displace" state laws providing for Trail maintenance. *Ante*, at 621–622, n. 6. The Court's concerns do not follow. Even with the Supremacy Clause, U. S. Const., Art. VI, cl. 2, federal and state laws can (and do) coexist in this context and myriad others. See, *e. g.*, NPS, Reference Manual 45, at 8 (Park Service's "Trail administration provides trailwide coordination and consistency" among "government agencies, landowners, interest groups, and individuals"). The Court's core objection seems to be that the Park Service could "gain power over numerous tracts of privately owned and state-owned land." *Ante*, at 621, n. 6. But it already did. See 16 U. S. C. § 1246(c); 54 U. S. C. § 100751(a); Pub. L. 91–383, §§ 1, 2(b), 84 Stat. 825–826; 36 CFR § 7.100; 67 Fed. Reg. 8479 (2002); 48 Fed. Reg. 30252; see also *Sturgeon* v. *Frost*, 587 U. S. 28, 38 (2019). Despite that fact, none of the Court's supposed "difficulties" has arisen. Compare *ante*, at 621–622, n. 6, with, *e. g.*, NPS, Reference Manual 45, at 41 (explaining complementary "Federal, State, and nonprofit roles" in the Trail's successful "management"). Rather, as the Court points out, the Park Service has not fully exercised its authority,

Nor is the Park Service's authority over Trail lands remarkable. Uniform regulatory power is a feature of a unified National Park System. After all, Congress designed the Park System to "expres[s] a single national heritage" and to "conserve" the country's "scenery, natural and historic objects, and wild life" for "the common benefit of all the people of the United States." 54 U. S. C. §§ 100101(a), (b). Thus, "the Secretary [of the Interior], acting through the Director of the Park Service, has broad authority under the National Park Service Organic Act . . . to administer both lands and waters within all system units in the country." *Sturgeon* v. *Frost*, 587 U. S. 28, 38 (2019); see also § 100751(a) (Secretary of the Interior "shall prescribe such regulations as [he or she] considers necessary or proper for the use and management of System units"). Because "[t]hose statutory grants of power make no distinctions based on the ownership of either lands or waters," 587 U. S., at 38, "park boundaries can encompass both federally and nonfederally owned lands and waters," all "subject to [Park] Service regulations," *id.*, at 61 (SOTOMAYOR, J., concurring).[14]

---

applying fewer regulations on private lands than on federal lands out of respect for private interests. 67 Fed. Reg. 8480. That the Park Service chooses not to regulate, however, does not mean it is powerless to do so.

In any case, the Court's policy objections do not bear on the statutory question here. And the Court's citations only confirm that the Trail is among the Park Service's "administered lands." *Id.*, at 8479. As those sources show, the Park Service's "general" regulations for lands "administered by the National Park Service" apply to Trail segments under the agency's "primary land management responsibility." 48 Fed. Reg. 30252–30253; see also *id.*, at 30253 (noting that because the Park Service "cannot abrogate [its] responsibility by excluding areas of the National Park System from coverage," it may also impose "special" regulations applicable to private lands). Those authorities thus reveal that administration differs from management, and that either way the Trail segment at issue is land in the Park System.

[14] If any Park Service regulations impair state or private-property rights, the Takings Clause and the Trails Act provide for compensation in appropriate cases. See U. S. Const., Amdt. 5; 16 U. S. C. §§ 1246(e), (g).

Despite all this, the Court insists that Congress use "exceedingly clear language" when it wishes "to significantly alter the balance between federal and state power and the power of the Government over private property." *Ante*, at 622. But Congress did. It used language so clear, in fact, that every year the Park Service provides an acreage report listing state and private land as part of the Appalachian Trail system unit. Last year, the Park Service's report listed that the Trail system unit comprises 58,110.94 acres of "Non-Federal" land, including 8,815.98 acres of "Private" land. See NPS, 2019 Acreage Report.

* * *

Today's outcome is inconsistent with the language of three statutes, longstanding agency practice, and common sense. The Park Service administers acres of land constituting the Appalachian Trail for scenic, historic, cultural, and recreational purposes. §§3(b), 5(a)(1), 82 Stat. 919–920; 34 Fed. Reg. 14337. "[A]ny area of land" so "administered" by the Park Service is a unit of and thus land in the National Park System. 54 U. S. C. §§100102(6), 100501. The Mineral Leasing Act does not permit natural-gas pipelines across such federally owned lands. 30 U. S. C. §185(b). Only Congress, not this Court, should change that mandate.

I respectfully dissent.

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

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

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 654–683.

(a) Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII's terms interpreted in accord with their ordinary public meaning at the time of their enactment resolves these cases. Pp. 654–662.

(1) The parties concede that the term "sex" in 1964 referred to the biological distinctions between male and female. And "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350. That term incorporates the but-for causation standard, *id.*, at 346, 360,

---

*Together with No. 17–1623, *Altitude Express, Inc., et al.* v. *Zarda et al., as Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

which, for Title VII, means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment action. The term "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745. In so-called "disparate treatment" cases, this Court has held that the difference in treatment based on sex must be intentional. See, *e. g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986. And the statute's repeated use of the term "individual" means that the focus is on "[a] particular being as distinguished from a class." Webster's New International Dictionary, at 1267. Pp. 655–659.

(2) These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group. A statutory violation occurs if an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee. Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. There is no escaping the role intent plays: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking. Pp. 659–662.

(b) Three leading precedents confirm what the statute's plain terms suggest. In *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, a company was held to have violated Title VII by refusing to hire women with young children, despite the fact that the discrimination also depended on being a parent of young children and the fact that the company favored hiring women over men. In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, an employer's policy of requiring women to make larger pension fund contributions than men because women tend to live longer was held to violate Title VII, notwithstanding the policy's evenhandedness between men and women as groups. And in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, a male plaintiff alleged a triable Title VII claim for sexual harassment by coworkers who were members of the same sex.

The lessons these cases hold are instructive here. First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer might have called its rule a "life expectancy" adjustment, and in

Phillips, the employer could have accurately spoken of its policy as one based on "motherhood." But such labels and additional intentions or motivations did not make a difference there, and they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the employer easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. Here, too, it is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. *Manhart* is instructive here. An employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule. Pp. 662–665.

(c) The employers do not dispute that they fired their employees for being homosexual or transgender. Rather, they contend that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability. But their statutory text arguments have already been rejected by this Court's precedents. And none of their other contentions about what they think the law was meant to do, or should do, allow for ignoring the law as it is. Pp. 665–682.

(1) The employers assert that it should make a difference that plaintiffs would likely respond in conversation that they were fired for being gay or transgender and not because of sex. But conversational conventions do not control Title VII's legal analysis, which asks simply whether sex is a but-for cause. Nor is it a defense to insist that intentional discrimination based on homosexuality or transgender status is not intentional discrimination based on sex. An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. Nor does it make a difference that an employer could refuse to hire a gay or transgender individual without learning that person's sex. By intentionally setting out a rule that makes hiring turn on sex, the employer violates the law, whatever he might know or not know about individual applicants. The employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. But when Con-

gress chooses not to include any exceptions to a broad rule, this Court applies the broad rule. Finally, the employers suggest that because the policies at issue have the same adverse consequences for men and women, a stricter causation test should apply. That argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action under Title VII, a suggestion at odds with the statute. Pp. 666–673.

(2) The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts. See *Milner* v. *Department of Navy*, 562 U. S. 562, 574. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms ordinarily carried some missed message. Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That is an invitation that no court should ever take up. Pp. 673–682.

No. 17–1618, 723 Fed. Appx. 964, reversed and remanded; No. 17–1623, 883 F. 3d 100, and No. 18–107, 884 F. 3d 560, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 683. KAVANAUGH, J., filed a dissenting opinion, *post*, p. 780.

Pamela S. Karlan argued the cause for petitioner in No. 17–1618 and respondents in No. 17–1623. With her on the briefs in No. 17–1623 were *Gregory Antollino*, *Stephen Bergstein*, *Jeffrey L. Fisher*, *Brian H. Fletcher*, *Ria Tabacco Mar*, *James D. Esseks*, *David D. Cole*, and *Christopher Dunn*. On the briefs in No. 17–1618 were *Brian J. Sutherland* and *Thomas J. Mew IV*.

Counsel

Jeffrey M. Harris argued the cause for respondent in No. 17–1618 and petitioners in No. 17–1623. On the brief in No. 17–1618 were *Jack R. Hancock*, *William H. Buechner*, *Jr.*, and *Michael M. Hill*. On the brief in No. 17–1623 was *Saul D. Zabell*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging affirmance in No. 17–1618 and reversal in No. 17–1623. With him on the brief were *Assistant Attorneys General Hunt* and *Dreiband*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Sopan Joshi*, *Eric Treene*, *Charles W. Scarborough*, and *Stephanie R. Marcus*.

Mr. Cole argued the cause for respondent-intervenor Aimee Stephens in No. 18–107. With him on the briefs were *John A. Knight*, *Elizabeth O. Gill*, *Gabriel Arkles*, *Chase B. Strangio*, *Ms. Tabacco Mar*, *Mr. Esseks*, *Louise Melling*, *Jay D. Kaplan*, and *Daniel S. Korobkin*.

John J. Bursch argued the cause for petitioner in No. 18–107. With him on the brief were *Kristen K. Waggoner*, *David A. Cortman*, *James A. Campbell*, *Katherine L. Anderson*, *Jeana J. Hallock*, and *Joel J. Kirkpatrick*.

Solicitor General Francisco argued the cause for the federal respondent in No. 18–107. With him on the brief were *Assistant Attorneys General Hunt* and *Dreiband*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Johnathan C. Bond*, *Messrs. Treene* and *Scarborough*, and *Ms. Marcus*.†

---

†Briefs of *amici curiae* urging reversal in No. 17–1618 and affirmance in Nos. 17–1623 and 18–107 were filed for the State of Illinois et al. by *Kwame Raoul*, Attorney General of Illinois, *Jane Elinor Notz*, Solicitor General, and *Sarah A. Hunger*, *Kaitlyn N. Chenevert*, and *Jonathan J. Sheffield*, Assistant Attorneys General, and *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Andrew W. Amend*, Senior Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Phil Weiser* of Colorado, *William Tong* of Connecticut, *Kathy Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii,

JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance

---

Aaron M. Frey of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert Ferguson* of Washington; for Altria Group, Inc., by *Lauren R. Goldman*, *Scott A. Chesin*, *Murray R. Garnick*, *Andrew J. Pincus*, and *Nicole A. Saharsky*; for the American Bar Association by *Robert M. Carlson* and *Douglas Hallward-Driemeier*; for the American Federation of Labor and Congress of Industrial Organizations by *Harold C. Becker* and *Matthew J. Ginsburg*; for the American Medical Association et al. by *Scott B. Wilkens*; for the American Psychological Association et al. by *Jessica Ring Amunson*, *Emily L. Chapuis*, *Aaron M. Panner*, *Deanne M. Ottaviano*, and *Nathalie F. P. Gilfoyle*; for Anti-discrimination Scholars by *Mitchell P. Reich*, *Thomas P. Schmidt*, and *Brian Soucek*, *pro se*; for Business Organizations by *Lisa S. Blatt*; for Employment Discrimination Law Scholars by *Sasha Samberg-Champion*, *Joseph J. Wardenski*, and *Sachin S. Pandya* and *Marcia L. McCormick*, both *pro se*; for Former Executive Branch Officials and Leaders et al. by *Evan Wolfson*; for Georgia Equality by *Emmet J. Bondurant*; for GLBTQ Legal Advocates & Defenders et al. by *Alan E. Schoenfeld*, *Mary Bonauto*, *Christopher Stoll*, *Julie Wilensky*, and *Shannon Minter*; for Historians by *Chanakya A. Sethi* and *Rakesh N. Kilaru*; for Impact Fund et al. by *Lindsay Nako* and *David Nahmias*; for inter-ACT: Advocates for Intersex Youth et al. by *Jonah M. Knobler*; for Lambda Legal Defense and Education Fund, Inc., by *Karen L. Loewy*, *Omar Gonzalez-Pagan*, *Sharon M. McGowan*, and *Gregory R. Nevins*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Daniel A. Rubens*, *Kristen Clarke*, *Jon Greenbaum*, *Dariely Rodriguez*, *Phylicia H. Hill*, *Vanita Gupta*, and *Michael Zubrensky*; for the Legal Aid Society by *Brian T. Burgess*, *Richard Blum*, and *Frederick H. Rein*; for Lesbian, Gay, Bisexual, Transgender, and Queer Members of the Legal Profession et al. by *Margaret Costello*; for Local Governments et al. by *Zachary W. Carter*, *Richard Dearing*, *Devin Slack*, *Michael N. Feuer*, *James P. Clark*, *Kathleen Kenealy*, *Blithe Smith Bock*, *Michael Walsh*, *Danielle L. Goldstein*, *Dennis J. Herrera*, *Jeremy M. Goldman*, *Jaime M. Huling Delaye*, *James R. Williams*, *Greta S. Hansen*, *Jeremy A. Avila*, *George McAndrews*, *William S. Kelly*, *G. Nicholas Herman*, *Mark A. Flessner*, *Christo-*

with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we

---

pher J. Caso, Kristin M. Bronson, Lawrence Garcia, Louis N. Rainone, Dave Williamson, F. Joseph Abood, Mary C. Wickham, Roger J. Desiderio, Susan L. Segal, Kathleen E. Gill, Mark Barber, Lyndsey M. Olson, Peter S. Holmes, Michael Jenkins, John M. Barr, Betsy Cavendish, Edward M. Pikula, Jordan B. Yeager, and *William Fosbre*; for Members of Congress by *Peter T. Barbur*; for the Modern Military Association of America et al. by *James Moore III, Jonathan L. Marcus, John M. Nannes*, and *Peter Perkowski*; for the Muslim Bar Association of New York et al. by *Adeel A. Mangi* and *Mr. Knobler*; for the National Education Association et al. by *Jeffrey A. Lamken, Alice O'Brien, Eric A. Harrington, David Strom, Francisco M. Negrón, Jr.*, and *Sonja Trainor*; for the National LGBT Bar Association et al. by *Sanford Jay Rosen* and *Michael S. Nunez*; for the National Women's Law Center et al. by *Erica C. Lai, Danielle C. Morello, Fatima Goss Graves, Emily Martin*, and *Sunu P. Chandy*; for Philosophy Professors by *Lisa Hogan* and *Esteban M. Morin*; for the Presiding Bishop and President of the House of Deputies of the Episcopal Church et al. by *Jeffrey S. Trachtman*; for Service Employees International Union et al. by *James M. Finberg, Barbara J. Chisholm, Nicole G. Berner*, and *Claire Prestel*; for the Southern Poverty Law Center et al. by *Melissa Arbus Sherry*; for Statutory Interpretation and Equality Law Scholars by *Elizabeth B. Wydra, Brianne J. Gorod, Ashwin Phatak*, and *Katie Eyer, pro se*; for the Trevor Project et al. by *Richard W. Smith* and *Douglas C. Dreier*; for Wisconsin Advocacy Organizations by *Jeffrey A. McIntyre*; for the Women's and Children's Advocacy Project et al. by *Wendy J. Murphy*; for Walter Dellinger et al. by *Joshua Matz* and *Laurence H. Tribe*; for William N. Eskridge, Jr., et al. by *Mr. Eskridge, pro se*; for Kenneth B. Mehlman et al. by *Roy T. Englert, Jr.*, and *Laurie R. Rubenstein*; for Brian Slocum et al. by *Andrew Rhys Davies*; and for 206 Businesses by *Todd Anten, Kathleen M. Sullivan, Cynthia H. Hyndman, Robert S. Cohen*, and *Justin T. Reinheimer.*

Jeffrey T. Green and *Patrick C. Bryant* filed a brief of *amici curiae* urging reversal in No. 17–1618 and affirmance in No. 17–1623 for Scholars Who Study the LGB Population.

Briefs of *amici curiae* urging reversal in Nos. 17–1623 and 18–107 were filed for Ryan T. Anderson by *Charles S. LiMandri, Paul M. Jonna*, and *Jeffrey M. Trissell*; and for W. Burlette Carter by *Ms. Carter, pro se.*

Briefs of *amici curiae* urging reversal in No. 18–107 were filed for the Center for Arizona Policy by *Aaron T. Martin* and *Cathi Herrod*; for the

must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual

---

Center for Religious Expression by *Nathan W. Kellum*; for the Christian Employers Alliance by *Parker Douglas*; for Family Policy Groups by *Jonathan R. Whitehead*; for the Foundation for Moral Law by *Matthew J. Clark* and *John A. Eidsmoe*; for Free Speech Advocates by *Thomas P. Monaghan* and *Walter M. Weber*; for the Great Lakes Justice Center by *William Wagner*, *Erin Elizabeth Mersino*, and *Katherine L. Henry*; for the Independent Women's Forum et al. by *Anita Y. Milanovich*; for Judicial Watch, Inc., by *Robert D. Popper*; for Military Spouses United by *Arthur A. Schulcz, Sr.*; for National Medical and Policy Groups That Study Sex and Gender Identity by *Antony B. Kolenc*; for Public Advocate of the United States et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, *Robert J. Olson*, *Joseph W. Miller*, *Gary G. Kreep*, and *J. Mark Brewer*; for Scholars of Family and Sexuality by *Dean R. Broyles*; for Scholars of Philosophy et al. by *David R. Langdon*; for the United States Conference of Catholic Bishops et al. by *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Michael F. Moses*, and *Hillary E. Byrnes*; for Women's Liberation Front by *David Bookbinder*; for William J. Bennett by *Charles J. Cooper*, *David H. Thompson*, and *John D. Ohlendorf*; and for Walt Heyer et al. by *Gregory H. Teufel*.

Briefs of *amici curiae* urging affirmance in No. 17–1618 and reversal in Nos. 17–1623 and 18–107 were filed for the State of Tennessee et al. by *Herbert H. Slatery III*, Attorney General of Tennessee, *Andrée S. Blumstein*, Solicitor General, and *Sarah K. Campbell*, Associate Solicitor General, *Douglas J. Peterson*, Attorney General of Nebraska, and *David Bydalek*, Chief Deputy Attorney General, and *Ken Paxton*, Attorney General of Texas, *Kyle D. Hawkins*, Solicitor General, and *M. Stephen Pitt*, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Jeff Landry* of Louisiana, *Eric S. Schmitt* of Missouri, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, and *Patrick Morrisey* of West Virginia; for Advocates for Faith and Freedom by *C. Thomas Ludden*; for the American Public Philosophy Institute by *David R. Upham*; for the Billy Graham Evangelistic Association et al. by *Frederick W. Claybrook, Jr.*, *Steven W. Fitschen*, *James A. Davids*, and *David A. Bruce*; for Business Organizations by *Sean P. Gates*; for the Council of Christian Colleges & Universities et al. by *R. Shawn Gunnarson*, *Steven M. Sandberg*, and *Heather E. Gunnarson*; for Defend My Pri-

or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

---

vacy et al. by *Joel A. Ready*; for the First Liberty Institute by *Kelly J. Shackelford*, *Hiram S. Sasser III*, and *Stephanie N. Taub*; for the H. T. Hackney Co. by *Edward H. Trent*; for the Institute for Faith and Family et al. by *Deborah J. Dewart* and *B. Tyler Brooks*; for the National Association of Evangelicals et al. by *Alexander Dushku* and *Luke W. Goodrich*; for the National Organization for Marriage et al. by *John C. Eastman* and *Anthony T. Caso*; for the Religious Freedom Institute's Islam & Religious Freedom Action Team et al. by *Michael K. Whitehead*; and for David A. Robinson by *Mr. Robinson*, *pro se*.

William C. Duncan filed a brief of *amici curiae* urging affirmance in No. 17–1618 and reversal in No. 17–1623 for the Marriage Law Foundation.

Briefs of *amici curiae* urging affirmance in No. 18–107 were filed for Anti-Sexual Assault Organizations et al. by *Walter Dellinger*; for Law & History Professors by *Craig J. Konnoth*, *Kevin Costello*, *Jack Harrison*, and *Kyle Velte*, all *pro se*, and *Andrew H. DeVoogd*, *Susan M. Finegan*, and *Donald C. Davis*; for Scholars Who Study the Transgender Population by *David R. Carpenter*; for the Transgender Law Center et al. by *Julia R. Lissner*, *Megan M. Kokontis*, *Melissa L. Cizmorris*, *Andrea Chinyere Ezie*, *Lynly Egyes*, and *Dale Melchert*; for the Transgender Legal Defense & Education Fund et al. by *Howard S. Zelbo* and *Carmine D. Boccuzzi, Jr.*; for Women Business Owners et al. by *Thomas Brejcha* and *Joan M. Mannix*; and for Samuel R. Bagenstos et al. by*Daniel Woofter*, *Kevin K. Russell*, *Eric F. Citron*, *Erica Oleszczuk Evans*, *Martin S. Lederman*, *Mr. Bagenstos*, *Leah M. Litman*, *Margo Schlanger*, and *Michael C. Dorf*, all *pro se*.

Briefs of *amici curiae* were filed in all cases for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, *Roger K. Gannam*, and *Rena M. Lindevaldsen*; for Members of Congress by *Timothy J. Newton* and *Kenneth W. Starr*; for the New Civil Liberties Alliance by *Jonathan F. Mitchell* and *Aditya Dynar*; and for Women CEOs et al. by *Suzanne B. Goldberg*, *Richard M. Segal*, and *Cynthia Cook Robertson*.

Briefs of *amici curiae* in Nos. 17–1618 and 17–1623 were filed for the Foundation for Moral Law by *Mr. Eidsmoe*; and for Karl Olson by *Janine M. Brookner*.

Randall L. Wenger, *Jeremy L. Samek*, and *Curtis M. Schube* filed a brief of *amicus curiae* for Paul R. McHugh in No. 18–107.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair

and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U. S. C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed. Appx. 964 (2018) (*per curiam*). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F. 3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. 884 F. 3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U. S. 960 (2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old

statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. See *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019).

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (citing *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009); quotation altered). In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage* v. *United States*, 571 U. S. 204, 211–212 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U. S., at 350.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Cf. 11 U. S. C. § 525; 16 U. S. C. § 511. Or it could have written "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged em-

ployment decision. Cf. 22 U. S. C. § 2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U. S. C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. *Ibid.* The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53, 59 (2006). In so-called

"disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, *e. g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975); see also *post*, at 709, n. 22 (ALITO, J., dissenting). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . 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* . . . sex." §2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or condi-

tions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the

employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextri-

cably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts

an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F. 3d, at 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms sug-

gest, this Court's cases have already confirmed. Consider three of our leading precedents.

In *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. *Id.*, at 707–708. Even so, the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. *Id.*, at 708. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to

achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. *Ibid.* The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex. *Id.*, at 711.

In *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." *Id.*, at 79. But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.* Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. In *Manhart*, the employer called its rule requiring women to pay more into the pension fund a "life expectancy" adjustment necessary to achieve sex equality. In *Phillips*, the employer could have accurately spoken of its policy as one based on "motherhood." In much the same way, today's employers might describe their actions as motivated by their employees' homosexuality or transgender sta-

tus. But just as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here. When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.

Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. In *Phillips*, *Manhart*, and *Oncale*, the defendant easily could have pointed to some other, nonprotected trait and insisted it was the more important factor in the adverse employment outcome. So, too, it has no significance here if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision.

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. As *Manhart* teaches, an employer is liable for intentionally requiring an individual female employee to pay more into a pension plan than a male counterpart even if the scheme promotes equality at the group level. Likewise, an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post*, at 684–685 (ALITO, J., dissenting); *post*, at 786–791 (KAVANAUGH, J., dissenting).

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a

but-for cause. In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. See *post*, at 690–693 (ALITO, J., dissenting); *post*, at 790–791 (KAVANAUGH, J., dissenting). But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart*, the employer intentionally required women to make

higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips*, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should

check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically. Cf. *post,* at 688 (ALITO, J., dissenting); *post,* at 791–793 (KAVANAUGH, J., dissenting).

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. *Oncale*, 523 U. S., at 79–80. Same with "motherhood discrimination." See *Phillips*, 400 U. S., at 544. Would the em-

ployers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something. Cf. *post*, at 683–684, 722–723 (ALITO, J., dissenting); *post*, at 782, 793 (KAVANAUGH, J., dissenting).

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990); see also *United States* v. *Wells*, 519 U. S. 482, 496 (1997); *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual

and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employ-

ers' policies in the cases before us have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a

man who applied to be a mechanic, we've quietly changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that,

when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. See, *e. g.*, *Carcieri* v. *Salazar*, 555 U. S. 379, 387 (2009); *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992); *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. Cf. *post*, at 721 (ALITO, J., dissenting). But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner* v. *Department of Navy*, 562 U. S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale*, 523 U. S., at 79. But "'[t]he fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead, it simply "'demonstrates [the] breadth'" of a legislative command. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985). And "it is ultimately the provisions of" those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U. S., at 79; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the

time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931). But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. *Ibid.* Similarly, in *New Prime*, we held that, while the term "contracts of employment" today might seem to encompass only contracts with employees, at the time of the statute's adoption the phrase was ordinarily understood to cover contracts with independent contractors as well. 586 U. S., at 112–116. Cf. *post*, at 785–786 (KAVANAUGH, J., dissenting) (providing additional examples).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not

dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employers' logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. See, *e. g.*, *Smith* v. *Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e. g.*, Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look

only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. Take this Court's encounter with the Americans with Disabilities Act's directive that no "'public entity'" can discriminate against any "'qualified individual with a disability.'" *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998). Congress, of course, didn't list every public entity the statute would apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to *prisons*, curiously, some demanded a closer look: Pennsylvania argued that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners.'" *Id.*, at 211–212. This Court emphatically rejected that view, explaining that, "in the context of an unambiguous statutory text," whether a specific application was anticipated by Congress "is irrelevant." *Id.*, at 212. As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would

tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms. Cf. *post*, at 709–716 (ALITO, J., dissenting); *post,* at 799–800 (KAVANAUGH, J., dissenting).

The employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale.* How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U. S., at 79. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of "'the sex provision of Title VII [are] difficult to . . . control.'" Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative

History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on, even among those tasked with enforcing the law. In the years immediately following Title VII's passage, the EEOC officially opined that listing men's positions and women's positions separately in job postings was simply helpful rather than discriminatory. Franklin, 125 Harv. L. Rev., at 1340 (citing Press Release, EEOC (Sept. 22, 1965)). Some courts held that Title VII did not prevent an employer from firing an employee for refusing his sexual advances. See, *e. g.*, *Barnes* v. *Train*, 13 FEP Cases 123, 1974 WL 10628, *1 (D DC, Aug. 9, 1974). And courts held that a policy against hiring mothers but not fathers of young children wasn't discrimination because of sex. See *Phillips* v. *Martin Marietta Corp.*, 411 F. 2d 1 (CA5 1969), rev'd, 400 U. S. 542 (1971) (*per curiam*).

Over time, though, the breadth of the statutory language proved too difficult to deny. By the end of the 1960s, the EEOC reversed its stance on sex-segregated job advertising. See Franklin, 125 Harv. L. Rev., at 1345. In 1971, this Court held that treating women with children differently from men with children violated Title VII. *Phillips*, 400 U. S., at 544. And by the late 1970s, courts began to recognize that sexual harassment can sometimes amount to sex discrimination. See, *e. g.*, *Barnes* v. *Costle*, 561 F. 2d 983, 990 (CADC 1977). While to the modern eye each of these examples may seem "plainly [to] constitut[e] discrimination because of biological sex," *post*, at 719 (Alito, J., dissenting), all were hotly contested for years following Title VII's enactment. And as with the discrimination we consider today, many federal judges long accepted interpretations of Title VII that ex-

cluded these situations. Cf. *post*, at 799–800 (KAVANAUGH, J., dissenting) (highlighting that certain lower courts have rejected Title VII claims based on homosexuality and transgender status). Would the employers have us undo every one of these unexpected applications too?

The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post*, at 724–734 (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences

of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S. F. R.*, 548 U. S., at 59. Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties

are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U. S. C. § 2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

*

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions,

the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U. S. C. §2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list,[1] and in recent years, bills have included

[1] *E. g.*, H. R. 166, 94th Cong., 1st Sess., §6 (1975); H. R. 451, 95th Cong., 1st Sess., §6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th

"gender identity" as well.[2] But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.[3] This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation.[4] A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.

Cong., 1st Sess., § 5 (1985); S. 464, 100th Cong., 1st Sess., § 5 (1987); H. R. 655, 101st Cong., 1st Sess., § 2 (1989); S. 574, 102d Cong., 1st Sess., § 5 (1991); H. R. 423, 103d Cong., 1st Sess., § 2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H. R. 365, 105th Cong., 1st Sess., § 2 (1997); H. R. 311, 106th Cong., 1st Sess., § 2 (1999); H. R. 217, 107th Cong., 1st Sess., § 2 (2001); S. 16, 108th Cong., 1st Sess., §§ 701–704 (2003); H. R. 288, 109th Cong., 1st Sess., § 2 (2005).

[2] See, *e. g.*, H. R. 2015, 110th Cong., 1st Sess. (2007); H. R. 3017, 111th Cong., 1st Sess. (2009); H. R. 1397, 112th Cong., 1st Sess. (2011); H. R. 1755, 113th Cong., 1st Sess. (2013); H. R. 3185, 114th Cong., 1st Sess., § 7 (2015); H. R. 2282, 115th Cong., 1st Sess., § 7 (2017); H. R. 5, 116th Cong., 1st Sess. (2019).

[3] H. R. 5331, 116th Cong., 1st Sess., §§ 4(b), (c) (2019).

[4] Section 7(b) of H. R. 5 strikes the term "sex" in 42 U. S. C. § 2000e–2 and inserts: "SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY)."

Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.[5]

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

---

[5] That is what Judge Posner did in the Seventh Circuit case holding that Title VII prohibits discrimination because of sexual orientation. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339 (2017) (en banc). Judge Posner agreed with that result but wrote:

"*I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted.*" *Id.*, at 357 (concurring opinion) (emphasis added).

I

A

Title VII, as noted, prohibits discrimination "because of . . . sex," § 2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."[6] *Ante*, at 653. (Appendix A, *infra*, to this opinion includes the full definitions of "sex" in the unabridged dictionaries in use in the 1960s.)

In all those dictionaries, the primary definition of "sex" was essentially the same as that in the then-most recent edition of Webster's New International Dictionary 2296 (def. 1) (2d ed. 1953): "[o]ne of the two divisions of organisms formed on the distinction of male and female." See also American Heritage Dictionary 1187 (def. 1(a)) (1969) ("[t]he property or quality by which organisms are classified according to their reproductive functions"); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) ("the fact or character of being either male or female"); 9 Oxford English Dictionary 577 (def. 1) (1933) ("[e]ither of the two divisions of organic beings distinguished as male and female respectively").

---

[6] The Court does not define what it means by "transgender status," but the American Psychological Association describes "transgender" as "[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth." A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. It defines "gender identity" as "[a]n internal sense of being male, female or something else, which may or may not correspond to an individual's sex assigned at birth or sex characteristics." *Ibid.* Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

The Court does not dispute that this is what "sex" means in Title VII, although it coyly suggests that there is at least some support for a different and potentially relevant definition. *Ante*, at 655. (I address alternative definitions below. See Part I–B–3, *infra*.) But the Court declines to stand on that ground and instead "proceed[s] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female." *Ante*, at 655.

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion? The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante*, at 655–659, 662.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, 42 U. S. C. §2000e–2(m), so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of . . . sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity

of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way.* According to the Court, the text is unambiguous. See *ante*, at 674, 677, 680.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra*. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra*. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.[7] Day in and day out, the Commission

[7] The EEOC first held that "discrimination against a transgender individual because that person is transgender" violates Title VII in 2012 in *Macy* v. *Holder*, 2012 WL 1435995, *11 (Apr. 20, 2012), though it earlier advanced that position in an *amicus* brief in Federal District Court in 2011, *ibid.*, n. 16. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015. See *Baldwin* v. *Foxx*, 2015 WL 4397641 (July 15, 2015).

enforced Title VII but did not grasp what discrimination "because of . . . sex" unambiguously means. See Part III–C, *infra*.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. *Ante*, at 669 ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. See *ante*, at 661 (recognizing that "discrimination on these bases" does not have "some disparate impact on one sex or another"). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes.[8] And individuals who are born with the genes and organs of either biological sex may identify with a different gender.[9]

Using slightly different terms, the Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex. See *ante*, at 651–652 (When an employer "fires an individual for being homosexual or transgender," "[s]ex plays a necessary and undisguisable role in the decision"); *ante*, at 660 ("[I]t is impossible to discriminate against

[8] "*Sexual orientation* refers to a person's erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (*homosexual*), the other sex (*heterosexual*), or both sexes (*bisexual*)." 1 B. Sadock, V. Sadock, & P. Ruiz, Comprehensive Textbook of Psychiatry 2061 (9th ed. 2009); see also American Heritage Dictionary 1607 (5th ed. 2011) (defining "sexual orientation" as "[t]he direction of a person's sexual interest, as towards people of the opposite sex, the same sex, or both sexes"); Webster's New College Dictionary 1036 (3d ed. 2008) (defining "sexual orientation" as "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes").

[9] See n. 6, *supra*; see also Sadock, *supra*, at 2063 ("transgender" refers to "any individual who identifies with and adopts the gender role of a member of the other biological sex").

a person for being homosexual or transgender without discriminating against that individual based on sex"); *ante*, at 661 ("[W]hen an employer discriminates against homosexual or transgender employees, [the] employer . . . inescapably *intends* to rely on sex in its decisionmaking"); *ante*, at 662 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"); *ante*, at 665 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex"); *ante*, at 669 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex"). But repetition of an assertion does not make it so, and the Court's repeated assertion is demonstrably untrue.

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual." Appendix D, *infra*, at 760, 773.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing

the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination.[10] And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante*, at 668–669. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i. e.*, that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that

[10] See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 ("If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex"); see also *id.*, at 69 ("Somebody who comes in and says I'm not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose").

> box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not." *Ante*, at 668.

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account. See *ante*, at 668–669.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring

> their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman." *Ante*, at 661–662.

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are "inextricably bound up with sex," *ante*, at 660–661, and that discrimination on the basis of sexual orientation or gender identity involves the application of "sex-based rules," *ante*, at 667. This is a variant of an argument found in many of the briefs filed in support of the employees and in the lower court decisions that agreed with the Court's interpretation. All these variants stress that sex, sexual orientation, and gender identity are related concepts. The Seventh Circuit observed that "[i]t would require considerable calisthenics to remove 'sex' from 'sexual orientation.'" *Hively*, 853 F. 3d, at 350.[11] The

---

[11] See also Brief for William N. Eskridge Jr. et al. as *Amici Curiae* 2 ("[T]here is no reasonable way to disentangle sex from same-sex attraction or transgender status").

Second Circuit wrote that sex is necessarily "a factor in sexual orientation" and further concluded that "sexual orientation is a function of sex." 883 F. 3d 100, 112–113 (2018) (en banc). Bostock's brief and those of *amici* supporting his position contend that sexual orientation is "a sex-based consideration."[12] Other briefs state that sexual orientation is "a function of sex"[13] or is "intrinsically related to sex."[14] Similarly, Stephens argues that sex and gender identity are necessarily intertwined: "By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth."[15]

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, "sex." Many things are related to sex. Think of all the nouns other than "orientation" that are commonly modified by the adjective "sexual." Some examples yielded by a quick computer search are "sexual harassment," "sexual assault, "sexual violence," "sexual intercourse," and "sexual content."

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to

---

[12] Brief for Petitioner in No. 17–1618, p. 14; see also Brief for Southern Poverty Law Center et al. as *Amici Curiae* 7–8.

[13] Brief for Scholars Who Study the LGB Population as *Amici Curiae* in Nos. 17–1618, 17–1623, p. 10.

[14] Brief for American Psychological Association et al. as *Amici Curiae* 11.

[15] Reply Brief for Respondent Aimee Stephens in No. 18–107, p. 5.

sex. The Court draws a distinction between things that are "inextricably" related and those that are related in "some vague sense." *Ante*, at 660–661. Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.[16] And it would do this in the name of high textualism.

An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Ante*, at 660. That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are "relevant to [its] employment decisions." *Ibid.* By proclaiming that sexual orientation and gender identity are "not relevant to employment decisions," the Court updates Title VII to reflect what it regards as 2020 values.

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind*" the two employees are "materially identical" except that one is a man and the other is a woman. *Ibid.* (emphasis added). The Court reasons that if

---

[16] Notably, Title VII itself already suggests a line, which the Court ignores. The statute specifies that the terms "because of sex" and "on the basis of sex" cover certain conditions that are biologically tied to sex, namely, "pregnancy, childbirth, [and] related medical conditions." 42 U. S. C. §2000e(k). This definition should inform the meaning of "because of sex" in Title VII more generally. Unlike pregnancy, neither sexual orientation nor gender identity is biologically linked to women or men.

the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. *Ibid.* After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, "race, color, religion, sex, [and] national origin," 42 U. S. C. §2000e–2(a)(1), Title VII allows employers to decide whether two employees are "materially identical." Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante*, at 661, 665, 671, but its exam-

ple does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." *Ante*, at 660. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante*, at 664–665, 667. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." *Ante*, at 660. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~
Woman attracted to men
~~Woman attracted to women~~
Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *ante*, at 660, but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," *ante*, at 669, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach.

And to say that the Court's interpretation is the only possible reading is indefensible.

B

Although the Court relies solely on the arguments discussed above, several other arguments figure prominently in the decisions of the lower courts and in briefs submitted by or in support of the employees. The Court apparently finds these arguments unpersuasive, and so do I, but for the sake of completeness, I will address them briefly.

1

One argument, which relies on our decision in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes. See 883 F. 3d, at 119–123; *Hively*, 853 F. 3d, at 346; 884 F. 3d 560, 576–577 (CA6 2018). The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these grounds is unlawful.

This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of "sex," and the two concepts are not the same. See *Price Waterhouse*, 490 U. S., at 251. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex. See *ibid.*

Much of the plaintiff's evidence in *Price Waterhouse* was of this nature. The plaintiff was a woman who was passed over for partnership at an accounting firm, and some of the adverse comments about her work appeared to criticize her for being forceful and insufficiently "feminin[e]." *Id.*, at 235–236.

The main issue in *Price Waterhouse*—the proper allocation of the burdens of proof in a so-called mixed motives Title VII case—is not relevant here, but the plurality opinion, endorsed by four Justices, commented on the issue of sex stereotypes. The plurality observed that "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but "can certainly be *evidence* that gender played a part." *Id.*, at 251.[17] And the plurality made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Ibid.*

Plaintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse.* In cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer's decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women. "[H]eterosexuality is not a *female* stereotype; it not a *male* stereotype; it is not a *sex-specific* stereotype at all." *Hively*, 853 F. 3d, at 370 (Sykes, J., dissenting).

---

[17] Two other Justices concurred in the judgment but did not comment on the issue of stereotypes. See 490 U. S., at 258–261 (opinion of White, J.); *id.*, at 261–279 (opinion of O'Connor, J.). And Justice Kennedy reiterated on behalf of the three Justices in dissent that "Title VII creates no independent cause of action for sex stereotyping," but he added that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.*, at 294.

To be sure, there may be cases in which a gay, lesbian, or transgender individual can make a claim like the one in *Price Waterhouse*. That is, there may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other. But that is a different matter.

2

A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. Several lower court cases have held that discrimination on this ground violates Title VII. See, *e. g.*, *Holcomb* v. *Iona College*, 521 F. 3d 130 (CA2 2008); *Parr* v. *Woodmen of World Life Ins. Co.*, 791 F. 2d 888 (CA11 1986). And the logic of these decisions, it is argued, applies equally where an employee or applicant is treated unfavorably because he or she is married to, or has an intimate relationship with, a person of the same sex.

This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. And without taking history into account, it is not easy to see how the decisions in question fit the terms of Title VII.

Recall that Title VII makes it unlawful for an employer to discriminate against an individual "because of *such individual's race*." 42 U. S. C. § 2000e–2(a) (emphasis added). So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks "because of such individual's race"? This employer would be applying the same rule to all its employees regardless of their race.

The answer is that this employer is discriminating on a ground that history tells us is a core form of race discrimination.[18] "It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases . . . . A prohibition on 'race-mixing' was . . . grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites." 883 F. 3d, at 158–159 (Lynch, J., dissenting).

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called "homophobic" or "transphobic," but not sexist. See *Wittmer* v. *Phillips 66 Co.*, 915 F. 3d 328, 338 (CA5 2019) (Ho, J., concurring).

3

The opinion of the Court intimates that the term "sex" was not universally understood in 1964 to refer just to the categories of male and female, see *ante*, at 655, and while the Court does not take up any alternative definition as a ground for its decision, I will say a word on this subject.

As previously noted, the definitions of "sex" in the unabridged dictionaries in use in the 1960s are reproduced in Appendix A, *infra*. Anyone who examines those definitions can see that the primary definition in every one of them refers to the division of living things into two groups, male and

---

[18] Notably, Title VII recognizes that in light of history distinctions on the basis of race are always disadvantageous, but it permits certain distinctions based on sex. Title 42 U. S. C. §2000e–2(e)(1) allows for "instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." Race is wholly absent from this list.

female, based on biology, and most of the definitions further down the list are the same or very similar. In addition, some definitions refer to heterosexual sex acts. See Random House Dictionary 1307 ("coitus," "sexual intercourse" (defs. 5–6)); American Heritage Dictionary, at 1187 ("[s]exual intercourse" (def. 5)).[19]

Aside from these, what is there? One definition, "to neck passionately," Random House Dictionary 1307 (def. 8), refers to sexual conduct that is not necessarily heterosexual. But can it be seriously argued that one of the aims of Title VII is to outlaw employment discrimination against employees, whether heterosexual or homosexual, who engage in necking? And even if Title VII had that effect, that is not what is at issue in cases like those before us.

That brings us to the two remaining subsidiary definitions, both of which refer to sexual urges or instincts and their manifestations. See the fourth definition in the American Heritage Dictionary, at 1187 ("[t]he sexual urge or instinct as it manifests itself in behavior"), and the fourth definition in both Webster's Second and Third ("[p]henomena of sexual instincts and their manifestations," Webster's New International Dictionary, at 2296 (2d ed.); Webster's Third New International Dictionary 2081 (1966)). Since both of these come after three prior definitions that refer to men and women, they are most naturally read to have the same association, and in any event, is it plausible that Title VII prohibits discrimination based on *any* sexual urge or instinct and its manifestations? The urge to rape?

Viewing all these definitions, the overwhelming impact is that discrimination because of "sex" was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions, which are

[19] See American Heritage Dictionary 1188 (1969) (defining "sexual intercourse"); Webster's Third New International Dictionary 2082 (1966) (same); Random House Dictionary of the English Language 1308 (1966) (same).

reproduced in Appendix B, *infra*.) This no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just discussed.

II

A

So far, I have not looked beyond dictionary definitions of "sex," but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, "mean *what they conveyed to reasonable people at the time*." Reading Law, at 16 (emphasis added).[20]

Leading proponents of Justice Scalia's school of textualism have expounded on this principle and explained that it is grounded on an understanding of the way language works. As Dean John F. Manning explains, "the meaning of language depends on the way a linguistic community uses words and phrases in context." What Divides Textualists From Purposivists? 106 Colum. L. Rev. 70, 78 (2006). "[O]ne can make sense of others' communications only by placing them in their appropriate social and linguistic context," *id.*, at 79–80, and

---

[20] See also *Chisom* v. *Roemer*, 501 U. S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined").

this is no less true of statutes than any other verbal communications. "[S]tatutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2457 (2003). Therefore, judges should ascribe to the words of a statute "what a reasonable person conversant with applicable social conventions would have understood them to be adopting." Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask "'what one would ordinarily be understood as saying, given the circumstances in which one said it.'" Manning, 116 Harv. L. Rev., at 2397–2398.

Judge Frank Easterbrook has made the same points:

> "Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. . . . Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance." *Herrmann* v. *Cencom Cable Assocs., Inc.*, 978 F. 2d 978, 982 (CA7 1992).

Consequently, "[s]licing a statute into phrases while ignoring . . . the setting of the enactment . . . is a formula for disaster." *Ibid.*; see also *Continental Can Co.* v. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F. 2d 1154, 1157 (CA7 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities").

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment.

Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination "because of sex" was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." For example, the California Constitution of 1879 stipulated that no one, "*on account of sex*, [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Art. XX, § 18 (emphasis added). It also prohibited a student's exclusion from any state university department "on account of sex." Art. IX, § 9; accord, Mont. Const., Art. XI, § 9 (1889).

Wyoming's first Constitution proclaimed broadly that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges," Art. VI, § 1 (1890), and then provided specifically that "[i]n none of the public schools . . . shall distinction or discrimination be made *on account of sex*," Art. VII, § 10 (emphasis added); see also § 16 (the "university shall be equally open to students of both sexes"). Washington's Constitution likewise required "ample provision for the education of all children . . . without distinction or preference *on account of* . . . *sex*." Art. IX, § 1 (1889) (emphasis added).

The Constitution of Utah, adopted in 1895, provided that the right to vote and hold public office "shall not be denied or abridged *on account of sex*." Art. IV, § 1 (emphasis added). And in the next sentence it made clear what "on account of sex" meant, stating that "[b]oth male and female citizens . . . shall enjoy equally all civil, political and religious rights and privileges." *Ibid.*

The most prominent example of a provision using this language was the Nineteenth Amendment, ratified in 1920, which bans the denial or abridgment of the right to vote "on account of sex." U. S. Const., Amdt. 19. Similar language appeared in the proposal of the National Woman's Party for an Equal Rights Amendment. As framed in 1921, this proposal forbade all "political, civil or legal disabilities or inequalities *on account of sex*, [o]r on account of marriage." Women Lawyers Meet: Representatives of 20 States En-

dorse Proposed Equal Rights Amendment, N. Y. Times, Sept. 16, 1921, p. 10.

Similar terms were used in the precursor to the Equal Pay Act. Introduced in 1944 by Congresswoman Winifred C. Stanley, it proclaimed that "[d]iscrimination against employees, in rates of compensation paid, *on account of sex*" was "contrary to the public interest." H. R. 5056, 78th Cong., 2d Sess.

In 1952, the new Constitution for Puerto Rico, which was approved by Congress, 66 Stat. 327, prohibited all "discrimination . . . *on account of* . . . *sex*," Art. II, Bill of Rights § 1 (emphasis added), and in the landmark Immigration and Nationality Act of 1952, Congress outlawed discrimination in naturalization "*because of* . . . *sex*." 8 U. S. C. § 1422 (emphasis added).

In 1958, the International Labour Organisation, a United Nations agency of which the United States is a member, recommended that nations bar employment discrimination "made *on the basis of* . . . *sex*." Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Art. 1, § 1(a), June 25, 1958, 362 U. N. T. S. 32 (emphasis added).

In 1961, President Kennedy ordered the Civil Service Commission to review and modify personnel policies "to assure that selection for any career position is hereafter made solely on the basis of individual merit and fitness, *without regard to sex*."[21] He concurrently established a "Commission on the Status of Women" and directed it to recommend policies "for overcoming discriminations in government and private employment *on the basis of sex*." Exec. Order No. 10980, 3 CFR 138 (1961 Supp.) (emphasis added).

---

[21] J. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women 3 (Dec. 14, 1961) (emphasis added), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/093/JFKPOF-093-004.

In short, the concept of discrimination "because of," "on account of," or "on the basis of" sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women.[22]

2

Discrimination "because of sex" was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.

In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiat-

[22] Analysis of the way Title VII's key language was used in books and articles during the relevant time period supports this conclusion. A study searched a vast database of documents from that time to determine how the phrase "discriminate against . . . because of [some trait]" was used. Phillips, The Overlooked Textual Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality (manuscript, at 3) (May 11, 2020) (brackets in original) (online source archived at https://www.supremecourt.gov). The study found that the phrase was used to denote discrimination against "someone . . . motivated by prejudice, or biased ideas or attitudes . . . directed at people with that trait in particular." *Id.*, at 7 (emphasis deleted). In other words, "*discriminate against*" was "associated with negative treatment directed at members of a discrete group." *Id.*, at 5. Thus, as used in 1964, "discrimination because of sex" would have been understood to mean discrimination against a woman or a man based on "unfair beliefs or attitudes" about members of that particular sex. *Id.*, at 7.

ric Association (APA) classified same-sex attraction as a "sexual deviation," a particular type of "sociopathic personality disturbance," *id.*, at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a "sexual deviatio[n]," Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this was changed.[23]

Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, Dishonorable Passions 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of "sexual psychopath[s]," Act of June 9, 1948, §§ 104, 201–207, 62 Stat. 347–349.[24]

This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal "[a]gencies could deny homosexual men and women employment because of their sexual orientation," and this practice continued until 1975. GAO, D. Heivilin, Security Clearances: Considera-

[23] APA, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM–II, 6th Printing, p. 44 (APA Doc. Ref. No. 730008, 1973) (reclassifying "homosexuality" as a "[s]exual orientation disturbance," a category "for individuals whose sexual interests are directed primarily toward people of the same sex and who are either disturbed by . . . or wish to change their sexual orientation," and explaining that "homosexuality . . . by itself does not constitute a psychiatric disorder"); see also APA, Diagnostic and Statistical Manual of Mental Disorders 281–282 (3d ed. 1980) (DSM–III) (similarly creating category of "Ego-dystonic Homosexuality" for "homosexuals for whom changing sexual orientations is a persistent concern," while observing that "homosexuality itself is not considered a mental disorder"); *Obergefell* v. *Hodges*, 576 U. S. 644, 661 (2015).

[24] In 1981, after achieving home rule, the District attempted to decriminalize sodomy, see D. C. Act No. 4–69, but the House of Representatives vetoed the bill, H. Res. 208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 22764–22779 (1981). Sodomy was not decriminalized in the District until 1995. See Anti-Sexual Abuse Act of 1994, § 501(b), 41 D. C. Reg. 53 (1995), enacted as D. C. Law 10–257.

tion of Sexual Orientation in the Clearance Process 2 (GAO/NSIAD–95–21, 1995). See, *e. g.*, *Anonymous* v. *Macy*, 398 F. 2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. A 1953 Executive Order provided that background investigations should look for evidence of "sexual perversion," as well as "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." Exec. Order No. 10450, § 8(a)(1)(iii), 3 CFR 938 (1949–1953 Comp.). "Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees' security clearances were denied or revoked because of their sexual orientation." GAO, Security Clearances, at 2. See, *e. g.*, *Adams* v. *Laird*, 420 F. 2d 230, 240 (CADC 1969) (upholding denial of security clearance to defense contractor employee because he had "engaged in repeated homosexual acts"); see also *Webster* v. *Doe*, 486 U. S. 592, 595, 601 (1988) (concluding that decision to fire a particular individual because he was homosexual fell within the "discretion" of the Director of Central Intelligence under the National Security Act of 1947 and thus was unreviewable under the APA).

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. An article summarizing the situation *15 years after Title VII became law* reported that "[a]ll states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism," and, the survey added, "[h]omosexuality is considered to fall within all three categories."[25]

[25] Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L. J. 799, 861 (1979).

The situation in California is illustrative. California laws prohibited individuals who engaged in "immoral conduct" (which was construed to include homosexual behavior), as well as those convicted of "sex offenses" (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§ 13202, 13207, 13209, 13218, 13255 (West 1960). The teaching certificates of individuals convicted of engaging in homosexual acts were revoked. See, *e. g.*, *Sarac* v. *State Bd. of Ed.*, 249 Cal. App. 2d 58, 62–64, 57 Cal. Rptr. 69, 72–73 (1967) (upholding revocation of secondary teaching credential from teacher who was convicted of engaging in homosexual conduct on public beach), overruled in part, *Morrison* v. *State Bd. of Ed.*, 1 Cal. 3d 214, 461 P. 2d 375 (1969).

In Florida, the legislature enacted laws authorizing the revocation of teaching certificates for "misconduct involving moral turpitude," Fla. Stat. Ann. § 229.08(16) (1961), and this law was used to target homosexual conduct. In 1964, a legislative committee was wrapping up a 6-year campaign to remove homosexual teachers from public schools and state universities. As a result of these efforts, the state board of education apparently revoked at least 71 teachers' certificates and removed at least 14 university professors. Eskridge, Dishonorable Passions, at 103.

Individuals who engaged in homosexual acts also faced the loss of other occupational licenses, such as those needed to work as a "lawyer, doctor, mortician, [or] beautician."[26] See, *e. g.*, *Florida Bar* v. *Kay*, 232 So. 2d 378 (Fla. 1970) (attorney disbarred after conviction for homosexual conduct in public bathroom).

In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e. g.*, Army Reg. 635–89, § I(2)(a) (July 15, 1966) ("Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted

[26] Eskridge, Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961–1981, 25 Hofstra L. Rev. 817, 819 (1997).

to serve in the Army in any capacity, and their prompt separation is mandatory"); Army Reg. 600–443, § I(2) (Apr. 10, 1953) (similar). Prohibitions against homosexual conduct by members of the military were not eliminated until 2010. See Don't Ask, Don't Tell Repeal Act of 2010, 124 Stat. 3515 (repealing 10 U. S. C. § 654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens "afflicted with psychopathic personality." 8 U. S. C. § 1182(a)(4) (1964 ed.). In *Boutilier* v. *INS*, 387 U. S. 118, 120–123 (1967), this Court, relying on the INA's legislative history, interpreted that term to encompass homosexuals and upheld an alien's deportation on that ground. Three Justices disagreed with the majority's interpretation of the phrase "psychopathic personality."[27] But it apparently did not occur to anyone to argue that the Court's interpretation was inconsistent with the INA's express prohibition of discrimination "because of sex." That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to "update" Title VII. But that is not our job. Our duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of "sex" carried

---

[27] Justices Douglas and Fortas thought that a homosexual is merely "one, who by some freak, is the product of an arrested development." *Boutilier*, 387 U. S., at 127 (Douglas, J., dissenting); see also *id.*, at 125 (Brennan, J., dissenting) (based on lower court dissent).

some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, "our job is not to scavenge the world of English usage to discover whether there is any possible meaning" of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. *Chisom* v. *Roemer*, 501 U. S. 380, 410 (1991) (dissenting opinion). Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the "*ordinary* meaning" of the statute. *Ibid.* And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.

The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. *Ante*, at 676. What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. *Ibid.* To call this evidence merely feeble would be generous.

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered

to hear that this law also forbids discrimination on the basis of "transgender status" or "gender identity," terms that would have left people at the time scratching their heads. The term "transgender" is said to have been coined "'in the early 1970s,'"[28] and the term "gender identity," now understood to mean "[a]n internal sense of being male, female or something else,"[29] apparently first appeared in an academic article in 1964.[30] Certainly, neither term was in common parlance; indeed, dictionaries of the time still primarily defined the word "gender" by reference to grammatical classifications. See, *e. g.*, American Heritage Dictionary, at 548 (def. 1(a)) ("Any set of two or more categories, such as masculine, feminine, and neuter, into which words are divided . . . and that determine agreement with or the selection of modifiers, referents, or grammatical forms").

While it is likely true that there have always been individuals who experience what is now termed "gender dysphoria," *i. e.*, "[d]iscomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth,"[31] the current understanding of the concept

---

[28] Drescher, Transsexualism, Gender Identity Disorder and the DSM, 14 J. Gay & Lesbian Mental Health 109, 110 (2010).

[29] American Psychological Association, 49 Monitor on Psychology, at 32.

[30] Green, Robert Stoller's *Sex and Gender*: 40 Years On, 39 Archives Sexual Behav. 1457 (2010); see Stoller, A Contribution to the Study of Gender Identity, 45 Int'l J. Psychoanalysis 220 (1964). The term appears to have been coined a year or two earlier. See Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, 33 Archives Sexual Behav. 87, 93 (2004) (suggesting the term was first introduced at 23rd International Psycho-Analytical Congress in Stockholm in 1963); J. Meyerowitz, How Sex Changed 213 (2002) (referring to founding of "Gender Identity Research Clinic" at UCLA in 1962). In his book, Sex and Gender, published in 1968, Robert Stoller referred to "*gender identity*" as "a working term" "associated with" his research team but noted that they were not "fixed either on copyrighting the term or on defending the concept as one of the splendors of the scientific world." Sex and Gender, p. viii.

[31] American Psychological Association, 49 Monitor on Psychology, at 32.

postdates the enactment of Title VII. Nothing resembling what is now called gender dysphoria appeared in either DSM–I (1952) or DSM–II (1968). It was not until 1980 that the APA, in DSM–III, recognized two main psychiatric diagnoses related to this condition, "Gender Identity Disorder of Childhood" and "Transsexualism" in adolescents and adults.[32] DSM–III, at 261–266.

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966,[33] and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either "'severely neurotic'" or "'psychotic.'"[34]

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.

D

1

The Court's main excuse for entirely ignoring the social context in which Title VII was enacted is that the meaning of Title VII's prohibition of discrimination because of sex is clear, and therefore it simply does not matter whether people in 1964 were "smart enough to realize" what its language means. *Hively*, 853 F. 3d, at 357 (Posner, J., concurring). According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language. *Ante*, at 675–676.

The Court's argument rests on a false premise. As already explained at length, the text of Title VII does not pro-

---

[32] See Drescher, *supra*, at 112.

[33] Buckley, A Changing of Sex by Surgery Begun at Johns Hopkins, N. Y. Times, Nov. 21, 1966, p. 1, col. 8; see also J. Meyerowitz, How Sex Changed 218–220 (2002).

[34] Drescher, *supra*, at 112 (quoting Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Transsexualism and Sex Reassignment 241–242 (R. Green & J. Money eds. 1969)).

hibit discrimination because of sexual orientation or gender identity. And what the public thought about those issues in 1964 is relevant and important, not because it provides a ground for departing from the statutory text, but because it helps to explain what the text was understood to mean when adopted.

In arguing that we must put out of our minds what we know about the time when Title VII was enacted, the Court relies on Justice Scalia's opinion for the Court in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). But *Oncale* is nothing like these cases, and no one should be taken in by the majority's effort to enlist Justice Scalia in its updating project.

The Court's unanimous decision in *Oncale* was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title VII's prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. See *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57 (1986). Given these premises, syllogistic reasoning dictated the holding.

What today's decision latches onto are *Oncale*'s comments about whether "'male-on-male sexual harassment'" was on Congress's mind when it enacted Title VII. *Ante*, at 678 (quoting 523 U. S., at 79). The Court in *Oncale* observed that this specific type of behavior "was assuredly not the *principal evil* Congress was concerned with when it enacted Title VII," but it found that immaterial because "statutory prohibitions often go beyond the *principal evil* to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the *principal concerns* of our legislators by which we are governed." *Id.*, at 79 (emphasis added).

It takes considerable audacity to read these comments as committing the Court to a position on deep philosophical questions about the meaning of language and their implications for the interpretation of legal rules. These comments are better understood as stating mundane and uncontroversial truths. Who would argue that a statute applies only to the "principal evils" and not lesser evils that fall within the plain scope of its terms? Would even the most ardent "purposivists" and fans of legislative history contend that congressional intent is restricted to Congress's "*principal* concerns"?

Properly understood, *Oncale* does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the "principal evil" on Congress's mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

2

The Court argues that two other decisions—*Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*),

and *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978)—buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In *Philips*, the employer treated women with young children less favorably than men with young children. In *Manhart*, the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three "lessons" from *Phillips*, *Manhart*, and *Oncale*, but none sheds any light on the question before us. The first lesson is that "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it." *Ante*, at 664. This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought that the application of a law to a person's conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer's conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I–A, *supra*, it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that "[i]n *Phillips*, the employer could have accurately spoken of its policy as one based on 'motherhood.'" *Ante*, at 664; see also *ante*, at 667. But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes

between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips*, because women with children were treated disadvantageously compared to men with children.

Lesson number two—"the plaintiff's sex need not be the sole or primary cause of the employer's adverse action," *ante*, at 665—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a "motivating factor" when an employer discriminates on the basis of sexual orientation or gender identity. 42 U. S. C. §2000e–2(m). But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.

Lesson number three—"an employer cannot escape liability by demonstrating that it treats males and females comparably as groups," *ante*, at 665, is also irrelevant. There is no dispute that discrimination against an individual employee based on that person's sex cannot be justified on the ground that the employer's treatment of the average employee of that sex is at least as favorable as its treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips*. That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex. See Part I–A, *supra*.

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision.

Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation.

B

As the Court explained in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976), the legislative history of Title VII's prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was "added to Title VII at the last minute on the floor of the House of Representatives," *Meritor Savings Bank*, 477 U. S., at 63, by Representative Howard Smith, the Chairman of the Rules Committee. See 110 Cong. Rec. 2577 (1964). Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of "sex" as a poison pill. See, *e. g.*, *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (CA7 1984). On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill's defeat.[35] But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other

[35] See Osterman, Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 Yale J. L. & Feminism 409, 409–410 (2009).

Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.[36] See 110 Cong. Rec. 2577–2584.

Representative Smith's motivations are contested, 883 F. 3d, at 139–140 (Lynch, J., dissenting), but whatever they were, the meaning of *the adoption of the prohibition* of sex discrimination is clear. It was no accident. It grew out of "a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance," and it marked a landmark achievement in the path toward fully equal rights for women. *Id.*, at 140. "Discrimination against gay women and men, by contrast, was not on the table for public debate . . . [i]n those dark, pre-Stonewall days." *Ibid.*

For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII's legislative history cannot be missed.

C

Post-enactment events only clarify what was apparent when Title VII was enacted. As noted, bills to add "sexual orientation" to Title VII's list of prohibited grounds were introduced in every Congress beginning in 1975, see *supra*, at 683, and two such bills were before Congress in 1991[37]

[36] Recent scholarship has linked the adoption of the Smith Amendment to the broader campaign for women's rights that was underway at the time. *E. g.*, Osterman, *supra*; Freeman, How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 L. & Ineq. 163 (1991); Barzilay, Parenting Title VII: Rethinking the History of the Sex Discrimination Provision, 28 Yale J. L. & Feminism 55 (2016); Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duquesne L. Rev. 453 (1981). None of these studies has unearthed evidence that the amendment was understood to apply to discrimination because of sexual orientation or gender identity.

[37] H. R. 1430, 102d Cong., 1st Sess., § 2(d) (as introduced in the House on Mar. 13, 1991); S. 574, 102d Cong., 1st Sess., § 5 (as introduced in the Senate on Mar. 6, 1991).

when it made major changes in Title VII. At that time, the three Courts of Appeals to reach the issue had held that Title VII does not prohibit discrimination because of sexual orientation,[38] two other Circuits had endorsed that interpretation in dicta,[39] and no Court of Appeals had held otherwise. Similarly, the three Circuits to address the application of Title VII to transgender persons had all rejected the argument that it covered discrimination on this basis.[40] These were also the positions of the EEOC.[41] In enacting substantial changes to Title VII, the 1991 Congress abrogated numerous judicial decisions with which it disagreed. If it also disagreed with the decisions regarding sexual orientation and transgender discrimination, it could have easily overruled those as well, but it did not do so.[42]

After 1991, six other Courts of Appeals reached the issue of sexual orientation discrimination, and until 2017, every single Court of Appeals decision understood Title VII's prohibition of "discrimination because of sex" to mean discrimination because of biological sex. See, *e. g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260

[38] See *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*), cert. denied, 493 U. S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*).

[39] *Ruth* v. *Children's Med. Ctr.*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984), cert. denied, 471 U. S. 1017 (1985).

[40] See *Ulane*, 742 F. 2d, at 1084–1085; *Sommers* v. *Budget Mktg., Inc.*, 667 F. 2d 748, 750 (CA8 1982) (*per curiam*); *Holloway* v. *Arthur Andersen & Co.*, 566 F. 2d 659, 661–663 (CA9 1977).

[41] *Dillon* v. *Frank*, 1990 WL 1111074, *3–*4 (EEOC, Feb. 14, 1990); *LaBate* v. *Postal Service*, 1987 WL 774785, *2 (EEOC, Feb. 11, 1987).

[42] In more recent legislation, when Congress has wanted to reach acts committed because of sexual orientation or gender identity, it has referred to those grounds by name. See, *e. g.*, 18 U. S. C. § 249(a)(2)(A) (hate crimes) (enacted 2009); 34 U. S. C. § 12291(b)(13)(A) (certain federally funded programs) (enacted 2013).

F. 3d 257, 261 (CA3 2001), cert. denied, 534 U. S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Hamm* v. *Weyauwega Milk Products, Inc.*, 332 F. 3d 1058, 1062 (CA7 2003); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005); *Evans* v. *Georgia Regional Hospital*, 850 F. 3d 1248, 1255 (CA11), cert. denied, 583 U. S. 1044 (2017). Similarly, the other Circuit to formally address whether Title VII applies to claims of discrimination based on transgender status had also rejected the argument, creating unanimous consensus prior to the Sixth Circuit's decision below. See *Etsitty* v. *Utah Transit Authority*, 502 F. 3d 1215, 1220–1221 (CA10 2007).

The Court observes that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms," *ante*, at 674, but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII's plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies "judicial humility." *Ante*, at 681. Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra*; *e. g.*, 20 U. S. C. § 1681(a) (Title IX); 42 U. S. C. § 3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court

dismisses questions about "bathrooms, locker rooms, or anything else of the kind." *Ante*, at 681. And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.[43]

"[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing

[43] Contrary to the implication in the Court's opinion, I do not label these potential consequences "undesirable." *Ante*, at 680. I mention them only as possible implications of the Court's reasoning.

an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.[44]

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time.[45] Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.[46] In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,[47] and some lower

---

[44] Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

[45] See 1 Sadock, Comprehensive Textbook of Psychiatry, at 2063 (explaining that "gender is now often regarded as more *fluid*" and "[t]hus, gender identity may be described as masculine, feminine, or somewhere in between").

[46] Title IX makes it unlawful to discriminate on the basis of sex in education: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a).

[47] See Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016 (Dear Colleague Letter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

court decisions have agreed. See *Whitaker* v. *Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F. 3d 1034, 1049 (CA7 2017); *G. G.* v. *Gloucester Cty. School Bd.*, 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. 1168 (2017); *Adams* v. *School Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. *Doe* v. *Boyertown Area School Dist.*, 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. 1035 (2019).

Women's sports. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.[48] This issue has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male. See, *e. g.*, Complaint in *Soule* v. *Connecticut Assn. of Schools*, No. 3:20–cv–00201 (D Conn., Apr. 17, 2020) (challenging Connecticut policy allowing transgender students to compete in girls' high school sports); Complaint in *Hecox* v. *Little*, No. 1:20–cv–00184 (D Idaho, Apr. 15, 2020) (challenging state law that bars transgender students from participating in school sports in accordance with gender identity). Students in these latter categories have found success in athletic competitions reserved for females.[49]

---

[48] A regulation allows single-sex teams, 34 CFR §106.41(b) (2019), but the statute itself would of course take precedence.

[49] "[S]ince 2017, two biological males [in Connecticut] have collectively won 15 women's state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes." Brief

The logic of the Court's decision could even affect professional sports. Under the Court's holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women's professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U. S. C. § 2000e–2(e), but the BFOQ exception has been read very narrowly. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977).

Housing. The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U. S. C. § 1686, allows schools to maintain "separate living facilities for the different sexes," but it may be argued that a student's "sex" is the gender with which the student identifies.[50] Similar claims may be brought under the Fair Housing Act. See 42 U. S. C. § 3604.

Employment by religious organizations. Briefs filed by a wide range of religious groups—Christian, Jewish, and

---

for Independent Women's Forum et al. as *Amici Curiae* in No. 18–107, pp. 14–15.

At the college level, a transgendered woman (biological male) switched from competing on the men's Division II track team to the women's Division II track team at Franklin Pierce University in New Hampshire after taking a year of testosterone suppressants. While this student had placed "eighth out of nine male athletes in the 400 meter hurdles the year before, the student won the women's competition by over a second and a half—a time that had garnered tenth place in the men's conference meet just three years before." *Id.*, at 15.

A transgender male—*i.e.*, a biological female who was in the process of transitioning to male and actively taking testosterone injections—won the Texas girls' state championship in high school wrestling in 2017. Babb, Transgender Issue Hits Mat in Texas, Washington Post, Feb. 26, 2017, p. A1, col. 1.

[50] Indeed, the 2016 advisory letter issued by the Department of Justice took the position that under Title IX schools "must allow transgender students to access housing consistent with their gender identity." Dear Colleague Letter 4.

Muslim—express deep concern that the position now adopted by the Court "will trigger open conflict with the faith-based employment practices of numerous churches, synagogues, mosques, and other religious institutions."[51] They argue that "[r]eligious organizations need employees who actually live the faith,"[52] and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable message.

This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty "communicate a particular way of life to its students," and a "violation by the faculty of those precepts" may undermine the school's "moral teaching."[53] Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment.

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the "ministerial exception" recognized in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be "ministers."[54] But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for the

---

[51] Brief for National Association of Evangelicals et al. as *Amici Curiae* 3; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, pp. 8–18.

[52] Brief for National Association of Evangelicals et al. as *Amici Curiae* 7.

[53] McConnell, Academic Freedom in Religious Colleges and Universities, 53 Law & Contemp. Prob. 303, 322 (1990).

[54] See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, No. 19–267; *St. James School* v. *Biel*, No. 19–348.

ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the "activities" of the organization or school, 42 U. S. C. § 2000e–1(a); see also § 2000e–2(e)(2), but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.[55]

Healthcare. Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery.[56] Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.[57]

---

[55] See, *e. g.*, *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F. 2d 458, 460 (CA9 1993); *EEOC* v. *Fremont Christian School*, 781 F. 2d 1362, 1365–1367 (CA9 1986); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1166 (CA4 1985); *EEOC* v. *Mississippi College*, 626 F. 2d 477, 484–486 (CA5 1980); see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, at 30, n. 28 (discussing disputed scope). In addition, 42 U. S. C. § 2000e–2(e)(1) provides that religion may be a BFOQ, and allows religious schools to hire religious employees, but as noted, the BFOQ exception has been read narrowly. See *supra* this page.

[56] See, *e. g.*, Amended Complaint in *Toomey* v. *Arizona*, No. 4:19–cv–00035 (D Ariz., Mar. 2, 2020). At least one District Court has already held that a state health insurance policy that does not provide coverage for sex reassignment surgery violates Title VII. *Fletcher* v. *Alaska*, 443 F. Supp. 3d 1024, 1030 (D Alaska 2020).

[57] See, *e. g.*, Complaint in *Conforti* v. *St. Joseph's Healthcare System*, No. 2:17–cv–00050 (D NJ, Jan. 5, 2017) (transgender man claims discrimination under the ACA because a Catholic hospital refused to allow a surgeon to perform a hysterectomy). And multiple District Courts have already concluded that the ACA requires health insurance coverage for sex reassignment surgery and treatment. *Kadel* v. *Folwell*, 446 F. Supp. 3d 1, 19 (MDNC 2020) (allowing claimsof discrimination under ACA, Title IX, and Equal Protection Clause); *Tovar* v. *Essentia Health*, 342 F. Supp. 3d 947,

Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Freedom of speech. The Court's decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories.[58] Some jurisdictions, such as New York City, have ordinances making the failure to use an indi-

952–954 (D Minn. 2018) (allowing ACA claim).

Section 1557 of the ACA, 42 U. S. C. § 18116, provides:

"Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U. S. C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U. S. C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U. S. C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection." (Footnote omitted.)

[58] See, *e. g.*, University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center, Gender Pronouns (2020), https://uwm.edu/lgbtrc/support/gender-pronouns/ (listing six new categories of pronouns: (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers; ve, ver, vis; xe, xem, xyr, xyrs; ze/zie, hir, hirs).

vidual's preferred pronoun a punishable offense,[59] and some colleges have similar rules.[60] After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination. See *Prescott* v. *Rady Children's Hospital San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (SD Cal. 2017) (hospital staff's refusal to use preferred pronoun violates ACA).[61]

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

---

[59] See 47 N. Y. C. R. R. § 2–06(a) (2020) (stating that a "deliberate refusal to use an individual's self-identified name, pronoun and gendered title" is a violation of N. Y. C. Admin. Code § 8–107 "where the refusal is motivated by the individual's gender"); see also N. Y. C. Admin. Code §§ 8–107(1), (4), (5) (2020) (making it unlawful to discriminate on the basis of "gender" in employment, housing, and public accommodations); cf. D. C. Municipal Regs., tit. 4, § 801.1 (2020) (making it "unlawful . . . to discriminate . . . on the basis of . . . actual or perceived gender identity or expression" in "employment, housing, public accommodations, or educational institutions" and further proscribing "engaging in verbal . . . harassment").

[60] See University of Minn., Equity and Access: Gender Identity, Gender Expression, Names, and Pronouns, Administrative Policy (Dec. 11, 2019), https://policy.umn.edu/operations/genderequity ("University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members, except as legally required"); *Meriwether* v. *Trustees of Shawnee State Univ.*, 2020 WL 704615, *1 (SD Ohio, Feb. 12, 2020) (rejecting First Amendment challenge to university's nondiscrimination policy brought by evangelical Christian professor who was subjected to disciplinary actions for failing to use student's preferred pronouns).

[61] Cf. Notice of Removal in *Vlaming* v. *West Point School Board*, No. 3:19–cv–00773 (ED Va., Oct. 22, 2019) (contending that high school teacher's firing for failure to use student's preferred pronouns was based on nondiscrimination policy adopted pursuant to Title IX).

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. *Sessions* v. *Morales-Santana*, 582 U. S. 47, 58 (2017); *United States* v. *Virginia*, 518 U. S. 515, 532–534 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal antidiscrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, *e. g.*, Complaint in *Hecox*, No. 1: 20–CV–00184 (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski* v. *Trump*, No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military's ban on transgender members); *Kadel* v. *Folwell*, 446 F. Supp. 3d 1, 18 (MDNC 2020) (state health plan's exclusion of coverage for sex reassignment procedures); Complaint in *Gore* v. *Lee*, No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm* v. *Gloucester Cty. School Bd.*, No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender-neutral bathrooms at school); Complaint in *Corbitt* v. *Taylor*, No. 2:18–cv–00091 (MD Ala., July 25, 2018) (change of gender on driver's licenses); *Whitaker*, 858 F. 3d, at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane* v. *Florida Dept. of Corrections Secretary*, 952 F. 3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy

and ability to dress and groom as a female); *Edmo* v. *Corizon, Inc.*, 935 F. 3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn* v. *Brumby*, 663 F. 3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

The Court itself recognizes this:

> "The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Ante*, at 680–681.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

APPENDIXES

A

Webster's New International Dictionary 2296 (2d ed. 1953):

sex (sĕks), *n.* [F. *sexe*, fr. L. *sexus;* prob. orig., division, and akin to L. *secare* to cut. See SECTION.] **1.** One of the two divisions of organisms formed on the distinction of male and female; males or females collectively.

2. The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being

male or female, or of pertaining to the distinctive function of the male or female in reproduction. *Conjugation*, or *fertilization* (union of germplasm of two individuals), a process evidently of great but not readily explainable importance in the perpetuation of most organisms, seems to be the function of differentiation of sex, which occurs in nearly all organisms at least at some stage in their life history. Sex is manifested in the conjugating cells by the larger size, abundant food material, and immobility of the female gamete (*egg*, *egg cell*, or *ovum*), and the small size and the locomotive power of the male gamete (*spermatozoon* or *spermatozoid*), and in the adult organisms often by many structural, physiological, and (in higher forms) psychological characters, aside from the necessary modification of the reproductive apparatus. Cf. HERMAPHRODITE, 1. In botany the term *sex* is often extended to the distinguishing peculiarities of staminate and pistillate flowers, and hence in dioecious plants to the individuals bearing them.

In many animals and plants the body and germ cells have been shown to contain one or more chromosomes of a special kind (called *sex chromosomes; idiochromosomes; accessory chromosomes*) in addition to the ordinary paired autosomes. These special chromosomes serve to determine sex. In the simplest case, the male germ cells are of two types, one with and one without a single extra chromosome (*X chromosome*, or *monosome*). The egg cells in this case all possess an *X chromosome*, and on fertilization by the two types of sperm, male and female zygotes result, of respective constitution *X*, and *XX*. In many other animals and plants (probably including man) the male organism produces two types of gametes, one possessing an *X chromosome*, the other a *Y chromosome*, these being visibly different members of a pair of chromosomes present in the diploid state. In this case also, the female organism is *XX*, the eggs *X*, and the zygotes respectively male (*XY*) and female (*XX*). In another type of sex determination, as in certain moths and possibly in the fowl, the female produces two kinds of eggs, the male only one kind of sperm. Each type of egg contains one member of a pair of differentiated chromosomes, called respectively *Z chromosomes* and *W chromosomes*, while all the sperm cells contain a *Z* chromosome. In fertilization, union of a *Z* with a

W gives rise to a female, while union of two *Z* chromosomes produces a male. Cf. SECONDARY SEX CHARACTER.
3. a The sphere of behavior dominated by the relations between male and female. **b** *Psychoanalysis.* By extension, the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.
4. Phenomena of sexual instincts and their manifestations.
5. Sect;—a confused use.
Syn.—SEX, GENDER. SEX refers to physiological distinctions; GENDER, to distinctions in grammar.
—the sex. The female sex; women, in general.
sex, *adj.* Based on or appealing to sex.
sex, *v. t.* To determine the sex of, as skeletal remains.

Webster's Third New International Dictionary 2081 (1966):

[1]**sex** \'seks\ n *–ES often attrib* [ME, fr. L *sexus;* prob. akin to L *secare* to cut–more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or

resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William Empson>

[2]**sex** \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be *~ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you *~ing* up that bar kitten—Oakley Hall>

9 Oxford English Dictionary 577–578 (1933):

Sex (seks), *sb.* Also 6–7 sexe, (6 seex, 7 pl. sexe, 8 *poss.* sexe's). [ad. L. *sexus* (*u*-stem), whence also F. *sexe* (12th c.), Sp., Pg. *sexo*, It. *sesso*. Latin had also a form *secus* neut. (indeclinable).]

1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively.

1382 WYCLIF *Gen.* vi. 19 Of alle thingis hauynge sowle of ony flehs, two thow shalt brynge into the ark, that maal sex and femaal lyuen with thee. **1532** MORE *Confut. Tindale* II. 152, I had as leue he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in loue. **1559** ALYMER *Harborowe* E 4 b, Neither of them debarred the heires female .. as though it had ben .. vnnatural for that sexe to gouern. **1576** GASCOIGNE *Philomene* xcviii, I speake against my sex. *a* **1586** SIDNEY *Arcadia* II. (1912) 158 The sexe of womankind of all other is most bound to have regardfull eie to mens judgements. **1600** NASHE *Summer's Last Will* F 3 b, A woman they imagine her to be, Because that sexe keepes nothing close they heare. **1615** CROOKE *Body of Man* 274 If wee respect the .. conformation of both the Sexes, the Male is sooner perfected .. in the wombe. **1634** SIR T. HERBERT *Trav.* 19 Both sexe goe naked. **1667**

Appendix A to opinion of ALITO, J.

MILTON *P. L.* IX, 822 To add what wants In Femal Sex. **1671—***Samson* 774 It was a weakness In me, but incident to all our sex. **1679** DRYDEN *Troilus & Cr.* I. ii, A strange dissembling sex we women are. **1711** ADDISON *Spect.* No. 10 ¶ 6 Their Amusements .. are more adapted to the Sex than to the Species. **1730** SWIFT *Let. to Mrs. Whiteway* 28 Dec., You have neither the scrawl nor the spelling of your sex. **1742** GRAY *Propertius* II. 73 She .. Condemns her fickle Sexe's fond Mistake. **1763** G. WILLIAMS in Jesse *Selwyn & Contemp.* (1843) I. 265 It would astonish you to see the mixture of sexes at this place. **1780** BENTHAM *Princ. Legisl.* VI. §35 The sensibility of the female sex appears .. to be greater than that of the male. **1814** SCOTT *Ld. of Isles* VI. iii, Her sex's dress regain'd. **1836** THIRLWALL *Greece* xi. II. 51 Solon also made regulations for the government of the other sex. **1846** *Ecclesiologist* Feb. 41 The propriety and necessity of dividing the sexes during the publick offices of the Church. **1848** THACKERAY *Van. Fair* xxv, She was by no means so far superior to her sex as to be above jealousy. **1865** DICKENS *Mut. Fr.* II. i, It was a school for both sexes. **1886** MABEL COLLINS *Prettiest Woman* ii, Zadwiga had not yet given any serious attention to the other sex.

b. *collect.* followed by plural verb. *rare.*

1768 GOLDSM. *Good. n. Man* IV. (Globe) 632/2 Our sex are like poor tradesmen. **1839** MALCOM *Trav.* (1840) 40/I Neither sex tattoo any part of their bodies.

c. *The fair(er), gentle(r), soft(er), weak(er) sex; the devout sex*; *the second sex*; † *the woman sex*: the female sex, women. *The* † *better, sterner sex*: the male sex, men.

[**1583** STUBBES *Anat. Abus.* E vij b, Ye magnificency & liberalitie of that gentle sex. **1613** PURCHAS *Pilgrimage* (1614) 38 Strong Sampson and wise Solomon are witnesses, that the strong men are slaine by this weaker sexe.]

1641 BROME *Jovial Crew* III. (1652) H 4, I am bound by a strong vow to kisse all of the woman sex I meet this morning. **1648** J. BEAUMONT *Psyche* XIV. I, The softer sex, attending Him And his still-growing woes. **1665** SIR T. HERBERT *Trav.* (1677) 22 Whiles the better sex seek prey abroad, the women (therein like themselves) keep home and spin. **1665** BOYLE *Occas. Refl.* v. ix. 176 Persons of the fairer Sex. a **1700** EVELYN *Diary* 12 Nov. an. 1644, The Pillar .. at which the devout sex are always rubbing their chaplets. **1701** STANHOPE *St. Aug. Medit.* I. xxxv. (1704) 82, I may .. not suffer my self to be outdone by the weaker Sex. **1732** [see FAIR a. I b]. **1753** HOGARTH *Anal. Beauty* x. 65 An elegant degree of plumpness peculiar to the skin of the softer sex. **1820** BYRON *Juan* IV. cviii, Benign Ceruleans of the second sex! Who advertise new poems by your looks. *Murray's Hand-bk. N. Germ.* 430 It is much frequented by the fair sex. **1894** C. D. TYLER in *Geog. Jrnl.* III. 479 They are beardless, and usually wear a shock of unkempt hair, which is somewhat finer in the gentler sex.

¶d. Used occas. with extended notion. *The third sex*: eunuchs. Also *sarcastically* (see quot. 1873).

1820 BYRON *Juan* IV. lxxxvi, From all the Pope makes yearly, 'twould perplex To find three perfect pipes of the third sex. *Ibid.* V. xxvi, A black old neutral personage Of the third sex

stept up. [**1873** LD. HOUGHTON *Monogr.* 280 Sydney Smith .. often spoke with much bitterness of the growing belief in three Sexes of Humanity—Men, Women, and Clergymen.]

e. *The sex*: the female sex. [F. *le sexe*.] Now *rare*.

1589 PUTTENHAM *Eng. Poesie* III. xix. (Arb.) 235 As he that had tolde a long tale before certaine noble women, of a matter somewhat in honour touching the Sex. **1608** D. T[UVILL] *Ess. Pol. & Mor.* 101 b, Not yet weighing with himselfe, the weaknesse and imbecillitie of the sex. **1631** MASSINGER *Emperor East* I. ii, I am called The Squire of Dames, or Servant of the Sex. **1697** VANBRUGH *Prov. Wife* II. ii, He has a strange penchant to grow fond of me, in spite of his aversion to the sex. **1760-2** GOLDSM. *Cit. W.* xcix, The men of Asia behave with more deference to the sex than you seem to imagine. **1792** A. YOUNG *Trav. France* I. 220 The sex of Venice are undoubtedly of a distinguished beauty. **1823** BYRON *Juan* XIII. lxxix, We give the sex the *pas*. **1863** R. F. BURTON *W. Africa* I. 22 Going 'up stairs', as the sex says, at 5 a.m. on the day after arrival, I cast the first glance at Funchal.

f. Without *the*, in predicative quasi-adj. use=feminine. *rare*.

***a* 1700** DRYDEN *Cymon & Iph.* 368 She hugg'd th' Offender, and forgave th' Offence, Sex to the last!

2. Quality in respect of being male or female.

a. With regard to persons or animals.

1526 *Pilgr. Perf.* (W. de. W. 1531) 282 b, Ye bee, whiche neuer gendreth with ony make of his kynde, nor yet hath ony distinct sex. **1577** T. KENDALL *Flowers of Epigr.* 71 b, If by corps supposd may be her seex, then sure a virgin she. **1616** T. SCOTT *Philomythie* I. (ed. 2) A 3 Euen as Hares change shape and sex, some say Once euery yeare. **1658** SIR T. BROWNE *Hydriot.* iii. 18 A critical view of bones makes a good distinction of sexes. **a 1665** DIGBY *Chym. Secrets* (1682) II. 225 Persons of all Ages and Sexes. **1667** MILTON *P. L.* I. 424 For Spirits when they please can either Sex assume, or both. **1710-11** SWIFT *Jrnl. to Stella* 7 Mar., I find I was mistaken in the sex, 'tis a boy. **1757** SMOLLETT *Reprisal* IV. v, As for me, my sex protects me. **1825** SCOTT *Betrothed* xiii, I am but a poor and neglected woman, feeble both from sex and age. **1841** ELPHINSTONE *Hist. India* I. 349 When persons of different sexes walk together, the woman always follows the man. **1882** TENSION-WOODS *Fish N. S. Wales* 116 Oysters are of distinct sexes.

b. with regard to plants (see FEMALE *a*. 2, MALE *a*. 2).

1567 MAPLET *Gr. Forest* 28 Some seeme to haue both sexes and kindes: as the Oke, the Lawrell and such others. **1631** WIDDOWES *Nat. Philos.* (ed. 2) 49 There be sexes of hearbes .. namely, the Male or Female. **1720** P. BLAIR *Bot. Ess.* iv. 237 These being very evident Proofs of a necessity of two Sexes in Plants as well as in Animals. **1790** SMELLIE *Philos. Nat. Hist.* I. 245 There is not a notion more generally adopted, that that vegetables have the distinction of sexes. **1848** LINDLEY *Introd. Bot.* (ed. 4) II. 80 Change of Sex under the influence of external causes.

3. The distinction between male and female in general. In recent use often with more explicit notion: The sum of

those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned.

Organs of sex: the reproductive organs in sexed animals or plants.

***a* 1631** DONNE *Songs & Sonn., The Printrose* Poems 1912 I. 61 Should she Be more then woman, she would get above All thought of sexe, and think to move My heart to study her, and not to love. ***a* 1643** CARTWRIGHT *Siedge* III. vi, My Soul's As Male as yours; there's no Sex in the mind. **1748** MELMOTH *Fitzosborne Lett.* lxii. (1749) II. 119 There may be a kind of sex in the very soul. **1751** HARRIS *Hermes* Wks. (1841) 129 Besides number, another characteristic, visible in substances, is that of sex. **1878** GLADSTONE *Prim. Homer* 68 Athenè .. has nothing of sex except the gender, nothing of the woman except the form. **1887** K. PEARSON *Eth. Freethought* xv. (1888) 429 What is the true type of social (moral) action in matters of sex? **1895** CRACKANTHORPE in 19*th Cent.* Apr. 607 (art.) Sex in modern literature. *Ibid.* 614 The writers and readers who have strenuously refused to allow to sex its place in creative art. **1912** H. G. WELLS *Marriage* ii. § 6. 72 The young need .. to be told .. all we know of three fundamental things; the first of which is God, .. and the third Sex.

¶ 4. Used, by confusion, in senses of SECT (q. v. I, 4 b, 7, and cf. I d *note*).

1575-85 ABP. SANDYS *Serm.* xx. 358 So are all sexes and sorts of people called vpon. **1583** MELBANCKE *Philotimus* L iij b, Whether thinkest thou better sporte & more absurd, to see an Asse play on an harpe contrary to his sex, or heare [etc.]. **1586** J. HOOKER *Hist. Irel.* 180/2 in *Holinshed*, The whole sex of the Oconhours. **1586** T. B. *La Primaud. Fr. Acad.* I. 359 O detestable furie, not to be found in most cruell beasts, which spare the blood of their sexe. **a 1704** T BROWN *Dial. Dead, Friendship* Wks. 1711 IV. 56 We have had enough of these Christians, and sure there can be no worse among the other Sex of Mankind [i. e. Jews and Turks]? **1707** ATTERBURY *Large Vind. Doctr.* 47 Much less can I imagine, why a Jewish Sex (whether of Pharisees or Saducees) should be represented, as [etc.].

5. *attrib.* and *Comb.*, as *sex-distinction*, *function*, etc.; *sex-abusing*, *transforming* adjs.; sex-cell, a reproductive cell, with either male or female function; a sperm-cell or an egg-cell.

1642 H. MORE *Song of Soul* I. III. lxxi, Mad-making waters, sex trans-forming springs. **1781** COWPER *Expost.* 415 Sin, that in old time Brought fire from heav'n, the sex-abusing crime. **1876** HARDY *Ethelberta* xxxvii, You cannot have celebrity and sex-privilege both. **1887** *Jrnl. Educ.* No. 210. 29 If this examination craze is to prevail, and the sex-abolitionists are to have their way. **1889** GEDDES & THOMSON *Evol. Sex* 91 Very commonly the sex-cells originate in the ectoderm and ripen there. **1894** H. DRUMMOND *Ascent of Man* 317 The sex-distinction slowly gathers definition. **1897** J. HUTCHINSON *in Arch. Surg.* VIII. 230 Loss of Sex Function.

Sex (seks), *v.* [f. SEX *sb.*] *trans.* To determine the sex of, by anatomical examination; to label as male or female.

1884 GURNEY *Diurnal Birds Prey* 173 The specimen is not sexed, neither is the sex noted on the drawing. **1888** A. NEWTON in *Zoologist* Ser. 111. XII. 101 The .. barbarous phrase of 'collecting a specimen' and then of 'sexing' it.

Concise Oxford Dictionary of Current English 1164 (5th ed. 1964):

sĕx, n. Being male or female or hermaphrodite (*what is its ~?; ~ does not matter; without distinction of age or ~*), whence ~'LESS a., ~'**lèss**NESS n., ~'$_{Y}^{2}$ a., immoderately concerned with ~; males or females collectively (*all ranks & both ~es; the fair, gentle, softer, weaker, ~,* & joc. *the ~*, women; *the sterner ~*, men; *is the fairest of her ~*); (attrib.) arising from difference, or consciousness, of ~ (*~ antagonism, ~ instinct, ~ urge*); *~ appeal*, attractiveness arising from difference of ~. [f. L *sexus –ūs;* partly thr. F]

Random House Dictionary of the English Language 1307 (1966):

sex (seks), *n.* **1.** The fact or character of being either male or female: *persons of different sex.* **2.** either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex.* **3.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **4.** the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **5.** coitus. **6. to have sex,** *Informal.* to engage in sexual intercourse. *–v.t.* **7.** to ascertain the sex of, esp. of newly hatched chicks. **8. sex it up,** *Slang.* to neck passionately: *They were really sexing it up last night.* **9. sex up,** *Informal.* **a.** to arouse sexually: *She certainly knows how to sex up the men.* **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [ME < L *sex*(*us*), akin to *secus*, deriv. of *secre* to cut, divide; see SECTION]

American Heritage Dictionary 1187 (1969):

sex (sĕks) *n.* **1. a.** The property or quality by which organisms are classified according to their reproductive functions.

b. Either of two divisions, designated *male* and *female*, of this classification. **2.** Males or females collectively. **3.** The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female. **4.** The sexual urge or instinct as it manifests itself in behavior. **5.** Sexual intercourse. –*tr.v.* **sexed, sexing, sexes.** To determine the sex of (young chickens). [Middle English, from Old French *sexe*, from Latin *sexus*†.]

B

Webster's Third New International Dictionary 2081 (2002):

[1]**sex** \'seks\ n –ES *often attrib* [ME, fr. L *sexus*; prob. akin to L *secare* to cut—more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3:** the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4:** the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what

modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William Empson>

[2]**sex** \"\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be *~ed* up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you *~ing* up that bar kitten—Oakley Hall>

Random House Webster's Unabridged Dictionary 1754 (2d ed. 2001):

sex (seks), *n.* **1**. either the male or female division of a species, esp. as differentiated with reference to the reproductive functions. **2**. the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **3**. the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **4**. coitus. **5**. genitalia. **6**. **to have sex**, to engage in sexual intercourse. – *v.t.* **7**. to ascertain the sex of, esp. of newly-hatched chicks. **8**. **sex up**, *Informal*. **a**. to arouse sexually: *The only intent of that show was to sex up the audience.* **b**. to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [1350–1400; ME < L *Sexus*, perh. akin to *secāre* to divide (see SECTION)]

American Heritage Dictionary 1605 (5th ed. 2011):

sex (seks) *n.* **1a.** Sexual activity, especially sexual intercourse: *hasn't had sex in months*. **b.** The sexual urge or instinct as it manifests itself in behavior: *motivated by sex*. **2a**. Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions: *How do you determine the sex of a lobster?* **b**. The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male: *the evolution of sex in plants; a study that takes sex into account.* See Usage Note at **gender. 3.** Females or males considered as a group: *dormi-*

tories that house only one sex. **4.** One's identity as either female or male. **5.** The genitals. ⁘ *tr.v.* **sexed, sex-ing, sex-es 1.** To determine the sex of (an organism). **2.** *Slang* **a.** To arouse sexually. Often used with *up.* **b.** To increase the appeal or attractiveness of. Often used with *up* [Middle English < Latin *sexus.*]

C

Statutes Prohibiting Sex Discrimination

- 2 U. S. C. § 658a(2) (Congressional Budget and Fiscal Operations; Federal Mandates)
- 2 U. S. C. § 1311(a)(1) (Congressional Accountability; Extension of Rights and Protections)
- 2 U. S. C. § 1503(2) (Unfunded Mandates Reform)
- 3 U. S. C. § 411(a)(1) (Presidential Offices; Employment Discrimination)
- 5 U. S. C. § 2301(b)(2) (Merit System Principles)
- 5 U. S. C. § 2302(b)(1) (Prohibited Personnel Practices)
- 5 U. S. C. § 7103(a)(4)(A) (Labor-Management Relations; Definitions)
- 5 U. S. C. § 7116(b)(4) (Labor-Management Relations; Unfair Labor Practices)
- 5 U. S. C. § 7201(b) (Antidiscrimination Policy; Minority Recruitment Program)
- 5 U. S. C. § 7204(b) (Antidiscrimination; Other Prohibitions)
- 6 U. S. C. § 488f(b) (Secure Handling of Ammonium Nitrate; Protection From Civil Liability)
- 7 U. S. C. § 2020(c)(1) (Supplemental Nutrition Assistance Program)
- 8 U. S. C. § 1152(a)(1)(A) (Immigration; Numerical Limitations on Individual Foreign States)
- 8 U. S. C. § 1187(c)(6) (Visa Waiver Program for Certain Visitors)
- 8 U. S. C. § 1522(a)(5) (Authorization for Programs for Domestic Resettlement of and Assistance to Refugees)

- 10 U. S. C. § 932(b)(4) (Uniform Code of Military Justice; Article 132 Retaliation)
- 10 U. S. C. § 1034(j)(3) (Protected Communications; Prohibition of Retaliatory Personnel Actions)
- 12 U. S. C. § 302 (Directors of Federal Reserve Banks; Number of Members; Classes)
- 12 U. S. C. § 1735f–5(a) (Prohibition Against Discrimination on Account of Sex in Extension of Mortgage Assistance)
- 12 U. S. C. § 1821(d)(13)(E)(iv) (Federal Deposit Insurance Corporation; Insurance Funds)
- 12 U. S. C. § 1823(d)(3)(D)(iv) (Federal Deposit Insurance Corporation; Corporation Moneys)
- 12 U. S. C. § 2277a–10c(b)(13)(E)(iv) (Farm Credit System Insurance Corporation; Corporation as Conservator or Receiver; Certain Other Powers)
- 12 U. S. C. § 3015(a)(4) (National Consumer Cooperative Bank; Eligibility of Cooperatives)
- 12 U. S. C. §§ 3106a(1)(B) and (2)(B) (Foreign Bank Participation in Domestic Markets)
- 12 U. S. C. § 4545(1) (Fair Housing)
- 12 U. S. C. § 5390(a)(9)(E)(v) (Wall Street Reform and Consumer Protection; Powers and Duties of the Corporation)
- 15 U. S. C. § 631(h) (Aid to Small Business)
- 15 U. S. C. § 633(b)(1) (Small Business Administration)
- 15 U. S. C. § 719 (Alaska Natural Gas Transportation; Civil Rights)
- 15 U. S. C. § 775 (Federal Energy Administration; Sex Discrimination; Enforcement; Other Legal Remedies)
- 15 U. S. C. § 1691(a)(1) (Equal Credit Opportunity Act)
- 15 U. S. C. § 1691d(a) (Equal Credit Opportunity Act)
- 15 U. S. C. § 3151(a) (Full Employment and Balanced Growth; Nondiscrimination)

- 18 U. S. C. § 246 (Deprivation of Relief Benefits)
- 18 U. S. C. § 3593(f) (Special Hearing To Determine Whether a Sentence of Death Is Justified)
- 20 U. S. C. § 1011(a) (Higher Education Resources and Student Assistance; Antidiscrimination)
- 20 U. S. C. § 1011f(h)(5)(D) (Disclosures of Foreign Gifts)
- 20 U. S. C. § 1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority)
- 20 U. S. C. § 1071(a)(2) (Federal Family Education Loan Program)
- 20 U. S. C. § 1078(c)(2)(F) (Federal Payments To Reduce Student Interest Costs)
- 20 U. S. C. § 1087–1(e) (Federal Family Education Loan Program; Special Allowances)
- 20 U. S. C. § 1087–2(e) (Student Loan Marketing Association)

- 20 U. S. C. § 1087–4 (Discrimination in Secondary Markets Prohibited)
- 20 U. S. C. § 1087tt(c) (Discretion of Student Financial Aid Administrators)
- 20 U. S. C. § 1231e(b)(2) (Education Programs; Use of Funds Withheld)
- 20 U. S. C. § 1681 (Title IX of the Education Amendments of 1972)
- 20 U. S. C. § 1701(a)(1) (Equal Educational Opportunities; Congressional Declaration of Policy)
- 20 U. S. C. § 1702(a)(1) (Equal Educational Opportunities; Congressional Findings)
- 20 U. S. C. § 1703 (Denial of Equal Educational Opportunity Prohibited)
- 20 U. S. C. § 1705 (Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity)

- 20 U. S. C. § 1715 (District Lines)
- 20 U. S. C. § 1720 (Equal Educational Opportunities; Definitions)
- 20 U. S. C. § 1756 (Remedies With Respect to School District Lines)
- 20 U. S. C. § 2396 (Career and Technical Education; Federal Laws Guaranteeing Civil Rights)
- 20 U. S. C. § 3401(2) (Department of Education; Congressional Findings)
- 20 U. S. C. § 7231d(b)(2)(C) (Magnet Schools Assistance; Applications and Requirements)
- 20 U. S. C. § 7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights)
- 22 U. S. C. § 262p–4n (Foreign Relations and Intercourse; Equal Employment Opportunities)
- 22 U. S. C. § 2304(a)(1) (Human Rights and Security Assistance)
- 22 U. S. C. § 2314(g) (Furnishing of Defense Articles or Related Training or Other Defense Service on Grant Basis)
- 22 U. S. C. § 2426 (Discrimination Against United States Personnel)
- 22 U. S. C. § 2504(a) (Peace Corps Volunteers)
- 22 U. S. C. § 2661a (Foreign Contracts or Arrangements; Discrimination)
- 22 U. S. C. § 2755 (Discrimination Prohibited if Based on Race, Religion, National Origin, or Sex)
- 22 U. S. C. § 3901(b)(2) (Foreign Service; Congressional Findings and Objectives)
- 22 U. S. C. § 3905(b)(1) (Foreign Service; Personnel Actions)
- 22 U. S. C. § 4102(11)(A) (Foreign Service; Definitions)
- 22 U. S. C. § 4115(b)(4) (Foreign Service; Unfair Labor Practices)

- 22 U. S. C. § 6401(a)(3) (International Religious Freedom; Findings; Policy)
- 22 U. S. C. § 8303(c)(2) (Office of Volunteers for Prosperity)
- 23 U. S. C. § 140(a) (Federal-Aid Highways; Nondiscrimination)
- 23 U. S. C. § 324 (Highways; Prohibition of Discrimination on the Basis of Sex)
- 25 U. S. C. § 4223(d)(2) (Housing Assistance for Native Hawaiians)
- 26 U. S. C. § 7471(a)(6)(A) (Tax Court; Employees)
- 28 U. S. C. § 994(d) (Duties of the United States Sentencing Commission)
- 28 U. S. C. § 1862 (Trial by Jury; Discrimination Prohibited)
- 28 U. S. C. § 1867(e) (Trial by Jury; Challenging Compliance With Selection Procedures)

- 29 U. S. C. § 206(d)(1) (Equal Pay Act of 1963)
- 29 U. S. C. §§ 2601(a)(6) and (b)(4) (Family and Medical Leave; Findings and Purposes)
- 29 U. S. C. § 2651(a) (Family and Medical Leave; Effect on Other Laws)
- 29 U. S. C. § 3248 (Workforce Development Opportunities; Nondiscrimination)
- 30 U. S. C. § 1222(c) (Research Funds to Institutes)
- 31 U. S. C. § 732(f) (Government Accountability Office; Personnel Management System)
- 31 U. S. C. § 6711 (Federal Payments; Prohibited Discrimination)
- 31 U. S. C. § 6720(a)(8) (Federal Payments; Definitions, Application, and Administration)
- 34 U. S. C. § 10228(c) (Prohibition of Federal Control Over State and Local Criminal Justice Agencies; Prohibition of Discrimination)

- 34 U. S. C. § 11133(a)(16) (Juvenile Justice and Delinquency Prevention; State Plans)
- 34 U. S. C. § 12161(g) (Community Schools Youth Services and Supervision Grant Program)
- 34 U. S. C. § 12361 (Violent Crime Control and Law Enforcement; Civil Rights for Women)
- 34 U. S. C. § 20110(e) (Crime Victims Fund; Administration Provisions)
- 34 U. S. C. § 50104(a) (Emergency Federal Law Enforcement Assistance)
- 36 U. S. C. § 20204(b) (Air Force Sergeants Association; Membership)
- 36 U. S. C. § 20205(c) (Air Force Sergeants Association; Governing Body)
- 36 U. S. C. § 21003(a)(4) (American GI Forum of the United States; Purposes)
- 36 U. S. C. § 21004(b) (American GI Forum of the United States; Membership)
- 36 U. S. C. § 21005(c) (American GI Forum of the United States; Governing Body)
- 36 U. S. C. § 21704A (The American Legion)
- 36 U. S. C. § 22703(c) (Amvets; Membership)
- 36 U. S. C. § 22704(d) (Amvets; Governing Body)
- 36 U. S. C. § 60104(b) (82nd Airborne Division Association, Incorporated; Membership)
- 36 U. S. C. § 60105(c) (82nd Airborne Division Association, Incorporated; Governing Body)
- 36 U. S. C. § 70104(b) (Fleet Reserve Association; Membership)
- 36 U. S. C. § 70105(c) (Fleet Reserve Association; Governing Body)
- 36 U. S. C. § 140704(b) (Military Order of the World Wars; Membership)

- 36 U. S. C. § 140705(c) (Military Order of the World Wars; Governing Body)
- 36 U. S. C. § 154704(b) (Non Commissioned Officers Association of the United States of America, Incorporated; Membership)
- 36 U. S. C. § 154705(c) (Non Commissioned Officers Association of the United States of America, Incorporated; Governing Body)
- 36 U. S. C. § 190304(b) (Retired Enlisted Association, Incorporated; Membership)
- 36 U. S. C. § 190305(c) (Retired Enlisted Association, Incorporated; Governing Body)
- 36 U. S. C. § 220522(a)(8) and (9) (United States Olympic Committee; Eligibility Requirements)
- 36 U. S. C. § 230504(b) (Vietnam Veterans of America, Inc.; Membership)
- 36 U. S. C. § 230505(c) (Vietnam Veterans of America, Inc.; Governing Body)

- 40 U. S. C. § 122(a) (Federal Property and Administrative Services; Prohibition on Sex Discrimination)
- 40 U. S. C. § 14702 (Appalachian Regional Development; Nondiscrimination)
- 42 U. S. C. § 213(f) (Military Benefits)
- 42 U. S. C. § 290cc–33(a) (Projects for Assistance in Transition From Homelessness)
- 42 U. S. C. § 290ff–1(e)(2)(C) (Children With Serious Emotional Disturbances; Requirements With Respect to Carrying Out Purpose of Grants)
- 42 U. S. C. § 295m (Public Health Service; Prohibition Against Discrimination on Basis of Sex)
- 42 U. S. C. § 296g (Public Health Service; Prohibition Against Discrimination by Schools on Basis of Sex)
- 42 U. S. C. § 300w–7(a)(2) (Preventive Health and Health Services Block Grants; Nondiscrimination Provisions)

- 42 U. S. C. § 300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination)
- 42 U. S. C. § 603(a)(5)(I)(iii) (Block Grants to States for Temporary Assistance for Needy Families)
- 42 U. S. C. § 708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions)
- 42 U. S. C. § 1975a(a) (Duties of Civil Rights Commission)
- 42 U. S. C. § 2000c(b) (Civil Rights; Public Education; Definitions)
- 42 U. S. C. § 2000c–6(a)(2) (Civil Rights; Public Education; Civil Actions by the Attorney General)
- 42 U. S. C. § 2000e–2 (Equal Employment Opportunities; Unlawful Employment Practices)
- 42 U. S. C. § 2000e–3(b) (Equal Employment Opportunities; Other Unlawful Employment Practices)
- 42 U. S. C. § 2000e–16(a) (Employment by Federal Government)

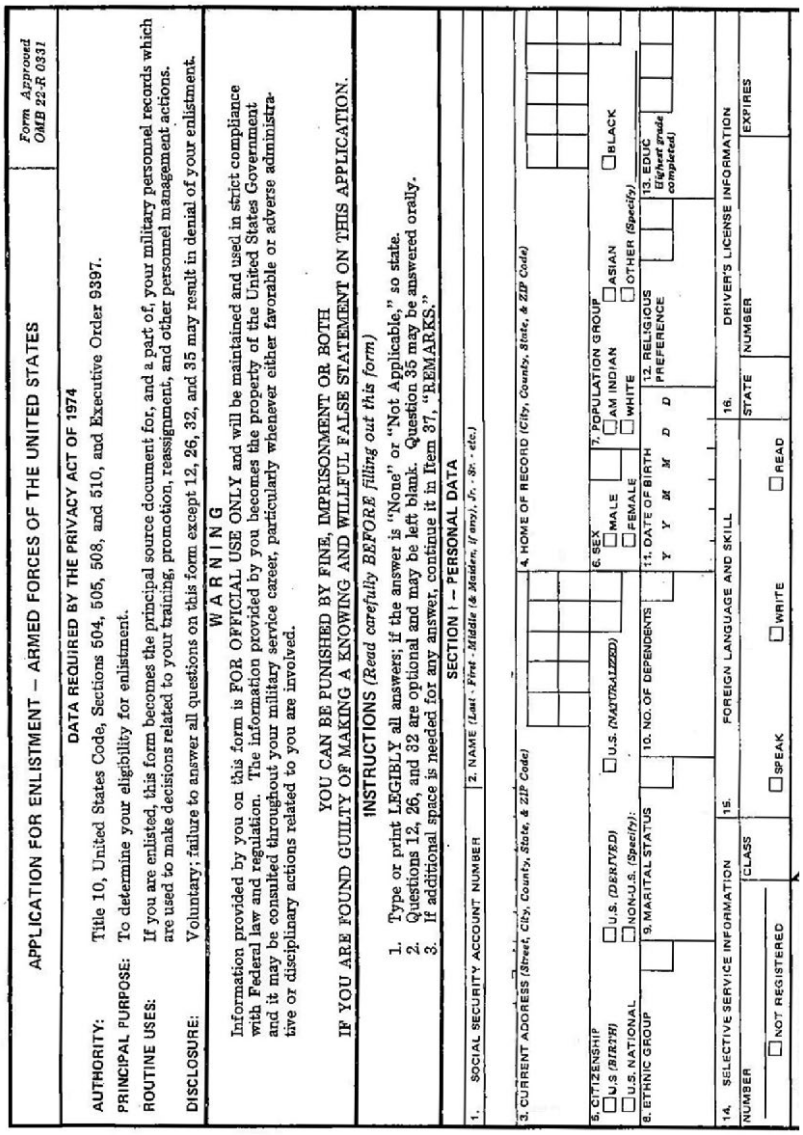
- 42 U. S. C. § 2000e–16a(b) (Government Employee Rights Act of 1991)
- 42 U. S. C. § 2000e–16b(a)(1) (Discriminatory Practices Prohibited)
- 42 U. S. C. § 2000h–2 (Intervention by Attorney General; Denial of Equal Protection on Account of Race, Color, Religion, Sex or National Origin)
- 42 U. S. C. § 3123 (Discrimination on Basis of Sex Prohibited in Federally Assisted Programs)
- 42 U. S. C. § 3604 (Fair Housing Act; Discrimination in the Sale or Rental of Housing and Other Prohibited Practices)
- 42 U. S. C. § 3605 (Fair Housing Act; Discrimination in Residential Real Estate-Related Transactions)
- 42 U. S. C. § 3606 (Fair Housing Act; Discrimination in the Provision of Brokerage Services)

- 42 U. S. C. § 3631 (Fair Housing Act; Violations; Penalties)
- 42 U. S. C. § 4701 (Intergovernmental Personnel Program; Congressional Findings and Declaration of Policy)
- 42 U. S. C. § 5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions)
- 42 U. S. C. § 5151(a) (Nondiscrimination in Disaster Assistance)
- 42 U. S. C. § 5309(a) (Community Development; Nondiscrimination in Programs and Activities)
- 42 U. S. C. § 5891 (Development of Energy Sources; Sex Discrimination Prohibited)
- 42 U. S. C. § 6709 (Public Works Employment; Sex Discrimination; Prohibition; Enforcement)
- 42 U. S. C. § 6727(a)(1) (Public Works Employment; Nondiscrimination)
- 42 U. S. C. § 6870(a) (Weatherization Assistance for Low-Income Persons)
- 42 U. S. C. § 8625(a) (Low-Income Home Energy Assistance; Nondiscrimination Provisions)
- 42 U. S. C. § 9821 (Community Economic Development; Nondiscrimination Provisions)
- 42 U. S. C. § 9849 (Head Start Programs; Nondiscrimination Provisions)
- 42 U. S. C. § 9918(c)(1) (Community Services Block Grant Program; Limitations on Use of Funds)
- 42 U. S. C. § 10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States)
- 42 U. S. C. § 11504(b) (Enterprise Zone Development; Waiver of Modification of Housing and Community Development Rules in Enterprise Zones)
- 42 U. S. C. § 12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination)

- 42 U. S. C. § 12832 (Investment in Affordable Housing; Nondiscrimination)
- 43 U. S. C. § 1747(10) (Loans to States and Political Subdivisions; Discrimination Prohibited)
- 43 U. S. C. § 1863 (Outer Continental Shelf Resource Management; Unlawful Employment Practices; Regulations)
- 47 U. S. C. § 151 (Federal Communications Commission)
- 47 U. S. C. § 398(b)(1) (Public Broadcasting; Equal Opportunity Employment)
- 47 U. S. C. §§ 554(b) and (c) (Cable Communications; Equal Employment Opportunity)
- 47 U. S. C. § 555a(c) (Cable Communications; Limitation of Franchising Authority Liability)
- 48 U. S. C. § 1542(a) (Virgin Islands; Voting Franchise; Discrimination Prohibited)
- 48 U. S. C. § 1708 (Discrimination Prohibited in Rights of Access to, and Benefits From, Conveyed Lands)
- 49 U. S. C. § 306(b) (Duties of the Secretary of Transportation; Prohibited Discrimination)
- 49 U. S. C. § 5332(b) (Public Transportation; Nondiscrimination)
- 49 U. S. C. § 40127 (Air Commerce and Safety; Prohibitions on Discrimination)
- 49 U. S. C. § 47123(a) (Airport Improvement; Nondiscrimination)
- 50 U. S. C. § 3809(b)(3) (Selective Service System)
- 50 U. S. C. § 4842(a)(1)(B) (Anti-Boycott Act of 2018)

Appendix D to opinion of ALITO, J.

D



APPLICATION FOR ENLISTMENT – ARMED FORCES OF THE UNITED STATES

Form Approved OMB 22-R 0331

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, and 510, and Executive Order 9397.

PRINCIPAL PURPOSE: To determine your eligibility for enlistment.

ROUTINE USES: If you are enlisted, this form becomes the principal source document for, and a part of, your military personnel records which are used to make decisions related to your training, promotion, reassignment, and other personnel management actions.

DISCLOSURE: Voluntary; failure to answer all questions on this form except 12, 26, 32, and 35 may result in denial of your enlistment.

WARNING

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal law and regulation. The information provided by you becomes the property of the United States Government and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS APPLICATION.

INSTRUCTIONS *(Read carefully BEFORE filling out this form)*

1. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state.
2. Questions 12, 26, and 32 are optional and may be left blank. Question 35 may be answered orally.
3. If additional space is needed for any answer, continue it in Item 37, "REMARKS."

SECTION I – PERSONAL DATA

1. SOCIAL SECURITY ACCOUNT NUMBER
2. NAME *(Last - First - Middle (& Maiden, if any), Jr. - Sr. - etc.)*
3. CURRENT ADDRESS *(Street, City, County, State, & ZIP Code)*
4. HOME OF RECORD *(City, County, State, & ZIP Code)*
5. CITIZENSHIP
   - ☐ U.S. *(BIRTH)*
   - ☐ U.S. *(DERIVED)*
   - ☐ U.S. *(NATURALIZED)*
   - ☐ U.S. NATIONAL
   - ☐ NON-U.S. *(Specify)*:
6. SEX
   - ☐ MALE
   - ☐ FEMALE
7. POPULATION GROUP
   - ☐ AM INDIAN
   - ☐ ASIAN
   - ☐ BLACK
   - ☐ WHITE
   - ☐ OTHER *(Specify)*
8. ETHNIC GROUP
9. MARITAL STATUS
10. NO. OF DEPENDENTS
11. DATE OF BIRTH
    Y Y M M D D
12. RELIGIOUS PREFERENCE
13. EDUC *(Highest grade completed)*
14. SELECTIVE SERVICE INFORMATION
    - NUMBER
    - CLASS
    - ☐ NOT REGISTERED
15. FOREIGN LANGUAGE AND SKILL
    - ☐ SPEAK
    - ☐ WRITE
    - ☐ READ
16. DRIVER'S LICENSE INFORMATION
    - STATE
    - NUMBER
    - EXPIRES

Appendix D to opinion of ALITO, J.

DO NOT WRITE IN THIS SECTION
(Go on to Item 22)

SECTION II – EXAMINATION AND ENLISTMENT DATA PROCESSING CODES
— FOR OFFICE USE ONLY —

17. MENTAL TEST RESULTS
a. TEST ID
b. AFQT %ILE
c. APTITUDE RAW SCORES
G I N O A D W K A R S P M K E I M C G S S I A I -C M -C A -C E -C C

18. MEDICAL RESULTS
a. P U L H E S X
b. HT.
c. WEIGHT
d. BLOOD PRESSURE — SYSTOLIC — DYSTOLIC
e. HAIR COLOR
f. EYE COLOR
g. VISUAL ACUITY — UNCORRECTED: RT 20/ ___ LF 20/ ___ — CORRECTED: RT 20/ ___ LF 20/ ___
h. COLOR VISION

19. DELAYED ENL/ENTRY DATA
a. DATE OF ENLISTMENT — Y Y M M D D
b. PROJ ACTIVE DUTY DATE — Y Y M M D D
c. ES
d. RECRUITER IDENTIFICATION
e. PROG ENL FOR
f. T-E MOS/AFS

20. ACCESSION DATA
a. DATE OF ENLISTMENT — Y Y M M D D
b. ACTIVE DUTY SVC DATE — Y Y M M D D
c. PAY ENTRY DATE — Y Y M M D D
d. TOE
e. WAIVER
f. PAY GRADE
g. DATE OF GRADE — Y Y M M D D
h. ES
i. HIGHEST GRADE
j. RECRUITER IDENTIFICATION
k. PROG ENL FOR
l. T-E MOS/AFS
m. PMOS/AFS
n. YOUTH
o. O-A
p. TRANSFER TO

21. SVC REQUIRED DATA CODES

		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34
35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52
53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70

DD FORM 1 SEP 78 1966/1

DD FORMS 1966/1 THRU 8, 1 SEP 78, REPLACE THE PREVIOUS EDITION OF THIS SERIES (1 AUG 75), WHICH IS OBSOLETE.

PAGE 1

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

III. VERIFICATION OF PERSONAL DATA

23. If Preferred Enlistment Name (name given in block 1) is not the same as on your birth certificate and has not been changed by legal procedure prescribed by state law, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE

_____

I hereby state that I have not changed my name through any court procedure; and that I prefer to use the name by which I am known in the community as a matter of convenience and with no criminal or fraudulent intent. I further state that I am the same person as the one whose name is shown in block 1.

b. WITNESS (Name, grade, and signature)	c. SIGNATURE OF APPLICANT

24. EDUCATION

YEAR & MONTH		NAME AND LOCATION OF SCHOOL	GRADUATE		DEGREE RECEIVED
FROM	TO		YES	NO	

25. CITIZENSHIP VERIFICATION (To be completed in presence of your recruiter).

a. PLACE OF BIRTH (City, State and (if not in USA) Country)	b. BIRTH CERTIFICATE ISSUED BY (County and State)
c. BIRTH CERTIFICATE FILE NUMBER / d. IF NATURALIZED, CERTIFICATE NO.	e. IF DERIVED, PARENTS' CERTIFICATE NO(S), DATE, PLACE AND COURT
f. IF ALIEN, ALIEN REGISTRATION NUMBER	
g. NATIVE COUNTRY	h. DATE AND PORT OF ENTRY

26. MILITARY SERVICE					
a. Are you now or have ever been in the Regular, Reserve or National Guard of the United States? ☐ No ☐ Yes. If "yes", complete the following:					
b. PAY GRADE AND SERVICE NUMBER	c. SERVICE AND COMPONENT	d. DATE OF ENTRY	e. DATE OF DISCH	f. TYPE DISCH/REL	g. TIME LOST (NO. OF DAYS)
h. If you are now a member of a US Reserve or National Guard organization, fill in organization name and unit address:					

27a. PREVIOUS MILITARY SERVICE		Years	Months	Days	b. PEBD	c. ADSD
DO NOT WRITE IN THIS BLOCK	Total Active Military Service					
	Total Inactive Military Service					

IV. OTHER BACKGROUND DATA			
28a. RELATIVES	b. DATE AND PLACE OF BIRTH	c. PRESENT ADDRESS	d. CITIZENSHIP
FATHER			
MOTHER (Maiden-name)			
SPOUSE (Maiden-name)			
CHILDREN (Show Relationship)			
[illegible]			

DD FORM 1 AUG 75 1966/2 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 2

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

29. COMMERCIAL LIFE INSURANCE POLICIES YOU OWN ON YOUR LIFE—Optional entry: used to assist your survivors in filing claims should you die while on active duty.

a. NAME OF COMPANY ISSUING POLICY	b. POLICY NUMBER

30. RELATIVES AND ALIEN FRIENDS LIVING IN FOREIGN COUNTRIES—List anyone with whom you had or have a close relationship, who lives in a foreign country.

a. NAME AND RELATIONSHIP	b. AGE	c. OCCUPATION	d. ADDRESS	e. CITIZENSHIP

31. RESIDENCES—List all from 10th birthday.

YEAR & MONTH		NUMBER AND STREET	CITY	STATE	ZIP CODE
FROM	TO				

32. EMPLOYMENT—Show every employment you have had and all periods of unemployment.

a. YEAR & MONTH		b. Company name and address (Street, City, State, and Zip Code)	c. JOB TITLE	d. SUPERVISOR NAME
FROM	TO			

e. HAVE YOU EVER WORKED FOR A FOREIGN GOVERNMENT? ☐ NO ☐ YES *(If "yes" give dates of employment, Government you worked for, location and nature of your duties)*

33. MEMBERSHIP IN YOUTH PROGRAMS—Optional entry; you *may be* eligible for a higher paygrade, based on membership and participation in the youth programs listed below.

☐ No membership

ORGANIZATION	MEMBERSHIP HELD FROM	MEMBERSHIP HELD TO	CONDUCTED BY (SPONSOR)	LOCATION (SCHOOL AND ADDRESS)	YEARS COMPLETED OR LEVEL REACHED
ROTC					(YEARS)
JROTC					(YEARS)
CAP			AIR FORCE		(LEVEL)
SEA CADET			NAVY		(LEVEL)
OTHER (Specify)					

34. FOREIGN TRAVEL—Other than as a direct result of military service.

YEAR & MONTH FROM	YEAR & MONTH TO	COUNTRY VISITED	PURPOSE OF TRAVEL

35. DECLARATIONS—Explain "Yes" answers in item 41.

a. HAVE YOU EVER BEEN REJECTED FOR ENLISTMENT, REENLISTMENT, OR INDUCTION INTO ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

b. ARE YOU A CONSCIENTIOUS OBJECTOR? ☐ NO ☐ YES

c. ARE YOU NOW OR HAVE YOU EVER BEEN A DESERTER FROM ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? ☐ NO ☐ YES

d. ARE YOU NOW DRAWING, OR DO YOU HAVE AN APPLICATION PENDING OR APPROVAL FOR, RETIRED PAY, DISABILITY ALLOWANCE, OR SEVERANCE PAY OR A PENSION FROM THE GOVERNMENT OF THE UNITED STATES? ☐ NO ☐ YES

e. ARE YOU THE ONLY LIVING CHILD OF YOUR PARENTS? ☐ NO ☐ YES

36. UNDERSTANDINGS.

	(INITIALS)
a. I understand that if I am rejected for enlistment because of a disqualification I have concealed, I may not be provided return transportation from the place of examination to my home.	
b. (For male applicants only). I understand that if I have not reached my 26th birthday that an original enlistment obligates me to serve in the Armed Forces for a period of six (6) years (active and reserve) unless sooner discharged.	(INITIALS)

DD FORM 1 AUG 75 1966/3 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 3

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

37. CHARACTER AND SOCIAL ADJUSTMENT: Read and consider the following instructions carefully BEFORE answering questions a through f.

1. If your answer to every question is truthfully "NO", please indicate in the appropriate space.
2. If your answer to any questions in this item is "YES", or you have reservations about answering questions of this nature, you are not required to answer, or explain any of these questions in writing. Instead, you may request a personal interview in which you may provide the required information for each question orally.
3. If you choose the personal interview, the information you give may be investigated; however, any written record of the interview itself will not be retained more than six months after entry upon active duty, and it will not become a part of your permanent military personnel service record.
4. If you enlist, this information may be requested from you again at some future date and may become a part of your security investigative file at that time. This could occur as a result of your being considered for duties involving access to classified information or other types of duty requiring a personnel security investigation.
5. A "YES" answer will not necessarily disqualify you for enlistment. It will depend on the circumstances surrounding the situation involved.

INITIAL HERE IF YOU PREFER A PERSONAL INTERVIEW: _____

APPLICANT HAS BEEN INTERVIEWED AND IS ☐ ELIGIBLE FOR ENLISTMENT, ☐ INELIGIBLE FOR ENLISTMENT

DATE OF INTERVIEW	NAME, ORGANIZATION & TITLE	SIGNATURE OF INTERVIEWER

EXPLAIN "YES" ANSWERS IN ITEM 41:

	NO	YES
a. HAVE YOU EVER TAKEN ANY NARCOTIC SUBSTANCE, SEDATIVE, STIMULANT, OR TRANQUILIZER DRUGS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
b. HAVE YOU EVER INTENTIONALLY SNIFFED GLUE, PAINT, HAIRSPRAY, OR OTHER CHEMICAL FUMES?		
c. HAVE YOU EVER BEEN INVOLVED IN THE USE, PURCHASE, POSSESSION OR SALE OF MARIJUANA, LSD, OR ANY HARMFUL OR HABIT-FORMING DRUGS AND/OR CHEMICALS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?		
d. HAS YOUR USE OF ALCOHOLIC BEVERAGES (*SUCH AS LIQUOR, BEER, WINE*) EVER RESULTED IN THE LOSS OF A JOB, ARREST BY POLICE, or TREATMENT FOR ALCOHOLISM?		
e. HAVE YOU EVER BEEN A PATIENT (*WHETHER OR NOT FORMALLY COMMITTED*) IN ANY INSTITUTION PRIMARILY DEVOTED TO THE TREATMENT OF MENTAL, NERVOUS, EMOTIONAL, PSYCHOLOGICAL, OR PERSONALITY DISORDERS?		
f. HAVE YOU EVER ENGAGED IN HOMOSEXUAL ACTIVITY (SEXUAL RELATIONS WITH ANOTHER PERSON OF THE SAME SEX)?		

38. MARITAL STATUS AND DEPENDENCY	NO	YES
a. ARE YOU NOW, OR HAVE YOU EVER BEEN MARRIED?		
b. IF YOU HAVE BEEN MARRIED, ARE YOU NOW LIVING WITH YOUR SPOUSE?		
c. HAVE YOU EVER BEEN DIVORCED? (If yes, enter date, place and court which granted divorce or legal separation)		
d. IS ANY COURT ORDER OR JUDGEMENT DIRECTING SUPPORT FOR CHILDREN OF ALIMONY IN EFFECT? (Enter date, place, and court which granted alimony decree, or support as the result of a paternity suit)		
e. IS ANYONE OTHER THAN YOUR SPOUSE AND/OR CHILDREN SOLELY OR PARTIALLY DEPENDENT UPON YOU? (list name & address)		

39. Do you now have, or within the past ten years, have you had knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organizations, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means?	NO	YES
If you answered "yes", give the names of the organizations and inclusive dates (month and year) of your membership; describe the nature of your activities as a member of the organization(s) in the "Remarks" section, Item 41.		

40. INVOLVEMENT WITH POLICE OR JUDICIAL AUTHORITIES **YOUR ANSWERS TO THE FOLLOWING QUESTIONS WILL BE VERIFIED WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI), AND OTHER AGENCIES TO DETERMINE ANY PREVIOUS RECORDS OF ARREST OR CONVICTIONS OR JUVENILE COURT ADJUDICATIONS. IF YOU CONCEAL SUCH RECORDS AT THIS TIME, YOU MAY, UPON ENLISTMENT, BE SUBJECT TO DISCIPLINARY ACTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE AND/OR DISCHARGE FROM THE MILITARY SERVICE WITH OTHER THAN AN HONORABLE DISCHARGE.**	NO	YES
a. Have you ever been arrested, charged, cited, or held by Federal, State, or other law enforcement or juvenile authorities regardless of whether the citation or charge was dropped or dismissed or you were found not guilty?		
b. As a result of being arrested, charged, cited, or held by law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State, or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record)?		
c. Have you ever been detained, held in, or served time in, any jail or prison, or reform or industrial school or any juvenile facility or institution under the jurisdiction of any City, County, State, Federal or foreign country?		
d. Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?		

Appendix D to opinion of ALITO, J.

LAST NAME: _____ SSN: _____

40. Continued	NO	YES
e. HAVE YOU BEEN RELEASED FROM PAROLE, PROBATION, JUVENILE SUPERVISION, OR GIVEN A SUSPENDED SENTENCE OR RELIEVED OF CHARGES PENDING ON CONDITION THAT YOU APPLY FOR OR ENLIST IN THE US ARMED FORCES?		
f. ARE YOU NOW INVOLVED IN OR A PARTY TO OR CONNECTED WITH ANY COURT ACTION OR CIVIL SUIT? (EXPLAIN "YES" ANSWER IN ITEM 41)		

g. EXPLAIN BELOW "YES" ANSWERS IN "a" THROUGH "e". BE CAREFUL TO INCLUDE *ALL* INCIDENTS WITH LAW ENFORCEMENT AUTHORITIES THAT YOU DISCUSSED WITH YOUR RECRUITER.

OFFENSE	DATE/PLACE	AGE	DISPOSITION	COURT

41. REMARKS

Appendix D to opinion of ALITO, J.

I am interested in the following options or programs:

V. CERTIFICATION

42. BY APPLICANT: I UNDERSTAND THAT THE ARMED FORCES REPRESENTATIVE WHO WILL ACCEPT MY ENLISTMENT DOES SO IN RELIANCE ON THE INFORMATION PROVIDED BY ME IN THIS DOCUMENT; THAT IF ANY OF THE INFORMATION IS KNOWINGLY FALSE OR INCORRECT, I MAY BE PROSECUTED UNDER FEDERAL CIVILIAN OR MILITARY LAW OR SUBJECT TO ADMINISTRATIVE SEPARATION PROCEEDINGS AND, IN EITHER INSTANCE, I MAY RECEIVE A LESS THAN HONORABLE DISCHARGE WHICH COULD AFFECT MY FUTURE EMPLOYMENT OPPORTUNITIES. I CERTIFY THAT THE INFORMATION GIVEN BY ME IN THIS DOCUMENT IS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

a. DATE	b. NAME (Last, First, Middle Initial)	c. SIGNATURE OF APPLICANT

43. DATA VERIFICATION: To be completed by the recruiter who enters a description of the actual documents reviewed by him/her to verify:

NAME	AGE	CITIZENSHIP
EDUCATION	PRIOR MILITARY SERVICE	
OTHER (Specify)		

DD FORM 1 AUG 75 1966/5 REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 6

LAST NAME: _____ SSN: _____

44. RECRUITER: I certify that I have witnessed applicant's signature above and further certify that I have verified the data in Sections I, III, and IV of this document, and the documents listed above as prescribed by my directives. I understand my liability to trial by courts-martial under the Uniform Code of Military Justice should I effect or cause to be effected the enlistment of anyone known by me to be ineligible for enlistment.

a. DATE	b. NAME, GRADE, SSN, AND RECRUITER ID NO. (Type or Print)	c. SIGNATURE OF RECRUITER

VI. PARENTAL/GUARDIAN CONSENT FOR ENLISTMENT

45. I/we certify that the applicant named herein has no other legal guardian than me/us and I/we consent to his/her enlistment in the _____ subject to all the requirements and lawful commands of the officers who may, from time to time, be placed over him/her; and I/we certify that no promise of any kind has been made to me/us concerning assignment to duty, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorized the Armed Forces representatives concerned to administer medical examinations, mental and/or aptitude testing, and conduct records checks to determine applicant's enlistment eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

46. *For enlistment in a Reserve Component:* I/we understand that as a member of a Reserve Component, he/she must serve minimum periods of active duty unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her Reserve commitment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while the applicant is in the Ready Reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

47. I/we certify that the applicant's birth date is:

NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN
NAME AND SIGNATURE OF WITNESSING OFFICIAL	SIGNATURE OF PARENT OR LEGAL GUARDIAN

VERIFICATION OF SINGLE SIGNATURE CONSENT

VII. ENLISTMENT OPTIONS – Completed by guidance counsellor, career counsellor, recruiter, AFEES Liaison NCO, etc., as specified by sponsoring service.

ENL. COMP.	GRADE/RATE	DATE OF RANK	TERM ENL.	T-E MOS/AFS	PMOS/AFS	WAIVER INFO	OPT ANAL	PROG ENL FOR

Appendix D to opinion of ALITO, J.

SPECIFIC OPTIONS ENLISTED FOR

I certify that I have reviewed all information contained in this document and, to the best of my judgment and belief, applicant fulfills all legal and policy requirements for enlistment. I accept his/her enlistment on behalf of the _____. I further certify that service regulations governing such enlistment have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

DATE	NAME, GRADE, AND SSN, ORGANIZATION OR RECRUITER ID (Type or Print)	SIGNATURE

VIII. RECERTIFICATION BY APPLICANT, AND CORRECTION OF DATA AT TIME OF ENLISTMENT

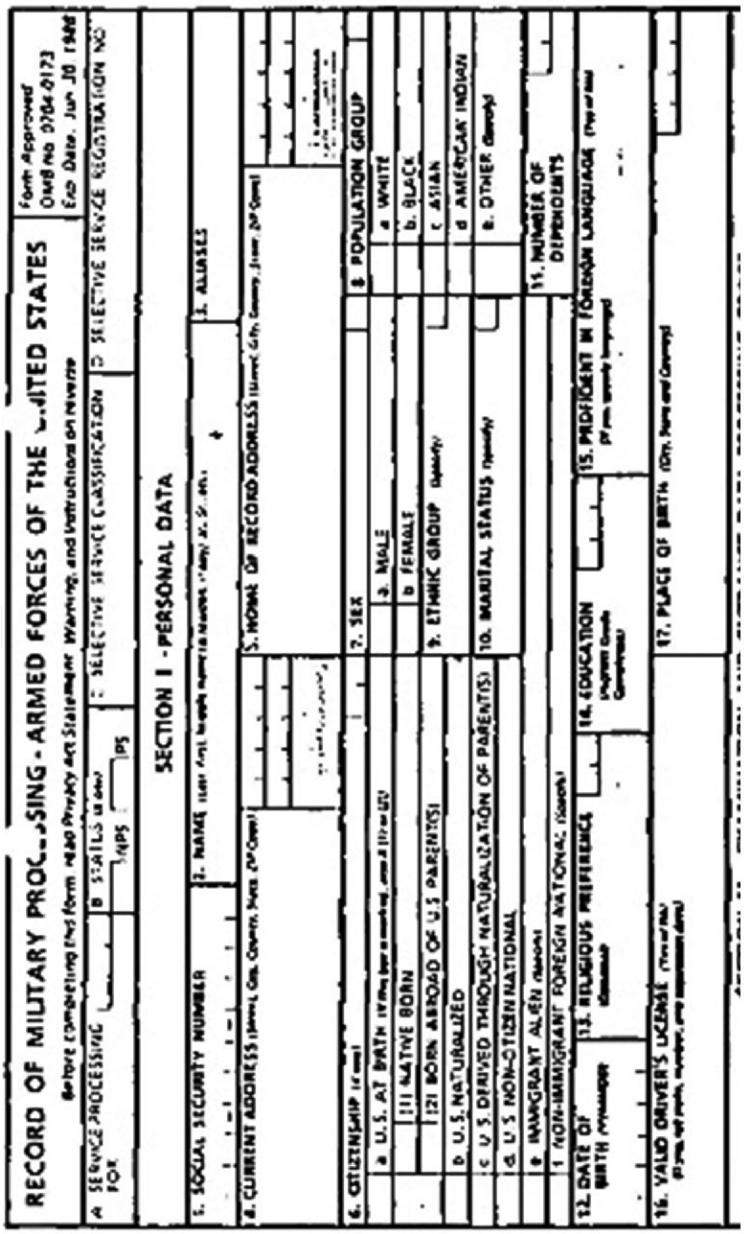
I HAVE REVIEWED ALL INFORMATION CONTAINED IN THIS DOCUMENT; THAT INFORMATION IS STILL CORRECT AND TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. IF CHANGES WERE REQUIRED, THE ORIGINAL ENTRY HAS BEEN MARKED. "SEE VIII" AND THE CORRECTED INFORMATION IS PROVIDED BELOW, KEYED TO THE APPROPRIATE QUESTION.

QUESTION	CHANGE REQUIRED

DATE	NAME, GRADE, SSN AND SIGNATURE OF WITNESS (Type or Print)	SIGNATURE OF APPLICANT

DD FORM 1 AUG 75 **1966/6** REPLACES DD FORM 1966, 1 JUN 75, WHICH WILL BE USED PAGE 6

Appendix D to opinion of ALITO, J.



RECORD OF MILITARY PROCESSING - ARMED FORCES OF THE UNITED STATES

SECTION I - PERSONAL DATA

Appendix D to opinion of Alito, J.

SECTION II - EXAMINATION AND ENTRANCE DATA PROCESSING CODES
FOR OFFICE USE ONLY - DO NOT WRITE IN THIS SECTION - GO ON TO PAGE 2, QUESTION 23

18. APTITUDE TEST RESULTS

a. TEST ID | b. TEST SCORES: GS | AR | WK | PC | NO | CS | AS | MK | MC | EI | VE

c. AFQT PERCENTILE | GT | NO | AD | WK | AR | SP | MK | EI | MC | GS | SI | AI

19. DEP ENLISTMENT DATA

a. DATE OF DEP ENLISTMENT (YYMMDD) | b. PROJ ACTIVE DUTY DATE (YYMMDD) | c. ES | d. RECRUITER IDENTIFICATION | e. PROGRAM ENLISTED FOR | f. T-E MOS/AFS

20. ACCESSION DATA

a. ENLISTMENT DATE (YYMMDD) | b. ACTIVE DUTY SERVICE DATE (YYMMDD) | c. PAY ENTRY DATE (YYMMDD) | d. TOE | e. WAIVER | f. PAY GRADE | g. DATE OF GRADE (YYMMDD) | h. ES | i. HIGHEST ED GR COMPL

j. RECRUITER IDENTIFICATION | k. PROGRAM ENLISTED FOR | l. T-E MOS/AFS | m. PMOS/AFS | n. YOUTH | o. QA | p. TRANSFER TO

21. SERVICE REQUIRED CODES	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

DD Form 1966/1, AUG 85 — Previous editions are obsolete. — PAGE 1

Appendix D to opinion of ALITO, J.

DD Form 1966

RECORD OF MILITARY PROCESSING

ARMED FORCES OF THE UNITED STATES

Privacy Act Statement

AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, 510, and 520a, and Title 50 USC Appendix 451 and following section.

PRINCIPAL PURPOSE: To determine your eligibility for military service.

ROUTINE USES: This form becomes the principal source document for, and part of, your military personnel records which are used to make decisions related to your training, promotion, assignments, and other personnel management actions.

DISCLOSURE: *(Applicants)* Voluntary; however, failure to answer all questions on this form, except "optional" items, may result in denial of your enlistment.

(Selective Service Registrants) Disclosure of requested information is mandatory except "optional" items, disclosure of which is voluntary.

WARNING

Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal laws and regulations. The information provided by you becomes the property of the United States Government, and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.

Appendix D to opinion of ALITO, J.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS DOCUMENT.

INSTRUCTIONS

(Read carefully BEFORE filling out this form.)

1. Read Privacy Act Statement above before completing form.

2. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state. "OPTIONAL" questions may be left blank.

3. List all responses requiring dates (schools, employment/residences) in chronological order beginning with present or the most recent and work backwards. Show all (employers/residences) for the last five years or since 13th birthday. Give inclusive dates for each period of residence/employment/school. If additional space is needed for any answer, continue it in item 39, "Remarks."

4. Unless otherwise specified, write all dates as 6 digits (with no spaces or marks) in YYMMDD fashion. February 13, 1985 is written 850213.

DD Form 1966/1R, AUG 85 Previous editions are obsolete . Reverse of Page 1

Appendix D to opinion of ALITO, J.

NAME		SOCIAL SECURITY NUMBER

SECTION III - OTHER PERSONAL DATA

23. CITIZENSHIP (*You must provide your recruiter with the necessary documents to confirm your answers.*)

a. BIRTH CERTIFICATE

(1) FILE NUMBER	(2) ISSUING COUNTY	(3) ISSUING STATE

b. NATIVE COUNTRY

c. IF ALIEN, GIVE ALIEN REGISTRATION NUMBER AND LAST ADDRESS FURNISHED TO IMMIGRATION AND NATURALIZATION SERVICE (INS)

d. DATE/PORT OF ENTRY INTO THE U.S (*If applicable*)

24. EDUCATION (*List all high schools and colleges attended. If none attended, show last school attended.*)

a. FROM (YY/MM)	b. TO (YY/MM)	c. NAME OF SCHOOL	d. LOCATION	e. GRADUATE	
				YES	NO

25. RESIDENCES (*List all for the last five years or since 13th birthday, whichever is shorter.*)

a. FROM (YY/MM)	b. TO (YY/MM)	c. STREET ADDRESS	d. CITY	e. STATE	f. ZIP CODE
	PRESENT				

Appendix D to opinion of ALITO, J.

26. EMPLOYMENT (Show all periods of employment and unemployment during the last five years.)

a. FROM. (YYMMM)	b. TO (YYMMM)	c. NAME OF EMPLOYER	d. ADDRESS (Include Zip Code)	e. NAME OF IMMEDIATE SUPERVISOR	f. JOB TITLE
	PRESENT				

27. RELATIVES

a. NAME (Last, First, Middle Initial)	b. DEPN		c. DATE OF BIRTH (YYMMDD)	d. PLACE OF BIRTH	e. PRESENT ADDRESS	f. CITIZENSHIP
	YES	NO				
FATHER						
MOTHER (Maiden Name)						
SPOUSE (Maiden Name, if applicable)						
CHILDREN						

DD Form 1966/2, AUG 85 Previous editions are obsolete. PAGE 2

Appendix D to opinion of ALITO, J.

NAME	SOCIAL SECURITY NUMBER		
		YES	NO
28. Are you now or have you ever been in any regular or reserve branch of the Armed Forces or in the Army National Guard or the Air National Guard? *(Give your recruiter the appropriate DD Form 214 and/or DD Form 215 or NGB Form 22 for review.)*			
29. Are you now or have you ever been divorced or legally separated? If "YES," enter in item 39, "REMARKS," the date, place and court which granted divorce or legal separation			
30. Is any court order or judgment in effect that directs you to provide support for children or alimony? If "YES," enter in item 39, "REMARKS," the date, place, and court which granted alimony or support including orders resulting from paternity suits			
31. Have you ever been arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, regardless of whether the citation was dropped or dismissed or you were found not guilty? Include all courts-martial or non-judicial punishment while in military service. If "YES," enter details in item 35			
32. As a result of being arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record); or have you been released from parole, probation, juvenile supervision or given a suspended sentence or relieved of charges pending on condition that you apply for or enlist in the United States Armed Forces? If "YES," *enter details in item 35*			
33. Have you ever been detained, held in, or served time in any jail or prison, reform or industrial school, or a juvenile facility or institution under the jurisdiction of any city, state, Federal or foreign country? If "YES," enter details in item 35			
34. Have you ever been a ward, or are you now under suspended sentence, parole, or probation or awaiting any action on criminal/civil charges against you? If "YES," enter details in item 35			

35. LAW VIOLATIONS. Explain below "YES" answers given in items 31 through 34 above (include all incidents with law enforcement authorities even if the citation or charge was dropped or dismissed or you were found not guilty or you have been told by recruiting personnel or anyone else that the incident was not important enough to list.)

a. DATE (YYMMDD)	b. NATURE OF OFFENSE OR VIOLATION	c. PLACE OF OFFENSE	d. NAME AND LOCATION OF COURT	e. PENALTY IMPOSED OR OTHER DISPOSITION IN EACH CASE

36. CHARACTER AND SOCIAL ADJUSTMENT: If your answer to every question is truthfully "NO," indicate so in the appropriate space. If your answer is "YES," indicate so in the appropriate space and give details in item 39, "REMARKS." A "YES" answer will not necessarily disqualify you for enlistment; it will depend on the circumstances surrounding the situation.

		YES	NO
a	Questions (1), (2), and (3) below concern possession, supply, use without a prescription of marijuana, narcotics, LSD or other dangerous drugs. A "Yes" answer to (3) has no bearing on your eligibility to enlist or be commissioned but is essential to accurate job classification. Additional screening will occur during basic training or officer training school.		
	(1) Have you ever used narcotics, LSD or other dangerous drugs?		
	(2) Have you ever been a supplier of narcotics, LSD or other dangerous drugs or marijuana?		
	(3) Have you used marijuana at any time in the past six months?		
b.	Has your use of drugs or alcoholic beverages (such as liquor, beer, wine), ever resulted in your loss of a job, arrest by police, or treatment or alcoholism?		
	Are you a homosexual or a bisexual? ("Homosexual" is defined as: sexual desire or behavior directed at a person(s) of one's own sex. "Bisexual" is defined as: a person sexually responsive to both sexes.)		
	Do you intend to engage in homosexual acts (sexual relations with another person of the same sex)?		
e.	Are you a conscientious objector? That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious training or belief?		
f.	Have you ever been rejected for enlistment, reenlistment, or induction by any branch of the Armed Forces of the United States?		
g.	Are you now, or have you ever been, a deserter from any branch of the Armed Forces of the United States?		
h	Are you now, or have you ever been, a member of the Communist Party or any Communist organization? Are you now, or have you ever been, affiliated with any organization, association, movement, group or combination of persons which advocates the overthrow of our constitutional form of government or which has adopted the policy of advocating the commission of acts of violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means? *(If "YES," give details in item 39, "REMARKS.")*		

Appendix D to opinion of ALITO, J.

NAME	SOCIAL SECURITY NUMBER

37. OTHER BACKGROUND DATA

		YES	NO
a.	Have you ever traveled to, or resided in, a foreign country except as a member of the United States Armed Forces (including dependent travel) performing official duties? (If "YES," give details in Item 39, "REMARKS.")		
b.	Are you the only living child of your parents?		
c.	Are you now drawing, or do you have an application pending, for disability retired pay, disability allowance, severance pay, or a pension from the government of the United States?		
d.	Have you been enrolled in ROTC, Junior ROTC, Sea Cadet Program, or have you been a member of the Civil Air Patrol? (If "YES," enter organization and its address in Item 39, "REMARKS.")		

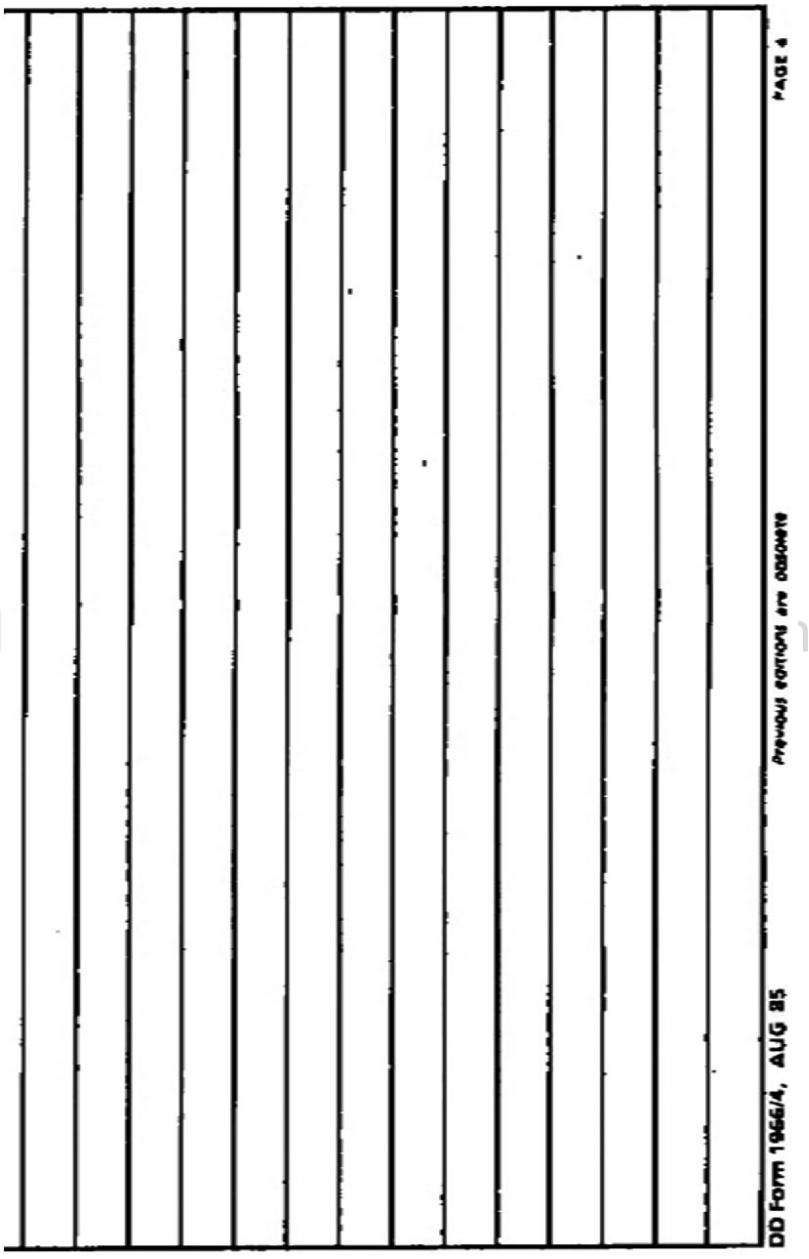
38. UNDERSTANDING

		b. APPLICANT'S INITIALS
a.	I understand that an original enlistment obligates me to serve in the Armed Forces for a period of eight (8) years (active and inactive duty) unless sooner discharged.	

SECTION IV - REMARKS

39. REMARKS *(Enter item(s) being continued.)*

Appendix D to opinion of ALITO, J.



Appendix D to opinion of ALITO, J.

Appendix D to opinion of ALITO, J.

I fully understand that I will not be guaranteed any specific military skill or assignment in a geographic area except as shown in item 43a above and annexes attached to my Enlistment/ Reenlistment Document (DD Form 4).

44. CERTIFICATION OF RECRUITER OR ACCESSION

a. I certify that I have reviewed the information contained in this document and, to the best of my judgment and belief, the applicant fulfills all legal policy requirements for enlistment. I accept him/her for enlistment on behalf of the United States Government. _____ and certify that I have not made any promises or guarantees other than those listed in item 43 above. I further certify that service regulations governing such enlistments have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.

SECTION VI - RECERTIFICATION

45. RECERTIFICATION BY APPLICANT AND CONNECTION OF DATA AT THE TIME OF ACTIVE DUTY ENTRY

a. I have reviewed all information contained in this document this date. That information is still correct and true to the best of my knowledge and belief. If changes were required, the original entry has been marked "See item 45" and the correct information is provided below.

DD FORM 1966/3, AUG 85

PAGE 3

Appendix D to opinion of ALITO, J.

NAME | SOCIAL SECURITY NUMBER

NOTE
USE THIS DD FORM 1966 PAGE ONLY IF EITHER SECTION APPLIES TO THE APPLICANT'S RECORD OF MILITARY PROCESSING

SECTION VII - PARENTAL/GUARDIAN CONSENT FOR ENLISTMENT

26. PARENT/GUARDIAN STATEMENT(S) (Line out portions not applicable)

a. I/we certify that (Enter name of applicant) _____
has no other legal guardian other than me/us and I/we consent to his/her enlistment in the United States (Enter Branch of Service) _____.

I/we certify that no promises or anything have been made to me/us concerning assignment to duty, training, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorize the Armed Forces representatives concerned to perform medical examinations, other examinations required, and to conduct records checks to determine his/her eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.

b. FOR ENLISTMENT IN A RESERVE COMPONENT

I/we understand that, as a member of a reserve component, he/she must serve minimum periods of active duty for training unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her reserve enlistment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while he/she is in the ready reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.

c. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

d. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle initial) | (2) SIGNATURE | (3) DATE SIGNED (YYYYMMDD)

Appendix D to opinion of ALITO, J.

e. PARENT

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

f. WITNESS

(1) TYPED OR PRINTED NAME (Last, First, Middle Initial) | (2) SIGNATURE | (3) DATE SIGNED (YYMMDD)

g7. VERIFICATION OF SINGLE SIGNATURE CONSENT

SECTION VIII - STATEMENT OF NAME FOR OFFICIAL MILITARY RECORDS

h8. NAME CHANGE. If the preferred enlistment name (name given in item 2) is not the same as on your birth certificate, and it has not been changed by legal procedure prescribed by state law, and it is the same as on your social security number card, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE | b. NAME AS SHOWN ON SOCIAL SECURITY NUMBER CARD

c. I hereby state that I have not changed my name through any court or other legal procedure; that I prefer to use the name of _____ by which I am known in the community as a matter of convenience and with no criminal intent. I further state that I am the same person as the person whose name is shown in item 2.

d. WITNESS

(1) TYPED OR PRINTED NAME | (2) PAY GRADE

(3) SIGNATURE

e. APPLICANT

(1) SIGNATURE | (2) DATE SIGNED (YYMMDD)

DD Form 1966/6, AUG 85 Previous editions are obsolete PAGE 6

JUSTICE KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. In 2007, the U. S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U. S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to outlaw employment discrimination on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 631 (2018).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend

the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.[1]

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1).[2] As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination.

Over time, Congress has enacted new employment discrimination laws. In 1967, Congress passed and President Johnson signed the Age Discrimination in Employment Act. 81 Stat. 602. In 1973, Congress passed and President Nixon signed the Rehabilitation Act, which in substance prohibited

---

[1] Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.

[2] In full, the statute provides:

"*It shall be an unlawful employment practice for an employer*—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a) (emphasis added).

As the Court today recognizes, Title VII contains an important exemption for religious organizations. § 2000e–1(a); see also § 2000e–2(e). The First Amendment also safeguards the employment decisions of religious employers. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188–195 (2012). So too, the Religious Freedom Restoration Act of 1993 exempts employers from federal laws that substantially burden the exercise of religion, subject to limited exceptions. § 2000bb–1.

disability discrimination against federal and certain other employees. 87 Stat. 355. In 1990, Congress passed and President George H. W. Bush signed the comprehensive Americans with Disabilities Act. 104 Stat. 327.

To prohibit age discrimination and disability discrimination, this Court did not unilaterally rewrite or update the law. Rather, Congress and the President enacted new legislation, as prescribed by the Constitution's separation of powers.

For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important

policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U. S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. *Ante*, at 659–662.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or

alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, A Matter of Interpretation 24 (1997). Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, Interpreting Law 33, 34–35 (2016) (footnote omitted). Or as Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–2393 (2003). Or as Professor Nelson wrote: No "mainstream judge is interested solely in the literal definitions of a statute's words." Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 376 (2005). The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now.

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers.

The ordinary meaning principle is longstanding and well settled. Time and again, this Court has rejected literalism in favor of ordinary meaning. Take a few examples:

- The Court recognized that beans may be seeds "in the language of botany or natural history," but concluded that beans are not seeds "in commerce" or "in common parlance." *Robertson* v. *Salomon*, 130 U. S. 412, 414 (1889).
- The Court explained that tomatoes are literally "the fruit of a vine," but "in the common language of the people," tomatoes are vegetables. *Nix* v. *Hedden*, 149 U. S. 304, 307 (1893).
- The Court stated that the statutory term "vehicle" does not cover an aircraft: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle* v. *United States*, 283 U. S. 25, 26 (1931).

- The Court pointed out that "this Court's interpretation of the three-judge-court statutes has frequently deviated from the path of literalism." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 96 (1974).
- The Court refused a reading of "mineral deposits" that would include water, even if "water is a 'mineral,' in the broadest sense of that word," because it would bring about a "major . . . alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history." *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 610, 616 (1978).
- The Court declined to interpret "facilitating" a drug distribution crime in a way that would cover purchasing drugs, because the "literal sweep of 'facilitate' sits uncomfortably with common usage." *Abuelhawa* v. *United States*, 556 U. S. 816, 820 (2009).
- The Court rebuffed a literal reading of "personnel rules" that would encompass any rules that personnel must follow (as opposed to human resources rules *about* personnel), and stated that no one "using ordinary language would describe" personnel rules "in this manner." *Milner* v. *Department of Navy*, 562 U. S. 562, 578 (2011).
- The Court explained that, when construing statutory phrases such as "arising from," it avoids "uncritical literalism leading to results that no sensible person could have intended." *Jennings* v. *Rodriguez*, 583 U. S. 281, 293–294 (2018) (plurality opinion) (internal quotation marks omitted).

Those cases exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.

Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider

phrases in statutes. (Recall that the shorthand version of the phrase at issue here is "discriminate because of sex.")[3] Courts must heed the ordinary meaning of the *phrase as a whole*, not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An "American flag" could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. A "three-pointer" could literally include a field goal in football, but in common parlance, it is a shot from behind the arc in basketball. A "cold war" could literally mean any wintertime war, but in common parlance it signifies a conflict short of open warfare. A "washing machine" could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes.

This Court has often emphasized the importance of sticking to the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase. In *FCC* v. *AT&T Inc.*, 562 U. S. 397 (2011), for example, the Court explained:

> "AT&T's argument treats the term 'personal privacy' as simply the sum of its two words: the privacy of a person. . . . But two words together may assume a more particular meaning than those words in isolation. We understand a golden cup to be a cup made of or resembling gold. A golden boy, on the other hand, is one who is charming, lucky, and talented. A golden opportunity is one not to be missed. 'Personal' in the phrase 'personal privacy' conveys more than just 'of a person.'

[3] The full phrasing of the statute is provided above in footnote 2. This opinion uses "discriminate because of sex" as shorthand for "discriminate . . . because of . . . sex." Also, the plaintiffs do not dispute that the ordinary meaning of the statutory phrase "discriminate" because of sex is the same as the statutory phrase "to fail or refuse to hire or to discharge any individual" because of sex.

> It suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T." *Id.*, at 406.

Exactly right and exactly on point in this case.

Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees.' The full body of a text contains implications that can alter the literal meaning of individual words." A. Scalia & B. Garner, Reading Law 356 (2012) (footnote omitted). Put another way, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes." *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.). Judges must take care to follow ordinary meaning "when two words combine to produce a meaning that is not the mechanical composition of the two words separately." Eskridge, Interpreting Law, at 62. Dictionaries are not "always useful for determining the ordinary meaning of word clusters (like 'driving a vehicle') or phrases and clauses or entire sentences." *Id.*, at 44. And we must recognize that a phrase can cover a "dramatically smaller category than either component term." *Id.*, at 62.

If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. "Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the 'plain meaning' of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on

such an approach." 883 F. 3d 100, 144, n. 7 (CA2 2018) (Lynch, J., dissenting).[4]

In other words, this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does. See *ante*, at 655–659. To reiterate Justice Scalia's caution, that approach misses the forest for the trees.

A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the "linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan." Eskridge, Interpreting Law, at 81; see Scalia, A Matter of Interpretation, at 17.

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in

---

[4] Another longstanding canon of statutory interpretation—the absurdity canon—similarly reflects the law's focus on ordinary meaning rather than literal meaning. That canon tells courts to avoid construing a statute in a way that would lead to absurd consequences. The absurdity canon, properly understood, is "an implementation of (rather than . . . an exception to) the ordinary meaning rule." W. Eskridge, Interpreting Law 72 (2016). "What the rule of absurdity seeks to do is what all rules of interpretation seek to do: *make sense* of the text." A. Scalia & B. Garner, Reading Law 235 (2012).

this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. *Ante*, at 666. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted. *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 114 (2019); see *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 84 (2017) (using a conversation between friends to demonstrate ordinary meaning); see also *Wisconsin Central Ltd.* v. *United States*, 585 U. S. 274, 278 (2018) (similar); *AT&T*, 562 U. S., at 403–404 (similar).

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that

have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 363 (CA7 2017) (Sykes, J., dissenting).

It also rewrites history. Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.[5]

---

[5] See 18 U. S. C. § 249(a)(2)(A) (criminalizing violence because of "gender, sexual orientation"); 20 U. S. C. § 1092(f)(1)(F)(ii) (requiring funding recipients to collect statistics on crimes motivated by the victim's "gender, . . . sexual orientation"); 34 U. S. C. § 12291(b)(13)(A) (prohibiting discrimination on the basis of "sex, . . . sexual orientation"); § 30501(1) (identifying violence motivated by "gender, sexual orientation" as national problem);

That longstanding and widespread congressional practice matters. When interpreting statutes, as the Court has often said, we "usually presume differences in language" convey "differences in meaning." *Wisconsin Central*, 585 U. S., at 279 (internal quotation marks omitted). When Congress chooses distinct phrases to accomplish distinct purposes, and does so over and over again for decades, we may not lightly toss aside all of Congress's careful handiwork. As Justice Scalia explained for the Court, "it is not our function" to "treat alike subjects that different Congresses have chosen to treat differently." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991); see *id.*, at 92.

And the Court has likewise stressed that we may not read "a specific concept into general words when precise language in other statutes reveals that Congress knew how to identify that concept." Eskridge, Interpreting Law, at 415; see *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 357 (2013); *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 297–298 (2006); *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341–342 (2005); *Custis* v. *United States*, 511 U. S. 485, 491–493 (1994); *West Virginia Univ. Hospitals*, 499 U. S., at 99.

So it is here. As demonstrated by all of the statutes covering sexual orientation discrimination, Congress knows how to prohibit sexual orientation discrimination. So courts

---

§ 30503(a)(1)(C) (authorizing Attorney General to assist state, local, and tribal investigations of crimes motivated by the victim's "gender, sexual orientation"); §§ 41305(b)(1), (3) (requiring Attorney General to acquire data on crimes motivated by "gender . . . , sexual orientation," but disclaiming any cause of action including one "based on discrimination due to sexual orientation"); 42 U. S. C. § 294e–1(b)(2) (conditioning funding on institution's inclusion of persons of "different genders and sexual orientations"); see also United States Sentencing Commission, Guidelines Manual § 3A1.1(a) (Nov. 2018) (authorizing increased offense level if the crime was motivated by the victim's "gender . . . or sexual orientation"); 2E Guide to Judiciary Policy § 320 (2019) (prohibiting judicial discrimination because of "sex, . . . sexual orientation").

should not read that specific concept into the general words "discriminate because of sex." We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories.

Where possible, we also strive to interpret statutes so as not to create undue surplusage. It is not uncommon to find some scattered redundancies in statutes. But reading sex discrimination to encompass sexual orientation discrimination would cast aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U. S. Code in laws enacted over the last 25 years.

In short, an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

The story is the same with bills proposed in Congress. Since the 1970s, Members of Congress have introduced many bills to prohibit sexual orientation discrimination in the workplace. Until very recently, all of those bills would have expressly established sexual orientation as a separately proscribed category of discrimination. The bills did not define sex discrimination to encompass sexual orientation discrimination.[6]

---

[6] See, *e. g.*, H. R. 14752, 93d Cong., 2d Sess., §§ 6, 11 (1974) (amending Title VII "by adding after the word 'sex'" the words "'sexual orientation,'" defined as "choice of sexual partner according to gender"); H. R. 451, 95th Cong., 1st Sess., §§ 6, 11 (1977) ("adding after the word 'sex,' . . . 'affectional or sexual preference,'" defined as "having or manifesting an emotional or physical attachment to another consenting person or persons of either gender, or having or manifesting a preference for such attachment"); S. 1708, 97th Cong., 1st Sess., §§ 1, 2 (1981) ("inserting after 'sex' . . . 'sexual orientation,'" defined as "'homosexuality, heterosexuality, and bisexuality'"); H. R. 230, 99th Cong., 1st Sess., §§ 4, 8 (1985) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); S. 47, 101st Cong., 1st Sess., §§ 5, 9

The proposed bills are telling not because they are relevant to congressional intent regarding Title VII. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 186–188 (1994). Rather, the proposed bills are telling because they, like the enacted laws, further demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

Presidential Executive Orders reflect that same common understanding. In 1967, President Johnson signed an Executive Order prohibiting sex discrimination in federal employment. In 1969, President Nixon issued a new order that did the same. Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11478, *id.*, at 803. In 1998, President Clinton charted a new path and signed an Executive Order prohibiting sexual orientation discrimination in federal employment. Exec. Order No. 13087, 3 CFR 191 (1999). The Nixon and Clinton Executive Orders remain in effect today.

Like the relevant federal statutes, the 1998 Clinton Executive Order expressly added sexual orientation as a new, separately prohibited form of discrimination. As Judge Lynch cogently spelled out, "the Clinton Administration did not argue that the prohibition of sex discrimination in" the prior 1969 Executive Order "already banned, or henceforth would be deemed to ban, sexual orientation discrimination." 883 F. 3d, at 152, n. 22 (dissenting opinion). In short, President

---

(1989) ("inserting after 'sex,' . . . 'affectional or sexual orientation,'" defined as "homosexuality, heterosexuality, and bisexuality"); H. R. 431, 103d Cong., 1st Sess., §2 (1993) (prohibiting discrimination "on account of . . . sexual orientation" without definition); H. R. 1858, 105th Cong., 1st Sess., §§3, 4 (1997) (prohibiting discrimination "on the basis of sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2692, 107th Cong., 1st Sess., §§3, 4 (2001) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, bisexuality, or heterosexuality"); H. R. 2015, 110th Cong., 1st Sess., §§3, 4 (2007) (prohibiting discrimination "because of . . . sexual orientation," defined as "homosexuality, heterosexuality, or bisexuality"); S. 811, 112th Cong., 1st Sess., §§3, 4 (2011) (same).

Clinton's 1998 Executive Order indicates that the Executive Branch, like Congress, has long understood sexual orientation discrimination to be distinct from, and not a form of, sex discrimination.

Federal regulations likewise reflect that same understanding. The Office of Personnel Management is the federal agency that administers and enforces personnel rules across the Federal Government. OPM has issued regulations that "govern . . . the employment practices of the Federal Government generally, and of individual agencies." 5 CFR §§300.101, 300.102 (2019). Like the federal statutes and the Presidential Executive Orders, those OPM regulations separately prohibit sex discrimination and sexual orientation discrimination.

The States have proceeded in the same fashion. A majority of States prohibit sexual orientation discrimination in employment, either by legislation applying to most workers,[7]

[7] See Cal. Govt. Code Ann. §12940(a) (West 2020 Cum. Supp.) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Colo. Rev. Stat. §24–34–402(1)(a) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Conn. Gen. Stat. §46a–81c (2017) (prohibiting discrimination because of "sexual orientation"); Del. Code Ann., Tit. 19, §711 (2018 Cum. Supp.) (prohibiting discrimination because of "sex (including pregnancy), sexual orientation," etc.); D. C. Code §2–1402.11(a)(1) (2019 Cum. Supp.) (prohibiting discrimination based on "sex, . . . sexual orientation," etc.); Haw. Rev. Stat. §378–2(a)(1)(A) (2018 Cum. Supp.) (prohibiting discrimination because of "sex[,] . . . sexual orientation," etc.); Ill. Comp. Stat., ch. 775, §§5/1–103(Q), 5/2–102(A) (West 2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Iowa Code §216.6(1)(a) (2018) (prohibiting discrimination because of "sex, sexual orientation," etc.); Me. Rev. Stat. Ann., Tit. 5, §4572(1)(A) (2013) (prohibiting discrimination because of "sex, sexual orientation," etc.); Md. State Govt. Code Ann. §20–606(a)(1)(i) (Supp. 2019) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Mass. Gen. Laws, ch. 151B, §4 (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Minn. Stat. §363A.08(2) (2018) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.); Nev. Rev. Stat. §613.330(1) (2017) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. H. Rev. Stat. Ann. §354–A:7(I) (2018 Cum. Supp.) (prohibiting discrimination because of "sex," "sexual orientation," etc.); N. J. Stat. Ann. §10:5–

an executive order applying to public employees,[8] or both. Almost every state statute or executive order

---

12(a) (West Supp. 2019) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); N. M. Stat. Ann. § 28–1–7(A) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); N. Y. Exec. Law Ann. § 296(1)(a) (West Supp. 2020) (prohibiting discrimination because of "sexual orientation, . . . sex," etc.); Ore. Rev. Stat. § 659A.030(1) (2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); R. I. Gen. Laws § 28–5–7(1) (Supp. 2019) (prohibiting discrimination because of "sex, sexual orientation," etc.); Utah Code § 34A–5–106(1) (2019) (prohibiting discrimination because of "sex; . . . sexual orientation," etc.); Vt. Stat. Ann., Tit. 21, § 495(a)(1) (2019 Cum. Supp.) (prohibiting discrimination because of "sex, sexual orientation," etc.); Wash. Rev. Code § 49.60.180 (2008) (prohibiting discrimination because of "sex, . . . sexual orientation," etc.).

[8] See, *e. g.*, Alaska Admin. Order No. 195 (2002) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ariz. Exec. Order No. 2003–22 (2003) (prohibiting public-employment discrimination because of "sexual orientation"); Cal. Exec. Order No. B–54–79 (1979) (prohibiting public-employment discrimination because of "sexual preference"); Colo. Exec. Order (Dec. 10, 1990) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Del. Exec. Order No. 8 (2009) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Ind. Governor's Pol'y Statement (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Kan. Exec. Order No. 19–02 (2019) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); Ky. Exec. Order No. 2008–473 (2008) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mass. Exec. Order No. 526 (2011) (prohibiting public-employment discrimination because of "gender, . . . sexual orientation," etc.); Minn. Exec. Order No. 86–14 (1986) (prohibiting public-employment discrimination because of "sexual orientation"); Mo. Exec. Order No. 10–24 (2010) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Mont. Exec. Order No. 04–2016 (2016) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); N. H. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "sex, sexual orientation," etc.); N. J. Exec. Order No. 39 (1991) (prohibiting public-employment discrimination because of "sexual orientation"); N. C. Exec. Order No. 24 (2017) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Ohio Exec. Order No. 2019–05D (2019) (prohibiting public-employment dis-

proscribing sexual orientation discrimination expressly prohibits sexual orientation discrimination separately from the State's ban on sex discrimination.

That common usage in the States underscores that sexual orientation discrimination is commonly understood as a legal concept distinct from sex discrimination.

And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. See *United States* v. *Virginia*, 518 U. S. 515, 531–533 (1996); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136–137 (1994); *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976); *Frontiero* v. *Richardson*, 411 U. S. 677, 682–684 (1973) (plurality opinion); *Reed* v. *Reed*, 404 U. S. 71, 75–77 (1971). Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protec-

---

crimination because of "gender, . . . sexual orientation," etc.); Ore. Exec. Order No. 19–08 (2019) (prohibiting public-employment discrimination because of "sexual orientation"); Pa. Exec. Order No. 2016–04 (2016) (prohibiting public-employment discrimination because of "gender, sexual orientation," etc.); R. I. Exec. Order No. 93–1 (1993) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Va. Exec. Order No. 1 (2018) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); Wis. Exec. Order No. 1 (2019) (prohibiting public-employment discrimination because of "sex, . . . sexual orientation," etc.); cf. Wis. Stat. §§ 111.36(1)(d)(1), 111.321 (2016) (prohibiting employment discrimination because of sex, defined as including discrimination because of "sexual orientation"); Mich. Exec. Directive No. 2019–9 (2019) (prohibiting public-employment discrimination because of "sex," defined as including "sexual orientation").

tion Clause. See *Bowers* v. *Hardwick*, 478 U. S. 186 (1986); *Romer* v. *Evans*, 517 U. S. 620 (1996); *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *United States* v. *Windsor*, 570 U. S. 744 (2013); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015).

Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. The opinions in those five cases contain no trace of such reasoning. That is presumably because everyone on this Court, too, has long understood that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

Judge Sykes summarized the law and language this way: "To a fluent speaker of the English language—then and now— . . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here." *Hively*, 853 F. 3d, at 363 (dissenting opinion).

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they

can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

Until the last few years, every U. S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. As noted above, in the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30 judges.[9]

The unanimity of those 30 federal judges shows that the question as a matter of law, as compared to as a matter of policy, was not deemed close. Those 30 judges realized a seemingly obvious point: Title VII is not a general grant of authority for judges to fashion an evolving common law of equal treatment in the workplace. Rather, Title VII identifies certain specific categories of prohibited discrimination. And under the separation of powers, Congress—not the courts—possesses the authority to amend or update the law, as Congress has done with age discrimination and disability discrimination, for example.

So what changed from the situation only a few years ago when 30 out of 30 federal judges had agreed on this question?

---

[9] See *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 258–259 (CA1 1999); *Simonton* v. *Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001); *Wrightson* v. *Pizza Hut of America, Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Blum* v. *Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*); *Ruth* v. *Children's Medical Center*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane* v. *Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984); *Williamson* v. *A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Medina* v. *Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005).

Not the text of Title VII. The law has not changed. Rather, the judges' decisions have evolved.

To be sure, the majority opinion today does not openly profess that it is judicially updating or amending Title VII. Cf. *Hively*, 853 F. 3d, at 357 (Posner, J., concurring). But the majority opinion achieves the same outcome by seizing on literal meaning and overlooking the ordinary meaning of the phrase "discriminate because of sex." Although the majority opinion acknowledges that the meaning of a phrase and the meaning of a phrase's individual words *could* differ, it dismisses phrasal meaning for purposes of this case. The majority opinion repeatedly seizes on the meaning of the statute's individual terms, mechanically puts them back together, and generates an interpretation of the phrase "discriminate because of sex" that is literal. See *ante*, at 655–659, 666, 674–676. But to reiterate, that approach to statutory interpretation is fundamentally flawed. Bedrock principles of statutory interpretation dictate that we look to ordinary meaning, not literal meaning, and that we likewise adhere to the ordinary meaning of phrases, not just the meaning of words in a phrase. And the ordinary meaning of the phrase "discriminate because of sex" does not encompass sexual orientation discrimination.

The majority opinion deflects that critique by saying that courts should base their interpretation of statutes on the text as written, not on the legislators' subjective intentions. *Ante*, at 670, 673–680. Of course that is true. No one disagrees. It is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998).

But in my respectful view, the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. To briefly explain: In the early years after Title VII was enacted, some may have wondered whether Title VII's prohibition on sex discrimination pro-

tected male employees. After all, covering male employees may not have been the intent of some who voted for the statute. Nonetheless, discrimination on the basis of sex against women and discrimination on the basis of sex against men are both understood as discrimination because of sex (back in 1964 and now) and are therefore encompassed within Title VII. Cf. *id.*, at 78–79; see *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682–685 (1983). So too, regardless of what the intentions of the drafters might have been, the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex with respect to the "terms, conditions, or privileges of employment," as this Court rightly concluded. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986) (internal quotation marks omitted).[10]

---

[10] An *amicus* brief supporting the plaintiffs suggests that the plaintiffs' interpretive approach is supported by the interpretive approach employed by the Court in its landmark decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). See Brief for Anti-Discrimination Scholars as *Amici Curiae* 4. That suggestion is incorrect. *Brown* is a correct decision as a matter of original public meaning. There were two analytical components of *Brown*. One issue was the meaning of "equal protection." The Court determined that black Americans—like all Americans—have an *individual* equal protection right against state discrimination on the basis of race. (That point is also directly made in *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500 (1954).) Separate but equal is not equal. The other issue was whether that racial nondiscrimination principle applied to public schools, even though public schools did not exist in any comparable form in 1868. The answer was yes. The Court applied the equal protection principle to public schools in the same way that the Court applies, for example, the First Amendment to the Internet and the Fourth Amendment to cars.

This case raises the same kind of inquiry as the *first* question in *Brown*. There, the question was what equal protection meant. Here, the question is what "discriminate because of sex" means. If this case raised the question whether the sex discrimination principle in Title VII applied to some category of employers unknown in 1964, such as to social media companies, it might be a case in *Brown*'s second category, akin to the question

By contrast, this case involves sexual orientation discrimination, which has long and widely been understood as distinct from, and not a form of, sex discrimination. Until now, federal law has always reflected that common usage and recognized that distinction between sex discrimination and sexual orientation discrimination. To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.

To be sure, as Judge Lynch appropriately recognized, it is "understandable" that those seeking legal protection for gay people "search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice." 883 F. 3d, at 162 (dissenting opinion).

The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept. Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two.

---

whether the racial nondiscrimination principle applied to public schools. But that is not this case.

Political groups distinguish the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law—a "statutory amendment courtesy of unelected judges." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). Some will surmise that the Court succumbed to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others." *Furman* v. *Georgia*, 408 U. S. 238, 467 (1972) (Rehnquist, J., dissenting).

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. After all, even back in 2007—a veritable lifetime ago in American attitudes about sexual orientation—the House voted 235 to 184 to prohibit sexual orientation discrimination in employment. H. R. 3685, 110th Cong., 1st Sess. In 2013, the Senate overwhelmingly approved a similar bill, 64 to 32. S. 815, 113th Cong., 1st Sess. In 2019,

the House voted 236 to 173 to amend Title VII to prohibit employment discrimination on the basis of sexual orientation. H. R. 5, 116th Cong., 1st Sess. It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.

It is true that meaningful legislative action takes time—often too much time, especially in the unwieldy morass on Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). The proper role of the Judiciary in statutory interpretation cases is "to apply, not amend, the work of the People's representatives," even when the judges might think that "Congress should reenter the field and alter the judgments it made in the past." *Henson*, 582 U. S., at 90.

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." *Hively*, 853 F. 3d, at 360 (Sykes, J., dissenting). And the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appro-

priate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.

Per Curiam

ANDRUS *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 18–9674. Decided June 15, 2020

Petitioner Andrus was sentenced to death after a jury trial. Defense counsel presented no opening statement during either the guilt or punishment phases of Andrus' trial, conceded his guilt, raised no material objection to the prosecution's evidence, and cross-examined the State's witnesses only briefly. In subsequent state habeas proceedings, Andrus argued his counsel was ineffective for failing to investigate or present available mitigation evidence about Andrus' childhood and background. After an 8-day evidentiary hearing, the state trial court agreed counsel had rendered constitutionally ineffective assistance given the readily available and compelling mitigating evidence concerning Andrus' grim life history. Andrus' counsel provided no reason for failing to investigate Andrus' history when questioned at the hearing. The trial court recommended Andrus be granted habeas relief and receive a new sentencing proceeding. The Texas Court of Criminal Appeals disagreed, concluding without explanation that Andrus had failed to satisfy his burden of showing ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668.

Held: To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that this deficient performance prejudiced him. *Id.*, at 688, 694. The record makes clear that Andrus has demonstrated counsel's deficient performance under *Strickland*. Counsel overlooked vast tranches of mitigating evidence. Counsel also failed to investigate the aggravating evidence, thereby forgoing critical opportunities to rebut the State's case in aggravation. It is unclear whether the Court of Criminal Appeals properly engaged with the follow-on question whether Andrus has shown that his counsel's deficient performance prejudiced him. The Court thus vacates the judgment of the Texas Court of Criminal Appeals and remands the case for that court to address in the first instance the weighty and record-intensive analysis of the prejudice prong of *Strickland*.

Certiorari granted; vacated and remanded.

PER CURIAM.

Death-sentenced petitioner Terence Andrus was six years old when his mother began selling drugs out of the apart-

ment where Andrus and his four siblings lived. To fund a spiraling drug addiction, Andrus' mother also turned to prostitution. By the time Andrus was 12, his mother regularly spent entire weekends, at times weeks, away from her five children to binge on drugs. When she did spend time around her children, she often was high and brought with her a revolving door of drug-addicted, sometimes physically violent, boyfriends. Before he reached adolescence, Andrus took on the role of caretaker for his four siblings.

When Andrus was 16, he allegedly served as a lookout while his friends robbed a woman. He was sent to a juvenile detention facility where, for 18 months, he was steeped in gang culture, dosed on high quantities of psychotropic drugs, and frequently relegated to extended stints of solitary confinement. The ordeal left an already traumatized Andrus all but suicidal. Those suicidal urges resurfaced later in Andrus' adult life.

During Andrus' capital trial, however, nearly none of this mitigating evidence reached the jury. That is because Andrus' defense counsel not only neglected to present it; he failed even to look for it. Indeed, counsel performed virtually no investigation of the relevant evidence. Those failures also fettered the defense's capacity to contextualize or counter the State's evidence of Andrus' alleged incidences of past violence.

Only years later, during an 8-day evidentiary hearing in Andrus' state habeas proceeding, did the grim facts of Andrus' life history come to light. And when pressed at the hearing to provide his reasons for failing to investigate Andrus' history, Andrus' counsel offered none.

The Texas trial court that heard the evidence recommended that Andrus be granted habeas relief and receive a new sentencing proceeding. The court found the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Andrus during the punishment phase of his trial. The Texas Court of Criminal

Appeals disagreed. It concluded without explanation that Andrus had failed to satisfy his burden of showing ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

We conclude that the record makes clear that Andrus has demonstrated counsel's deficient performance under *Strickland*, but that the Court of Criminal Appeals may have failed properly to engage with the follow-on question whether Andrus has shown that counsel's deficient performance prejudiced him. We thus grant Andrus' petition for a writ of certiorari, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for further proceedings not inconsistent with this opinion.

I

A

In 2008, 20-year-old Terence Andrus unsuccessfully attempted a carjacking in a grocery-store parking lot while under the influence of PCP-laced marijuana. During the bungled attempt, Andrus fired multiple shots, killing car owner Avelino Diaz and bystander Kim-Phuong Vu Bui. The State charged Andrus with capital murder.

At the guilt phase of trial, Andrus' defense counsel declined to present an opening statement. After the State rested its case, the defense immediately rested as well. In his closing argument, defense counsel conceded Andrus' guilt and informed the jury that the trial would "boil down to the punishment phase," emphasizing that "that's where we are going to be fighting." 45 Tr. 18. The jury found Andrus guilty of capital murder.

Trial then turned to the punishment phase. Once again, Andrus' counsel presented no opening statement. In its 3-day case in aggravation, the State put forth evidence that Andrus had displayed aggressive and hostile behavior while confined in a juvenile detention center; that Andrus had tattoos indicating gang affiliations; and that Andrus had hit,

kicked, and thrown excrement at prison officials while awaiting trial. The State also presented evidence tying Andrus to an aggravated robbery of a dry-cleaning business. Counsel raised no material objections to the State's evidence and cross-examined the State's witnesses only briefly.

When it came to the defense's case in mitigation, counsel first called Andrus' mother to testify. The direct examination focused on Andrus' basic biographical information and did not reveal any difficult circumstances in Andrus' childhood. Andrus' mother testified that Andrus had an "excellent" relationship with his siblings and grandparents. 49 *id.*, at 52, 71. She also insisted that Andrus "didn't have access to" "drugs or pills in [her] household," and that she would have "[c]ounsel[ed] him" had she found out that he was using drugs. *Id.*, at 67, 79.

The second witness was Andrus' biological father, Michael Davis, with whom Andrus had lived for about a year when Andrus was around 15 years old. Davis had been in and out of prison for much of Andrus' life and, before he appeared to testify, had not seen Andrus in more than six years. The bulk of Davis' direct examination explored such topics as Davis' criminal history and his relationship with Andrus' mother. Toward the end of the direct examination, counsel elicited testimony that Andrus had been "good around [Davis]" during the 1-year period he had lived with Davis. 50 *id.*, at 8.

Once Davis stepped down, Andrus' counsel informed the court that the defense rested its case and did not intend to call any more witnesses. After the court questioned counsel about this choice during a sidebar discussion, however, counsel changed his mind and decided to call additional witnesses.

Following a court recess, Andrus' counsel called Dr. John Roache as the defense's only expert witness. Counsel's terse direct examination focused on the general effects of drug use on developing adolescent brains. On cross-examination, the State quizzed Dr. Roache about the rele-

vance and purpose of his testimony, probing pointedly whether Dr. Roache "drove three hours from San Antonio to tell the jury . . . that people change their behavior when they use drugs." 51 *id.*, at 21.

Counsel next called James Martins, a prison counselor who had worked with Andrus. Martins testified that Andrus "started having remorse" in the past two months and was "making progress." *Id.*, at 35. On cross-examination, the State emphasized that Andrus' feelings of remorse had manifested only recently, around the time trial began.

Finally, Andrus himself testified. Contrary to his mother's depiction of his upbringing, he stated that his mother had started selling drugs when he was around six years old, and that he and his siblings were often home alone when they were growing up. He also explained that he first started using drugs regularly around the time he was 15. All told, counsel's questioning about Andrus' childhood comprised four pages of the trial transcript. The State on cross declared, "I have not heard one mitigating circumstance in your life." *Id.*, at 60.

The jury sentenced Andrus to death.

B

After an unsuccessful direct appeal, Andrus filed a state habeas application, principally alleging that his trial counsel was ineffective for failing to investigate or present available mitigation evidence. During an 8-day evidentiary hearing, Andrus presented what the Texas trial court characterized as a "tidal wave of information . . . with regard to mitigation." 7 Habeas Tr. 101.

The evidence revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse. Andrus was born into a neighborhood of Houston, Texas, known for its frequent shootings, gang fights, and drug overdoses. Andrus' mother had Andrus, her second of five children, when she was 17. The children's fathers never

stayed as part of the family. One of them raped Andrus' younger half sister when she was a child. The others—some physically abusive toward Andrus' mother, all addicted to drugs and carrying criminal histories—constantly flitted in and out of the picture.

Starting when Andrus was young, his mother sold drugs and engaged in prostitution. She often made her drug sales at home, in view of Andrus and his siblings. She also habitually used drugs in front of them, and was high more often than not. In her frequently disoriented state, she would leave her children to fend for themselves. Many times, there was not enough food to eat.

After her boyfriend was killed in a shooting, Andrus' mother became increasingly dependent on drugs and neglectful of her children. As a close family friend attested, Andrus' mother "would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it." 13 Habeas Tr., Def. Exh. 13, p. 2.

With the children often left on their own, Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs. Andrus was around 12 years old at the time. He cleaned for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner. According to his siblings, Andrus was "a protective older brother" who "kept on to [them] to stay out of trouble." *Id.*, Def. Exh. 18, p. 1. Andrus, by their account, was "very caring and very loving," "liked to make people laugh," and "never liked to see people cry." *Ibid.*; *id.*, Def. Exh. 9, p. 1. While attempting to care for his siblings, Andrus struggled with mental-health issues: When he was only 10 or 11, he was diagnosed with affective psychosis.

At age 16, Andrus was sentenced to a juvenile detention center run by the Texas Youth Commission (TYC), for allegedly "serv[ing] as the 'lookout'" while he and his friends

robbed a woman of her purse. 10 *id.*, State Exh. 16, p. 9; 13 *id.*, Def. Exh. 4, p. 4 ("Records indicate[d that] Andrus served as the lookout"); 3 *id.*, at 273–274; 5 *id.*, at 206.[1] While in TYC custody, Andrus was prescribed high doses of psychotropic drugs carrying serious adverse side effects. He also spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things. TYC records on Andrus noted multiple instances of self-harm and threats of suicide. After 18 months in TYC custody, Andrus was transferred to an adult prison facility.

Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in his capital convictions. While incarcerated awaiting trial, Andrus tried to commit suicide. He slashed his wrist with a razor blade and used his blood to smear messages on the walls, beseeching the world to "[j]ust let [him] die." 31 *id.*, Def. Exh. 122–A, ANDRUS–SH 4522.

After considering all the evidence at the hearing, the Texas trial court concluded that Andrus' counsel had been ineffective for "failing to investigate and present mitigating evidence regarding [Andrus'] abusive and neglectful childhood." App. to Pet. for Cert. 36. The court observed that the reason Andrus' jury did not hear "relevant, available, and persuasive mitigating evidence" was that trial counsel had "fail[ed] to investigate and present all other mitigating evidence." *Id.*, at 36–37. The court explained that "there [is] ample mitigating evidence which could have, and should have, been presented at the punishment phase of [Andrus']

---

[1] The dissent states that the victim identified Andrus as the individual holding the gun, *post*, at 829 (opinion of ALITO, J.), but in fact, the victim testified at Andrus' trial that she did not and could not identify faces or individuals, see 4 Tr. 17, 19–20. The dissent also claims that "the victim matched Andrus's clothing to the gunman's," *post*, at 829, n. 1, but neglects to mention that the victim described at least two individuals as wearing such clothing, see 46 Tr. 25–27.

trial." *Id.*, at 36. For that reason, the court concluded that counsel had been constitutionally ineffective, and that habeas relief, in the form of a new punishment trial, was warranted. *Id.*, at 37, 42.

C

The Texas Court of Criminal Appeals rejected the trial court's recommendation to grant habeas relief. In an unpublished *per curiam* order, the Court of Criminal Appeals concluded without elaboration that Andrus had "fail[ed] to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." App. to Pet. for Cert. 7–8. A concurring opinion reasoned that, even if counsel had provided deficient performance under *Strickland*, Andrus could not show that counsel's deficient performance prejudiced him.

Andrus petitioned for a writ of certiorari. We grant the petition, vacate the judgment of the Texas Court of Criminal Appeals, and remand for further proceedings not inconsistent with this opinion. The evidence makes clear that Andrus' counsel provided constitutionally deficient performance under *Strickland*. But we remand so that the Court of Criminal Appeals may address the prejudice prong of *Strickland* in the first instance.

II

To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland*, 466 U. S., at 688, 694. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. And to establish prejudice, a defendant must show "that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.

A

"It is unquestioned that under prevailing professional norms at the time of [Andrus'] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter* v. *McCollum*, 558 U. S. 30, 39 (2009) (*per curiam*) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000)). Counsel in a death-penalty case has "'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins* v. *Smith*, 539 U. S. 510, 521 (2003) (quoting *Strickland*, 466 U. S., at 691). "'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Wiggins*, 539 U. S., at 521–522.

Here, the habeas record reveals that Andrus' counsel fell short of his obligation in multiple ways: First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation. Taken together, those deficiencies effected an unconstitutional abnegation of prevailing professional norms.

1

To assess whether counsel exercised objectively reasonable judgment under prevailing professional standards, we first ask "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Andrus'] background was itself reasonable." *Id.*, at 523 (emphasis de-

leted); see also *id.*, at 528 (considering whether "the *scope* of counsel's investigation into petitioner's background" was reasonable); *Porter*, 558 U. S., at 39. Here, plainly not. Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise.

To start, counsel was, by his own admissions at the habeas hearing, barely acquainted with the witnesses who testified during the case in mitigation. Counsel acknowledged that the first time he met Andrus' mother was when she was subpoenaed to testify, and the first time he met Andrus' biological father was when he showed up at the courthouse to take the stand. Counsel also admitted that he did not get in touch with the third witness (Dr. Roache) until just before *voir dire*, and became aware of the final witness (Martins) only partway through trial. Apart from some brief pretrial discussion with Dr. Roache, who averred that he was "struck by the extent to which [counsel] appeared unfamiliar" with pertinent issues, counsel did not prepare the witnesses or go over their testimony before calling them to the stand. 13 Habeas Tr., Def. Exh. 6, p. 3.

Over and over during the habeas hearing, counsel acknowledged that he did not look into or present the myriad tragic circumstances that marked Andrus' life. For instance, he did not know that Andrus had attempted suicide in prison, or that Andrus' experience in the custody of the TYC left him badly traumatized. Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing. As a clinical psychologist testified at the habeas hearing, Andrus suffered "very pronounced trauma" and posttraumatic stress disorder symptoms from, among other things, "severe neglect" and exposure to domestic violence, substance abuse, and death in his childhood. 6 *id.*, at 168–169, 180; 7 *id.*, at 52. Counsel

uncovered none of that evidence. Instead, he "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U. S., at 524.

On top of that, counsel "ignored pertinent avenues for investigation of which he should have been aware," and indeed was aware. *Porter*, 558 U. S., at 40. At trial, counsel averred that his review did not reveal that Andrus had any mental-health issues. But materials prepared by a mitigation expert well before trial had pointed out that Andrus had been "diagnosed with affective psychosis," a mental-health condition marked by symptoms such as depression, mood lability, and emotional dysregulation. 3 Habeas Tr. 70. At the habeas hearing, counsel admitted that he "recall[ed] noting," based on the mitigation expert's materials, that Andrus had been "diagnosed with this seemingly serious mental health issue." *Id.*, at 71. He also acknowledged that a clinical psychologist briefly retained to examine a limited sample of Andrus' files had informed him that Andrus may have schizophrenia. Clearly, "the known evidence would [have] le[d] a reasonable attorney to investigate further." *Wiggins*, 539 U. S., at 527. Yet counsel disregarded, rather than explored, the multiple red flags.

In short, counsel performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence. The untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast.

"[C]ounsel's failure to uncover and present [the] voluminous mitigating evidence," moreover, cannot "be justified as a tactical decision." *Id.*, at 522; see also *Williams*, 529 U. S., at 396. Despite repeated questioning, counsel never offered, and no evidence supports, any tactical rationale for the pervasive oversights and lapses here. Instead, the overwhelming weight of the record shows that counsel's "failure to in-

vestigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U. S., at 526. That failure is all the more alarming given that counsel's purported strategy was to concede guilt and focus on mitigation. Indeed, counsel justified his decision to present "basically" "no defense" during the guilt phase by stressing that he intended to train his efforts on the case in mitigation. 3 Habeas Tr. 57. As the habeas hearing laid bare, that representation blinked reality. Simply put, "the scope of counsel's [mitigation] investigation" approached nonexistent. *Wiggins*, 539 U. S., at 528 (emphasis deleted).

2

No doubt due to counsel's failure to investigate the case in mitigation, much of the so-called mitigating evidence he offered unwittingly aided the State's case in aggravation. Counsel's introduction of seemingly *aggravating* evidence confirms the gaping distance between his performance at trial and objectively reasonable professional judgment.

The testimony elicited from Andrus' mother best illustrates this deficiency. First to testify during the case in mitigation, Andrus' mother sketched a portrait of a tranquil upbringing, during which Andrus got himself into trouble despite his family's best efforts. On her account, Andrus fell into drugs entirely on his own: Drugs were not available at home, Andrus did not use them at home, and she would have intervened had she known about Andrus' drug habits. Andrus, his mother related to the jury, "[k]ind of" "just decided he didn't want to do what [she] told him to do." 49 Tr. 83.

Even though counsel called Andrus' mother as a defense witness, he was ill prepared for her testimony. Andrus told counsel that his mother was being untruthful on the stand, but counsel made no real attempt to probe the accuracy of her testimony. Later, at the habeas hearing, counsel conceded that Andrus' mother had been a "hostile" witness. 3

Habeas Tr. 94. He further admitted that he "[did not] know if [Andrus' mother] was telling the truth," *id.*, at 96, and could not even say that he had known what Andrus' mother would say on the stand, because he had not "done any independent investigation" of her, *id.*, at 95.

None of that inaction was for want of warning. During the habeas proceedings, a mitigation specialist averred that she had alerted Andrus' counsel to her concerns about Andrus' mother well before trial. In a short interview with the mitigation specialist, Andrus' mother had stated that she "had too many kids," and had taken out a $10,000 life-insurance policy on Andrus on which she would be able to collect were Andrus executed. 13 *id.*, Def. Exh. 28, p. 5. Troubled by these comments, the mitigation specialist "specifically discussed with [Andrus' counsel] the fact that [Andrus' mother] was not being a cooperative witness and might not have Andrus's best interests motivating her behavior." *Id.*, at 6. But Andrus' counsel did not heed the caution.

Turning a bad situation worse, counsel's uninformed decision to call Andrus' mother ultimately undermined Andrus' own testimony. After Andrus testified that his mother had sold drugs from home when he was a child, counsel promptly pointed out that Andrus "heard [his] mama testify," and that she "didn't say anything about selling drugs." 51 Tr. 48. Whether counsel merely intended to provide Andrus an opportunity to explain the discrepancy (or, far worse, sought to signal that his client was being deceitful) the jury could have understood counsel's statements to insinuate that Andrus was lying. Counsel did nothing to dislodge that suggestion, and the damaging exchange occurred only because defense counsel had called a hostile witness in the first place. Plainly, these offerings of seemingly aggravating evidence further demonstrate counsel's constitutionally deficient performance.

3

Counsel also failed to conduct any independent investigation of the State's case in aggravation, despite ample oppor-

tunity to do so. He thus could not, and did not, rebut critical aggravating evidence. This failure, too, reinforces counsel's deficient performance. See *Rompilla* v. *Beard*, 545 U. S. 374, 385 (2005) ("counsel ha[s] a duty to make all reasonable efforts to learn what they c[an] about the offense[s]" the prosecution intends to present as aggravating evidence).

During the case in aggravation, the State's task was to prove to the jury that Andrus presented a future danger to society. Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1) (Vernon 2006). To that end, the State emphasized that Andrus had acted aggressively in TYC facilities and in prison while awaiting trial. This evidence principally comprised verbal threats, but also included instances of Andrus' kicking, hitting, and throwing excrement at prison officials when they tried to control him. See App. to Pet. for Cert. 10–13. Had counsel genuinely investigated Andrus' experiences in TYC custody, counsel would have learned that Andrus' behavioral problems there were notably mild, and the harms he sustained severe.[2] Or, with sufficient understanding of the violent environments Andrus inhabited his entire life, counsel could have provided a counternarrative of Andrus' later episodes in prison. But instead, counsel left all of that aggravating evidence untouched at trial—even going so far as to inform the jury that the evidence made it "probabl[e]" that Andrus was "a violent kind of guy." 52 Tr. 35.

The State's case in aggravation also highlighted Andrus' alleged commission of a knifepoint robbery at a dry-cleaning business. At the time of the offense, "all [that] the crime

[2] See, *e. g.*, 5 Habeas Tr. 189 (TYC ombudsman testifying that it was "surpris[ing] how few" citations Andrus received, "particularly in the dorms where [Andrus] was" housed); *ibid.* (TYC ombudsman finding "nothing uncommon" about Andrus' altercations because "sometimes you have to fight to get by" in the "violent atmosphere" and "savage environment"); *id.*, at 169 (TYC ombudsman testifying that Andrus' isolation periods in TYC custody, for 90 days at a time when Andrus was 16 or 17 years old, "would horrify most current professionals in our justice field today"); *id.*, at 246 (TYC ombudsman testifying that Andrus' "experience at TYC" "damaged him" and "further traumatized" him).

victim . . . told the police . . . was that he had been the victim of an assault by a black man." 3 Habeas Tr. 65. Although Andrus stressed to counsel his innocence of the offense, and although the State had not proceeded with charges, Andrus' counsel did not attempt to exclude or rebut the State's evidence. That, too, is because Andrus' counsel concededly had not independently investigated the incident. In fact, at the habeas hearing, counsel did not even recall Andrus' denying responsibility for the offense. Had he looked, counsel would have discovered that the only evidence originally tying Andrus to the incident was a lone witness statement, later recanted by the witness,[3] that led to the inclusion of Andrus' photograph in a belated photo array, which the police admitted gave rise to numerous reliability concerns. The dissent thus reinforces Andrus' claim of deficient performance by recounting and emphasizing the details of the dry-cleaning offense as if Andrus were undoubtedly the perpetrator. See *post*, at 829–830 (opinion of ALITO, J.). The very problem here is that the jury indeed heard that account, but not any of the significant evidence that would have cast doubt on Andrus' involvement in the offense at all: significant evidence that counsel concededly failed to investigate.[4]

[3] The dissent maintains that this witness, Andrus' ex-girlfriend, "linked [Andrus] to the robbery," *post*, at 830, n. 4, even though she testified at the habeas hearing that she thought "it was impossible" that Andrus had committed the offense, 8 Habeas Tr. 57.

[4] The dissent does not mention that Andrus' image was conspicuously placed in a central position in the photo array, as the "[o]nly one . . . looking directly up and out." 8 Habeas Tr. 35; see also *id.*, at 32. Nor does the dissent acknowledge that there was an approximately 3-month interval between the incident (after which the victim provided little identifying information about the assailant) and the police's presentation of the photo array to the victim. See *id.*, at 37; 46 Tr. 65. When asked about the delay, the detective who prepared the photo array admitted that memory can "deca[y] within a matter of days after a traumatizing incident like a crime" and that an "eyewitness identificatio[n]" "can be" "more exponentially problematic" "the greater the time interval between the incident and the identification." 8 Habeas Tr. 31; see also *ibid.* (detective confirm-

That is hardly the work of reasonable counsel. In Texas, a jury cannot recommend a death sentence without unanimously finding that a defendant presents a future danger to society (*i. e.*, that the State has made a sufficient showing of aggravation). Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1). Only after a jury makes a finding of future dangerousness can it consider any mitigating evidence. *Ibid.* Thus, by failing to conduct even a marginally adequate investigation, counsel not only "seriously compromis[ed his] opportunity to respond to a case for aggravation," *Rompilla*, 545 U. S., at 385, but also relinquished the first of only two procedural pathways for opposing the State's pursuit of the death penalty. There is no squaring that conduct, certainly when examined alongside counsel's other shortfalls, with objectively reasonable judgment.

B

Having found deficient performance, the question remains whether counsel's deficient performance prejudiced Andrus. See *Strickland*, 466 U. S., at 692. Here, prejudice exists if there is a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether Andrus deserved the death penalty as opposed to a lesser sentence. See *Wiggins*, 539 U. S., at 536; see also Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e)(1). In assessing whether Andrus has made that showing, the reviewing court must consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[h] it against the evidence in aggravation." *Williams*, 529 U. S., at 397–398; see also *Sears* v. *Upton*, 561 U. S. 945, 956 (2010) (*per curiam*) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence . . . , along with the mitigation evidence

ing that there can be "real problems with reliability" if an "identification [was] made several months" after).

introduced during [the defendant's] penalty phase trial, to assess whether there is a reasonable probability that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation" (citing cases)). And because Andrus' death sentence required a unanimous jury recommendation, Tex. Code Crim. Proc. Ann., Art. 37.071, prejudice here requires only "a reasonable probability that at least one juror would have struck a different balance" regarding Andrus' "moral culpability," *Wiggins*, 539 U. S., at 537–538; see also Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(e)(1).

According to Andrus, effective counsel would have painted a vividly different tableau of aggravating and mitigating evidence than that presented at trial. See Pet. for Cert. 18. But despite powerful and readily available mitigating evidence, Andrus argues, the Texas Court of Criminal Appeals failed to engage in any meaningful prejudice inquiry. See *ibid.*

It is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all. Its one-sentence denial of Andrus' *Strickland* claim, see *supra*, at 813, does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong, that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong, or that Andrus had failed to satisfy both prongs of *Strickland*.

Unlike the concurring opinion, however, the brief order of the Court of Criminal Appeals did not analyze *Strickland* prejudice or engage with the effect the additional mitigating evidence highlighted by Andrus would have had on the jury.[5]

---

[5] The Court of Criminal Appeals did briefly observe that the trial court's order recommending relief had omitted the "'reasonable probability'" language when reciting the *Strickland* prejudice standard. App. to Pet. for Cert. 8, n. 2; cf. *Strickland*, 466 U. S., at 694 (a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Even

What little is evident from the proceeding below is that the concurring opinion's analysis of or conclusion regarding prejudice did not garner a majority of the Court of Criminal Appeals.[6] Given that, the court may have concluded simply that Andrus failed to demonstrate deficient performance under the first prong of *Strickland* (without even reaching the second prong). For the reasons explained above, any such conclusion is erroneous as a matter of law. See *supra*, at 813–822.

The record before us raises a significant question whether the apparent "tidal wave," 7 Habeas Tr. 101, of "available mitigating evidence, taken as a whole," might have sufficiently "'influenced the jury's appraisal' of [Andrus'] moral culpability" as to establish *Strickland* prejudice, *Wiggins*, 539 U. S., at 538 (quoting *Williams*, 529 U. S., at 398). (That is, at the very least, whether there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.) That prejudice inquiry "necessarily require[s] a court to 'speculate' as to the effect of the new evidence" on the trial evidence, "regardless of how much or little mitigation evidence was presented during the initial penalty phase." *Sears*, 561 U. S., at 956; see also *id.*, at 954 ("We have never limited the prejudice inquiry under *Strick-*

were there reason to set aside that "[t]rial judges are presumed to know the law," *Lambrix* v. *Singletary*, 520 U. S. 518, 532, n. 4 (1997) (internal quotation marks omitted), the trial court's omission of the "reasonable probability" language would at most suggest that it held Andrus to (and found that Andrus had satisfied) a stricter standard of prejudice than that set forth in *Strickland*.

[6] The concurring opinion, moreover, seemed to assume that the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*. We note that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice. Cf. *Wiggins*, 539 U. S., at 537–538 ("[T]he mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence"); *Williams*, 529 U. S., at 399 (finding such prejudice after applying AEDPA deference).

land to cases in which there was only 'little or no mitigation evidence' presented").[7] Given the uncertainty as to whether the Texas Court of Criminal Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated above. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

* * *

We conclude that Andrus has shown deficient performance under the first prong of *Strickland*, and that there is a significant question whether the Court of Criminal Appeals properly considered prejudice under the second prong of *Strickland*. We thus grant Andrus' petition for a writ of certiorari and his motion for leave to proceed *in forma pauperis*, vacate the judgment of the Texas Court of Criminal Appeals, and remand the case for the court to address the prejudice prong of *Strickland* in a manner not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

The Court clears this case off the docket, but it does so on a ground that is hard to take seriously. According to the Court, "[i]t is unclear whether the Court of Criminal Appeals considered *Strickland* prejudice at all." *Ante*, at 822; see *Strickland* v. *Washington*, 466 U. S. 668 (1984). But that

---

[7] The dissent trains its attention on the aggravating evidence actually presented at trial. *Post*, at 828–830; but see *Sears*, 561 U. S., at 956 (*Strickland* prejudice inquiry "will necessarily require a court to 'speculate' as to the effect of the new evidence" on the trial evidence); 561 U. S., at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence . . . , along with the mitigation evidence introduced during [the] penalty phase trial").

reading is squarely contradicted by the opinion of the Court of Criminal Appeals (CCA), which said explicitly that Andrus failed to show prejudice:

> "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness *and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance.*" App. to Pet. for Cert. 7–8 (emphasis added).

Not only does the CCA opinion contain this express statement, but it adds that the trial court did not heed *Strickland*'s test for prejudice. See App. to Pet. for Cert. 8, n. 2 ("[T]hroughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's 'reasonable probability' language"). And the record clearly shows that the trial court did not apply that test to Andrus's claim. See *id.*, at 36–37. A majority of this Court cannot seriously think that the CCA pointed this out and then declined to reach the issue of prejudice.

How, then, can the Court get around the unmistakable evidence that the CCA decided the issue of prejudice? It begins by expressing doubt about the meaning of the critical sentence reproduced above. According to the Court, that sentence "does not conclusively reveal whether [the CCA] determined . . . that Andrus had failed to demonstrate prejudice under *Strickland*'s second prong." *Ante*, at 822. It is hard to write a more conclusive sentence than "[Andrus] fails to meet his burden under *Strickland* v. *Washington*, 466 U. S. 668 (1984), to show by a preponderance of the evidence . . . that there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance." App. to Pet. for Cert. 7–8. Per-

haps the Court thinks the CCA should have used CAPITAL LETTERS or **bold type**. Or maybe it should have added: "And we really mean it!!!"

Not only does the Court express doubt that the CCA reached the prejudice prong of *Strickland*, but the Court is not sure that the CCA decided even the performance prong. See *ante*, at 822 ("Its one-sentence denial of Andrus' *Strickland* claim . . . does not conclusively reveal whether it determined that Andrus had failed to demonstrate deficient performance under *Strickland*'s first prong"). The Court may feel it necessary to make that statement because the CCA disposed of both prongs in the sentence quoted above. So if that sentence is not sufficient to show that the CCA reached the prejudice prong, there is no better reason for thinking that it decided the performance prong. But if the Court really thinks that the CCA did not decide the performance issue, why does it treat that issue differently from the prejudice issue? Why does it decide the performance question in the first instance? Are we now a court of "first view" and not, as we have often stressed, a "court of review"? See, *e. g.*, *McLane Co.* v. *EEOC*, 581 U. S. 72, 85 (2017). The Court's disparate treatment of the two parts of the CCA's dispositive sentence shows that the Court is only selectively skeptical.

The Court gives two reasons for doubting that the CCA reached the issue of prejudice, but both are patent makeweights. First, the Court notes that the CCA's *per curiam* opinion, unlike the concurring opinion, did not provide reasons for finding that prejudice had not been shown. But the failure to explain is not the same as failure to decide. Today's "tutelary remand" is a misuse of our supervisory authority and a waste of our and the CCA's time. *Lawrence* v. *Chater*, 516 U. S. 163, 185 (1996) (Scalia, J., dissenting).

Second, the Court observes that the concurring opinion, which discussed the question of prejudice at some length, was joined by only four of the CCA's nine judges. See App. to Pet. for Cert. 9–21 (opinion of Richardson, J., joined by

Keller, P. J., and Hervey and Slaughter, JJ.). But that does not show that the other five declined to decide the question of prejudice. The most that one might possibly infer is that these judges might not have agreed with everything in the concurrence, but even that is by no means a certainty. So the Court's reading of the decision below is contrary to the plain language of the decision and is not supported by any reason worth mentioning.

If that were not enough, the Court's reading is belied by Andrus's interpretation of the CCA decision. Andrus nowhere claims that the CCA failed to decide the issue of prejudice. On the contrary, the petition faults the CCA for providing "a *truncated* 'no prejudice' analysis," not for failing to decide the prejudice issue at all. Pet. for Cert. ii (emphasis added). Indeed, the main argument in the petition is that we should modify *Strickland* because courts are too often rejecting ineffective-assistance claims for lack of prejudice. That argument would make no sense if the CCA had not decided the prejudice issue, something that is never even implied by Andrus's counsel in either the 40-page petition or the 11-page reply.

Not only did the CCA clearly hold that Andrus failed to show prejudice, but there was strong support for that holding in the record. To establish prejudice, Andrus must show "a substantial, not just conceivable, likelihood" that one of the jurors who unanimously agreed on his sentence would not have done so if his trial counsel had presented more mitigation evidence. *Cullen* v. *Pinholster*, 563 U. S. 170, 189 (2011) (internal quotation marks omitted). This inquiry focuses not just on the newly offered mitigation evidence, but on the likelihood that this evidence would have overcome the State's aggravation evidence. See, *e. g.*, *Sears* v. *Upton*, 561 U. S. 945, 955–956 (2010) (*per curiam*). While providing a lengthy (and one-sided) discussion of Andrus's mitigation evidence, the Court never acknowledges the volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in

or out of prison. Instead, the Court says as little as possible about Andrus's violent record.

For example, here is what the Court says about the crimes for which he was sentenced to death: "Not long after Andrus' release from prison at age 18, Andrus attempted the fatal carjacking that resulted in his capital convictions." *Ante*, at 812.

Here is what the record shows. According to Andrus's confession, he left his apartment one evening, "'amped up' on embalming fluid [PCP] mixed with marijuana, cocaine, and beer," and looked for a car to "go joy-riding." No. AP–76,936, p. 5 (CCA, Mar. 23, 2016) (Reh'g Op.); see also 54 Tr., State Exh. 147 (Andrus's confession). In the parking lot of a supermarket, he saw Avelino Diaz drop off his wife, Patty, in front of the store. By his own admission, Andrus approached Diaz's car with a gun drawn, but he abandoned the carjacking attempt when he saw that the car had a stick shift, which he could not drive. Alerted by a store employee, Patty Diaz ran out of the store and found her husband lying by the side of the car with a bullet wound in the back of his head. He was subsequently pronounced dead.

After killing Avelino Diaz, Andrus approached a car with two occupants, whom Andrus described as an "old man and old wom[a]n." *Id.*, at 2. Andrus fired three shots into the car. The first went through the open driver's side window and hit the passenger, Kim-Phuong Vu Bui, in the head. As the car sped away, Andrus fired a second shot, which entered the back driver's side window, and a third shot, which "entered at an angle indicating that the shot originated from a farther distance." Reh'g Op. 3. One of these bullets hit the driver, Steve Bui, in the back. Seeing that blood was coming out of his wife's mouth, Steve drove her to a hospital and carried her inside, where she died.

These senseless murders in October 2008 were not Andrus's first crimes. In 2004, he was placed on probation for a drug offense, but just two weeks later, he committed an

armed robbery. Andrus and two others followed a woman to her parents' home, where they held her at gunpoint and took her purse and gym bag. The woman identified Andrus as the perpetrator who held the gun. *Id.*, at 7.[1]

For this offense, Andrus was sent to a juvenile facility where he showed such "'significant assaultive behavior' toward other youths and staff" that he was eventually transferred to an adult facility. App. to Pet. for Cert. 11.[2] Shortly after his release, he again violated his supervisory conditions and was returned to the adult facility. *Ibid.*

When he was released again, he committed an armed robbery of a dry-cleaning establishment. Around 7 a.m. one morning, he entered the business and chased the owner, Tuan Tran, to the back. He beat Tran and threatened him with a knife until Tran gave him money. Reh'g Op. 7–8. Andrus's ex-girlfriend told the police that he confessed to this robbery. 8 Habeas Tr. 14.[3] In addition, Tran picked

[1] The Court credits Andrus's version of the event and repeats his allegation that he merely served as a "lookout." *Ante*, at 807, 811–812. As the CCA explained on direct review, however, the victim matched Andrus's clothing to the gunman's. See Reh'g Op. 7; see also 46 Tr. 23–25 (arresting officer explaining that only Andrus's clothing matched the suspect description).

[2] Just as the Court provides a one-sided summary of Andrus's mitigation evidence, it quibbles at every possible turn with the aggravation evidence. Thus, the Court states that Andrus's behavioral problems at this facility "were notably mild." *Ante*, at 819. But the witness on whose testimony the Court relies admitted that Andrus's record included multiple threats and assaults against staff and other youths. 4 Habeas Tr. 202–204. And the record shows that Andrus had needed to be removed from general population 77 times. 10 *id.*, Pl. Exh. 28. The responsible corrections officials obviously did not think this record was "notably mild," because it prompted them to transfer him to an adult facility.

[3] Although Andrus's ex-girlfriend later signed an affidavit contradicting herself, 41 *id.*, Def. Exh. 139, pp. 1–2, she admitted at the habeas hearing—after learning that she had been recorded—that she indeed relayed this information, 8 *id.*, at 48–49. Andrus's counsel tried to withdraw her affidavit from evidence, having "learned information that caused [them] to doubt [her] reliability." *Id.*, at 5.

Andrus out of a photo array, 46 Tr. 66, 69–70,[4] and testified at trial that the robber was in the courtroom, *id.*, at 59–60, but he was too afraid to point at Andrus, *ibid.* Less than two months after this crime, Andrus murdered Avelino Diaz and Kim-Phuong Vu Bui. App. to Pet. for Cert. 11.

While awaiting trial for those murders, Andrus carried out a reign of terror in jail. He assaulted another detainee, attacked and injured corrections officers, threw urine in an officer's face, repeatedly made explicit threats to kill officers and staff, flooded his cell and threw excrement on the walls, and engaged in other disruptive acts. *Id.*, at 11–13. Also while awaiting trial for murder, he had the words "murder weapon" tattooed on his hands and a smoking gun tattooed on his forearm. 51 Tr. 65–66, 68.

In sum, the CCA assessed the issue of prejudice in light of more than the potentially mitigating evidence that the Court marshals for Andrus. The CCA had before it strong aggravating evidence that Andrus wantonly killed two innocent victims and shot a third; that he committed other violent crimes; that he has a violent, dangerous, and unstable character; and that he is a threat to those he encounters.

The CCA has already held once that Andrus failed to establish prejudice. I see no good reason why it should be required to revisit the issue.

---

[4] The Court again credits Andrus's allegation that he did not commit this robbery. See *ante*, at 819–820. In support, the Court points to what Tran told police shortly after being beaten and to supposed problems with the photo array from which Tran first identified Andrus. But the Court cannot dispute that Andrus's ex-girlfriend linked him to the robbery or that Tran identified him twice. Nor did the detective to whom the Court refers in fact testify that "the inclusion of Andrus' photograph in a belated photo array . . . gave rise to numerous reliability concerns." *Ante*, at 820; see 8 Habeas Tr. 31 (testifying, in response to habeas counsel's repeated questions whether delays affect the reliability of identifications, only that they "can"); *id.*, at 42–44 (affirming the bases for Andrus's inclusion).

REPORTER'S NOTE

Orders commencing with June 1, 2020, begin with page 970. The preceding orders in 590 U. S., from April 20, 2020, through May 29, 2020, were reported in Part 1, at 901–969. 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.

JUNE 1, 2020

Certiorari Granted—Vacated and Remanded

No. 19–7007. FURLOW *v.* UNITED STATES. C. A. 4th 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 *Rehaif* v. *United States*, 588 U. S. 225 (2019). Reported below: 928 F. 3d 311.

Miscellaneous Orders

No. 19M139. ROBERSON *v.* ILLINOIS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 19–7756. IN RE DEVILLE; and
No. 19–8136. IN RE CRAWFORD. Petitions for writs of mandamus denied.

Certiorari Denied

No. 19–277. HSBC HOLDINGS PLC ET AL. *v.* PICARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 917 F. 3d 85.

No. 19–737. DOUSE *v.* UNITED STATES ET AL.; and
No. 19–982. BRYANT ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 564.

No. 19–767. NATIONAL ASSOCIATION FOR GUN RIGHTS, INC. *v.* MANGAN, COMMISSIONER OF POLITICAL PRACTICES FOR THE STATE OF MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 3d 1102.

No. 19–774. MARSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 282.

No. 19–782. KELERCHIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 3d 895.

No. 19–906. ANTICO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 934 F. 3d 1278.

No. 19–1000. HEON-CHEOL CHI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 936 F. 3d 888.

No. 19–1023. MORGAN, WARDEN *v.* WHITE; and
No. 19–8117. WHITE *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 3d 270.

No. 19–1044. Batista Ferreira *v.* Barr, Attorney General. C. A. 1st Cir. Certiorari denied. Reported below: 939 F. 3d 44.

No. 19–1052. Dewberry *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 936 F. 3d 803.

No. 19–1066. Comcast Corp. et al. *v.* Tillage et al. C. A. 9th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 569.

No. 19–1078. AT&T Mobility LLC et al. *v.* McArdle. C. A. 9th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 575.

No. 19–1165. Willis *v.* Tower Loan of Mississippi, LLC. C. A. 5th Cir. Certiorari denied. Reported below: 944 F. 3d 577.

No. 19–1185. Wilding et al. *v.* DNC Services Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 3d 1116.

No. 19–6939. Hunt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 806.

No. 19–7043. Toth *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 624.

No. 19–7127. Tomlin *v.* Patterson, Warden. C. A. 11th Cir. Certiorari denied.

No. 19–7361. Shevtsov *v.* United States;
No. 19–7368. Kuzmenko *v.* United States; and
No. 19–7729. New *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 272.

No. 19–7481. Murphy *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7706. Adams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 198.

No. 19–7738. H. K. V. *v.* Florida Department of Children and Families et al. Sup. Ct. Fla. Certiorari denied.

No. 19–7739. H. K. V. *v.* Florida Department of Children and Families et al. Sup. Ct. Fla. Certiorari denied.

No. 19–7751. THRASHER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 19–7799. BAKER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 19–8095. MCCANTS *v.* HANSEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–8101. MAMONE *v.* PLOWS BURCH. Ct. Sp. App. Md. Certiorari denied. Reported below: 242 Md. App. 766 and 774.

No. 19–8112. ALI *v.* OBERLANDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FOREST, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8114. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL. Ct. App. Mich. Certiorari denied.

No. 19–8116. WHITE *v.* MATTHEWS ET AL. Ct. App. Mich. Certiorari denied.

No. 19–8118. WISCONSIN EX REL. WREN *v.* RICHARDSON, WARDEN. Sup. Ct. Wis. Certiorari denied. Reported below: 2019 WI 110, 389 Wis. 2d 516, 936 N. W. 2d 587.

No. 19–8119. WILLIAMS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 19–8123. BROWN AKA ANKH EL *v.* SUPERIOR COURT OF INDIANA, MARION COUNTY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–8128. BUCKNER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 906.

No. 19–8132. CHEST *v.* BALD, JUDGE, CIRCUIT COURT OF ILLINOIS, STEPHENSON COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 19–8140. DENNERLEIN *v.* GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8141. COWAN *v.* GASTELO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 381.

No. 19–8142. SARHAN ET UX. *v.* H & H INVESTORS, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 19–8143. DOUCE AL DEY *v.* BREVARD COUNTY TAX COLLECTOR ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 19–8150. JACKSON *v.* KANSAS CITY KANSAS PUBLIC SCHOOLS UNIFIED SCHOOL DISTRICT NO. 500. C. A. 10th Cir. Certiorari denied. Reported below: 799 Fed. Appx. 586.

No. 19–8152. ANKH-EL, AKA BROWN *v.* CARTER ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–8167. TALBERT *v.* CARNEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8168. JUSTISE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 129 N. E. 3d 839.

No. 19–8177. KEYS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 19–8180. M. H. *v.* INDIANA DEPARTMENT OF CHILD SERVICES. Sup. Ct. Ind. Certiorari denied. Reported below: 134 N. E. 3d 41.

No. 19–8258. GOREE *v.* MICHIGAN PAROLE BOARD. C. A. 6th Cir. Certiorari denied.

No. 19–8287. TOURE *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 916.

No. 19–8304. MCVAY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2019 IL App (3d) 150821, 139 N. E. 3d 648.

No. 19–8326. MARTIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 242 Md. App. 775.

No. 19–8344. COMBS *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8353. STOKES *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 19–8366. CABEZAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8380. MONDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 945 F. 3d 1049.

No. 19–8381. O'DONNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 182.

No. 19–8382. EWING *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 641, 452 P. 3d 933.

No. 19–8385. LOPEZ QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 335.

No. 19–8387. CALDWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–8390. DO KYUN KIM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 490.

No. 19–8391. COFFMAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2019 IL App (4th) 170115–U.

No. 19–8393. TUCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 963.

No. 19–8399. TOLLIVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 3d 244.

No. 19–8400. NICHOLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 Fed. Appx. 172.

No. 19–8401. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 744.

No. 19–8411. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 802 Fed. Appx. 896.

No. 19–8412. MCLEAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 19–8415. STANLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 19–8416. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 799 Fed. Appx. 657.

No. 19–8423. GIES *v.* OHIO. Ct. App. Ohio, 1st App. Dist., Hamilton County. Certiorari denied. Reported below: 2019-Ohio-4249, 146 N. E. 3d 1277.

No. 19–831. JARCHOW ET AL. *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

A majority of States, including Wisconsin, have "integrated bars." Unlike voluntary bar associations, integrated or mandatory bars require attorneys to join a state bar and pay compulsory dues as a condition of practicing law in the State. Petitioners are practicing lawyers in Wisconsin who allege that their Wisconsin State Bar dues are used to fund "advocacy and other speech on matters of intense public interest and concern." App. to Pet. for Cert. 10. Among other things, petitioners allege that the Wisconsin State Bar has taken a position on legislation prohibiting health plans from funding abortions, legislation on felon voting rights, and items in the state budget. Petitioners' First Amendment challenge to Wisconsin's integrated bar arrangement is foreclosed by *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), which this petition asks us to revisit. I would grant certiorari to address this important question.

In *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), the Court held that a law requiring public employees to pay mandatory union dues did not violate the freedom of speech guaranteed by the First Amendment, *id.*, at 235–236. In *Keller*, the Court extended *Abood* to integrated bar dues based on an "analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." 496 U. S., at 12. Applying *Abood*, the Court held that "[t]he State Bar may . . . constitutionally fund activities germane to [its] goals" of "regulating the legal profession and improving the quality of legal services" using "the mandatory dues of all members." 496 U. S., at 13–14.

Two Terms ago, we overruled *Abood* in *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878 (2018). We observed that "*Abood* was poorly reasoned," that "[i]t has led to practical problems and abuse," and that "[i]t is inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Id.*, at 886. After considering arguments for retaining *Abood* that sounded in both precedent and original meaning, we held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." 585 U. S., at 929.

Our decision to overrule *Abood* casts significant doubt on *Keller*. The opinion in *Keller* rests almost entirely on the framework

of *Abood*. Now that *Abood* is no longer good law, there is effectively nothing left supporting our decision in *Keller*. If the rule in *Keller* is to survive, it would have to be on the basis of new reasoning that is consistent with *Janus*.*

Respondents argue that our review of this case would be hindered because it was dismissed on the pleadings. But any challenge to our precedents will be dismissed for failure to state a claim, before discovery can take place. And in any event, a record would provide little, if any, benefit to our review of the purely legal question whether *Keller* should be overruled.

Short of a constitutional amendment, only we can rectify our own erroneous constitutional decisions. We have admitted that *Abood* was erroneous, and *Abood* provided the foundation for *Keller*. In light of these developments, we should reexamine whether *Keller* is sound precedent. Accordingly, I respectfully dissent from the denial of certiorari.

No. 19–8156. STANCU *v.* HYATT CORP. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 791 Fed. Appx. 446.

Rehearing Denied

No. 19–690. NEVILLE *v.* DHILLON, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., 589 U. S. 1305;

No. 19–994. HILL *v.* JOHNSON ET AL., 589 U. S. 1305;

No. 19–7354. MARTIN *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 589 U. S. 1282;

No. 19–7496. STRONER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 589 U. S. 1298; and

No. 19–7708. ALJINDI *v.* UNITED STATES ET AL., 589 U. S. 1308. Petitions for rehearing denied.

JUNE 8, 2020

Certiorari Granted—Vacated and Remanded

No. 19–623. SHRINIVAS SUGANDHALAYA LLP *v.* SETTY ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case

*Respondents resist this conclusion by citing *Harris* v. *Quinn*, 573 U. S. 616 (2014), which predates *Janus*. But all we said in *Harris* was that "a refusal to extend *Abood*" would not "call into question" *Keller*. *Harris*, 573 U. S., at 655. Now that we have overruled *Abood*, *Keller* has unavoidably been called into question.

remanded for further consideration in light of *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA, LLC*, 590 U. S. 432 (2020). Reported below: 771 Fed. Appx. 456.

No. 19–5990. VOGEL *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 *Banister* v. *Davis*, 590 U. S. 504 (2020).

Certiorari Dismissed

No. 19–8153. BROOKS *v.* SCHWARTZ ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 19M140. MARIN GUTIERREZ *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 18–1401. PETERSON *v.* LINEAR CONTROLS, INC. C. A. 5th Cir. Joint motion to defer consideration of petition for writ of certiorari granted.

No. 19–631. BARR, ATTORNEY GENERAL, ET AL. *v.* AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL. C. A. 4th Cir. [Certiorari granted, 589 U. S. 1127.] Motion of ACA International, Inc., for leave to file brief as *amicus curiae* out of time denied.

No. 19–7403. SHOVE *v.* DAVIS, WARDEN. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1273] denied.

No. 19–8179. IN RE NICHOLS. Petition for writ of habeas corpus denied.

No. 19–8475. IN RE WATSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 19–8205. IN RE BRUNSON. Petition for writ of mandamus denied.

Certiorari Granted

No. 19–863. NIZ-CHAVEZ *v.* BARR, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari granted. Reported below: 789 Fed. Appx. 523.

Certiorari Denied

No. 19–685. MCGREGOR *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–747. LOPEZ GAMERO *v.* BARR, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 929 F. 3d 464.

No. 19–855. LUGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 766.

No. 19–875. OTO, L. L. C. *v.* KHO ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 5th 111, 447 P. 3d 680.

No. 19–889. KAUFMAN COUNTY, TEXAS, ET AL. *v.* WINZER, INDIVIDUALLY AND ON BEHALF OF THE STATUTORY BENEFICIARIES OF WINZER, ET AL.; and

No. 19–1042. WINZER, INDIVIDUALLY AND ON BEHALF OF THE STATUTORY BENEFICIARIES OF WINZER *v.* KAUFMAN COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 19–901. DEVON DRIVE LIONVILLE, LP, ET AL. *v.* PARKE BANK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 Fed. Appx. 301.

No. 19–997. WILLIKY *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 3d 389.

No. 19–1054. PIKE *v.* GROSS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 936 F. 3d 372.

No. 19–1069. TAKEDA PHARMACEUTICAL CO. LTD. ET AL. *v.* PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 82 HEALTH

CARE FUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 3d 1243.

No. 19–1070. OLSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 655 Pa. 511, 218 A. 3d 863.

No. 19–1084. CRAMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 153.

No. 19–1180. RADCLIFFE ET AL. *v.* EXPERIAN INFORMATION SOLUTIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 605.

No. 19–1182. SMITH LAND CO. ET AL. *v.* HERHOLD ET AL. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied. Reported below: 2019-Ohio-2418.

No. 19–1190. SLOAN *v.* SLOAN ET AL. Sup. Ct. S. C. Certiorari denied.

No. 19–1193. WILKINSON *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 19–1197. GWANJUN KIM *v.* CITY OF IONIA, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–1200. ELLIOTT *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Guernsey County. Certiorari denied. Reported below: 2019-Ohio-4411.

No. 19–1205. LUCERO *v.* GORDON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 833.

No. 19–1219. RESPECT WASHINGTON *v.* BURIEN COMMUNITIES FOR INCLUSION ET AL. Ct. App. Wash. Certiorari denied. Reported below: 10 Wash. App. 2d 1013.

No. 19–1227. KERNS ET AL. *v.* CATERPILLAR, INC. C. A. 6th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 568.

No. 19–1239. JACKSON RIDGE REHABILITATION AND CARE ET AL. *v.* MEADOWS. Ct. App. Ohio, 5th App. Dist., Stark County. Certiorari denied. Reported below: 2019-Ohio-2879.

No. 19–1240. HUBBARD *v.* MISSOURI DEPARTMENT OF MENTAL HEALTH. C. A. 8th Cir. Certiorari denied.

No. 19–1271. COLLINS *v.* ZOLNIER. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 19–7076. PONDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 625.

No. 19–7153. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 19–7165. MACIAS-MACIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 19–7451. ROGERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 19–7469. PALAMARCHUK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7472. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 358.

No. 19–7637. ROMERO CRUZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 660.

No. 19–7872. WILDER *v.* KREBS. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 198.

No. 19–8103. RUBI IBARRA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 420.

No. 19–8134. EZELL *v.* HININGER ET AL. C. A. 10th Cir. Certiorari denied.

No. 19–8138. WOOLSEY-ROSS *v.* WOOLSEY ET AL. Sup. Ct. Va. Certiorari denied.

No. 19–8157. RICHARDSON *v.* MOORE. C. A. 5th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 208.

No. 19–8159. RAMIREZ *v.* ALLBAUGH, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 771 Fed. Appx. 458.

No. 19–8164. TOLEN *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–8165. WINTERS *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 19–8170. REYNOLDS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 263 N. C. App. 595, 822 S. E. 2d 330.

No. 19–8174. MATA *v.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION. App. Ct. Mass. Certiorari denied. Reported below: 94 Mass. App. 1122, 123 N. E. 3d 802.

No. 19–8176. LANE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 19–8182. MOSS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 19–8183. NOGALES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 19–8185. SCOTT *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 19–8186. STATON *v.* SUPERINTENDENT, LEE CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 204.

No. 19–8189. RAMOS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 194 Conn. App. 594, 221 A. 3d 909.

No. 19–8195. CHARLES *v.* BRADSHAW, SHERIFF, PALM BEACH COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 991.

No. 19–8198. ADKINS *v.* WHOLE FOODS MARKET GROUP, INC. C. A. 4th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 217.

No. 19–8201. HOUSEHOLDER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 19–8202. GOUGH *v.* BANKERS LIFE & CASUALTY CO. C. A. 4th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 251.

No. 19–8203. HUNT *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2019-Ohio-4053, 145 N. E. 3d 1214.

No. 19–8206. BUSH *v.* OHIO. Ct. App. Ohio, 7th App. Dist., Mahoning County. Certiorari denied. Reported below: 2019-Ohio-4082.

No. 19–8209. FOYE *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 757.

No. 19–8210. GORDON *v.* HOLY CROSS HOSPITAL GERMANTOWN, INC. C. A. 4th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 84.

No. 19–8213. RODRIGUEZ *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8217. JONES *v.* MCKEE FOODS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 76.

No. 19–8226. PHIPPS *v.* RAEMISCH, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 561.

No. 19–8227. CARRIER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 19–8245. PETERS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 19–8264. GORDON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2019 Ark. 344, 588 S. W. 3d 342.

No. 19–8270. JOHNSON *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 19–8286. TIGER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 289 So. 3d 484.

No. 19–8297. O'CONNELL *v.* ZATECKY. C. A. 7th Cir. Certiorari denied.

No. 19–8301. MOCCO *v.* SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8311. DALEN *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL. Ct. App. S. C. Certiorari denied.

No. 19–8319. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 288 So. 3d 1.

No. 19–8322. DIXON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–8362. MITCHELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 19–8363. MCCLAIN *v.* SHARP, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 238.

No. 19–8371. HAM *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 543.

No. 19–8379. BURGESS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 19–8422. GLENN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 410.

No. 19–8431. CRUZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 349.

No. 19–8437. WILSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 19–8440. O'NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 513.

No. 19–8447. DAVIS *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–8451. SKINNER *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–8453. DOBBS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 802 Fed. Appx. 466.

No. 19–8463. MAYEA-PULIDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 946 F. 3d 1055.

No. 19–8464. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 435.

No. 19–8468. SHUFFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8469. VIENGXAY CHANTHARATH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–6172. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 676.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 18–7575. VALDES GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 915.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–5267. ST. HUBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 3d 335.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes several restrictions on inmates seeking to file a second or successive habeas petition. See 28 U. S. C. §§ 2244, 2255. Among other things, the inmate must first seek leave from a court of appeals, which may not authorize a filing unless the inmate demonstrates, as a prima facie matter, that the petition will be based either on new evidence sufficient to establish that no reasonable factfinder would have found the defendant guilty or on a new constitutional rule made retroactive on collateral review. §§ 2244(b)(2), (3); § 2255(h). An order denying authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." § 2244(b)(3)(E). But an inmate seeking such authorization from the Court of Appeals for the Eleventh Circuit faces even greater hurdles.

Unlike its sister circuits, the Eleventh Circuit has interpreted the relevant statutes to mandate an authorization decision within 30 days, leaving the court little time to consider a complex inmate application. *In re Williams*, 898 F. 3d 1098, 1102 (2018) (Wilson, J., concurring). Under Eleventh Circuit rules, the applicant must confine his or her entire legal argument to a form on which "[f]ew prisoners manage to squeeze more than 100 words." 918 F. 3d

1174, 1198 (2019) (Wilson, J., dissenting from denial of reh'g en banc). That limited form is the only submission that the court typically accepts: The Government seemingly "never files a responsive pleading," and the court never grants oral argument. *Ibid.* Surprisingly still, this perfunctory process affects future claimants too, and not only those who find themselves in the second or successive petition posture. The Eleventh Circuit has published several of its orders denying permission to file a second or successive petition, and determined that *all* future litigants (including those on direct appeal) are bound to the holdings of these orders unless and until an en banc Eleventh Circuit or this Court says otherwise. See 909 F. 3d 335, 346 (2018).

These factors make out a troubling tableau indeed. Most importantly, they raise a question whether the Eleventh Circuit's process is consistent with due process. The Eleventh Circuit has not yet appeared to address a procedural due process claim head on, so I will leave it to that court to consider the issue in the first instance in an appropriate case. In the meantime, nothing prevents the Eleventh Circuit from reconsidering its practices to make them fairer, more transparent, and more deliberative.

I

Petitioner Michael St. Hubert and several other petitioners[1] have had their direct appeals or initial habeas petitions decided based on binding precedent issued through the above-mentioned process. I describe the course faced by St. Hubert, as it is representative of the process for many petitioners.

St. Hubert was convicted of two counts of brandishing a firearm during a crime of violence under 18 U. S. C. § 924(c). The putative "crimes of violence" underlying these convictions were Hobbs Act robbery and attempted Hobbs Act robbery, both in violation of 18 U. S. C. § 951. Under § 924(c), St. Hubert faced increased sentencing exposure and was sentenced to consecutive terms of 300 months' imprisonment on one count and 84 months' imprisonment on another.

---

[1] *Williams* v. *United States*, No. 18–6172; *Gonzalez* v. *United States*, No. 18–7575; *Robinson* v. *United States*, No. 19–5451; *Mack* v. *United States*, No. 19–6355; *Boston* v. *United States*, No. 19–7148; *Hunt* v. *United States*, No. 19–7506; *Smith* v. *United States*, No. 19–7527; *Alston* v. *United States*, No. 19–7672.

On direct appeal, St. Hubert argued that his Hobbs Act crimes were not "crime[s] of violence" under § 924(c).[2] After many twists and turns, the Eleventh Circuit disagreed. 909 F. 3d, at 345–346. The Court of Appeals held both that the residual clause, § 924(c)(3)(B), was not void for vagueness—a holding that this Court rejected in *United States* v. *Davis*, 588 U. S. 445 (2019)—and that St. Hubert's Hobbs Act crimes constituted crimes of violence under the elements clause, § 924(c)(3)(A). In holding that Hobbs Act robbery was a crime of violence under the elements clause, the Eleventh Circuit noted that it "ha[d] already" reached that conclusion in prior cases. 909 F. 3d, at 345. But those precedents were not fully briefed direct appeals subject to adversarial testing; instead, they were denials of applications seeking authorization to file second or successive habeas petitions. *Ibid.* (citing *In re Saint Fleur*, 824 F. 3d 1337, 1340–1341 (CA11 2016), and *In re Colon*, 826 F. 3d 1301, 1305 (CA11 2016)). The court rejected St. Hubert's objection that orders resolving such applications should not be binding precedent. It declared that published three-judge orders resolving second or successive habeas petitions under § 2255 are "binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, 'unless and until [they are] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.'" 909 F. 3d, at 346.

The Eleventh Circuit declined to rehear en banc St. Hubert's case. 918 F. 3d, at 1174. Several judges dissented, explaining the many "grave problems" with the Eleventh Circuit's perfunctory practices surrounding applications to file second or successive habeas petitions. *Id.*, at 1197 (opinion of Wilson, J). As one judge explained, "[i]t is an aberration that a statute meant to govern the treatment of inmates who seek to file a second or successive § 2255 motion now serves as a tool for this Court to limit the review of prison sentences on direct appeal." *Id.*, at

[2] Section 924(c) defines a crime of violence as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," § 924(c)(3)(A), or, "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," § 924(c)(3)(B). The first clause is known as the elements clause; the second is known as the residual clause. See *United States* v. *Davis*, 588 U. S. 445, 449 (2019).

1200–1201 (Martin, J., dissenting). In those judges' view, the court's procedures stymied its "ability to administer justice to the people who come before" it. *Id.*, at 1200.

II

"The courts of appeals have significant authority to fashion rules to govern their own procedures." *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U. S. 83, 99 (1993). Under Federal Rule of Appellate Procedure 47(b), moreover, the Courts of Appeals may adopt local rules and internal operating procedures consistent with applicable federal law and "may regulate practice in a particular case in any manner consistent with federal law, [the FRAP], and local rules of the circuit." But the Eleventh Circuit is significantly out of step with other courts in how it approaches applications seeking authorization to file second or successive habeas petitions.

First, compared to other Courts of Appeals, the Eleventh Circuit publishes far more of its orders denying authorization. From 2013 to 2018, the Eleventh Circuit published 45 such orders, while all of the other Circuits combined published 80. *Williams*, 898 F. 3d, at 1102 (Wilson, J., concurring). Second, other Circuits generally do not treat the relevant statute as mandating a decision within 30 days. *Ibid.* Finally, many other Circuits "often consider briefing from the government before issuing a published order; some also entertain oral argument from both parties." *Id.*, at 1103. The Eleventh Circuit, by contrast, does not grant oral argument in any noncapital cases; nor does the court typically receive individualized briefs from the petitioner or the Government before decision. *Ibid.* Making matters worse, the court often decides the merits of the habeas claims sought to be presented in the second or successive habeas petition, when the statutory question at the preliminary authorization stage is simply whether the applicant has "ma[de] a prima facie showing that the application satisfies" the authorization requirements, § 2244(b)(3)(C). See 918 F. 3d, at 1203 (Martin, J., dissenting from denial of reh'g en banc).[3]

[3] In the certificate-of-appealability (COA) context, where an inmate must make a threshold "substantial showing of the denial of a constitutional right," § 2253(c)(2), this Court has cautioned that the threshold inquiry is "not coextensive with a merits analysis" and that any court that "'justif[ies] its denial of a COA based on its adjudication of the actual merits . . . is in

In sum, the Eleventh Circuit represents the "worst of three worlds." *Williams*, 898 F. 3d, at 1104. It "publish[es] the most orders," "adhere[s] to a tight timeline that the other circuits have disclaimed," and "do[es] not ever hear from the government before making [its] decision." *Ibid.* In this context, important statutory and constitutional questions are decided (for all future litigants) on the basis of fewer than 100 words of argument. See 918 F. 3d, at 1196 (opinion of Wilson, J).

Notably, this Court has been wary of affording full precedential weight to its own decisions based on so little argument. The Court has explained, for example, that "summary action" in this Court without merits briefing or oral argument "does not have the same precedential effect as does a case decided upon full briefing and argument." *Gray* v. *Mississippi*, 481 U. S. 648, 651, n. 1 (1987) (citing *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974)). Further, as "part of our 'deep-rooted historic tradition that everyone should have his own day in court,'" *Richards* v. *Jefferson County*, 517 U. S. 793, 798 (1996), issue preclusion can bind a nonparty to a suit only when certain minimum requirements, consistent with due process, have been met, *id.*, at 798–799; see also *Taylor* v. *Sturgell*, 553 U. S. 880 (2008).

To be sure, this case rests not on issue preclusion but on *stare decisis*, and implicates not this Court's practices but the precedential weight another court grants to its own opinions. But these doctrines stem from a common concern: Decisions that bind other litigants should, at the very least, be based on more than minimal briefing. That animating principle, in turn, casts doubt on the Eleventh Circuit's practices at issue here.

Before the Eleventh Circuit addresses a procedural due process challenge to its practices, there are many steps that the court could take to make its process fairer. It could, for example, solicit fuller briefing on those (relatively few) applications that present open questions of law. It could even allow limited oral argument for the thorniest of questions presented through those applications (especially questions that may affect many future litigants). And it could afford precedential value only to those or-

---

essence deciding an appeal without jurisdiction,'" *Buck* v. *Davis*, 580 U. S. 100, 115 (2017) (quoting *Miller-El* v. *Cockrell*, 537 U. S. 322, 336–337 (2003)). This principle provides yet another reason, apart from the due process issues that petitioners focus on, to doubt the Eleventh Circuit's practices.

ders resulting from a robust process. Regardless of what the Due Process Clause requires, these procedures would better accord with basic fairness—and would ensure that those like St. Hubert would not spend several more years in prison because of artificially imposed limitations like 100 words of argument.

No. 19–5451. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 520.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–6355. MACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–7148. BOSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 939 F. 3d 1266.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–7506. HUNT ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 3d 1259.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–7527. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 882.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–7672. ALSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 659.

JUSTICE SOTOMAYOR, respecting the denial of certiorari.

I concur for the reasons set out in *St. Hubert* v. *United States*, 590 U. S. 984 (2020) (SOTOMAYOR, J., statement respecting denial of certiorari).

No. 19–8166. WILLIAMS *v.* NAJI ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 19–8467. MCLENDON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 944 F. 3d 255.

Rehearing Denied

No. 19–7692. R. A. S. *v.* MONTGOMERY COUNTY CHILDREN AND YOUTH SERVICES, 590 U. S. 909. Petition for rehearing denied.

JUNE 15, 2020

Certiorari Granted—Vacated and Remanded. (See also *Andrus* v. *Texas*, 590 U. S. 806 (2020) (*per curiam*).)

No. 19–966. EMERSON ELECTRIC CO. *v.* SIPCO, LLC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thryv, Inc.* v. *Click-To-Call Technologies, LP*, 590 U. S. 45 (2020). Reported below: 939 F. 3d 1301.

No. 19–7919. KING *v.* UNITED STATES. C. A. 9th 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 *Rehaif* v. *United States*, 588 U. S. 225 (2019). Reported below: 771 Fed. Appx. 449.

Miscellaneous Orders

No. 19M141. GUTIERREZ *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 19M142. MEHDIPOUR *v.* DENWALT-HAMMOND ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 153, Orig. TEXAS *v.* CALIFORNIA. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 19–7495. BADRUDDOZA *v.* DEPARTMENT OF HOMELAND SECURITY ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1292] denied.

No. 19–8536. IN RE RUSSELL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 19–897. ALBENCE, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF U. S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* GUZMAN CHAVEZ ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 940 F. 3d 867.

No. 19–963. HENRY SCHEIN, INC. *v.* ARCHER & WHITE SALES, INC. C. A. 5th Cir. Certiorari granted. Reported below: 935 F. 3d 274.

Certiorari Denied

No. 18–843. PENA ET AL. *v.* HORAN, DIRECTOR, CALIFORNIA DEPARTMENT OF JUSTICE BUREAU OF FIREARMS. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 3d 969.

No. 18–913. BRENNAN *v.* DAWSON ET AL.; and
No. 18–1078. DAWSON ET AL. *v.* BRENNAN. C. A. 6th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 276.

No. 18–1272. GOULD ET AL. *v.* LIPSON, CHIEF OF THE BROOKLINE POLICE DEPARTMENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 3d 659.

No. 19–114. CIOLEK *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–404. WORMAN ET AL. *v.* HEALEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 922 F. 3d 26.

No. 19–423. MALPASSO ET AL. *v.* PALLOZZI, MARYLAND SECRETARY OF STATE POLICE. C. A. 4th Cir. Certiorari denied. Reported below: 767 Fed. Appx. 525.

No. 19–487. CULP ET AL. *v.* RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 3d 646.

No. 19–656. ANDERSON *v.* CITY OF MINNEAPOLIS, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 934 F. 3d 876.

No. 19–676. ZADEH ET AL. *v.* ROBINSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 928 F. 3d 457.

No. 19–679. CORBITT *v.* VICKERS. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 3d 1304.

No. 19–704. WILSON ET AL. *v.* COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 3d 1028.

No. 19–753. HUNTER ET AL. *v.* COLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 935 F. 3d 444.

No. 19–757. ARIZONA LIBERTARIAN PARTY ET AL. *v.* HOBBS, ARIZONA SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 3d 1085.

No. 19–839. EASTERN OREGON MINING ASSN. ET AL. *v.* OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 365 Ore. 313, 445 P. 3d 251.

No. 19–899. WEST *v.* WINFIELD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 931 F. 3d 978.

No. 19–970. RETAIL READY CAREER CENTER, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 942 F. 3d 655.

No. 19–1033. CANTU *v.* MOODY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 933 F. 3d 414.

No. 19–1058. HOSPIRA, INC. *v.* ELI LILLY & CO.; and
No. 19–1061. DR. REDDY'S LABORATORIES, LTD., ET AL. *v.* ELI LILLY & CO. C. A. Fed. Cir. Certiorari denied. Reported below: 933 F. 3d 1320.

No. 19–1065. JOHNSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 19–1080. ARCHER & WHITE SALES, INC. *v.* HENRY SCHEIN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 935 F. 3d 274.

No. 19–1141. ATLANTIC TRADING USA, LLC, ET AL. *v.* BP P. L. C. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 784 Fed. Appx. 4.

No. 19–1206. BOLAND, AS HEIR OF THE ESTATE OF BOLAND, ET AL. *v.* BOLAND ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 397 Mont. 319, 450 P. 3d 849.

No. 19–1207. YOUNG *v.* CLAYTON, CHIEF JUDGE, KENTUCKY COURT OF APPEALS. Sup. Ct. Ky. Certiorari denied.

No. 19–1215. SUSSEX ET UX. *v.* CITY OF TEMPE, ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 19–1217. BAGI ET AL. *v.* CITY OF PARMA, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 338.

No. 19–1282. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 19–1294. YOUNG *v.* MCGRATH. Ct. App. Ky. Certiorari denied.

No. 19–1295. MANDALAPU *v.* TEMPLE UNIVERSITY HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 786 Fed. Appx. 348.

No. 19–1297. COLLINS ET AL. *v.* D. R. HORTON-TEXAS, LTD. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 574 S. W. 3d 39.

No. 19–6858. LIDDELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 258.

No. 19–7018. BISHOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 926 F. 3d 621.

No. 19–7188. POWERS *v.* STANCIL. C. A. 10th Cir. Certiorari denied.

No. 19–7790. MASON, INDIVIDUALLY AND ON BEHALF OF MASON, ET VIR *v.* FAUL. C. A. 5th Cir. Certiorari denied. Reported below: 929 F. 3d 762.

No. 19–8200. FARLEY *v.* PARSON. C. A. 10th Cir. Certiorari denied. Reported below: 800 Fed. Appx. 617.

No. 19–8216. DAVIS *v.* HATCHER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 940 F. 3d 1175.

No. 19–8223. CONNORS *v.* HOWELL, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 630, 451 P. 3d 548.

No. 19–8224. NEUMAN *v.* CALLAHAN ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 938 N. W. 2d 730.

No. 19–8230. KATES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 162 App. Div. 3d 1627, 78 N. Y. S. 3d 600.

No. 19–8233. ALBERTO CANTU *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 19–8234. DAVIS *v.* EPPINGER, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 157 Ohio St. 3d 1560, 2020-Ohio-313, 138 N. E. 3d 1156.

No. 19–8236. BROOKS *v.* FOSTER. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 19–8238. THOMPSON *v.* CERATO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARDS-THOMPSON. Sup. Ct. Fla. Certiorari denied.

No. 19–8241. WORRELL *v.* EMIGRANT MORTGAGE CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 Fed. Appx. 905.

No. 19–8242. WEATHERSPOON *v.* BAGAHPOUR ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 19–8243. LEDEUX *v.* ANTHONY, AS AN INDIVIDUAL AND IN HER OFFICIAL CAPACITY AS TRUSTEE OF THE EMMETT AND ARALEE CHARLTON TRUST, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8244. MORGAN *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. Sup. Ct. Ill. Certiorari denied.

No. 19–8246. THOMAS *v.* CORBETT ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 654 Pa. 129, 212 A. 3d 519.

No. 19–8247. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 259 So. 3d 941.

No. 19–8251. TALKINGTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–8253. CHURCHILL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 183 A. 3d 1094.

No. 19–8257. MILLER *v.* GIBBS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–8259. HUSSAIN *v.* MARIETTA HALAL MEAT ET AL. Ct. App. Ga. Certiorari denied.

No. 19–8260. FULTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 173 App. Div. 3d 1861, 101 N. Y. S. 3d 691.

No. 19–8266. HEARD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2019 IL App (1st) 162302–U.

No. 19–8271. LARSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 19–8290. TAYLOR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 802 Fed. Appx. 701.

No. 19–8318. WHITELEY *v.* WILLIS ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–8389. YARBROUGH *v.* SULLIVAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–8439. CVJETICANIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 795 Fed. Appx. 873.

No. 19–8449. HARRIS *v.* UNITED STATES; and
No. 19–8456. HOPES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 135.

No. 19–8466. NIEHOUSE *v.* AMSBERRY. C. A. 9th Cir. Certiorari denied.

No. 19–8470. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–8478. KING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 19–8479. FLEMING *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 224 A. 3d 213.

No. 19–8485. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 19–8486. BLOODWORTH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 842.

No. 19–8494. LUSTIG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 460.

No. 19–8500. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 236.

No. 18–663. MANCE ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Motion of National Shooting Sports Foundation, Inc., for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 896 F. 3d 699.

No. 18–824. ROGERS ET AL. *v.* GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

JUSTICE THOMAS, with whom JUSTICE KAVANAUGH joins as to all but Part II, dissenting.

The text of the Second Amendment protects "the right of the people to keep and bear Arms." We have stated that this "fundamental righ[t]" is "necessary to our system of ordered liberty." *McDonald* v. *Chicago*, 561 U. S. 742, 778 (2010). Yet, in several jurisdictions throughout the country, law-abiding citizens have been barred from exercising the fundamental right to bear arms because they cannot show that they have a "justifiable need" or "good reason" for doing so. One would think that such an onerous burden on a fundamental right would warrant this Court's review. This Court would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights. And it seems highly unlikely that the Court would allow a State to enforce a law requiring a woman to provide a justifiable need before seeking an abortion. But today, faced with a petition challenging just such a restriction on citizens' Second Amendment rights, the Court simply looks the other way.

Petitioner Rogers is a law-abiding citizen who runs a business that requires him to service automated teller machines in high-crime areas. He applied for a permit to carry his handgun for self-defense. But, to obtain a carry permit in New Jersey, an applicant must, among other things, demonstrate "that he has a justifiable need to carry a handgun." N. J. Stat. Ann. § 2C:58–4(c) (West 2019 Cum. Supp.). For a "private citizen" to satisfy this "justifiable need" requirement, he must "specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." *Ibid.*; see also N. J. Admin. Code § 13:54–2.4 (2020). "Generalized fears for personal safety are inadequate." *In re Preis*, 118 N. J. 564, 571, 573 A. 2d 148, 152 (1990). Petitioner could not satisfy this standard and, as a result, his permit application was denied. With no ability to obtain a permit, petitioner is forced to operate his business in high-risk neighborhoods with no firearm for self-defense.

Petitioner asks this Court to grant certiorari to determine whether New Jersey's near-total prohibition on carrying a firearm in public violates his Second Amendment right to bear arms, made applicable to the States through the Fourteenth Amendment. See *McDonald*, 561 U. S., at 750; see *id.*, at 806 (THOMAS, J., concurring in part and concurring in judgment). This case gives us the opportunity to provide guidance on the proper approach for evaluating Second Amendment claims; acknowledge that the Second Amendment protects the right to carry in public; and resolve a square Circuit split on the constitutionality of justifiable-need restrictions on that right. I would grant the petition for a writ of certiorari.

I

It has been more than a decade since this Court's decisions in *McDonald* v. *Chicago*, *supra*, and *District of Columbia* v. *Heller*, 554 U. S. 570 (2008). In the years since those decisions, lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges.

Although our decision in *Heller* did not provide a precise standard for evaluating all Second Amendment claims, it did provide a general framework to guide lower courts. In *Heller*, we recognized that "the Second Amendment . . . codified a *pre-existing* right." *Id.*, at 592. This right was "enshrined with the scope [it

was] understood to have when the people adopted" it. *Id.*, at 634. To determine that scope, we analyzed the original meaning of the Second Amendment's text as well as the historical understanding of the right. We noted that "limitation[s]" on the right may be supported by "historical tradition," but we declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.*, at 626–627. Instead, we indicated that courts could conduct historical analyses for restrictions in the future as challenges arose. *Id.*, at 635.

Consistent with this guidance, many jurists have concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms. See, *e. g.*, *Mance* v. *Sessions*, 896 F. 3d 390, 394 (CA5 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from denial of reh'g en banc); *Tyler* v. *Hillsdale Cty. Sheriff's Dept.*, 837 F. 3d 678, 702–703 (CA6 2016) (Batchelder, J., concurring in most of judgment); *Gowder* v. *Chicago*, 923 F. Supp. 2d 1110, 1123 (ND Ill. 2012); *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1285 (CADC 2011) (*Heller II*) (Kavanaugh, J., dissenting).

But, as I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*. See *Silvester* v. *Becerra*, 583 U. S. 1139, 1148 (2018) (opinion dissenting from denial of certiorari). Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, *e. g.*, *Gould* v. *Morgan*, 907 F. 3d 659, 667 (CA1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale. *National Rifle Assn. of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F. 3d 185, 194 (CA5 2012); *Powell* v. *Tompkins*, 783 F. 3d 332, 347, n. 9 (CA1 2015) (compiling Circuit opinions adopting some form of the sliding-scale framework).

Under this test, courts first ask "whether the challenged law burdens conduct protected by the Second Amendment." *United States* v. *Chovan*, 735 F. 3d 1127, 1136 (CA9 2013). If so, courts proceed to the second step—determining the appropriate level of scrutiny. *Ibid.* To do so, courts generally consider "how close the law comes to the core of the Second Amendment right" and

"the severity of the law's burden on the right." *Id.*, at 1138 (internal quotation marks omitted); see also, *e. g.*, *Gould*, *supra*, at 670–671. Depending on their analysis of those two factors, courts then apply what purports to be either intermediate or strict scrutiny—at least recognizing that *Heller* barred the application of rational-basis review. *Chovan*, *supra*, at 1137.

This approach raises numerous concerns. For one, the courts of appeals' test appears to be entirely made up. The Second Amendment provides no hierarchy of "core" and peripheral rights. And "[t]he Constitution does not prescribe tiers of scrutiny." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 639 (2016) (THOMAS, J., dissenting); see also *Heller II*, *supra*, at 1283 (Kavanaugh, J., dissenting) (listing constitutional rights that are not subject to means-ends scrutiny). Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as "a tripartite binary test with a sliding scale and a reasonable fit." *Duncan* v. *Becerra*, 265 F. Supp. 3d 1106, 1117 (SD Cal. 2017), aff'd, 742 Fed. Appx. 218 (CA9 2018).

Even accepting this test on its terms, its application has yielded analyses that are entirely inconsistent with *Heller*. There, we cautioned that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all," stating that our constitutional rights must be protected "whether or not future legislatures or (yes) even future judges think that scope too broad." 554 U. S., at 634–635. On that basis, we explicitly rejected the invitation to evaluate Second Amendment challenges under an "interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *Id.*, at 689 (BREYER, J., dissenting). But the application of the test adopted by the courts of appeals has devolved into just that.[1] In

[1] See, *e. g.*, *Kachalsky* v. *County of Westchester*, 701 F. 3d 81, 100 (CA2 2012) (deferring to the legislature's conclusion that "public safety . . . outweighs the need to have a handgun for an unexpected confrontation"); *New York State Rifle & Pistol Assn., Inc.* v. *New York*, 883 F. 3d 45, 64 (CA2 2018) (stating that a "review of state and local gun control" involves a "balancing of the individual's constitutional right to keep and bear arms against the states' obligation to 'prevent armed mayhem'" (quoting *Kachalsky*, *supra*, at 96)), vacated and remanded, 590 U. S. 336; *Gould* v. *Morgan*, 907

fact, at least one scholar has contended that this interest-balancing approach has ultimately carried the day, as the lower courts systematically ignore the Court's actual holding in *Heller*. See Rostron, Justice Breyer's Triumph in the Third Battle Over the Second Amendment, 80 Geo. Wash. L. Rev. 703 (2012). With what other constitutional right would this Court allow such blatant defiance of its precedent?

Whatever one may think about the proper approach to analyzing Second Amendment challenges, it is clearly time for us to resolve the issue.

II

This case also presents the Court with an opportunity to clarify that the Second Amendment protects a right to public carry. While some Circuits have recognized that the Second Amendment extends outside the home, see *Wrenn* v. *District of Columbia*, 864 F. 3d 650, 665 (CADC 2017); *Moore* v. *Madigan*, 702 F. 3d 933, 937 (CA7 2012), many have declined to define the scope of the right, simply assuming that the right to public carry exists for purposes of applying a scrutiny-based analysis, see *Woollard* v. *Gallagher*, 712 F. 3d 865, 876 (CA4 2013); *Drake* v. *Filko*, 724 F. 3d 426, 431 (CA3 2013); *Kachalsky* v. *County of Westchester*, 701 F. 3d 81, 89 (CA2 2012).[2] Other courts have specifically indicated that they would not interpret the Second Amendment to apply outside the home without further instruction from this Court. *United States* v. *Masciandaro*, 638 F. 3d 458, 475 (CA4

F. 3d 659, 676 (CA1 2018) (stating that "courts must defer to a legislature's choices among reasonable alternatives" when the legislature has "take[n] account of the heightened needs of some individuals to carry firearms for self-defense and balance[d] those needs against the demands of public safety"); *Drake* v. *Filko*, 724 F. 3d 426, 440 (CA3 2013) ("refus[ing] . . . to intrude upon the sound judgment and discretion of the State of New Jersey" that only "those citizens who can demonstrate a 'justifiable need' to do so" may carry handguns outside the home).

[2] It is not clear how these courts can apply the made-up sliding-scale test without determining the scope of the right. See *Peruta* v. *County of San Diego*, 742 F. 3d 1144, 1166 (CA9 2014) (noting that courts "must fully understand the historical scope of the right before [they] can determine whether and to what extent the [challenged law] burdens the right or whether it goes even further and amounts to a destruction of the right altogether" (internal quotation marks omitted)), vacated and reh'g en banc granted, 781 F. 3d 1106 (CA9 2015).

2011) ("On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself"); *Williams* v. *State*, 417 Md. 479, 496, 10 A. 3d 1167, 1177 (2011) ("If the Supreme Court . . . meant its holding [in *Heller*] to extend beyond home possession, it will need to say so more plainly"). We should provide the requested instruction.

A

The text of the Second Amendment guarantees that "the right of the people to keep and bear Arms, shall not be infringed." As this Court explained in *Heller*, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" 554 U. S., at 584. "When used with 'arms,' . . . the term has a meaning that refers to carrying for a particular purpose—confrontation." *Ibid.* Thus, the right to "bear arms" refers to the right to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Ibid.* (quoting *Muscarello* v. *United States*, 524 U. S. 125, 143 (1998) (GINSBURG, J., dissenting); alterations and some internal quotation marks omitted).

"The most natural reading of this definition encompasses public carry." *Peruta* v. *California*, 582 U. S. 943, 946 (2017) (THOMAS, J., dissenting from denial of certiorari). Confrontations, of course, often occur outside the home. See, *e. g.*, *Moore*, *supra*, at 937 (noting that "most murders occur outside the home" in Chicago). Thus, the right to carry arms for self-defense inherently includes the right to carry in public. This conclusion not only flows from the definition of "bear Arms" but also from the natural use of the language in the text. As I have stated before, it is "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." *Peruta*, *supra*, at 946 (opinion dissenting from denial of certiorari).

The meaning of the term "bear Arms" is even more evident when read in the context of the phrase "right . . . to keep and bear Arms." U. S. Const., Amdt. 2. "To speak of 'bearing' arms solely within one's home . . . would conflate 'bearing' with 'keeping,' in derogation of [*Heller*'s] holding that the verbs codified distinct rights." *Drake*, *supra*, at 444 (Hardiman, J., dissenting); see also *Moore*, *supra*, at 936. In short, it would take serious

linguistic gymnastics—and a repudiation of this Court's decision in *Heller*—to claim that the phrase "bear Arms" does not extend the Second Amendment beyond the home.

B

Cases and treatises from England, the founding era, and the antebellum period confirm that the right to bear arms includes the right to carry in public.

1

"[T]he Second Amendment . . . codified a *pre-existing* right." *Heller*, *supra*, at 592. So, as in *Heller*, my analysis of the scope of that right begins with our country's English roots.

In 1328, during a time of political transition, the English Parliament enacted the Statute of Northampton. The statute provided that no man was permitted to "bring . . . force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." Statute of Northampton 1328, 2 Edw. 3, ch. 3. On its face, the statute could be read as a sweeping ban on the carrying of arms. However, both the history and enforcement of the statute reveal that it created a far more limited restriction.

From the beginning, the scope of the Statute of Northampton was unclear. Some officers were ordered to arrest all persons that "go armed," regardless of whether the bearer was carrying arms peacefully. See Letter to Mayor and Bailiffs of York (Jan. 30, 1334), in Calendar of the Close Rolls, Edward III, 1333–1337, p. 294 (H. Maxwell Lyte ed. 1898). Other officers, however, were ordered to arrest only "persons riding or going armed *to disturb the peace*." Letter to Keeper and Justices of Northumberland (Oct. 28, 1332), in Calendar of the Close Rolls, Edward III, 1330–1333, p. 610 (H. Maxwell Lyte ed. 1898) (emphasis added).

Whatever the initial breadth of the statute, it is clear that it was not strictly enforced in the ensuing centuries. To the contrary, "[d]uring most of England's history, maintenance of an armed citizenry was neither merely permissive nor cosmetic but essential" because "[u]ntil late in the seventeenth century England had no standing army, and until the nineteenth century no regular police force." Malcolm, The Right of the People To Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L. Q. 285, 290 (1983). Citizens were not only expected to possess arms,

they were encouraged to maintain skills in the use of those arms, which, of course, required carrying arms in public. See, *e. g.*, *id.*, at 292 (describing King Henry VIII's order requiring villages to maintain targets at which local men were to practice shooting).

The religious and political turmoil in England during the 17th century thrust the scope of the Statute of Northampton to the forefront. See J. Malcolm, To Keep and Bear Arms 104–105 (1994) (hereinafter Malcolm). King James II, a Catholic monarch, sought to revive the Statute of Northampton as a weapon to disarm his Protestant opponents. *Id.*, at 104. To this point, "[a]lthough men were occasionally indicted for carrying arms to terrorize their neighbours, the strict prohibition [of the Statute of Northampton] had never been enforced." *Ibid.* But, in November 1686, the Attorney General brought Sir John Knight—an opponent of James II—to trial before the King's Bench. The information alleged that Knight violated the Statute of Northampton by "walk[ing] about the streets armed with guns, and [entering] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76. At trial, the Chief Justice of the King's Bench stated that the Statute of Northampton only "punish[ed] people who go armed *to terrify the King's subjects*." *Id.*, at 118, 87 Eng. Rep., at 76 (emphasis added). He explained that the Statute of Northampton was "almost gone in desuetudinem" for "now there be a general connivance to gentlemen to ride armed for their security." *Rex* v. *Sir John Knight*, 1 Comb. 38–39, 90 Eng. Rep. 330 (1686). The Chief Justice also noted that only "where the crime shall appear to be malo animo [*i. e.*, with a wrongful intent,] it will come within the Act." *Id.*, at 39, 90 Eng. Rep., at 330. In other words, the Statute of Northampton was almost obsolete from disuse and prohibited only the carrying arms to terrify. Knight was ultimately acquitted.[3]

[3] At least one scholar has asserted that Sir John Knight was acquitted because he fell within the Statute of Northampton's exception for the "King's Officers and Ministers." Charles, The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review, 60 Clev. St. L. Rev. 1, 28, 30 (2012) (internal quotation marks omitted). This assertion has been repudiated by subsequent scholarship. See Kopel, The First Century of Right to Arms Litigation, 14 Geo. J. L. & Pub. Pol'y 127, 135, n. 46 (2016); see also *Young* v. *Hawaii*, 896 F. 3d 1044, 1064, n. 17 (CA9 2018), reh'g en banc granted, 915 F. 3d 681 (CA9 2019). Moreover, regard-

James II's attempts to disarm his opponents continued. Only two weeks after Knight's acquittal, James II ordered general disarmaments of regions inhabited by his Protestant enemies under the auspices of the Game Act of 1671. See Malcolm 105–106. As we explained in *Heller*, "[t]hese experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms." 554 U. S., at 593.

In 1688, James II was deposed in an uprising which came to be known as The Glorious Revolution. Soon thereafter, the English compiled the Declaration of Rights, which contained a list of grievances against James II and sought assurances from William and Mary that Protestants would not be disarmed. See Malcom 115. William and Mary accepted the Declaration of Rights, which was later codified as the English Bill of Rights, agreeing that "the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 Wm. & Mary, ch. 2, § 7, in 3 Eng. Stat. at Large 441 (1689).

The Statute of Northampton remained in force following the codification of the English Bill of Rights, but the narrow interpretation of the statute adopted in *Sir John Knight's Case* became blackletter law in England. Writing in 1716, Serjeant William Hawkins, author of an influential English treatise, explained that "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons." 1 Pleas of the Crown 136 (1716). Theodore Barlow, another legal commentator, also explained that "Wearing Arms, if not accompanied with Circumstances of Terror, is not within this Statute; therefore People of Rank and Distinction do not offend by wearing common Weapons." The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 12 (1745). Sir William Blackstone concluded the Statute of Northampton banned only the carrying of "dangerous and unusual weapons." *Heller*, *supra*, at 627 (internal quotation marks omitted). He explained that the right to arms protected by the 1689 English Bill of Rights preserved "the natural right of resistance and self-preservation" and "the

---

less of the ground for acquittal, the Chief Justice's pronouncement of law remains.

right of having and using arms for self-preservation and defence." 1 Commentaries on the Laws of England 139–140 (1765); see also 2 *id.*, at 412, n. 2 (E. Christian ed. 1794) ("[E]very one is at liberty to keep or carry a gun, if he does not use it for the [illegal] destruction of game" (editor's note)).

In short, although England may have limited the right to carry in the 14th century, by the time of the founding, the English right was "an individual right protecting against both *public* and private violence." *Heller*, *supra*, at 594 (emphasis added). And for purposes of discerning the original meaning of the Second Amendment, it is this founding era understanding that is most pertinent.

2

Founding era legal commentators in America also understood the Second Amendment right to "bear Arms" to encompass the right to carry in public.

St. George Tucker, in his 1803 American edition of Blackstone's Commentaries, explained that the right to armed self-defense is the "first law of nature." 1 Blackstone's Commentaries, App. 300. He described "the right of the people to keep and bear arms" as "the true palladium of liberty." *Ibid.* Tucker makes clear that bearing arms in public was common practice at the founding: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." 5 *id.*, at 19.

Similarly, William Rawle, a member of the Pennsylvania Assembly that ratified the Bill of Rights, acknowledged the right to carry arms in public. A View of the Constitution of the United States of America 125–126 (2d ed. 1825). Rawle noted that the right should not "be abused to the disturbance of the public peace" and explained that if a man carried arms "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them," he may be required "to give surety of the peace." *Id.*, at 126.[4] But his general understanding appeared to

[4] Lower courts looking to historical practice have concluded that, even in these circumstances, if a surety was provided or the accused was exempt from providing a surety, he could continue to bear arms in public. *Wrenn* v. *District of Columbia*, 864 F. 3d 650, 661 (CADC 2017) (explaining the application of surety laws); *Young*, 896 F. 3d, at 1061–1062.

mirror Hawkins' articulation of the English right—public carry was permitted so long as it was not done to terrify.

Other commentators took a similar view. James Wilson, a prominent Framer and one of the six original Justices of the Supreme Court, understood founding era law to prohibit only the carrying of "dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people." 2 Lectures on Law, in Collected Works of James Wilson 1138 (K. Hall & M. Hall eds. 2007). Charles Humphreys, a law professor, reiterated "that in this country the constitution guarranties to all persons the right to bear arms" and that "it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily." A Compendium of the Common Law in Force in Kentucky 482 (1822).

3

This view persisted in the early years of the Republic. The majority of the relevant cases during the antebellum period—many of which *Heller* relied on—support the understanding that the phrase "bear Arms" includes the right to carry in public.

In *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822), the Kentucky Court of Appeals held that its state constitutional right to "bear arms" invalidated a concealed carry restriction. *Id.*, at 91–92. The court stated that "whatever restrains the full and complete exercise of [the right to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Ibid.*

Eleven years after *Bliss*, Tennessee's highest court interpreted its State Second Amendment analog in a similar manner in *Simpson* v. *State*, 13 Tenn. 356 (1833). In that case, a jury convicted Simpson of carrying arms "in a warlike manner . . . and to the great terror and disturbance of . . . good citizens." *Id.*, at 357. Simpson challenged the conviction, arguing that the State merely proved that he carried arms, not that he did so in a manner to provoke violence. *Id.*, at 358. The State asserted that violence was not "essential" to support the conviction, pointing to a statement of Serjeant Hawkins regarding the English Statute of Northampton. *Ibid.* The court rejected the State's argument. First, it noted that the State had selectively quoted Hawkins' statement about "'dangerous and unusual weapons,'" and that Hawkins actually explained that "persons of quality are in no danger of offending [the Statute of Northampton] by wearing their common weapons . . . in such places, and upon occasions in which

it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace." *Id.*, at 358–359. Second, the court held that even assuming "that our ancestors adopted and brought over with them [the Statute of Northampton], or [a] portion of the common law," the state-law "right to keep and to bear arms" "completely abrogated it." *Id.*, at 359–360 (internal quotation marks omitted).

In 1840, the Supreme Court of Alabama concluded that, while the legislature could impose limitations on "the manner in which arms shall be borne," it could not bar the right to bear arms in public for self-defense. *State* v. *Reid*, 1 Ala. 612, 616–619. The court upheld a prohibition on the "practice of carrying weapons secretly." *Id.*, at 616 (internal quotation marks omitted). In doing so, however, the court recognized that there were limits to the State's ability to restrict the right to carry in public: "A statute which, under the pretence of regulating, amounts to a destruction of the right [to bear arms], or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.*, at 616–617. In the court's view, "it is only when carried openly, that [arms] can be efficiently used for defence." *Id.*, at 619. Thus, the court allowed some regulation of the form of carrying arms in public, but it firmly concluded that the right to carry in public for self-defense could not be eliminated altogether.

Other state courts adopted a similar view. In *Nunn* v. *State*, 1 Ga. 243 (1846), the Supreme Court of Georgia held that "seek[ing] to suppress the practice of carrying certain weapons *secretly* . . . is valid" but that "a prohibition against bearing arms *openly* . . . is in conflict with the Constitution, and *void*." *Id.*, at 251. And, in *State* v. *Chandler*, 5 La. 489 (1850), the Supreme Court of Louisiana held that the State could ban concealed carry but that the "right to carry arms . . . in full open view" was "guaranteed by the Constitution of the United States." *Id.*, at 489–490 (internal quotation marks omitted).

These cases show that, with few exceptions,[5] courts in the antebellum period understood the right to bear arms as including the right to carry in public for self-defense.

[5] In *State* v. *Buzzard*, 4 Ark. 18 (1842), the Supreme Court of Arkansas upheld a law that prohibited concealed carry. *Id.*, at 27 (opinion of Ringo, C. J.); *id.*, at 32 (opinion of Dickinson, J.); but see *id.*, at 34–35 (Lacy, J., dissenting).

C

Finally, in the wake of the Civil War, "there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 554 U. S., at 614. These discussions confirm that the Second Amendment right to bear arms was understood to protect public carry at the time the Fourteenth Amendment was ratified.[6]

As I have previously explained, "Southern anxiety about an uprising among the newly freed slaves peaked" after the Civil War. *McDonald*, 561 U. S., at 846 (opinion concurring in part and concurring in judgment). Acting on this fear, States of the "old Confederacy" engaged in "systematic efforts" to disarm recently freed slaves and many of the 180,000 blacks who served in the Union Army. *Id.*, at 847 (internal quotation marks omitted). "Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *Id.*, at 772 (majority opinion). In addition, some States passed laws that explicitly prohibited blacks from carrying arms without a license (a requirement not imposed on white citizens) or barred blacks from possessing arms altogether. See Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309, 344–345 (1991) (compiling laws from Alabama, Louisiana, and Mississippi).

The Federal Government acknowledged that these abuses violated blacks' fundamental right to carry arms in public. In 1866, a report of the Commissioner of the Freedmen's Bureau recognized that "[t]he civil law [of Kentucky] prohibits the colored man from bearing arms" and concluded that such a restriction infringed "the right of the people to keep and bear arms as provided in the Constitution." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. Similarly, a circular in a congressional Report acknowledged that "in some parts of [South Carolina,] armed par-

[6] Although these discussions occurred well after the ratification of the Bill of Rights, *Heller* treated them as "instructive" in determining the meaning of the Second Amendment. 554 U. S., at 614. The discussions also inform our understanding of the right to keep and bear arms guaranteed by the Fourteenth Amendment as a privilege of American citizenship. See *McDonald* v. *Chicago*, 561 U. S. 742, 837 (2010) (THOMAS, J., concurring in part and concurring in judgment).

ties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen . . . in plain and direct violation of their personal rights [to keep and bear arms] as guaranteed by the Constitution of the United States." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., 229 (1866) (Proposed Circular of Brigadier Gen. R. Saxton). The circular noted the "peaceful and orderly conduct" of freed slaves when carrying arms, as well as their need "to kill game for subsistence, and to protect their crops from destruction by birds and animals," clearly indicating that the bearing of arms occurs in public. *Ibid.* Finally, numerous Congressmen expressed dismay at the denial of blacks' rights to bear arms when discussing the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1866, and the Fourteenth Amendment. See Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, 4 Geo. Mason L. Rev. 1, 21–25 (1981).

The importance of the right to carry arms in public during Reconstruction and thereafter cannot be overstated. "The use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence." *McDonald*, 561 U. S., at 857 (opinion of THOMAS, J.). And, unfortunately, "[w]ithout federal enforcement of the inalienable right to keep and bear arms, . . . militias and mobs were tragically successful in waging a campaign of terror" against Southern blacks. *Id.*, at 856. On this record, it is clear that "the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms" encompassed the right to carry arms in public for self-defense. *Id.*, at 858.

In short, the text of the Second Amendment and the history from England, the founding era, the antebellum period, and Reconstruction leave no doubt that the right to "bear Arms" includes the individual right to carry in public in some manner.

III

Recognizing that the Constitution protects the right to carry arms in public does not mean that there is a "right to . . . carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U. S., at 626. "The protections enumerated in the Second Amendment . . . are not absolute prohibitions against government regulation." *Voisine* v. *United States*,

579 U. S. 686, 714 (2016) (THOMAS, J., dissenting). States can impose restrictions on an individual's right to bear arms that are consistent with historical limitations. "Some laws, however, broadly divest an individual of his Second Amendment rights" altogether. *Ibid.* This case gives us the ideal opportunity to at least begin analyzing which restrictions are consistent with the historical scope of the right to bear arms.

It appears that a handful of States throughout the country prohibit citizens from carrying arms in public unless they can establish "good cause" or a "justifiable need" for doing so. The majority of States, while regulating the carrying of arms to varying degrees, have not imposed such a restriction, which amounts to a "[b]a[n] on the ability of most citizens to exercise an enumerated right." *Wrenn*, 864 F. 3d, at 666. The Courts of Appeals are squarely divided on the constitutionality of these onerous "justifiable need" or "good cause" restrictions. The D. C. Circuit has held that a law limiting public carry to those with a "good reason to fear injury to [their] person or property" violates the Second Amendment. *Id.*, at 655 (internal quotation marks omitted).[7] By contrast, the First, Second, Third, and Fourth Circuits have upheld the constitutionality of licensing schemes with "justifiable need" or "good reason" requirements, applying what purported to be an intermediate scrutiny standard. See *Gould*, 907 F. 3d, at 677; *Kachalsky*, 701 F. 3d, at 101; *Drake*, 724 F. 3d, at 440; *Masciandaro*, 638 F. 3d, at 460.

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U. S. 1057 (2018) (THOMAS, J., dissenting from denial of certiorari) (quoting this Court's Rule 10(a)). The question whether a State can effectively ban most citizens from exercising their fundamental right to bear arms surely qualifies as such a matter. We should settle the conflict among the lower courts so that the fundamental protections set forth in our Constitution are applied equally to all citizens.

---

[7] A panel of the Ninth Circuit, in an exhaustive and scholarly opinion, also held that a law violated the Second Amendment by limiting public carry to those with "'urgency,'" "'need,'" or a "'reason to fear injury.'" *Young*, 896 F. 3d, at 1048. That decision, however, was vacated when a majority of the active judges on the Ninth Circuit voted to grant en banc review. See 915 F. 3d 681.

* * *

This case gives us an opportunity to provide lower courts with much-needed guidance, ensure adherence to our precedents, and resolve a Circuit split. Each of these reasons is independently sufficient to grant certiorari. In combination, they unequivocally demonstrate that this case warrants our review. Rather than prolonging our decade-long failure to protect the Second Amendment, I would grant this petition.

No. 18–1287. BAXTER *v.* BRACEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 869.

JUSTICE THOMAS, dissenting.

Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging excessive force and failure to intervene, in violation of the Fourth Amendment. Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied.

I have previously expressed my doubts about our qualified immunity jurisprudence. See *Ziglar* v. *Abbasi*, 582 U. S. 120, 157–160 (2017) (THOMAS, J., concurring in part and concurring in judgment). Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.

I

A

In the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States. Between 1865 and 1870, Congress proposed, and the States ratified, the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments protect certain rights and gave Congress the power to enforce those rights against the States.

Armed with its new enforcement powers, Congress sought to respond to "the reign of terror imposed by the Klan upon black

citizens and their white sympathizers in the Southern States." *Briscoe* v. *LaHue*, 460 U. S. 325, 337 (1983). Congress passed a statute variously known as the Ku Klux Act of 1871, the Civil Rights Act of 1871, and the Enforcement Act of 1871. Section 1, now codified, as amended, at 42 U. S. C. § 1983, provided that

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." Act of Apr. 20, 1871, § 1, 17 Stat. 13.

Put in simpler terms, § 1 gave individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights.

B

The text of § 1983 "ma[kes] no mention of defenses or immunities." *Ziglar*, *supra*, at 157 (opinion of THOMAS, J.). Instead, it applies categorically to the deprivation of constitutional rights under color of state law.

For the first century of the law's existence, the Court did not recognize an immunity under § 1983 for good-faith official conduct. Although the Court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiffs must prove malice to recover. *Myers* v. *Anderson*, 238 U. S. 368, 378–379 (1915) (imposing liability); *id.*, at 371 (argument by counsel that malice was an essential element). No other case appears to have established a good-faith immunity.

In the 1950s, this Court began to "as[k] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983." *Ziglar*, *supra*, at 159 (opinion of THOMAS, J.). The Court, for example, recognized absolute immunity for legislators because it concluded Congress had not "impinge[d] on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language" of § 1983. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951). The Court also extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967). The Court derived this defense from "the background of tort

liability . . . in the case of police officers making an arrest." *Id.*, at 556–557. These decisions were confined to certain circumstances based on specific analogies to the common law.

Almost immediately, the Court abandoned this approach. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), without considering the common law, the Court remanded for the application of qualified immunity doctrine to state executive officials, National Guard members, and a university president, *id.*, at 234–235. It based the availability of immunity on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based," *id.*, at 247, rather than the liability of officers for analogous common-law torts in 1871. The Court soon dispensed entirely with context-specific analysis, extending qualified immunity to a hospital superintendent sued for deprivation of the right to liberty. *O'Connor* v. *Donaldson*, 422 U. S. 563, 577 (1975); see also *Procunier* v. *Navarette*, 434 U. S. 555, 561 (1978) (prison officials and officers).

Then, in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the "substantial costs [that] attend the litigation of" subjective intent, *id.*, at 816. Although *Harlow* involved an implied constitutional cause of action against federal officials, not a § 1983 action, the Court extended its holding to § 1983 without pausing to consider the statute's text because "it would be 'untenable to draw a distinction for purposes of immunity law.'" *Id.*, at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)). The Court has subsequently applied this objective test in § 1983 cases. See, *e. g.*, *Ziglar*, 582 U. S., at 151 (majority opinion).[1]

II

In several different respects, it appears that "our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." *Id.*, at 159 (opinion of THOMAS, J.).

There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading trea-

[1] I express no opinion on qualified immunity in the context of implied constitutional causes of action against federal officials. See, *e. g.*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

tises from the second half of the 19th century and case law until the 1980s contain no support for this "clearly established law" test. Indeed, the Court adopted the test not because of "'general principles of tort immunities and defenses,'" *Malley* v. *Briggs*, 475 U. S. 335, 339 (1986), but because of a "balancing of competing values" about litigation costs and efficiency, *Harlow*, *supra*, at 816.

There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. Nineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith. See, *e. g.*, *Wilkes* v. *Dinsman*, 7 How. 89, 130–131 (1849); see also Nielson & Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853, 1864–1868 (2018); Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 57 (2018); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 48–55 (1972). But officials were not *always* immune from liability for their good-faith conduct. See, *e. g.*, *Little* v. *Barreme*, 2 Cranch 170, 179 (1804) (Marshall, C. J.); *Miller* v. *Horton*, 152 Mass. 540, 548, 26 N. E. 100, 103 (1891) (Holmes, J.); see also Baude, *supra*, at 55–58; Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414–422 (1986); Engdahl, *supra*, at 14–21.

Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. See, *e. g.*, *Wilkes*, *supra*, at 130; T. Cooley, Law of Torts 688–689 (1880); J. Bishop, Commentaries on Non-Contract Law § 773, p. 360 (1889). An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.

Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity "was 'historically accorded the relevant official' in an analogous situation 'at common law.'" *Ziglar*, *supra*, at 157 (opinion of THOMAS, J.) (quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976)). The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. See *Burns* v. *Reed*, 500 U. S. 478, 489–492 (1991). We should do so in qualified immunity cases as well.[2]

[2] Qualified immunity is not the only doctrine that affects the scope of relief under § 1983. In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that an officer acts "'under color of any statute, ordinance, regulation, custom, or usage of any State'" even when state law did not authorize his action, *id.*,

* * *

I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.

No. 19–27. CHEESEMAN *v.* POLILLO, CHIEF OF POLICE, CITY OF GLASSBORO, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Motion of Firearms Policy Coalition et al. for leave to file brief as *amici curiae* granted. Certiorari denied.

No. 19–532. UNITED STATES *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE THOMAS and JUSTICE ALITO would grant the petition for writ of certiorari. Reported below: 921 F. 3d 865.

No. 19–1010. ACTAVIS HOLDCO U. S., INC., ET AL. *v.* CONNECTICUT ET AL. C. A. 3d Cir. Motion of Twelve Companies et al. and Chamber of Commerce of the United States of America et al. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 19–1105. SHARP, INTERIM WARDEN *v.* HARRIS. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 941 F. 3d 962.

No. 19–1191. OHIO *v.* FORD. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 158 Ohio St. 3d 139, 2019-Ohio-4539, 140 N. E. 3d 616.

No. 19–6593. FORD *v.* WHITE ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed

---

at 168, 183. Scholars have debated whether this holding is correct. Compare Zagrans, "Under Color of" *What* Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 559 (1985), with Winter, The Meaning of "Under Color of" Law, 91 Mich. L. Rev. 323, 341–361 (1992), and Achtenberg, A "Milder Measure of Villainy": The Unknown History of 42 U. S. C. § 1983 and the Meaning of "Under Color of" Law, 1999 Utah L. Rev. 1, 56–60. Although concern about revisiting one doctrine but not the other is understandable, see *Crawford-El* v. *Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting), respondents—like many defendants in § 1983 actions—have not challenged *Monroe*.

in forma pauperis granted. The order entered January 13, 2020, [589 U. S. 1131] vacated. Certiorari denied.

No. 19–7670. PANAH *v.* BROOMFIELD, WARDEN. Sup. Ct. Cal. Motion of Embassy of Pakistan, Iranian Interests Section for leave to file brief as *amicus curiae* out of time denied. Certiorari denied.

No. 19–8489. ABBO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 798 Fed. Appx. 239.

Rehearing Denied

No. 19–1127. NEFF *v.* UNITED STATES, 590 U. S. 906;

No. 19–6444. HARRIS *v.* MOYER, SECRETARY, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL., 589 U. S. 1112;

No. 19–7300. BOOKER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 589 U. S. 1280;

No. 19–7538. CARLSON ET VIR *v.* HARPSTEAD, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES, ET AL., 589 U. S. 1298;

No. 19–7642. KARNOFEL *v.* SUPERIOR WATERPROOFING, INC., 590 U. S. 908;

No. 19–7669. MATTISON *v.* WILLIS ET AL., 590 U. S. 908;

No. 19–7732. HANKS *v.* UNITED STATES, 589 U. S. 1299;

No. 19–8010. CHHIM *v.* CITY OF HOUSTON, TEXAS, ET AL., 590 U. S. 912; and

No. 19–8036. JACKSON *v.* UNITED STATES, 590 U. S. 913. Petitions for rehearing denied.

JUNE 16, 2020

Miscellaneous Order

No. 19A1052 (19–8695). GUTIERREZ *v.* SAENZ ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is

granted, the stay shall terminate upon the sending down of the judgment of this Court. The District Court should promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 27, 2020, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1020. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, 559 U. S. 1119, 563 U. S. 1045, 569 U. S. 1125, 572 U. S. 1161, 578 U. S. 1031, 581 U. S. 1029, 584 U. S. 1043, and 587 U. S. 1077.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 2020

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2019; a redline version of the rules with committee notes; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2019 report of the Advisory Committee on Appellate Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

April 27, 2020

Ordered:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 35 and 40.

[See *infra*, p. 1023.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2020, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. The Chief Justice is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 35. En banc determination.

. . . . .

(*e*) *Response.*—No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

. . . . .

Rule 40. Petition for panel rehearing.

(*a*) *Time to file; contents; response; action by the court if granted.*

. . . . .

(*3*) *Response.*—Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

. . . . .

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 27, 2020, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1026. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, 563 U. S. 1051, 566 U. S. 1045, 569 U. S. 1141, 572 U. S. 1169, 575 U. S. 1049, 578 U. S. 1051, 581 U. S. 1035, 584 U. S. 1057, and 587 U. S. 1087.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 2020

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying the amended rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2019; a redline version of the rules with committee notes; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2019 report of the Advisory Committee on Bankruptcy Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

April 27, 2020

Ordered:

1. The Federal Rules of Bankruptcy Procedure are amended to include amendments to Rules 2002, 2004, 8012, 8013, 8015, and 8021.

[See *infra*, pp. 1029–1032.]

2. The foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2020, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. The Chief Justice is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 2002. Notices to creditors, equity security holders, administrators in foreign proceedings, persons against whom provisional relief is sought in ancillary and other cross-border cases, United States, and United States Trustee.

. . . . .

(*f*) *Other notices.*—Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

. . . . .

(7) entry of an order confirming a chapter 9, 11, 12, or 13 plan;

. . . . .

(*h*) *Notices to creditors whose claims are filed.*

(*1*) *Voluntary case.*—In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, after 70 days following the order for relief under that chapter or the date of the order converting the case to chapter 12 or chapter 13, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(*2*) *Involuntary case.*—In an involuntary chapter 7 case, after 90 days following the order for relief under that

chapter, the court may direct that all notices required by subdivision (a) of this rule be mailed only to:

- the debtor;
- the trustee;
- all indenture trustees;
- creditors that hold claims for which proofs of claim have been filed; and
- creditors, if any, that are still permitted to file claims because an extension was granted under Rule 3002(c)(1) or (c)(2).

(*3*) *Insufficient assets.*—In a case where notice of insufficient assets to pay a dividend has been given to creditors under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

. . . . .

(*k*) *Notices to United States Trustee.*—Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses.

. . . . .

Rule 2004. Examination.

. . . . .

(*c*) *Compelling attendance and production of documents or electronically stored information.*—The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a

subpoena on behalf of the court where the case is pending if the attorney is admitted to practice in that court.

. . . . .

Rule 8012. Disclosure statement.

(*a*) *Nongovernmental corporations.*—Any nongovernmental corporation that is a party to a proceeding in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(*b*) *Disclosure about the debtor.*—The debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 8012(a).

(*c*) *Time to file; supplemental filing.*—A Rule 8012 statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, whichever occurs first, unless a local rule requires earlier filing;

(2) be included before the table of contents in the principal brief; and

(3) be supplemented whenever the information required by Rule 8012 changes.

Rule 8013. Motions; intervention.

(*a*) *Contents of a motion response; response reply.*

(*1*) *Request for relief.*—A request for an order or other relief is made by filing a motion with the district or BAP clerk.

. . . . .

Rule 8015. Form and length of briefs; form of appendices and other papers.

. . . . .

(*g*) *Items excluded from length.*—In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- cover page;
- disclosure statement under Rule 8012;
- table of contents;
- table of citations;
- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificates of counsel;
- signature block;
- proof of service; and
- any item specifically excluded by these rules or by local rule.

. . . . .

Rule 8021. Costs.

. . . . .

(*d*) *Bill of costs; objections.*—A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk and serve an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 27, 2020, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1034. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, 556 U. S. 1341, 559 U. S. 1139, 569 U. S. 1149, 572 U. S. 1217, 575 U. S. 1055, 578 U. S. 1061, 581 U. S. 1049, and 584 U. S. 1077.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 2020

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress an amendment to the Federal Rules of Civil Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2019; a redline version of the rule with committee note; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the June 2019 report of the Advisory Committee on Civil Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

April 27, 2020

Ordered:

1. That the Federal Rules of Civil Procedure are amended to include an amendment to Rule 30.

[See *infra,* p. 1037.]

2. That the foregoing amendment to the Federal Rules of Civil Procedure shall take effect on December 1, 2020, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. The Chief Justice is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 30. Depositions by oral examination.

. . . . .

(*b*) *Notice of the deposition; other formal requirements.*

. . . . .

(*6*) *Notice or subpoena directed to an organization.*—In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

. . . . .

AMENDMENT TO FEDERAL RULES OF EVIDENCE

The following amendment to the Federal Rules of Evidence was prescribed by the Supreme Court of the United States on April 27, 2020, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1040. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, 547 U. S. 1281, 559 U. S. 1157, 563 U. S. 1075, 569 U. S. 1167, 572 U. S. 1233, 581 U. S. 1055, and 587 U. S. 1101.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 2020

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2019; a redline version of the rule with committee note; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2019 report of the Advisory Committee on Evidence Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 27, 2020

ORDERED:

1. The Federal Rules of Evidence are amended to include an amendment to Rule 404.

[See *infra*, p. 1043.]

2. The foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2020, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 404. Character evidence; other crimes, wrongs, or acts.

. . . . .

(*b*) *Other crimes, wrongs, or acts.*

(*1*) *Prohibited uses.*—Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(*2*) *Permitted uses.*—This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(*3*) *Notice in a criminal case.*—In a criminal case, the prosecutor must:

(*A*) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(*B*) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(*C*) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.