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OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 18 THROUGH JUNE 29, 2020

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

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

For the First Circuit, STEPHEN BREYER, Associate Justice.

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

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

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

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For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

October 19, 2018.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2019

DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

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

No. 18–587. Argued November 12, 2019—Decided June 18, 2020*

In 2012, the Department of Homeland Security (DHS) issued a memorandum announcing an immigration relief program known as Deferred Action for Childhood Arrivals (DACA), which allows certain unauthorized aliens who arrived in the United States as children to apply for a two-year forbearance of removal. Those granted such relief become eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Two years later, DHS expanded DACA eligibility and created a related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). If implemented, that program would have made 4.3 million parents of U. S. citizens or lawful

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*Together with No. 18–588, *Trump, President of the United States, et al.* v. *National Association for the Advancement of Colored People et al.*, on certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit, and No. 18–589, *Wolf, Acting Secretary of Homeland Security, et al.* v. *Batalla Vidal et al.*, on certiorari before judgment to the United States Court of Appeals for the Second Circuit.

permanent residents eligible for the same forbearance from removal, work eligibility, and other benefits as DACA recipients. Texas, joined by 25 other States, secured a nationwide preliminary injunction barring implementation of both the DACA expansion and DAPA. The Fifth Circuit upheld the injunction, concluding that the program violated the Immigration and Nationality Act (INA), which carefully defines eligibility for benefits. This Court affirmed by an equally divided vote, and the litigation then continued in the District Court.

In June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum, citing, among other reasons, the ongoing suit by Texas and new policy priorities. That September, the Attorney General advised Acting Secretary of Homeland Security Elaine C. Duke that DACA shared DAPA's legal flaws and should also be rescinded. The next day, Duke acted on that advice. Taking into consideration the Fifth Circuit and Supreme Court rulings and the Attorney General's letter, Duke decided to terminate the program. She explained that DHS would no longer accept new applications, but that existing DACA recipients whose benefits were set to expire within six months could apply for a two-year renewal. For all other DACA recipients, previously issued grants of relief would expire on their own terms, with no prospect for renewal.

Several groups of plaintiffs challenged Duke's decision to rescind DACA, claiming that it was arbitrary and capricious in violation of the Administrative Procedure Act (APA) and infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause. District Courts in California (*Regents*, No. 18–587), New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588) all ruled for the plaintiffs. Each court rejected the Government's arguments that the claims were unreviewable under the APA and that the INA deprived the courts of jurisdiction. In *Regents* and *Batalla Vidal*, the District Courts further held that the equal protection claims were adequately alleged, and they entered coextensive nationwide preliminary injunctions based on the conclusion that the plaintiffs were likely to succeed on their APA claims. The District Court in *NAACP* took a different approach. It deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, finding that the rescission was inadequately explained. The court then stayed its order for 90 days to permit DHS to reissue a memorandum rescinding DACA, this time with a fuller explanation of the conclusion that DACA was unlawful. Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded to the court's order. She declined to disturb or replace Duke's rescission decision and instead

explained why she thought her predecessor's decision was sound. In addition to reiterating the illegality conclusion, she offered several new justifications for the rescission. The Government moved for the District Court to reconsider in light of this additional explanation, but the court concluded that the new reasoning failed to elaborate meaningfully on the illegality rationale.

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. While those appeals were pending, the Government filed three petitions for certiorari before judgment. Following the Ninth Circuit affirmance in *Regents*, this Court granted certiorari.

Held: The judgment in No. 18–587 is vacated in part and reversed in part; the judgment in No. 18–588 is affirmed; the February 13, 2018 order in No. 18–589 is vacated, the November 9, 2017 order is affirmed in part, and the March 29, 2018 order is reversed in part; and all of the cases are remanded.

No. 18–587, 908 F. 3d 476, vacated in part and reversed in part; No. 18–588, affirmed; and No. 18–589, February 13, 2018 order vacated, November 9, 2017 order affirmed in part, and March 29, 2018 order reversed in part; all cases remanded.

THE CHIEF JUSTICE delivered the opinion of the Court, except as to Part IV, concluding:

1. DHS's rescission decision is reviewable under the APA and is within this Court's jurisdiction. Pp. 16–20.

(a) The APA's "basic presumption of judicial review" of agency action, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140, can be rebutted by showing that the "agency action is committed to agency discretion by law," 5 U. S. C. § 701(a)(2). In *Heckler* v. *Chaney*, the Court held that this narrow exception includes an agency's decision not to institute an enforcement action. 470 U. S. 821, 831–832. The Government contends that DACA is a general non-enforcement policy equivalent to the individual non-enforcement decision in *Chaney*. But the DACA Memorandum did not merely decline to institute enforcement proceedings; it created a program for conferring affirmative immigration relief. Therefore, unlike the non-enforcement decision in *Chaney*, DACA's creation—and its rescission—is an "action [that] provides a focus for judicial review." *Id.*, at 832. In addition, by virtue of receiving deferred action, 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Access to such benefits is an interest "courts often are called upon to protect." *Ibid.* DACA's rescission is thus subject to review under the APA. Pp. 16–19.

(b) The two jurisdictional provisions of the INA invoked by the Government do not apply. Title 8 U. S. C. § 1252(b)(9), which bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien," is inapplicable where, as here, the parties do not challenge any removal proceedings. And the rescission is not a decision "to commence proceedings, adjudicate cases, or execute removal orders" within the meaning of § 1252(g). Pp. 19–20.

2. DHS's decision to rescind DACA was arbitrary and capricious under the APA. Pp. 20–33.

(a) In assessing the rescission, the Government urges the Court to consider not just the contemporaneous explanation offered by Acting Secretary Duke but also the additional reasons supplied by Secretary Nielsen nine months later. Judicial review of agency action, however, is limited to "the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U. S. 743, 758. If those grounds are inadequate, a court may remand for the agency to offer "a fuller explanation of the agency's reasoning *at the time of the agency action*," *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 654 (emphasis added), or to "deal with the problem afresh" by taking *new* agency action, *SEC* v. *Chenery Corp.*, 332 U. S. 194, 201. Because Secretary Nielsen chose not to take new action, she was limited to elaborating on the agency's original reasons. But her reasoning bears little relationship to that of her predecessor and consists primarily of impermissible "*post hoc* rationalization." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 420. The rule requiring a new decision before considering new reasons is not merely a formality. It serves important administrative law values by promoting agency accountability to the public, instilling confidence that the reasons given are not simply convenient litigating positions, and facilitating orderly review. Each of these values would be markedly undermined if this Court allowed DHS to rely on reasons offered nine months after the rescission and after three different courts had identified flaws in the original explanation. Pp. 20–24.

(b) Acting Secretary Duke's rescission memorandum failed to consider important aspects of the problem before the agency. Although Duke was bound by the Attorney General's determination that DACA is illegal, see 8 U. S. C. § 1103(a)(1), deciding how best to address that determination involved important policy choices reserved for DHS. Acting Secretary Duke plainly exercised such discretionary authority in winding down the program, but she did not appreciate the full scope of her discretion. The Attorney General concluded that the legal defects in DACA mirrored those that the courts had recognized in DAPA. The Fifth Circuit, the highest court to offer a reasoned opinion on DAPA's

legality, found that DAPA violated the INA because it extended eligibility for benefits to a class of unauthorized aliens. But the defining feature of DAPA (and DACA) is DHS's decision to defer removal, and the Fifth Circuit carefully distinguished that forbearance component from the associated benefits eligibility. Eliminating benefits eligibility while continuing forbearance thus remained squarely within Duke's discretion. Yet, rather than addressing forbearance in her decision, Duke treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation. That reasoning repeated the error in *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm*— treating a rationale that applied to only part of a policy as sufficient to rescind the entire policy. 463 U. S. 29, 51. While DHS was not required to "consider all policy alternatives," *ibid.*, deferred action was "within the ambit of the existing" policy, *ibid.*; indeed, it was the centerpiece of the policy. In failing to consider the option to retain deferred action, Duke "failed to supply the requisite 'reasoned analysis.'" *Id.*, at 57.

That omission alone renders Duke's decision arbitrary and capricious, but it was not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742. Certain features of the DACA policy may affect the strength of any reliance interests, but those features are for the agency to consider in the first instance. DHS has flexibility in addressing any reliance interests and could have considered various accommodations. While the agency was not required to pursue these accommodations, it was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns. Its failure to do so was arbitrary and capricious. Pp. 24–33.

THE CHIEF JUSTICE, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN, concluded in Part IV that respondents' claims fail to establish a plausible inference that the rescission was motivated by animus in violation of the equal protection guarantee of the Fifth Amendment. Pp. 33–35.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part IV. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and SOTOMAYOR, J., joined as to all but Part IV. SOTOMAYOR, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part *post*, p. 36. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ALITO and GORSUCH, JJ., joined *post*, p. 39. ALITO, J., *post*, p. 63, and KAVANAUGH, J., *post*, p. 64, filed opinions concurring in the judgment in part and dissenting in part.

Solicitor General Francisco argued the cause for petitioners in all cases. With him on the briefs were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Jonathan Y. Ellis*, *Mark B. Stern*, and *Thomas Pulham*.

Theodore B. Olson argued the cause for private respondents in all cases. With him on the briefs in Nos. 18–587 and 18–589 were *Stuart F. Delery*, *Matthew S. Rozen*, *Andrew J. Wilhelm*, *Theodore J. Boutros, Jr.*, *Ethan D. Dettmer*, *Jonathan N. Soleimani*, *Mark D. Rosenbaum*, *Judy London*, *Erwin Chemerinsky*, *Laurence H. Tribe*, *Luis Cortes Romero*, *Leah M. Litman*, *Stacey M. Leyton*, *James R. Williams*, *Greta S. Hansen*, *Michael J. Wishnie*, *Muneer I. Ahmad*, *Marisol Orihuela*, *Karen C. Tumlin*, *Amy S. Taylor*, *Trudy S. Rebert*, *Araceli Martínez-Olguín*, *Mayra B. Joachin*, and *Scott Foletta*. On the brief for respondent Regents of the University of California et al. in No. 18–587 were *Robert A. Long*, *Mark H. Lynch*, *Alexander A. Berengaut*, *Megan A. Crowley*, *David Watnick*, *Charles F. Robinson*, *Margaret Wu*, and *Brian Danitz*. On the brief in No. 18–588 were *Lindsay C. Harrison*, *Ian Heath Gershengorn*, *Thomas J. Perrelli*, *Matthew E. Price*, *Ishan K. Bhabha*, *Benjamin M. Eidelson*, *Joseph M. Sellers*, *Ramona E. Romero*, *Wesley Markham*, *Cynthia L. Randall*, *David J. Strom*, and *Peter J. Ford*.

Michael J. Mongan, Solicitor General of California, argued the cause for state respondents in all cases. With him on the brief in No. 18–587 were *Xavier Becerra*, Attorney General of California, *Michael L. Newman*, Senior Assistant Attorney General, *Samuel P. Siegel* and *Joshua Patashnik*, Deputy Solicitors General, and *Shubhra Shivpuri* and *James F. Zahradka II*, Deputy Attorneys General, by *Aaron M. Frey*, Attorney General of Maine, and *Susan P. Herman*, Deputy Attorney General, by *Brian E. Frosh*, Attorney General of Maryland, *Steven M. Sullivan*, Solicitor General, and *Leah J. Tulin*, Assistant Attorney General, and by *Keith Ellison*, Attorney General of Minnesota, *Liz Kramer*, Solicitor

General, and *Jacob Campion*, Assistant Attorney General. On the brief in No. 18–589 were *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, *Andrew W. Amend*, Assistant Deputy Solicitor General, and *David S. Frankel*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *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, *Kwame Raoul* of Illinois, *Thomas J. Miller* of Iowa, *Maura Healey* of Massachusetts, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington.†

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†Briefs of *amici curiae* urging reversal in all cases were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Kyle D. Hawkins*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, *Matthew H. Frederick*, Deputy Solicitor General, and *Ari Cuenin* and *Lanora C. Pettit*, Assistant Solicitors General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, and *Patrick Morrisey* of West Virginia; for the Cato Institute et al. by *Ilya Shapiro* and *Josh Blackman*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Citizens United et al. by *Robert J. Olson*, *Jeremiah L. Morgan*, *Herbert W. Titus*, and *William J. Olson*; for the Immigration Reform Law Institute by *Christopher J. Hajec*; for Save Jobs USA et al. by *John M. Miano*; for the Southeastern Legal Foundation by *Kurt R. Hilbert*, *Kelly H. Brolly*, and *Kimberly S. Hermann*; and for Ronald A. Cass et al. by *Mr. Cass*, *pro se*.

Briefs of *amici curiae* urging affirmance in all cases were filed for the State of Nevada et al. by *Aaron D. Ford*, Attorney General of Nevada, *Heidi Parry Stern*, Solicitor General, *Craig A. Newby*, Deputy Solicitor General, *Dana Nessel*, Attorney General of Michigan, *Eric J. Wilson*, Deputy Attorney General of Wisconsin, and *Steve Bullock*, Governor of Montana; for Administrative Law Practitioners by *Kevin K. Russell*, *Daniel*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part IV.

In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as De-

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Woofter, *Charles H. Davis*, and *Erica Oleszczuk Evans*; for Administrative Law Scholars by *Seth P. Waxman* and *Alan E. Schoenfeld*; for Alianza Americas et al. by *Neil V. McKittrick*; for the American Council on Education et al. by *Neal K. Katyal*, *Jessica L. Ellsworth*, and *Mitchell P. Reich*; for the American Historical Association et al. by *Pratik A. Shah*, *Z. W. Julius Chen*, *Jessica Weisel*, and *Robert S. Chang*; for the American Professional Society on the Abuse of Children et al. by *Mary Kelly Persyn* and *Kelsi Brown Corkran*; for the Association of American Medical Colleges et al. by *Jonathan S. Franklin*, *Heather J. Alarcon*, and *Frank R. Trinity*; for Current and Former Prosecutors et al. by *Mary B. McCord*, *Joshua A. Geltzer*, *Annie L. Owens*, *Matthew J. Piers*, and *Caryn C. Lederer*; for Current Members of Congress et al. by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle*; for Empirical Scholars by *Nikolas Bowie* and *Oren Nimni*; for Former Homeland Security and Immigration Officials by *Joshua Riley*, *Menno Goedman*, *Albert Giang*, *Jeh C. Johnson*, and *Masha G. Hansford*; for Former National Security Officials by *Harold Hongju Koh*, *Hope R. Metcalf*, and *Phillip Spector*; for Former Service Secretaries et al. by *Charles B. Klein*, *Peter E. Perkowski*, and *Harvey Weiner*; for the Government of the United Mexican States by *Adela Elvia Ruth McChesney* and *Faye Magdalena Kolly*; for Immigration Law Scholars by *Harry Lee*; for Institutions of Higher Education by *Bruce V. Spiva*; for the Lawyers' Committee for Civil Rights Under Law et al. by *William D. Coston*, *Martin L. Saad*, *Kristen Clarke*, *Jon Greenbaum*, *Dariely Rodriguez*, and *Phylicia H. Hill*; for the NAACP Legal Defense & Education Fund, Inc., et al. by *Daniel Harawa*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, *Natasha Merle*, *Raymond Audain*, and *Cara McClellan*; for the National Association of Home Builders et al. by *Gavin R. Villareal*; for the National Education Association et al. by *Alice O'Brien*, *Emma Leheny*, and *Lubna A. Alam*; for the National Queer Asian Pacific Islander Alliance et al. by *Susan M. Finegan*; for the National School Boards Association et al. by *Richard P. Bress* and *Francisco M. Negrón, Jr.*; for Nineteen Colleges and Universities by *Anton Metlitsky* and *Jennifer B. Sokoler*; for Nonprofit Legal Services Organizations by *Maureen P. Alger*, *Monique R. Sherman*, *Jonathan S. Kolodner*, and *Jessa DeGroote*; for Public Citizen et al. by *Scott L. Nelson* and *Allison M. Zieve*; for the Public Interest Law Center et al. by *William Alden McDaniel, Jr.*, *Thomas W. Hazlett*, and *Mansi G. Shah*; for Service Employees Interna-

ferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity.

Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act (APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated.

I

A

In June 2012, the Secretary of Homeland Security issued a memorandum announcing an immigration relief program

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tional Union et al. by *Deepak Gupta*, *Nicole G. Berner*, *Claire Prestel*, *Harold C. Becker*, *Matthew J. Ginsburg*, and *Judith Rivlin*; for Teach for America, Inc., by *Ronald G. Blum* and *Harvey L. Rochman*; for *Texas v. United States* Defendant-Intervenors DACA Recipients et al. by *Nina Perales*, *Douglas Hallward-Driemeier*, *Gurbir S. Grewal*, Attorney General of New Jersey, and *Jeremy M. Feigenbaum* and *Glenn J. Moramarco*, Assistant Attorneys General; for the United States Conference of Catholic Bishops et al. by *Christopher J. Wright* and *Stephen W. Miller*; for United We Dream et al. by *Peter Karanjia* and *Geoffrey Brounell*; for Tim Cook et al. by *E. Joshua Rosenkranz*, *Mark S. Davies*, *Thomas M. Bondy*, *Jeremy R. Peterman*, and *Aaron Brecher*; for 109 Cities et al. by *Margaret L. Carter*, *Daniel R. Suvor*, *Michael N. Feuer*, *James P. Clark*, *Valerie L. Flores*, *Danielle Goldstein*, and *Michael Dundas*; for 127 Religious Organizations by *Steven A. Zalesin*, *Adeel A. Mangi*, *Farhana Khera*, and *Juvaria Khan*; and for 143 U. S. Business Associations et al. by *Andrew J. Pincus*.

for "certain young people who were brought to this country as children." App. to Pet. for Cert. in No. 18–587, p. 97a (App. to Pet. for Cert.). Known as DACA, the program applies to childhood arrivals who were under age 31 in 2012; have continuously resided here since 2007; are current students, have completed high school, or are honorably discharged veterans; have not been convicted of any serious crimes; and do not threaten national security or public safety. *Id.*, at 98a. DHS concluded that individuals who meet these criteria warrant favorable treatment under the immigration laws because they "lacked the intent to violate the law," are "productive" contributors to our society, and "know only this country as home." *Id.*, at 98a–99a.

"[T]o prevent [these] low priority individuals from being removed from the United States," the DACA Memorandum instructs Immigration and Customs Enforcement to "exercise prosecutorial discretion[ ] on an individual basis . . . by deferring action for a period of two years, subject to renewal." *Id.*, at 100a. In addition, it directs U. S. Citizenship and Immigration Services (USCIS) to "accept applications to determine whether these individuals qualify for work authorization during this period of deferred action," *id.*, at 101a, as permitted under regulations long predating DACA's creation, see 8 CFR §274a.12(c)(14) (2012) (permitting work authorization for deferred action recipients who establish "economic necessity"); 46 Fed. Reg. 25080–25081 (1981) (similar). Pursuant to other regulations, deferred action recipients are considered "lawfully present" for purposes of, and therefore eligible to receive, Social Security and Medicare benefits. See 8 CFR §1.3(a)(4)(vi); 42 CFR §417.422(h) (2019).

In November 2014, two years after DACA was promulgated, DHS issued a memorandum announcing that it would expand DACA eligibility by removing the age cap, shifting the date-of-entry requirement from 2007 to 2010, and extending the deferred action and work authorization period to

three years. App. to Pet. for Cert. 106a–107a. In the same memorandum, DHS created a new, related program known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. That program would have authorized deferred action for up to 4.3 million parents whose children were U. S. citizens or lawful permanent residents. These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients.

Before the DAPA Memorandum was implemented, 26 States, led by Texas, filed suit in the Southern District of Texas. The States contended that DAPA and the DACA expansion violated the APA's notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive's duty under the Take Care Clause of the Constitution. The District Court found that the States were likely to succeed on the merits of at least one of their claims and entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion. See *Texas* v. *United States*, 86 F. Supp. 3d 591, 677–678 (2015).

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. *Texas* v. *United States*, 809 F. 3d 134, 188 (2015). In opposing the injunction, the Government argued that the DAPA Memorandum reflected an unreviewable exercise of the Government's enforcement discretion. The Fifth Circuit majority disagreed. It reasoned that the deferred action described in the DAPA Memorandum was "much more than nonenforcement: It would affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens." *Id.*, at 166. From this, the majority concluded that the creation of the DAPA program was not an unreviewable action "committed to agency discretion by law." *Id.*, at 169 (quoting 5 U. S. C. § 701(a)(2)).

The majority then upheld the injunction on two grounds. It first concluded the States were likely to succeed on their procedural claim that the DAPA Memorandum was a sub-

stantive rule that was required to undergo notice and comment. It then held that the APA required DAPA to be set aside because the program was "manifestly contrary" to the INA, which "expressly and carefully provides legal designations allowing defined classes" to "receive the benefits" associated with "lawful presence" and to qualify for work authorization, 809 F. 3d, at 179–181, 186 (internal quotation marks omitted). Judge King dissented.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote, which meant that no opinion was issued. *United States* v. *Texas*, 579 U. S. 547 (2016) (*per curiam*). For the next year, litigation over DAPA and the DACA expansion continued in the Southern District of Texas, while implementation of those policies remained enjoined.

Then, in June 2017, following a change in Presidential administrations, DHS rescinded the DAPA Memorandum. In explaining that decision, DHS cited the preliminary injunction and ongoing litigation in Texas, the fact that DAPA had never taken effect, and the new administration's immigration enforcement priorities.

Three months later, in September 2017, Attorney General Jefferson B. Sessions III sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, "advis[ing]" that DHS "should rescind" DACA as well. App. 877. Citing the Fifth Circuit's opinion and this Court's equally divided affirmance, the Attorney General concluded that DACA shared the "same legal . . . defects that the courts recognized as to DAPA" and was "likely" to meet a similar fate. *Id.*, at 878. "In light of the costs and burdens" that a rescission would "impose[ ] on DHS," the Attorney General urged DHS to "consider an orderly and efficient wind-down process." *Ibid.*

The next day, Duke acted on the Attorney General's advice. In her decision memorandum, Duke summarized the history of the DACA and DAPA programs, the Fifth Circuit

opinion and ensuing affirmance, and the contents of the Attorney General's letter. App. to Pet. for Cert. 111a–117a. "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "letter from the Attorney General," she concluded that the "DACA program should be terminated." *Id.*, at 117a.

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months. For all other DACA recipients, previously issued grants of deferred action and work authorization would not be revoked but would expire on their own terms, with no prospect for renewal. *Id.*, at 117a–118a.

B

Within days of Acting Secretary Duke's rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision in the U. S. District Courts for the Northern District of California (*Regents*, No. 18–587), the Eastern District of New York (*Batalla Vidal*, No. 18–589), and the District of Columbia (*NAACP*, No. 18–588). The relevant claims are that the rescission was arbitrary and capricious in violation of the APA and that it infringed the equal protection guarantee of the Fifth Amendment's Due Process Clause.[1]

All three District Courts ruled for the plaintiffs, albeit at different stages of the proceedings.[2] In doing so, each court

[1] Plaintiffs also raised notice and comment claims, which uniformly failed below, and assorted due process challenges, some of which survived motions to dismiss. Those claims are not before us.

[2] In a related challenge not at issue here, the District Court for the District of Maryland granted partial summary judgment in favor of the Government. *Casa de Maryland* v. *United States Dept. of Homeland*

rejected the Government's threshold arguments that the claims were unreviewable under the APA and that the INA deprived the court of jurisdiction. 298 F. Supp. 3d 209, 223–224, 234–235 (DC 2018); 279 F. Supp. 3d 1011, 1029–1033 (ND Cal. 2018); 295 F. Supp. 3d 127, 150, 153–154 (EDNY 2017).

In *Regents* and *Batalla Vidal*, the District Courts held that the equal protection claims were adequately alleged. 298 F. Supp. 3d 1304, 1315 (ND Cal. 2018); 291 F. Supp. 3d 260, 279 (EDNY 2018). Those courts also entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious. These injunctions did not require DHS to accept new applications, but did order the agency to allow DACA recipients to "renew their enrollments." 279 F. Supp. 3d, at 1048; see 279 F. Supp. 3d 401, 437 (EDNY 2018).

In *NAACP*, the D. C. District Court took a different course. In April 2018, it deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, holding that Acting Secretary Duke's "conclusory statements were insufficient to explain the change in [the agency's] view of DACA's lawfulness." 298 F. Supp. 3d, at 243. The District Court stayed its order for 90 days to permit DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." *Id.*, at 245.

Two months later, Duke's successor, Secretary Kirstjen M. Nielsen, responded via memorandum. App. to Pet. for Cert. 120a–126a. She explained that, "[h]aving considered the

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Security, 284 F. Supp. 3d 758 (2018). After the Government filed petitions for certiorari in the instant cases, the Fourth Circuit reversed that decision and vacated Acting Secretary Duke's rescission as arbitrary and capricious. *Casa de Maryland* v. *United States Dept. of Homeland Security*, 924 F. 3d 684 (2019), cert. pending, No. 18–1469. The Fourth Circuit has since stayed its mandate.

Duke memorandum," she "decline[d] to disturb" the rescission. *Id.*, at 121a. Secretary Nielsen went on to articulate her "understanding" of Duke's memorandum, identifying three reasons why, in Nielsen's estimation, "the decision to rescind the DACA policy was, and remains, sound." *Ibid.* First, she reiterated that, "as the Attorney General concluded, the DACA policy was contrary to law." *Id.*, at 122a. Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. *Id.*, at 123a. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. *Id.*, at 123a–124a. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum. *Id.*, at 125a.

The Government asked the D. C. District Court to revise its prior order in light of the reasons provided by Secretary Nielsen, but the court declined. In the court's view, the new memorandum, which "fail[ed] to elaborate meaningfully" on the agency's illegality rationale, still did not provide an adequate explanation for the September 2017 rescission. 315 F. Supp. 3d 457, 460, 473–474 (2018).

The Government appealed the various District Court decisions to the Second, Ninth, and D. C. Circuits, respectively. In November 2018, while those appeals were pending, the Government simultaneously filed three petitions for certiorari before judgment. After the Ninth Circuit affirmed the nationwide injunction in *Regents*, see 908 F. 3d 476 (2018),

but before rulings from the other two Circuits, we granted the petitions and consolidated the cases for argument. 588 U. S. 919 (2019). The issues raised here are (1) whether the APA claims are reviewable, (2) if so, whether the rescission was arbitrary and capricious in violation of the APA, and (3) whether the plaintiffs have stated an equal protection claim.

II

The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin* v. *Massachusetts*, 505 U. S. 788, 796 (1992). It requires agencies to engage in "reasoned decisionmaking," *Michigan* v. *EPA*, 576 U. S. 743, 750 (2015) (internal quotation marks omitted), and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U. S. C. § 706(2)(A). Under this "narrow standard of review, . . . a court is not to substitute its judgment for that of the agency," *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009) (internal quotation marks omitted), but instead to assess only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971).

But before determining whether the rescission was arbitrary and capricious, we must first address the Government's contentions that DHS's decision is unreviewable under the APA and outside this Court's jurisdiction.

A

The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140

(1967) (quoting § 702). That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, § 701(a)(1), or that the "agency action is committed to agency discretion by law," § 701(a)(2). The latter exception is at issue here.

To "honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly," *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 23 (2018), confining it to those rare "administrative decision[s] traditionally left to agency discretion," *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993). This limited category of unreviewable actions includes an agency's decision not to institute enforcement proceedings, *Heckler* v. *Chaney*, 470 U. S. 821, 831–832 (1985), and it is on that exception that the Government primarily relies.

In *Chaney*, several death-row inmates petitioned the Food and Drug Administration (FDA) to take enforcement action against two States to prevent their use of certain drugs for lethal injection. The Court held that the FDA's denial of that petition was presumptively unreviewable in light of the well-established "tradition" that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion." *Id.*, at 831. We identified a constellation of reasons that underpin this tradition. To start, a non-enforcement decision "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," such as "whether the particular enforcement action requested best fits the agency's overall policies." *Ibid.* The decision also mirrors, "to some extent," a prosecutor's decision not to indict, which has "long been regarded as the special province of the Executive Branch." *Id.*, at 832. And, as a practical matter, "when an agency refuses to act" there is no action to "provide[ ] a focus for judicial review." *Ibid.*

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement deci-

sion at issue in *Chaney*. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class. *Ibid.* Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. App. to Pet. for Cert. 100a. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively "adjudicat[ions]." *Id.*, at 117a. And the result of these adjudications—DHS's decision to "grant deferred action," Brief for Petitioners 45—is an "affirmative act of approval," the very opposite of a "refus[al] to act," *Chaney*, 470 U. S., at 831–832. In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an "action [that] provides a focus for judicial review." *Id.*, at 832.

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security

and Medicare. See *supra*, at 10. Unlike an agency's refusal to take requested enforcement action, access to these types of benefits is an interest "courts often are called upon to protect." *Chaney*, 470 U. S., at 832. See also *Barnhart* v. *Thomas*, 540 U. S. 20 (2003) (reviewing eligibility determination for Social Security benefits).

Because the DACA program is more than a nonenforcement policy, its rescission is subject to review under the APA.

B

The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies.

Section 1252(b)(9) bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien." 66 Stat. 209, as amended, 8 U. S. C. § 1252(b)(9). That targeted language is not aimed at this sort of case. As we have said before, § 1252(b)(9) "does not present a jurisdictional bar" where those bringing suit "are not asking for review of an order of removal," "the decision . . . to seek removal," or "the process by which . . . removability will be determined." *Jennings* v. *Rodriguez*, 583 U. S. 281, 294–295 (2018) (plurality opinion); *id.*, at 355 (BREYER, J., dissenting). And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings.

Section 1252(g) is similarly narrow. That provision limits review of cases "arising from" decisions "to commence proceedings, adjudicate cases, or execute removal orders." § 1252(g). We have previously rejected as "implausible" the Government's suggestion that § 1252(g) covers "all claims arising from deportation proceedings" or imposes "a general jurisdictional limitation." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 482 (1999). The rescission, which revokes a deferred action program with associated benefits, is not a decision to "commence proceedings," much less to "adjudicate" a case or "execute" a removal order.

With these preliminary arguments out of the way, we proceed to the merits.

III

A

Deciding whether agency action was adequately explained requires, first, knowing where to look for the agency's explanation. The natural starting point here is the explanation provided by Acting Secretary Duke when she announced the rescission in September 2017. But the Government urges us to go on and consider the June 2018 memorandum submitted by Secretary Nielsen as well. That memo was prepared after the D. C. District Court vacated the Duke rescission and gave DHS an opportunity to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority." 298 F. Supp. 3d, at 245. According to the Government, the Nielsen Memorandum is properly before us because it was invited by the District Court and reflects the views of the Secretary of Homeland Security—the official responsible for immigration policy. Respondents disagree, arguing that the Nielsen Memorandum, issued nine months after the rescission, impermissibly asserts prudential and policy reasons not relied upon by Duke.

It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." *Michigan*, 576 U. S., at 758. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer "a fuller explanation of the agency's reasoning *at the time of the agency action*." *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 654 (1990) (emphasis added). See also *Alpharma, Inc.* v. *Leavitt*, 460 F. 3d 1, 5–6 (CADC 2006) (Garland, J.) (permitting an agency to provide an "amplified articulation" of a prior "conclusory" observation (internal quotation marks

omitted)). This route has important limitations. When an agency's initial explanation "indicate[s] the determinative reason for the final action taken," the agency may elaborate later on that reason (or reasons) but may not provide new ones. *Camp* v. *Pitts*, 411 U. S. 138, 143 (1973) (*per curiam*). Alternatively, the agency can "deal with the problem afresh" by taking *new* agency action. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 201 (1947) (*Chenery II*). An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

The District Court's remand thus presented DHS with a choice: rest on the Duke Memorandum while elaborating on its prior reasoning, or issue a new rescission bolstered by new reasons absent from the Duke Memorandum. Secretary Nielsen took the first path. Rather than making a new decision, she "decline[d] to disturb the Duke memorandum's rescission" and instead "provide[d] further explanation" for that action. App. to Pet. for Cert. 121a. Indeed, the Government's subsequent request for reconsideration described the Nielsen Memorandum as "additional explanation for [Duke's] decision" and asked the District Court to "leave in place [Duke's] September 5, 2017 decision to rescind the DACA policy." Motion to Revise Order in No. 17–cv–1907 etc. (D DC), pp. 2, 19. Contrary to the position of the Government before this Court, and of JUSTICE KAVANAUGH in dissent, *post*, at 64 (opinion concurring in judgment in part and dissenting in part), the Nielsen Memorandum was by its own terms not a new rule implementing a new policy.

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency's original reasons, and her explanation "must be viewed critically" to ensure that the rescission is not upheld on the basis of impermissible "*post hoc* rationalization." *Overton Park*, 401 U. S., at 420. But despite purporting to explain the Duke Memorandum, Secretary Nielsen's reasoning bears little relation-

ship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. See App. to Pet. for Cert. 117a. By contrast, Secretary Nielsen's new memorandum offered three "separate and independently sufficient reasons" for the rescission, *id.*, at 122a, only the first of which is the conclusion that DACA is illegal.

Her second reason is that DACA is, at minimum, legally *questionable* and should be terminated to maintain public confidence in the rule of law and avoid burdensome litigation. No such justification can be found in the Duke Memorandum. Legal uncertainty is, of course, related to illegality. But the two justifications are meaningfully distinct, especially in this context. While an agency might, for one reason or another, choose to do nothing in the face of uncertainty, illegality presumably requires remedial action of some sort.

The policy reasons that Secretary Nielsen cites as a third basis for the rescission are also nowhere to be found in the Duke Memorandum. That document makes no mention of a preference for legislative fixes, the superiority of case-by-case decisionmaking, the importance of sending a message of robust enforcement, or any other policy consideration. Nor are these points included in the legal analysis from the Fifth Circuit and the Attorney General. They can be viewed only as impermissible *post hoc* rationalizations and thus are not properly before us.

The Government, echoed by JUSTICE KAVANAUGH, protests that requiring a new decision before considering Nielsen's new justifications would be "an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 766, n. 6 (1969) (plurality opinion). See also *post*, at 67–68. Procedural requirements can often seem such. But here the rule serves important values of administrative law. Requiring a new decision before considering new reasons promotes "agency accountability," *Bowen* v. *American Hospital Assn.*, 476

U. S. 610, 643 (1986), by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply "convenient litigating position[s]." *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (internal quotation marks omitted). Permitting agencies to invoke belated justifications, on the other hand, can upset "the orderly functioning of the process of review," *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

JUSTICE KAVANAUGH asserts that this "foundational principle of administrative law," *Michigan*, 576 U. S., at 758, actually limits only what lawyers may argue, not what agencies may do. *Post*, at 67. While it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 539 (1981) ("[T]he *post hoc* rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action."); *Overton Park*, 401 U. S., at 419 (rejecting "litigation affidavits" from agency officials as "merely '*post hoc*' rationalizations").[3]

[3] JUSTICE KAVANAUGH further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. *Post*, at 67–68 (opinion concurring in judgment in part and dissenting in

Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

B

We turn, finally, to whether DHS's decision to rescind DACA was arbitrary and capricious. As noted earlier, Acting Secretary Duke's justification for the rescission was succinct: "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, she concluded—without elaboration—that the "DACA program should be terminated." App. to Pet. for Cert. 117a.[4]

Respondents maintain that this explanation is deficient for three reasons. Their first and second arguments work in tandem, claiming that the Duke Memorandum does not ade-

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part). But he cites no authority limiting this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument.

[4] The Government contends that Acting Secretary Duke also focused on litigation risk. Although the background section of her memo references a letter from the Texas Attorney General threatening to challenge DACA, the memo never asserts that the rescission was intended to avert litigation. And, given the Attorney General's conclusion that the policy was unlawful—and thus presumably could not be maintained or defended in its current form—it is difficult to see how the risk of litigation carried any independent weight.

quately explain the conclusion that DACA is unlawful, and that this conclusion is, in any event, wrong. While those arguments carried the day in the lower courts, in our view they overlook an important constraint on Acting Secretary Duke's decisionmaking authority—she was *bound* by the Attorney General's legal determination.

The same statutory provision that establishes the Secretary of Homeland Security's authority to administer and enforce immigration laws limits that authority, specifying that, with respect to "all questions of law," the determinations of the Attorney General "shall be controlling." 8 U. S. C. § 1103(a)(1). Respondents are aware of this constraint. Indeed they emphasized the point in the reviewability sections of their briefs. But in their merits arguments, respondents never addressed whether or how this unique statutory provision might affect our review. They did not discuss whether Duke was required to explain a legal conclusion that was not hers to make. Nor did they discuss whether the current suits challenging Duke's rescission decision, which everyone agrees was within her legal authority under the INA, are proper vehicles for attacking the Attorney General's legal conclusion.

Because of these gaps in respondents' briefing, we do not evaluate the claims challenging the explanation and correctness of the illegality conclusion. Instead we focus our attention on respondents' third argument—that Acting Secretary Duke "failed to consider . . . important aspect[s] of the problem" before her. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

Acting Secretary Duke plainly exercised such discretionary authority in winding down the program. See App. to Pet. for Cert. 117a–118a (listing the Acting Secretary's decisions on eight transition issues). Among other things, she specified that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals. *Ibid.*

But Duke did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off. The Attorney General concluded that "the DACA policy has the same legal . . . defects that the courts recognized as to DAPA." App. 878. So, to understand those defects, we look to the Fifth Circuit, the highest court to offer a reasoned opinion on the legality of DAPA. That court described the "core" issue before it as the "Secretary's decision" to grant "eligibility for benefits"—including work authorization, Social Security, and Medicare—to unauthorized aliens on "a class-wide basis." *Texas*, 809 F. 3d, at 170; see *id.*, at 148, 184. The Fifth Circuit's focus on these benefits was central to every stage of its analysis. See *id.*, at 155 (standing); *id.*, at 163 (zone of interest); *id.*, at 164 (applicability of § 1252(g)); *id.*, at 166 (reviewability); *id.*, at 176–177 (notice and comment); *id.*, at 184 (substantive APA). And the court ultimately held that DAPA was "manifestly contrary to the INA" precisely because it "would make 4.3 million otherwise removable aliens" eligible for work authorization and public benefits. *Id.*, at 181–182 (internal quotation marks omitted).[5]

[5] As the Fifth Circuit noted, DAPA recipients were eligible for Social Security and Medicare benefits because they had been designated "lawfully present." *Texas*, 809 F. 3d, at 168. Lawful presence is a statutory prerequisite for receipt of certain benefits. See *id.*, at 148 (citing 8 U. S. C. § 1611). It is not the same as forbearance nor does it flow inexorably from forbearance. Thus, while deferred action recipients have been designated lawfully present for purposes of Social Security and Medicare eligibility, see 8 CFR § 1.3; 42 CFR § 417.422(h), agencies can also exclude them from this designation, see 45 CFR § 152.2(8) (2019) (specifying that

But there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action is the decision to defer removal (and to notify the affected alien of that decision). See App. to Pet. for Cert. 99a. And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits. As it explained, the "challenged portion of DAPA's deferred-action program" was the decision to make DAPA recipients eligible for benefits. See *Texas*, 809 F. 3d, at 168, and n. 108. The other "[p]art of DAPA," the court noted, "involve[d] the Secretary's decision—at least temporarily—not to enforce the immigration laws as to a class of what he deem[ed] to be low-priority illegal aliens." *Id.*, at 166. Borrowing from this Court's prior description of deferred action, the Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.'" *Id.*, at 168 (quoting *Reno*, 525 U. S., at 484). And the Fifth Circuit underscored that nothing in its decision or the preliminary injunction "requires the Secretary to remove any alien or to alter" the Secretary's class-based "enforcement priorities." *Texas*, 809 F. 3d, at 166, 169. In other words, the Secretary's forbearance authority was unimpaired.

Acting Secretary Duke recognized that the Fifth Circuit's holding addressed the benefits associated with DAPA. In her memorandum she explained that the Fifth Circuit concluded that DAPA "conflicted with the discretion authorized by Congress" because the INA "'flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization.'" App. to Pet. for Cert. 114a (quoting *Texas*, 809 F. 3d, at 184). Duke did not characterize the opinion as one about forbearance.

DACA recipients are not considered lawfully present for purposes of coverage under the Affordable Care Act).

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for "[e]stablishing national immigration enforcement policies and priorities." 116 Stat. 2178, 6 U. S. C. § 202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

That reasoning repeated the error we identified in one of our leading modern administrative law cases, *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.* There, the National Highway Traffic Safety Administration (NHTSA) promulgated a requirement that motor vehicles produced after 1982 be equipped with one of two passive restraints: airbags or automatic seatbelts. 463 U. S., at 37–38, 46. Four years later, before the requirement went into effect, NHTSA concluded that automatic seatbelts, the restraint of choice for most manufacturers, would not provide effective protection. Based on that premise, NHTSA rescinded the passive restraint requirement in full. *Id.*, at 38.

We concluded that the total rescission was arbitrary and capricious. As we explained, NHTSA's justification supported only "disallow[ing] compliance by means of" automatic seatbelts. *Id.*, at 47. It did "not cast doubt" on the "efficacy of airbag technology" or upon "the need for a passive restraint standard." *Ibid.* Given NHTSA's prior judgment that "airbags are an effective and cost-beneficial lifesaving technology," we held that "the mandatory passive restraint rule [could] not be abandoned without any consideration whatsoever of an airbags-only requirement." *Id.*, at 51.

While the factual setting is different here, the error is the same. Even if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only "disallow[ing]" benefits. *Id.*, at 47. It did "not cast doubt" on the legality of forbearance or upon DHS's original reasons for extending forbearance to childhood arrivals. *Ibid.* Thus, given DHS's earlier judgment that forbearance is "especially justified" for "productive young people" who were brought here as children and "know only this country as home," App. to Pet. for Cert. 98a–99a, the DACA Memorandum could not be rescinded in full "without any consideration whatsoever" of a forbearance-only policy, *State Farm*, 463 U. S., at 51.[6]

The Government acknowledges that "[d]eferred action coupled with the associated benefits are the two legs upon which the DACA policy stands." Reply Brief 21. It insists, however, that "DHS was not required to consider whether DACA's illegality could be addressed by separating" the two. *Ibid.* According to the Government, "It was not arbitrary and capricious for DHS to view deferred action and its collateral benefits as importantly linked." *Ibid.* Perhaps. But that response misses the point. The fact that there may be a valid reason not to separate deferred action from benefits does not establish that DHS considered that option or that such consideration was unnecessary.

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[6] The three-page memorandum that established DACA is devoted entirely to forbearance, save for one sentence directing USCIS to "determine whether [DACA recipients] qualify for work authorization." App. to Pet. for Cert. 101a. The benefits associated with DACA flow from a separate regulation. See 8 CFR § 1.3(a)(4)(vi); see also 42 CFR § 417.422(h) (cross-referencing 8 CFR § 1.3). Thus, DHS could have addressed the Attorney General's determination that such benefits were impermissible under the INA by amending 8 CFR § 1.3 to exclude DACA recipients from those benefits without rescinding the DACA Memorandum and the forbearance policy it established. But Duke's rescission memo shows no cognizance of this possibility.

The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled. *Post*, at 59, n. 14 (opinion of THOMAS, J). It contends, however, that we should not "dissect" agency action "piece by piece." *Post*, at 58. The dissent instead rests on the Attorney General's legal determination—which considered only benefits—"to supply the 'reasoned analysis' " to support rescission of both benefits and forbearance. *Post*, at 60 (quoting *State Farm*, 463 U. S., at 42). But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the "alternative[s]" that are "within the ambit of the existing [policy]." *Id.*, at 51. Here forbearance was not simply "within the ambit of the existing [policy]," it was the centerpiece of the policy: DACA, after all, stands for "*Deferred Action* for Childhood Arrivals." App. to Pet. for Cert. 111a (emphasis added). But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke "entirely failed to consider [that] important aspect of the problem." *State Farm*, 463 U. S., at 43.

That omission alone renders Acting Secretary Duke's decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was "legitimate reliance" on the DACA Memorandum. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). When an agency changes course, as DHS did here, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' " *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 222 (2016) (quoting *Fox Television*, 556 U. S., at 515). "It would be arbitrary or capricious to ignore such matters." *Id.*, at 515. Yet that is what the Duke Memorandum did.

For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable

reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. Reply Brief 16–17; App. to Pet. for Cert. 125a. See also *post*, at 61 (opinion of THOMAS, J.). But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Respondents and their *amici* assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program. Brief for Respondent Regents of Univ. of California et al. in No. 18–587, p. 41 (Brief for Regents). The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U. S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. See *id.*, at 41–42; Brief for Respondent State of New York et al. in No. 18–589, p. 42 (Brief for New York). See also Brief for 143 Businesses as *Amici Curiae* 17 (estimating that hiring and training replacements would cost employers $6.3 billion). In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten years. Brief for Regents 6. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year. *Ibid.*

These are certainly noteworthy concerns, but they are not necessarily dispositive. To the Government and lead dis-

sent's point, DHS could respond that reliance on forbearance and benefits was unjustified in light of the express limitations in the DACA Memorandum. Or it might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight. And, even if DHS ultimately concludes that the reliance interests rank as serious, they are but one factor to consider. DHS may determine, in the particular context before it, that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it.

DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available. Acting Secretary Duke authorized DHS to process two-year renewals for those DACA recipients whose benefits were set to expire within six months. But Duke's consideration was solely for the purpose of assisting the agency in dealing with "administrative complexities." App. to Pet. for Cert. 116a–118a. She should have considered whether she had similar flexibility in addressing any reliance interests of DACA recipients. The lead dissent contends that accommodating such interests would be "another exercise of unlawful power," *post*, at 60 (opinion of THOMAS, J.), but the Government does not make that argument and DHS has already extended benefits for purposes other than reliance, following consultation with the Office of the Attorney General. App. to Pet. for Cert. 116a.

Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any

reliance interests engendered by DACA when exercising individualized enforcement discretion.

To be clear, DHS was not required to do any of this or to "consider all policy alternatives in reaching [its] decision." *State Farm*, 463 U. S., at 51. Agencies are not compelled to explore "every alternative device and thought conceivable by the mind of man." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 551 (1978). But, because DHS was "not writing on a blank slate," *post*, at 59, n. 14 (opinion of THOMAS, J.), it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

The lead dissent sees all the foregoing differently. In its view, DACA is illegal, so any actions under DACA are themselves illegal. Such actions, it argues, must cease immediately and the APA should not be construed to impede that result. See *post*, at 56–60 (opinion of THOMAS, J.).

The dissent is correct that DACA was rescinded because of the Attorney General's illegality determination. See *post*, at 57. But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests. Acting Secretary Duke should have considered those matters but did not. That failure was arbitrary and capricious in violation of the APA.

IV

Lastly, we turn to respondents' claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

The parties dispute the proper framing of this claim. The Government contends that the allegation that the Executive, motivated by animus, ended a program that disproportionately benefits certain ethnic groups is a selective enforcement claim. Such a claim, the Government asserts, is barred by our decision in *Reno* v. *American-Arab Anti-*

Discrimination Committee. See 525 U. S., at 488 (holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"). Respondents counter that their claim falls outside the scope of that precedent because they are not challenging individual enforcement proceedings. We need not resolve this debate because, even if the claim is cognizable, the allegations here are insufficient.

To plead animus, a plaintiff must raise a plausible inference that an "invidious discriminatory purpose was a motivating factor" in the relevant decision. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Possible evidence includes disparate impact on a particular group, "[d]epartures from the normal procedural sequence," and "contemporary statements by members of the decisionmaking body." *Id.*, at 266–268. Tracking these factors, respondents allege that animus is evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission; and (3) pre- and post-election statements by President Trump. Brief for New York 54–55.

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. See B. Baker, DHS, Office of Immigration Statistics, Population Estimates, Illegal Alien Population Residing in the United States: January 2015, Table 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.

Second, there is nothing irregular about the history leading up to the September 2017 rescission. The lower courts concluded that "DACA received reaffirmation by [DHS] as

recently as three months before the rescission," 908 F. 3d, at 519 (quoting 298 F. Supp. 3d, at 1315), referring to the June 2017 DAPA rescission memo, which stated that DACA would "remain in effect," App. 870. But this reasoning confuses abstention with reaffirmation. The DAPA memo did not address the merits of the DACA policy or its legality. Thus, when the Attorney General later determined that DACA shared DAPA's legal defects, DHS's decision to reevaluate DACA was not a "strange about-face." 908 F. 3d, at 519. It was a natural response to a newly identified problem.

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. As the *Batalla Vidal* court acknowledged, respondents did not "identif[y] statements by [either] that would give rise to an inference of discriminatory motive." 291 F. Supp. 3d, at 278. Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue. *Arlington Heights*, 429 U. S., at 268. Thus, like respondents' other points, the statements fail to raise a plausible inference that the rescission was motivated by animus.

* * *

We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." *Chenery II*, 332 U. S., at 207. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a

reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

The judgment in *NAACP*, No. 18–588, is affirmed.[7] The judgment in *Regents*, No. 18–587, is vacated in part and reversed in part. And in *Batalla Vidal*, No. 18–589, the February 13, 2018 order granting respondents' motion for a preliminary injunction is vacated, the November 9, 2017 order partially denying the Government's motion to dismiss is affirmed in part, and the March 29, 2018 order partially denying the balance of the Government's motion to dismiss is reversed in part. All three cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

Respondents' equal protection challenges come to us in a preliminary posture. All that respondents needed to do at this stage of the litigation was state sufficient facts that would "allo[w a] court to draw the reasonable inference that [a] defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009). The three courts to evaluate respondents' pleadings below held that they cleared this modest threshold. 908 F. 3d 476, 518–520 (CA9 2018) (af-

[7] Our affirmance of the *NAACP* order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions issued by the District Courts in *Regents* and *Batalla Vidal*.

firming the District Court's denial of the Government's motion to dismiss); see also *Batalla Vidal* v. *Nielsen*, 291 F. Supp. 3d 260, 274 (EDNY 2018).

I too would permit respondents' claims to proceed on remand. The complaints each set forth particularized facts that plausibly allege discriminatory animus. The plurality disagrees, reasoning that "[n]one of these points, either singly or in concert, establishes a plausible equal protection claim." *Ante*, at 34. But it reaches that conclusion by discounting some allegations altogether and by narrowly viewing the rest.

First, the plurality dismisses the statements that President Trump made both before and after he assumed office. The *Batalla Vidal* complaints catalog then-candidate Trump's declarations that Mexican immigrants are "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." 291 F. Supp. 3d, at 276 (internal quotation marks omitted). The *Regents* complaints additionally quote President Trump's 2017 statement comparing undocumented immigrants to "animals" responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS 13." 298 F. Supp. 3d 1304, 1314 (ND Cal. 2018) (internal quotation marks omitted). The plurality brushes these aside as "unilluminating," "remote in time," and having been "made in unrelated contexts." *Ante*, at 35.

But "nothing in our precedent supports [the] blinkered approach" of disregarding any of the campaign statements as remote in time from later-enacted policies. *Trump* v. *Hawaii*, 585 U. S. 667, 738, n. 3 (2018) (SOTOMAYOR, J., dissenting). Nor did any of the statements arise in unrelated contexts. They bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA. Cf. *ibid.* (noting that Presidential Proclamation No. 9645, 82 Fed.

Reg. 45161 (2017), which barred entry of individuals from several Muslim-majority countries, was an outgrowth of the President's campaign statements about Muslims). Taken together, "the words of the President" help to "create the strong perception" that the rescission decision was "contaminated by impermissible discriminatory animus." 585 U. S., at 739–740 (opinion of SOTOMAYOR, J.). This perception provides respondents with grounds to litigate their equal protection claims further.

Next, the plurality minimizes the disproportionate impact of the rescission decision on Latinos after considering this point in isolation. *Ante*, at 34 ("Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds"). But the impact of the policy decision must be viewed in the context of the President's public statements on and off the campaign trail. At the motion-to-dismiss stage, I would not so readily dismiss the allegation that an executive decision disproportionately harms the same racial group that the President branded as less desirable mere months earlier.

Finally, the plurality finds nothing untoward in the "specific sequence of events leading up to the challenged decision." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977). I disagree. As late as June 2017, DHS insisted it remained committed to DACA, even while rescinding a related program, the Deferred Action for Parents of Americans and Lawful Permanent Residents. App. 718–720. But a mere three months later, DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination. The abrupt change in position plausibly suggests that something other than questions about the legality of DACA motivated the rescission decision. Accordingly, it raises the possibility of a "significant mismatch between the decision . . . made and the rationale . . . provided." *Department of Commerce* v.

New York, 588 U. S. 752, 783 (2019). Only by bypassing context does the plurality conclude otherwise.

* * *

The facts in respondents' complaints create more than a "sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U. S., at 678. Whether they ultimately amount to actionable discrimination should be determined only after factual development on remand. Because the Court prematurely disposes of respondents' equal protection claims by overlooking the strength of their complaints, I join all but Part IV of the opinion and do not concur in the corresponding part of the judgment.

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

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency's policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end.

Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS' initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court's duty to apply the law according to neutral principles, and the ripple effects of the majority's error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority's holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today's decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor

provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. I respectfully dissent in part.[1]

I

A

In 2012, after more than two dozen attempts by Congress to grant lawful status to aliens who were brought to this country as children,[2] the then-Secretary of Homeland Security Janet Napolitano announced, by memorandum, a new "prosecutorial discretion" policy known as DACA. App. to Pet. for Cert. in No. 18–587, p. 97a. The memorandum directed immigration enforcement officers not to remove "certain young people who were brought to this country as chil-

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[1] I concur in the judgment insofar as the majority rejects respondents' equal protection claim.

[2] See Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001, H. R. 1582, 107th Cong., 1st Sess.; Student Adjustment Act of 2001, H. R. 1918, 107th Cong., 1st Sess.; DREAM Act, S. 1291, 107th Cong., 1st Sess. (2001); DREAM Act, S. 1545, 108th Cong., 1st Sess. (2003); Student Adjustment Act of 2003, H. R. 1684, 108th Cong., 1st Sess.; DREAM Act, S. 2863, 108th Cong., 2d Sess., Tit. XVIII (2003); DREAM Act of 2005, S. 2075, 109th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess., Tit. VI, Subtitle C; American Dream Act, H. R. 5131, 109th Cong., 2d Sess. (2006); DREAM Act of 2007, S. 774, 110th Cong., 1st Sess.; DREAM Act of 2007, S. 2205, 110th Cong., 1st Sess.; STRIVE Act of 2007, H. R. 1645, 110th Cong., 1st Sess., Tit. VI, Subtitle B; Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., 1st Sess., Tit. VI, Subtitle C; DREAM Act of 2009, S. 729, 111th Cong., 1st Sess.; American Dream Act, H. R. 1751, 111th Cong., 1st Sess.; Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong., 2d Sess., Tit. V, Subtitle D; DREAM Act of 2010, S. 3827, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3962, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3963, 111th Cong., 2d Sess.; DREAM Act of 2010, S. 3992, 111th Cong., 2d Sess.; DREAM Act of 2010, H. R. 6497, 111th Cong., 2d Sess.; DREAM Act of 2011, S. 952, 112th Cong., 1st Sess.

dren" that met delineated criteria. *Id.*, at 97a–98a. In the Secretary's view, the program was consistent with "the framework of the existing law." *Id.*, at 101a.

DACA granted a renewable 2-year period of "deferred action" that made approximately 1.7 million otherwise removable aliens eligible to remain in this country temporarily.[3] By granting deferred action, the memorandum also made recipients eligible for certain state and federal benefits, including Medicare and Social Security. See 8 U. S. C. §§ 1611(b)(2)–(4); 8 CFR § 1.3(a)(4)(vi) (2020); 45 CFR § 152.2(4)(vi) (2019). In addition, deferred action enabled the recipients to seek work authorization. 8 U. S. C. § 1324a(h)(3)(B); 8 CFR § 274a.12(c)(14). Despite these changes, the memorandum contradictorily claimed that it "confer[red] no substantive right [or] immigration status," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." App. to Pet. for Cert. in No. 18–587, at 101a.

In 2014, then-Secretary of Homeland Security Jeh Johnson broadened the deferred-action program in yet another brief memorandum. This 2014 memorandum expanded DACA eligibility by extending the deferred-action period to three years and by relaxing other criteria. It also implemented a related program, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DAPA allowed unlawfully present parents to obtain deferred action derivatively through their children who were either citizens or lawful permanent residents. Approximately 4.3 million aliens qualified for DAPA and, as with DACA, these individuals would have become eligible for certain federal and state benefits upon the approval of their DAPA applications. See *Texas* v. *United States*, 809 F. 3d 134, 181 (CA5

[3] See J. Passel & M. Lopez, Pew Research Center, Up to 1.7 Million Unauthorized Immigrant Youth May Benefit From New Deportation Rules (Aug. 14, 2012).

2015). Nevertheless, the 2014 memorandum repeated the incongruous assertion that these programs "d[id] not confer any form of legal status in this country" and added that deferred action "may be terminated at any time at the agency's discretion." App. to Pet. for Cert. in No. 18–587, at 104a.

B

Twenty-six States filed suit to enjoin the implementation of these new programs, DAPA and "expanded DACA," maintaining that they violated the Constitution, the Administrative Procedure Act (APA), and the Immigration and Naturalization Act (INA). The States contended that, because the 2014 memorandum allowed aliens to receive deferred action and other benefits, it amounted to a legislative rule that had to comply with the APA's notice and comment procedures. The States also argued that DHS' decision to recategorize an entire class of aliens from "unlawfully present" to "lawfully present" exceeded its statutory authority under the federal immigration laws. According to the States, these defects rendered the 2014 memorandum arbitrary, capricious, or otherwise not in accordance with law.

The District Court preliminarily enjoined DAPA and expanded DACA. The Fifth Circuit affirmed, rejecting DHS' claim that the programs were an exercise of prosecutorial discretion. *Texas*, 809 F. 3d, at 167, 188. The court concluded that the States were likely to succeed on their claim that the 2014 memorandum was a legislative rule that had to be adopted through notice and comment rulemaking. *Id.*, at 171–178. The court further concluded that the 2014 memorandum was "substantively contrary to law" because the INA did not grant DHS the statutory authority to implement either program. *Id.*, at 170, 178–186.

This Court affirmed the Fifth Circuit's judgment by an equally divided vote. *United States* v. *Texas*, 579 U. S. 547 (2016) (*per curiam*).

C

The 2014 memorandum was rescinded on June 15, 2017, before taking effect. Shortly after that rescission, several of the plaintiff States sent a letter to then-Attorney General Jefferson Sessions III. They contended that the 2012 DACA memorandum was also legally defective because, "just like DAPA, DACA unilaterally confers eligibility for . . . lawful presence without any statutory authorization from Congress." App. 873. The States wrote that they would amend their complaint to challenge DACA if the administration did not rescind the 2012 memorandum creating DACA by September 5, 2017.

On September 4, then-Attorney General Sessions wrote to then-Acting Secretary of Homeland Security Elaine Duke, advising her to rescind DACA. Sessions stated that, in his legal opinion, DACA took effect "through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." *Id.*, at 877. The letter also stated that DACA was infected with the "same legal . . . defects that the courts recognized as to DAPA," *id.*, at 878, and thus DACA would likely be enjoined as well.

Then-Acting Secretary Duke rescinded DACA the next day, also through a memorandum. Her memorandum began by noting that DACA "purported to use deferred action . . . to confer certain benefits to illegal aliens that Congress had not otherwise acted to provide by law." App. to Pet. for Cert. in No. 18–587, at 112a. It described the history of the Fifth Circuit litigation, noting that the court had concluded that DAPA "conflicted with the discretion authorized by Congress" because "the [INA] flatly does not permit the reclassification of millions of illegal aliens as lawfully present." *Id.*, at 114a (internal quotation marks omitted). Finally, the

memorandum accepted then-Attorney General Sessions' legal determination that DACA was unlawful for the same reasons as DAPA. See § 1103(a)(1). In light of the legal conclusions reached by the Fifth Circuit and the Attorney General, then-Acting Secretary Duke set forth the procedures for winding down DACA.

These three cases soon followed. In each, respondents claimed, among other things, that DACA's rescission was arbitrary and capricious under the APA. Two District Courts granted a preliminary nationwide injunction, while the third vacated the rescission.

II

"'[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.'" *Arlington* v. *FCC*, 569 U. S. 290, 317 (2013) (ROBERTS, C. J., dissenting) (quoting *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 374 (1986)). When an agency exercises power beyond the bounds of its authority, it acts unlawfully. See, *e. g.*, *SAS Institute Inc.* v. *Iancu*, 584 U. S. 357, 368, n. (2018). The 2012 memorandum creating DACA provides a poignant illustration of ultra vires agency action.

DACA alters how the immigration laws apply to a certain class of aliens. "DACA [recipients] primarily entered the country either by overstaying a visa or by entering without inspection, and the INA instructs that aliens in both classes are removable." *Texas* v. *United States*, 328 F. Supp. 3d 662, 713 (SD Tex. 2018) (footnote omitted). But DACA granted its recipients deferred action, *i. e.*, a decision to "decline to institute [removal] proceedings, terminate [removal] proceedings, or decline to execute a final order of [removal]." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999) (internal quotation marks omitted). Under other regulations, recipients of deferred action are deemed lawfully present for purposes of certain federal benefits. See *supra*, at 42. Thus, DACA in effect created a new exception to the statutory provisions governing removability

and, in the process, conferred lawful presence on an entire class of aliens.

To lawfully implement such changes, DHS needed a grant of authority from Congress to either reclassify removable DACA recipients as lawfully present, or to exempt the entire class of aliens covered by DACA from statutory removal procedures. No party disputes that the immigration statutes lack an express delegation to accomplish either result. And, an examination of the highly reticulated immigration regime makes clear that DHS has no implicit discretion to create new classes of lawful presence or to grant relief from removal out of whole cloth. Accordingly, DACA is substantively unlawful.

This conclusion should begin and end our review. The decision to rescind an unlawful agency action is *per se* lawful. No additional policy justifications or considerations are necessary. And, the majority's contrary holding—that an agency is not only permitted, but required, to continue an ultra vires action—has no basis in law.

A

Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions.

1

I begin with lawful presence. As just stated, nothing in the federal immigration laws expressly delegates to DHS the unfettered discretion to create new categories of lawfully present aliens. And, there is no basis for concluding that Congress implicitly delegated to DHS the power to reclassify categories of aliens as lawfully present. The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively

provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways.

For example, federal immigration laws provide over 60 temporary nonimmigrant visa options, including visas for ambassadors, full-time students and their spouses and children, those engaged to marry a United States citizen within 90 days of arrival, athletes and performers, and aliens with specialized knowledge related to their employers. See §§ 1101(a)(15)(A)–(V), 1184; 8 CFR § 214.1; see also Congressional Research Service, J. Wilson, Nonimmigrant and Immigrant Visa Categories: Data Brief 1–6 (2019) (Table 1). In addition, the statutes permit the Attorney General to grant temporary "parole" into the United States "for urgent humanitarian reasons or [a] significant public benefit," 8 U. S. C. § 1182(d)(5)(A); provide for temporary protected status when the Attorney General finds that removal to a country with an ongoing armed conflict "would pose a serious threat to [an alien's] personal safety," § 1254a(b)(1)(A); and allow the Secretary of Homeland Security (in consultation with the Secretary of State) to waive visa requirements for certain aliens for up to 90 days, §§ 1187(a)–(d).

The immigration laws are equally complex and detailed when it comes to obtaining lawful permanent residence. Congress has expressly specified numerous avenues for obtaining an immigrant visa, which aliens may then use to become lawful permanent residents. §§ 1201, 1255(a). Among other categories, immigrant visas are available to specified family-sponsored aliens, aliens with advanced degrees or exceptional abilities, certain types of skilled and unskilled workers, "special immigrants," and those entering the country to "engag[e] in a new commercial enterprise." §§ 1153(a)–(b), 1154; see also Congressional Research Service, Nonimmigrant and Immigrant Visa Categories, at 6–7 (Table 2). Refugees and asylees also may receive lawful

permanent residence under certain conditions, § 1159; 8 CFR §§ 209.1, 209.2.[4] As with temporary lawful presence, each avenue to lawful permanent residence status has its own set of rules and exceptions.[5]

As the Fifth Circuit held in the DAPA litigation, a conclusion with which then-Attorney General Sessions agreed, "specific and detailed provisions [of] the INA expressly and carefully provid[e] legal designations allowing defined classes of aliens to be lawfully present." *Texas*, 809 F. 3d, at 179. In light of this elaborate statutory scheme, the lack of any similar provision for DACA recipients convincingly establishes that Congress left DHS with no discretion to create an additional class of aliens eligible for lawful presence. Congress knows well how to provide broad discretion, and it has provided open-ended delegations of authority in statutes too numerous to name. But when it comes to lawful presence, Congress did something strikingly different. Instead of enacting a statute with "broad general directives" and leaving it to the agency to fill in the lion's share of the details, *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989), Congress put in place intricate specifications governing eligibility for lawful presence. This comprehensive scheme indicates that DHS has no discretion to supplement or amend the statutory provisions in any manner, least of all by memorandum. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted" (internal quotation

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[4] The immigration statutes also provide for conditional lawful permanent residence status. See § 1186a(b)(1)(A)(i) (two years for spouses to demonstrate that the marriage "was [not] entered into for the purpose of procuring an alien's admission as an immigrant"); § 1186b (qualifying business entrepreneurs).

[5] For instance, Congress has carved out rules for aliens who served in the Armed Forces, §§ 1438–1440, and alien spouses who have been subject to domestic abuse, §§ 1186a(c)(4)(C)–(D).

marks omitted)); see also *ETSI Pipeline Project* v. *Missouri*, 484 U. S. 495, 509–510 (1988).

2

The relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS' delegated authority. Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See *Texas*, 328 F. Supp. 3d, at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute's removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption.

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. See 8 U. S. C. §§ 1154(a)(1)(D)(i)(II), (IV) (certain individuals covered under the Violence Against Women Act are "eligible for deferred action"); Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1522 ("'Any individual described in subclause (I) is eligible for deferred action'"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, § 423(b), 115 Stat. 361 ("Such spouse, child, son, or daughter may be eligible for deferred action"); National Defense Authorization Act for Fiscal Year 2004, §§ 1703(c)(1)(A), (2), 117 Stat. 1694–1695 ("Such spouse or child shall be eligible for deferred action").[6]

[6] In the DAPA litigation, DHS noted that some deferred-action programs have been implemented by the Executive Branch without explicit legislation. But "'[p]ast practice does not, by itself, create [executive] power.'" *Medellín* v. *Texas*, 552 U. S. 491, 532 (2008) (quoting *Dames &*

Congress has failed to provide similar explicit provisions for DACA recipients, and the immigration laws contain no indication that DHS can, at will, create its own categorical policies for deferred action.

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. §§ 1229b(a)–(b). And certain nonpermanent residents may have their status adjusted to permanent residence during these proceedings. § 1229b(b)(2). Aliens can apply for asylum or withholding of removal during removal proceedings unless they have committed certain crimes. §§ 1158, 1231(b)(3). Applicants for certain nonimmigrant visas may be granted a stay of removal until the visa application is adjudicated. § 1227(d). And, aliens may voluntarily depart rather than be subject to an order of removal. § 1229c.

In sum, like lawful presence, Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discre-

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Moore v. *Regan*, 453 U. S. 654, 686 (1981)). If any of these programs had been challenged, it would seem that they would be legally infirm for the same reasons as DACA. Moreover, if DHS had the authority to create new categories of aliens eligible for deferred action, then all of Congress' deferred-action legislation was but a superfluous exercise. *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001). Finally, whereas some deferred-action programs were followed by legislation, DACA has existed for eight years, and Congress is no closer to a legislative solution than it was in 2012. See, *e. g.*, American Dream and Promise Act of 2019, H. R. 6, 116th Cong., 1st Sess.

tion to DHS to provide additional programmatic forms of relief.[7]

3

Finally, DHS could not appeal to general grants of authority, such as the Secretary's ability to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter," § 1103(a)(3), or to "[e]stablis[h] national immigration enforcement policies and priorities," 6 U. S. C. § 202(5). See also 8 U. S. C. § 1103(g)(2). Because we must interpret the statutes "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569 (1995), these grants of authority must be read alongside the express limits contained within the statute. Basing the Secretary's ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by "allow[ing the Secretary of DHS] to grant lawful presence . . . to any illegal alien in the United States." *Texas*, 809 F. 3d, at 184. Not only is this "an untenable position in light of the INA's intricate system," *ibid.*, but it would also render many of those provisions wholly superfluous due to DHS' authority to disregard them at will, *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001). And in addition to these fatal problems, adopting a broad interpretation of these general grants of authority would run afoul of the presumption 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). And it

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[7] It is uncontested that deferred action frequently occurs on a case-by-case basis, often justified on the grounds that the agency lacks resources to remove all removable aliens. Even assuming that these ad hoc exercises of discretion are permissible, however, we have stated that "[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 327 (2014).

would also conflict with the major questions doctrine, which is based on the expectation that Congress speaks clearly when it delegates the power to make "decisions of vast economic and political significance." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (*UARG*) (internal quotation marks omitted); see also *Texas* v. *United States*, 787 F. 3d 733, 760–761 (CA5 2015).

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is "inconsisten[t] with the design and structure of the statute as a whole." *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 353 (2013). As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, "[i]nstead of merely refusing to enforce the INA's removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence . . . to individuals Congress has deemed deportable or removable." *Texas* v. *United States*, 86 F. Supp. 3d 591, 654 (SD Tex. 2015). The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as "alien entrepreneurs," § 1186b, is simultaneously capacious enough for DHS to grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary's pen.

B

Then-Attorney General Sessions concluded that the initial DACA program suffered from the "same legal . . . defects" as DAPA and expanded DACA, finding that, like those programs, DACA was implemented without statutory authority. App. 877–878. Not only was this determination correct, but

it is also dispositive for purposes of our review. "It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988). DHS had no authority here to create DACA, and the unlawfulness of that program is a sufficient justification for its rescission.

The majority opts for a different path, all but ignoring DACA's substantive legal defect. See *ante*, at 24–25. On the majority's understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule "has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court's opinion." *Massachusetts* v. *EPA*, 549 U. S. 497, 536 (2007) (ROBERTS, C. J., dissenting).

The lack of support for the majority's position is hardly surprising in light of our Constitution's separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void *ab initio*. Cf. *Clinton* v. *City of New York*, 524 U. S. 417 (1998); *INS* v. *Chadha*, 462 U. S. 919 (1983); see also *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 542, n. 5 (2014) (Scalia, J., dissenting); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 487 (1989) (Kennedy, J., concurring in judgment). In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, *Arlington*, 569 U. S., at 327 (ROBERTS, C. J., dissenting), not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute's clear limits, see *UARG*, 573 U. S., at 327–328; *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

Under our precedents, DHS can only exercise the authority that Congress has chosen to delegate to it. See *UARG*, 573 U. S., at 327. In implementing DACA, DHS under the

Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

III

The majority's demanding review of DHS' decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA's procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely provides an independent basis for rescinding DACA. But at the very least, this procedural defect compounds the absurdity of the majority's position in these cases.

As described above, DACA fundamentally altered the immigration laws. It created a new category of aliens who, as a class, became exempt from statutory removal procedures, and it gave those aliens temporary lawful presence. Both changes contravened statutory limits. DACA is thus what is commonly called a substantive or legislative rule.[8] As the name implies, our precedents state that legislative rules are those that "have the force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295 (1979) (internal quotation marks omitted).

Our precedents allow the vast majority of legislative rules to proceed through so-called "informal" notice and comment rulemaking. See *United States* v. *Florida East Coast R.*

[8] The majority tacitly acknowledges as much, as it must. See *ante*, at 18–19. Otherwise, the majority would have to accept that DACA was nothing more than a policy of prosecutorial discretion, which would make its rescission unreviewable. See *Heckler* v. *Chaney*, 470 U. S. 821, 831 (1985).

Co., 410 U. S. 224, 237–238 (1973).[9] But under our precedents, an agency must engage in certain procedures mandated by the APA before its rule carries legal force. *Kisor* v. *Wilkie*, 588 U. S. 558, 584 (2019) (plurality opinion) ("[A] legislative rule, . . . to be valid[,] must go through notice and comment"); *id.*, at 607 (GORSUCH, J., concurring in judgment) (same); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96 (2015); cf. *Azar* v. *Allina Health Services*, 587 U. S. 566, 568 (2019) (same with respect to materially identical procedures under the Medicare Act). These procedures specify that the agency "shall" publish a notice of proposed rulemaking in the Federal Register, justify the rule by reference to legal authority, describe "the subjects and issues involved" in the rule, and allow interested parties to submit comments. 5 U. S. C. §§ 553(b)–(c); see also *Kisor*, 588 U. S., at 607 (opinion of GORSUCH, J.). As we have recognized recently, use of the word "shall" indicates that these procedures impose mandatory obligations on the agency before it can adopt a valid binding regulation. See *Maine Community Health Options* v. *United States*, 590 U. S. 296, 310 (2020). After undergoing notice and comment, the agency then publishes the final rule, which must "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). Only after completing this process is the legislative rule a valid law. See *Kisor*, 588 U. S., at 607 (opinion of GORSUCH, J.).[10]

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[9] As I have previously pointed out, "the APA actually contemplated a much more formal process for most rulemaking." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 128, n. 5 (2015) (opinion concurring in judgment).

[10] The APA also provides certain exceptions from notice and comment rulemaking. For example, an agency may promulgate a legally binding rule without notice and comment if good cause exists to do so. 5 U. S. C. § 553(b)(B). This text would become a nullity if the agency could achieve

Because DACA has the force and effect of law, DHS was required to observe the procedures set out in the APA if it wanted to promulgate a legislative rule. It is undisputed, however, that DHS did not do so. It provided no opportunity for interested parties to submit comments regarding the effect that the program's dramatic and very significant change in immigration law would have on various aspects of society. It provided no discussion of economic considerations or national security interests. Nor did it provide any substantial policy justifications for treating young people brought to this country differently from other classes of aliens who have lived in the country without incident for many years. And, it did not invoke any law authorizing DHS to create such a program beyond its inexplicable assertion that DACA was consistent with existing law. Because DHS failed to engage in the statutorily mandated process, DACA never gained status as a legally binding regulation that could impose duties or obligations on third parties. See *id.*, at 584 (plurality opinion); *id.*, at 607 (opinion of GORSUCH, J.).

Given this state of affairs, it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill *any* ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning. And, it is well established that we do not remand for an agency to correct its reasoning when it was required by law to take or abstain from an action. See *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 544–545 (2008). Here, remand would be futile, because no amount of policy explanation could cure the fact that DHS lacked statutory authority to enact DACA in the first place.

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the same effect by simply dispensing with notice and comment procedures altogether.

Instead of recognizing this, the majority now requires the rescinding Department to treat the invalid rule as though it were legitimate. As just explained, such a requirement is not supported by the APA.[11] It is also absurd, as evidenced by its application to DACA in these cases. The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA's issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. See *infra*, at 61. The majority's demand for such an explanation here simply makes little sense.

At bottom, of course, none of this matters, because DHS *did* provide a sufficient explanation for its action. DHS' statement that DACA was ultra vires was more than sufficient to justify its rescission.[12] By requiring more, the majority has distorted the APA review process beyond recognition, further burdening all future attempts to rescind unlawful programs. Plaintiffs frequently bring successful challenges to agency actions by arguing that the agency has impermissibly dressed up a legislative rule as a policy statement and must comply with the relevant procedures before functionally binding regulated parties. See, *e. g.*, *Mendoza* v. *Perez*, 754 F. 3d 1002 (CADC 2014); *Natural Resources Defense Council* v. *EPA*, 643 F. 3d 311 (CADC 2011); *National Family Planning & Reproductive Health Assn., Inc.* v. *Sullivan*, 979 F. 2d 227 (CADC 1992). But going forward,

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[11] Thus, it is not that the APA "*should* not" be construed to support the majority's result, *ante*, at 33 (emphasis added), it is that the APA does not and *cannot* support that result.

[12] I express no view on what other reasons would justify an agency's decision to rescind a procedurally unlawful action. I merely point out that correctly concluding that the program was illegal is sufficient.

when a rescinding agency inherits an invalid legislative rule that ignored virtually every rulemaking requirement of the APA, it will be obliged to overlook that reality. Instead of simply terminating the program because it did not go through the requisite process, the agency will be compelled to treat an invalid legislative rule as though it were legitimate.[13]

IV

Even if I were to accept the majority's premise that DACA's rescission required additional policy justifications, the majority's reasons for setting aside the agency's decision still fail.

A

First, the majority claims that the Fifth Circuit discussed only the legality of the 2014 memorandum's conferral of benefits, not its "forbearance component"—*i. e.*, the decision not to place DACA recipients into removal proceedings. *Ante*, at 27. The majority, therefore, claims that, notwithstanding the then-Attorney General's legal conclusion, then-Acting Secretary Duke was required to consider revoking DACA recipients' lawful presence and other attendant benefits while continuing to defer their removal. *Ante*, at 29. Even assuming the majority correctly characterizes the Fifth Circuit's opinion, it cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing

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[13] In my view, even if DACA were permitted under the federal immigration laws and had complied with the APA, it would still violate the Constitution as an impermissible delegation of legislative power. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 77 (2015) (THOMAS, J., concurring in judgment). Putting aside this constitutional concern, however, the notice and comment process at least attempts to provide a "surrogate political process" that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process. Asimow, Interim-Final Rules: Making Haste Slowly, 51 Admin. L. Rev. 703, 708 (1999).

each separate element to determine whether it would independently violate the law, rather than just rescinding the entire program.[14]

The then-Attorney General reviewed the thorough decisions of the District Court and the Fifth Circuit. Those courts exhaustively examined the INA's text and structure, the relevant provisions of other federal immigration statutes, the historical practice of deferred action, and the general grants of statutory authority to set immigration policy. Both decisions concluded that DAPA and expanded DACA violated the carefully crafted federal immigration scheme, that such violations could not be justified through reference to past exercises of deferred action, and that the general grants of statutory authority did not give DHS the power to enact such a sweeping nonenforcement program. Based on the reasoning of those decisions, then-Attorney General Sessions concluded that DACA was likewise implemented with-

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[14] The majority's interpretation of the Fifth Circuit's opinion is highly questionable. Because a grant of deferred action renders DACA recipients eligible for certain benefits and work authorization, it is far from clear that the Department could separate DACA's "forbearance component" from the major benefits it conferred without running into yet another APA problem. The majority points to the fact that, under the Patient Protection and Affordable Care Act of 2010, relevant regulations exclude those receiving deferred action through DACA from coverage. *Ante*, at 26–27, n. 5. But that misses the point. Those regulations were promulgated before "anyone with deferred action under the DACA process applie[d]" for those benefits. See 77 Fed. Reg. 52616 (2012). By contrast, DACA recipients have been eligible for and have received Medicare, Social Security, and work authorization for years. DHS therefore is not writing on a blank slate. Under the majority's rule, DHS would need to amend all relevant regulations and explain why *all* recipients of deferred action who have previously received such benefits may no longer receive them. Alternatively and perhaps more problematically, it would need to provide a reason why other recipients of deferred action should continue to qualify, while DACA recipients should not. It thus seems highly likely that the majority's proposed course of action would be subject to serious arbitrary and capricious challenges.

out statutory authority. He directed DHS to restore the rule of law. DHS followed the then-Attorney General's legal analysis and rescinded the program. This legal conclusion more than suffices to supply the "reasoned analysis" necessary to rescind an unlawful program. *State Farm*, 463 U. S., at 42.

The majority has no answer except to suggest that this approach is inconsistent with *State Farm*. See *ante*, at 28–29. But in doing so, the majority ignores the fact that, unlike the typical "prior policy" contemplated by the Court in *State Farm*, DACA is unlawful. Neither *State Farm* nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather than responding with authority of its own, the majority simply opts to excise the "unlawful policy" aspect from its discussion.

B

Second, the majority claims that DHS erred by failing to take into account the reliance interests of DACA recipients. *Ante*, at 30–33. But reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be "not in accordance with law" or "in excess of statutory . . . authority." 5 U. S. C. §§ 706(2)(A), (C). Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action.[15]

[15] The majority contends that this argument does not carry force because the rescission implemented a winddown period during which recipients would continue to receive benefits. But whether DHS' decision to wind down DACA was lawful is a separate question from whether DHS was

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government's discretion and can be revoked at any time. See App. to Pet. for Cert. in No. 18–587, at 104a (DACA and expanded DACA); 8 CFR §214.11(j)(3) (T visas); §214.14(d)(2) (U visas); 62 Fed. Reg. 63249, 63253 (1997) (discussing Exec. Order No. 12711 for certain citizens of the People's Republic of China). The Government has made clear time and again that, because "deferred action is not an immigration status, no alien has the right to deferred action. It is used solely in the discretion of the [Government] and confers no protection or benefit upon an alien." DHS Immigration and Customs Enforcement Office of Detention and Removal, Detention and Deportation Officer's Field Manual §20.8 (Mar. 27, 2006); see also Memorandum from D. Meissner, Comm'r, INS, to Regional Directors et al., pp. 11–12 (Nov. 17, 2000); Memorandum from W. Yates, Assoc. Director of Operations, DHS, Citizenship and Immigration Servs., to Director, Vt. Serv. Center, p. 5 (2003). Thus, contrary to the majority's unsupported assertion, *ante*, at 30, this longstanding administrative treatment of deferred action provides strong evidence and authority for the proposition that an agency need not consider reliance interests in this context.[16]

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required to consider reliance interests before discontinuing an unlawful program.

[16] The majority's approach will make it far more difficult to change deferred-action programs going forward, which is hardly in keeping with this Court's own understanding that deferred action is an "exercise in administrative discretion" used for administrative "convenience." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999). Agencies will likely be less willing to grant deferred action knowing that any attempts to undo it will require years of litigation and time-consuming rulemakings.

Finally, it is inconceivable to require DHS to study reliance interests before rescinding DACA considering how the program was previously defended. DHS has made clear since DACA's inception that it would not consider such reliance interests. Contemporaneous with the DACA memo, DHS stated that "DHS can terminate or renew deferred action at any time at the agency's discretion." Consideration of Deferred Action for Childhood Arrivals Process, 89 Interpreter Releases 1557, App. 4, p. 2 (Aug. 20, 2012). In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part *because* deferred action created no rights on which recipients could rely. Before the Fifth Circuit, DHS stated that "DHS may revoke or terminate deferred action and begin removal proceedings at any time at its discretion." Brief for Appellants in *Texas* v. *United States*, No. 15–40238, p. 7; see also *id.*, at 45–46. And before this Court, in that same litigation, DHS reiterated that "DHS has absolute discretion to revoke deferred action unilaterally, without notice or process." Brief for United States in *United States* v. *Texas*, O. T. 2015, No. 15–674, p. 5; see also *id.*, at 37. If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA's issuance, not its rescission.

* * *

President Trump's Acting Secretary of Homeland Security inherited a program created by President Obama's Secretary that was implemented without statutory authority and without following the APA's required procedures. Then-Attorney General Sessions correctly concluded that this ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

Instead, the majority today concludes that DHS was required to do far more. Without grounding its position in either the APA or precedent, the majority declares that DHS

was required to overlook DACA's obvious legal deficiencies and provide additional policy reasons and justifications before restoring the rule of law. This holding is incorrect, and it will hamstring all future agency attempts to undo actions that exceed statutory authority. I would therefore reverse the judgments below and remand with instructions to dissolve the nationwide injunctions.

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

Anyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA's rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

I join JUSTICE THOMAS's opinion. DACA presents a delicate political issue, but that is not our business. As JUSTICE THOMAS explains, DACA was unlawful from the start, and that alone is sufficient to justify its termination. But even if DACA were lawful, we would still have no basis for overturning its rescission. First, to the extent DACA represented a lawful exercise of prosecutorial discretion, its rescission represented an exercise of that same discretion, and it would therefore be unreviewable under the Administrative Procedure Act. 5 U. S. C. § 701(a)(2); see *Heckler* v. *Chaney*,

470 U. S. 821, 831–832 (1985). Second, to the extent we could review the rescission, it was not arbitrary and capricious for essentially the reasons explained by JUSTICE KAVANAUGH. See *post*, at 66–68 (opinion concurring in judgment in part and dissenting in part).

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

For the last 20 years, the country has engaged in consequential policy, religious, and moral debates about the legal status of millions of young immigrants who, as children, were brought to the United States and have lived here ever since. Those young immigrants do not have legal status in the United States under current statutory law. They live, go to school, and work here with uncertainty about their futures. Despite many attempts over the last two decades, Congress has not yet enacted legislation to afford legal status to those immigrants.

In 2012, exercising its view of the Executive's prosecutorial discretion under Article II and the immigration laws, President Obama's administration unilaterally instituted a program known as Deferred Action for Childhood Arrivals, or DACA. Under DACA, eligible young immigrants may apply for and receive deferred action. They must renew their DACA status every two years. Under the program, the Executive Branch broadly forbears from enforcing certain immigration removal laws against DACA recipients. And by virtue of the forbearance, DACA recipients also become eligible for work authorization and other benefits.

Since 2017, President Trump's administration has sought to rescind DACA based on its different and narrower understanding of the Executive's prosecutorial discretion under Article II and the immigration laws. In its view, the Executive Branch legally may not, and as a policy matter should not, *unilaterally* forbear from enforcing the immigration laws against such a large class of individuals. The current

administration has stated that it instead wants to work with Congress to enact comprehensive legislation that would address the legal status of those immigrants together with other significant immigration issues.

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch's exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint—namely, whether the Executive Branch's action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502 (2009); *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983).

The Executive Branch explained its decision to rescind DACA in two sequential memorandums by successive Secretaries of Homeland Security: the 2017 Duke Memorandum

and the 2018 Nielsen Memorandum. The Duke Memorandum focused on DACA's perceived legal flaws. The Court today finds the Duke Memorandum insufficient under the APA's arbitrary-and-capricious standard.

But regardless of whether the Court is correct about the Duke Memorandum, the Nielsen Memorandum more fully explained the Department's legal reasons for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons. The Nielsen Memorandum also expressly addressed the reliance interests of DACA recipients. The question under the APA's deferential arbitrary-and-capricious standard is not whether we agree with the Department's decision to rescind DACA. The question is whether the Nielsen Memorandum reasonably explained the decision to rescind DACA. Under ordinary application of the arbitrary-and-capricious standard, the Nielsen Memorandum—with its alternative and independent rationales and its discussion of reliance—would pass muster as an explanation for the Executive Branch's action.

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a "rule" setting forth "an agency statement of general . . . applicability and future effect designed to implement . . . policy." 5 U. S. C. § 551(4). Because it is a rule, the Nielsen Memorandum constitutes "agency action." § 551(13). As the Secretary of Homeland Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke's decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration.

Courts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency's bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a *post hoc* justification for rescinding DACA. *Ante*, at 21–23. Under our precedents, however, the *post hoc* justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced *by agency lawyers during litigation* (or by judges). See, *e. g.*, *State Farm*, 463 U. S., at 50 ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397 (1974) (same); *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443–444 (1965) (same); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962) (same). As the D. C. Circuit has explained, the *post hoc* justification doctrine "is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers." *Alpharma, Inc.* v. *Leavitt*, 460 F. 3d 1, 6 (2006) (Garland, J.) (internal quotation marks omitted).

Indeed, the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the *post hoc* justification doctrine today. The Court's refusal

to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider. *Ante*, at 27–33.

To be sure, cases such as *Overton Park* and *Camp* v. *Pitts* suggest that courts reviewing certain agency *adjudications* may in some circumstances decline to examine an after-the-fact agency explanation. See *Camp* v. *Pitts*, 411 U. S. 138, 142–143 (1973) (*per curiam*); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 419–421 (1971). But agency adjudications are "concerned with the determination of past and present rights and liabilities," Attorney General's Manual on the Administrative Procedure Act 14 (1947), and implicate the due process interests of the individual parties to the adjudication. Judicial review of an adjudication therefore ordinarily focuses on what happened during the agency's adjudication process of deciding that individual case.

Even if certain agency adjudications have a slightly more stringent restriction on *post hoc* explanations, the APA is "based upon a dichotomy between rule making and adjudication," *ibid.*, and this case involves an ongoing agency rule that has future effect—the rescission of DACA. The Nielsen Memorandum implements and explains the rescission of DACA. I am aware of no case from this Court, and the Court today cites none, that has employed the *post hoc* justification doctrine to exclude an agency's official explanation of an agency rule. For purposes of arbitrary-and-capricious review, it does not matter whether the latest official explanation was two years ago or three years ago. What matters is whether the explanation was reasonable and followed the requisite procedures. In my view, the Court should consider the Nielsen Memorandum in deciding whether the Department's rescission of DACA satisfies the APA's arbitrary-and-capricious standard.

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland Security for further explanation. Although I disagree with the Court's decision to remand, the only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court's opinion. *Ante*, at 30–33.*

* * *

The Court's resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress's inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the pros-

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*Because I conclude that the Executive Branch satisfied the APA's arbitrary-and-capricious standard, I need not consider whether its prosecutorial enforcement policy was "committed to agency discretion by law" and therefore not subject to APA arbitrary-and-capricious review in the first place. 5 U. S. C. §701(a)(2). Several judges have advanced arguments suggesting that DACA—at least to the extent it was simply an exercise of forbearance authority—and the repeal of DACA are decisions about whether and to what extent to exercise prosecutorial discretion against a class of offenses or individuals, and are therefore unreviewable under the APA as "committed to agency discretion by law." *Ibid.*; see *Casa De Maryland* v. *United States Dept. of Homeland Security*, 924 F. 3d 684, 709–715 (CA4 2019) (Richardson, J., concurring in part and dissenting in part); *Regents of Univ. Cal.* v. *United States Dept. of Homeland Security*, 908 F. 3d 476, 521–523 (CA9 2018) (Owens, J., concurring in judgment); see also *Texas* v. *United States*, 809 F. 3d 134, 196–202 (CA5 2015) (King, J., dissenting); *Texas* v. *United States*, 787 F. 3d 733, 770–776 (CA5 2015) (Higginson, J., dissenting); cf. *Heckler* v. *Chaney*, 470 U. S. 821, 831–835 (1985); *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 277–284 (1987); *United States* v. *Nixon*, 418 U. S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *In re Aiken County*, 725 F. 3d 255, 262–264 (CADC 2013).

pect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Nation's immigration system. In the meantime, as to the narrow APA question presented here, I appreciate the Court's careful analysis, but I ultimately disagree with its treatment of the Nielsen Memorandum. I therefore respectfully dissent from the Court's judgment on plaintiffs' APA claim, and I concur in the judgment insofar as the Court rejects plaintiffs' equal protection claim.

Syllabus

LIU ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

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

No. 18–1501. Argued March 3, 2020—Decided June 22, 2020

To punish securities fraud, the Securities and Exchange Commission is authorized to seek "equitable relief" in civil proceedings, 15 U. S. C. § 78u(d)(5). In *Kokesh* v. *SEC*, 581 U. S. 455, this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action constitutes a "penalty" for purposes of the applicable statute of limitations. The Court did not, however, address whether disgorgement can qualify as "equitable relief" under § 78u(d)(5), given that equity historically excludes punitive sanctions.

Petitioners Charles Liu and Xin Wang solicited foreign nationals to invest in the construction of a cancer-treatment center, but, an SEC investigation revealed, misappropriated much of the funds in violation of the terms of a private offering memorandum. The SEC brought a civil action against petitioners, seeking, as relevant here, disgorgement equal to the full amount petitioners had raised from investors. Petitioners argued that the disgorgement remedy failed to account for their legitimate business expenses, but the District Court disagreed and ordered petitioners jointly and severally liable for the full amount. The Ninth Circuit affirmed.

Held: A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is "equitable relief" permissible under § 78u(d)(5). Pp. 78–92.

(a) In interpreting statutes that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256. Relevant here are two principles of equity jurisprudence. Equity practice has long authorized courts to strip wrongdoers of their ill-gotten gains. And to avoid transforming that remedy into a punitive sanction, courts restricted it to an individual wrongdoer's net profits to be awarded for victims. Pp. 78–87.

(1) Whether it is called restitution, an accounting, or disgorgement, the equitable remedy that deprives wrongdoers of their net profits from unlawful activity reflects both the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.*, 105 U. S. 189, 207, and the countervailing

equitable principle that the wrongdoer should not be punished by "pay-[ing] more than a fair compensation to the person wronged," *Tilghman* v. *Proctor*, 125 U. S. 136, 145–146. The remedy has been a mainstay of equity courts, and is not limited to cases involving a breach of trust or fiduciary duty, see *Root*, 105 U. S., at 214. Pp. 79–82.

(2) To avoid transforming a profits award into a penalty, equity courts restricted the remedy in various ways. A constructive trust was often imposed on wrongful gains for wronged victims. See, *e. g.*, *Burdell* v. *Denig*, 92 U. S. 716, 720. Courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See, *e. g.*, *Ambler* v. *Whipple*, 20 Wall. 546, 559. Finally, courts limited awards to the net profits from wrongdoing after deducting legitimate expenses. See, *e. g.*, *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. Pp. 82–85.

(3) Congress incorporated these longstanding equitable principles into § 78u(d)(5), but courts have occasionally awarded disgorgement in ways that test the bounds of equity practice. Petitioners claim that disgorgement is necessarily a penalty under *Kokesh*, and thus not available at equity. But *Kokesh* expressly declined to reach that question. The Government contends that the SEC's interpretation has Congress' tacit support. But Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. Pp. 85–87.

(b) Petitioners briefly claim that their disgorgement award crosses the bounds of traditional equity practice by failing to return funds to victims, imposing joint-and-several liability, and declining to deduct business expenses from the award. Because the parties did not fully brief these narrower questions, the Court does not decide them here. But certain principles may guide the lower courts' assessment of these arguments on remand. Pp. 87–92.

(1) Section 78u(d)(5) provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies its command that any remedy be "appropriate or necessary for the benefit of investors," and the equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors. The parties, however, do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would be for the benefit of investors and consistent with equitable principles. Pp. 87–90.

(2) Imposing disgorgement liability on a wrongdoer for benefits that accrue to his affiliates through joint-and-several liability runs

against the rule in favor of holding defendants individually liable. See *Belknap* v. *Schild*, 161 U. S. 10, 25–26. The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e. g.*, *Ambler*, 20 Wall., at 559. On remand, the Ninth Circuit may determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required. Pp. 90–91.

(3) Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804. When the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions." *Root*, 105 U. S., at 203. Accordingly, courts must deduct legitimate expenses before awarding disgorgement under § 78u(d)(5). The District Court below did not ascertain whether any of petitioners' expenses were legitimate. On remand, the lower courts should examine whether including such expenses in a profits-based remedy is consistent with the equitable principles underlying § 78u(d)(5). Pp. 91–92.

754 Fed. Appx. 505, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 93.

Gregory G. Rapawy argued the cause for petitioners. With him on the briefs were *Michael K. Kellogg*, *Benjamin S. Softness*, and *Hervé Gouraige.*

Deputy Solicitor General Stewart argued the cause for respondent. With him on the brief were *Solicitor General Francisco*, *Vivek Suri*, *Robert B. Stebbins*, *Michael A. Conley*, *Jeffrey A. Berger*, *David D. Lisitza*, *Daniel Staroselsky*, and *Kerry J. Dingle.**

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*Briefs of *amici curiae* urging reversal were filed for the Americans for Prosperity Foundation by *Cynthia Fleming Crawford*; for the Cato Institute by *Bradley J. Bondi* and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Adam G. Unikowsky* and *Zachary C. Schauf*; for Law Professors by *Donald Burke* and *Brandon L. Arnold*; for the New Civil Liberties Alliance by *John J. Vecchione*, *Margaret A. Little*, and *Kara Rollins*; for the New England Legal Foundation by *John Pagliaro* and *Martin J. Newhouse*; for the Securities Industry and Financial Markets Association by *Michael J. Dell* and *Kevin M. Carroll*; for the

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Kokesh* v. *SEC*, 581 U. S. 455 (2017), this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action imposes a "penalty" for the purposes of 28 U. S. C. § 2462, the applicable statute of limitations. In so deciding, the Court reserved an antecedent question: whether, and to what extent, the SEC may seek "disgorgement" in the first instance through its power to award "equitable relief" under 15 U. S. C. § 78u(d)(5), a power that historically excludes punitive sanctions. The

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Washington Legal Foundation by *Richard A. Samp*; for Andy Altahawi by *Robert G. Heim* and *Jonathan E. Temchin*; and for Parker R. Hallam et al. by *Karen L. Cook* and *S. Michael McColloch*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Kwame Raoul*, Attorney General of Illinois, *Jane Elinor Notz*, Solicitor General, *Sarah A. Hunger*, Deputy Solicitor General, and *Priyanka Gupta*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Kevin G. Clarkson* of Alaska, *Phil Weiser* of Colorado, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *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 Balderas* of New Mexico, *Letitia James* of New York, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for Better Markets, Inc., et al. by *Dennis M. Kelleher* and *Stuart T. Rossman*; for Former Commissioners and Staff of the Securities and Exchange Commission by *Steven E. Fineman* and *Daniel P. Chiplock*; for Former Federal Trade Commission Officials by *David C. Vladeck* and *Rachel L. Fried*; for Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Ashwin P. Phatak*; for the North American Securities Administrators Association, Inc., by *Michael B. Eisenkraft*; and for Securities Law Professors by *Donna M. Nagy*, *pro se* and *Shana Wallace*.

Briefs of *amici curiae* were filed for Oak Management Corporation by *Michael B. Kimberly*, *Paul W. Hughes*, *Matthew A. Waring*, *Sarah P. Hogarth*, and *David K. Momborquette*; and for Remedies and Restitution Scholars by *Douglas Laycock*, *pro se*.

Court holds today that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5). The judgment is vacated, and the case is remanded for the courts below to ensure the award was so limited.

I

A

Congress authorized the SEC to enforce the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.*, and to punish securities fraud through administrative and civil proceedings. In administrative proceedings, the SEC can seek limited civil penalties and "disgorgement." See § 77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"); see also § 77h–1(g) ("Authority to impose money penalties"). In civil actions, the SEC can seek civil penalties and "equitable relief." See, *e. g.*, § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors"); see also § 78u(d)(3) ("Money penalties in civil actions" (quotation modified)).

Congress did not define what falls under the umbrella of "equitable relief." Thus, courts have had to consider which remedies the SEC may impose as part of its § 78u(d)(5) powers.

Starting with *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (CA2 1971), courts determined that the SEC had authority to obtain what it called "restitution," and what in substance amounted to "profits" that "merely depriv[e]" a defendant of "the gains of . . . wrongful conduct." *Id.*, at 1307–1308. Over the years, the SEC has continued to re-

quest this remedy, later referred to as "disgorgement,"[1] and courts have continued to award it. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 95 (CA2 1978) (explaining that, when a court awards "[d]isgorgement of profits in an action brought by the SEC," it is "exercising the chancellor's discretion to prevent unjust enrichment"); see also *SEC* v. *Blatt*, 583 F. 2d 1325, 1335 (CA5 1978); *SEC* v. *Washington Cty. Util. Dist.*, 676 F. 2d 218, 227 (CA6 1982).

In *Kokesh*, this Court determined that disgorgement constituted a "penalty" for the purposes of 28 U. S. C. § 2462, which establishes a 5-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." The Court reached this conclusion based on several considerations, namely, that disgorgement is imposed as a consequence of violating public laws, it is assessed in part for punitive purposes, and in many cases, the award is not compensatory. 581 U. S., at 463–465. But the Court did not address whether a § 2462 penalty can nevertheless qualify as "equitable relief" under § 78u(d)(5),

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[1] Courts have noted the relatively recent vintage of the term "disgorgement." See, *e. g.*, *SEC* v. *Cavanaugh*, 445 F. 3d 105, 116, n. 24 (CA2 2006). The dissent contends that this recency in terminology alone removes disgorgement from the class of traditional equitable remedies, *post*, at 96 (opinion of THOMAS, J.), despite seeming to recognize disgorgement's parallels to restitution-based awards well within that class, *post*, at 96–97. It is no surprise that the dissent notes such parallels, given this Court's acknowledgment that "disgorgement of improper profits" is "a remedy only for restitution" that is "traditionally considered . . . equitable." *Tull* v. *United States*, 481 U. S. 412, 424 (1987); see also *infra*, at 80. The dissent also observes the solid equitable roots of an accounting for profits, *post*, at 94; accord, *infra*, at 79–80 (discussing the equitable origins of the accounting remedy), a remedy closely resembling disgorgement, see *infra*, at 81–82. In any event, casting aside a form of relief solely "based on the particular label affixed to [it] would 'elevate form over substance,'" *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 214 (2004), leaving unresolved the question before us: whether the underlying profits-based award conforms to equity practice.

given that equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 15 Wall. 146, 149 (1873). The Court cautioned, moreover, that its decision should not be interpreted "as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 581 U. S., at 461, n. 3. This question is now squarely before the Court.

B

The SEC action and disgorgement award at issue here arise from a scheme to defraud foreign nationals. Petitioners Charles Liu and his wife, Xin (Lisa) Wang, solicited nearly $27 million from foreign investors under the EB–5 Immigrant Investor Program (EB–5 Program). 754 Fed. Appx. 505, 506 (CA9 2018) (case below). The EB–5 Program, administered by the U. S. Citizenship and Immigration Services, permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises that are based on "proposals for promoting economic growth." See USCIS, EB–5 Immigrant Investor Program, https://www.uscis.gov/eb-5. Investments in EB–5 projects are subject to the federal securities laws.

Liu sent a private offering memorandum to prospective investors, pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center. The memorandum specified that only amounts collected from a small administrative fee would fund "'legal, accounting and administration expenses.'" 754 Fed. Appx., at 507. An SEC investigation revealed, however, that Liu spent nearly $20 million of investor money on ostensible marketing expenses and salaries, an amount far more than what the offering memorandum permitted and far in excess of the administrative fees collected. 262 F. Supp. 3d 957, 960–964 (CD Cal. 2017). The investigation also revealed that Liu diverted a sizable portion of those funds to personal accounts and to a company under Wang's control. *Id.*, at 961, 964. Only a fraction of the funds were put toward a lease, prop-

erty improvements, and a proton-therapy machine for cancer treatment. *Id.*, at 964–965.

The SEC brought a civil action against petitioners, alleging that they violated the terms of the offering documents by misappropriating millions of dollars. The District Court found for the SEC, granting an injunction barring petitioners from participating in the EB–5 Program and imposing a civil penalty at the highest tier authorized. *Id.*, at 975, 976. It also ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project. *Id.*, at 975–976.

Petitioners objected that the disgorgement award failed to account for their business expenses. The District Court disagreed, concluding that the sum was a "reasonable approximation of the profits causally connected to [their] violation." *Ibid.* The court ordered petitioners jointly and severally liable for the full amount that the SEC sought. App. to Pet. for Cert. 62a.

The Ninth Circuit affirmed. It acknowledged that *Kokesh* "expressly refused to reach" the issue whether the District Court had the authority to order disgorgement. 754 Fed. Appx., at 509. The court relied on Circuit precedent to conclude that the "proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors." *Ibid.*; see also *SEC* v. *JT Wallenbrock & Assocs.*, 440 F. 3d 1109, 1113, 1114 (CA9 2006) (reasoning that it would be "unjust to permit the defendants to offset . . . the expenses of running the very business they created to defraud . . . investors").

We granted certiorari to determine whether § 78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant's net profits from wrongdoing. 589 U. S. 1041 (2019).

II

Our task is a familiar one. In interpreting statutes like § 78u(d)(5) that provide for "equitable relief," this Court ana-

lyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993); see also *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 439 (2011); *Montanile* v. *Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U. S. 136, 142 (2016). The "basic contours of the term are well known" and can be discerned by consulting works on equity jurisprudence. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 217 (2002).

These works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

A

Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names. Compare, *e. g.*, 1 D. Dobbs, Law of Remedies § 4.3(5), p. 611 (2d ed. 1993) ("Accounting holds the defendant liable for his profits"), with *id.*, § 4.1(1), at 555 (referring to "restitution" as the relief that "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain"); see also Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *a*, p. 204 (2010) (Restatement (Third)) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.' Other cases refer to an 'accounting' or an 'accounting for profits' "); 1 J. Pomeroy, Equity Jurisprudence § 101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy for the violation of strictly legal primary rights).

No matter the label, this "profit-based measure of unjust enrichment," Restatement (Third) § 51, Comment *a*, at 204, reflected a foundational principle: "[I]t would be inequitable

that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.*, 105 U. S. 189, 207 (1882). At the same time courts recognized that the wrongdoer should not profit "by his own wrong," they also recognized the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged." *Tilghman* v. *Proctor*, 125 U. S. 136, 145–146 (1888).

Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts. In *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that encompassed a "comprehensiv[e]" grant of "equitable jurisdiction." *Id.*, at 398. "[O]nce [a District Court's] equity jurisdiction has been invoked" under that provision, the Court concluded, "a decree compelling one to disgorge profits . . . may properly be entered." *Id.*, at 398–399.

Subsequent cases confirm the "'protean character' of the profits-recovery remedy." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 668, n. 1 (2014). In *Tull* v. *United States*, 481 U. S. 412 (1987), the Court described "disgorgement of improper profits" as "traditionally considered an equitable remedy." *Id.*, at 424. While the Court acknowledged that disgorgement was a "limited form of penalty" insofar as it takes money out of the wrongdoer's hands, it nevertheless compared disgorgement to restitution that simply "'restor[es] the status quo,'" thus situating the remedy squarely within the heartland of equity. *Ibid.*[2] In *Great-*

[2] The dissent acknowledges that this Court has "referred to disgorgement as an equitable remedy in some of its prior decisions." *Post*, at 97 (citing *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 352 (1998)). While the dissent attempts to discount those cases for having "merely referred to the term" only "in passing," *post*, at 97, those cases expressly "characterized as equitable . . . actions for disgorgement of improper profits" in analyzing whether certain remedies were traditionally available in equity, *Feltner*, 523 U. S., at 352 (citing *Teamsters* v. *Terry*, 494 U. S. 558, 570 (1990) ("characteriz[ing] damages as equitable where

West, the Court noted that an "accounting for profits" was historically a "form of equitable restitution." 534 U. S., at 214, n. 2. And in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), a " 'basically equitable' " original jurisdiction proceeding, the Court ordered disgorgement of Nebraska's gains from exceeding its allocation under an interstate water compact. *Id.*, at 453, 475.

Most recently, in *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 580 U. S. 328 (2017), the Court canvassed pre-1938 patent cases invoking equity jurisdiction. It noted that many cases sought an "accounting," which it described as an equitable remedy requiring disgorgement of ill-gotten profits. *Id.*, at 341–342. This Court's "transsubstantive guidance on broad and fundamental" equitable principles, *Romag Fasteners, Inc.* v. *Fossil Group, Inc.*, 590 U. S. 212, 217 (2020), thus reflects the teachings of equity treatises that identify a defendant's net profits as a remedy for wrongdoing.

Contrary to petitioners' argument, equity courts did not limit this remedy to cases involving a breach of trust or of fiduciary duty. Brief for Petitioners 28–29. As petitioners acknowledge, courts authorized profits-based relief in patent-infringement actions where no such trust or special relationship existed. *Id.*, at 29; see also *Root*, 105 U. S., at 214 ("[I]t is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement").

Petitioners attempt to distinguish these patent cases by suggesting that an "accounting" was appropriate only because Congress explicitly conferred that remedy by statute in 1870. Brief for Petitioners 29 (citing the Act of July 8, 1870, § 55, 16 Stat. 206). But patent law had not previously deviated from the general principles outlined above: This

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they are restitutionary, such as in 'action[s] for disgorgement of improper profits' "); *Tull*, 481 U. S., at 424).

Court had developed the rule that a plaintiff may "recover the amount of . . . profits that the defendants have made by the use of his invention" through "a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction . . . in cases arising under the patent laws." *Tilghman*, 125 U. S., at 144. The 1836 statute, in turn, incorporated the substance of an earlier statute from 1819 which granted courts the ability to "proceed according to the course and principles of courts of equity" to "prevent the violation of patent-rights." *Root*, 105 U. S., at 193. Thus, as these cases demonstrate, equity courts habitually awarded profits-based remedies in patent cases well before Congress explicitly authorized that form of relief.

B

While equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers. See *Marshall*, 15 Wall., at 149.

For one, the profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, "into a trustee, as to those profits, for the owner of the patent which he infringes." *Burdell* v. *Denig*, 92 U. S. 716, 720 (1876). In "converting the infringer into a trustee for the patentee as regards the profits thus made," the chancellor "estimat[es] the compensation due from the infringer to the patentee." *Packet Co.* v. *Sickles*, 19 Wall. 611, 617–618 (1874); see also *Clews* v. *Jamieson*, 182 U. S. 461, 480 (1901) (describing an accounting as involving a " 'distribution of the trust moneys among all the beneficiaries who are entitled to share therein' " in an action against the governing committee of a stock exchange).

Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted

wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See *Ambler* v. *Whipple*, 20 Wall. 546, 559 (1874) (ordering an accounting against a partner who had "knowingly connected himself with and aided in . . . fraud"). In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878), for example, a city engaged contractors to install pavement in a manner that infringed a third party's patent. The patent holder brought a suit in equity to recover profits from both the city and its contractors. The Court held that only the contractors (the only parties to make a profit) were responsible, even though the parties answered jointly. *Id.*, at 140; see also *ibid.* (rejecting liability for an individual officer who merely acted as an agent of the defendant and received a salary for his work). The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits. See, *e. g.*, *Belknap* v. *Schild*, 161 U. S. 10, 25–26 (1896) ("The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those which have accrued to another, and in which they have no participation"); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894) (reversing profits award that was based not on what defendant had made from infringement but on what third persons had made from the use of the invention); *Jennings* v. *Carson*, 4 Cranch 2, 21 (1807) (holding that an order requiring restitution could not apply to "those who were not in possession of the thing to be restored" and "had no power over it") (citing *Penhallow* v. *Doane's Administrators*, 3 Dall. 54 (1795) (reversing a restitution award in admiralty that ordered joint damages in excess of what each defendant received)).

Finally, courts limited awards to the net profits from wrongdoing, that is, "the gain made upon any business or investment, when both the receipts and payments are taken into the account." *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804 (1870); see also *Livingston* v. *Woodworth*, 15 How. 546, 559–

560 (1854) (restricting an accounting remedy "to the actual gains and profits . . . during the time" the infringing machine "was in operation and during no other period" to avoid "convert[ing] a court of equity into an instrument for the punishment of simple torts"); *Seymour* v. *McCormick*, 16 How. 480, 490 (1854) (rejecting a blanket rule that infringing one component of a machine warranted a remedy measured by the full amounts of the profits earned from the machine); *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872) (vacating an accounting that exceeded the profits from infringement alone); *Wooden-Ware Co.* v. *United States*, 106 U. S. 432, 434–435 (1882) (explaining that an innocent trespasser is entitled to deduct labor costs from the gains obtained by wrongfully harvesting lumber).

The Court has carved out an exception when the "entire profit of a business or undertaking" results from the wrongful activity. *Root*, 105 U. S., at 203. In such cases, the Court has explained, the defendant "will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." *Ibid.* In *Goodyear*, for example, the Court affirmed an accounting order that refused to deduct expenses under this rule. The Court there found that materials for which expenses were claimed were bought for the purposes of the infringement and "extraordinary salaries" appeared merely to be "dividends of profit under another name." 9 Wall., at 803; see also *Callaghan* v. *Myers*, 128 U. S. 617, 663–664 (1888) (declining to deduct a defendant's personal and living expenses from his profits from copyright violations, but distinguishing the expenses from salaries of officers in a corporation).

Setting aside that circumstance, however, courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses. Such remedies, when assessed against only culpable actors and for victims, fall com-

fortably within "those categories of relief that were *typically* available in equity." *Mertens*, 508 U. S., at 256.

C

By incorporating these longstanding equitable principles into § 78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing. To be sure, the SEC originally endeavored to conform its disgorgement remedy to the common-law limitations in § 78u(d)(5). Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud.[3] The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices.

Petitioners go further. They claim that this Court effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity. Brief for Petitioners 19–20, 22–26. Not so. *Kokesh* expressly declined to pass on the question. 581 U. S., at 461, n. 3. To be sure, the *Kokesh* Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability to conform future re-

[3] See, *e. g.*, *SEC* v. *Clark*, 915 F. 2d 439, 441, 454 (CA9 1990) (requiring defendant to disgorge the profits that his stockbroker made from unlawful trades); *SEC* v. *Brown*, 658 F. 3d 858, 860–861 (CA8 2011) (*per curiam*) (ordering joint-and-several disgorgement of funds collected from investors and concluding that "'the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses'"); *SEC* v. *Contorinis*, 743 F. 3d 296, 304–306 (CA2 2014) (requiring defendant to disgorge benefits conferred on close associates).

quests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.

The Government, for its part, contends that the SEC's interpretation of the equitable disgorgement remedy has Congress' tacit support, even if it exceeds the bounds of equity practice. Brief for Respondent 13–21. It points to the fact that Congress has enacted a number of other statutes referring to "disgorgement."

That argument attaches undue significance to Congress' use of the term. It is true that Congress has authorized the SEC to seek "disgorgement" in administrative actions. 15 U. S. C. § 77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"). But it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings. After all, agencies are unlike federal courts where, "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U. S., at 398.

Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. The Government argues that under the prior-construction principle, Congress should be presumed to have been aware of the scope of "disgorgement" as interpreted by lower courts and as having incorporated the (purportedly) prevailing meaning of the term into its subsequent enactments. Brief for Respondent 24. But "that canon has no application" where, among other things, the scope of disgorgement was "far from 'settled.'" *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 330 (2015).

At bottom, even if Congress employed "disgorgement" as a shorthand to cross-reference the relief permitted by § 78u(d)(5), it did not silently rewrite the scope of what the

SEC could recover in a way that would contravene limitations embedded in the statute. After all, such "statutory reference[s]" to a remedy grounded in equity "must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Great-West*, 534 U. S., at 211, n. 1. Accordingly, Congress' own use of the term "disgorgement" in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity.

III

Applying the principles discussed above to the facts of this case, petitioners briefly argue that their disgorgement award is unlawful because it crosses the bounds of traditional equity practice in three ways: It fails to return funds to victims, it imposes joint-and-several liability, and it declines to deduct business expenses from the award. Because the parties focused on the broad question whether any form of disgorgement may be ordered and did not fully brief these narrower questions, we do not decide them here. We nevertheless discuss principles that may guide the lower courts' assessment of these arguments on remand.

A

Section 78u(d)(5) restricts equitable relief to that which "may be appropriate or necessary for the benefit of investors." The SEC, however, does not always return the entirety of disgorgement proceeds to investors, instead depositing a portion of its collections in a fund in the Treasury. See SEC, Division of Enforcement, 2019 Ann. Rep. 16–17, https://www.sec.gov/files/enforcement-annual-report-2019.pdf. Congress established that fund in the Dodd-Frank Wall Street Reform and Consumer Protection Act for disgorgement awards that are not deposited in "disgorgement fund[s]" or otherwise "distributed to victims." 124 Stat. 1844. The statute provides that these sums may be used to pay whistle-

blowers reporting securities fraud and to fund the activities of the Inspector General. *Ibid.* Here, the SEC has not returned the bulk of funds to victims, largely, it contends, because the Government has been unable to collect them.[4]

The statute provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies the statute's command that any remedy be "appropriate or necessary for the benefit of investors." The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit. After all, the Government has pointed to no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being disbursed to known victims. Cf. *Root*, 105 U. S., at 214–215 (comparing the accounting remedy to a breach-of-trust action, where a court would require the defendant to "refund the amount of profit which they have actually realized").

The Government maintains, however, that the primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains, not to return the funds to victims as a kind of restitution. See, *e. g.*, SEC, Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002, p. 3, n. 2 (2003) (taking the position that disgorgement is not intended to make investors whole, but rather to deprive wrongdoers of ill-gotten gains); see also 6 T. Hazen, Law of Securities Regulation § 16.18, p. 8 (rev. 7th ed. 2016) (concluding that the remedial nature of the disgorgement remedy does not mean that it is essentially compensatory and concluding that the "primary function of the remedy is to deny the wrongdoer the fruits of ill-gotten gains"). Under the Government's theory, the very fact that it con-

[4] According to the Government, petitioners "transferred the bulk of their misappropriated funds to China, defied the district court's order to repatriate those funds, and fled the United States." Brief for Respondent 36.

ducted an enforcement action satisfies the requirement that it is "appropriate or necessary for the benefit of investors."

But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of § 78u(d)(5). Indeed, this Court concluded similarly in *Mertens* when analyzing statutory language accompanying the term "equitable remedy." 508 U. S., at 253 (interpreting the term "appropriate equitable relief"). There, the Court found that the additional statutory language must be given effect since the section "does not, after all, authorize . . . 'equitable relief' *at large*." *Ibid.* As in *Mertens*, the phrase "appropriate or necessary for the benefit of investors" must mean something more than depriving a wrongdoer of his net profits alone, else the Court would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U. S. 601, 611 (2019) (internal quotation marks omitted).

The Government additionally suggests that the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors.[5] Brief for Respondent 37. It is an open question whether, and to what extent, that practice nevertheless satisfies the SEC's obligation to award relief "for the benefit of investors" and is consistent with the limitations of § 78u(d)(5). The parties have not identified authorities revealing what traditional equitable principles

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[5] We express no view as to whether the SEC has offered adequate proof of failed attempts to return funds to investors here. To the extent that feasibility is relevant at all to equitable principles, we observe that lower courts are well equipped to evaluate the feasibility of returning funds to victims of fraud. See, *e. g.*, *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (CD Cal. 1983) (appointing a magistrate judge to determine whether it was feasible to locate victims of financial wrongdoing).

govern when, for instance, the wrongdoer's profits cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would indeed be for the benefit of investors as required by § 78u(d)(5) and consistent with equitable principles.

B

The SEC additionally has sought to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability, in a manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits. See, *e. g.*, *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (CA2 2014) (holding that a defendant could be forced to disgorge not only what he "personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that he channeled to friends, family, or clients"); *SEC* v. *Clark*, 915 F. 2d 439, 454 (CA9 1990) ("It is well settled that a tipper can be required to disgorge his tippees' profits"); *SEC* v. *Whittemore*, 659 F. 3d 1, 10 (CADC 2011) (approving joint-and-several disgorgement liability where there is a close relationship between the defendants and collaboration in executing the wrongdoing).

That practice could transform any equitable profits-focused remedy into a penalty. Cf. *Marshall*, 15 Wall., at 149. And it runs against the rule to not impose joint liability in favor of holding defendants "liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation." *Belknap*, 161 U. S., at 25–26; see also *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878).

The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e. g.*, *Ambler*, 20 Wall., at 559. The historic profits remedy thus allows

some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.

Here, petitioners were married. 754 Fed. Appx. 505; 262 F. Supp. 3d, at 960–961. The Government introduced evidence that Liu formed business entities and solicited investments, which he misappropriated. *Id.*, at 961. It also presented evidence that Wang held herself out as the president, and a member of the management team, of an entity to which Liu directed misappropriated funds. *Id.*, at 964. Petitioners did not introduce evidence to suggest that one spouse was a mere passive recipient of profits. Nor did they suggest that their finances were not commingled, or that one spouse did not enjoy the fruits of the scheme, or that other circumstances would render a joint-and-several disgorgement order unjust. Cf. *SEC* v. *Hughes Capital Corp.*, 124 F. 3d 449, 456 (CA3 1997) (finding that codefendant spouse was liable for unlawful proceeds where they funded her "lavish lifestyle"). We leave it to the Ninth Circuit on remand to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required.

C

Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804; see also Restatement (Third) § 51, Comment *h*, at 216 (reciting the general rule that a defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement). Accordingly, courts must deduct legitimate expenses before

ordering disgorgement under § 78u(d)(5). A rule to the contrary that "make[s] no allowance for the cost and expense of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery." *Tilghman*, 125 U. S., at 145–146; cf. *SEC* v. *Brown*, 658 F. 3d 858, 861 (CA8 2011) (declining to deduct even legitimate expenses like payments to innocent third-party employees and vendors).

The District Court below declined to deduct expenses on the theory that they were incurred for the purposes of furthering an entirely fraudulent scheme. It is true that when the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions" such as for personal services. *Root*, 105 U. S., at 203. But that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains "under another name." *Goodyear*, 9 Wall., at 803. Doing so will ensure that any disgorgement award falls within the limits of equity practice while preventing defendants from profiting from their own wrong. *Root*, 105 U. S., at 207.

Although it is not necessary to set forth more guidance addressing the various circumstances where a defendant's expenses might be considered wholly fraudulent, it suffices to note that some expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme. We leave it to the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying § 78u(d)(5).

* * *

For the foregoing reasons, we vacate the judgment below and remand the case to the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Court correctly declines to affirm the Ninth Circuit's decision upholding the District Court's disgorgement order, but I disagree with the Court's decision to vacate and remand for the lower courts to "limi[t]" the disgorgement award. *Ante*, at 74. Disgorgement can never be awarded under 15 U. S. C. § 78u(d)(5). That statute authorizes the Securities and Exchange Commission (SEC) to seek only "equitable relief that may be appropriate or necessary for the benefit of investors," and disgorgement is not a traditional equitable remedy. Thus, I would reverse the judgment of the Court of Appeals.

I

The Securities Exchange Act of 1934, as amended in 2005, allows the SEC to request "equitable relief" in federal district court against those who violate federal securities laws. § 78u(d)(5). According to our usual interpretive convention, "equitable relief" refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as "equitable relief," and, hence, the District Court was not authorized to award it under § 78u(d)(5).

A

"This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies." *Trump* v. *Hawaii*, 585 U. S. 667, 714 (2018) (THOMAS, J., concurring). "Rather, it has read such statutes as constrained by 'the body of law which had been transplanted to this country from the English Court of Chancery' in 1789." *Ibid.* (quoting *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945)). As Justice Story put it, "the settled doctrine of this court is, that the remedies in equity are to be administered . . . according to the practice of courts of equity in [England], as

contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 658 (1832).

We have interpreted other statutes according to this "settled doctrine." For example, we have read the term "equitable relief " in the Employee Retirement Income Security Act of 1974 to refer to "those categories of relief that were typically available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993) (emphasis deleted). We have done the same for the Judiciary Act of 1789, see, *e. g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318–319 (1999), and for provisions in the Bankruptcy Code, see *Taggart* v. *Lorenzen*, 587 U. S. 554, 559–560 (2019). There is nothing about § 78u(d)(5) that counsels departing from this approach.

B

Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.

As an initial matter, it is not even clear what "disgorgement" means. The majority frankly acknowledges its "'"protean character."'" *Ante*, at 80 (quoting *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 688, n. 1 (2014)). The difficulty of defining this supposedly traditional remedy is the first sign that it is not a historically recognized equitable remedy. In contrast, an accounting for profits, or accounting—a distinct form of relief that the majority groups with disgorgement—has a well-accepted definition: It compels a defendant to account for, and repay to a plaintiff, those profits that belong to the plaintiff in equity. Bray, Fiduciary Remedies, in The Oxford Handbook of Fiduciary Law 449 (E. Criddle, P. Miller, & R. Sitkoff eds. 2019). The definition of disgorgement, after today's decision, is a remedy that compels each defendant to pay his profits (and sometimes, though

it is not clear when, all of his codefendants' profits) to a third-party Government agency (which sometimes, though it is not clear when, passes the money on to victims). This remedy has no basis in historical practice.

No published case appears to have used the term "disgorgement" to refer to equitable relief until the 20th century. Even then, the earliest cases use the word in a "non-technical" sense, Brief for Law Professors as *Amici Curiae* 22, to describe the action a defendant must take when a party is awarded a traditional equitable remedy such as an accounting for profits or an equitable lien.[1] For example, in *Byrd* v. *Mullinix*, 159 Ark. 310, 251 S. W. 871 (1923), the Supreme Court of Arkansas affirmed the imposition of an equitable lien to prevent a debtor from "put[ting] the money in property which was itself beyond the reach of creditors, and to compel its disgorgement," *id.*, at 316–317, 251 S. W., at 872. Likewise, in *Armstrong* v. *Richards*, 128 Fla. 561, 175 So. 340 (1937), the Supreme Court of Florida referred to "the right of the taxpayer to require an accounting from and disgorgement by public officers and those in collusion with them," *id.*, at 564, 175 So., at 341. In these cases, the term "disgorgement" colloquially described what a defendant was ordered to do, not the remedy itself.

By the 1960s, published opinions began to use "disgorgement" to refer to a remedy in the administrative context. In *NLRB* v. *Local 176*, 276 F. 2d 583 (CA1 1960), the agency had "applied its . . . remedy of disgorgement of dues, requiring the union to refund to every member who had obtained employment on the Company project the dues which he had paid," *id.*, at 586 (footnote omitted). The court declined to enforce this part of the agency's order, but not because disgorgement was an impermissible form of relief. Instead, it

[1] An equitable lien is imposed on a defendant's property "as security for a claim on the ground that otherwise the former would be unjustly enriched." Restatement of Restitution § 161, p. 650 (1936).

found that, in the circumstances of the case, disgorgement "seem[ed] . . . to be an ex post facto penalty." *Ibid.*; see also *NLRB* v. *Local 111*, 278 F. 2d 823, 825 (CA1 1960) (enforcing a disgorgement order from the agency).

By the 1970s, courts started using the term "disgorgement" to describe a judicial remedy in its own right. When the SEC initially sought this kind of relief under the Securities Exchange Act in *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (SDNY 1970), the District Court called it "restitution," *id.*, at 93, and the Court of Appeals called it "[r]estitution of [p]rofits," *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1307 (CA2 1971) (emphasis deleted). Courts soon substituted the label "disgorgement." *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1105 (CA2 1972); *SEC* v. *Shapiro*, 349 F. Supp. 46, 55 (SDNY 1972).

The late date of these cases is sufficient reason to reject the argument that disgorgement is a traditional equitable remedy. But it is also telling that, when the SEC began seeking this relief, it did so without any statutory authority. Prior to 2005, the SEC lacked the power even to seek "equitable relief" in cases like this one. See §305(b), 116 Stat. 779 (amending the Securities Exchange Act). The District Court in *Texas Gulf Sulphur* purported to "imply [a] new remed[y]," based on its "inherent equity power" and a belief that "the congressional purpose is effectuated by so doing." 312 F. Supp., at 91. But the sources it cited are dubious. The court relied on *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), a case about implied causes of action that we have since abrogated. See *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001). It also relied on a securities law treatise that advocated for what it called "restitution" but admitted that district courts had no express authority to grant the remedy and that the SEC had never sought this remedy in the past. 3 L. Loss, Securities Regulation 1827–1828 (1961). It is functionally this same unauthorized remedy that the SEC

and courts now call "disgorgement." The details have varied over time, but the lineage is clear: Disgorgement is "a relic of the heady days" of courts inserting judicially created relief into statutes. *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring).

Disgorgement as a remedy in its own right is also absent from legal publications until the 20th century. Leading legal dictionaries did not define the term until the turn of the 20th century. See, *e. g.*, Merriam-Webster's Dictionary of Law 143 (1996); Black's Law Dictionary 480 (7th ed. 1999). Nor was disgorgement included in the first Restatement of Restitution, adopted in 1936. The remedy does not appear until the Third Restatement, adopted in 2010, which states that "[r]estitution remedies" that seek "to eliminate profit from wrongdoing . . . are often called 'disgorgement' or 'accounting.'" 2 Restatement (Third) of Restitution and Unjust Enrichment § 51(4), p. 203. But "Restatement" is an inapt title for this edition of the treatise. Like many of the modern Restatements, its "authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part). The inclusion of "disgorgement" in the Third Restatement, which the majority cites in support of its holding, *ante*, at 79, represents a "'novel extension'" of equity. *Kansas*, *supra*, at 483 (THOMAS, J., concurring in part and dissenting in part) (quoting Roberts, Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages, 42 Loyola (LA) L. Rev. 131, 134 (2008)).

I acknowledge that this Court has referred to disgorgement as an equitable remedy in some of its prior decisions. See, *e. g.*, *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 352 (1998). But these opinions merely referred to the term in passing without considering the question in

depth. The history is clear: Disgorgement is not a form of relief that was available in the English Court of Chancery at the time of the founding.

C

The majority's treatment of disgorgement as an equitable remedy threatens great mischief. The term disgorgement itself invites abuse because it is a word with no fixed meaning. The majority sees "parallels" between accounting and disgorgement, *ante*, at 76, n. 1, but parallels are by definition not the same. Even if they were, the traditional remedy of an accounting—which compels a party to repay profits that belong to a plaintiff—has important conceptual limitations that disgorgement does not. An accounting connotes the relationship between a plaintiff and a defendant. In the words of one scholar, "it is an accounting by A to B." Bray, Fiduciary Remedies, at 454. But disgorgement connotes no relationship and so is not naturally limited to net profits and compensation of victims. It simply "is A disgorging." *Ibid.* Further, the traditional remedy of a constructive trust[2] or an equitable lien requires that the "money or property identified as belonging in good conscience to the plaintiff . . . clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 213 (2002). Disgorgement reaches further because it has no tracing requirement. By using a word with no history in equity jurisprudence, the SEC and courts have made it possible to circumvent the careful limitations imposed on other equitable remedies.

One need look no further than the SEC's use of disgorgement to see the pitfalls of the majority's acquiescence in its continued use as a remedy. The order in *Texas Gulf Sulphur* did not depart too far from equitable principles. The

[2] A constructive trust compels a defendant "holding title to property . . . to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Restatement of Restitution § 160, at 640–641.

award was limited to the defendants' net profits and the funds were held in escrow and were at least partly available to compensate victims, 446 F. 2d, at 1307. It did not take long, however, for a district court to order a defendant to turn over both his profits and the investment "income earned on the proceeds." *Manor Nursing Centers*, 458 F. 2d, at 1105. And in the case before us today, just a half century later, disgorgement has expanded even further. The award is not limited to net profits or even money possessed by an individual defendant when it is imposed jointly and severally. See *ante*, at 78. And not only is it not guaranteed to be used to compensate victims, but the imposition of over $26 million in disgorgement and approximately $8 million in civil monetary penalties in this case seems to ensure that victims will be unable to recover anything in their own actions. As long as courts continue to award "disgorgement," both courts and the SEC will continue to have license to expand their own power.

The majority's decision to tame, rather than reject, disgorgement will also cause confusion in administrative practice. As the majority explains, the SEC is expressly authorized to impose "'disgorgement'" in its in-house tribunals. *Ante*, at 86 (quoting 15 U. S. C. § 77h–1(e)). It is unclear whether the majority's new restrictions on disgorgement will apply to these proceedings as well. If they do not, the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.

More fundamentally, by failing to recognize that the problem is disgorgement itself, the majority undermines our entire system of equity. The majority believes that insistence on the traditional rules of equity is unnecessarily formalistic, *ante,* at 76, n. 1, but the Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was "a precise legal system" with "specific equi-

table remed[ies]." *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring). "Although courts of equity exercised remedial 'discretion,' that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope." *Trump*, 585 U. S., at 716 (THOMAS, J., concurring). The majority, while imposing some limits, ultimately permits courts to continue expanding equitable remedies. I would simply hold that the phrase "equitable relief " in § 78u(d)(5) does not authorize disgorgement.

II

After holding that disgorgement is equitable relief, the majority remands for the lower courts to reconsider the disgorgement order in this case. If the majority is going to accept "disgorgement" as an available remedy, it should at least limit the order to be consistent with the traditional rules of equity. First, the order should be limited to each petitioner's profits. Second, the order should not be imposed jointly and severally. Third, the money paid by petitioners should be used to compensate petitioners' victims.

A

First, the disgorgement order should be limited to "the profits actually made" by each petitioner. *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872); see also *ante*, at 83–84, 91–92. Defendants in equity traditionally may deduct "allowances . . . for the cost and expense of the business" from the amount of the award. *Root* v. *Railway Co.*, 105 U. S. 189, 215 (1882); see also *Callaghan* v. *Myers*, 128 U. S. 617, 665 (1888); *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139 (1878); *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804 (1870). The rationale behind this rule is that "[i]t is not the function of courts of equity to administer punishment." *Bangor Punta Operations*, *Inc.* v. *Bangor & Aroostook R. Co.*, 417 U. S. 703, 717–718, n. 14 (1974) (internal quotation marks omitted); see also 2 J. Story,

Commentaries on Equity Jurisprudence § 1494, p. 819 (13th ed. 1886). Here, however, the District Court reasoned that "it would be 'unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place.'" 754 Fed. Appx. 505, 509 (CA9 2018) (quoting *SEC* v. *J. T. Wallenbrock & Assocs.*, 440 F. 3d 1109, 1114 (CA9 2006)). On remand, the lower courts should limit the award to each petitioner's profits.

B

Second, and relatedly, the disgorgement order should not be imposed jointly and severally. The majority analogizes disgorgement to accounting, *ante*, at 79, but this Court has rejected joint and several liability in actions for an accounting. *Elizabeth*, *supra*, at 139–140; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894); *Belknap* v. *Schild*, 161 U. S. 10, 25–26 (1896). The majority instructs the lower courts to determine whether petitioners were "partners in wrongdoing," apparently based on a case about the liability of partners. *Ante*, at 82–83, 91 (citing *Ambler* v. *Whipple*, 20 Wall. 546 (1874)). But the liability in that case was premised on the law of partnership, and nothing indicates that petitioners here were legal partners. The joint and several order in this case is thus at odds with traditional equitable rules.[3]

[3] For its part, respondent cites the joint and several liability in *Jackson* v. *Smith*, 254 U. S. 586, 589 (1921), but the remedy in that case was a constructive trust, see *Smith* v. *Jackson*, 48 App. D. C. 565, 576 (1919). As explained above, there is no tracing requirement in the District Court's order as would be required in a case of constructive trust. *Supra*, at 98. The Court also allowed joint and several liability in *Belford* v. *Scribner*, 144 U. S. 488 (1892), a copyright case. But it based its holding on the fact that, under the relevant copyright statute, "both the printer and the publisher are equally liable to the owner of the copyright for an infringement." *Id.*, at 507; see also *Washingtonian Publishing Co.* v. *Pearson*, 140 F. 2d 465, 467 (CADC 1944).

C

Finally, the award should be used to compensate victims, not to enrich the Government. Plaintiffs in equity may claim "that which, *ex aequo et bono* [according to what is equitable and good], is theirs, and nothing beyond this." *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854). The money ordered to be paid as disgorgement in no sense belongs to the Government, and the majority cites no authority allowing a Government agency to keep equitable relief for a wrong done to a third party. Requiring the SEC to only "generally" compensate victims, *ante,* at 88, is inconsistent with traditional equitable principles.

Worse still from a practical standpoint, the majority provides almost no guidance to the lower courts about how to resolve this question on remand. Even assuming that disgorgement is "equitable relief" for purposes of § 78u(d)(5) and that the Government may sometimes keep the money, the Court should at least do more to identify the circumstances in which the Government may keep the money. Instead, the Court asks lower courts to improvise a solution. If past is prologue, this uncertainty is sure to create opportunities for the SEC to continue exercising unlawful power.

* * *

I would reverse for the straightforward reason that disgorgement is not "equitable relief" within the meaning of § 78u(d)(5). Because the majority acquiesces in the continued use of disgorgement under that statute, I respectfully dissent.

Syllabus

DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* THURAISSIGIAM

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

No. 19–161. Argued March 2, 2020—Decided June 25, 2020

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provides for the expedited removal of certain "applicants" seeking admission into the United States, whether at a designated port of entry or elsewhere. 8 U. S. C. § 1225(a)(1). An applicant may avoid expedited removal by demonstrating to an asylum officer a "credible fear of persecution," defined as "a significant possibility . . . that the alien could establish eligibility for asylum." § 1225(b)(1)(B)(v). An applicant who makes this showing is entitled to "full consideration" of an asylum claim in a standard removal hearing. 8 CFR § 208.30(f). An asylum officer's rejection of a credible-fear claim is reviewed by a supervisor and may then be appealed to an immigration judge. §§ 208.30(e)(8), 1003.42(c), (d)(1). But IIRIRA limits the review that a federal court may conduct on a petition for a writ of habeas corpus. 8 U. S. C. § 1252(e)(2). In particular, courts may not review "the determination" that an applicant lacks a credible fear of persecution. § 1252(a)(2)(A)(iii).

Respondent Vijayakumar Thuraissigiam is a Sri Lankan national who was stopped just 25 yards after crossing the southern border without inspection or an entry document. He was detained for expedited removal. An asylum officer rejected his credible-fear claim, a supervising officer agreed, and an Immigration Judge affirmed. Respondent then filed a federal habeas petition, asserting for the first time a fear of persecution based on his Tamil ethnicity and political views and requesting a new opportunity to apply for asylum. The District Court dismissed the petition, but the Ninth Circuit reversed, holding that, as applied here, § 1252(e)(2) violates the Suspension Clause and the Due Process Clause.

Held:

1. As applied here, § 1252(e)(2) does not violate the Suspension Clause. Pp. 116–138.

(a) The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. This Court has held that, at a minimum, the Clause "protects the writ as it existed in 1789," when the Constitution was adopted. *INS* v. *St. Cyr*, 533 U. S. 289, 301. Habeas has traditionally provided a means

to seek release from unlawful detention. Respondent does not seek release from custody, but an additional opportunity to obtain asylum. His claims therefore fall outside the scope of the writ as it existed when the Constitution was adopted. Pp. 116–120.

(b) Respondent contends that three bodies of case law support his argument that the Suspension Clause guarantees a broader habeas right, but none do. Pp. 120–138.

(1) Respondent first points to British and American cases decided before or around the Constitution's adoption. All those cases show is that habeas was used to seek release from detention in a variety of circumstances. Respondent argues that some cases show aliens using habeas to remain in a country. But the relief ordered in those cases was simply release; an alien petitioner's ability to remain in the country was due to immigration law, or lack thereof. The relief that a habeas court may order and the collateral consequences of that relief are two entirely different things. Pp. 120–127.

(2) Although respondent claims to rely on the writ as it existed in 1789, his argument focuses on this Court's decisions during the "finality era," which takes its name from a feature of the Immigration Act of 1891 making certain immigration decisions "final." In *Nishimura Ekiu* v. *United States*, 142 U. S. 651, the Court interpreted the Act to preclude judicial review only of questions of fact. Federal courts otherwise retained authority under the Habeas Corpus Act of 1867 to determine whether an alien was detained in violation of federal law. Thus, when aliens sought habeas relief during the finality era, the Court exercised habeas jurisdiction that was conferred by the habeas statute, not because it was required by the Suspension Clause—which the Court did not mention. Pp. 128–136.

(3) The Court's more recent decisions in *Boumediene* v. *Bush*, 553 U. S. 723, and *St. Cyr*, 533 U. S. 289, also do not support respondent's argument. *Boumediene* was not about immigration at all, and *St. Cyr* reaffirmed that the common-law habeas writ provided a vehicle to challenge detention and could be invoked by aliens already in the country who were held in custody pending deportation. It did not approve respondent's very different attempted use of the writ. Pp. 136–138.

2. As applied here, § 1252(e)(2) does not violate the Due Process Clause. More than a century of precedent establishes that, for aliens seeking initial entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U. S., at 660. Respondent argues that this rule does not apply to him because he succeeded in making it 25 yards into U. S. territory. But the rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S.

Syllabus

soil. An alien who is detained shortly after unlawful entry cannot be said to have "effected an entry." *Zadvydas* v. *Davis*, 533 U. S. 678, 693. An alien in respondent's position, therefore, has only those rights regarding admission that Congress has provided by statute. In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum," and he was given that right. §§ 1225(b)(1)(B)(ii), (v). Pp. 138–141.

917 F. 3d 1097, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 141. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 150. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 158.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Morgan L. Ratner*, *Erez Reuveni*, and *Joshua S. Press*.

Lee Gelernt argued the cause for respondent. With him on the brief were *Omar C. Jadwat*, *Jonathan Hafetz*, *Celso J. Perez*, *David D. Cole*, *Cody Wofsy*, *Stephen B. Kang*, *Morgan Russell*, *Cecillia D. Wang*, and *Lucas Guttentag*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Oramel H. Skinner*, Solicitor General, *Rusty D. Crandell*, Deputy Solicitor General, *Kate B. Sawyer*, Assistant Solicitor General, *Katherine H. Jessen*, Assistant Attorney General, *Joseph A. Kanefield*, and *Brunn W. Roysden III*, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Douglas Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, and *Ken Paxton* of Texas; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; and for the Immigration Law Reform Institute by *Christopher J. Hajec* and *Lawrence J. Joseph*.

Briefs of *amici curiae* urging affirmance 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*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows:

JUSTICE ALITO delivered the opinion of the Court.

Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. Some of these claims are valid, and by granting asylum, the United States lives up to its ideals and its treaty obligations. Most asylum claims, however, ultimately fail, and some are fraudulent. In 1996, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–546, it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. It was Congress's judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings.

This case concerns the constitutionality of the system Congress devised. Among other things, IIRIRA placed restrictions on the ability of asylum seekers to obtain review under the federal habeas statute, but the United States Court of

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Xavier Becerra of California, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *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, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the American Bar Association by *Pratik A. Shah*, *James E. Tysse*, and *Judy Perry Martinez*; for Asylum Law Professors by *Roy T. Englert, Jr.*, and *Wendy Liu*; for Immigration and Human Rights Organizations by *Matthew E. Price*; for Immigration Scholars by *Joshua S. Lipshutz* and *Adam Cox* and *Cristina Rodríguez*, both *pro se*; for International Lawyers by *Curtis Doebbler*; for Legal Historians by *Michael J. Wishnie*, *Anton Metlitsky*, and *Jennifer B. Sokoler*; for Scholars of the Law of Habeas Corpus by *Noah A. Levine*; and for Sri Lankan Politics by *Leo L. Lam*, *Anjali Srinivasan*, and *Candice Mai Khanh Nguyen*.

Appeals for the Ninth Circuit held that these restrictions are unconstitutional. According to the Ninth Circuit, they unconstitutionally suspend the writ of habeas corpus and violate asylum seekers' right to due process. We now review that decision and reverse.

Respondent's Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope "when the Constitution was drafted and ratified." *Boumediene* v. *Bush*, 553 U. S. 723, 746 (2008). Indeed, respondent's use of the writ would have been unrecognizable at that time. Habeas has traditionally been a means to secure *release* from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country.

Respondent's due process argument fares no better. While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause. See *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660 (1892). Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute.

In short, under our precedents, neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment requires any further review of respondent's claims, and IIRIRA's limitations on habeas review are constitutional as applied.

I

A

We begin by briefly outlining the provisions of immigration law that are pertinent to this case. Under those provi-

sions, several classes of aliens are "inadmissible" and therefore "removable." 8 U. S. C. §§ 1182, 1229a(e)(2)(A). These include aliens who lack a valid entry document "at the time of application for admission." § 1182(a)(7)(A)(i)(I). An alien who arrives at a "port of entry," *i. e.*, a place where an alien may lawfully enter, must apply for admission. An alien like respondent who is caught trying to enter at some other spot is treated the same way. §§ 1225(a)(1), (3).

If an alien is inadmissible, the alien may be removed. The usual removal process involves an evidentiary hearing before an immigration judge, and at that hearing an alien may attempt to show that he or she should not be removed. Among other things, an alien may apply for asylum on the ground that he or she would be persecuted if returned to his or her home country. § 1229a(b)(4); 8 CFR § 1240.11(c) (2020). If that claim is rejected and the alien is ordered removed, the alien can appeal the removal order to the Board of Immigration Appeals and, if that appeal is unsuccessful, the alien is generally entitled to review in a federal court of appeals. 8 U. S. C. §§ 1229a(c)(5), 1252(a). As of the first quarter of this fiscal year, there were 1,066,563 pending removal proceedings. See Executive Office for Immigration Review (EOIR), Adjudication Statistics: Pending Cases (Jan. 2020). The average civil appeal takes approximately one year.[1] During the time when removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found. § 1226(a).

Congress addressed these problems by providing more expedited procedures for certain "applicants for admission."

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[1] See Administrative Office of the U. S. Courts, Federal Judicial Caseload Statistics, U. S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits (2019) (Table B–4A) (time calculated for non-prisoner appeals from the filing of a notice of appeal to the last opinion or final order).

For these purposes, "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)" is deemed "an applicant for admission." § 1225(a)(1).[2] An applicant is subject to expedited removal if, as relevant here, the applicant (1) is inadmissible because he or she lacks a valid entry document; (2) has not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility"; and (3) is among those whom the Secretary of Homeland Security has designated for expedited removal. §§ 1225(b)(1)(A)(i), (iii)(I)–(II).[3] Once "an immigration officer determines" that a designated applicant "is inadmissible," "the officer [must] order the alien removed from the United States without further hearing or review." § 1225(b)(1)(A)(i).

Applicants can avoid expedited removal by claiming asylum. If an applicant "indicates either an intention to apply for asylum" or "a fear of persecution," the immigration officer "shall refer the alien for an interview by an asylum officer." §§ 1225(b)(1)(A)(i)–(ii). The point of this screening interview is to determine whether the applicant has a "credible fear of persecution." § 1225(b)(1)(B)(v). The applicant need not show that he or she *is in fact eligible* for asylum—a "credible fear" equates to only a "significant possibility" that the alien would be eligible. *Ibid.* Thus, while eligibility ultimately requires a "well-founded fear of persecution on account of," among other things, "race" or "political opinion,"

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[2] When respondent entered the country, aliens were treated as applicants for admission if they were "encountered within 14 days of entry without inspection and within 100 air miles of any U. S. international land border." 69 Fed. Reg. 48879 (2004).

[3] This authority once belonged to the Attorney General, who is still named in the statute. See 6 U. S. C. § 251(2) (transferring authority over "[t]he detention and removal program" to the Department).

§§ 1101(a)(42)(A), 1158(b)(1)(A), all that an alien must show to avoid expedited removal is a "credible fear."[4]

If the asylum officer finds an applicant's asserted fear to be credible,[5] the applicant will receive "full consideration" of his asylum claim in a standard removal hearing. 8 CFR § 208.30(f); see 8 U. S. C. § 1225(b)(1)(B)(ii). If the asylum officer finds that the applicant does not have a credible fear, a supervisor will review the asylum officer's determination. 8 CFR § 208.30(e)(8). If the supervisor agrees with it, the applicant may appeal to an immigration judge, who can take further evidence and "shall make a de novo determination." §§ 1003.42(c), (d)(1); see 8 U. S. C. § 1225(b)(1)(B)(iii)(III).

An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.

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[4] A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary. § 1158(b)(1)(A).

[5] The asylum officer also considers an alien's potential eligibility for withholding of removal under § 1231(b)(3) or relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). 8 CFR §§ 208.30(e)(2)–(3). Respondent's habeas petition alleges that "he can show a significan[t] possibility that he could establish eligibility for asylum, withholding of removal, and CAT claims." App. 31–32. But he says in his petition that he left Sri Lanka "to seek asylum in the United States." *Id.*, at 15. He discusses the criteria only for asylum. *Id.*, at 21; see also Brief for Respondent 4. And he now alleges that he was improperly "denied asylum." *Id.*, at 5. Moreover, the gravamen of his petition is that he faces persecution in Sri Lanka "because of" his Tamil ethnicity and political opinions. App. 13. To obtain withholding or CAT relief on that basis, he would need to show "a greater likelihood of persecution or torture at home than is necessary for asylum." *Moncrieffe* v. *Holder*, 569 U. S. 184, 187–188, n. 1 (2013). And he would not avoid removal, only removal to Sri Lanka. 8 U. S. C. § 1231(b)(3)(A); 8 CFR § 208.16(f). We therefore read his petition as it is plainly intended: to seek another opportunity to apply for asylum.

Over the last five years, nearly 77% of screenings have resulted in a finding of credible fear.[6] And nearly half the remainder (11% of the total number of screenings) were closed for administrative reasons, including the alien's withdrawal of the claim.[7] As a practical matter, then, the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.

Whether an applicant who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release. Applicants "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." § 1225(b)(1)(B)(iii)(IV). Applicants who are found to have a credible fear may also be detained pending further consideration of their asylum applications. § 1225(b)(1)(B)(ii); see *Jennings* v. *Rodriguez*, 583 U. S. 281, 287, 297 (2018).[8]

B

The IIRIRA provision at issue in this case, § 1252(e)(2), limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus. That provision allows habeas review of three matters: first, "whether the petitioner is an alien"; second, "whether the petitioner was ordered removed"; and third, whether the petitioner has already been granted entry as a lawful permanent resident, refugee, or asylee. §§ 1252(e)(2)(A)–(C). If the petitioner has such a status, or if a removal order has not "in fact"

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[6] See GAO, Immigration: Actions Needed To Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings 13–15, and fig. 2 (GAO–20–250, Feb. 2020).

[7] See *id.*, at 16, n. b.

[8] The Department may grant temporary parole "for urgent humanitarian reasons or significant public benefit." 8 U. S. C. § 1182(d)(5)(A); see also 8 CFR §§ 212.5(b), 235.3(b)(2)(iii), and (b)(4)(ii).

been "issued," § 1252(e)(5), the court may order a removal hearing, § 1252(e)(4)(B).

A major objective of IIRIRA was to "protec[t] the Executive's discretion" from undue interference by the courts; indeed, "that can fairly be said to be the theme of the legislation." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 486 (1999) (*AAADC*). In accordance with that aim, § 1252(e)(5) provides that "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." And "[n]otwithstanding" any other "habeas corpus provision"—including 28 U. S. C. § 2241—"no court shall have jurisdiction to review" any other "individual determination" or "claim arising from or relating to the implementation or operation of an order of [expedited] removal." § 1252(a)(2)(A)(i). In particular, courts may not review "the determination" that an alien lacks a credible fear of persecution. § 1252(a)(2)(A)(iii); see also §§ 1252(a)(2)(A)(ii), (iv) (other specific limitations).

Even without the added step of judicial review, the credible-fear process and abuses of it can increase the burdens currently "overwhelming our immigration system." 84 Fed. Reg. 33841 (2019).[9] The past decade has seen a 1,883%

[9] References to the factual material in this regulation are not endorsements of the regulation itself. And like the immigration officials in this case, we do not question the basis for respondent's asserted fear. See *infra*, at 114. But we note the Department's view that credible-fear claims can be asserted "in the hope of a lengthy asylum process that will enable [the claimants] to remain in the United States for years . . . despite their statutory ineligibility for relief" and that an influx of meritless claims can delay the adjudication of meritorious ones; strain detention capacity and degrade detention conditions; cause the release of many inadmissible aliens into States and localities that must shoulder the resulting costs; divert Department resources from protecting the border; and aggravate "the humanitarian crisis created by human smugglers." 84 Fed. Reg. 33831; see also, *e. g.*, Violent Crime Control and Law Enforcement Act of 1994, § 130010(a)(3)(C), 108 Stat. 2030 (legislative finding of "a drain on limited resources resulting from the high cost of processing frivolous asylum claims"); *Arizona* v. *United States*, 567 U. S. 387, 397–398 (2012);

increase in credible-fear claims, and in 2018 alone, there were 99,035 claims. See *id.*, at 33838 (data for fiscal years 2008 to 2018). The majority have proved to be meritless. Many applicants found to have a credible fear—about 50% over the same 10-year period—did not pursue asylum. See EOIR, Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim (Nov. 2018); see also 84 Fed. Reg. 33841 (noting that many instead abscond). In 2019, a grant of asylum followed a finding of credible fear just 15% of the time. See EOIR, Asylum Decision Rates in Cases Originating With a Credible Fear Claim (Oct. 2019). Fraudulent asylum claims can also be difficult to detect,[10] especially in a screening process that is designed to be expedited and that is currently handling almost 100,000 claims per year.

The question presented thus has significant consequences for the immigration system. If courts must review credible-fear claims that in the eyes of immigration officials and an immigration judge do not meet the low bar for such claims, expedited removal would augment the burdens on that system. Once a fear is asserted, the process would no longer be expedited.

Homeland Security Advisory Council, Final Emergency Interim Report 1, 7–8 (Apr. 16, 2019); Letter from K. Nielsen, Secretary of Homeland Security, to Members of Congress 1–2 (Mar. 28, 2019); GAO, Asylum: Additional Actions Needed To Assess and Address Fraud Risks 24 (GAO–16–50, Dec. 2015) (GAO Fraud Report); Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments 8–9 (Dec. 2007); Brief for State of Arizona et al. as *Amici Curiae* 9–12.

[10] See, *e. g.*, GAO Fraud Report 32–33 (discussing Operation Fiction Writer, a criminal investigation of attorneys and application preparers who counseled asylum seekers to lie about religious persecution and forced abortions); Asylum Fraud: Abusing America's Compassion? Hearing before the Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 113th Cong., 2d Sess. (2014) (testimony of Louis D. Crocetti, Jr.) (describing study in which 58% of randomly selected asylum applications exhibited indicators of possible fraud and 12% were determined to be fraudulent).

C

Respondent Vijayakumar Thuraissigiam, a Sri Lankan national, crossed the southern border without inspection or an entry document at around 11 p.m. one night in January 2017. App. 38. A Border Patrol agent stopped him within 25 yards of the border, and the Department detained him for expedited removal. *Id.*, at 37–39, 106; see §§ 1182(a)(7)(A)(i)(I), 1225(b)(1)(A)(ii), and (b)(1)(B)(iii)(IV). He claimed a fear of returning to Sri Lanka because a group of men had once abducted and severely beaten him, but he said that he did not know who the men were, why they had assaulted him, or whether Sri Lankan authorities would protect him in the future. *Id.*, at 80. He also affirmed that he did not fear persecution based on his race, political opinions, or other protected characteristics. *Id.*, at 76–77; see § 1101(a)(42)(A).

The asylum officer credited respondent's account of the assault but determined that he lacked a "credible" fear of persecution, as defined by § 1225(b)(1)(B)(v), because he had offered no evidence that could have made him eligible for asylum (or other removal relief). *Id.*, at 83, 87, 89; see § 1158(b)(1)(A). The supervising officer agreed and signed the removal order. *Id.*, at 54, 107. After hearing further testimony from respondent, an Immigration Judge affirmed on *de novo* review and returned the case to the Department for removal. *Id.*, at 97.

Respondent then filed a federal habeas petition. Asserting for the first time a fear of persecution based on his Tamil ethnicity and political views, *id.*, at 12–13, he argued that he "should have passed the credible fear stage," *id.*, at 30. But, he alleged, the immigration officials deprived him of "a meaningful opportunity to establish his claims" and violated credible-fear procedures by failing to probe past his denial of the facts necessary for asylum. *Id.*, at 27, 32. Allegedly they also failed to apply the "correct standard" to his claims—the "significant possibility" standard—despite its repeated appearance in the records of their decisions. *Id.*, at

30; see *id.*, at 53, 84–89, 97. Respondent requested "a writ of habeas corpus, an injunction, or a writ of mandamus directing [the Department] to provide [him] a new opportunity to apply for asylum and other applicable forms of relief." *Id.*, at 33. His petition made no mention of release from custody.

The District Court dismissed the petition, holding that §§ 1252(a)(2) and (e)(2) and clear Ninth Circuit case law foreclosed review of the negative credible-fear determination that resulted in respondent's expedited removal order. 287 F. Supp. 3d 1077, 1081 (SD Cal. 2018). The court also rejected respondent's argument "that the jurisdictional limitations of § 1252(e) violate the Suspension Clause," again relying on Circuit precedent. *Id.*, at 1082–1083.

The Ninth Circuit reversed. It found that our Suspension Clause precedent demands "reference to the writ as it stood in 1789." 917 F. 3d 1097, 1111 (2019). But without citing any pre-1789 case about the scope of the writ, the court held that § 1252(e)(2) violates the Suspension Clause. See *id.*, at 1113–1119. The court added that respondent "has procedural due process rights," specifically the right "'to expedited removal proceedings that conformed to the dictates of due process.'" *Id.*, at 1111, n. 15 (quoting *United States* v. *Raya-Vaca*, 771 F. 3d 1195, 1203 (CA9 2014)). Although the decision applied only to respondent, petitioners across the Circuit have used it to obtain review outside the scope of § 1252(e)(2), and petitioners elsewhere have attempted to follow suit.[11]

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[11] See, *e. g.*, *Mnatsakanyan* v. *United States Dept. of Homeland Security*, 2020 WL 1245371, *5 (SD Cal., Mar. 16, 2020) ("Given the identical claims here as in *Thuraissigiam*, the Court concludes it has jurisdiction over Petitioner's habeas petition under the Suspension Clause"); *Kaur* v. *Barr*, 2019 WL 4974425, *3 (D Ariz., Oct. 8, 2019) (granting stay of removal in light of the decision below); *Rodrigues* v. *McAleenan*, 435 F. Supp. 3d 731, 734, 738 (ND Tex. 2020) (declining to follow the decision below).

The Ninth Circuit's decision invalidated the application of an important provision of federal law and conflicted with a decision from another Circuit, see *Castro* v. *United States Dept. of Homeland Security*, 835 F. 3d 422 (CA3 2016). We granted certiorari, 589 U. S. 1030 (2019).

II

A

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. In *INS* v. *St. Cyr*, 533 U. S. 289 (2001), we wrote that the Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted. *Id.*, at 301 (internal quotation marks omitted). And in this case, respondent agrees that "there is no reason" to consider whether the Clause extends any further. Brief for Respondent 26, n. 12. We therefore proceed on that basis.[12]

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[12] The original meaning of the Suspension Clause is the subject of controversy. In *INS* v. *St. Cyr*, 533 U. S. 289 (2001), the majority and dissent debated whether the Clause independently guarantees the availability of the writ or simply restricts the temporary withholding of its operation. Compare *id.*, at 300, with *id.*, at 336–341 (Scalia, J., dissenting). See also *Ex parte Bollman*, 4 Cranch 75, 95 (1807). We do not revisit that question. Nor do we consider whether the scope of the writ as it existed in 1789 defines the boundary of the constitutional protection to which the *St. Cyr* Court referred, since the writ has never encompassed respondent's claims.

We also do not reconsider whether the common law allowed the issuance of a writ on behalf of an alien who lacked any allegiance to the country. Compare *Boumediene* v. *Bush*, 553 U. S. 723, 746–747 (2008) (forming "no certain conclusions"), with Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 5–13. See also Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1847 (2009); P. Halliday, Habeas Corpus: From England to Empire 204 (2010) (Halliday).

B

This principle dooms respondent's Suspension Clause argument, because neither respondent nor his *amici* have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release.

In 1768, Blackstone's Commentaries—usually a "satisfactory exposition of the common law of England," *Schick* v. *United States*, 195 U. S. 65, 69 (1904)—made this clear. Blackstone wrote that habeas was a means to "remov[e] the injury of unjust and illegal confinement." 3 W. Blackstone, Commentaries on the Laws of England 137 (emphasis deleted). Justice Story described the "common law" writ the same way. See 3 Commentaries on the Constitution of the United States § 1333, p. 206 (1833). Habeas, he explained, "is the appropriate remedy to ascertain . . . whether any person is rightfully in confinement or not." *Ibid.*

We have often made the same point. See, *e. g.*, *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody"); *Wilkinson* v. *Dotson*, 544 U. S. 74, 79 (2005) (similar); *Munaf* v. *Geren*, 553 U. S. 674, 693 (2008) (similar).

In this case, however, respondent did not ask to be released.[13] Instead, he sought entirely different relief: vaca-

[13] In his brief, respondent states that "he requests an entirely ordinary habeas remedy: conditional release pending a lawful adjudication. J. A. 33." Brief for Respondent 29. Citing the same page, the dissent argues that respondent "asked the District Court to '[i]ssue a writ of habeas corpus' without further limitation on the kind of relief that might en-

tur of his "removal order" and "an order directing [the Department] to provide him with a new . . . opportunity to apply for asylum and other relief from removal." App. 14 (habeas petition). See also *id.*, at 31 ("a fair procedure to apply for asylum, withholding of removal, and CAT relief"); *id.*, at 14 ("a new, meaningful opportunity to apply for asylum and other relief from removal"). Such relief might fit an injunction or writ of mandamus—which tellingly, his petition also requested, *id.*, at 33—but that relief falls outside the scope of the common-law habeas writ.

Although the historic role of habeas is to secure release from custody, the Ninth Circuit did not suggest that release, at least in the traditional sense of the term,[14] was required. Instead, what it found to be necessary was a "meaningful opportunity" for review of the procedures used in determining that respondent did not have a credible fear of persecution. 917 F. 3d, at 1117. Thus, even according to the Ninth Circuit, respondent's petition did not call for traditional habeas relief.

Not only did respondent fail to seek release, he does not dispute that confinement during the pendency of expedited asylum review, and even during the additional proceedings he seeks, is lawful. Nor could he. It is not disputed that he was apprehended in the very act of attempting to enter this country; that he is inadmissible because he lacks an

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tail." *Post*, at 164 (opinion of SOTOMAYOR, J.) (quoting App. 33). However, neither on the cited page nor at any other place in the habeas petition is release, conditional or otherwise, even mentioned. And in any event, as we discuss *infra*, at 120–125, the critical point is that what he sought in the habeas petition and still seeks—a writ "directing [the Department] to provide [him] a new opportunity to apply for asylum," App. 33—is not a form of relief that was available in habeas at the time of the adoption of the Constitution.

[14] Although the Ninth Circuit never mentioned release, its opinion might be read to suggest that gaining a right to remain in this country would constitute a release from the "restraint" of exclusion. See 917 F. 3d 1097, 1117 (2019). No evidence has been called to our attention that the writ was understood in 1789 to apply to any comparable form of restraint.

entry document, see §§ 1182(a)(7)(A), 1225(b)(1)(A)(i); and that, under these circumstances, his case qualifies for the expedited review process, including "[m]andatory detention" during his credible-fear review, §§ 1225(b)(1)(B)(ii), (iii)(IV). Moreover, simply releasing him would not provide the right to stay in the country that his petition ultimately seeks. Without a change in status, he would remain subject to arrest, detention, and removal. §§ 1226(a), 1229a(e)(2).

While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka. That would be the equivalent of the habeas relief Justice Story ordered in a case while riding circuit. He issued a writ requiring the release of a foreign sailor who jumped ship in Boston, but he provided for the sailor to be released into the custody of the master of his ship. *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (No. 3,967) (CC Mass. 1813).

Respondent does not want anything like that. His claim is more reminiscent of the one we rejected in *Munaf*. In that case, American citizens held in U. S. custody in Iraq filed habeas petitions in an effort to block their transfer to Iraqi authorities for criminal prosecution. See 553 U. S., at 692. Rejecting this use of habeas, we noted that "[h]abeas is at its core a remedy for unlawful executive detention" and that what these individuals wanted was not "simple release" but an order requiring them to be brought to this country. *Id.*, at 693, 697. Claims so far outside the "core" of habeas may not be pursued through habeas. See, *e. g.*, *Skinner* v. *Switzer*, 562 U. S. 521, 535, n. 13 (2011).

Like the habeas petitioners in *Munaf*, respondent does not want "simple release" but, ultimately, the opportunity to remain lawfully in the United States. That he seeks to stay in this country, while the habeas petitioners in *Munaf* asked to be brought here from Iraq, see *post*, at 176–177 (opinion of SOTOMAYOR, J.), is immaterial. In this case as in *Munaf*, the relief requested falls outside the scope of the writ as it was understood when the Constitution was adopted. See *Castro*,

835 F. 3d, at 450–451 (Hardiman, J., concurring dubitante) ("Petitioners here seek to alter their status in the United States in the hope of avoiding release to their homelands. That prayer for relief . . . dooms the merits of their Suspension Clause argument" (emphasis deleted)).

III

Disputing this conclusion, respondent argues that the Suspension Clause guarantees a broader habeas right. To substantiate this claim, he points to three bodies of case law: British and American cases decided prior to or around the time of the adoption of the Constitution, decisions of this Court during the so-called "finality era" (running from the late 19th century to the mid-20th century), and two of our more recent cases. None of these sources support his argument.

A

Respondent and *amici* supporting his position have done considerable research into the use of habeas before and around the time of the adoption of the Constitution,[15] but they have not unearthed evidence that habeas was then used to obtain anything like what is sought here, namely, authorization for an alien to remain in a country other than his own or to obtain administrative or judicial review leading to that result. All that their research (and the dissent's) shows is that habeas was used to seek release from detention in a variety of circumstances. In fact, respondent and his *amici* do not argue that their cases show anything more. See Brief for Respondent 27 (arguing that habeas was "available" at the founding "to test all forms of physical restraint");

[15] Respondent and his *amici* rely primarily on British cases decided before the adoption of the Constitution. "There is widespread agreement that the common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776," but "almost no reported decisio[n] from the period." Oldham & Wishnie, The Historical Scope of *Habeas Corpus* and *INS* v. *St. Cyr*, 16 Geo. Immigration L. J. 485, 496 (2002) (Oldham & Wishnie) (internal quotation marks omitted).

Brief for Scholars of the Law of Habeas Corpus as *Amici Curiae* 11 (the "historical record . . . demonstrates that the touchstone for access to the writ" was "whether the petitioner challenges control of his person").

Because respondent seeks to use habeas to obtain something far different from simple release, his cause is not aided by the many release cases that he and his *amici* have found. Thus, for present purposes, it is immaterial that habeas was used to seek release from confinement that was imposed for, among other things, contempt of court (see *Bushell's Case*, Vaugh. 135, 124 Eng. Rep. 1006 (C. P. 1670)), debt (see *Hollingshead's Case*, 1 Salk. 351, 91 Eng. Rep. 307 (K. B. 1702); *Rex* v. *Nathan*, 2 Str. 880, 93 Eng. Rep. 914 (K. B. 1724)), medical malpractice (see *Dr. Groenvelt's Case*, 1 Raym. Ld. 213, 91 Eng. Rep. 1038 (K. B. 1702)), failing to pay an assessment for sewers (see *Hetley* v. *Boyer*, Cro. Jac. 336, 79 Eng. Rep. 287 (K. B. 1613)), failure to lend the King money (see *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627)), carrying an authorized "dagg," *i. e.*, handgun (see *Gardener's Case*, Cro. Eliz. 821, 78 Eng. Rep. 1048 (K. B. 1600)), "impressment" into military service or involuntary servitude (see *St. Cyr*, 533 U. S., at 302), or refusing to pay a colonial tax (see Oldham & Wishnie 496). Nor does it matter that common-law courts sometimes ordered or considered ordering release in circumstances that would be beyond the reach of any habeas statute ever enacted by Congress, such as release from private custody. See, *e. g.*, *Rex* v. *Delaval*, 3 Burr. 1434, 1435–1437, 97 Eng. Rep. 913, 914 (K. B. 1763) (release of young woman from "indentures of apprenticeship"); *Rex* v. *Clarkson*, 1 Str. 444, 93 Eng. Rep. 625 (K. B. 1722) (release from boarding school); *Lister's Case*, 8 Mod. 22, 88 Eng. Rep. 17 (K. B. 1721) (release of wife from estranged husband's restraint). What matters is that all these cases are about release from restraint. Accord, *Preiser*, 411 U. S., at 484–485, and nn. 3–5.[16]

[16] Respondent's *amici* also point out that, during the English Civil War, Parliament created a national religion and a "bewildering array of committees" to manage the war. Brief for Legal Historians as *Amici Curiae* 10

Respondent and his *amici* note that habeas petitioners were sometimes released on the condition that they conform to certain requirements. See Brief for Respondent 30; Legal Historians Brief 18. For example, they cite a case in which a man was released on condition that he treat his wife well and support her, and another in which a man was released on condition that he issue an apology. *Ibid.* But what respondent sought in this case is nothing like that. Respondent does not seek an order releasing him on the condition that he do or refrain from doing something. What he wants—further review of his asylum claim—is not a condition with which he must comply. Equally irrelevant is the practice, discussed in the dissent, of allowing the executive to justify or cure a defect in detention before requiring release. See *post*, at 173–175. Respondent does not seek this sort of conditional release either, because the legality of his detention is not in question.

Respondent contends that two cases show that habeas could be used to secure the right of a non-citizen to remain in a foreign country, but neither proves his point. His first case, involving a Scot named Murray, is one for which no official report is available for us to review.[17] We could hardly base our decision here on such a decision.[18]

(Legal Historians Brief) (internal quotation marks omitted). They argue that "[h]abeas corpus was readily available to test the legality of their actions." *Ibid.* But according to their source, the challenged actions were "imprisonment orders," including imprisonment of clergymen who refused to conform. Halliday 163–164.

[17] Respondent cites a secondary source, which in turn cites to the National Archives in London. See Brief for Respondent 27 (citing Halliday 236).

[18] Whether the founding generation understood habeas relief more broadly than described by Blackstone, Justice Story, and our prior cases, see *supra*, at 117, cannot be settled by a single case or even a few obscure and possibly aberrant cases. And in any event, what is said here about Murray's case provides little support for respondent's position. In 1677, we are told, Murray was imprisoned in England so that he could be " 'sent into Scotland' " for a criminal trial, but the King's Bench twice issued a

His second case, *Somerset* v. *Stewart*, Lofft. 1, 98 Eng. Rep. 499 (K. B. 1772), is celebrated but does not aid respondent. James Somerset was a slave who was "detain[ed]" on a ship bound for Jamaica, and Lord Mansfield famously ordered his release on the ground that his detention as a slave was unlawful in England. *Id.*, at 19, 98 Eng. Rep., at 510. This relief, release from custody, fell within the historic core of habeas, and Lord Mansfield did not order anything else.

It may well be that a collateral consequence of Somerset's release was that he was allowed to remain in England, but if that is so, it was due not to the writ issued by Lord Mansfield, but to English law regarding entitlement to reside in the country. At the time, England had nothing like modern immigration restrictions. As late as 1816, the word "deportation" apparently "was not to be found in any English dictionary." The Use of the Crown's Power of Deportation Under the Aliens Act, 1793–1826, in J. Dinwiddy, Radicalism and Reform in Britain, 1780–1850, p. 150, n. 4 (1992); see also, *e. g.*, Craies, The Right of Aliens To Enter British Territory, 6 L. Q. Rev. 27, 35 (1890) ("England was a complete asylum to the foreigner who did not offend against its laws"); Haycraft, Alien Legislation and the Prerogative of the Crown, 13 L. Q. Rev. 165, 180 (1897) ("There do not appear to have been any transactions in Parliament or in the [Crown's] Privy Council directly affecting [deportation] from the time of Elizabeth [I] to that of George III").[19]

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writ of habeas corpus requiring his release. Brief for Respondent 27 (quoting Halliday 236). Putting aside the "delicate" relationship between England and Scotland at the time, *Boumediene*, 553 U. S., at 749, issuance of a writ to secure the release of a person held in pretrial custody is far afield from what respondent wants here.

[19] This regime lasted until after 1789, when the Aliens Act of 1793 authorized justices of the peace to imprison "without bail or mainprize" (*i. e.*, bond) any alien found without a passport, who could then be "sen[t] out of th[e] realm." An Act for Regulating Immigration into Great Britain, 33 Geo. III, ch. 4, §§ 11, 29.

For a similar reason, respondent cannot find support in early 19th-century American cases in which deserting foreign sailors used habeas to obtain their release from the custody of American officials. In none of the cases involving deserters that have been called to our attention did the court order anything more than simple release from custody. As noted, Justice Story ordered a sailor's release into the custody of his ship's master. See *Ex parte D'Olivera*, 7 F. Cas., at 854. Other decisions, while ordering the release of detained foreign deserters because no statute authorized detention, chafed at having to order even release. See *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L. J. & Misc. Repertory 132, 135–136 (Md. 1810) (reporting judge's statement "that he never would interfere to prevent" the British consul himself from detaining British deserters); *Case of Hippolyte Dumas*, 2 Am. L. J. & Misc. Repertory 86, 87 (Pa. 1809) (noting "inconvenience" that U. S. law did not discourage desertion of foreign sailors); *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392, 396 (Pa. 1815) (opinion of Tilghman, C. J.) (same); *id.*, at 397 (opinion of Yeates, J.) (same). These cases thus do not contemplate the quite different relief that respondent asks us to sanction here.

In these cases, as in *Somerset*, it may be that the released petitioners were able to remain in the United States as a collateral consequence of release, but if so, that was due not to the writs ordering their release, but to U. S. immigration law or the lack thereof. These decisions came at a time when an "open door to the immigrant was the . . . federal policy." *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588, n. 15 (1952); see also *St. Cyr*, 533 U. S., at 305 (first immigration regulation enacted in 1875). So release may have had the side effect of enabling these individuals to remain in this country, but that is beside the point.

The relief that a habeas court may order and the collateral consequences of that relief are two entirely different things. Ordering an individual's release from custody may have the side effect of enabling that person to pursue all sorts of op-

portunities that the law allows. For example, release may enable a qualified surgeon to operate on a patient; a licensed architect may have the opportunity to design a bridge; and a qualified pilot may be able to fly a passenger jet. But a writ of habeas could not be used to compel an applicant to be afforded those opportunities or as a means to obtain a license as a surgeon, architect, or pilot. Similarly, while the release of an alien may give the alien the opportunity to remain in the country if the immigration laws permit, we have no evidence that the writ as it was known in 1789 could be used to require that aliens be permitted to remain in a country other than their own, or as a means to seek that permission.

Respondent's final examples involve international extradition, but these cases are no more pertinent than those already discussed. For one thing, they post-date the founding era. England was not a party to any extradition treaty in 1789, and this country's first extradition treaty was the Jay Treaty of 1794. See 1 J. Moore, Extradition and Interstate Rendition §§7, 78, pp. 10, 89 (1891). In any event, extradition cases, similar to the deserter cases, illustrate nothing more than the use of habeas to secure release from custody when not in compliance with the extradition statute and relevant treaties. As noted by a scholar on whose work respondent relies, these cases "examine[d] the lawfulness of magistrates' decisions permitting the executive to detain aliens." Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1003 (1998). In these cases, as in all the others noted above, habeas was used "simply" to seek release from allegedly unlawful detention. *Benson* v. *McMahon*, 127 U. S. 457, 463 (1888). See also, *e. g.*, *In re Stupp*, 23 F. Cas. 296, 303 (No. 13,563) (CC SDNY 1875).[20]

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[20] *Amici* supporting respondent make an additional argument. They contend that "[i]n eighteenth century practice, the authority of English judges to review habeas petitions was not constrained by past decisions" and that these judges felt free to innovate in order to ensure that justice

Despite pages of rhetoric, the dissent is unable to cite a single pre-1789 habeas case in which a court ordered relief that was anything like what respondent seeks here. The dissent instead contends that "the Suspension Clause inquiry does not require a close (much less precise) factual match with historical habeas precedent," *post*, at 168, and then discusses cases that are not even close to this one. The dissent reveals the true nature of its argument by suggesting that there are "inherent difficulties [in] a strict originalist approach in the habeas context because of, among other things, the dearth of reasoned habeas decisions at the founding." *Post*, at 167. But respondent does not ask us to hold that the Suspension Clause guarantees the writ as it might have evolved since the adoption of the Constitution. On the contrary, as noted at the outset of this discussion, he rests his argument on "the writ as it existed in 1789." Brief for Respondent 26, n. 12.

What the dissent merely implies, one concurring opinion states expressly, arguing that the scope of the writ guaranteed by the Suspension Clause "may change 'depending upon the circumstances'" and thus may allow certain aliens to seek relief other than release. *Post*, at 152 (BREYER, J., con-

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was done. Legal Historians Brief 5–6. But the role of federal courts under our Constitution is very different from that of those English judges. The English judges "were considered agents of the Crown, designed to assist the King in the exercise of his power." *Boumediene*, 553 U. S., at 740. The court with primary habeas jurisdiction, after all, was called the King's Bench, on which the King "was theoretically always present." Halliday & White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 594, 598, and n. 49 (2008). Habeas was an exercise of the King's prerogative "to have an account . . . why the liberty of any of his subjects is restrained." 3 J. Story, Commentaries on the Constitution of the United States § 1335, p. 207 (1833); accord, Legal Historians Brief 5–7. In our federal courts, by contrast, the scope of habeas has been tightly regulated by statute, from the Judiciary Act of 1789 to the present day, and precedent is as binding in a habeas case as in any other. See, *e. g.*, *Jenkins* v. *Hutton*, 582 U. S. 280, 284 (2017) (*per curiam*).

curring in judgment) (quoting *Boumediene*, 553 U. S., at 779). But that is not respondent's argument, and as a general rule "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States* v. *Sineneng-Smith*, 590 U. S. 371, 375 (2020) (internal quotation marks omitted). In any event, the concurrence's snippets of quotations from *Boumediene* are taken entirely out of context. They relate to the question whether the statutory review procedures for Guantanamo detainees *seeking release from custody* provided an adequate substitute for a habeas petition *seeking release*. See *infra*, at 136–138. They do not suggest that any habeas writ guaranteed by the Suspension Clause permits a petitioner to obtain relief that goes far beyond the "core" of habeas as "a remedy for unlawful executive detention." *Munaf*, 553 U. S., at 693.[21]

[21] This concurrence imagines three horrible possibilities that it fears could come to pass unless we interpret the Suspension Clause to protect the right to some undefined category of relief beyond release from custody. See *post*, at 151 (opinion of BREYER, J.). But its interpretation is neither necessary nor obviously sufficient to prevent the possibilities it fears. First, if a citizen were detained for deportation, today's opinion would not prevent the citizen from petitioning for release. Second, if respondent's "procedural" claims do not merit habeas review, as the concurrence concludes, *post*, at 156–157, it is not clear why habeas should help the concurrence's hypothetical alien whose credible-fear claim was rejected based on forged evidence. Both respondent and this hypothetical alien assert procedural irregularities. Does the availability of habeas review depend on a judge's view of the severity of the irregularity asserted? Finally, there is the hypothetical alien denied asylum on the ground that Judaism is not a religion. Such a decision would of course be ridiculous, but why it would not raise a question of "brute fac[t]" that falls outside the concurrence's interpretation of the Suspension Clause, *post*, at 154, is again not clear.

Whatever may be said about the concurrence's hypotheticals, it is possible to imagine all sorts of abuses not even remotely related to unauthorized executive detention that could be imposed on people in this country if the Constitution allowed Congress to deprive the courts of any jurisdiction to entertain claims regarding such abuses. If that were to happen, it would no doubt be argued that constitutional provisions other than the

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We now proceed to consider the second body of case law on which respondent relies, decisions of this Court during the "finality era," which takes its name from a feature of the Immigration Act of 1891 making certain immigration decisions "final." Although respondent claims that his argument is supported by "the writ as it existed in 1789," Brief for Respondent 26, n. 12, his argument focuses mainly on this body of case law, which began a century later. These cases, he claims, held that "the Suspension Clause mandates a minimum level of judicial review to ensure that the Executive complies with the law in effectuating removal." *Id.*, at 11–12. The Ninth Circuit also relied heavily on these cases and interpreted them to "suggest that the Suspension Clause requires review of legal and mixed questions of law and fact related to removal orders." 917 F. 3d, at 1117.

This interpretation of the "finality era" cases is badly mistaken. Those decisions were based not on the Suspension Clause but on the habeas statute and the immigration laws then in force. The habeas statute in effect during this time was broad in scope. It authorized the federal courts to review whether a person was being held in custody in violation of any federal law, including immigration laws. Thus, when aliens claimed that they were detained in violation of immigration statutes, the federal courts considered whether immigration authorities had complied with those laws. This, of course, required that the immigration laws be interpreted, and at the start of the finality era, this Court interpreted the 1891 Act's finality provision to block review of only questions of fact. Accordingly, when writs of habeas corpus were sought by aliens who were detained on the ground that they were not entitled to enter this country, the Court considered whether, given the facts found by the immigration

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Suspension Clause guaranteed judicial review. We have no occasion to consider such arguments here.

authorities, the detention was consistent with applicable federal law. But the Court exercised that review because it was authorized to do so by statute. The decisions did not hold that this review was required by the Suspension Clause.

In this country, the habeas authority of federal courts has been addressed by statute from the very beginning. The Judiciary Act of 1789, § 14, 1 Stat. 82, gave the federal courts the power to issue writs of habeas corpus under specified circumstances, but after the Civil War, Congress enacted a much broader statute. That law, the Habeas Corpus Act of 1867, provided that "the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The Act was "of the most comprehensive character," bringing "within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary" to federal law. *Ex parte McCardle*, 6 Wall. 318, 325–326 (1868). This jurisdiction was "impossible to widen." *Id.*, at 326; see *Fay* v. *Noia*, 372 U. S. 391, 415 (1963) (noting the Act's "expansive language" and "imperative tone"). The 1867 statute, unlike the current federal habeas statute, was not subject to restrictions on the issuance of writs in immigration matters, and in *United States* v. *Jung Ah Lung*, 124 U. S. 621 (1888), the Court held that an alien in immigration custody could seek a writ under that statute. *Id.*, at 626. This provided the statutory basis for the writs sought in the finality era cases.

The Immigration Act of 1891, enacted during one of the country's great waves of immigration, required the exclusion of certain categories of aliens and established procedures for determining whether aliens fell within one of those categories. The Act required the exclusion of "idiots, insane persons, paupers or persons likely to become a public charge,"

persons with infectious diseases, persons with convictions for certain crimes, some individuals whose passage had been paid for by a third party, and certain laborers. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084. Inspection officers were authorized to board arriving vessels and inspect any aliens on board. § 8, *id.*, at 1085. And, in the provision of central importance here, the Act provided that "[a]ll decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." *Ibid.* Later immigration Acts, which remained in effect until 1952,[22] contained similar provisions. See Act of 1894, 28 Stat. 390; Immigration Act of 1907, § 25, 34 Stat. 907; Immigration Act of 1917, § 17, 39 Stat. 887.

The first of the finality era cases, *Nishimura Ekiu* v. *United States*, 142 U. S. 651 (1892), required the Court to address the effect of the 1891 Act's finality provision in a habeas case. *Nishimura Ekiu* is the cornerstone of respondent's argument regarding the finality era cases, so the opinion in that case demands close attention.

The case involved an alien who was detained upon arrival based on the immigration inspector's finding that she was liable to become a public charge. Seeking to be released, the alien applied to the Circuit Court for a writ of habeas corpus and argued that the 1891 Act, if construed to give immigration authorities the "exclusive authority to determine" her right to enter, would violate her constitutional right to the writ of habeas corpus and her right to due process. *Id.*, at 656 (statement of the case). The Circuit Court refused to issue the writ, holding that the determination of

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[22] See *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51–52 (1955) (interpreting 1952 Immigration and Nationality Act, 66 Stat. 163, to provide for review of deportation orders).

the inspector of immigration was not subject to review, and the alien then appealed.

This Court upheld the denial of the writ. The Court interpreted the 1891 Act to preclude judicial review only with respect to questions of fact. *Id.*, at 660. And after interpreting the 1891 Act in this way, the Court found that "the act of 1891 is constitutional." *Id.*, at 664.

The Court's narrow interpretation of the 1891 Act's finality provision meant that the federal courts otherwise retained the full authority granted by the Habeas Corpus Act of 1867 to determine whether an alien was detained in violation of federal law. Turning to that question, the Court held that the only procedural rights of an alien seeking to enter the country are those conferred by statute. "As to such persons," the Court explained, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.*, at 660. The Court therefore considered whether the procedures set out in the 1891 Act had been followed, and finding no violation, affirmed the denial of the writ. *Id.*, at 661–664. What is critical for present purposes is that the Court did not hold that the Suspension Clause imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters.

Respondent interprets *Nishimura Ekiu* differently. See Brief for Respondent 13–15. As he reads the decision, the Court interpreted the 1891 Act to preclude review of *all questions* related to an alien's entitlement to enter the country. Any other interpretation, he contends, would fly in the face of the statutory terms. But, he maintains, the Court held that this limitation violated the Suspension Clause except with respect to questions of fact, and it was for this reason that the Court considered whether the procedures specified by the 1891 Act were followed. In other words, he reads *Nishimura Ekiu* as holding that the 1891 Act's finality

provision was unconstitutional in most of its applications (*i. e.*, to all questions other than questions of fact).

This interpretation is wrong. The opinion in *Nishimura Ekiu* states unequivocally that "the act of 1891 is constitutional," 142 U. S., at 664, not that it is constitutional only in part. And if there is any ambiguity in the opinion regarding the Court's interpretation of the finality provision, the later decision in *Gegiow* v. *Uhl*, 239 U. S. 3 (1915), left no doubt. What *Nishimura Ekiu* meant, *Gegiow* explained, was that the immigration authorities' factual findings were conclusive (as *Gegiow* put it, "[t]he conclusiveness of the decisions of immigration officers . . . is conclusiveness upon matters of fact") and therefore, the Court was "not forbidden by the statute to consider" in a habeas proceeding "whether the reasons" for removing an alien "agree with the requirements of the act." 239 U. S., at 9. In light of this interpretation, the *Nishimura Ekiu* Court had no occasion to decide whether the Suspension Clause would have tolerated a broader limitation, and there is not so much as a hint in the opinion that the Court considered this question. Indeed, the opinion never even mentions the Suspension Clause, and it is utterly implausible that the Court would hold *sub silentio* that Congress had violated that provision.

Holding that an Act of Congress unconstitutionally suspends the writ of habeas corpus is momentous. See *Boumediene*, 553 U. S., at 773 (noting "the care Congress has taken throughout our Nation's history" to avoid suspension). The Justices on the Court at the beginning of the finality era had seen historic occasions when the writ was suspended—during the Civil War by President Lincoln and then by Congress, and later during Reconstruction by President Grant. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 563 (2004) (Scalia, J., dissenting) (discussing these events). The suspension of habeas during this era played a prominent role in our constitutional history. See *Ex parte Merryman*, 17 F. Cas. 144, 151–152 (No. 9,487) (CC Md. 1861) (Taney, C. J.); *Ex parte*

Milligan, 4 Wall. 2, 116, 131 (1866). (Two of the Justices at the beginning of the finality era were on the Court when *Ex parte Milligan* was decided.) The Justices knew a suspension of the writ when they saw one, and it is impossible to believe that the *Nishimura Ekiu* Court identified another occasion when Congress had suspended the writ and based its decision on the Suspension Clause without even mentioning that provision.

The dissent's interpretation of *Nishimura Ekiu* is different from respondent's. According to the dissent, *Nishimura Ekiu* interpreted the 1891 Act as it did based on the doctrine of constitutional avoidance. See *post*, at 179–180. This reading has no support in the Court's opinion, which never mentions the Suspension Clause or the avoidance doctrine and never explains why the Clause would allow Congress to preclude review of factual findings but nothing more. But even if there were some basis for this interpretation, it would not benefit respondent, and that is undoubtedly why he has not made the argument. IIRIRA unequivocally bars habeas review of respondent's claims, see § 1252(e)(2), and he does not argue that it can be read any other way. The avoidance doctrine "has no application in the absence of ambiguity." *Warger* v. *Shauers*, 574 U. S. 40, 50 (2014) (internal quotation marks and ellipsis omitted). Thus, if *Nishimura Ekiu*'s interpretation were based on constitutional avoidance, it would still not answer the interpretive question here.

When we look to later finality era cases, any suggestion of a Suspension Clause foundation becomes even less plausible. None of those decisions mention the Suspension Clause or even hint that they are based on that provision, and these omissions are telling. On notable occasions during that time, the writ was suspended—in the Philippines in 1906[23]

[23] While the Philippines was a Territory, its government suspended habeas to deal with "'certain organized bands'" of rebels. *Fisher* v. *Baker*, 203 U. S. 174, 179–181 (1906) (quoting resolution).

and Hawaii in 1941.[24] During World War II, the Court held that "enemy aliens" could utilize habeas "unless there was suspension of the writ." *In re Yamashita*, 327 U. S. 1, 9 (1946). And the Court invoked the Suspension Clause in holding that the Executive lacked authority to intern a Japanese-American citizen. See *Ex parte Endo*, 323 U. S. 283, 297–299 (1944). If the Justices during that time had thought that the Suspension Clause provided the authority they were exercising in the many cases involving habeas petitions by aliens detained prior to entry, it is hard to believe that this important fact would have escaped mention.

Respondent suggests that *Nishimura Ekiu* cannot have interpreted the 1891 Act's finality provision to apply only to factual questions because the statutory text categorically bars all review. The important question here, however, is *what the Court did* in *Nishimura Ekiu*, not whether its interpretation was correct, and in any event, there was a reasonable basis for the Court's interpretation.

The determinations that the immigration officials were required to make under the 1891 Act were overwhelmingly factual in nature. The determination in Nishimura's case—that she was likely to become a public charge—seems to have been a pure question of fact, and the other grounds for exclusion under the Act involved questions that were either solely or at least primarily factual in nature.

If we were now called upon to determine the meaning of a provision like the finality provision in the 1891 Act, our precedents would provide the basis for an argument in favor of the interpretation that the *Nishimura Ekiu* Court reached. The presumption in favor of judicial review, see, *e. g.*, *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221, 229 (2020); *Nasrallah* v. *Barr*, 590 U. S. 573, 581–583 (2020), could be invoked. So could the rule that "[i]mplications from statu-

[24] The Governor of Hawaii suspended habeas, with President Roosevelt's approval, after the attack on Pearl Harbor. See *Duncan* v. *Kahanamoku*, 327 U. S. 304, 307–308, 324 (1946).

tory text or legislative history are not sufficient to repeal habeas jurisdiction." *St. Cyr*, 533 U. S., at 299; accord, *Ex parte Yerger*, 8 Wall. 85, 105 (1869). Thus, respondent's interpretation of the decision in *Nishimura Ekiu* is wrong, and the same is true of his understanding of the later finality era cases.

Rather than relying on the Suspension Clause, those cases simply involved the exercise of the authority conferred by the habeas statute then in effect. This was true of *Nishimura Ekiu*, *Gegiow*, and every other finality era case that respondent cites in support of his Suspension Clause argument. See, *e. g.*, *Gonzales* v. *Williams*, 192 U. S. 1 (1904); *Yee Won* v. *White*, 256 U. S. 399 (1921); *Tod* v. *Waldman*, 266 U. S. 113 (1924); *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279 (1932); *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954). Some finality era cases presented pure questions of law, while others involved the application of a legal test to particular facts. At least one involved an alien who had entered illegally. See *id.*, at 262. But none was based on the Suspension Clause. No majority opinion even mentioned the Suspension Clause.[25] Indeed, any mention of the Constitution was rare—and unhelpful to respondent's arguments here.[26] And in all the cited cases concerning aliens detained at entry, unlike the case now before us, what was sought—and the only

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[25] In a concurrence in *United States ex rel. Turner* v. *Williams*, 194 U. S. 279 (1904), Justice Brewer stated without elaboration and without citing any authority that the Suspension Clause prohibits Congress from "oust-[ing] the courts from the duty of inquiry respecting both law and facts" in habeas cases. *Id.*, at 295. No other Justice joined that opinion.

[26] In *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713 (1893), and many other cases, the Court noted that the Constitution gives Congress plenary power to set requirements for admission.

relief considered—was release. Indeed, in an early finality era case, the Court took pains to note that it did not "express any opinion" on whether an alien was entitled to enter. *Lem Moon Sing* v. *United States*, 158 U. S. 538, 549 (1895).

Like the dissent, respondent makes much of certain statements in *Heikkila* v. *Barber*, 345 U. S. 229 (1953), which he interprets to substantiate his interpretation of *Nishimura Ekiu* and the subsequent entry cases discussed above. But he takes these statements out of context and reads far too much into them. *Heikkila* was not a habeas case, and the question before the Court was whether a deportation order was reviewable under the Administrative Procedure Act (APA). The Court held that the order was not subject to APA review because the Immigration Act of 1917 foreclosed "judicial review"—as opposed to review in habeas. 345 U. S., at 234–235. Nothing in *Heikkila* suggested that the 1891 Act had been found to be partly unconstitutional, and *Heikkila* certainly did not address the scope of the writ of habeas corpus in 1789.

In sum, the Court exercised habeas jurisdiction in the finality era cases because the habeas statute conferred that authority, not because it was required by the Suspension Clause. As a result, these cases cannot support respondent's argument that the writ of habeas corpus as it was understood when the Constitution was adopted would have allowed him to claim the right to administrative and judicial review while still in custody.

C

We come, finally, to the more recent cases on which respondent relies. The most recent, *Boumediene*, is not about immigration at all. It held that suspected foreign terrorists could challenge their detention at the naval base in Guantanamo Bay, Cuba. They had been "apprehended on the battlefield in Afghanistan" and elsewhere, not while crossing the border. 553 U. S., at 734. They sought only to be released

from Guantanamo, not to enter this country. See, *e. g.*, Brief for Petitioner Al Odah et al. in *Al Odah* v. *United States*, decided with *Boumediene* v. *Bush*, O. T. 2007, No. 06–1196, p. 39 (arguing that "habeas contemplates but one remedy," "release"). And nothing in the Court's discussion of the Suspension Clause suggested that they could have used habeas as a means of gaining entry. Rather, the Court reaffirmed that release is the habeas remedy though not the "exclusive" result of every writ, given that it is often "appropriate" to allow the executive to cure defects in a detention. 553 U. S., at 779.

Respondent's other recent case is *St. Cyr*, in which the Court's pertinent holding rejected the argument that certain provisions of IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996 that did not refer expressly to habeas should nevertheless be interpreted as stripping the authority conferred by the habeas statute. In refusing to adopt that interpretation, the Court enlisted a quartet of interpretive canons: "the strong presumption in favor of judicial review of administrative action," "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," the rule that a "clear indication" of congressional intent is expected when a proposed interpretation would push "the outer limits of Congress' power," and the canon of constitutional avoidance. 533 U. S., at 298–300. In connection with this final canon, the Court observed: "Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *Id.*, at 300 (quoting *Heikkila*, 345 U. S., at 235).

Respondent pounces on this statement, but like the *Heikkila* statement on which it relies, it does nothing for him. The writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation. *St. Cyr* re-

affirmed these propositions, and this statement in *St. Cyr* does not signify approval of respondent's very different attempted use of the writ, which the Court did not consider.[27]

IV

In addition to his Suspension Clause argument, respondent contends that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding. Brief for Respondent 38–45. The Ninth Circuit agreed, holding that respondent "had a constitutional right to expedited removal proceedings that conformed to the dictates of due process." 917 F. 3d, at 1111, n. 15 (internal quotation marks omitted). And the Ninth Circuit acknowledged, *ibid.*, that this holding conflicted with the Third Circuit's decision upholding § 1252(e)(2) on the ground that applicants for admission lack due process rights regarding their applications, see *Castro*, 835 F. 3d, at 445–446. Since due process provided an independent ground for the decision below and since respondent urges us to affirm on this ground, it is hard to understand the dissent's argument that the due process issue was not "seriously in dispute below" or that it is somehow improper for us to decide the issue. *Post*, at 190.

Nor is the dissent correct in defending the Ninth Circuit's holding. That holding is contrary to more than a century of precedent. In 1892, the Court wrote that as to "foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U. S., at 660. Since then, the Court has often reiterated this important rule. See, *e. g.*, *Knauff*,

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[27] The Government notes other distinctions between *St. Cyr* and this case, including that the alien in *St. Cyr* raised a pure question of law, while respondent raises at best a mixed question of law and fact. We have no need to consider these distinctions.

338 U. S., at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Mezei*, 345 U. S., at 212 (same); *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative").

Respondent argues that this rule does not apply to him because he was not taken into custody the instant he attempted to enter the country (as would have been the case had he arrived at a lawful port of entry). Because he succeeded in making it 25 yards into U. S. territory before he was caught, he claims the right to be treated more favorably. The Ninth Circuit agreed with this argument.

We reject it. It disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: "[T]he power to admit or exclude aliens is a sovereign prerogative," *id.*, at 32; the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit, *Nishimura Ekiu*, 142 U. S., at 659; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted, see *Knauff*, 338 U. S., at 544.

This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are "treated" for due process purposes "as if stopped at the border." *Mezei*, 345 U. S., at 215; see *Leng May Ma* v. *Barber*, 357 U. S. 185, 188–190 (1958); *Kaplan* v. *Tod*, 267 U. S. 228, 230–231 (1925).

The same must be true of an alien like respondent. As previously noted, an alien who tries to enter the country illegally is treated as an "applicant for admission," § 1225(a)(1), and an alien who is detained shortly after unlawful entry cannot be said to have "effected an entry," *Zadvydas* v. *Davis*, 533 U. S. 678, 693 (2001). Like an alien detained after arriving at a port of entry, an alien like respondent is "on the threshold." *Mezei*, 345 U. S., at 212. The rule advocated by respondent and adopted by the Ninth Circuit would undermine the "sovereign prerogative" of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location. *Plasencia*, 459 U. S., at 32.

For these reasons, an alien in respondent's position has only those rights regarding admission that Congress has provided by statute. In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum," and he was given that right. §§ 1225(b)(1)(B)(ii), (v). Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made. As applied here, therefore, § 1252(e)(2) does not violate due process.[28]

* * *

Because the Ninth Circuit erred in holding that § 1252(e)(2) violates the Suspension Clause and the Due Process Clause,

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[28] Although respondent, during his interviews with immigration officials, does not appear to have provided any information tying the assault he suffered at the hands of those who arrived at his home in a van to persecution on the basis of ethnicity or political opinion, his counseled petition offers details about "white va[n]" attacks against Tamils in Sri Lanka. App. 25–26 (internal quotation marks omitted). As now portrayed, his assault resembles those incidents. Department officials and immigration judges may reopen cases or reconsider decisions, see 8 CFR §§ 103.5(a)(1), (5), and 1003.23(b)(1), and the Executive always has discretion not to remove, see *AADC*, 525 U. S., at 483–484.

we reverse the judgment and remand the case with directions that the application for habeas corpus be dismissed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion, which correctly concludes that respondent's Suspension Clause argument fails because he does not seek a writ of habeas corpus. I write separately to address the original meaning of the Suspension Clause, which guarantees that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. The Founders appear to have understood "[t]he Privilege of the Writ of Habeas Corpus" to guarantee freedom from discretionary detention, and a "suspen[sion]" of that privilege likely meant a statute granting the executive the power to detain without bail or trial based on mere suspicion of a crime or dangerousness. Thus, the expedited removal procedure in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546, is likely not a suspension.[1]

I

The writ of habeas corpus began as a prerogative writ in the Court of King's Bench in the 16th century. J. Baker, An Introduction to English Legal History 157 (5th ed. 2019). Over time, however, it came to be understood both as a right to be free from arbitrary detention and as a procedural writ.

By the end of the 16th century, the English connected the common-law writ of habeas corpus to liberty. Specifically, it was associated with the guarantee in Magna Carta that "[n]o free person (*Nullus liber homo*) shall be taken or imprisoned, or disseised or outlawed or exiled, or in any way

[1] I express no view on the question whether respondent is even entitled to the privilege of the writ as an unadmitted alien.

destroyed . . . except by the lawful judgment of his peers or by the law of the land." *Id.*, at 157, n. 76, 506. Perhaps most prominently, Edward Coke wrote in his Institutes that "if a man be taken, or committed to prison *contra legem terrae*, against the Law of the land," then "[h]e may have an *habeas corpus*." The Second Part of the Institutes of the Laws of England 55 (6th ed. 1681). For Coke, and for the many English (and later Americans) who read his work, "the writ was treated as an aspect of the Charter's guaranty." D. Meador, Habeas Corpus and Magna Carta: Dualism of Power and Liberty 22 (1966).

This association between habeas corpus and freedom from discretionary detention deepened after 1679 with the Habeas Corpus Act, also known as An Act for the better secureing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas. The statute sought to address "great Delayes" in "criminall or supposed criminall Matters." 31 Car. 2, ch. 2. It required an officer served with a writ of habeas corpus to produce the prisoner within three days in "any such criminall or supposed criminall Matters." *Ibid.* It also guaranteed bail to prisoners in cases of felony or high treason if they were not tried within one term of court. *Ibid.* To protect these rights, Parliament created a special statutory remedy: All writs under the Habeas Corpus Act were marked as issuing pursuant to the statute. *Ibid.*; P. Halliday, Habeas Corpus: From England to Empire 320 (2010).

Parliament passed the Habeas Corpus Act to curb the power of King Charles II, but it nonetheless came to be seen as a protection for liberty, not just an assertion of the powers of Parliament over the Crown. Henry Care, in the 1774 edition of his widely read treatise English Liberties, commented that "before this statute [the common-law writ of habeas corpus] was rendered far less useful than it ought to be, partly by the Judges pretending a power to grant or deny the said writ at their pleasure, in many cases; and especially by the ill practices of Sheriffs and Goalers, by putting the

prisoner to the charge and trouble of . . . a second and third writ, before they would obey the first." 1 English Liberties, or the Free-born Subject's Inheritance 195. The Habeas Corpus Act, he concluded, "provides thus for our liberty." *Id.*, at 198. William Blackstone put it even more sweepingly, writing that the Habeas Corpus Act "is frequently considered as another *magna carta*." 3 Commentaries on the Laws of England 135 (1770).

II

The Founders inherited this understanding of habeas corpus. And they enshrined it in the Suspension Clause, which they understood to protect a substantive right.

The language of the Suspension Clause evinces this understanding. The Clause itself does not authorize courts to issue writs of habeas corpus. *INS* v. *St. Cyr*, 533 U. S. 289, 337 (2001) (Scalia, J., dissenting); *Ex parte Bollman*, 4 Cranch 75, 94 (1807). Nor does it refer simply to the writ of habeas corpus. Rather, it protects the *privilege of* the writ of habeas corpus. The word "privilege" was "used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone." *McDonald* v. *Chicago*, 561 U. S. 742, 813 (2010) (THOMAS, J., concurring in part and concurring in judgment). By using this term, the Framers appear to have had a substantive right in mind.

Ratification debates reflect this understanding as well. Future Supreme Court Justice James Iredell said in the North Carolina convention that, "[b]y the privileges of the *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged." 4 Debates in the Several State Conventions 171 (J. Elliot ed. 1891). Signer of the Constitution James McHenry told the Maryland House of Delegates that "[p]ublic safety may require a suspension of the Ha-[beas] Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected in his oppo-

sition to power." 11 Documentary History of the Ratification of the Constitution 80, 84 (J. Kaminski et al. eds. 2015) (Documentary History).

This understanding is echoed in statements that the Constitution protects the Habeas Corpus Act, the writ of habeas corpus, or simply "the habeas corpus," all referring to a substantive right. Alexander Hamilton wrote in The Federalist No. 83 that "the *habeas corpus* act" was "provided for in the most ample manner in the plan of the convention." The Federalist No. 83, p. 499 (C. Rossiter ed. 1961). Again in No. 84, he wrote that the Constitution "establish[ed] the writ of *habeas corpus*." *Id.*, No. 84, at 511. In the Pennsylvania ratifying convention, Jasper Yeates said that the Suspension Clause "direct[ed] that the privilege of the *habeas corpus* act shall not be suspended except in times of immediate danger." 2 Documentary History 434–435 (M. Jensen ed. 1976). In Virginia, Governor Edmund Randolph—a signer and future Attorney General—argued that "the habeas corpus is at least on as secure and good a footing as it is in England" because "[t]hat privilege is secured here by the Constitution." 9 *id.*, at 1099 (J. Kaminski & G. Saladino eds. 1990). Luther Martin of Maryland wrote that "the general government is to have a *power* of *suspending* the *habeas corpus act*, in cases of *rebellion* or *invasion*." Genuine Information VIII, reprinted in 15 *id.*, at 434 (J. Kaminski & G. Saladino eds. 1984). In Massachusetts, Theophilius Parsons "made a Loud Speech on the Habeas Corpus act that it will not be in the power of Gov[ern]ment to suspend the act only in time of war." 7 *id.*, at 1813 (J. Kaminski & G. Saladino eds. 2001). Other speakers and writers made similar references. See A. Tyler, Habeas Corpus in Wartime 132–133 (2017) (collecting examples). In sum, it seems that the founding generation viewed the privilege of the writ of habeas corpus as a freedom from arbitrary detention.[2]

[2] None of this is to say that the writ of habeas corpus involved a wide-ranging, ever-changing inquiry. As the Court today reaffirms, "the scope of habeas has been tightly regulated by statute, from the Judiciary Act of

III

The remaining question is what it means for "[t]he Privilege of the Writ of Habeas Corpus" to "be suspended." U. S. Const., Art. I, § 9, cl. 2. At the founding, suspension was a well-known term that meant "a [t]emporal [s]top of a [m]an's [r]ight." N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770); see *St. Cyr*, 533 U. S., at 337–338 (Scalia, J., dissenting). In the context of habeas corpus, it appears to have specifically meant a grant of authority to the executive to detain without bail or trial based on suspicion of a crime or dangerousness.

The English understood the term this way. Blackstone called it "the happiness of [the English] constitution" that "the parliament only, or legislative power, . . . can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing." 1 Commentaries on the Laws of England, at 136. Bills known as suspensions granted broad power to detain based on suspicion of a crime. For

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1789 to the present day." *Ante*, at 126, n. 20. A writ of habeas corpus was "in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 3 Pet. 193, 202 (1830) (Marshall, C. J.). When an executive detained someone without trial, it allowed a court to "examine into [the] validity" of "the reason for" commitment. 3 W. Blackstone, Commentaries on the Laws of England 133 (1770). In cases of detention pursuant to the judgment of a court, "a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody." *Wright* v. *West*, 505 U. S. 277, 285 (1992) (opinion of THOMAS, J.). In both contexts, the writ "played only a procedural role: It issued as of right when a prisoner showed probable cause to believe he was being held illegally . . . and obligated the warden to file a 'return' identifying the grounds of imprisonment." *Jennings* v. *Stephens*, 574 U. S. 271, 285 (2015) (THOMAS, J., dissenting). When the writ of habeas corpus was granted, it "decided nothing except that there was a case calling for an answer by the gaoler." Goddard, A Note on Habeas Corpus, 65 L. Q. Rev. 30, 34 (1949). "After reviewing the reason so returned, the court could release, bail, or remand the prisoner as appropriate." J. Baker, An Introduction to English Legal History 157 (5th ed. 2019).

example, in 1777, Lord Germaine introduced a bill "'to empower his Majesty to secure and detain Persons charged with, or suspected of, the Crime of High Treason committed in North America, or on the High Seas, or the Crime of Piracy.'" 19 W. Cobbett, The Parliamentary History of England 4 (1814). The bill allowed certain prisoners to be detained "'without bail or mainprize'"[3] and prohibited any "'judge or justice of peace'" from "'bail[ing] or try[ing] any such person or persons, . . . any law, statute, or usage, to the contrary in any wise notwithstanding.'" *Id.*, at 5. The text contained no mention of the Habeas Corpus Act, but it nevertheless was referred to as a "suspension of the Habeas Corpus Act." *Id.*, at 9–10. As one historian has written, suspensions "were officially acts 'empowering his majesty to apprehend and detain such persons as he shall find cause to suspect'" and to do so "'without bail or mainprise.'" Halliday, Habeas Corpus, at 248.

Americans shared a similar understanding, as evidenced by the suspensions that States passed during the Revolutionary War. "By their common terms," these suspensions "bestowed authority on state executives to arrest and detain persons preventively based on suspicion of supporting the Crown." Tyler, Habeas Corpus in Wartime, at 111. In 1777, Massachusetts authorized the detention of "any person whom the council shall deem the safety of the Commonwealth requires should be restrained of his personal liberty, or whose enlargement within this state is dangerous thereto" "without bail or mainpri[s][z]e." 1776–1777 Mass. Acts ch. 45, §§ 1, 3, p. 641. Virginia similarly allowed the Governor and council to detain anyone "whom they may have just cause to suspect of disaffection to the independence of the United States or of attachment to their enemies." An act for giving certain powers to the governour and council, and

[3] Mainprise or mainprize is a "writ ordering the sheriff to take . . . security . . . for the prisoner's appearance and release the prisoner." Black's Law Dictionary 1142 (11th ed. 2019).

for punishing those who shall oppose the execution of laws, reprinted in 10 W. Hening's Statutes at Large 413–414 (1822). And New York created a board with power "to apprehend and confine or cause to be apprehended or confined . . . all persons whose going at large shall in the judgment of the said commissioners or any three of them appear dangerous to the safety of this State." An Act appointing commissioners for detecting and defeating conspiracies and declaring their powers (Feb. 5, 1778), 1778 N. Y. Laws ch. 3, pp. 8–9; see also An Act for constituting a Council of Safety (Oct. 11, 1777), 1777 N. J. Laws ch. 40, § 4, p. 85; An Act to Empower the Supreme Executive Council of this Commonwealth to Provide for the Security Thereof in Special Cases Where No Provision Is Already Made by Law (Sept. 6, 1777), ch. 762, § 2, 9 Statutes at Large of Pennsylvania 140 (J. Mitchell & H. Flanders eds. 1903); An Act to punish certain crimes and misdemeanors, and to prevent the growth of toryism, 1777 Md. Laws ch. 20, § 7.[4]

Massachusetts continued using this formula for suspensions under its 1780 Constitution. These suspensions are especially probative because that Constitution contained language similar to the Federal Suspension Clause: "The privilege and benefit of the writ of habeas corpus shall be enjoyed in this Commonwealth in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months." Pt. 2, ch. VI, Art. VII. In response to Shays' Rebellion, which gained notoriety across the United States, Massachusetts passed "An Act for Suspending the Privilege of the Writ of Habeas Corpus." It provided that

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[4] It does not appear that it was necessary to expressly mention the availability of the writ in a suspending Act. Some States made express reference to the writ of habeas corpus, see, *e. g.*, ch. 762, § 2, 9 Statutes at Large of Pennsylvania 140, but many did not.

> "the Governor, with the advice and consent of the Council, be and he hereby is authorised and empowered . . . to command, and cause to be apprehended, and committed in any Goal, or other safe place, within the Commonwealth, any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires should be restrained of their personal liberty, or whose enlargement is dangerous thereto; any Law, Usage or Custom to the contrary notwithstanding." 1786–1787 Mass. Acts ch. 41, p. 102.

The Act also provided that "any Person who shall be apprehended and imprisoned, as aforesaid, shall be continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." *Id.*, at 103; see also An Act to Suspend the Privilege of the Writ of Habeas Corpus for Six Months (June 27, 1782), 1782–1783 Mass. Acts ch. 2, pp. 6–7. Thus, in a jurisdiction with an analog to the Suspension Clause, a suspension was a grant of power to detain without bail or trial based on suspicion of a crime or dangerousness.

Although the ratification debates are not especially illuminating on the meaning of a suspension, they provide further support for this understanding. Luther Martin wrote that the Government, upon "suspending the habeas corpus act may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure." Genuine Information VIII, reprinted in 15 Documentary History 434. Another essayist, writing in a Boston newspaper, explained that suspension would allow "the President, or President and Senate, as Congress shall think proper to empower, to take up and confine for any cause, or for any suspicion, or for no cause, perhaps any person, he or they shall think proper." 5 *id.*, at 712 (J. Kaminski & G. Saladino eds. 1998).

In sum, a suspension was not necessarily an express limitation on the availability of the writ of habeas corpus. Rather, it appears to have been a grant of power to detain based on suspicion of a crime or dangerousness without bail or trial.

IV

Under this interpretation, 8 U. S. C. § 1252 likely does not suspend the writ of habeas corpus. To be placed in expedited removal, an immigration officer must "determin[e]" that an alien is "inadmissible." § 1225(b)(1)(A)(i). That determination is based in part on the alien's lack of valid entry documentation and failure to satisfy a 2-year continuous physical presence requirement, not on mere suspicion or dangerousness. §§ 1225(b)(1)(A)(i), (iii)(II); § 1182(a)(7). An alien has the opportunity to avoid expedited removal by demonstrating a "credible fear of persecution." §§ 1225(b)(1)(B)(iii), (v). If the alien is unsuccessful, he may seek "[j]udicial review . . . in habeas corpus proceedings" of "whether [he] is an alien"; "whether [he] was ordered removed" under expedited removal; and "whether [he] can prove by a preponderance of the evidence that [he] is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . , or has been granted asylum" and "such status [has not] been terminated." § 1252(e)(2).

This statute bears little resemblance to a suspension as that term was understood at the founding. It does not allow the executive to detain based on mere suspicion of a crime or dangerousness. Rather, it requires a finding that the detainee lacks valid documentation and is not eligible for asylum. It even expressly permits habeas relief for a detainee who does not meet certain criteria for expedited removal.

Some may wish that the Suspension Clause were broader. Perhaps for this reason, our precedents have departed from the original understanding of the Suspension Clause. See, *e. g.*, *Boumediene* v. *Bush*, 553 U. S. 723, 826–850 (2008) (Scalia, J., dissenting); *St. Cyr*, 533 U. S., at 336–341 (Scalia,

J., dissenting). But this understanding does contain an important guarantee of individual liberty by limiting the circumstances in which Congress may give the executive power to detain without bail or trial based on suspicion of a crime or dangerousness. In this case, that guarantee has not been violated.

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

The statute at issue here, 8 U. S. C. § 1252(e)(2), sets forth strict limits on what claims a noncitizen subject to expedited removal may present in federal habeas corpus proceedings. I agree that enforcing those limits *in this particular case* does not violate the Suspension Clause's constitutional command: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. But we need not, and should not, go further.

We need not go further because the Government asked us to decide, and we agreed to review, an issue limited to the case before us. The question presented is "whether, *as applied to respondent*, Section 1252(e)(2) is unconstitutional under the Suspension Clause." Pet. for Cert. I (emphasis added). All we must decide is whether, under the Suspension Clause, the statute at issue "is unconstitutional as applied to *this* party, in the circumstances of *this* case." *Chicago* v. *Morales*, 527 U. S. 41, 74 (1999) (Scalia, J., dissenting).

Nor should we go further. Addressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context. What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country? Under current law, noncitizens who have lived in the United States for up to two years may be placed in expedited removal proceedings, see § 1225(b)(1)(A)(iii),

but Congress might decide to raise that 2-year cap (or remove it altogether). Does the Suspension Clause let Congress close the courthouse doors to a long-term permanent resident facing removal? In *INS* v. *St. Cyr*, 533 U. S. 289 (2001), we avoided just that "serious and difficult constitutional issue." *Id.*, at 305.

Could Congress, for that matter, deny habeas review to someone ordered removed despite claiming to be a natural-born U. S. citizen? The petitioner in *Chin Yow* v. *United States*, 208 U. S. 8 (1908), and others have faced that predicament. See also § 1252(e)(2)(A) (permitting, at present, habeas review of citizenship claims). What about foreclosing habeas review of a claim that rogue immigration officials forged the record of a credible-fear interview that, in truth, never happened? Or that such officials denied a refugee asylum based on the dead-wrong legal interpretation that Judaism does not qualify as a "religion" under governing law? Cf. *Tod* v. *Waldman*, 266 U. S. 113, 119–120 (1924) (observing that immigration officials ignored a Jewish family's claim that they were "refugees" fleeing "religious persecution").

The answers to these and other "difficult questions about the scope of [Suspension Clause] protections" lurk behind the scenes here. *Lozman* v. *Riviera Beach*, 585 U. S. 87, 99 (2018). I would therefore avoid making statements about the Suspension Clause that sweep beyond the principles needed to decide this case—let alone come to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here. Compare *ibid.* (concluding that, with narrow grounds for decision available, resolving broader, more difficult questions "must await a different case") with *ante*, at 117–121 (suggesting that removal is simply not the sort of "restraint" for which the Suspension Clause guarantees a means of "securing release"), and *ante*, at 138–140 (addressing a separate due process question).

As for the resolution of the dispute before us, Congress, in my view, had the constitutional power to foreclose habeas

review of the claims that respondent has pressed in this case. Habeas corpus, as we have said, is an "adaptable remedy," and the "precise application and scope" of the review it guarantees may change "depending upon the circumstances." *Boumediene* v. *Bush*, 553 U. S. 723, 779 (2008); see also *id.*, at 813 (ROBERTS, C. J., dissenting). So where the Suspension Clause applies, the "habeas court's role" may prove more "extensive," or less so, depending on the context at issue. *Id.*, at 780 (majority opinion). Here, even assuming that the Suspension Clause guarantees respondent some form of habeas review—which is to say, even accepting for argument's sake that the relief respondent seeks *is* "release," contra, *ante*, at 126–127—the scope of that constitutionally required review would not extend to his claims. Two features of this case persuade me.

First, respondent's status suggests that the constitutional floor set by the Suspension Clause here cannot be high. A Border Patrol agent apprehended respondent just 25 yards inside the border. Respondent was placed in expedited removal proceedings shortly thereafter, where he received the same consideration for relief from removal that Congress has afforded persons arriving at the border. Respondent has never lived in, or been lawfully admitted to, the United States.

To my mind, those are among the "circumstances" that inform the "scope" of any habeas review that the Suspension Clause might guarantee respondent. *Boumediene*, 553 U. S., at 779. He is thus in a materially different position for Suspension Clause purposes than the noncitizens in, for example, *Rowoldt* v. *Perfetto*, 355 U. S. 115 (1957), *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), *Bridges* v. *Wixon*, 326 U. S. 135 (1945), and *Hansen* v. *Haff*, 291 U. S. 559 (1934). They had all lived in this country for years. The scope of whatever habeas review the Suspension Clause assures respondent need not be as extensive as it might for someone in that position.

Second, our precedents demonstrate that respondent's claims are of the kind that Congress may, consistent with the Suspension Clause, make unreviewable in habeas proceedings. Even accepting respondent's argument that our "finality era" cases map out a constitutional minimum, see *ante*, at 128–129, his claims, on the facts presented here, differ significantly from those that we reviewed throughout this period.

To begin, respondent concedes that Congress may eliminate habeas review of factual questions in cases like this one. See, *e. g.*, *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660 (1892). He has thus disclaimed the "right to challenge the historical facts" found by immigration officials during his credible-fear process. Tr. of Oral Arg. 44. But even though respondent has framed his two primary claims as asserting legal error, substance belies that label. Both claims are, at their core, challenges to factual findings.

During his credible-fear interview, respondent said that he is an ethnic Tamil from Sri Lanka and that, one day, a group of men abducted him in a van and brutally beat him. App. 67, 70–74. The asylum officer believed respondent's account, *id.*, at 83, which respondent confirmed was his sole basis for seeking relief, *id.*, at 77, 79. The critical question, then, concerned the nature of the attack: Who attacked respondent and why? In written findings, the asylum officer concluded that it was "unknown who these individuals were or why they wanted to harm [respondent]." *Id.*, at 87. Based on those findings, the asylum officer determined that respondent had not established a credible fear of persecution or torture within the meaning of governing law. See *id.*, at 87, 89.

Respondent, to be sure, casts the brunt of his challenge to this adverse credible-fear determination as two claims of legal error. But it is the factual findings underlying that determination that respondent, armed with strong new *factual* evidence, now disputes. See *id.*, at 23–27; Brief for

Professors of Sri Lankan Politics as *Amici Curiae* 7–11; see also *ante*, at 140, n. 28 (noting that immigration officials may revisit their findings in light of this additional evidence).

Respondent first asserts that the asylum officer failed to apply—or at least misapplied—the applicable legal standard under § 1225(b)(1)(B)(v), which required only a "significant possibility" that respondent could establish entitlement to relief from removal. See App. 30–32; Brief for Respondent 6. Respondent also contends that the asylum officer "demonstrated a fatal lack of knowledge" about conditions in Sri Lanka, *id.*, at 7, in violation of provisions requiring that asylum officers consider "other facts as are known to the officer," § 1225(b)(1)(B)(v), and have "had professional training in country conditions," § 1225(b)(1)(E)(i). See App. 24–26, 28–29, 31.

At the heart of both purportedly legal contentions, however, lies a disagreement with immigration officials' findings about the two brute facts underlying their credible-fear determination—again, the identity of respondent's attackers and their motive for attacking him. Other than his own testimony describing the attack, respondent has pointed to nothing in the administrative record to support either of these claims.

As to his legal-standard claim, respondent does not cite anything affirmatively indicating that immigration officials misidentified or misunderstood the proper legal standard under § 1225(b)(1)(B)(v). Rather, he argues that their credible-fear determination was so egregiously wrong that it simply *must* have rested on such a legal error. See Tr. of Oral Arg. 46–50. But that contention rests on a refusal to accept the facts as found by the immigration officials. Specifically, it rejects their findings that no evidence suggested respondent was attacked by men affiliated with the Sri Lankan Government and motivated by respondent's Tamil ethnicity or (as he now alleges) history of political activism. See App. 87; see also, *e. g.*, *id.*, at 23–26. Respondent's

quarrel, at bottom, is not with whether settled historical facts satisfy a legal standard, see *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221, 227 (2020), but with what the historical facts *are*.

Respondent's country-conditions claim is much the same. Respondent does not cite anything in the administrative record affirmatively indicating that, contrary to §§1225(b)(1)(B)(v) and (E)(i), immigration officials, for example, consciously disregarded facts presented or otherwise known to them, or that the asylum officer never received relevant professional training. Instead, respondent offers a similar refrain: The credible-fear determination was so egregiously wrong that immigration officials simply *must* not have known about conditions in Sri Lanka. See Brief for Respondent 7. So this claim, too, boils down to a factual argument that immigration officials should have known who respondent's attackers were and why they attacked him.

Mindful that the "Constitution deals with substance, not shadows," *Salazar* v. *Buono*, 559 U. S. 700, 723 (2010) (ROBERTS, C. J., concurring) (internal quotation marks omitted), I accordingly view both claims as factual in nature, notwithstanding respondent's contrary characterization. For that reason, Congress may foreclose habeas review of these claims without running afoul of the Suspension Clause. See, *e. g.*, *Nishimura Ekiu*, 142 U. S., at 660.

The other two claims of error that respondent has pressed assert that immigration officials violated procedures required by law. He first contends that, by not asking additional questions during the credible-fear interview, the asylum officer failed to elicit "all relevant and useful information," in violation of 8 CFR §208.30(d) (2020). See App. 27, 31. Respondent further alleges that translation problems arose during the interview, in violation of the asylum officer's duty under §§208.30(d)(1) and (2) to ensure that respondent was "[a]ble to participate effectively" and "ha[d] an understanding of the credible fear determination process." See

id., at 27–28, 31. Though both claims may reasonably be understood as procedural, they may constitutionally be treated as unreviewable—at least under the border-entry circumstances present in this case. See *supra*, at 152.

Respondent's procedural claims are unlike those that we reviewed in habeas proceedings during the finality era. Throughout that period, the procedural claims that we addressed asserted errors that fundamentally undermined the efficacy of process prescribed by law. See *Chin Yow*, 208 U. S., at 11 (observing that a noncitizen could obtain habeas relief on procedural grounds if he was denied "an opportunity to prove his right to enter the country, as the statute meant that he should have"). Many of our finality era cases thus dealt with situations in which immigration officials failed entirely to take obligatory procedural steps.

In *Waldman*, for example, we faulted immigration officials for making "no finding[s]" at all on potentially dispositive issues, including whether the noncitizens were fleeing religious persecution and therefore exempt from a literacy requirement. 266 U. S., at 120. And in *United States ex rel. Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949), we reversed for procedural error because the noncitizen was denied outright "the independent [medical] review and re-examination" required by then-governing law. *Id.*, at 812; see also *Accardi*, 347 U. S., at 267 (faulting the Attorney General for short-circuiting altogether legally prescribed adjudication procedures by "dictating" an immigration decision himself).

Respondent's procedural claims are different. He does not allege that immigration officials, say, denied him a credible-fear interview or skipped a layer of intra-agency review altogether. Nor do his allegations suggest that the asylum officer's questioning or the interpreter's translation constructively deprived him of the opportunity to establish a credible fear; indeed, he has consistently maintained that the information that *was* elicited more than sufficed. See, *e. g.*, Tr. of Oral Arg. 46–48; cf. *Chin Yow*, 208 U. S., at 13

(observing that "the denial of a hearing cannot be established" merely "by proving that the decision was wrong"). Respondent thus contends that the credible-fear process was procedurally defective for reasons that are more technical. He alleges that additional questions would have yielded further "relevant and useful" information and that "communication issues affected the interview" in some way. App. 27.

Respondent's procedural claims consequently concern not the outright denial (or constructive denial) of a process, but the precise way in which the relevant procedures were administered. They raise fine-grained questions of degree—*i. e.*, whether the asylum officer made *sufficiently thorough* efforts to elicit all "relevant and useful information" and whether he took *sufficiently thorough* precautions to ensure that respondent was "[a]ble to participate effectively" in the interview. 8 CFR § 208.30(d).

Reviewing claims hinging on procedural details of this kind would go beyond the traditionally "limited role" that habeas has played in immigration cases similar to this one—even during the finality era. *St. Cyr*, 533 U. S., at 312. To interpret the Suspension Clause as insisting upon habeas review of these claims would require, by constitutional command, that the habeas court make indeterminate and highly record-intensive judgments on matters of degree. Respondent has not cited, and I have not found, any case of ours suggesting that the Suspension Clause demands parsing procedural compliance at so granular a level. Neither, apparently, has the Solicitor General. See Tr. of Oral Arg. 14–15, 23–24; Brief for Petitioners 38.

Together with respondent's status, see *supra*, at 152, these characteristics convince me that Congress had the constitutional power to foreclose habeas review of respondent's procedural claims. Recasting those claims as an allegation that respondent's "due process rights were violated by" immigration officials makes no material difference. App. 32. That alternative description changes none of the features that, in

my view, put respondent's procedural claims beyond the scope of any minimum habeas review that the Suspension Clause might assure him under the circumstances.

* * *

For these reasons, I would hold that, as applied to respondent, § 1252(e)(2)'s limits on habeas review do not violate the Suspension Clause. I would go no further.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

The majority declares that the Executive Branch's denial of asylum claims in expedited removal proceedings shall be functionally unreviewable through the writ of habeas corpus, no matter whether the denial is arbitrary or irrational or contrary to governing law. That determination flouts over a century of this Court's practice. In case after case, we have heard claims indistinguishable from those respondent raises here, which fall within the heartland of habeas jurisdiction going directly to the origins of the Great Writ.

The Court thus purges an entire class of legal challenges to executive detention from habeas review, circumscribing that foundational and "stable bulwark of our liberties," 1 W. Blackstone, Commentaries 99 (Am. ed. 1832). By self-imposing this limitation on habeas relief in the absence of a congressional suspension, the Court abdicates its constitutional duty and rejects precedent extending to the foundations of our common law.

Making matters worse, the Court holds that the Constitution's due process protections do not extend to noncitizens like respondent, who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate. The decision deprives them of any means to ensure the integrity of an expedited removal order, an order which, the Court has just held, is not subject to any meaningful judicial oversight as

to its substance. In doing so, the Court upends settled constitutional law and paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative adjudications.

Today's decision handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers. It will leave significant exercises of executive discretion unchecked in the very circumstance where the writ's protections "have been strongest." *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). And it increases the risk of erroneous immigration decisions that contravene governing statutes and treaties.

The Court appears to justify its decision by adverting to the burdens of affording robust judicial review of asylum decisions. But our constitutional protections should not hinge on the vicissitudes of the political climate or bend to accommodate burdens on the Judiciary. I respectfully dissent.

I

The as-applied challenge here largely turns on how the Court construes respondent's requests for relief. Its descriptions, as well as those of one of the concurrences, skew the essence of these claims. A proper reframing thus is in order.

A

Respondent first advances a straightforward legal question that courts have heard in habeas corpus proceedings in "case after case." *Id.*, at 306. His habeas petition claimed that an asylum officer and Immigration Judge "appl[ied] an incorrect legal standard" by ordering him removed despite a showing of a significant possibility of credible fear to establish "eligibility for asylum, withholding of removal, and [Convention Against Torture] claims." App. 31–32; see also 8 U. S. C. § 1225(b)(1)(B)(v) (setting standard for credible fear as "a significant possibility, taking into account the . . . state-

ments made by the alien . . . and such other facts as are known to the officer, that the alien could establish eligibility for asylum"). The Government itself has characterized that claim as a challenge to the "'application of a legal standard to factual determinations . . . underlying the Executive's negative credible-fear findings.'" 917 F. 3d 1097, 1117, n. 20 (CA9 2019) (case below). At bottom, respondent alleged that he was unlawfully denied admission under governing asylum statutes and regulations.

The Court disagrees, flattening respondent's claim into a mere plea "ultimately to obtain authorization to stay in this country." *Ante*, at 107; see also *ante*, at 117 (describing the request as a "right to enter or remain in a country"); *ante*, at 118, n. 14 (framing relief sought as "gaining a right to remain in this country"); *ante*, at 120 (equating relief with "authorization . . . to remain in a country other than his own"). Yet while the Court repeatedly says that respondent seeks nothing more than admission as a matter of grace, its own descriptions of respondent's habeas petition belie its assertions. See, *e. g.*, *ante*, at 110, n. 5 ("[T]he gravamen of his petition is that [respondent] faces persecution in Sri Lanka 'because of' his Tamil ethnicity and political opinions"); *ibid.* (suggesting that the same persecution inquiry governs respondent's Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment claim); *ante*, at 140, n. 28 (observing that respondent's habeas petition contains factual allegations that resemble documented persecution on the basis of ethnicity or political opinion). Though the Court refuses to admit as much, its descriptions of respondent's arguments illustrate, at bottom, claims that immigration officials legally erred in their review of his asylum application.

In papering over the true nature of respondent's claims, the Court transforms his assertions of legal error in the exercise of executive discretion into a naked demand for executive action. But the distinction between those forms of re-

lief makes all the difference. The law has long permitted habeas petitioners to challenge the legality of the exercise of executive power, even if the executive action ultimately sought is discretionary. See *St. Cyr*, 533 U. S., at 307 (citing cases). That principle has even more force today, where an entire scheme of statutes and regulations cabins the Executive's discretion in evaluating asylum applications. For that reason, the Court's observation that the ultimate "grant of asylum is discretionary" is beside the point. *Ante*, at 110, n. 4.

For its part, one concurring opinion seems to acknowledge that claims that assert something other than pure factual error may constitutionally require some judicial review. *Ante*, at 152–154 (BREYER, J., concurring in judgment). It simply determines that respondent's credible-fear claims amount to nothing more than a "disagreement with immigration officials' findings about the two brute facts underlying their credible-fear determination," namely, the identity of his attackers and their motivations. *Ante*, at 154. It also faults respondent for failing to develop his claims of legal error with citations "indicating that immigration officials misidentified or misunderstood the proper legal standard" or that they "disregarded" or were not properly trained in identifying relevant country conditions. *Ante*, at 154–155.

But the essence of respondent's petition is that the facts as presented (that he, a Tamil minority in Sri Lanka, was abducted by unidentified men in a van and severely beaten), when considered in light of known country conditions (as required by statute), amount at least to a "significant possibility" that he could show a well-founded fear of persecution. So viewed, respondent's challenge does not quibble with historic facts, but rather claims that those "settled facts satisfy a legal standard," which this Court has held amounts to a "legal inquiry." *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221, 227–228 (2020). The concurring opinion suggests that any conclusions drawn from the discrete settled facts here could not be "so egregiously wrong" as to amount to legal error.

Ante, at 154. But the ultimate inquiry is simply whether the facts presented satisfy a statutory standard. While this concurring opinion may believe that the facts presented here do not show that respondent is entitled to relief, its view of the merits does not alter the legal nature of respondent's challenge.

B

Second, respondent contended that the inadequate procedures afforded to him in his removal proceedings violated constitutional due process. Among other things, he asserted that the removal proceedings by design did not provide him a meaningful opportunity to establish his claims, that the translator and asylum officer misunderstood him, and that he was not given a "reasoned explanation" for the decision. App. 27, 32; see also *id.*, at 32 (arguing that "[u]nder constitutionally adequate procedures, [respondent] would have prevailed on his claims"). Again, however, the Court falls short of capturing the procedural relief actually requested. The Court vaguely suggests that respondent merely wanted more cracks at obtaining review of his asylum claims, not that he wanted to challenge the existing expedited removal framework or the process actually rendered in his case as constitutionally inadequate. See *ante*, at 107 (characterizing respondent as asking for "additional administrative review of his asylum claim"); see also *ante*, at 110, n. 5 (describing petition as seeking "another opportunity to apply for asylum"). That misconstrues respondent's procedural challenges to the expedited removal proceedings, which matters crucially; a constitutional challenge to executive detention is just the sort of claim the common law has long recognized as cognizable in habeas. See generally Part II, *infra*.

One concurring opinion, meanwhile, properly characterizes respondent's claims on this score as "procedural" challenges. *Ante*, at 156 (opinion of BREYER, J.). Yet it concludes that those claims are not reviewable because they do not allege sufficiently serious defects. See *ante*, at 156–157 (describing

cognizable claims as those involving "'no [factual] finding[s],'" contentions that officials "skipped a layer of intra-agency review altogether," the "outright denial (or constructive denial) of a process," or an official's "fail[ure] entirely to take obligatory procedural steps"). But these are simply distinctions of degree, not of kind. Respondent claimed that officials violated governing asylum regulations and deprived him of due process by conducting an inadequate interview and providing incomplete translation services. It is difficult to see the difference between those claims and the ones that the concurring opinion upholds as cognizable. Cf. *ante*, at 156 (finding cognizable claims that an official "short-circuit[ed] altogether legally prescribed adjudication procedures by 'dictating' an immigration decision" and that an official deprived a noncitizen of "'an opportunity to prove his right to enter the country, as the statute meant that he should have'").

Indeed, the concurring opinion notes that the core question is whether a defect "fundamentally undermined the efficacy of process prescribed by law." *Ibid.* Respondent's petition plainly posits procedural defects that violate, or at least call into question, the "efficacy of process prescribed by law" and the Constitution. *Ibid.* The concurring opinion might think that respondent is not entitled to additional protections as a matter of law or that the facts do not show he was denied any required process. But conclusions about the merits of respondent's procedural challenges should not foreclose his ability to bring them in the first place.

C

Finally, the Court asserts that respondent did not specifically seek "release" from custody in what the Court styles as the "traditional" sense of the term as understood in habeas jurisprudence. *Ante*, at 115, 118; cf. *ante*, at 119 (suggesting that respondent "does not claim an entitlement to release"). Instead, the Court seems to argue that respondent seeks

only a peculiar form of release: admission into the United States or additional asylum procedures that would allow for admission into the United States. Such a request, the Court implies, is more akin to mandamus and injunctive relief. *Ante*, at 118.

But it is the Court's directionality requirement that bucks tradition. Respondent asks merely to be freed from wrongful executive custody. He asserts that he has a credible fear of persecution, and asylum statutes authorize him to remain in the country if he does. That request is indistinguishable from, and no less "traditional" than, those long made by noncitizens challenging restraints that prevented them from otherwise entering or remaining in a country not their own. See Part II–B–1, *infra*.

The Court has also never described "release" as the sole remedy of the Great Writ. Nevertheless, respondent's petition is not limited in the way the Court claims. As it acknowledges, *ante*, at 115, respondent directly asked the District Court to "[i]ssue a writ of habeas corpus" without further limitation on the kind of relief that might entail, App. 33. Respondent also sought "an [o]rder directing [the Government] to show cause why the writ should not be granted" and an order "directing [the Government] to vacate the expedited removal order entered against [him]." *Ibid.* As the petition's plain language indicates, respondent raised a garden-variety plea for habeas relief in whatever form available and appropriate, including, but not limited to, release.

* * *

Fairly characterized, respondent's claims allege legal error (for violations of governing asylum law and for violations of procedural due process) and an open-ended request for habeas relief. It is "uncontroversial" that the writ encompasses such claims. See *Boumediene* v. *Bush*, 553 U. S. 723, 779 (2008) (concluding that release is but one form of relief available); see also *St. Cyr.*, 533 U. S., at 302, 304–308 (citing

cases predating the founding to show that the writ could challenge "the erroneous application or interpretation" of relevant law); see also Part II–D, *infra*.

II

Only by recasting respondent's claims and precedents does the Court reach its decision on the merits. By its account, none of our governing cases, recent or centuries old, recognize that the Suspension Clause guards a habeas right to the type of release that respondent allegedly seeks.[1] *Ante*, at 118, n. 14 (finding no evidence that the writ was understood in 1789 to grant relief that would amount to "gaining a right to remain in this country"); *ante*, at 118 (characterizing a "'meaningful opportunity'" for review of asylum claims as falling outside of traditional notions of release from custody). An overview of cases starting from the colonial period to the present reveals that the Court is incorrect, even accepting its improper framing of respondent's claims.

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[1] The Court wisely declines to explore whether the Suspension Clause independently guarantees the availability of the writ or simply restricts the temporary withholding of its operation, a point of disagreement between the majority and dissent in *INS* v. *St. Cyr*, 533 U. S. 289 (2001). *Ante*, at 116, n. 12. Justice Scalia, dissenting in *St. Cyr*, wrote that the Suspension Clause "does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended." 533 U. S., at 337. But no majority of this Court, at any time, has adopted that theory. Notably, moreover, even Justice Scalia appears to have abandoned his position just three years later in *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 555–556 (2004) (dissenting opinion) ("The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses"); see also *id.*, at 558 ("The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned"). Even one concurring opinion seems to recognize that the Suspension Clause "protect[s] a substantive right." *Ante*, at 143 (opinion of THOMAS, J.).

A

The critical inquiry, the Court contends, is whether respondent's specific requests for relief (namely, admission into the United States or additional asylum procedures allowing for admission into the United States) fall within the scope of the kind of release afforded by the writ as it existed in 1789. *Ante*, at 116, 117; see also *ante*, at 115 (criticizing the court below for holding § 1252(e)(2) unconstitutional "without citing any pre-1789 case about the scope of the writ"). This scope, it explains, is what the Suspension Clause protects "at a minimum." *Ante*, at 116. But as the Court implicitly acknowledges, its inquiry is impossible. The inquiry also runs headlong into precedent, which has never demanded the kind of precise factual match with pre-1789 case law that today's Court demands.

To start, the Court recognizes the pitfalls of relying on pre-1789 cases to establish principles relevant to immigration and asylum: "At the time, England had nothing like modern immigration restrictions." *Ante*, at 123 ("As late as 1816, the word 'deportation' apparently 'was not to be found in any English dictionary' "). It notes, too, that our cases have repeatedly observed the relative novelty of immigration laws in the early days of this country. *Ante*, at 124 (citing *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588, n. 15 (1952) ("An open door to the immigrant was the early federal policy"); *St. Cyr*, 533 U. S., at 305 (remarking that the first immigration regulation was enacted in 1875)); see also *Demore* v. *Kim*, 538 U. S. 510, 539 (2003) (O'Connor, J., concurring in part and concurring in judgment) ("Because colonial America imposed few restrictions on immigration, there is little case law prior to that time about the availability of habeas review to challenge temporary detention pending exclusion or deportation").

The Court nevertheless seems to require respondent to engage in an exercise in futility. It demands that respondent unearth cases predating comprehensive federal immigration regulation showing that noncitizens obtained release

from federal custody onto national soil. But no federal statutes at that time spoke to the permissibility of their entry in the first instance; the United States lacked a comprehensive asylum regime until the latter half of the 20th century. Despite the limitations inherent in this exercise, the Court appears to insist on a wealth of cases mirroring the precise relief requested at a granular level; nothing short of that, in the Court's view, would demonstrate that a noncitizen in respondent's position is entitled to the writ. See *ante*, at 122, n. 18 (dismissing respondent's cited cases on the ground that "[w]hether the founding generation understood habeas relief more broadly than described by Blackstone, Justice Story, and our prior cases . . . cannot be settled by a single case or even a few obscure and possibly aberrant cases"); see also Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961 (1998) (noting the inherent difficulties of a strict originalist approach in the habeas context because of, among other things, the dearth of reasoned habeas decisions at the founding).

But this Court has never rigidly demanded a one-to-one match between a habeas petition and a common-law habeas analog. In *St. Cyr*, for example, the Court considered whether a noncitizen with a controlled substance conviction could challenge on habeas the denial of a discretionary waiver of his deportation order. 533 U. S., at 293. In doing so, the Court did not search high and low for founding-era parallels to waivers of deportation for criminal noncitizens. It simply asked, at a far more general level, whether habeas jurisdiction was historically "invoked on behalf of noncitizens . . . in the immigration context" to "challenge Executive . . . detention in civil cases." *Id.*, at 302, 305. That included determining whether "[h]abeas courts . . . answered questions of law that arose in the context of discretionary relief" (including questions regarding the allegedly "erroneous application or interpretation of statutes"). *Id.*, at 302, and n. 18, 307.

Boumediene is even clearer that the Suspension Clause inquiry does not require a close (much less precise) factual match with historical habeas precedent. There, the Court concluded that the writ applied to noncitizen detainees held in Guantanamo, 553 U. S., at 771, despite frankly admitting that a "[d]iligent search by all parties reveal[ed] no certain conclusions" about the relevant scope of the common-law writ in 1789, *id.*, at 746. Indeed, the Court reasoned that none of the cited cases illustrated whether a "common-law court would or would not have granted . . . a petition for a writ of habeas corpus" like that brought by the noncitizen-detainee petitioners, and candidly acknowledged that "the common-law courts simply may not have confronted cases with close parallels." *Id.*, at 746, 752. But crucially, the Court declined to "infer too much, one way or the other, from the lack of historical evidence on point." *Id.*, at 752. Instead, it sought to find comparable common-law habeas cases by "analogy." *Id.*, at 748–752.

There is no squaring the Court's methodology today with *St. Cyr* or *Boumediene*. As those cases show, requiring near-complete equivalence between common-law habeas cases and respondent's habeas claim is out of step with this Court's longstanding approach in immigration cases.

B

1

Applying the correct (and commonsense) approach to defining the Great Writ's historic scope reveals that respondent's claims have long been recognized in habeas.

Respondent cites *Somerset* v. *Stewart*, Lofft. 1, 98 Eng. Rep. 499 (K. B. 1772), as an example on point. There, Lord Mansfield issued a writ ordering release of a slave bound for Jamaica, holding that there was no basis in English law for "sending . . . him over" to another country. *Id.*, at 17–19, 98 Eng. Rep., at 509–510. Thus, the writ issued even though it

"did not free [the] slave so much as it protected him from deportation." P. Halliday, Habeas Corpus: From England to Empire 175 (2010). *Somerset* establishes the longstanding availability of the writ to challenge the legality of removal and to secure release into a country in which a petitioner sought shelter. Scholarly discussions of *Murray's Case* suggest much of the same. There, the King's Bench granted habeas to allow a nonnative to remain in England and to prevent his removal to Scotland for trial. Halliday, Habeas Corpus, at 236.

The Court dismisses these examples outright. It acknowledges that the petitioner in *Somerset* may have been allowed to remain in England because of his release on habeas, yet declares that this was "due not to the wri[t] ordering [his] release" but rather to the existing state of the law. *Ante*, at 124. But the writ clearly did more than permit the petitioner to disembark from a vessel; it prevented him from being "sen[t] . . . over" to Jamaica. Lofft., at 17, 98 Eng. Rep., at 509. What England's immigration laws might have prescribed after the writ's issuance did not bear on the availability of the writ as a means to remain in the country in the first instance.

The Court also casts aside the facts of *Murray's Case*, even though they, too, reveal that habeas was used to permit a nonnative detainee to remain in a country. *Ante*, at 122, n. 18. The Court minimizes the decision as "obscure and possibly aberrant." *Ibid.* But given the relative paucity of habeas cases from this era, it is telling that the case serves as another example of the writ being used to allow a noncitizen to remain in England.[2]

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[2] The Court notes "the 'delicate' relationship between England and Scotland at the time" of *Murray's Case*. *Ante*, at 123, n. 18. Interestingly, the Court does not mention the delicate nature of the relationship between the United States and Iraq in *Munaf* v. *Geren*, 553 U. S. 674 (2008), the centerpiece of the Court's argument, even though that case arose during

The reasoning of *Somerset* and *Murray's Case* carried over to the Colonies, where colonial governments presumed habeas available to noncitizens to secure their residence in a territory. See generally Oldham & Wishnie, The Historical Scope of Habeas Corpus and *INS* v. *St. Cyr*, 16 Geo. Immigration L. J. 485 (2002). For example, in 1755, British authorities sought to deport French Acadian settlers from Nova Scotia, then under the control of Great Britain, to the American Colonies. *Id.*, at 497. The Governor and Assembly of South Carolina resisted the migrants' arrival and detained them in ships off the coast of Charleston. They recognized, however, that the exclusion could not persist because the migrants would be entitled to avail themselves of habeas corpus. *Id.*, at 498. Ultimately, the Governor released most of the Acadian migrants for resettlement throughout the Colony. *Ibid.*

Founding-era courts accepted this view of the writ's scope. Rather than credit these decisions, the Court marches through an assorted selection of cases and throws up its hands, contending that the case law merely reflects a wide range of circumstances for which individuals were deprived of their liberty. See *ante*, at 121–122. Thus, the Court concludes, the common law simply did not speak to whether individuals could seek "release" that would allow them to enter a country (as opposed to being expelled from it).

At the same time, notwithstanding its professed keen interest in precedent, the Court seems to discount decisions supporting respondent's view that habeas permitted release from custody into the country. At least two other classes of cases demonstrate that the writ was available from around the founding onward to noncitizens who were detained, and wanted to remain, including those who were prevented from entering the United States at all.

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a military conflict. *Ante*, at 119–120. Nor does it acknowledge the impact that the relationship had on the *Munaf* Court's decision to refrain from issuing the writ. See Part II–B–3, *infra*.

First, common-law courts historically granted the writ to discharge deserting foreign sailors found and imprisoned in the United States. In *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392 (1815), the Pennsylvania Supreme Court granted a writ of habeas corpus to a Danish sailor who had deserted his vessel in violation of both an employment contract and Danish law. The court explained that the desertion did not violate any domestic law or treaty, and thus imprisonment was inappropriate. *Id.*, at 396 (opinion of Tilghman, C. J.). By ordering an unconditional discharge and declining to return the noncitizen sailor to the custody of any foreign power, the court used the writ to order a release that authorized a noncitizen to remain in the United States, a country "other than his own." *Ante*, at 120. The same was true in similar cases that even the Court cites. See *ante*, at 124 (citing *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L. J. & Misc. Repertory 132 (Md. 1810) (reporting on a decision discharging deserters); *Case of Hippolyte Dumas*, 2 Am. L. J. & Misc. Repertory 86 (Pa. 1809) (same)).

Curiously, the Court does not contest that the writs in these cases were used to secure the liberty of foreign sailors, and consequently their right to enter the country.[3] Rather, it remarks that judges at the time "chafed at having to order even release," *ante*, at 124, which some saw as inconsistent with principles of comity, *Holloway*, 1 Serg. & Rawle, at 394. But reluctance is not inability. That those judges followed the law's dictates despite their distaste for the result should give today's Court pause.

The Court seizes on one case where a court ordered a deserting sailor to be returned to his foreign vessel-master. See *ante*, at 119, 124 (citing *Ex parte D'Olivera*, 7 F. Cas.

[3] Indeed, the Court highlights a striking similarity to the present asylum challenge by observing that the foreign-deserter cases show the "use of habeas to secure release from custody when not in compliance with . . . statute[s] and relevant treaties." *Ante*, at 125.

853, 854 (No. 3,967) (CC Mass. 1813)). But it reads too much into this one decision. In *D'Olivera*, the court held that deserting sailors were unlawfully confined and granted a writ of habeas corpus, but directed that they be discharged to their vessel-master out of "a desire not to encourage desertion among foreign seamen." *Id.*, at 854. As illustrated by other deserter cases *supra*, the kind of results-oriented decisionmaking in *D'Olivera* does not seem to be the norm. The Court's proclamation about how the scope of common-law habeas cannot hinge on a "single case" should have equal force here. *Ante*, at 122, n. 18.

Next, courts routinely granted the writ to release wrongfully detained noncitizens into Territories other than the detainees' "own." Many involved the release of fugitive or former slaves outside their home State. In these cases, courts decided legal questions as to the status of these petitioners. In *Arabas* v. *Ivers*, 1 Root 92 (Conn. Super. Ct. 1784), for example, a Connecticut court determined that a former slave from New York held in local jail on his alleged master's instructions had, in fact, been freed through his service in the Continental Army. The court ordered him discharged "upon the ground that he was a freeman, absolutely manumitted from his master by enlisting and serving in the army." *Id.*, at 93. See also *In re Belt*, 7 N. Y. Leg. Obs. 80 (1848) (granting habeas to discharge an imprisoned fugitive slave whose owner did not timely apply for his return to Maryland); *In re Ralph*, 1 Morris 1 (Iowa 1839) (discharging person from custody on the grounds that he was not a fugitive slave subject to return to Missouri when he had been allowed to travel to the Iowa Territory by his former master); *Commonwealth* v. *Holloway*, 2 Serg. & Rawle 305 (Pa. 1816) (holding on habeas corpus that a child born in a free State to a slave was free); *In re Richardson's Case*, 20 F. Cas. 703 (No. 11,778) (CC DC 1837) (ordering prisoner to be discharged in the District of Columbia because warrant was insufficient to establish that he was a runaway slave from Maryland); *Commonwealth* v. *Griffith*, 19 Mass. 11 (1823)

(contemplating that the status of a freeman seized in Massachusetts as an alleged fugitive from Virginia could be determined on habeas corpus).

The weight of historical evidence demonstrates that common-law courts at and near the founding granted habeas to noncitizen detainees to enter Territories not considered their own, and thus ordered the kind of release that the Court claims falls outside the purview of the common-law writ.

The Court argues that none of this evidence is persuasive because the writ could not be used to compel authorization to enter the United States. *Ante*, at 125. But that analogy is inapt. Perhaps if respondent here sought to use the writ to grant naturalization, the comparison would be closer. But respondent sought only the proper interpretation and application of asylum law (which statutorily permits him to remain if he shows a credible fear of persecution), or in the alternative, release pursuant to the writ (despite being cognizant that he could be denied asylum or rearrested upon release if he were found within the country without legal authorization). But that consequence does not deprive respondent of the ability to invoke the writ in the first instance. See, *e. g.*, *Lewis* v. *Fullerton*, 22 Va. 15 (1821) (affirming that a judgment on habeas corpus in favor of a slave was not conclusive of her rights but merely permitted release from custody on the record before the court and did not prohibit recapture by a master); *Ralph*, 1 Morris, at 1 (noting that an adjudication that petitioner was not a fugitive only exempted him from fugitive-slave laws but did not prohibit master from entering Territory to reclaim him on his own accord).

For these reasons, the Court is wrong to dispute that common-law habeas practice encompassed the kind of release respondent seeks here.

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The Court also appears to contend that respondent sought merely additional procedures in his habeas adjudication and that this kind of relief does not fall within the traditional

scope of the writ. That reflects a misunderstanding of the writ. Habeas courts regularly afforded the state additional opportunities to show that a detention was lawful before ordering what the Court now considers a release outright.

The common-law writ of *habeas corpus ad subjiciendum* evolved into what we know and hail as the "Great Writ." See 3 W. Blackstone, Commentaries on the Laws of England 131 (1768). That writ, at bottom, allowed a court to elicit the cause for an individual's imprisonment and to ensure that he be released, granted bail, or promptly tried. See Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 244 (1965). From its origins, the writ did not require immediate release, but contained procedures that would allow the state to proceed against a detainee. Under the English Habeas Corpus Act of 1679, jailers were ordered to make a "return" to a writ within a designated time period and certify the true causes of imprisonment. *Id.*, at 252–253. Justices of the King's Bench obtained returns that provided full legal accounts justifying detention. Halliday & White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 599–600 (2008) (Halliday & White). They also examined and were guided by depositions upon which a detention was founded to determine whether to admit a petitioner to bail. Oaks, 32 U. Chi. L. Rev., at 258. Indeed, the King's Bench routinely considered facts not asserted in the return to assist scrutiny of detentions. Halliday & White 610; see also *id.*, at 611 (documenting instances where the court would consider affidavits of testimony beyond what was included in the return).

Moreover, early practice showed that common-law habeas courts routinely held proceedings to determine whether detainees should be discharged immediately or whether the state could subject them to further proceedings, including trial in compliance with proper procedures. See *Ex parte Bollman*, 4 Cranch 75, 125 (1807) (taking testimony in conjunction with an "inquiry" to determine whether "the ac-

cused shall be discharged or held to trial"). In *Ex parte Kaine*, 14 F. Cas. 78 (No. 7,597) (CC SDNY 1853), for example, a federal court analyzed whether a petitioner, who had been found guilty of an offense by a commissioner, was subject to extradition. The court passed on questions of law concerning whether the commissioner had the power to adjudicate petitioner's criminality. *Id.*, at 80. Ultimately, the court found that petitioner was "entitled to be discharged from imprisonment" due to defects in the proceedings before the commissioner, but entertained further evidence on whether he could nevertheless be extradited. *Id.*, at 82. Only after finding no additional evidence that would permit extradition did the court order release. *Ibid.*

Similarly, in *Coleman* v. *Tennessee*, 97 U. S. 509 (1879), the petitioner had been convicted of a capital offense by a state court, even though he had committed the offense while a soldier in the United States Army. *Id.*, at 510–511. This Court granted habeas on the grounds that the state-court judgment was void but, because the petitioner had also been found guilty of murder by a military court, nevertheless turned the prisoner over to the custody of the military for appropriate punishment. *Id.*, at 518–520. Not surprisingly, then, the Court has found that habeas courts may discharge detainees in a manner that would allow defects in a proceeding below to be corrected. *In re Bonner*, 151 U. S. 242, 261 (1894).

These examples confirm that outright habeas release was not always immediately awarded. But they also show that common-law courts understood that relief short of release, such as ordering officials to comply with the law and to correct underlying errors, nevertheless fell within the scope of a request for habeas corpus.[4]

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[4] The Court considers irrelevant cases demonstrating that the executive was permitted to cure defects in detention because "the legality of [respondent's] detention is not in question" here. *Ante*, at 122; see also *ante*, at 137 (acknowledging that it is "often 'appropriate' to allow the execu-

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Despite exalting the value of pre-1789 precedent, the Court's key rationale for why respondent does not seek "release" in the so-called traditional sense rests on an inapposite, contemporary case: *Munaf* v. *Geren*, 553 U. S. 674 (2008).[5] *Ante*, at 119. *Munaf*, the Court claims, shows that habeas is not available to seek an order to be brought into this country. *Ante*, at 119. But that case is in a category of its own and has no bearing on respondent's claims here. *Munaf* addressed a one-of-a-kind scenario involving the transfer of individuals between different sovereigns. There, two United States citizens in Iraq filed habeas petitions seeking to block their transfer to Iraqi authorities after being accused of committing crimes and detained by American-led coalition forces pending investigation and prosecution in Iraqi courts. 553 U. S., at 679–680, 692. The central question, this Court repeatedly stated, was "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution." *Id.*, at 689; see also *id.*, at 704.

In concluding that habeas did not extend to the relief sought by the citizens detained in Iraq, the *Munaf* Court relied on cases involving habeas petitions filed to avoid extradition. *Id.*, at 695–696 (citing *Wilson* v. *Girard*, 354 U. S. 524 (1957) (*per curiam*), and *Neely* v. *Henkel*, 180 U. S. 109

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tive to cure defects in a detention" in habeas cases (quoting *Boumediene* v. *Bush*, 553 U. S. 723, 779 (2008))). But as explained in Part I–A, *supra*, that is exactly what respondent questions by arguing that his detention violated governing asylum law.

[5] Oddly, the Court embraces *Munaf*—a recent decision involving detainees held outside the territorial limits of the United States who were subject to prosecution by a foreign sovereign—to support its conclusion about the availability of habeas review. Yet at the same time, it dismisses respondent's reliance on *Boumediene* outright on the grounds that the case is "not about immigration at all." *Ante*, at 136.

(1901)). These decisions, the Court concluded, established that American courts lack habeas jurisdiction to enjoin an extradition or similar transfer to a foreign sovereign exercising a right to prosecution. 553 U. S., at 696–697. These circumstances, which today's Court overlooks, mean that *Munaf* is more like the extradition cases that the Court deems not "pertinent." *Ante*, at 125.[6]

In any event, respondent is not similarly situated to the petitioners in *Munaf*, who sought habeas to thwart removal from the United States in the face of a competing sovereign's

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[6] Nor is the Court correct in dismissing common-law extradition precedents as inapposite because they show "nothing more than the use of habeas to secure release from custody." *Ante*, at 125. Indeed, these extradition cases demonstrate that the common-law writ encompassed exactly the kind of permission to remain in a country that the Court claims falls outside its scope. *Ante*, at 117, 119. *In re Stupp*, 23 F. Cas. 296 (No. 13,563) (CC SDNY 1875), which the Court cites in passing, emphatically affirmed that habeas corpus was available to challenge detention pending extradition: "[T]he great purposes of the writ of habeas corpus can be maintained, as they must be. The court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction . . . and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender." *Id.*, at 303. Although the *Stupp* court did not ultimately issue the writ, other courts have. See, *e. g.*, *Ex parte Kaine*, 14 F. Cas. 78, 82 (No. 7,597) (CC SDNY 1853) (granting the writ to a prisoner whose detention was "in consequence of illegality in the proceedings under the [extradition] treaty"); *Pettit* v. *Walshe*, 194 U. S. 205, 219–220 (1904) (affirming a grant of habeas where a prisoner's detention violated the terms of an extradition treaty with Great Britain); *In re Washburn*, 4 Johns. Ch. 106, 114 (N. Y. 1819) (granting a habeas petition of a noncitizen after a request for extradition); *People* v. *Goodhue*, 2 Johns. Ch. 198, 200 (N. Y. 1816) (releasing prisoner subject to possible interstate extradition). These extradition-related habeas cases show that the writ was undoubtedly used to grant release in the very direction—that is, away from a foreign country and into the United States—that the Court today derides. Indeed, the same scholar the Court cites makes the point that extradition specifically allowed courts to hear challenges to the Executive's ability to "detain aliens for removal to another country at the request of [the] government." Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1003 (1998).

interests. Mindful that the case implicated "sensitive foreign policy issues in the context of ongoing military operations," the *Munaf* Court observed that granting habeas relief would "interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders." 553 U. S., at 692 (internal quotation marks omitted); see also *id.*, at 689, 694, 700. For that reason, it proceeded "'with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of . . . international relations.'" *Id.*, at 689, 692. Here, of course, no foreign sovereign is exercising a similar claim to custody over respondent during an ongoing conflict that would trigger the comity concerns that animated *Munaf*.

C

Next, the Court casually dismisses nearly 70 years of precedent from the finality era, the most relevant historic period for examining judicial review of immigration decisions. It concludes that, in case after case, this Court exercised habeas review over legal questions arising in immigration cases akin to those at issue here, not because the Constitution required it but only because a statute permitted it. *Ante*, at 128–129. That conclusion is both wrong in its own right and repeats arguments this Court rejected a half century ago when reviewing this same body of cases.

At the turn of the 20th century, immigration to the United States was relatively unrestricted. Public sentiment, however, grew hostile toward many recent entrants, particularly migrant laborers from China. In response, Congress enacted the so-called Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, which prohibited the entry of Chinese laborers to the United States. The Scott Act, ch. 1064, 25 Stat. 504, enacted in 1888, forbade reentry of Chinese laborers who had left after previously residing in this country. Although immigration officials routinely denied entry to arriving migrants on the basis of these laws, many of these decisions

were overturned by federal courts on habeas review. See, *e. g.*, *United States* v. *Jung Ah Lung*, 124 U. S. 621 (1888).

This did not escape Congress' attention. See Select Committee on Immigration and Naturalization, H. R. Rep. No. 4048, 51st Cong., 2d Sess., 273–275 (1891) (documenting rate of reversal of immigration exclusion orders by Federal District Court in San Francisco). Congress responded by enacting the Immigration Act of 1891, which stripped federal courts of their power to review immigration denials: "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." Act of Mar. 3, 1891, § 8, 26 Stat. 1085. By its terms, that restriction on federal judicial power was not limited to review of some undefined subset of issues, such as questions of law or fact; it made executive immigration decisions final in all respects.

The Court, however, quickly construed the statute in *Nishimura Ekiu* v. *United States*, 142 U. S. 651 (1892) (*Ekiu*), to preclude only review of executive factfinding. Having so construed the statute, the Court in *Ekiu*, and in case after case following *Ekiu*, recognized the availability of habeas to review a range of legal and constitutional questions arising in immigration decisions. The crucial question here is whether the finality-era Courts adopted that construction of jurisdiction-stripping statutes because it was simply the correct interpretation of the statute's terms and nothing more or because that construction was constitutionally compelled to ensure the availability of habeas review. The better view is that *Ekiu*'s construction of the 1891 statute was constitutionally compelled.

In *Ekiu*, the Court recognized that a Japanese national was entitled to seek a writ of habeas corpus to review an exclusion decision issued almost immediately upon her arrival to the United States. As the Court notes, *ante*, at 130,

the relevant issue in that case was whether the 1891 Act, "if construed as vesting . . . exclusive authority" in the Executive to determine a noncitizen's right to enter the United States, violated the petitioner's constitutional "right to the writ of *habeas corpus*, which carried with it the right to a determination by the court as to the legality of her detention," 142 U. S., at 656 (statement of the case). That is, the *Ekiu* Court confronted whether construing the 1891 Act as precluding all judicial review of immigration decisions like the exclusion order at issue would violate the constitutional guarantee to habeas.

The Court answered that question by construing the 1891 Act as precluding judicial review only of questions of fact. "An alien immigrant," the Court first held, who is "prevented from landing [in the United States] by any [executive] officer . . . and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Id.*, at 660. The Court then explained that it had authority to hear the case (despite Congress' clear elimination of judicial review) because it interpreted the 1891 Act as meaning only that an immigration official's determination of "facts" was final and unreviewable. *Ibid.* (explaining that Congress could entrust the final determination of facts to executive officers).

After so articulating the 1891 Act's limits on judicial review, the Court analyzed two challenges to the integrity of the proceedings, neither of which raised questions of historical fact. See *id.*, at 662–663 (considering whether immigration officer's appointment was unconstitutional such that his actions were invalid); *id.*, at 663 (determining whether proceedings were unlawful because the officer failed to take sworn testimony or make a record of the decision).[7] Although the Court ultimately concluded that those legal and

[7] These claims are uncannily reminiscent of the kinds of claims respondent advances here. See Parts II–A and II–B, *supra*.

constitutional challenges lacked merit, *id.*, at 662–664, what matters is that the Court evaluated the arguments and recognized them as possible grounds for habeas relief.

What, then, can *Ekiu* tell us? Today's Court finds significant that the brief opinion makes no explicit mention of the Suspension Clause. *Ante*, at 132. This omission, it concludes, can only mean that the *Ekiu* Court did not think that (or had no occasion to consider whether) the Suspension Clause "imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters." *Ante*, at 131. According to this theory, *Ekiu* concluded that the plain terms of the 1891 Act prohibited judicial review of executive factfinding alone, and nothing more can be said.

But this myopic interpretation ignores many salient facts. To start, the 1891 Act was enacted for the purpose of limiting all judicial review of immigration decisions, not just a subset of factual issues that may arise in those decisions. Further, the plain terms of the statute did not cabin the limitation on judicial review to historical facts found by an immigration officer. *Ekiu*, moreover, evaluated the Act's constitutionality in view of the petitioner's argument that the limitation on judicial review violated the constitutional "right to the writ of *habeas corpu*s." 142 U. S., at 656 (statement of the case). These considerations all point in one direction: Even if the *Ekiu* Court did not explicitly hold that the Suspension Clause prohibits Congress from broadly limiting all judicial review in immigration proceedings, it certainly decided the case in a manner that avoided raising this constitutional question. Indeed, faced with a jurisdiction-stripping statute, the only review left for the *Ekiu* Court was that required by the Constitution and, by extension, protected by the guarantee of habeas corpus.

The Court also maintains that *Ekiu* concluded that "'the act of 1891 is constitutional'" in full, not "only in part."

Ante, at 132 (quoting *Ekiu*, 142 U. S., at 664). Yet as the Court acknowledges, it was only "after interpreting the 1891 Act" as precluding judicial review of questions of fact alone that the *Ekiu* Court deemed it constitutional. *Ante*, at 131; see also *Ekiu*, 142 U. S., at 664 (concluding that "[t]he result" of its construction is that the 1891 Act "is constitutional"). That cannot mean that *Ekiu* found the 1891 Act constitutional even to the extent that it prevented all judicial review of immigration decisions, even those brought on habeas. What it can only mean, instead, is that *Ekiu*'s construction of the 1891 Act was an answer to the constitutional question posed by the case: whether and to what extent denying judicial review under the 1891 Act would violate the constitutional "right to the writ of *habeas corpus*." *Id.*, at 656 (statement of the case).[8]

Bolstering this interpretation is that the Court has repeatedly reached the same result when interpreting subsequent statutes purporting to strip federal courts of all jurisdiction over immigration decisions. In *Gegiow* v. *Uhl*, 239 U. S. 3 (1915), for example, the Court observed that *Ekiu* decided that "[t]he conclusiveness of the decisions of immigration officers under [the 1891 Act]" referred only to "conclusiveness upon matters of fact." 239 U. S., at 9. It relied heavily on *Ekiu* to support its determination that the Immigration Act of 1907, 34 Stat. 898, which also rendered decisions of immigration officers to be "final," § 25, *id.*, at 907, similarly only barred judicial review of questions of fact, 239 U. S., at 9. Indeed, time and again, against a backdrop of statutes purporting to bar all judicial review of executive immigration decisions, this Court has entertained habeas petitions raising

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[8] The Court also claims that because *Ekiu* stated that the 1891 Act was constitutional, respondent must be wrong that *Ekiu* found the 1891 Act "unconstitutional in most of its applications (*i. e.*, to all questions other than questions of fact)." *Ante*, at 132. But the point here is not that *Ekiu* actually found the 1891 Act unconstitutional in part; it is that *Ekiu* interpreted the 1891 Act to avoid rendering it unconstitutional in part.

a host of issues other than historic facts found by immigration authorities.[9]

To be sure, this entrenched line of cases does not directly state that habeas review of immigration decisions is constitutionally compelled. But an alternate understanding of those cases rests on an assumption that is farfetched at best: that, year after year, and in case after case, this Court simply ignored the unambiguous texts of the serial Immigration Acts limiting judicial review altogether. The Court's pattern of hearing habeas cases despite those statutes' contrary mandate reflects that the Court understood habeas review in those cases as not statutorily permitted but constitutionally compelled.

In any event, we need not speculate now about whether the *Ekiu* Court, or the Courts that followed, had the constitutional right to habeas corpus in mind when they interpreted jurisdiction-stripping statutes only to preclude review of historic facts. This Court has already identified

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[9] See, *e. g.*, *The Japanese Immigrant Case*, 189 U. S. 86 (1903) (habeas petition filed by noncitizen alleged to have entered unlawfully and apprehended four days after being let on shore); *Gonzales* v. *Williams*, 192 U. S. 1 (1904) (habeas petition filed by resident of Puerto Rico detained at the port, who claimed that Puerto Rican nationals are United States citizens allowed to enter the mainland as a matter of course); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279 (1904) (habeas petition by noncitizen found within the United States 10 days after entry alleging his arrest was unconstitutional); *Chin Yow* v. *United States*, 208 U. S. 8 (1908) (habeas petition filed by a Chinese individual with a claim of U. S. citizenship who was detained on a steamship and prohibited from disembarking); *Yee Won* v. *White*, 256 U. S. 399 (1921) (habeas petition filed on behalf of noncitizen wife and child denied admission to the United States upon arrival despite claiming legal right to join a family member residing in the country); *Tod* v. *Waldman*, 266 U. S. 113 (1924) (habeas petition by family fleeing religious persecution in Russia denied entry on the grounds that they were likely to become a public charge); *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279 (1932) (habeas petition filed by residents of Greek ancestry who left the United States and sought reentry after a lengthy trip abroad).

which view is correct. In *Heikkila* v. *Barber*, 345 U. S. 229 (1953), the Court explained that *Ekiu* and its progeny had, in fact, construed the finality statutes to avoid serious constitutional questions about Congress' ability to strip federal courts of their habeas power. As *Heikkila* reiterated, the key question in *Ekiu* (and in later cases analyzing finality statutes) was the extent to which the Constitution allowed Congress to make administrative decisions unreviewable. 345 U. S., at 234. And it concluded that the jurisdiction-stripping immigration statute in that case, a successor to the 1891 Act, "preclud[ed] judicial intervention in deportation cases except insofar as it was required by the Constitution." *Id.*, at 234–235.

Heikkila thus settles the matter; during the finality era, this Court either believed that the Constitution required judicial review on habeas of constitutional and legal questions arising in immigration decisions or, at the very least, thought that there was a serious question about whether the Constitution so required. Although the Court tries to minimize that conclusion as not dispositive of the question presented, *ante*, at 133, such a conclusion undoubtedly weighs against finding § 1252(e)(2) constitutional in spite of its broad prohibition on reviewing constitutional and legal questions.

The Court dismisses *Heikkila* and its explanation of the finality-era cases outright. It fixates on the fact that *Heikkila* was not itself a habeas case and instead analyzed whether judicial review of immigration orders was available under the Administrative Procedure Act (APA). *Ante*, at 136. *Heikkila*'s discussion of the APA does not detract from its affirmation that when the language of a jurisdiction-stripping statute precludes all judicial review, the only review that is left is that required by the constitutional guarantee of habeas corpus. 345 U. S., at 235.[10] Most im-

[10] Indeed, the Government itself embraced that position in a brief to the Court during that time. Brief for Respondent in *Martinez* v. *Neelly*, O. T. 1952, No. 218, p. 19 ("The clear purpose of this [finality] provision

portantly, *Heikkila* concluded that APA review was not equivalent to that judicial review. Second, the Court also states that *Heikkila* never interpreted *Ekiu* as having found the 1891 Act "partly unconstitutional." *Ante*, at 136. But there was no need for the *Ekiu* Court to find the 1891 Act unconstitutional in part to construe it as prohibiting only review of historic facts. Instead, as *Heikkila* explained, *Ekiu* reached its decision by exercising constitutional avoidance.

By disregarding *Heikkila*, the Court ignores principles of *stare decisis* to stir up a settled debate. Cf. *Ramos* v. *Louisiana*, 590 U. S. 83, 140, 150 (2020) (ALITO, J., dissenting). Perhaps its view is tinted by the fact that it doubts the Suspension Clause could limit Congress' ability to eliminate habeas jurisdiction at all. The Court scoffs at the notion that a limitation on judicial review would have been understood as an unconstitutional suspension of habeas, noting and distinguishing the limited number of occasions that this Court has found a suspension of the writ of habeas corpus. See *ante*, at 132–133; but see *ante*, at 147, n. 4 (THOMAS, J., concurring) (noting that historically, suspensions of habeas did not necessarily mention the availability of the writ). The references to those major historic moments where this Court has identified a suspension only establish the outer bounds of Congress' suspension powers; it says nothing about whether, and to what extent, more limited restrictions on judicial review might also be found unconstitutional.

Indeed, the Court acknowledges that some thought it an open question during the finality era whether the Suspension

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was to preclude judicial review of the Attorney General's decisions in alien deportation cases insofar as the Congress could do so under the Constitution"); *id.*, at 33 ("[T]he courts have long recognized" the finality provisions "restric[t] review of deportation orders as far as the Constitution permits"); see also *id.*, at 18 (explaining that the finality provisions "precluded judicial review of deportation orders except for the collateral review in habeas corpus which the Constitution prescribes in cases of personal detention").

Clause imposes limits on Congress' ability to limit judicial review. See *ante*, at 135, n. 25 (quoting Justice Brewer's concurring opinion in *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 295 (1904), raising the question). That this question remained unsettled, see n. 1, *supra*, suffices to support the Court's conclusion in *Heikkila*: The finality-era Courts endeavored to construe jurisdiction-stripping statutes to avoid serious constitutional questions about the extent of congressional power to limit judicial review.

At bottom, the better view of the finality-era cases is that they understood the habeas right they sustained to be, or at least likely to be, constitutionally compelled. Certainly the cases do not establish the Court's simplistic view to the contrary: That the finality-era Court entertained habeas petitions only because no statute limited its ability to do so, and no Constitutional provision required otherwise. That reading of precedent disregards significant indications that this Court persistently construed immigration statutes stripping courts of judicial review to avoid depriving noncitizens of constitutional habeas guarantees. Ignoring how past courts wrestled with this issue may make it easier for the Court to announce that there is no unconstitutional suspension today. But by sweeping aside most of our immigration history in service of its conclusion, the Court reopens a question that this Court put to rest decades ago, and now decides it differently. The cost of doing so is enormous. The Court, on its own volition, limits a constitutional protection so respected by our Founding Fathers that they forbade its suspension except in the direst of circumstances.

D

Not only does the Court cast to one side our finality-era jurisprudence, it skims over recent habeas precedent. Perhaps that is because these cases undermine today's decision. Indeed, both *INS* v. *St. Cyr*, 533 U. S. 289 (2001), and *Boumediene* v. *Bush*, 553 U. S. 723 (2008), instruct that eliminating

judicial review of legal and constitutional questions associated with executive detention, like the expedited removal statute at issue here does, is unconstitutional.

The Court acknowledges *St. Cyr*'s holding but does not heed it. *St. Cyr* concluded that "'[b]ecause of [the Suspension] Clause, some "judicial intervention in deportation cases" is unquestionably "required by the Constitution."'" *Ante*, at 137 (quoting 533 U. S., at 300). This statement affirms what the finality-era cases long suggested: that the Suspension Clause limits Congress' power to restrict judicial review in immigration cases. Nor did *St. Cyr* arrive at this conclusion simply based on canons of statutory construction. The Court spoke of deeper historical principles, affirming repeatedly that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.*, at 301; see also *id.*, at 305 ("The writ of habeas corpus has always been available to review the legality of Executive detention"). The Court looked to founding-era cases to establish that the scope of this guarantee extended to both the "interpretation" and "application" of governing law, including law that guided the exercise of executive discretion. *Id.*, at 302.

Based on that history, the Court also concluded that "a serious Suspension Clause issue would be presented" by precluding habeas review in the removal context, *id.*, at 305, even where there was "no dispute" that the Government had the legal authority to detain a noncitizen like St. Cyr, *id.*, at 303. Thus based on the same principles that the Court purports to apply in this case, the *St. Cyr* Court reached the opposite conclusion: The Suspension Clause likely prevents Congress from eliminating judicial review of discretionary executive action in the deportation context, even when the writ is used to challenge more than the fact of detention itself.

Boumediene reprised many of the rules articulated in *St. Cyr*. It first confirmed that the Suspension Clause ap-

plied to detainees held at Guantanamo Bay, repeating the "uncontroversial" proposition that "the privilege of habeas corpus entitles" an executive detainee to a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 553 U. S., at 779 (quoting *St. Cyr*, 533 U. S., at 302). Then the Court detailed the writ's remedial scope. It affirmed that one of the "easily identified attributes of any constitutionally adequate habeas corpus proceeding" is that "the habeas court must have the power to order the conditional release of an individual unlawfully detained." 553 U. S., at 779. Notably, the Court explained that release "need not be the exclusive remedy," reasoning that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." *Ibid.* (citing 3 W. Blackstone, Commentaries *131). The Court noted that any habeas remedy might be tempered based on the traditional test for procedural adequacy in the due process context and thus could accommodate the "rigor of any earlier proceedings." 553 U. S., at 781 (citing *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976)).

The Court discounts these cases because it objects to the perceived direction of respondent's requested release. *Ante*, at 136–137 (explaining that *Boumediene* did not suggest that the enemy combatant petitioners were entitled to enter the United States upon release). It similarly contends that respondent's attempted use of the writ is "very different" from that at issue in *St. Cyr*. *Ante*, at 138.

Neither rejoinder is sound. *St. Cyr* and *Boumediene* confirm that at minimum, the historic scope of the habeas power guaranteed judicial review of constitutional and legal challenges to executive action. They do not require release as an exclusive remedy, let alone a particular direction of release. Rather, both cases built on the legacy of the finality era where the Court, concerned about the constitutionality of limiting judicial review, unquestionably entertained habeas petitions from arriving migrants who raised the same types

of questions respondent poses here. See, *e. g.*, *St. Cyr*, 533 U. S., at 307 (citing *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954) (habeas case attacking the denial of an application for suspension of deportation)); see also *id.*, at 268 ("[W]e object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations" (emphasis deleted)).

As discussed above, respondent requests review of immigration officials' allegedly unlawful interpretation of governing asylum law, and seeks to test the constitutional adequacy of expedited removal procedures. As a remedy, he requests procedures affording a conditional release, but certainly did not so limit his prayer for relief. His constitutional and legal challenges fall within the heartland of what *St. Cyr* said the common-law writ encompassed, and *Boumediene* confirms he is entitled to additional procedures as a form of conditional habeas relief. These precedents themselves resolve this case.

* * *

The Court wrongly declares that § 1252(e)(2) can preclude habeas review of respondent's constitutional and legal challenges to his asylum proceedings. So too the Court errs in concluding that Congress need not provide a substitute mechanism to supply that review. In so holding, the Court manages to flout precedents governing habeas jurisprudence from three separate eras. Each one shows that respondent is entitled to judicial review of his constitutional and legal claims. Because § 1252(e)(2) excludes his challenges from habeas proceedings, and because the Immigration and Nationality Act does not otherwise provide for meaningful judicial review of the Executive's removal determination, respondent has no effective means of vindicating his right to habeas relief. Quite simply, the Constitution requires more.

III

Although the Court concludes that habeas relief is not available because of the particular kind of release that it

thinks respondent requests, it also suggests that respondent's unlawful status independently prohibits him from challenging the constitutionality of the expedited removal proceedings. By determining that respondent, a recent unlawful entrant who was apprehended close in time and place to his unauthorized border crossing, has no procedural due process rights to vindicate through his habeas challenge, the Court unnecessarily addresses a constitutional question in a manner contrary to the text of the Constitution and to our precedents.

The Court stretches to reach the issue whether a noncitizen like respondent is entitled to due process protections in relation to removal proceedings, which the court below mentioned only in a footnote and as an aside. See *ante*, at 138 (quoting 917 F. 3d, at 1111, n. 15). In so doing, the Court opines on a matter neither necessary to its holding nor seriously in dispute below.[11]

The Court is no more correct on the merits. To be sure, our cases have long held that foreigners who had never come into the United States—those "on the threshold of initial entry"—are not entitled to any due process with respect to their admission. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953) (citing *Ekiu*, 142 U. S., at 660); see also *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982). That follows from this Courts' holdings that the political branches of Government have "plenary" sovereign power over regulating the admission of noncitizens to the United States. *Ante*, at 139; see also *Ekiu*, 142 U. S., at 659.

[11] While the Court contends that the writ of habeas corpus does not allow an individual to "obtain administrative review" or additional procedures, it arrives at this conclusion only in the context of discussing what sorts of "relief" properly qualified as release from custody at common law. *Ante*, at 107, 119–121 (contrasting request for additional remedies with a "simple" release from custody). To the extent that this discussion necessarily prohibits federal courts from entertaining habeas petitions alleging due process violations in expedited removal proceedings, the Court's separate discussion in Part IV is unnecessary.

Noncitizens in this country, however, undeniably have due process rights. In *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Court explained that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens" but rather applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Id.*, at 369; *Zadvydas* v. *Davis*, 533 U. S. 678, 693 (2001) (reiterating that "once an alien enters the country," he is entitled to due process in his removal proceedings because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

In its early cases, the Court speculated whether a noncitizen could invoke due process protections when he entered the country without permission or had resided here for too brief a period to "have become, in any real sense, a part of our population." *The Japanese Immigrant Case*, 189 U. S. 86, 100 (1903); see also *ante*, at 138 (remarking that for those not "'admitted into the country pursuant to law,'" the procedures afforded by the political branches are all that are due (quoting *Ekiu*, 142 U. S., at 660)). But the Court has since determined that presence in the country is the touchstone for at least some level of due process protections. See *Mezei*, 345 U. S., at 212 (explaining that "aliens who have once passed through our gates, even illegally," possess constitutional rights); *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons . . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection"). As a noncitizen within the territory of the United States, respondent is entitled to invoke the protections of the Due Process Clause.

In order to reach a contrary conclusion, the Court assumes that those who do not enter the country legally have the same due process rights as those who do not enter the coun-

try at all. The Court deems that respondent possesses only the rights of noncitizens on the "threshold of initial entry," skirting binding precedent by assuming that individuals like respondent have "'assimilated to [the] status'" of an arriving noncitizen for purposes of the constitutional analysis. *Mezei*, 345 U. S., at 212, 214. But that relies on a legal fiction. Respondent, of course, was actually within the territorial limits of the United States.

More broadly, by drawing the line for due process at legal admission rather than physical entry, the Court tethers constitutional protections to a noncitizen's legal status as determined under contemporary asylum and immigration law. But the Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: It applies to "persons" without qualification. *Yick Wo*, 118 U. S., at 369. The Court has repeatedly affirmed as much long after Congress began regulating entry to the country. *Mathews*, 426 U. S., at 77; *Zadvydas*, 533 U. S., at 693–694. The Court lacks any textual basis to craft an exception to this rule, let alone one hinging on dynamic immigration laws that may be amended at any time, to redefine when an "entry" occurs. Fundamentally, it is out of step with how this Court has conceived the scope of the Due Process Clause for over a century: Congressional policy in the immigration context does not dictate the scope of the Constitution.

In addition to creating an atextual gap in the Constitution's coverage, the Court's rule lacks any limiting principle. This is not because our case law does not supply one. After all, this Court has long affirmed that noncitizens have due process protections in proceedings to remove them from the country once they have entered. See *id.*, at 693–694; *Mezei*, 345 U. S., at 212.

Perhaps recognizing the tension between its opinion today and those cases, the Court cabins its holding to individuals who are "in respondent's position." *Ante*, at 140. Presum-

ably the rule applies to—and only to—individuals found within 25 feet of the border who have entered within the past 24 hours of their apprehension. Where its logic must stop, however, is hard to say. Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U. S. citizens or residents.

This judicially fashioned line-drawing is not administrable, threatens to create arbitrary divisions between noncitizens in this country subject to removal proceedings, and, most important, lacks any basis in the Constitution. Both the Constitution and this Court's cases plainly guarantee due process protections to all "persons" regardless of their immigration status, a guarantee independent of the whims of the political branches. This contrary proclamation by the Court unnecessarily decides a constitutional question in a manner contrary to governing law.[12]

IV

The Court reaches its decision only by downplaying the nature of respondent's claims, ignoring a plethora of common-law immigration cases from a time of relatively open borders, and mischaracterizing the most relevant precedents from this Court. Perhaps to shore up this unstable founda-

[12] The Court notes that noncitizens like respondent seeking legal admission lack due process rights "'regarding [their] application.'" *Ante*, at 139 (quoting *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982)). It does not, however, explain what kinds of challenges are related to one's application and what kinds are not. Presumably a challenge to the length or conditions of confinement pending a hearing before an immigration judge falls outside that class of cases. Because respondent only sought promised asylum procedures, however, today's decision can extend no further than these claims for relief.

tion, the Court justifies its decision by pointing to perceived vulnerabilities and abuses in the asylum system. I address the Court's policy concerns briefly.

In some ways, this country's asylum laws have represented the best of our Nation. Unrestricted migration at the founding and later, formal asylum statutes, have served as a beacon to the world, broadcasting the vitality of our institutions and our collective potential. For many who come here fleeing religious, political, or ideological persecution, and for many more who have preceded them, asylum has provided both a form of shelter and a start to a better life. That is not to say that this country's asylum policy has always, or ever, had overwhelming support. Indeed, many times in our past, particularly when the Nation's future has appeared uncertain or bleak, members of this country have sought to close our borders rather than open them. See S. Legomsky & C. Rodriguez, Immigration and Refugee Law and Policy 875–876 (5th ed. 2009) (explaining that restrictionist sentiments in the 1930s were fueled in part by the Great Depression). Yet this country has time and again reaffirmed its commitment to providing sanctuary to those escaping oppression and persecution. Congress and the Executive have repeatedly affirmed that choice in response to serial waves of migration from other countries by enacting and amending asylum laws and regulations. In fact, a centerpiece of respondent's claim is that officials were not following these statutorily enacted procedures.

The volume of asylum claims submitted, pending, and granted has varied over the years, due to factors like changing international migration patterns, the level of resources devoted to processing and adjudicating asylum applications, and amendments to governing immigration laws. See Congressional Research Service, Immigration: U. S. Asylum Policy 25 (Feb. 19, 2019); see also Dept. of Homeland Security, Office of Immigration Statistics, 2018 Yearbook of Immigration Statistics 43 (2019) (Table 16) ("Individuals Granted

Asylum Affirmatively or Defensively: Fiscal Years 1990 to 2018" (quotation modified)). For the past few years, both new asylum applications and pending applications have steadily increased. Immigration: U. S. Asylum Policy, at 25.

It is universally acknowledged that the asylum regime is under strain. It is also clear that, while the reasons for the large pending caseload are complicated,[13] delays in adjudications are undesirable for a number of reasons. At bottom, when asylum claims are not resolved in a timely fashion, the protracted decisionmaking harms those eligible for protection and undermines the integrity of the regime as a whole. D. Meissner, F. Hipsman, & T. Aleinikoff, Migration Policy Institute, The U. S. Asylum System in Crisis: Charting a Way Forward 4 (Sept. 2018).

But the political branches have numerous tools at their disposal to reform the asylum system, and debates over the best methods of doing so are legion in the Government, in the academy, and in the public sphere.[14] Congress and the

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[13] In 2018 Senate Judiciary Committee hearings, the Director of the Executive Office of Immigration Review identified factors contributing to the backlog of cases, including lengthy hiring times for new immigration judges and the continued use of paper files. See Testimony of James McHenry, Strengthening and Reforming America's Immigration Court System, Hearings before the Subcommittee on Border Security and Immigration of the Senate Committee on the Judiciary, 115th Cong., 2d Sess., 2 (2018). The Court, meanwhile, insinuates that much of the burden on the asylum system can be attributed to frivolous or fraudulent asylum claims. See, *e. g.*, *ante*, at 106, 112–113, nn. 9 and 10. But the magnitude of asylum fraud has long been debated. See S. Legomsky & C. Rodriguez, Immigration and Refugee Law and Policy 1034 (5th ed. 2009); Immigration: U. S. Asylum Policy, at 28.

[14] See, *e. g.*, GAO, Immigration Courts: Actions Needed To Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (GAO–17–438, June 2017); Uchimiya, A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers, 26 Pa. St. Int'l L. Rev. 383 (2007); Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247 (1990).

Executive are thus well equipped to enact a range of measures to reform asylum in a number of ways and routinely do so.[15] Indeed, as the Court notes, the expedited removal process at issue here was created by law as one such measure to ease pressures on the immigration system. *Ante*, at 108–109.

In the face of these policy choices, the role of the Judiciary is minimal, yet crucial: to ensure that laws passed by Congress are consistent with the limits of the Constitution. The Court today ignores its obligation, going out of its way to restrict the scope of the Great Writ and the reach of the Due Process Clause. This may accommodate congressional policy concerns by easing the burdens under which the immigration system currently labors. But it is nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ.

Because I disagree with the Court's interpretation of the reach of our Constitution's protections, I respectfully dissent.

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[15] P. Alvarez & G. Sands, Trump Administration Proposes Sweeping Changes to U. S. Asylum System in New Rule, CNN, June 10, 2020 (online source archived at www.supremecourt.gov).

Syllabus

SEILA LAW LLC *v.* CONSUMER FINANCIAL PROTECTION BUREAU

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

No. 19–7. Argued March 3, 2020—Decided June 29, 2020

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act; and Congress enacted a new prohibition on unfair and deceptive practices in the consumer-finance sector. 12 U. S. C. § 5536(a)(1)(B). In doing so, Congress gave the CFPB extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties for violations of the 19 federal statutes under its purview. So far, the agency has obtained over $11 billion in relief for more than 25 million consumers.

Unlike traditional independent agencies headed by multimember boards or commissions, the CFPB is led by a single Director, § 5491(b)(1), who is appointed by the President with the advice and consent of the Senate, § 5491(b)(2), for a five-year term, during which the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office," §§ 5491(c)(1), (3). The CFPB receives its funding outside the annual appropriations process from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments.

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a California-based law firm that provides debt-related legal services to clients. The civil investigative demand (essentially a subpoena) sought information and documents related to the firm's business practices. Seila Law asked the CFPB to set aside the demand on the ground that the agency's leadership by a single Director removable only for cause violated the separation of powers. When the CFPB declined,

Seila Law refused to comply with the demand, and the CFPB filed a petition to enforce the demand in District Court. Seila Law renewed its claim that the CFPB's structure violated the separation of powers, but the District Court disagreed and ordered Seila Law to comply with the demand. The Ninth Circuit affirmed, concluding that Seila Law's challenge was foreclosed by *Humphrey's Executor* v. *United States*, 295 U. S. 602, and *Morrison* v. *Olson*, 487 U. S. 654.

Held: The judgment is vacated and remanded.

923 F. 3d 680, vacated and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, and III, concluding:

1. Appointed *amicus* raises three threshold arguments for why this Court may not or should not reach the merits of petitioner's constitutional challenge, but they are unavailing. Pp. 209–213.

2. The CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers. Pp. 213–232.

(a) Article II vests the entire "executive Power" in the President alone, but the Constitution presumes that lesser executive officers will assist the President in discharging his duties. The President's executive power generally includes the power to supervise—and, if necessary, remove—those who exercise the President's authority on his behalf. The President's removal power has long been confirmed by history and precedent. It was recognized by the First Congress in 1789, confirmed by this Court in *Myers* v. *United States*, 272 U. S. 52, and reiterated in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477. In *Free Enterprise Fund*, the Court recognized that it had previously upheld certain congressional limits on the President's removal power. But the Court declined to extend those limits to "a new situation not yet encountered by the Court." 561 U. S., at 483. *Free Enterprise Fund* left in place only two exceptions to the President's unrestricted removal power. First, *Humphrey's Executor* permitted Congress to give for-cause removal protection to a multimember body of experts who were balanced along partisan lines, appointed to staggered terms, performed only "quasi-legislative" and "quasi-judicial functions," and were said not to exercise any executive power. Second, *Morrison* approved for-cause removal protection for an *inferior* officer—the independent counsel—who had limited duties and no policymaking or administrative authority. Pp. 213–218.

(b) Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. The New Deal-era FTC upheld in *Humphrey's Executor* bears little resem-

blance to the CFPB. Unlike the multiple Commissioners of the FTC, who were balanced along partisan lines and served staggered terms to ensure the accumulation of institutional knowledge, the CFPB Director serves a five-year term that guarantees abrupt shifts in leadership and the loss of agency expertise. In addition, the Director cannot be dismissed as a mere legislative or judicial aid. Rather, the Director possesses significant administrative and enforcement authority, including the power to seek daunting monetary penalties against private parties in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

The logic of *Morrison* also does not apply. The independent counsel approved in *Morrison* was an inferior officer who lacked policymaking or administrative authority and exercised narrow authority to initiate criminal investigations and prosecutions of governmental actors identified by others. By contrast, the CFPB Director is a principal officer whose duties are far from limited. The Director promulgates binding rules fleshing out 19 consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. And the Director brings the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions.

The question here is therefore whether to extend the *Humphrey's Executor* and *Morrison* exceptions to a "new situation." *Free Enterprise Fund*, 561 U. S., at 433. Pp. 218–220.

(c) The Court declines to extend these precedents to an independent agency led by a single Director and vested with significant executive power. Pp. 220–232.

(1) The CFPB's structure has no foothold in history or tradition. Congress has provided removal protection to principal officers who alone wield power in only four isolated instances: the Comptroller of the Currency (for a one-year period during the Civil War); the Office of Special Counsel; the Administrator of the Social Security Administration; and the Director of the Federal Housing Finance Agency. Aside from the one-year blip for the Comptroller of the Currency, these examples are modern and contested; and they do not involve regulatory or enforcement authority comparable to that exercised by the CFPB. Pp. 220–222.

(2) The CFPB's single-Director configuration is also incompatible with the structure of the Constitution, which—with the sole exception of the Presidency—scrupulously avoids concentrating power in the hands of any single individual. The Framers' constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through

regular elections. In that scheme, individual executive officials may wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual who is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. And the Director may do so without even having to rely on Congress for appropriations. While the CFPB's independent, single-Director structure is sufficient to render the agency unconstitutional, the Director's five-year term and receipt of funds outside the appropriations process heighten the concern that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499. Pp. 222–226.

(3) *Amicus* raises three principal arguments in the agency's defense. First, *amicus* challenges the textual basis for the President's removal power and highlights statements from individual Framers expressing divergent views on the subject. This Court's precedents, however, make clear that the President's removal power derives from the "executive Power" vested exclusively in the President by Article II. And this Court has already discounted the founding-era statements cited by *amicus* in light of their context. Second, *amicus* claims that *Humphrey's Executor* and *Morrison* establish a general rule that Congress may freely constrain the President's removal power, with only two limited exceptions not applicable here. But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception. Finally, *amicus* submits that this Court can cure any constitutional defect in the CFPB's structure by interpreting the language "inefficiency, neglect of duty, or malfeasance in office," 12 U. S. C. § 5491(c)(3), to reserve substantial discretion to the President. But *Humphrey's Executor* implicitly rejected this position, and the CFPB's defenders have not advanced any workable standard derived from the statutory text. Nor have they explained how a lenient removal standard can be squared with the Dodd-Frank Act as a whole, which makes plain that the CFPB is an "independent bureau." § 5491(a).

The dissent advances several additional arguments in the agency's defense, but they have already been expressly considered and rejected by the Court in *Free Enterprise Fund.* Pp. 226–232.

Syllabus

THE CHIEF JUSTICE, joined by JUSTICE ALITO and JUSTICE KAVANAUGH, concluded in Part IV that the Director's removal protection is severable from the other provisions of the Dodd-Frank Act that establish the CFPB and define its authority. Pp. 232–238.

ROBERTS, C. J., delivered the opinion of the Court with respect to Parts I, II, and III, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined, and an opinion with respect to Part IV, in which ALITO and KAVANAUGH, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH, J., joined, *post*, p. 238. KAGAN, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 261.

Kannon K. Shanmugam argued the cause for petitioner. With him on the briefs were *Masha G. Hansford*, *William T. Marks*, *Joel S. Johnson*, and *Anthony Bisconti*.

Solicitor General Francisco argued the cause for respondent urging vacatur. With him on the briefs were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Jonathan Y. Ellis*, *Mark B. Stern*, *Daniel Aguilar*, and *Steven Y. Bressler*.

Paul D. Clement, by invitation of the Court, 589 U. S. 1041, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief were *Erin E. Murphy*, *Matthew D. Rowen*, and *Andrew C. Lawrence*.

Douglas N. Letter argued the cause for the United States House of Representatives as *amicus curiae* urging affirmance. With him on the brief were *Megan Barbero*, *Adam A. Grogg*, *Brian H. Fletcher*, and *Pamela S. Karlan*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Kyle D. Hawkins*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, and *Lanora C. Pettit*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Mike Hunter* of Oklahoma, *Alan Wilson* of South

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that

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Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, and *Caroline A. Olsen*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Phil Weiser* of Colorado, *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, *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

consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. Be-

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Nevada, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *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, *Robert Ferguson* of Washington, and *Josh Kaul* of Wisconsin; for Current and Former Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle*; for Financial Regulation Scholars by *Deepak Gupta* and *Adam J. Levitin*, *pro se*; for the Main Street Alliance by *Steven E. Fineman*, *Jason L. Lichtman*, and *Andrew R. Kaufman*; for the National Consumer Law Center et al. by *Stuart T. Rossman*, *J. L. Pottenger, Jr.*, *Jeffrey Gentes*, *Seth E. Mermin*, *Jonathan R. Marshall*, and *Patricia M. Kipnis*; for the Project on Government Oversight et al. by *J. Carl Cecere*; for Public Citizen et al. by *Scott L. Nelson* and *Allison M. Zieve*; for Self-Help Credit Union et al. by *Daniel S. Sommers*; for Rachel E. Barkow et al. by *Richard L. Revesz*; for Harold H. Bruff et al. by *Latif M. Nurani*, *Jeffrey M. Bayne*, *Gillian E. Metzger*, and *Peter M. Shane*; for John Harrison by *Mr. Harrison*, *pro se*; for Martin S. Lederman et al. by *Mr. Lederman* and *David C. Vladeck*, both *pro se*; and for Sen. Sheldon Whitehouse et al. by *Stephen D. Susman* and *Amanda Bonn*.

Briefs of *amici curiae* were filed for the Consumer Bankers Association by *Jonathan S. Franklin* and *Peter B. Siegal*; for the Mortgage Bankers Association et al. by *Benjamin B. Klubes*, *Michelle L. Rogers*, and *Elizabeth R. Bailey*; and for Alan B. Morrison by *Mr. Morrison*, *pro se*.

cause no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties," *id.*, at 513–514. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.*, at 514.

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers* v. *United States*, 272 U. S. 52 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. Warren, Unsafe at Any Rate, Democracy (Summer 2007). Professor Warren believed the financial products marketed to ordinary American households—credit cards, student loans, mortgages, and the like—had grown increasingly unsafe due to a "regulatory jumble" that paid too much attention to banks and too little to consumers. *Ibid.* To remedy the lack of "coherent, consumer-oriented" financial regulation, she proposed "concentrat[ing] the review of financial products in a single location"—an independent agency modeled after the multimember Consumer Product Safety Commission. *Ibid.*

That proposal soon met its moment. Within months of Professor Warren's writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes. In the aftermath, the Obama administration embraced Professor Warren's recommendation. Through the Treasury Department, the administration encouraged Congress to establish an agency with a mandate to ensure that "consumer protection regulations" in the financial sector "are written fairly and enforced vigorously." Dept. of Treasury, Financial Regulatory Reform: A New Foundation 55 (2009). Like Professor Warren, the administration envisioned a tradi-

tional independent agency, run by a multimember board with a "diverse set of viewpoints and experiences." *Id.*, at 58.

In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U. S. C. § 5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. See §§ 5512(a), 5481(12), (14). In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. § 5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations. §§ 5531(a)–(b), 5581(a)(1)(A), (b).

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§ 5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1 million (inflation adjusted) for each day that a violation occurs. §§ 5565(a), (c)(2); 12 CFR § 1083.1(a), Table (2019). Since its inception, the CFPB has obtained over $11 billion in relief for over 25 million consumers, including a $1 billion penalty against a single bank in 2018. See CFPB, Financial Report of the Consumer Financial Pro-

tection Bureau, Fiscal Year 2015, p. 3; CFPB, Bureau of Consumer Financial Protection Announces Settlement With Wells Fargo for Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018).

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. § 5563(a). When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." § 5565(a)(1). The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR § 1081.104(b). At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order." §§ 1081.400(d), 1081.402(b); see also § 1081.405.

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. § 5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. § 5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§ 5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems "reasonably necessary to carry out" the agency's duties, and the Federal Reserve

grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). §§ 5497(a)(1), (2)(A)(iii), (2)(B). In recent years, the CFPB's annual budget has exceeded half a billion dollars. See CFPB, Fiscal Year 2019: Ann. Performance Plan and Rep., p. 7.

B

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services." 2017 WL 6536586, *1 (CD Cal., Aug. 25, 2017). See also 12 U. S. C. § 5562(c)(1) (authorizing the agency to issue such demands to persons who "may have any information[ ] relevant to a violation" of one of the laws enforced by the CFPB). The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices.

Seila Law asked the CFPB to set aside the demand, objecting that the agency's leadership by a single Director removable only for cause violated the separation of powers. The CFPB declined to address that claim and directed Seila Law to comply with the demand.

When Seila Law refused, the CFPB filed a petition to enforce the demand in the District Court. See § 5562(e)(1) (creating cause of action for that purpose). In response, Seila Law renewed its defense that the demand was invalid and must be set aside because the CFPB's structure violated the Constitution. The District Court disagreed and ordered Seila Law to comply with the demand (with one modification not relevant here).

The Court of Appeals affirmed. 923 F. 3d 680 (CA9 2019). The Court observed that the "arguments for and against" the constitutionality of the CFPB's structure had already been "thoroughly canvassed" in majority, concurring, and dissenting opinions by the en banc Court of Appeals for the District

of Columbia Circuit in *PHH Corp.* v. *CFPB*, 881 F. 3d 75 (2018), which had rejected a challenge similar to the one presented here. 923 F. 3d, at 682. The Court saw "no need to re-plow the same ground." *Ibid.* Instead, it provided a brief explanation for why it agreed with the *PHH* Court's core holding. The Court took as its starting point *Humphrey's Executor*, which had approved for-cause removal protection for the Commissioners of the Federal Trade Commission (FTC). In applying that precedent, the Court recognized that the CFPB wields "substantially more executive power than the FTC did back in 1935" and that the CFPB's leadership by a single Director (as opposed to a multimember commission) presented a "structural difference" that some jurists had found "dispositive." 923 F. 3d, at 683–684. But the Court felt bound to disregard those differences in light of our decision in *Morrison*, which permitted a single individual (an independent counsel) to exercise a core executive power (prosecuting criminal offenses) despite being insulated from removal except for cause. Because the Court found *Humphrey's Executor* and *Morrison* "controlling," it affirmed the District Court's order requiring compliance with the demand. 923 F. 3d, at 684.

We granted certiorari to address the constitutionality of the CFPB's structure. 589 U. S. 1031 (2019). We also requested argument on an additional question: whether, if the CFPB's structure violates the separation of powers, the CFPB Director's removal protection can be severed from the rest of the Dodd-Frank Act.

Because the Government agrees with petitioner on the merits of the constitutional question, we appointed Paul Clement to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

II

We first consider three threshold arguments raised by the appointed *amicus* for why we may not or should not reach the merits. Each is unavailing.

First, *amicus* argues that the demand issued to petitioner is not "traceable" to the alleged constitutional defect because two of the three Directors who have in turn played a role in enforcing the demand were (or now consider themselves to be) removable by the President at will. Brief for Court-Appointed *Amicus Curiae* 21–24. *Amicus* highlights the Government's argument below that the demand, originally issued by former Director Richard Cordray, had been ratified by an *acting* CFPB Director who, according to the Office of Legal Counsel (OLC), was removable by the President at will. See Brief for Appellee in No. 17–56324 (CA9), pp. 1, 10, 13–19 (citing Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. OLC 99, 109 (2017)). *Amicus* further observes that current CFPB Director Kathleen Kraninger, now responsible for enforcing the demand, agrees with the Solicitor General's position in this case that her for-cause removal protection is unconstitutional. See Brief for Respondent on Pet. for Cert. 20; Letter from K. Kraninger, CFPB Director, to M. McConnell, Majority Leader, U. S. Senate, p. 2 (Sept. 17, 2019); Letter from K. Kraninger, CFPB Director, to N. Pelosi, Speaker, U. S. House of Representatives, p. 2 (Sept. 17, 2019).[1] In *amicus*' view, these developments reveal that the demand would have been issued—and would continue to be enforced—even in the absence of the CFPB Director's removal protection, making the asserted separation of powers dispute "artificial." Brief for Court-Appointed *Amicus Curiae* 22.

Even if that were true, it would not deprive us of jurisdiction. *Amicus*' traceability argument appears to challenge petitioner's Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (explaining that the plaintiff's injury must be "fairly traceable to the challenged action of the defendant" (internal quotation marks and alterations

[1] Director Kraninger did not indicate whether she would disregard her statutory removal protection if the President attempted to remove her without cause.

omitted)). But *amicus*' argument does not cast any doubt on the jurisdiction of the District Court because petitioner is *the defendant* and did not invoke the Court's jurisdiction. See *Bond* v. *United States*, 564 U. S. 211, 217 (2011) (When the plaintiff has standing, "Article III does not restrict the opposing party's ability to object to relief being sought at its expense.").

It is true that "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth* v. *Perry*, 570 U. S. 693, 705 (2013) (internal quotation marks omitted). But petitioner's appellate standing is beyond dispute. Petitioner is compelled to comply with the civil investigative demand and to provide documents it would prefer to withhold, a concrete injury. That injury is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals and remand with instructions to deny the Government's petition to enforce the demand.

Without engaging with these principles, *amicus* contends that a litigant wishing to challenge an executive act on the basis of the President's removal power must show that the challenged act would not have been taken if the responsible official had been subject to the President's control. See Brief for Court-Appointed *Amicus Curiae* 21–24. Our precedents say otherwise. We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a "counterfactual world" in which the Government had acted with constitutional authority. *Free Enterprise Fund*, 561 U. S., at 512, n. 12. In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority. *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986).

Second, *amicus* contends that the proper context for assessing the constitutionality of an officer's removal restriction is a contested removal. See Brief for Court-Appointed *Amicus Curiae* 24–27. While that is certainly one way to review a removal restriction, it is not the only way. Our precedents have long permitted private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power while insulated from removal by the President. See *Bowsher*, 478 U. S., at 721 (lawsuit filed by aggrieved third party in the absence of contested removal); *Free Enterprise Fund*, 561 U. S., at 487 (same); *Morrison*, 487 U. S., at 668–669 (defense to subpoena asserted by third party in the absence of contested removal). Indeed, we have expressly "reject[ed]" the "argument that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used," because when such a provision violates the separation of powers it inflicts a "here-and-now" injury on affected third parties that can be remedied by a court. *Bowsher*, 478 U. S., at 727, n. 5 (internal quotation marks omitted). The Court of Appeals therefore correctly entertained petitioner's constitutional defense on the merits.

Lastly, *amicus* contends that we should dismiss the case because the parties agree on the merits of the constitutional question and the case therefore lacks "adverseness." Tr. of Oral Arg. 42–43, 45–46. That contention, however, is foreclosed by *United States* v. *Windsor*, 570 U. S. 744 (2013). There, we explained that a lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction—even if "the Executive may welcome" an adverse order that "is accompanied by the constitutional ruling it wants." *Id.*, at 758. Here, petitioner and the Government disagree about whether petitioner must comply with the civil investigative demand. The lower courts sided with the Government, and the Government has not volunteered to relinquish that vic-

tory and withdraw the demand. To the contrary, while the Government agrees that the agency is unconstitutionally structured, it believes it may nevertheless enforce the demand on remand. See *infra*, at 232. Accordingly, our "decision will have real meaning" for the parties. *INS* v. *Chadha*, 462 U. S. 919, 939 (1983). And, as in *Windsor*, any prudential concerns with deciding an important legal question in this posture can be addressed by "the practice of entertaining arguments made by an *amicus* when the Solicitor General confesses error with respect to a judgment below," which we have done. 570 U. S., at 760.

We therefore turn to the merits of petitioner's constitutional challenge.

III

We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.*, § 3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of

[their] functions, obey." *Bowsher*, 478 U. S., at 726 (internal quotation marks omitted).

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*, 561 U. S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," *Bowsher*, 478 U. S., at 723 (internal quotation marks omitted), and has long been the "settled and well understood construction of the Constitution," *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President's prerogative to remove executive officials in *Myers* v. *United States*, 272 U. S. 52. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Id.*, at 163–164 (emphasis added). Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Id.*, at 117. "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed." *Id.*, at 164.

We recently reiterated the President's general removal power in *Free Enterprise Fund*. "Since 1789," we recapped, "the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." 561 U. S., at 483. Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. *Id.*, at 483, 514. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties." *Id.*, at 513–514.

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." 295 U. S., at 620 (quoting 15 U. S. C. § 41). In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office." 295 U. S., at 631.

Because the Court limited its holding "to officers of the kind here under consideration," *id.*, at 632, the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." *Id.*, at 628. Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." *Ibid.* It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chan-

cery. *Ibid.* "To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers." *Ibid.* (emphasis added).[2]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Commission was designed to be "non-partisan" and to "act with entire impartiality." *Id.*, at 624; see *id.*, at 619–620. The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." *Id.*, at 624 (internal quotation marks omitted). And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time." *Ibid.*

In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied "[t]he philosophy of *Humphrey's Executor*" to uphold for-cause removal protections for the members of the War Claims Commission—a three-member "adjudicatory body" tasked with resolving claims for compensation arising from World War II. *Wiener* v. *United States*, 357 U. S. 349, 356 (1958).

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[2] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Id.*, at 690, n. 28. See also *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (even though the activities of administrative agencies "take 'legislative' and 'judicial' forms," "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, § 1, cl. 1)).

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power . . . to remove purely executive officers." 295 U. S., at 632. The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration." *Ibid.*

We have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson*.[3] In *Perkins*, we upheld tenure protections for a naval cadet-engineer. 116 U. S., at 485. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. 487 U. S., at 662–663, 696–697. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." 487 U. S., at 691. Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because

[3] Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments). §2, cl. 2. While "[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers," we have in the past examined factors such as the nature, scope, and duration of an officer's duties. *Edmond* v. *United States*, 520 U. S. 651, 661 (1997). More recently, we have focused on whether the officer's work is "directed and supervised" by a principal officer. *Id.*, at 663.

"the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Ibid.*

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH*, 881 F. 3d, at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor*. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. 295 U. S., at 624. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions

to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.[4]

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and

[4] The dissent would have us ignore the reasoning of *Humphrey's Executor* and instead apply the decision only as part of a reimagined *Humphrey's*-through-*Morrison* framework. See *post*, at 278, n. 7, 279–282 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent). But we take the decision on its own terms, not through gloss added by a later Court in dicta. The dissent also criticizes us for suggesting that the 1935 FTC may have had lesser responsibilities than the present FTC. See *post*, at 286–287, n. 10. Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court.

businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U. S., at 483. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

1

"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.*, at 505 (internal quotation marks omitted). An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. *Ibid.* "[T]hese few scattered examples"—four to be exact—shed little light. *NLRB* v. *Noel Canning*, 573 U. S. 513, 538 (2014).

First, the CFPB's defenders point to the Comptroller of the Currency, who enjoyed removal protection for *one year* during the Civil War. That example has rightly been dismissed as an aberration. It was "adopted without discussion" during the heat of the Civil War and abandoned before it could be "tested by executive or judicial inquiry." *Myers*, 272 U. S., at 165. (At the time, the Comptroller may also have been an inferior officer, given that he labored

"under the general direction of the Secretary of the Treasury." Ch. 58, 12 Stat. 665.)[5]

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978.[6] But this first enduring single-leader office, created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. See Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. OLC 120, 122 (1978); Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, pp. 1391–1392 (1991).[7] In any event, the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. See 5 U. S. C. § 1212. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB's defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA's new single-Director structure upon

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[5] The dissent suggests that the Comptroller still enjoyed some degree of insulation after his removal protection was repealed because the President faced a new requirement to "communicate[ ]" his "reasons" for terminating the Comptroller to the Senate. *Post*, at 274 (quoting Act of June 3, 1864, ch. 106, § 1, 13 Stat. 100). But the President could still remove the Comptroller for any reason so long as the President was, in the dissent's phrase, "in a firing mood." *Post*, at 275.

[6] The OSC should not be confused with the independent counsel in *Morrison* or the special counsel recently appointed to investigate allegations related to the 2016 Presidential election. Despite sharing similar titles, those individuals have no relationship to the OSC.

[7] An Act similar to the one vetoed by President Reagan was eventually signed by President George H. W. Bush after extensive negotiations and compromises with Congress. See Public Papers of the Presidents, George H. W. Bush, Vol. I, Apr. 10, 1989, p. 391 (1990).

signing it into law. See Public Papers of the Presidents, William J. Clinton, Vol. II, Aug. 15, 1994, pp. 1471–1472 (1995) (inviting a "corrective amendment" from Congress). In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same financial crisis. See Housing and Economic Recovery Act of 2008, 122 Stat. 2654. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy. Indeed, it was recently held unconstitutional by the Fifth Circuit, sitting en banc. See *Collins* v. *Mnuchin*, 938 F. 3d 553, 587–588 (2019).

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.[8]

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the

[8] The dissent categorizes the CFPB as one of many "financial regulators" that have historically enjoyed some insulation from the President. See *post*, at 271–276. But even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league. It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens. See *supra*, at 206–207. And, of course, it is the only agency of its kind run by a single Director.

Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, 478 U. S., at 730. Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. *Gamble* v. *United States*, 587 U. S. 678, 688 (2019) (internal quotation marks omitted). They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Chadha*, 462 U. S., at 951.

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§2, 3.

The Executive Branch is a stark departure from all this division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70, at 475 (A. Hamilton); see also *id.*, No. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. See *id.*, No. 70, at 475–478. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.*, No. 51, at 350.

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of

property," and "the security of liberty." *Id.*, No. 70, at 471. Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id.*, at 476. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man." *Id.*, at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." *Id.*, at 479. The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Free Enterprise Fund*, 561 U. S., at 496–497 (quoting *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (BREYER, J., concurring in judgment)).

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor

meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See The Federalist No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of Presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, § 7, cl. 2; Art. II, § 3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. See Budget and Accounting Act, 1921, ch. 18, § 201, 42 Stat. 20. Presidents frequently use these budgetary tools "to influence the policies of independent agencies." *PHH*, 881 F. 3d, at 147 (Henderson, J., dissenting) (citing Pasachoff, The President's Budget as a Source of Agency Policy Control, 125 Yale L. J. 2182, 2191, 2203–2204 (2016)). But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499.[9]

3

Amicus raises three principal arguments in the agency's defense. At the outset, *amicus* questions the textual basis

[9] *Amicus* and the dissent try to diminish the CFPB's insulation from Presidential control by observing that the CFPB's final rules can be set aside by a super majority of the Financial Stability and Oversight Council (FSOC). See Brief for Court-Appointed *Amicus Curiae* 40; *post*, at 292, n. 13, 295. But the FSOC's veto power is statutorily reserved for extreme situations, when two-thirds of the Council concludes that a CFPB regulation would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U. S. C. §§ 5513(a), (c)(3). That narrow escape hatch has no impact on the CFPB's enforcement or adjudicatory authority and has never been used in the ten years since the agency's creation. It certainly does not render the CFPB's independent, single-Director structure constitutional.

for the removal power and highlights statements from Madison, Hamilton, and Chief Justice Marshall expressing "heterodox" views on the subject. Brief for Court-Appointed *Amicus Curiae* 4–5, 28–29. But those concerns are misplaced. It is true that "there is no 'removal clause' in the Constitution," *id.*, at 1, but neither is there a "separation of powers clause" or a "federalism clause." These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies. As we have explained many times before, the President's removal power stems from Article II's vesting of the "executive Power" in the President. *Free Enterprise Fund*, 561 U. S., at 483 (quoting Art. II, § 1, cl. 1). As for the opinions of Madison, Hamilton, and Chief Justice Marshall, we have already considered the statements cited by *amicus* and discounted them in light of their context (Madison), the fact they reflect initial impressions later abandoned by the speaker (Hamilton), or their subsequent rejection as ill-considered dicta (Chief Justice Marshall). See *Free Enterprise Fund*, 561 U. S., at 500, n. 6 (Madison); *Myers*, 272 U. S., at 136–139, 142–144 (Hamilton and Chief Justice Marshall).[10]

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[10] The dissent likewise points to Madison's statement in The Federalist No. 39 that the "tenure" of "ministerial offices generally will be a subject of legal regulation." *Post*, at 270 (quoting The Federalist No. 39, p. 253 (J. Cooke ed. 1961)). But whatever Madison may have meant by that statement, he later led the charge in contending, on the floor of the First Congress, that "inasmuch as the power of removal is of an Executive nature . . . it is beyond the reach of the Legislative body." 1 Annals of Cong. 464 (1789); see also *id.*, at 462–464, 495–496. Like the dissent in *Free Enterprise Fund*, the dissent goes on to "attribute[ ] to Madison a belief that . . . the Comptroller[ ] could be made independent of the President. But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of 'years, unless sooner removed by the President'; he would thus be 'dependent upon the President, because he can be removed by him,' and also 'dependent upon the Senate, because they must consent to his [reappointment] for every term of years.' " *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499, 500, n. 6 (2010) (quoting 1

Next, *amicus* offers a grand theory of our removal precedents that, if accepted, could leave room for an agency like the CFPB—and many other innovative intrusions on Article II. According to *amicus*, *Humphrey's Executor* and *Morrison* establish a general rule that Congress may impose "modest" restrictions on the President's removal power, with only two limited exceptions. Brief for Court-Appointed *Amicus Curiae* 33–37. Congress may not reserve a role *for itself* in individual removal decisions (as it attempted to do in *Myers* and *Bowsher*). And it may not eliminate the President's removal power altogether (as it effectively did in *Free Enterprise Fund*). Outside those two situations, *amicus* argues, Congress is generally free to constrain the President's removal power. See also *post*, at 276–282 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent) (expressing similar view).

But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception. While we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority.[11]

Annals of Cong. 612; citation omitted). See *post*, at 270, n. 4. The dissent further notes that, at the time of the founding, some States placed limitations on their Governors' removal power. See *post*, at 267. But the Framers hardly viewed State Governors as a reliable guide in fashioning the Federal Executive. Indeed, they expressly rejected the "executive council" structure favored by most States, fearing that subjecting the President to oversight, as the States had, would "distract and . . . enervate the whole system of administration" and inject it with "habitual feebleness and dilatoriness." The Federalist No. 70, at 473, 476 (A. Hamilton).

[11] Building on *amicus*' proposal, the dissent would endorse whatever "the times demand, so long as the President retains the ability to carry out his constitutional duties." *Post*, at 264. But that amorphous test

Finally, *amicus* contends that if we identify a constitutional problem with the CFPB's structure, we should avoid it by broadly construing the statutory grounds for removing the CFPB Director from office. See Brief for Court-Appointed *Amicus Curiae* 50–53; Tr. of Oral Arg. 57–62. The Dodd-Frank Act provides that the Director may be removed for "inefficiency, neglect of duty, or malfeasance in office." 12 U. S. C. § 5491(c)(3). In *amicus*' view, that language could be interpreted to reserve substantial discretion to the President. Brief for Court-Appointed *Amicus Curiae* 51.

We are not persuaded. For one, *Humphrey's Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy. See 295 U. S., at 619, 625–626. In addition, while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the con-

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provides no real limiting principle. The "clearest" (and only) "example" the dissent can muster for what may be prohibited is a for-cause removal restriction placed on the President's "close military or diplomatic advisers." *Post*, at 276. But that carveout makes no logical or constitutional sense. In the dissent's view, for-cause removal restrictions are permissible because they guarantee the President "meaningful control" over his subordinates. *Post*, at 288 (internal quotation marks and alterations omitted); see also *post*, at 268, 279–280, 285–286, 295. If that is the theory, then what is the harm in giving the President the same "meaningful control" over his close advisers? The dissent claims to see a constitutional distinction between the President's "own constitutional duties in foreign relations and war" and his duty to execute laws passed by Congress. *Post*, at 273. But the same Article that establishes the President's foreign relations and war duties expressly entrusts him to take care that the laws be faithfully executed. And, from the perspective of the governed, it is far from clear that the President's core and traditional powers present greater cause for concern than peripheral and modern ones. If anything, "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, *heightens* the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499 (emphasis added).

stitutional problem, they have not advanced any workable standard derived from the statutory language. *Amicus* suggests that the proper standard might permit removals based on *general* policy disagreements, but not *specific* ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. See Tr. of Oral Arg. 58–60, 76–77. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, *amicus* suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. *Id.*, at 55–56. We decline to embrace such an uncertain and elastic approach to the text.

Amicus and the House also fail to engage with the Dodd-Frank Act as a whole, which makes plain that the CFPB is an "independent bureau." 12 U. S. C. § 5491(a); see also 44 U. S. C. § 3502(5) (listing the CFPB as an "independent regulatory agency"). Neither *amicus* nor the House explains how the CFPB would be "independent" if its head were required to implement the President's policies upon pain of removal. See Black's Law Dictionary 838 (9th ed. 2009) (defining "independent" as "[n]ot subject to the control or influence of another"). The Constitution might of course compel the agency to be dependent on the President notwithstanding Congress's contrary intent, but that result cannot fairly be inferred from the statute Congress enacted.

Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation. Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority.

The dissent, for its part, largely reprises points that the Court has already considered and rejected: It notes the lack of an express removal provision, invokes Congress's general power to create and define executive offices, highlights isolated statements from individual Framers, downplays the decision of 1789, minimizes *Myers*, brainstorms methods of Presidential control short of removal, touts the need for creative congressional responses to technological and economic change, and celebrates a pragmatic, flexible approach to American governance. See *post*, at 261–284, 292–293, 297–298.

If these arguments sound familiar, it's because they are. They were raised by the dissent in *Free Enterprise Fund*. Compare *post*, at 261–284, 292–293, 297–298, with *Free Enterprise Fund*, 561 U. S., at 515–524, 530 (BREYER, J., dissenting). The answers to these repeated concerns (beyond those we have already covered) are the same today as they were ten years ago. Today, as then, Congress's "plenary control over the salary, duties, and even existence of executive offices" makes "Presidential oversight" *more* critical—not less—as the "[o]nly" tool to "counter [Congress's] influence." *Id.*, at 500 (opinion of the Court). Today, as then, the various "bureaucratic minutiae" a President might use to corral agency personnel is no substitute for at will removal. *Ibid.* And today, as always, the urge to meet new technological and societal problems with novel governmental structures must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility. *Id.*, at 499.

As we explained in *Free Enterprise Fund*, "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Ibid.* While "[n]o one doubts Congress's power to create a vast and varied federal bureaucracy," the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only

sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people. *Ibid.*

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President. There is a live controversy between the parties on that question, and resolving it is a necessary step in determining petitioner's entitlement to its requested relief.

As the defendant in this action, petitioner seeks a straightforward remedy. It asks us to deny the Government's petition to enforce the civil investigative demand and dismiss the case. The Government counters that the demand, though initially issued by a Director unconstitutionally insulated from removal, can still be enforced on remand because it has since been ratified by an Acting Director accountable to the President. The parties dispute whether this alleged ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect in the original demand. That debate turns on case-specific factual and legal questions not addressed below and not briefed here. A remand for the lower courts to consider those questions in the first instance is therefore the appropriate course—unless such a remand would be futile.

In petitioner's view, it would be. Before the Court of Appeals, petitioner contended that, regardless of any ratification, the demand is unenforceable because the statutory provision insulating the CFPB Director from removal cannot be severed from the other statutory provisions that define the

CFPB's authority. See Brief for Appellant in No. 17–56324 (CA9), pp. 27–28, 30–32. If petitioner is correct, and the offending removal provision means the entire agency is unconstitutional and powerless to act, then a remand would be pointless. With no agency left with statutory authority to maintain this suit or otherwise enforce the demand, the appropriate disposition would be to reverse with instructions to deny the Government's petition to enforce the agency's demand for documents and dismiss the case, as petitioner requests.

Accordingly, there is a live controversy over the question of severability. And that controversy is essential to our ability to provide petitioner the relief it seeks: If the removal restriction is not severable, then we must grant the relief requested, promptly rejecting the demand outright. If, on the other hand, the removal restriction is severable, we must instead remand for the Government to press its ratification arguments in further proceedings. Unlike the lingering ratification issue, severability presents a pure question of law that has been fully briefed and argued by the parties. We therefore proceed to address it.[12]

It has long been settled that "one section of a statute may be repugnant to the Constitution without rendering the whole act void." *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490 (1900) (quoting *Treasurer of Fayette Cty.* v. *People's & Drovers' Bank*, 47 Ohio St. 503, 523, 25 N. E. 697,

[12] JUSTICE THOMAS believes that any ratification is irrelevant. In his view, even if the issuance of the demand and initiation of this suit have been validly ratified, Director Kraninger's activities in litigating the case—after inheriting it from an Acting Director, but before becoming removable at will herself in light of our decision—present a distinct constitutional injury requiring immediate dismissal. See *post*, at 254–256 (opinion concurring in part and dissenting in part). But whether and when the temporary involvement of an unconstitutionally insulated officer in an otherwise valid prosecution requires dismissal falls outside the questions presented, has not been fully briefed, and is best resolved by the lower courts in the first instance.

702 (1890)). Because a "statute bad in part is not necessarily void in its entirety," "[p]rovisions within the legislative power may stand if separable from the bad." *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924).

"Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund*, 561 U. S., at 508 (internal quotation marks omitted). Even in the absence of a severability clause, the "traditional" rule is that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 685 (1987). When Congress has expressly provided a severability clause, our task is simplified. We will presume "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision . . . unless there is strong evidence that Congress intended otherwise." *Id.*, at 686.

The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal. If the Director were removable at will by the President, the constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities.

In *Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of "functioning independently" and "nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 561 U. S., at 509 (internal quotation marks omitted).

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected." 12 U. S. C. § 5302.

Petitioner urges us to disregard this plain language for three reasons. None is persuasive. First, petitioner dismisses the clause as non-probative "boilerplate" because it applies "to the entire, 848-page Dodd-Frank Act" and "appears almost 600 pages before the removal provision at issue." Brief for Petitioner 45. In petitioner's view, that means we cannot be certain that Congress really meant to apply the clause to each of the Act's provisions. But boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result. That is the case here. The language unmistakably references "*any* provision of this Act." 12 U. S. C. § 5302 (emphasis added). And it appears in a logical and prominent place, immediately following the Act's title and definitions sections, reinforcing the conclusion that it applies to the entirety of the Act. Congress was not required to laboriously insert duplicative severability clauses, provision by provision, to accomplish its stated objective.

Second, petitioner points to an additional severability clause in the Act that applies only to one of the Act's subtitles. See 15 U. S. C. § 8232. In petitioner's view, that clause would be superfluous if Congress meant the general

severability clause to apply across the Act. But "our preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004). In this instance, the redundant language appears to reflect the fact that the subtitle to which it refers originated as a standalone bill that was later incorporated into Dodd-Frank. Compare 15 U. S. C. § 8232 with H. R. 2571, 111th Cong., 1st Sess., § 302 (2009). And petitioner does not offer any construction that would give effect to both provisions, making the redundancy both inescapable and unilluminating. See *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 106 (2011) ("The canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." (internal quotation marks omitted)).

Finally, petitioner argues more broadly that Congress would not have wanted to give the President unbridled control over the CFPB's vast authority. Petitioner highlights the references to the CFPB's independence in the statutory text and legislative history, as well as in Professor Warren's and the Obama administration's original proposals. See Brief for Petitioner 43–44 (collecting examples). And petitioner submits that Congress might not have exempted the CFPB from congressional oversight via the appropriations process if it had known that the CFPB would come under executive control.

These observations certainly confirm that Congress preferred an independent CFPB to a dependent one; but they shed little light on the critical question whether Congress would have preferred a dependent CFPB to *no agency at all*. That is the only question we have the authority to decide, and the answer seems clear. Petitioner assumes that, if we eliminate the CFPB, regulatory and enforcement authority over the statutes it administers would simply revert back to the handful of independent agencies previously responsible for them. See *id.*, at 46. But, as the Solicitor General and House of Representatives explain, that shift

would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena. See Reply Brief for Respondent 21–22; Tr. of Oral Arg. 67–68. One of the agencies whose regulatory authority was transferred to the CFPB no longer exists. See 12 U. S. C. §§ 5412–5413 (Office of Thrift Supervision). The others do not have the staff or appropriations to absorb the CFPB's 1,500-employee, 500-million-dollar operations. And none has the authority to administer the Dodd-Frank Act's new prohibition on unfair and deceptive practices in the consumer-finance sector. Given these consequences, it is far from evident that Congress would have preferred no CFPB to a CFPB led by a Director removable at will by the President.

JUSTICE THOMAS would have us junk our settled severability doctrine and start afresh, even though no party has asked us to do so. See *post*, at 252–253, 258–261 (opinion concurring in part and dissenting in part). Among other things, he objects that it is sheer "speculation" that Congress would prefer that its consumer protection laws be enforced by a Director accountable to the President rather than not at all. *Post*, at 261. We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today. And such an approach by this Court can come as no surprise to Congress, which was on notice of constitutional objections to single-Director agencies by multiple past Presidents from both political parties, *supra*, at 221–222, and enacted Dodd-Frank against the background of our established severability doctrine.

As in every severability case, there may be means of remedying the defect in the CFPB's structure that the Court lacks the authority to provide. Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency. The Court's only instrument, however, is a blunt one. We have "the negative power to

disregard an unconstitutional enactment," *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923); see *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803), but we cannot rewrite Congress's work by creating offices, terms, and the like. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary." *Free Enterprise Fund*, 561 U. S., at 510.

Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.

* * *

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power. The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and dissenting in part.

The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), rather than overruling it. At

the same time, the Court takes an aggressive approach on severability by severing a provision when it is not necessary to do so. I would do the opposite.

Because the Court takes a step in the right direction by limiting *Humphrey's Executor* to "multimember expert agencies that *do not wield substantial executive power*," *ante*, at 218 (emphasis added), I join Parts I, II, and III of its opinion. I respectfully dissent from the Court's severability analysis, however, because I do not believe that we should address severability in this case.

I

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. See *ante*, at 204, 215–219. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent.

A

"The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 67 (2015) (THOMAS, J., concurring in judgment). It sets out three branches and vests a different form of power in each—legislative, executive, and judicial. See Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1.

Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," § 1, cl. 1, and directs that he shall "take Care that the Laws be faithfully executed," § 3. Of course, the President cannot fulfill his role of executing the laws without assistance. See *Myers* v. *United States*, 272 U. S. 52, 117 (1926). He therefore must "select those who [are] to act for him under his direction in the execution of the laws." *Ibid.* While these

officers assist the President in carrying out his constitutionally assigned duties, "[t]he buck stops with the President." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 493 (2010). "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Id.*, at 483. The Framers "insist[ed]" upon "unity in the Federal Executive" to "ensure both vigor and accountability" to the people. *Printz* v. *United States*, 521 U. S. 898, 922 (1997); see also *ante*, at 224.

Despite the defined structural limitations of the Constitution and the clear vesting of executive power in the President, Congress has increasingly shifted executive power to a *de facto* fourth branch of Government—independent agencies. These agencies wield considerable executive power without Presidential oversight. They are led by officers who are insulated from the President by removal restrictions, "reduc[ing] the Chief Magistrate to [the role of] cajoler-in-chief." *Free Enterprise Fund*, 561 U. S., at 502. But "[t]he people do not vote for the Officers of the United States. They instead look to the President to guide the assistants or deputies subject to his superintendence." *Id.*, at 497–498 (alterations, internal quotation marks, and citation omitted). Because independent agencies wield substantial power with no accountability to either the President or the people, they "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.* v. *CFPB*, 881 F. 3d 75, 165 (CADC 2018) (Kavanaugh, J., dissenting).

Unfortunately, this Court "ha[s] not always been vigilant about protecting the structure of our Constitution," at times endorsing a "more pragmatic, flexible approach" to our Government's design. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 115–116 (2015) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate

example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design.

B

1

The lead up to *Humphrey's Executor* begins with this Court's decision in *Myers*, 272 U. S. 52. *Myers* involved a federal statute that prohibited the President from removing certain postmasters except "by and with the advice and consent of the Senate." *Id.*, at 107 (internal quotation marks omitted). The question presented was "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id.*, at 106. In a 70-page opinion by Chief Justice Taft, the Court held that the Constitution did vest such power in the President.

The Court anchored its analysis in evidence from the founding era. It acknowledged that the "subject [of removal] was not discussed in the Constitutional Convention," *id.*, at 109–110, but it reviewed in detail the First Congress' vigorous debate about the removal of executive officers in what is known as the Decision of 1789, *id.*, at 111–135.[1] In the course of analyzing the Decision of 1789, the Court explained that Article II vests "the executive power of the Government . . . in one person"—the President—and that the executive power includes the authority to "select those who [are] to act for him under his direction in the execution of the laws." *Id.*, at 116–117. Reiterating the position of James Madison and other Members of the First Congress, the Court noted that allowing limits on the President's removal author-

[1] For a comprehensive review of the Decision of 1789, see Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006).

ity would grant Congress "the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Id.*, at 131. After "devot[ing] much space to [the] discussion and decision of the question of the Presidential power of removal in the First Congress" as well as its understanding of the executive power, *id.*, at 136, the Court concluded that "the power to remove officers appointed by the President and the Senate vested in the President alone," *id.*, at 114. It repeatedly described this removal power as "unrestricted." *Id.*, at 115, 134, 150, 172, 176.

The Court noted that the First Congress' understanding of the removal question was quickly "accepted as a final decision of the question by all branches of the Government." *Id.*, at 136. The decision was "affirmed by this Court in unmistakable terms." *Id.*, at 148, 152–153 (discussing *Ex parte Hennen*, 13 Pet. 230, 259 (1839); *Parsons* v. *United States*, 167 U. S. 324, 330 (1897)). Presidents had "uniform[ly]" adopted the First Congress' view "whenever an issue ha[d] clearly been raised." *Myers*, 272 U. S., at 169. And "Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-four years." *Id.*, at 145. While disputes with President Andrew Johnson over Reconstruction led Congress to "enact legislation to curtail the then acknowledged powers of the President," *id.*, at 165, the *Myers* Court declined to give these politically charged acts any weight, *id.*, at 175–176.

After exhaustively analyzing the historical evidence, the Court had "no hesitation in holding that [the First Congress'] conclusion [was] correct." *Id.*, at 176. Accordingly, the Court held that "the provision of the law [at issue], by which the unrestricted power of removal of first class postmasters

is denied to the President, [was] in violation of the Constitution, and invalid." *Ibid.*

2

Nine years after *Myers*, the Court decided *Humphrey's Executor*. That case arose from the attempted removal of Commissioner William Humphrey from the Federal Trade Commission (FTC). In 1931, President Herbert Hoover appointed Humphrey to serve a 7-year term as one of the FTC's five Commissioners. By all accounts, Humphrey proved to be a controversial figure. See Crane, Debunking *Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1841 (2015); Winerman, The FTC at Ninety: History Through Headlines, 72 Antitrust L. J. 871, 878–879 (2005); Yoo, Calabresi, & Nee, The Unitary Executive During the Third Half-Century, 1889–1945, 80 Notre Dame L. Rev. 1, 64 (2004). He reportedly "vowed not to approve any Commission action that did not have as its goal to help business help itself," "threaten[ed] criminal prosecution against other commissioners who publicly dissented," and "called his fellow commissioners men drunk with their own greatness" when they voted to initiate an investigation. Crane, *supra*, at 1841 (internal quotation marks omitted).

Less than two years into Humphrey's term, newly inaugurated President Franklin D. Roosevelt wrote Humphrey a letter, asking for his resignation. The President explained that, in his view, "the aims and purposes of the Administration with respect to the work of the Commission [could] be carried out most effectively with personnel of [his] own selection." *Humphrey's Executor*, 295 U. S., at 618 (internal quotation marks omitted). A little over a month after his first letter, President Roosevelt wrote Humphrey again to ask for his resignation. The letter stated: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the [FTC], and, frankly, I think it is best for the people of this country that I should have a full confidence." *Id.*, at

619 (internal quotation marks omitted). Humphrey declined to resign. In October 1933, President Roosevelt informed Humphrey that he was removed from his position. Humphrey did not comply, continuing "to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law." *Ibid.*

Four months later, Humphrey died. The executor of his estate brought suit in the Court of Claims, seeking to recover Humphrey's salary from the date of his removal until the date of his death. The Court of Claims certified two questions to this Court: (1) whether § 1 of the Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717, prohibited the President from removing FTC Commissioners except for "inefficiency, neglect of duty, or malfeasance in office," and (2) if so, whether that restriction was constitutional. 295 U. S., at 619 (internal quotation marks omitted).

The Court answered both of these questions in favor of Humphrey's estate. It first held that the FTC Act "limit[ed] the executive power of removal to the causes enumerated" therein—inefficiency, neglect of duty, or malfeasance in office. *Id.*, at 626. In the Court's view, this construction of the Act was clear from "the face of the statute" and "the character of the commission," *id.*, at 624, which the Court described as a "body of experts" that operates "independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official," *id.*, at 625–626.

Then, notwithstanding the text of Article II of the Constitution and the decision in *Myers*, the Court held that the Act's restriction on the President's authority to remove Commissioners was constitutional. The Court acknowledged that the "recently decided" *Myers* decision had "fully review[ed] the general subject of the power of executive removal" and "examine[d] at length the historical, legislative and judicial data bearing upon the question." *Humphrey's Executor*, 295 U. S., at 626. And it conceded that executive

officers are "subject to the exclusive and illimitable power of removal by the Chief Executive." *Id.*, at 627; see also *id.*, at 631 (recognizing "the President's illimitable power of removal" over executive officers).[2] The Court, however, claimed that "[t]he office of a postmaster is so essentially unlike the office [of an FTC Commissioner] that the decision in the *Myers* case [could not] be accepted as controlling." *Id.*, at 627. In the Court's view, unlike the postmaster in *Myers*, FTC Commissioners did not qualify as "purely executive officers." 295 U. S., at 632.

The Court grounded its analysis in its assertion that the FTC "occupies no place in the executive department and . . . exercises no part of the executive power vested by the Constitution in the President." *Id.*, at 628. Rather, in the Court's view, by "filling in and administering the details embodied by [the FTC Act's] general standard[,] the commission act[ed] in part quasi-legislatively and in part quasi-judicially." *Ibid.* The Court stated that the FTC acted "as a legislative agency" by "making investigations and reports thereon for the information of Congress" and acted "as an agency of the judiciary" when performing its role "as a master in chancery under rules prescribed by the court." *Ibid.* "Such a body," the Court explained, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Ibid.*

After distinguishing "purely executive officers" from officers exercising "quasi-legislative or quasi-judicial powers,"

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[2] The explicit and repeated recognition of the President's "illimitable power" in *Humphrey's Executor* highlights the dissent's error in claiming that *Humphrey's Executor* "abandoned [the] view" set out in *Myers* v. *United States*, 272 U. S. 52 (1926). *Post*, at 277 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent). *Humphrey's Executor* did not abandon *Myers*; it distinguished *Myers* based on the flawed premise that the FTC exercised "quasi-legislative" and "quasi-judicial" power that is not part of "the executive power vested by the Constitution in the President." *Humphrey's Executor*, 295 U. S., at 628; see also *infra*, at 246–248.

ibid., the Court held that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by . . . precluding a removal except for cause, will depend upon the character of the office," *id.*, at 631. "[P]urely executive officers" are subject to the President's "unrestrictable power . . . to remove." *Id.*, at 632. But with regard to "quasi-legislative" and "quasi-judicial" officers, the Court concluded that "no removal [could] be made . . . except for one or more of the causes named." *Ibid.*

3

Humphrey's Executor laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as "quasi-legislative" and "quasi-judicial." Unlike the thorough analysis in *Myers*, the Court's thinly reasoned decision is completely "devoid of textual or historical precedent for the novel principle it set forth." *Morrison* v. *Olson*, 487 U. S. 654, 726 (1988) (Scalia, J., dissenting). The exceptional weakness of the reasoning could be a product of the circumstances under which the case was decided—in the midst of a bitter standoff between the Court and President Roosevelt[3]—or it could be just another example of this Court de-

[3] A number of historical sources indicate that President Roosevelt saw *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), as an attack on his administration. Given the Court's recent decision in *Myers*, the Roosevelt administration was reportedly "stunned" by the Court's decision in *Humphrey's Executor*, and the President was particularly annoyed that the decision "ma[de] it appear that he had been willfully violating the Constitution." See W. Leuchtenburg, The Supreme Court Reborn 78 (1995). Justice Jackson, who was serving in the Roosevelt administration at the time, stated in an interview that "'the decision that made Roosevelt madder at the Court than any other decision was that . . . little case of *Humphrey's Executor* v. *United States*. The President thought they went out of their way to spite him personally.'" E. Gerhart, America's Advocate: Robert H. Jackson 99 (1958) (quoting 1949 interview with Justice Jackson).

parting from the strictures of the Constitution for a "more pragmatic, flexible approach" to our government's design. *Perez*, 575 U. S., at 116 (opinion of THOMAS, J.) (internal quotation marks omitted). But whatever the motivation, *Humphrey's Executor* does not comport with the Constitution.

Humphrey's Executor relies on one key premise: the notion that there is a category of "quasi-legislative" and "quasi-judicial" power that is not exercised by Congress or the Judiciary, but that is also not part of "the executive power vested by the Constitution in the President." *Humphrey's Executor*, *supra*, at 628. Working from that premise, the Court distinguished the "illimitable" power of removal recognized in *Myers*, *Humphrey's Executor*, 295 U. S., at 627–628, and upheld the FTC Act's removal restriction, while simultaneously acknowledging that the Constitution vests the President with the entirety of the executive power, *id.*, at 628.

The problem is that the Court's premise was entirely wrong. The Constitution does not permit the creation of officers exercising "quasi-legislative" and "quasi-judicial powers" in "quasi-legislative" and "quasi-judicial agencies." *Id.*, at 628–629. No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001), and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III, *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. See Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1. Free-floating agencies simply do not comport with this constitutional structure. "[A]gencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution."

FTC v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J., dissenting). But "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *Id.*, at 487–488.

That is exactly what happened in *Humphrey's Executor*. The Court upheld the FTC Act's removal restriction by using the "quasi" label to support its claim that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." *Humphrey's Executor*, *supra*, at 628. But "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, *supra*, at 690, n. 28; see *ante*, at 216, n. 2; see *post*, at 278, n. 7 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

C

Today's decision constitutes the latest in a series of cases that have significantly undermined *Humphrey's Executor*. First, in *Morrison*, the Court repudiated the reasoning of the decision. 487 U. S., at 689. Then, in *Free Enterprise Fund*, we returned to the principles set out in the "landmark case of *Myers*." 561 U. S., at 492. And today, the Court rightfully limits *Humphrey's Executor* to "multimember expert agencies that do not wield substantial executive power." *Ante*, at 218. After these decisions, the foundation for *Humphrey's Executor* is not just shaky. It is nonexistent.

This Court's repudiation of *Humphrey's Executor* began with its decision in *Morrison*. There, the Court upheld a statute insulating an independent counsel from removal by the Attorney General absent a showing of "good cause." *Morrison*, *supra*, at 659–660. In doing so, the Court set aside the reasoning of *Humphrey's Executor*. It recognized that *Humphrey's Executor* "rel[ied] on the terms 'quasi-

legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* . . . from those in *Myers*." 487 U. S., at 689. But it then immediately stated that its "present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Ibid.* The Court also rejected *Humphrey's Executor*'s conclusion that the FTC did not exercise executive power, stating that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive.'" *Morrison*, *supra*, at 690, n. 28. The lone dissenter, Justice Scalia, disagreed with much of the Court's analysis but noted that the Court had rightfully "swept" *Humphrey's Executor* "into the dustbin of repudiated constitutional principles." 487 U. S., at 725. Thus, all Members of the Court who heard *Morrison* rejected the core rationale of *Humphrey's Executor*.

The reasoning of the Court's decision in *Free Enterprise Fund* created further tension (if not outright conflict) with *Humphrey's Executor*. In *Free Enterprise Fund*, the Court concluded that a dual layer of for-cause removal restrictions for members of the Public Company Accounting Oversight Board violated the Constitution. In its analysis, the Court recognized that allowing officers to "execute the laws" beyond the President's control "is contrary to Article II's vesting of the executive power *in the President*." 561 U. S., at 496 (emphasis added). The Court acknowledged that "the executive power include[s] a power to oversee executive officers through removal." *Id.*, at 492. And it explained that, without the power of removal, the President cannot "be held fully accountable" for the exercise of the executive power, "'greatly diminish[ing] the intended and necessary responsibility of the chief magistrate himself.'" *Id.*, at 514 (quoting The Federalist No. 70, p. 478 (J. Cooke ed.

1961) (A. Hamilton)). Accountability, the Court repeatedly emphasized, plays a central role in our constitutional structure. See, *e. g.*, *Free Enterprise Fund*, 561 U. S., at 498 ("[E]xecutive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"); *id.*, at 513 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so"). *Humphrey's Executor* is at odds with every single one of these principles: It ignores Article II's Vesting Clause, sidesteps the President's removal power, and encourages the exercise of executive power by unaccountable officers. The reasoning of the two decisions simply cannot be reconciled.

Finally, today's decision builds upon *Morrison* and *Free Enterprise Fund*, further eroding the foundation of *Humphrey's Executor*. The Court correctly notes that "[t]he entire 'executive Power' belongs to the President alone." *Ante*, at 213. The President therefore must have "power to remove—and thus supervise—those who wield executive power on his behalf." *Ante*, at 204. As a result, the Court concludes that *Humphrey's Executor* must be limited to "multimember expert agencies that *do not wield substantial executive power*." *Ante*, at 218 (emphasis added). And, at the same time, it recognizes (as the Court did in *Morrison*) that "[t]he Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." *Ante*, at 216, n. 2. In other words, *Humphrey's Executor* does not even satisfy its own exception.

In light of these decisions, it is not clear what is left of *Humphrey's Executor*'s rationale.[4] But if any remnant of

[4] The dissent, while vigorously defending the holding of *Humphrey's Executor*, can muster no defense for the reasoning of the decision. The dissent does not defend the notion of "quasi" powers or "quasi" agencies, recognizing that the power exercised by the FTC was executive power. See *post*, at 278, n. 7. And, in 38 pages, it cannot explain how any aspect

that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure.

* * *

Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty. We have a "responsibility to 'examin[e] without fear, and revis[e] without reluctance,' any 'hasty and crude decisions' rather than leaving 'the character of [the] law impaired, and the beauty and harmony of the [American constitutional] system destroyed by the perpetuity of error.'" *Gamble* v. *United States*, 587 U. S. 678, 716 (2019) (THOMAS, J., concurring) (quoting 1 J. Kent, Commentaries on American Law 444 (1826); some alterations in original). We simply cannot compromise when it comes to our Government's structure. Today, the Court does enough to resolve this case, but in the future, we should reconsider *Humphrey's Executor in toto*. And I hope that we will have the will to do so.

II

While I think that the Court correctly resolves the merits of the constitutional question, I do not agree with its decision

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of *Humphrey's Executor* (other than its holding) survived *Morrison* v. *Olson*, 487 U. S. 654 (1988), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). Instead, the dissent simply claims that *Humphrey's Executor* was "extended" and "clarified" in *Morrison*, *post*, at 279, attempting to breathe validity into *Humphrey's Executor* through the Court's *Morrison* decision. But the dissent's reading of *Morrison* as "extend[ing] *Humphrey's* domain" is baffling. *Post*, at 279. *Morrison* expressly repudiated the substantive reasoning of *Humphrey's Executor*. See *supra*, at 248–249.

to sever the removal restriction in 12 U. S. C. § 5491(c)(3). See *ante*, at 232–238 (plurality opinion); *post*, at 296–297. To resolve this case, I would simply deny the Consumer Financial Protection Bureau (CFPB) petition to enforce the civil investigative demand.

A

Article III of the Constitution vests "[t]he judicial Power of the United States" in the "supreme Court" and the lower federal courts established by Congress. § 1. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases" or controversies that are properly before the court. *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 488 (2018) (THOMAS, J., concurring); see also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995) ("'[A] "judicial Power" is one to render dispositive judgments'"); Baude, The Judgment Power, 96 Geo. L. J. 1807, 1815–1816 (2008). "[T]he power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). In the context of a constitutional challenge, "[i]t amounts to little more than the negative power to disregard an unconstitutional enactment." *Ibid.*; see also Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018). Thus, if a party argues that a statute and the Constitution conflict, "then courts must resolve that dispute and . . . follow the higher law of the Constitution." *Murphy*, 584 U. S., at 488 (THOMAS, J., concurring).

Consistent with this understanding, "[e]arly American courts did not have a severability doctrine." *Ibid.* (citing Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 769 (2010)). If a statute was unconstitutional, the court would just decline to enforce the statute in the case before it. 584 U. S., at 488 (THOMAS, J., concurring). That was the end of the matter. "[T]here was no 'next step' in which [a] cour[t]" severed portions of a statute. Walsh, *supra*, at 777.

Our modern severability precedents create tension with this historic practice. Instead of declining to enforce an unconstitutional statute in an individual case, this Court has stated that courts must "seve[r] and excis[e]" portions of a statute to "remedy" the constitutional problem. *United States* v. *Booker*, 543 U. S. 220, 245 (2005); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). The Court's rhetoric when discussing severance implies that a court's decision to sever a provision "formally suspend[s] or erase[s it], when [the provision] actually remains on the books as a law." Mitchell, *supra*, at 1017. The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute. *Murphy*, *supra*, at 489 (THOMAS, J., concurring); Mitchell, *supra*, at 936. And the Court's reference to severability as a "remedy" is inaccurate. Traditional remedies—like injunctions, declarations, or damages—" 'operate with respect to specific parties,' not 'on legal rules in the abstract.' " *Murphy*, *supra*, at 489 (THOMAS, J., concurring) (quoting Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 85 (2014)).

Because the power of judicial review does not allow courts to revise statutes, Mitchell, *supra*, at 983, the Court's severability doctrine must be rooted in statutory interpretation. But, even viewing severability as an interpretive question, I remain skeptical of our doctrine. As I have previously explained, "the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions." *Murphy*, 584 U. S., at 490 (concurring opinion). And the application of the doctrine "does not follow basic principles of statutory interpretation." *Id.*, at 489. Instead of determining the meaning of a statute's text, severability involves "nebulous inquir[ies] into hypothetical congressional intent." *Booker*, *supra*, at 320, n. 7 (THOMAS, J., dissenting in part).

B

Consistent with the traditional understanding of the judicial power, I would deny CFPB's petition to enforce the civil investigative demand that it issued to Seila. See § 5562(e)(1). Seila "challenge[d] the validity of both the civil investigative demand and the ensuing enforcement action." Reply Brief for Petitioner 5. Seila has not countersued or sought affirmative relief preventing the CFPB from acting in the future; it simply asks us to "reverse the court of appeals' judgment." Brief for Petitioner 35. I would do just that. As the Court recognizes, the enforcement of a civil investigative demand by an official with unconstitutional removal protection injures Seila. See *ante*, at 211. Presented with an enforcement request from an unconstitutionally insulated Director, I would simply deny the CFPB's petition for an order of enforcement. This approach would resolve the dispute before us without addressing the issue of severability.

The Court, however, does more. In the plurality's view,[5] because the CFPB raised a ratification argument before the Court of Appeals, we can (and should) reach the question of severability. See *ante*, at 232–233. But as explained more fully below, resolving this question is wholly unnecessary. Regardless of whether the CFPB's ratification theory is valid, the Court of Appeals on remand must reach the same outcome: The CFPB's civil investigative demand cannot be enforced against Seila.

The ratification argument presented by the CFPB is quite simple. Since its creation in 2010, the CFPB has had three Directors—first Director Richard Cordray, then Acting Director Mick Mulvaney, and now Director Kathleen Kraninger. The CFPB's first Director, Director Cordray, issued a civil investigative demand to Seila and initiated the en-

[5] The dissent provides no analysis of severability, simply stating "*if* the agency's removal provision is unconstitutional, it should be severed." *Post*, at 297.

forcement action. The CFPB has conceded that these actions were unconstitutional. But, in the Ninth Circuit, the CFPB argued that the investigative demand was ratified by Acting Director Mulvaney, who it claimed was *not* insulated by the removal provision. Brief for Appellee in No. 17–56324, pp. 13–19. In the CFPB's view, the President could remove Acting Director Mulvaney at will because the "removal provision by its terms applies only to 'the Director,' not to an Acting Director," and the Federal Vacancy Reform Act "does not limit the President's ability to designate a different person as Acting Director." *Id.*, at 14. Based on this ratification theory, the CFPB asked the Ninth Circuit to affirm the District Court's order granting the CFPB's petition to enforce its investigative demand.

The CFPB does not ask this Court to address ratification on the merits, but it does rely on its unresolved ratification theory to assert that the Court should reach severability. In doing so, the CFPB relies on the same theory that it presented to the Ninth Circuit. Thus, the only live ratification claim is the theory that Acting Director Mulvaney ratified the civil investigative demand. See *ante*, at 232–233.[6]

The resolution of the CFPB's Acting-Director ratification theory, however, has no bearing on the outcome of the dispute before us and therefore provides no basis for addressing severability. If the Acting Director did not ratify the investigative demand, then there is obviously no need to address severability. And even if he did, the Court still does not need to address severability because the alleged ratification does not cure the constitutional injury—enforcement of an

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[6] The Court-appointed *amicus* suggests that the CFPB's current Director, Director Kraninger, ratified the enforcement proceeding by maintaining the suit after she stated her belief that the removal provision is unconstitutional. But the CFPB expressly disclaimed the notion that Director Kraninger had the power to ratify the civil investigative demand, stating that she "remains statutorily insulated from removal, regardless whether she believes the law is invalid." Reply Brief for Respondent 7.

investigative demand by an unconstitutionally insulated Director. Seila "challenge[d] the validity of both the civil investigative demand *and the ensuing enforcement action*." Reply Brief for Petitioner 5 (emphasis added). Acting Director Mulvaney may (or may not) have properly ratified the issuance of the investigative demand and the initiation of the enforcement proceedings. But he certainly could not ratify the continuance of the enforcement action by his successor, Director Kraninger. *Id.*, at 7. Thus, even if the CFPB's ratification theory is valid, Seila still has an injury: It has been (and continues to be) subjected to enforcement of an investigative demand by Director Kraninger, who "remains statutorily insulated from removal." Reply Brief for Respondent 7; see also *Free Enterprise Fund*, 561 U. S., at 513; *ante*, at 211–212. Thus, we should decline to enforce the civil investigative demand against Seila. See *supra*, at 252.

Ultimately, I cannot see how the resolution of the severability question affects the dispute before us. And even if severability could affect this case in some hypothetical scenario, I would not reach out to resolve the issue given my growing discomfort with our current severability precedents.

C

Confident that it can address the question of severability, the plurality moves on to conduct its analysis. It starts by pointing to the severability clause in the Dodd-Frank Act. See *ante*, at 235–236. That clause states: "If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." § 5302. The plurality states that "[i]f the Director were removable at will by the President, the constitutional violation would disappear." *Ante*, at 234. Then, relying on language in the severability clause, it con-

cludes that the removal provision, § 5491(c)(3), should be severed.

The plurality suggests that its analysis is a matter of simply enforcing the "plain language" of the severability clause. See *ante*, at 235. But I am not sure it is that simple. For one, the plurality does not actually analyze the statutory language.[7] Second, the analysis the plurality does provide looks nothing like traditional statutory interpretation. Generally, when we interpret a statute, we do not hold that the text sets out a "presum[ption]" that can be rebutted by looking to atextual evidence of legislative intent. *Ante*, at 234. A text-based interpretation does not allow a free-ranging inquiry into what "'Congress, faced with the limitations imposed by the Constitution, would have preferred'" had it known of a constitutional issue. *Ibid.* (quoting *Free Enterprise Fund*, *supra*, at 509). Nor does it consider whether Congress would have wanted to avoid "a major regulatory disruption." *Ante*, at 237. Statutory interpretation focuses on the text.

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[7] The severability clause refers to three alternative scenarios: (1) a "provision of [the] Act . . . is held to be unconstitutional"; (2) "an amendment made by [the] Act . . . is held to be unconstitutional"; and (3) "the application of [a] provision or amendment [of the Act] to any person or circumstance is held to be unconstitutional." 12 U. S. C. § 5302. The plurality assumes, with no analysis, that this case falls in the first scenario, calling for a provision to be severed from the Dodd-Frank Act. See *ante*, at 235. But, as discussed below, there is no single "provision" of the Act that has led to the constitutional injury in this case. See *infra*, at 258. It is the attempted enforcement of a civil investigative demand under § 5562(e)(1) by an unconstitutionally insulated Director that causes the constitutional injury in this case. There is at least a nonfrivolous argument that this case implicates the third scenario contemplated by the severability clause—*i. e.*, "the application of [a] provision" in a certain "circumstance." § 5302. If that were so, the text of the severability clause would not require any "provision" to be severed; the unconstitutional application of § 5562(e)(1) simply would not affect other provisions of the Dodd-Frank Act. Such a reading would be consistent with the traditional limits on the judicial power. See *supra*, at 252–253.

Even treating the question as a matter of pure statutory interpretation and assuming that the plurality points to the correct language, the text of the severability clause cannot, in isolation, justify severance of the removal provision. In some instances, a constitutional injury arises as a result of two or more statutory provisions operating together. See, *e. g.*, *Free Enterprise Fund*, *supra*, at 509 (stating that the convergence of "a number of statutory provisions" produce a constitutional violation); *Booker*, 543 U. S., at 316–317 (opinion of THOMAS, J.) (explaining that "the concerted action of [18 U. S. C.] § 3553(b)(1) *and* the operative Guidelines *and* the relevant Rule of Criminal Procedure resulted in unconstitutional judicial factfinding"); Lea, Situation Severability, 103 Va. L. Rev. 735, 778–780 (2017) (discussing statutory convergences). That is precisely the situation we have in this case. As in *Free Enterprise Fund*, the provision requiring "good-cause removal is only one of [the] statutory provisions that, working together, produce a constitutional violation." 561 U. S., at 509. The constitutional violation results from, at a minimum, the combination of the removal provision, 12 U. S. C. § 5491(c)(3), and the provision allowing the CFPB to seek enforcement of a civil investigative demand, § 5562(e)(1). When confronted with two provisions that operate together to violate the Constitution, the text of the severability clause provides no guidance as to *which* provision should be severed. Thus, we must choose, based on something other than the severability clause, which provision to sever.

Without text to guide us, the severability inquiry moves away from statutory interpretation and falls back on this Court's questionable precedents. See *Murphy*, 584 U. S., at 489–491 (THOMAS, J., concurring). An analysis of the Court's decisions in *Booker* and *Free Enterprise Fund* illustrates the Court's approach to determining which provision to sever when confronting an injury caused by an unconstitutional convergence of multiple statutory provisions.

In *Booker*, a Rule of Criminal Procedure, a subset of provisions in the Sentencing Guidelines, and a statutory provision operated together to require unconstitutional judicial fact-finding. To determine which aspect of the sentencing scheme to sever, the Court sought to divine "what Congress would have intended in light of the Court's constitutional holding." *Booker*, 543 U. S., at 246 (internal quotation marks omitted). The Court "recognize[d] that sometimes severability questions . . . can arise [in the context of] a legislatively unforeseen constitutional problem." *Id.*, at 247. But it nonetheless felt qualified to craft a remedy that would "move sentencing in Congress' preferred direction." *Id.*, at 264. Surprisingly, that "move" did not involve enforcing the constitutional aspects of Congress' sentencing scheme. The Court stated that "we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible." *Id.*, at 248.[8] Despite the fact that there were a plethora of cases in which mandatory Sentencing Guidelines would have posed no constitutional problem, the Court decided to "sever and excise . . . the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range," along with another provision which was not even at issue in the case. *Id.*, at 259. In essence, the Court crafted a new sentencing scheme, transforming the Sentencing Guidelines into an entirely discretionary system based on its estimation that Congress would have wanted that result.

The Court in *Free Enterprise Fund* declined to explicitly engage in *Booker*'s free-wheeling inquiry into Congress' hy-

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[8] This statement in *Booker* is irreconcilable with the plurality's assertion here that "Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect." *Ante*, at 237. Thus, it appears that the plurality either *sub silentio* "junk[s] our settled severability doctrine," *ibid.*, or invokes, without explanation, different assumptions for different cases.

pothetical preferences, but it did not replace that inquiry with a clear standard. In that case, the Court held that a "number of statutory provisions . . . , working together, produce[d] a constitutional violation" similar to the violation at issue here. *Free Enterprise Fund*, 561 U. S., at 509. The Court decided to sever the Board's removal restriction. It explicitly recognized that there were multiple ways to address the constitutional injury, stating that the Court could, for example, "blue-pencil a sufficient number of the Board's responsibilities," or "restrict the Board's enforcement powers." *Ibid.* But it described these alternative options as involving "editorial freedom—far more extensive than [the] holding today—[that] belongs to the Legislature, not the Judiciary." *Id.*, at 510. The Court did not explain, however, why the option that it chose was not also "editorial freedom" that belongs to the Legislature or why the alternatives involved "more extensive" "editorial freedom" than its preferred option. *Ibid.* The most that the Court provided was a suggestion that fewer provisions would have to be severed under its approach. *Id.*, at 509–510.

Today's plurality opinion provides no further guidance. In fact, the plurality does not even recognize that it has made a choice between the provisions that cause the constitutional injury. It merely states that "[i]f the Director were removable at will by the President, the constitutional violation would disappear." *Ante*, at 234. Fair enough. But if the Director lacked executive authority under the statute to seek enforcement of a civil investigative demand, § 5562(e)(1), the constitutional violation in this case would also disappear. The plurality thus *chooses* which of the provisions to sever.

In short, when multiple provisions of law combine to cause a constitutional injury, the Court's current approach allows the Court to decide which provision to sever. The text of a severability clause does not guide that choice. Nor does the practice of early American courts. See *supra*, at 252.

The Court is thus left to choose based on nothing more than speculation as to what the Legislature would have preferred. And the result of its choice can have a dramatic effect on the governing statutory scheme. See *Booker*, *supra*, at 259 (converting the entirety of the Sentencing Guidelines from a mandatory to a discretionary system). This is not a simple matter of following the "plain language" of a statute. *Ante*, at 235. It is incumbent on us to take a close look at our precedents to make sure that we are not exceeding the scope of the judicial power.

* * *

Given my concerns about our modern severability doctrine and the fact that severability makes no difference to the dispute before us, I would resolve this case by simply denying the CFPB's petition to enforce the civil investigative demand.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have sur-

vived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct presidential control. As the years passed, and governance became ever more complicated, Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to "endure for ages to come." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President's control over regulatory agencies, including through his removal power, have never abated.[1] But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

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[1] In the academic literature, compare, *e. g.*, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001) (generally favoring presidential control over agencies), with, *e. g.*, Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 704, 713–715 (2007) (generally favoring administrative independence).

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. *Ante*, at 215. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power[ ] operates." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 523 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to

a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again. Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." *Ante*, at 215, 218. Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. See Schoolhouse Rock! Three Ring Government (Mar. 13, 1979), http://www.youtube.com/watch?v=pKSGyiT-o3o ("Ring one, Executive. Two is Legislative, that's Congress. Ring three, Judiciary"). The Constitution's first three articles, the majority recounts, "split the atom of sovereignty" among Congress, the President, and the courts. *Ante*, at 223 (internal quotation marks omitted). And by that

mechanism, the Framers provided a "simple" fix "to governmental power and its perils." *Ibid.*

There is nothing wrong with that as a beginning (except the adjective "simple"). It is of course true that the Framers lodged three different kinds of power in three different entities. And that they did so for a crucial purpose—because, as James Madison wrote, "there can be no liberty where the legislative and executive powers are united in the same person[ ] or body" or where "the power of judging [is] not separated from the legislative and executive powers." The Federalist No. 47, p. 325 (J. Cooke ed. 1961) (quoting Baron de Montesquieu).

The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete. Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." 1 W. Blackstone, Commentaries on the Laws of England 151 (1765). So as James Madison stated, the creation of distinct branches "did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other." The Federalist No. 47, at 325 (emphasis deleted).[2] To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government "absolutely separate and distinct." *Id.*, at 327. Or as Justice Story reiterated a half-century later: "[W]hen we speak of a separation of the three great departments of government," it is "not meant to affirm, that they must be kept wholly and entirely separate." 2 J. Story, Commentaries

[2] The principle of separation of powers, Madison continued, maintained only that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution[ ] are subverted." The Federalist No. 47, at 325–326.

on the Constitution of the United States § 524, p. 8 (1833). Instead, the branches have—as they must for the whole arrangement to work—"common link[s] of connexion [and] dependence." *Ibid.*

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." § 2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. See *ante*, at 213 ("The entire 'executive Power' belongs to the President alone"). Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." § 8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall . . . establish[ ] by Law" (and of course subject to the Senate's advice and consent). Art. II, § 2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[ ] the office, define[ ] the powers, [and] limit[ ] its duration." 1 Annals of Cong. 582 (1789). The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.[3]

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[3] Article II's Opinions Clause also demonstrates the possibility of limits on the President's control over the Executive Branch. Under that Clause, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the

The majority relies for its contrary vision on Article II's Vesting Clause, see *ante*, at 213–214, 227, but the provision can't carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "extrapolat[ing]" an unrestricted removal power from such "general constitutional language"—which says only that "[t]he executive Power shall be vested in a President"—is "more than the text will bear." *Id.*, at 690, n. 29. Dean John Manning has well explained why, even were it not obvious from the Clause's "open-ended language." Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971 (2011). The Necessary and Proper Clause, he writes, makes it impossible to "establish a constitutional violation simply by showing that Congress has constrained the way '[t]he executive Power' is implemented"; that is exactly what the Clause gives Congress the power to do. *Id.*, at 1967. Only "a *specific* historical understanding" can bar Congress from enacting a given constraint. *Id.*, at 2024. And nothing of that sort broadly prevents Congress from limiting the President's removal power. I'll turn soon to the Decision of 1789 and other evidence of Post-Convention thought. See *infra*, at 269–273. For now, note two points about practice before the Constitution's drafting. First, in that era, Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king. See Birk, Interrogating the Historical Basis for a Unitary Executive, 73 Stan. L. Rev. 175 (2021). Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. See Shane, The Originalist Myth of

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Duties of their respective Offices." §2, cl. 1. For those in the majority's camp, that Clause presents a puzzle: If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads' opinions? The Clause becomes at least redundant—though really, inexplicable—under the majority's idea of executive power.

the Unitary Executive, 19 U. Pa. J. Const. L. 323, 334–344 (2016). Historical understandings thus belie the majority's "general rule."

Nor can the Take Care Clause come to the majority's rescue. That Clause cannot properly serve as a "placeholder for broad judicial judgments" about presidential control. Goldsmith & Manning, The Protean Take Care Clause, 164 U. Pa. L. Rev. 1835, 1867 (2016); but see *ante*, at 213–214, 228–229, n. 11 (using it that way). To begin with, the provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. Art. II, § 3. New scholarship suggests the language came from English and colonial oaths taken by, and placing fiduciary obligations on, all manner and rank of executive officers. See Kent, Leib, & Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2121–2178 (2019). To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. But again, the majority's view of that power ill comports with founding-era practice, in which removal limits were common. See, *e. g.*, Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 385 (1927) (noting that New York's Constitution of 1777 had nearly the same clause, though the State's executive had "very little voice" in removals). And yet more important, the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure " 'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. *Morrison*, 487 U. S., at 692. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Ibid.*

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to

remove subordinate officials at will. The majority professes unconcern. After all, it says, "neither is there a 'separation of powers clause' or a 'federalism clause.'" *Ante*, at 227. But those concepts are carved into the Constitution's text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a "foundational doctrine[ ]," *ibid.*: You won't find it on a civics class syllabus. That's because removal is a *tool*—one means among many, even if sometimes an important one, for a President to control executive officials. See generally *Free Enterprise Fund*, 561 U. S., at 524 (BREYER, J., dissenting). To find that authority hidden in the Constitution as a "general rule" is to discover what is nowhere there.

B

History no better serves the majority's cause. As Madison wrote, "a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate constitutional provisions. Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908); see *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014). The majority lays claim to that kind of record, asserting that its muscular view of "[t]he President's removal power has long been confirmed by history." *Ante*, at 214. But that is not so. The early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority. And when a "settle[ment of] meaning" at last occurred, it was not on the majority's terms. Instead, it supports wide latitude for Congress to create spheres of administrative independence.

1

Begin with evidence from the Constitution's ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed

whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In Federalist No. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. *Id.*, at 515. He thought that scheme would promote "steady administration": "Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained" from substituting "a person more agreeable to him." *Ibid.* By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in Federalist No. 39: "The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions." *Id.*, at 253. Neither view, of course, at all supports the majority's story.[4]

The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers* v. *United States*, 272 U. S. 52 (1926), read that debate as expressing Congress's judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests its own

[4] The majority dismisses Federalist Nos. 77 and 39 as "reflect[ing] initial impressions later abandoned." *Ante*, at 227, and n. 10. But even Hamilton's and Madison's later impressions are less helpful to the majority than it suggests. Assuming Hamilton gave up on the Senate's direct participation in removal (the evidence is sketchy but plausible), there is no evidence to show he accepted the majority's view. And while Madison opposed the first Congress's enactment of removal limits (as the majority highlights), he also maintained that the legislature had constitutional power to protect the Comptroller of the Treasury from at-will firing. See *infra*, at 272–273. In any event, such changing minds and inconstant opinions don't usually prove the existence of constitutional rules.

historical claim on that analysis (though somehow also finding room for its two exceptions). See *ante*, at 214–215. But Taft's historical research has held up even worse than *Myers*' holding (which was mostly reversed, see *infra*, at 277). As Dean Manning has concluded after reviewing decades' worth of scholarship on the issue, "the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading." Manning, 124 Harv. L. Rev., at 1965, n. 135; see *id.*, at 2030–2031.

The best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. *Id.*, at 1965, n. 135; Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1072 (2006). The congressional debates revealed three main positions. See Corwin, 27 Colum. L. Rev., at 361. Some shared Hamilton's Federalist No. 77 view: The Constitution required Senate consent for removal. At the opposite extreme, others claimed that the Constitution gave absolute removal power to the President. And a third faction maintained that the Constitution placed Congress in the driver's seat: The legislature could regulate, if it so chose, the President's authority to remove. In the end, Congress passed a bill saying nothing about removal, leaving the President free to fire the Secretary of Foreign Affairs at will. But the only one of the three views definitively rejected was Hamilton's theory of necessary Senate consent. As even strong proponents of executive power have shown, Congress never "endorse[d] the view that [it] lacked authority to modify" the President's removal authority when it wished to. Prakash, *supra*, at 1073; see Manning, *supra*, at 1965, n. 135, 2030–2031. The summer of 1789 thus ended without resolution of the critical question: Was the removal power "beyond the reach of congressional regulation?" Prakash, *supra*, at 1072.

At the same time, the First Congress gave officials handling financial affairs—as compared to diplomatic and mili-

tary ones—some independence from the President. The title and first section of the statutes creating the Departments of Foreign Affairs and War designated them "executive departments." Act of July 27, 1789, ch. 4, 1 Stat. 28; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49. The law creating the Treasury Department conspicuously avoided doing so. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. That difference in nomenclature signaled others of substance. Congress left the organization of the Departments of Foreign Affairs and War skeletal, enabling the President to decide how he wanted to staff them. See Casper, An Essay in Separation of Powers, 30 Wm. & Mary L. Rev. 211, 239–241 (1989). By contrast, Congress listed each of the offices within the Treasury Department, along with their functions. See *ibid.* Of the three initial Secretaries, only the Treasury's had an obligation to report to Congress when requested. See § 2, 1 Stat. 65–66. And perhaps most notable, Congress soon deemed the Comptroller of the Treasury's settlements of public accounts "final and conclusive." Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441–442. That decision, preventing presidential overrides, marked the Comptroller as exercising independent judgment.[5] True enough, no statute shielded the Comptroller from discharge. But even James Madison, who

[5] As President Jefferson explained: "[W]ith the settlement of the accounts at the Treasury I have no right to interfere in the least," because the Comptroller of the Treasury "is the sole & supreme judge in all claims for money against the US. and would no more receive a direction from me" than would "one of the judges of the supreme court." Letter from T. Jefferson to B. Latrobe (June 2, 1808), in Thomas Jefferson and the National Capital 429, 431 (S. Padover ed. 1946). A couple of decades later, Attorney General William Wirt reached the same conclusion, stating that "the President has no right to interpose in the settling of accounts" because Congress had "separated" the Comptroller from the President's authority. 1 Op. Atty. Gen. 636, 637 (1824); 1 Op. Atty. Gen. 678, 680 (1824). And indeed, Wirt believed that Congress could restrict the President's authority to remove such officials, at least so long as it "express[ed] that intention clearly." 1 Op. Atty. Gen. 212, 213 (1818).

at this point opposed most removal limits, told Congress that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure" of the Secretary or President. 1 Annals of Cong. 612. At the least, as Professor Prakash writes, "Madison maintained that Congress had the [constitutional] authority to modify [the Comptroller's] tenure." Prakash, *supra*, at 1071.

Contrary to the majority's view, then, the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. The latter mainly helped the President carry out his own constitutional duties in foreign relations and war. The former chiefly carried out statutory duties, fulfilling functions Congress had assigned to their offices. In addressing the new Nation's finances, Congress had begun to use its powers under the Necessary and Proper Clause to design effective administrative institutions. And that included taking steps to insulate certain officers from political influence.

2

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. I mention just a few highlights here—times when Congress decided that effective governance depended on shielding technical or expertise-based functions relating to the financial system from political pressure (or the moneyed interests that might lie behind it). Enacted under the Necessary and Proper Clause, those measures—creating some of the Nation's most enduring institutions—themselves helped settle the extent of Congress's

power. "[A] regular course of practice," to use Madison's phrase, has "liquidate[d]" constitutional meaning about the permissibility of independent agencies. See *supra*, at 269.

Take first Congress's decision in 1816 to create the Second Bank of the United States—"the first truly independent agency in the republic's history." Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 30 (1994). Of the twenty-five directors who led the Bank, the President could appoint and remove only five. See Act of Apr. 10, 1816, §8, 3 Stat. 269. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank's independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President's dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate's consent—a version of the old Hamiltonian idea, though this time required not by the Constitution itself but by Congress. See Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." Act of June 3, 1864, §1, 13 Stat. 100. The majority dismisses the original

version of the statute as an "aberration." *Ante,* at 220. But in the wake of the independence given first to the Comptroller of the Treasury and then to the national Bank, it's hard to conceive of this newest Comptroller position as so great a departure. And even the second iteration of the statute preserved a constraint on the removal power, requiring a President in a firing mood to explain himself to Congress—a demand likely to make him sleep on the subject. In both versions of the law, Congress responded to new financial challenges with new regulatory institutions, alert to the perils in this area of political interference.[6]

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. Act of Feb. 4, 1887, §11, 24 Stat. 383. More—many more—for-

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[6] The Comptroller legislation of the Civil War provided a key precedent for what *does* appear a historical "aberration"—the Tenure of Office Act of 1867. See ch. 154, 14 Stat. 430. Anxious to prevent President Andrew Johnson from interfering with reconstruction policies—including through his command of the military—Congress barred presidential removal of any Senate-confirmed officials without the Senate's consent. The law thus severed the President's removal authority over even officials like the Secretaries of War and State. The statute became the basis for the Nation's first presidential impeachment, but was repealed in 1887. See Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. In one sense, the two-decade-long existence of the Tenure of Office Act reveals the 19th-century political system's comfort with expansive restrictions on presidential removal. But the ultimate repudiation of the law, and the broad historical consensus that it went too far, just as strongly shows the limits that system later accepted on legislative power—that Congress may not impose removal restrictions preventing the President from carrying out his own constitutionally assigned functions in areas like war or foreign affairs. See *Morrison* v. *Olson*, 487 U. S. 654, 689–691 (1988) (recognizing that limit as the constitutional standard).

cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. See Act of Dec. 23, 1913, ch. 6, 38 Stat. 251. The next year, Congress provided similar protection to the FTC in the interest of ensuring "a continuous policy" "free from the effect" of "changing [White House] incumbency." 51 Cong. Rec. 10376 (1914). The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U. S. markets." Gadinis, From Independence to Politics in Financial Regulation, 101 Cal. L. Rev. 327, 331 (2013). By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. See *Free Enterprise Fund*, 561 U. S., at 541 (BREYER, J., dissenting). So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

C

What is more, the Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the President's performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President's power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the

majority announces today: that the President has an "unrestricted removal power" subject to two bounded exceptions. *Ante*, at 204.

The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision. *Myers*, the majority tells us, found an unrestrained removal power "essential to the [President's] execution of the laws." *Ante*, at 214 (quoting *Myers*, 272 U. S., at 117). What the majority does not say is that within a decade the Court abandoned that view (much as later scholars rejected Taft's one-sided history, see *supra*, at 270–271). In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), the Court unceremoniously—and unanimously—confined *Myers* to its facts. "[T]he narrow point actually decided" there, *Humphrey's* stated, was that the President could "remove a postmaster of the first class, without the advice and consent of the Senate." 295 U. S., at 626. Nothing else in Chief Justice Taft's prolix opinion "c[a]me within the rule of *stare decisis*." *Ibid.* (Indeed, the Court went on, everything in *Myers* "out of harmony" with *Humphrey's* was expressly "disapproved." 295 U. S., at 626.) Half a century later, the Court was more generous. Two decisions read *Myers* as standing for the principle that Congress's own "participation in the removal of executive officers is unconstitutional." *Bowsher* v. *Synar*, 478 U. S. 714, 725 (1986); see *Morrison*, 487 U. S., at 686 ("As we observed in *Bowsher*, the essence" of "*Myers* was the judgment that the Constitution prevents Congress from draw[ing] to itself" the power to remove (internal quotation marks omitted)). *Bowsher* made clear that *Myers* had nothing to say about Congress's power to enact a provision merely "limit[ing] the President's powers of removal" through a for-cause provision. 478 U. S., at 724. That issue, the Court stated, was "not presented" in "the *Myers* case." *Ibid.* Instead, the relevant cite was *Humphrey's*.

And *Humphrey's* found constitutional a statute identical to the one here, providing that the President could remove FTC Commissioners for "inefficiency, neglect of duty, or mal-

feasance in office." 295 U. S., at 619. The *Humphrey's* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. See *id.*, at 628, 631; *ante,* at 215–216. (By contrast, nothing in the decision turned—as the majority suggests, see *ibid.*—on any of the agency's organizational features. See *infra*, at 290.) According to *Humphrey's*, the Commissioners' primary work was to "carry into effect legislative policies"—"filling in and administering the details embodied by [a statute's] general standard." 295 U. S., at 627–628. In addition, the Court noted, the Commissioners recommended dispositions in court cases, much as a special master does. Given those "quasi-legislative" and "quasi-judicial"—as opposed to "purely executive"—functions, Congress could limit the President's removal authority. *Id.*, at 628.[7] Or said another way, Congress could give the FTC some "independen[ce from] executive control." *Id.*, at 629.

About two decades later, an again-unanimous Court in *Wiener* v. *United States*, 357 U. S. 349 (1958), reaffirmed *Humphrey's*. The question in *Wiener* was whether the President could dismiss without cause members of the War Claims Commission, an entity charged with compensating injuries arising from World War II. Disdaining *Myers* and relying on *Humphrey's*, the Court said he could not. The Court described as "short-lived" *Myers*' view that the President had "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge

[7] The majority is quite right that today we view *all* the activities of administrative agencies as exercises of "the 'executive Power.'" *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (quoting Art. II, § 1, cl. 1); see *ante,* at 216, n. 2. But we well understand, just as the *Humphrey's* Court did, that those activities may "take 'legislative' and 'judicial' forms." *Arlington*, 569 U. S., at 305, n. 4. The classic examples are agency rulemakings and adjudications, endemic in agencies like the FTC and CFPB. In any event, the Court would soon make clear that Congress can also constrain the President's removal authority over officials performing even the most "executive" of functions. See *infra*, at 279–280.

of their duties." 357 U. S., at 352.[8] Here, the Commissioners were not close agents of the President, who needed to be responsive to his preferences. Rather, they exercised adjudicatory responsibilities over legal claims. Congress, the Court found, had wanted the Commissioners to do so "free from [political] control or coercive influence." *Id.*, at 355 (quoting *Humphrey's*, 295 U. S., at 629). And that choice, as *Humphrey's* had held, was within Congress's power. The Constitution enabled Congress to take down "the Damocles' sword of removal" hanging over the Commissioners' heads. 357 U. S., at 356.

Another three decades on, *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues. The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in *Humphrey's* and *Wiener*. But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." 487 U. S., at 691. Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. Even though the counsel's functions were "purely exec-

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[8] Expressing veiled contempt as only he could, Justice Frankfurter wrote for the Court that Chief Justice Taft's opinion had "laboriously traversed" American history and that it had failed to "restrict itself to the immediate issue before it." 357 U. S., at 351. No wonder *Humphrey's* had "narrowly confined the scope of the *Myers* decision." 357 U. S., at 352. Justice Frankfurter implied that the "Chief Justice who himself had been President" was lucky his handiwork had not been altogether reversed. *Id.*, at 351.

utive," the President's "need to control the exercise of [her] discretion" was not "so central to the functioning of the Executive Branch as to require" unrestricted removal authority. *Id.*, at 690–691. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. *Id.*, at 692. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws." *Ibid.*; see *supra*, at 268.[9]

The majority's description of *Morrison*, see *ante*, at 217–218, is not true to the decision. (Mostly, it seems, the majority just wishes the case would go away. See *ante*, at 219, n. 4.) First, *Morrison* is no "exception" to a broader rule from *Myers*. *Morrison* echoed all of *Humphrey's* criticism of the by-then infamous *Myers* "dicta." 487 U. S., at 687. It again rejected the notion of an "all-inclusive" removal power. *Ibid.* It yet further confined *Myers*' reach, making clear that Congress could restrict the President's removal

[9] Pretending this analysis is mine rather than *Morrison*'s, the majority registers its disagreement. See *ante*, at 228–229, n. 11. In its view, a test asking whether a for-cause provision impedes the President's ability to carry out his constitutional functions has "no real limiting principle." *Ibid.* If the provision leaves the President with constitutionally sufficient control over some subordinates (like the independent counsel), the majority asks, why not over even his close military or diplomatic advisers? See *ibid.* But the Constitution itself supplies the answer. If the only presidential duty at issue is the one to ensure faithful execution of the laws, a for-cause provision does not stand in the way: As *Morrison* recognized, it preserves authority in the President to ensure (just as the Take Care Clause requires) that an official is abiding by law. See 487 U. S., at 692. But now suppose an additional constitutional duty is implicated—relating, say, to the conduct of foreign affairs or war. To carry out those duties, the President needs advisers who will (beyond complying with law) help him devise and implement policy. And that means he needs the capacity to fire such advisers for disagreeing with his policy calls.

of officials carrying out even the most traditional executive functions. And the decision, with care, set out the governing rule—again, that removal restrictions are permissible so long as they do not impede the President's performance of his own constitutionally assigned duties. Second, as all that suggests, *Morrison* is not limited to inferior officers. In the eight pages addressing the removal issue, the Court constantly spoke of "officers" and "officials" in general. 487 U. S., at 685–693. By contrast, the Court there used the word "inferior" in just one sentence (which of course the majority quotes), when applying its general standard to the case's facts. *Id.*, at 691. Indeed, Justice Scalia's dissent emphasized that the counsel's inferior-office status played no role in the Court's decision. See *id.*, at 724 ("The Court could have resolved the removal power issue in this case by simply relying" on that status, but did not). As Justice Scalia noted, the Court in *United States* v. *Perkins*, 116 U. S. 483, 484–485 (1886), had a century earlier allowed Congress to restrict the President's removal power over inferior officers. See *Morrison*, 487 U. S., at 723–724. Were that *Morrison*'s basis, a simple citation would have sufficed.

Even *Free Enterprise Fund*, in which the Court recently held a removal provision invalid, operated within the framework of this precedent—and in so doing, left in place a removal provision just like the one here. In that case, the Court considered a "highly unusual" scheme of double for-cause protection. 561 U. S., at 505. Members of an accounting board were protected from removal by SEC Commissioners, who in turn were protected from removal by the President. The Court found that the two-layer structure deprived the President of "adequate control" over the Board members. *Id.*, at 508. The scheme "impaired" the President's "ability to execute the laws," the Court explained, because neither he nor any fully dependent agent could decide "whether[ ] good cause exists" for a discharge. *Id.*, at 495–496. That holding cast no doubt on ordinary for-cause pro-

tections, of the kind in the Court's prior cases (and here as well). Quite the opposite. The Court observed that it did not "take issue with for-cause limitations in general"—which *do* enable the President to determine whether good cause for discharge exists (because, say, an official has violated the law). *Id.*, at 501. And the Court's solution to the constitutional problem it saw was merely to strike one level of insulation, making the Board removable by the SEC at will. That remedy left the SEC's own for-cause protection in place. The President could thus remove Commissioners for malfeasance or neglect, but not for policy disagreements. See *ante*, at 229–230.

So caselaw joins text and history in establishing the general permissibility of for-cause provisions giving some independence to agencies. Contrary to the majority's view, those laws do not represent a suspicious departure from illimitable presidential control over administration. For almost a century, this Court has made clear that Congress has broad discretion to enact for-cause protections in pursuit of good governance.

D

The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. See, well, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001). At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It pro-

motes continuity, and prevents short-term electoral interests from distorting policy. (Consider, for example, how the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.) Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. No mathematical formula governs institutional design; tradeoffs are endemic to the enterprise. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way. Rather than impose rigid rules like the majority's, they should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.

Judicial intrusion into this field usually reveals only how little courts know about governance. Even everything I just said is an over-simplification. It suggests that agencies can easily be arranged on a spectrum, from the most to the least presidentially controlled. But that is not so. A given agency's independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President. In that light, even the judicial opinions' perennial focus on removal standards is a bit of a puzzle. Removal is only the most obvious, not necessarily the most potent, means of control. See generally *Free Enterprise Fund*, 561 U. S., at 524 (BREYER, J., dissenting). That is because informal restraints can prevent Presidents from firing at-will officers—and because other devices can keep officers with for-cause protection under control. Of course no court, as *Free Enterprise Fund* noted, can accurately assess the "bureau-

cratic minutiae" affecting a President's influence over an agency. *Id.*, at 500 (majority opinion); *ante*, at 30 (reprising the point). But that is yet more reason for courts to defer to the branches charged with fashioning administrative structures, and to hesitate before ruling out agency design specs like for-cause removal standards.

Our Constitution, as shown earlier, entrusts such decisions to more accountable and knowledgeable actors. See *supra*, at 264–269. The document—with great good sense—sets out almost no rules about the administrative sphere. As Chief Justice Marshall wrote when he upheld the first independent financial agency: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument." *McCulloch*, 4 Wheat., at 415. That would have been, he continued, "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* And if the Constitution, for those reasons, does not lay out immutable rules, then neither should judges. This Court has usually respected that injunction. It has declined to second-guess the work of the political branches in creating independent agencies like the CFPB. In reversing course today—in spurning a "pragmatic, flexible approach to American governance" in favor of a dogmatic, inflexible one, *ante*, at 231—the majority makes a serious error.

II

As the majority explains, the CFPB emerged out of disaster. The collapse of the subprime mortgage market "precipitat[ed] a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." *Ante*, at 205. In that moment of economic ruin, the President proposed and Congress enacted legislation to address the causes of the collapse and prevent a recurrence. An important part of that statute created an agency to protect consumers from

exploitative financial practices. The agency would take over enforcement of almost 20 existing federal laws. See 12 U. S. C. § 5581. And it would administer a new prohibition on "unfair, deceptive, or abusive act[s] or practice[s]" in the consumer-finance sector. § 5536(a)(1)(B).

No one had a doubt that the new agency should be independent. As explained already, Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC. See *supra*, at 271–276. And agencies of that kind had administered most of the legislation whose enforcement the new statute transferred to the CFPB. The law thus included an ordinary for-cause provision—once again, that the President could fire the CFPB's Director only for "inefficiency, neglect of duty, or malfeasance in office." § 5491(c)(3). That standard would allow the President to discharge the Director for a failure to "faithfully execute[ ]" the law, as well as for basic incompetence. U. S. Const., Art. II, § 3; see *supra*, at 268, 280. But it would not permit removal for policy differences.

The question here, which by now you're well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.

A

Applying our longstanding precedent, the answer is clear: It does not. This Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. See *ante*, at 204, 215–218. The for-cause protections for the heads of those agencies, the Court has found, do not impede the President's ability to perform his own constitutional duties, and so do not breach the separation of powers. See *supra*, at 277–282. There is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies. And all of their heads receive the same kind of removal protection. No less than

those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress's power under the Necessary and Proper Clause to structure administration.

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. See *ante*, at 203; 12 U. S. C. §§ 5512, 5562–5565. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. See 15 U. S. C. §§ 45, 53, 57a, 57b–3, 78u, 78v, 78w. Just for a comparison, the CFPB now has 19 enforcement actions pending, while the SEC brought 862 such actions last year alone. See Brief for Petitioner 7; SEC, Div. of Enforcement 2019 Ann. Rep. 14. And although the majority bemoans that the CFPB can "bring the coercive power of the state to bear on millions of private citizens," *ante*, at 219–220, that scary-sounding description applies to most independent agencies. Forget that the more relevant factoid for those many citizens might be that the CFPB has recovered over $11 billion for banking consumers. See *ante*, at 206. The key point here is that the CFPB got the mass of its regulatory authority from other independent agencies that had brought the same "coercive power to bear." See 12 U. S. C. § 5581 (transferring power from, among others, the Federal Reserve, FTC, and FDIC). Congress, to be sure, gave the CFPB new authority over "unfair, deceptive, or abusive act[s] or practice[s]" in transactions involving a "consumer financial product or service." §§ 5517(a)(1), 5536(a)(1). But again, the FTC has power to go after "unfair or deceptive acts or practices in or affecting commerce"—a portfolio spanning a far wider swath of the economy. 15 U. S. C. § 45(a)(1).[10] And if influence on economic life is the

[10] The majority suggests that the FTC was a different animal when this Court upheld its independent status in *Humphrey's*. See *ante*, at 218. But then, as now, the FTC's organic statute broadly "empowered and di-

measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. See *supra*, at 277. The statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. See *supra*, at 281–282. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." See 12 U. S. C. § 5491(c)(3); 15 U. S. C. § 41; *supra*, at 277–278. A removal provision of that kind applied to a financial agency head, this Court has held, does not "unduly trammel[ ] on executive authority," even though it prevents the President from dismissing the official for a discretionary policy judgment. *Morrison*, 487 U. S., at 691. Once again: The removal power has not been "completely stripped from

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rected" the agency "to prevent persons" or businesses "from using unfair methods of competition in commerce." Act of Sept. 26, 1914, § 5, 38 Stat. 719. To fulfill that mandate, the agency could and did run investigations, bring administrative charges, and conduct adjudications. See *ibid.*; § 6(a), *id.*, at 721; FTC Ann. Rep. (1935) (describing the FTC's extensive enforcement activities in the year before *Humphrey's*). And if any person refused to comply with an order, the agency could seek its enforcement in federal court under a highly deferential standard. See § 5, 38 Stat. 720; *FTC* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927). Still more, the FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications until the 1960s. See § 6(g), 38 Stat. 722; *National Petroleum Refiners Assn.* v. *FTC*, 482 F. 2d 672, 686 (CADC 1973). (The majority's reply that a court including Charles Evans Hughes, Louis Brandeis, Benjamin Cardozo, and Harlan Stone somehow misunderstood these powers, see *ante*, at 219, n. 4, lacks all plausibility.) And in any case, the relevant point of comparison is the present-day FTC, which remains independent even if it now has some expanded powers—and which remains constitutional under not only *Humphrey's* but also *Morrison*. See *supra*, at 277–280.

the President," providing him with no means to "ensure the 'faithful execution' of the laws." *Id.*, at 692; see *supra*, at 280. Rather, this Court has explained, the for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. 487 U. S., at 692; see *supra*, at 280. In other words—and contra today's majority—the President's removal power, though not absolute, gives him the "meaningful[ ] control[ ]" of the Director that the Constitution requires. *Ante*, at 224–225.

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B

The majority focuses on one (it says sufficient) reason: The CFPB Director is singular, not plural. "Instead of placing the agency under the leadership of a board with multiple members," the majority protests, "Congress provided that the CFPB would be led by a single Director." *Ante*, at 203.[11]

[11] The majority briefly mentions, but understandably does not rely on, two other features of Congress's scheme. First, the majority notes that the CFPB receives its funding outside the normal appropriations process. See *ante*, at 226. But so too do other financial regulators, including the Federal Reserve Board and the FDIC. See 12 U. S. C. §§ 243, 1815(d), 1820(e). And budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's. (Because that is so, it actually works to the President's advantage.) Second, the majority complains that the Director's five-year term may prevent a President from "shap[ing the agency's] leadership" through appointments. *Ante*, at 225. But again that is true, to one degree or another, of quite a few longstanding independent agencies, including the Federal Reserve, the FTC, the Merit Systems Protection Board, and the Postal Service Board of Governors. See, *e. g.*, §§ 241, 242; 15 U. S. C. § 41; 5 U. S. C. §§ 1201, 1202; 39 U. S. C. § 202. (If you think the last is unimportant, just ask the current President whether he agrees.)

And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." *Ante*, at 204, 220. Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control." *Ante*, at 204, 224.

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, as I'm afraid you've heard before, the majority's "exceptions" (like its general rule) are made up. See *supra*, at 276–282. To begin with, our precedents reject the very idea of such exceptions. "The analysis contained in our removal cases," *Morrison* stated, shuns any attempt "to define rigid categories" of officials who may (or may not) have job protection. 487 U. S., at 689. Still more, the contours of the majority's exceptions don't connect to our decisions' reasoning. The analysis in *Morrison*, as I've shown, extended far beyond inferior officers. See *supra*, at 281. And of course that analysis had to apply to *individual* officers: The independent counsel was very much a person, not a committee. So the idea that *Morrison* is in a separate box from this case doesn't hold up.[12] Similarly, *Humphrey's* and later prece-

[12] The majority, seeking some other way to distinguish *Morrison*, asserts that the independent counsel's "duties" were more "limited" than the CFPB Director's. *Ante*, at 218–219. That's true in a sense: All (all?) the special counsel had to do was decide whether the President and his top advisers had broken the law. But I doubt (and I suspect Presidents would too) whether the need to control those duties was any less "central to the

dents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," *ante*, at 204, it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing. I've already explained why the earliest of those agencies—the Civil-War-era Comptroller—is not the blip the majority describes. See *supra*, at 274–275. The office is one in a long line, starting with the founding-era Comptroller of the Treasury (also one person), of financial regulators designed to do their jobs with some independence. As for the other three, the majority objects: too powerless and too contested. See *ante*, at 220–222. I think not. On power, the SSA runs the Nation's largest government program—among other things, deciding all claims brought by its 64 million beneficiaries; the FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely; and the OSC prosecutes misconduct in the two-million-person federal workforce. All different from the CFPB, no doubt; but the majority can't think those matters beneath a President's notice. (Consider: Would the President lose more votes from a malfunctioning SSA or CFPB?) And controversial? Well,

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functioning of the Executive Branch" than the need to control the CFPB's. *Morrison*, 487 U. S., at 691–692. And in any event, as I've shown, *Morrison* did much more than approve a specific removal provision; it created a standard to govern all removal cases that is at complete odds with the majority's reasoning. See *supra*, at 279–281.

yes, they are. Almost *all* independent agencies are controversial, no matter how many directors they have. Or at least controversial among Presidents and their lawyers. That's because whatever might be said in their favor, those agencies divest the President of some removal power. If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn't pass muster. Maybe that's what the majority really wants (I wouldn't know)—but it can't pretend the disputes surrounding these agencies had anything to do with whether their heads are singular or plural.

Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. See *Mistretta* v. *United States*, 488 U. S. 361, 385 (1989) ("[M]ere anomaly or innovation" does not violate the separation of powers). Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. See *supra*, at 266. The Framers understood that new times would often require new measures, and exigencies often demand innovation. See *McCulloch*, 4 Wheat., at 415; *supra*, at 284. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change. See *supra*, at 269–276. Indeed, each of the agencies the majority says now fits within its "exceptions" was once new; there is, as the saying goes, "a first time for everything." *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 549 (2012). So even if the CFPB differs from its forebears in having a single director, that departure is not itself "telling" of a "constitutional problem." *Ante*, at 220. In deciding what *this* moment demanded, Congress had no obligation to make a carbon copy of a design from a bygone era.

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. The purported constitu-

tional problem here is that an official has "slip[ped] from the Executive's control" and "supervision"—that he has become unaccountable to the President. *Ante*, at 225, 226 (internal quotation marks omitted). So to make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e. g.*, centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more. See *Free Enterprise Fund*, 561 U. S., at 524 (BREYER, J., dissenting); *supra*, at 283–284.[13] The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational

[13] To use one important example, Congress provided for executive oversight of all the CFPB's rulemaking. The Financial Stability Oversight Council can veto by a two-thirds vote any CFPB regulation it deems a threat to the "safety and soundness" of the financial system. 12 U. S. C. § 5513(a). The FSOC is chaired by the Treasury Secretary, and most of its members are under the direct supervision of the President. See § 5321. So the majority is wrong in saying that the CFPB's Director can "*unilaterally*" issue final regulations. *Ante*, at 225 (emphasis in original). Indeed, the President has more control over rulemaking at the CFPB than at any similar independent agency. And the majority is similarly wrong to think that because the FSOC has not yet issued a formal veto, its review authority makes no practical difference. See *ante*, at 226, n. 9. Regulatory review, whether by the Office of Management and Budget or the FSOC, usually relies more on the threat of vetoes than on their execution. OMB casts a long shadow over rulemaking in the Executive Branch, but rarely uses its veto pen. See Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838, 1846–1847, n. 37 (2013).

features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. Or to make the point more concrete, a multimember commission may be harder to control than an individual director for a host of reasons unrelated to its plural character. That may be so when the two are subject to the same removal standard, or even when the individual director has greater formal job protection. Indeed, the very category of multimember commissions breaks apart under inspection, spoiling the majority's essential dichotomy. See generally Brief for Rachel E. Barkow et al. as *Amici Curiae*. Some of those commissions have chairs appointed by the President; others do not. Some of those chairs are quite powerful; others are not. Partisan-balance requirements, term length, voting rules, and more—all vary widely, in ways that make a significant difference to the ease of presidential control. Why, then, would anyone distinguish along a simple commission/single-director axis when deciding whether the Constitution requires at-will removal?

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. Holding everything else equal, those are the agencies more likely to "slip from the Executive's control." *Ante*, at 226. Just consider your everyday experience: It's easier to get one person to do what you want than a gaggle. So too, you know exactly whom to blame when an individual—but not when a group—does a job badly. The same is true in bureaucracies. A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is *why* Congress so often resorts to hydra-headed agencies. "[M]ultiple membership," an influential Senate Report concluded, is "a buffer against Presidential control" (especially when combined, as it often is, with partisan-balance requirements). Senate

Committee on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 95–91, vol. 5, p. 75 (1977). So, for example, Congress constructed the Federal Reserve as it did because it is "easier to protect a board from political control than to protect a single appointed official." R. Cushman, The Independent Regulatory Commissions 153 (1941).[14] It is hard to know why Congress did not take the same tack when creating the CFPB. But its choice brought the agency only closer to the President—more exposed to his view, more subject to his sway. In short, the majority gets the matter backward: Where presidential control is the object, better to have one than many.

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? See *ante*, at 222–225. The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade." *Ante*, at 225 (emphasis in original). So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constrain-

[14] I could go on. A recent study prepared for the Administrative Conference of the United States noted that "[g]overnance by multiple members limits the President's influence." J. Selin & D. Lewis, Sourcebook of United States Executive Agencies 89 (2d ed. 2018). And the General Accounting Office has recognized that the desire for "greater independence" is what "most likely explains why the Congress in the past has opted to head independent regulatory bodies with multimember commissions rather than single administrators." Hearing before the Senate Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 135 (1987) (Statement of F. Frazier).

ing Congress's ability to legislate under the Necessary and Proper Clause. *Morrison*, 487 U. S., at 690, n. 29; see *supra*, at 267. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i. e.*, between a multi-headed and single-headed agency. That is, to adapt a phrase (or two) from our precedent, "more than" the emanations of "the text will bear." *Morrison*, 487 U. S., at 690, n. 29. By using abstract separation-of-powers arguments for such purposes, the Court "appropriate[s]" the "power delegated to Congress by the Necessary and Proper Clause" to compose the government. Manning, Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 78 (2014). In deciding for itself what is "proper," the Court goes beyond its own proper bounds.

And in doing so, the majority again reveals its lack of interest in how agencies work. First, the premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control, see *ante*, at 224–225—is wrong. As this Court has seen in the past, independent agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves "ample" control over agency heads in the hands of the President. *Morrison*, 487 U. S., at 692; see *supra*, at 279–280. He can discharge them for failing to perform their duties competently or in accordance with law, and so ensure that the laws are "faithfully executed." U. S. Const., Art. II, § 3; see *supra*, at 268, 280. And he can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls. See *supra*, at 292, and n. 13. Second, the majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if

it had more than one Director (even supposing that were a suitable issue for a court to address). *Ante*, at 222–225. Maybe the CFPB would be. Or maybe not. Although a multimember format tends to frustrate the President's control over an agency, see *supra*, at 293–294, it may not lessen the agency's own ability to act with decision and dispatch. (Consider, for a recent example, the Federal Reserve Board.) That effect presumably would depend on the agency's internal organization, voting rules, and similar matters. At the least: If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.

III

Recall again how this dispute got started. In the midst of the Great Recession, Congress and the President came together to create an agency with an important mission. It would protect consumers from the reckless financial practices that had caused the then-ongoing economic collapse. Not only Congress but also the President thought that the new agency, to fulfill its mandate, needed a measure of independence. So the two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day's work. Relying on their experience and knowledge of administration, they had built an agency in the way best suited to carry out its functions. They had protected the public from financial chicanery and crisis. They had governed.

And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process. The outcome today will not shut down the CFPB: A different majority of this Court, including all those who join

this opinion, believes that *if* the agency's removal provision is unconstitutional, it should be severed. But the majority on constitutionality jettisons a measure Congress and the President viewed as integral to the way the agency should operate. The majority does so even though the Constitution grants to Congress, acting with the President's approval, the authority to create and shape administrative bodies. And even though those branches, as compared to courts, have far greater understanding of political control mechanisms and agency design.

Nothing in the Constitution requires that outcome; to the contrary. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). The Framers took pains to craft a document that would allow the structures of governance to change, as times and needs change. The Constitution says only a few words about administration. As Chief Justice Marshall wrote: Rather than prescribing "immutable rules," it enables Congress to choose "the means by which government should, in all future time, execute its powers." *McCulloch*, 4 Wheat., at 415. It authorizes Congress to meet new exigencies with new devices. So Article II does not generally prohibit independent agencies. Nor do any supposed structural principles. Nor do any odors wafting from the document. Save for when those agencies impede the President's performance of his own constitutional duties, the matter is left up to Congress.

Our history has stayed true to the Framers' vision. Congress has accepted their invitation to experiment with administrative forms—nowhere more so than in the field of financial regulation. And this Court has mostly allowed it to do so. The result is a broad array of independent agencies, no two exactly alike but all with a measure of insulation from the President's removal power. The Federal Reserve

Board; the FTC; the SEC; maybe some you've never heard of. As to each, Congress thought that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest. Congress may have been right; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.

The CFPB should have joined the ranks. Maybe it will still do so, even under today's opinion: The Court tells Congress that it may "pursu[e] alternative responses" to the identified constitutional defect—"for example, converting the CFPB into a multimember agency." *Ante*, at 237. But there was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design. Because this Court ignores that sensible—indeed, that obvious—division of tasks, I respectfully dissent.

Syllabus

JUNE MEDICAL SERVICES L. L. C. ET AL. *v.* RUSSO, INTERIM SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS

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

No. 18–1323. Argued March 4, 2020—Decided June 29, 2020*

Louisiana's Act 620, which is almost word-for-word identical to the Texas "admitting privileges" law at issue in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, requires any doctor who performs abortions to hold "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed or induced," and defines "active admitting privileges" as being "a member in good standing" of the hospital's "medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient."

In these consolidated cases, five abortion clinics and four abortion providers challenged Act 620 before it was to take effect, alleging that it was unconstitutional because (among other things) it imposed an undue burden on the right of their patients to obtain an abortion. (The plaintiff providers and two additional doctors are referred to as Does 1 through 6.) The plaintiffs asked for a temporary restraining order (TRO), followed by a preliminary injunction to prevent the law from taking effect. The defendant (State) opposed the TRO request but also urged the court not to delay ruling on the preliminary injunction motion, asserting that there was no doubt about the physicians' standing. Rather than staying the Act's effective date, the District Court provisionally forbade the State to enforce the Act's penalties, while directing the plaintiff doctors to continue to seek privileges and to keep the court apprised of their progress. Several months later, after a 6-day bench trial, the District Court declared Act 620 unconstitutional on its face and preliminarily enjoined its enforcement. On remand in light of *Whole Woman's Health*, the District Court ruled favorably on the plaintiffs' request for a permanent injunction on the basis of the record previously developed, finding, among other things, that the law offers no significant

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*Together with No. 18–1460, *Russo, Interim Secretary, Louisiana Department of Health and Hospitals* v. *June Medical Services L. L. C. et al.*, also on certiorari to the same court.

health benefit; that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety; and that this inability places a substantial obstacle in the path of women seeking an abortion. The court concluded that the law imposes an undue burden and is thus unconstitutional. The Fifth Circuit reversed, agreeing with the District Court's interpretation of the standards that apply to abortion regulations, but disagreeing with nearly every one of the District Court's factual findings.

Held: The judgment is reversed.

905 F. 3d 787, reversed.

JUSTICE BREYER, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, concluded:

1. The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs' undue-burden claims and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing in this Court. Pp. 316–320.

2. Given the District Court's factual findings and precedents, particularly *Whole Woman's Health*, Act 620 violates the Constitution. Pp. 321–344.

(a) Under the applicable constitutional standards set forth in the Court's earlier abortion-related cases, particularly *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, and *Whole Woman's Health*, "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right'" and are therefore "constitutionally invalid," *Whole Woman's Health*, 579 U. S., at 607. This standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. *Id.*, at 609. The District Court here, like the trial court in *Whole Woman's Health*, faithfully applied these standards. The Fifth Circuit disagreed with the District Court, not so much in respect to the legal standards, but in respect to the factual findings on which the District Court relied in assessing both the burdens that Act 620 imposes and the health-related benefits it might bring.

Under well-established legal standards, a district court's findings of fact "must not be set aside unless clearly erroneous, and the reviewing

court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. Rule. Civ. Proc. 52(a)(6). When the district court is "sitting without a jury," the appellate court "is not to decide factual issues *de novo*," *Anderson* v. *Bessemer City*, 470 U. S. 564, 573. Provided "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.*, at 573–574. Viewed in light of this standard, the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's conclusion on Act 620's constitutionality. Pp. 321–323.

(b) Taken together, the District Court's findings and the evidence underlying them are sufficient to support its conclusion that enforcing the admitting-privileges requirement would drastically reduce the number and geographic distribution of abortion providers, making it impossible for many women to obtain a safe, legal abortion in the State and imposing substantial obstacles on those who could. Pp. 323–339.

(1) The evidence supporting the court's findings in respect to Act 620's impact on abortion providers is stronger and more detailed than that in *Whole Woman's Health*. The District Court supervised Does 1, 2, 5, and 6 for more than 18 months as they tried, and largely failed, to obtain conforming privileges from 13 relevant hospitals; it relied on a combination of direct evidence that some of the doctors' applications were denied for reasons having nothing to do with their ability to perform abortions safely, and circumstantial evidence—including hospital bylaws with requirements like those considered in *Whole Woman's Health* and evidence that showed the role that opposition to abortion plays in some hospitals' decisions—that explained why other applications were denied despite the doctors' good-faith efforts. Just as in *Whole Woman's Health*, that evidence supported the District Court's factual finding that Louisiana's admitting-privileges requirement serves no "relevant credentialing function." 579 U. S., at 613. The Fifth Circuit's conclusion that Does 2, 5, and 6 acted in bad faith cannot be squared with the clear-error standard of review that applies to the District Court's contrary findings. Pp. 324–336.

(2) The District Court also drew from the record evidence several conclusions in respect to the burden that Act 620 is likely to impose upon women's ability to access an abortion in Louisiana. It found that enforcing that requirement would prevent Does 1, 2, and 6 from providing abortions altogether. Doe 3 gave uncontradicted, in-court testimony that he would stop performing abortions if he was the last pro-

vider in northern Louisiana, so the departure of Does 1 and 2 would also eliminate Doe 3. And Doe 5's inability to obtain privileges in the Baton Rouge area would leave Louisiana with just one clinic with one provider to serve the 10,000 women annually who seek abortions in the State. Those women not altogether prevented from obtaining an abortion would face "longer waiting times, and increased crowding." *Whole Woman's Health*, 579 U. S., at 613. Delays in obtaining an abortion might increase the risk that a woman will experience complications from the procedure and may make it impossible for her to choose a non-invasive medication abortion. Both expert and lay witnesses testified that the burdens of increased travel to distant clinics would fall disproportionately on poor women, who are least able to absorb them. Pp. 336–339.

(c) An examination of the record also shows that the District Court's findings regarding the law's asserted benefits are not "clearly erroneous." The court found that the admitting-privileges requirement serves no "relevant credentialing function." 250 F. Supp. 3d 27, 87. Hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions, focusing primarily upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions. And nothing in the record indicates that the vetting of applicants for privileges adds significantly to the vetting already provided by the State Board of Medical Examiners. The court's finding that the admitting-privileges requirement "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana," *ibid.*, is supported by expert and lay trial testimony. And, as in *Whole Woman's Health*, the State introduced no evidence "showing that patients have better outcomes when their physicians have admitting privileges" or "of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment," 250 F. Supp. 3d, at 64. Pp. 339–342.

(d) In light of the record, the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support and are not "clearly erroneous." Thus, the court's related factual and legal determinations and its ultimate conclusion that Act 620 is unconstitutional are proper. P. 342.

THE CHIEF JUSTICE agreed that abortion providers in this case have standing to assert the constitutional rights of their patients and concluded that because Louisiana's Act 620 imposes a burden on access to abortion just as severe as that imposed by the nearly identical Texas law invalidated four years ago in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, it cannot stand under principles of *stare decisis*. Pp. 344–358.

Syllabus

BREYER, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment, *post*, p. 344. THOMAS, J., filed a dissenting opinion, *post*, p. 359. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined, in which THOMAS, J., joined except as to Parts III–C and IV–F, and in which KAVANAUGH, J., joined as to Parts I, II, and III, *post*, p. 377. GORSUCH, J., *post*, p. 409, and KAVANAUGH, J., *post*, p. 428, filed dissenting opinions.

Julie Rikelman argued the cause for June Medical Services, LLC. With her on the briefs in both cases were *Travis J. Tu*, *Jessica Sklarsky*, *Anton Metlitsky*, *Yaira Dubin*, *Jeffrey L. Fisher*, *Bradley N. Garcia*, *Samantha M. Goldstein*, *Kendall Turner*, and *Jeremy Girton*.

Elizabeth B. Murrill, Solicitor General of Louisiana, argued the cause for Stephen Russo, Interim Secretary, Louisiana Department of Health and Hospitals. With her on the briefs in both cases were *Jeff Landry*, Attorney General of Louisiana, *Joseph Scott St. John*, Deputy Solicitor General, *Gene C. Schaerr*, *Erik S. Jaffe*, *Stephen S. Schwartz*, *Kathryn E. Tarbert*, *William S. Consovoy*, and *Jeffrey M. Harris*.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* in support of Stephen Russo, Interim Secretary, Louisiana Department of Health and Hospitals. With him on the brief in both cases were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Christopher G. Michel*, *Benjamin W. Snyder*, *Mark R. Freeman*, *Michael S. Raab*, *Robert P. Charrow*, *Sean Keveney*, and *Paula Stannard*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American College of Obstetricians and Gynecologists et al. by *Kimberly A. Parker* and *Skye L. Perryman*; for Catholics for Choice et al. by *Eugene M. Gelernter* and *Barbara Mullin*; for Federal Courts Scholars by *Elaine J. Goldenberg* and *Adam P. Barry*; for the Feminist Majority Foundation et al. by *Janice Mac Avoy*, *Jennifer L. Colyer*, *Leigh G. Rome*, *David S. Cohen*, and *Susan Frietsche*; for Former Federal Judges et al. by *Robert A. Long, Jr.*; for If/When/How: Lawyering for Reproductive Justice et

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

In *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016), we held that "'[u]nnecessary health regulations that

al. by *Farah Diaz-Tello*, *Sara L. Ainsworth*, *Rebecca S. Engrav*, *Lauren J. Tsuji*, and *Ariel B. Glickman*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Kristen Clarke*, *Jon Greenbaum*, *Dariely Rodriguez*, *Vanita Gupta*, and *Michael Zubrensky*; for Medical Staff Professionals by *Robert M. Palumbos*, *Erin M. Duffy*, and *Sean Zabaneh*; for the National Health Law Program et al. by *Jane Perkins* and *Ms. Ainsworth*; for the National Women's Law Center et al. by *Fatima Goss Graves*, *Gretchen Borchelt*, *Sunu Chandy*, *Michelle Banker*, and *Heather Shumaker*; for Organizations and Individuals Dedicated to the Fight for Reproductive Justice–Women With a Vision et al. by *Wesley R. Powell*, *Mary Eaton*, and *Michael J. Gottlieb*; for Planned Parenthood Federation of America et al. by *E. Joshua Rosenkranz* and *Rachel G. Shalev*; for Reproductive Justice Scholars by *Kelly M. Dermody*, *Tiseme G. Zegeye*, and *Madeline M. Gomez*; for Social Science Researchers by *Alan S. Gilbert* and *Leah R. Bruno*; for Tort Law Scholars by *Gary N. Frischling*; for Holly Alvarado et al. by *Michael J. Dell*; for Michele Coleman Mayes et al. by *Claudia Hammerman* and *Tanya S. Manno*; and for 197 Members of Congress by *Clyde G. Szyfer*. A brief of *amici curiae* urging vacatur in both cases was filed for Abby Johnson et al. by *Catherine W. Short*.

Briefs of *amici curiae* urging reversal in No. 18–1323 were filed for the State of New York et al. by *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Andrea Oser*, Deputy Solicitor General, and *Ester Murdukhayeva*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Phil Weiser* of Colorado, *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, *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 the American Bar Association by *Clifton S. Elgarten*, *Keith J. Harrison*, *Amanda Shafer Berman*, and *Judy Perry Martinez;* for the Ameri-

have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right' " and are therefore "constitutionally invalid." *Id.*, at 589–590 (quoting *Planned Parenthood of Southeastern Pa.*

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can Civil Liberties Union et al. by *Andrew D. Beck*, *Jennifer Dalven*, *Louise Melling*, *David D. Cole*, *Katie Schwartzmann*, and *Bruce Hamilton*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for Constitutional Law Scholars et al. by *Orin Snyder* and *Joshua S. Lipshutz*; for the Information Society Project at Yale Law School by *Priscilla J. Smith*; and for LGBTQ Organizations by *David J. Weiner*, *Andrew Tutt*, *Shannon P. Minter*, *Julianna S. Gonen*, and *Christopher F. Stoll*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Arkansas et al. by *Leslie Rutledge*, Attorney General of Arkansas, *Nicholas J. Bronni*, Solicitor General, *Vincent M. Wagner*, Deputy Solicitor General, and *Dylan L. Jacobs*, Assistant Solicitor General, by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Kian J. Hudson*, Deputy Solicitor General, and *Julia C. Payne*, Deputy Attorney General, and by the Attorneys General and other officials for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Derek Schmidt* of Kansas, *Daniel Cameron* of Kentucky, *Jim Hood* of Mississippi, *Eric S. Schmitt* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for the State of Idaho by *Lawrence G. Wasden*, Attorney General of Idaho, *Brian Kane*, Assistant Deputy Chief, and *Cynthia L. Yee-Wallace*, Deputy Attorney General; for the State of Texas by *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Kyle D. Hawkins*, Solicitor General, and *Heather Gebelin Hacker* and *Beth Klusmann*, Assistant Solicitors General; for African American Pro-Life Organizations by *C. Boyden Gray* and *Adam R. F. Gustafson*; for the American Association of Pro-Life Obstetricians et al. by *Bradley S. Tupi*; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Thomas P. Monaghan*, *Francis J. Manion*, and *Geoffrey R. Surtees*; for Americans United for Life by *Catherine Glenn Foster*, *Steven H. Aden*, and *Clarke D. Forsythe*; for the Association of American Physicians and Surgeons, Inc., by *Antony B. Kolenc*; for the

v. *Casey*, 505 U. S. 833, 878 (1992) (plurality opinion); alteration in original). We explained that this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the

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Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Christian Legal Society et al. by *Reed N. Smith* and *Kimberlee Wood Colby*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the Ethics & Religious Liberty Commission of the Southern Baptist Conference et al. by *Alexander Dushku* and *R. Shawn Gunnarson*; for Family Research Council by *Jonathan F. Mitchell* and *Travis S. Weber*; for the Foundation for Moral Law by *Matthew J. Clark* and *Martin Wishnatsky*; for Illinois Right to Life by *Thomas Brejcha*, *Thomas Olp*, and *Joan M. Mannix*; for the Independence Law Center by *Randall L. Wegner*, *Jeremy L. Samek*, and *Curtis M. Schube*; for the Inner Life Fund et al. by *James L. Hirsen*, *Deborah J. Dewart*, and *Tami Fitzgerald*; for the International Conference of Evangelical Chaplain Endorsers by *Arthur A. Schulcz, Sr.*; for Louisiana State Legislators by *Kristen K. Waggoner*, *John J. Bursch*, *David A. Cortman*, *Kevin H. Theriot*, and *James A. Campbell*; for the National Institute of Family and Life Advocates et al. by *Harold J. Cassidy* and *Joseph R. Zakhary*; for Operation Rescue et al. by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Ms. Short*; for Priests for Life et al. by *Robert Joseph Muise* and *David Yerushalmi*; for the Pro-Life Legal Defense Fund et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, *Robert J. Olson*, *Joseph W. Miller*, and *J. Mark Brewer*; for Right to Life of Michigan by *William Wagner*, *Erin Elizabeth Mersino*, and *Katherine L. Henry*; for the Susan B. Anthony List by *John G. Knepper*; for the United States Conference of Catholic Bishops et al. by *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, and *Michael F. Moses*; for Mary J. Browning by *Allan E. Parker, Jr.*, and *Ms. Browning, pro se*; for Sen. Josh Hawley by *Mr. Hawley, pro se*; for Melinda Thybault by *Mr. Parker* and *R. Clayton Trotter*; for 207 Members of Congress by *Ms. Foster* and *Mr. Aden*; and for 2,624 Women Injured by Abortion et al. by *Mr. Parker*, *Kathleen Cassidy Goodman*, *Mary Ann Randolph*, and *Mr. Trotter*.

Briefs of *amici curiae* urging affirmance in No. 18–1323 were filed for the Billy Graham Evangelistic Association et al. by *Kevin T. Snider*; for the CatholicVote.Org Education Fund by *Scott W. Gaylord*; for Former Abortion Providers et al. by *Linda Boston Schlueter*; for IBIS Reproductive Health et al. by *Jessica L. Ellsworth* and *Kaitlyn A. Golden*; for the Legal Center for Defense of Life by *Andrew L. Schlafly*; for the Louisiana

law's "asserted benefits against the burdens" it imposes on abortion access. 579 U. S., at 609 (citing *Gonzales* v. *Carhart*, 550 U. S. 124, 165 (2007)).

The Texas statute at issue in *Whole Woman's Health* required abortion providers to hold "'active admitting privileges at a hospital'" within 30 miles of the place where they perform abortions. 579 U. S., at 590 (quoting Tex. Health & Safety Code Ann. §171.0031(a) (West Cum. Supp. 2015)). Reviewing the record for ourselves, we found ample evidence to support the District Court's finding that the statute did not further the State's asserted interest in protecting women's health. The evidence showed, moreover, that conditions on admitting privileges that served no "relevant credentialing function," 579 U. S., at 613, "help[ed] to explain" the closure of half of Texas' abortion clinics, *id.*, at 612. Those closures placed a substantial obstacle in the path of Texas women seeking an abortion. *Ibid.* And that obstacle, "when viewed in light of the virtual absence of any health benefit," imposed an "undue burden" on abortion access in violation of the Federal Constitution. *Id.*, at 614; see *Casey*, 505 U. S., at 878 (plurality opinion).

In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas' admitting-privileges law. See La. Rev. Stat. Ann. §40:1061.10(A)(2)(a) (West 2020). As in *Whole Woman's Health*, the District Court found that the statute offers no

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Family Forum et al. by *Anita Y. Milanovich* and *Renee K. Carlson*; for the National Right to Life Committee et al. by *James Bopp, Jr.*, and *Richard E. Coleson*; and for Samaritan's Purse by *Frederick W. Claybrook, Jr.*, *Steven W. Fitschen*, *James A. Davids*, and *David A. Bruce*.

Briefs of *amici curiae* urging affirmance in No. 18–1460 were filed for Concerned Women for America by *Teresa Stanton Collett*; for Judicial Watch, Inc., by *James F. Peterson* and *Meredith L. Di Liberto*; and by Whole Woman's Health et al. by *Linda C. Goldstein* and *Jonathan Tam.*

Timothy J. Newton and *Kenneth W. Starr* filed a brief for the Thomas More Society as *amicus curiae* in both cases.

significant health benefit. It found that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety. And it found that this inability places a substantial obstacle in the path of women seeking an abortion. As in *Whole Woman's Health*, the substantial obstacle the Act imposes, and the absence of any health-related benefit, led the District Court to conclude that the law imposes an undue burden and is therefore unconstitutional. See U. S. Const., Amdt. 14, § 1.

The Court of Appeals agreed with the District Court's interpretation of the standards we have said apply to regulations on abortion. It thought, however, that the District Court was mistaken on the facts. We disagree. We have examined the extensive record carefully and conclude that it supports the District Court's findings of fact. Those findings mirror those made in *Whole Woman's Health* in every relevant respect and require the same result. We consequently hold that the Louisiana statute is unconstitutional.

I

A

In March 2014, five months after Texas' admitting-privileges requirement forced the closure of half of that State's abortion clinics, Louisiana's Legislature began to hold hearings to consider a substantially identical proposal. Compare *Whole Woman's Health*, 579 U. S., at 590–591, with *June Medical Services LLC* v. *Kliebert*, 250 F. Supp. 3d 27, 53 (MD La. 2017); Record 11220. The proposal became law in mid-June 2014. 2014 La. Acts p. 2330.

As was true in Texas, Louisiana law already required abortion providers *either* to possess local hospital admitting privileges *or* to have a patient "transfer" arrangement with a physician who had such privileges. Compare *Whole Wom-*

an's Health, 579 U. S., at 609 (citing Tex. Admin. Code, tit. 25, § 139.56 (2009)), with former La. Admin. Code, tit. 48, pt. I, § 4407(A)(3) (2003), 29 La. Reg. 706–707 (2003). The new law eliminated that flexibility. Act 620 requires any doctor who performs abortions to hold "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a).

The statute defines "active admitting privileges" to mean that the doctor must be "a member in good standing" of the hospital's "medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient." *Ibid.*; La. Admin. Code, tit. 48, pt. I, § 4401. Failure to comply may lead to fines of up to $4,000 per violation, license revocation, and civil liability. See *ibid.*; La. Rev. Stat. Ann. § 40:1061.29.

B

A few weeks before Act 620 was to take effect in September 2014, three abortion clinics and two abortion providers filed a lawsuit in Federal District Court. They alleged that Act 620 was unconstitutional because (among other things) it imposed an undue burden on the right of their patients to obtain an abortion. App. 24. The court later consolidated their lawsuit with a similar, separate action brought by two other clinics and two other abortion providers. (Like the courts below, we shall refer to the two doctors in the first case as Doe 1 and Doe 2; we shall refer to the two doctors in the second case as Doe 5 and Doe 6; and we shall refer to two other doctors then practicing in Louisiana as Doe 3 and Doe 4.)

The plaintiffs immediately asked the District Court to issue a temporary restraining order (TRO), followed by a preliminary injunction that would prevent the law from taking effect. *June Medical Services LLC* v. *Caldwell*, No. 14–cv–00525 (MD La., Aug. 22, 2014), Doc. No. 5.

The State of Louisiana, appearing for the defendant Secretary of the Department of Health and Hospitals, filed a response that opposed the plaintiffs' TRO request. App. 32–39. But the State went on to say that, if the court granted the TRO or if the parties reached an agreement that would allow the plaintiffs time to obtain privileges without a TRO, the court should hold a hearing on the preliminary injunction request as soon as possible. *Id.*, at 43. The State argued that there was no reason to delay a ruling on the merits of the plaintiffs' undue-burden claims. *Id.*, at 43–44. It asserted that there was "no question that the physicians had standing to contest the law." *Id.*, at 44. And, in light of the State's "overriding interest in vindicating the constitutionality of its admitting-privileges law," the plaintiffs' suit was "the proper vehicle" to "remov[e] any cloud upon" Act 620's "validity." *Id.*, at 45.

The District Court declined to stay the Act's effective date. Instead, it provisionally forbade the State to enforce the Act's penalties, while directing the plaintiff doctors to continue to seek conforming privileges and to keep the court apprised of their progress. See TRO in No. 14–cv–00525, Doc. No. 31, pp. 2–3; see, *e. g.*, App. 48–55, 64–82. These updates continued through the date of the District Court's decision. 250 F. Supp. 3d, at 77.

C

In June 2015, the District Court held a 6-day bench trial on the plaintiffs' request for a preliminary injunction. It heard live testimony from a dozen witnesses, including three Louisiana abortion providers, June Medical's administrator, the Secretary (along with a senior official) of the State's Department of Health and Hygiene, and three experts each for the plaintiffs and the State. *Id.*, at 33–34. It also heard from several other witnesses via deposition. *Ibid.* Based on this evidentiary record, the court issued a decision in January 2016 declaring Act 620 unconstitutional on its face and

preliminarily enjoining its enforcement. *June Medical Services LLC* v. *Kliebert*, 158 F. Supp. 3d 473 (MD La.).

The State immediately asked the Court of Appeals for the Fifth Circuit to stay the District Court's injunction. The Court of Appeals granted that stay. But we then issued our own stay at the plaintiffs' request, thereby leaving the District Court's preliminary injunction (at least temporarily) in effect. See *June Medical Services, L. L. C.* v. *Gee*, 814 F. 3d 319 (CA5), vacated, 577 U. S. 1185 (2016).

Approximately two months later, in June 2016, we issued our decision in *Whole Woman's Health*, reversing the Fifth Circuit's judgment in that case. We remanded this case for reconsideration, and the Fifth Circuit in turn remanded the case to the District Court permitting it to engage in further factfinding. See *June Medical Services, L.L.C.* v. *Gee*, 2016 WL 11494731 (CA5, Aug. 24, 2016) (*per curiam*). All the parties agreed that the District Court could rule on the plaintiffs' request for a permanent injunction on the basis of the record it had already developed. Minute Entry in No. 14–cv–00525, Doc. No. 253. The court proceeded to do so.

D

Because the issues before us in this case primarily focus upon the factual findings (and fact-related determinations) of the District Court, we set forth only the essential findings here, giving greater detail in the analysis that follows.

With respect to the Act's asserted benefits, the District Court found that:

- "[A]bortion in Louisiana has been extremely safe, with particularly low rates of serious complications." 250 F. Supp. 3d, at 65. The "testimony of clinic staff and physicians demonstrated" that it "rarely . . . is necessary to transfer patients to a hospital: far less than once a year, or less than one per several thousand patients." *Id.*, at 63. And "[w]hether or not a patient's treating

physician has admitting privileges is not relevant to the patient's care." *Id.*, at 64.

- There was accordingly "'no significant health-related problem that the new law helped to cure.' . . . The record does not contain any evidence that complications from abortion were being treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital." *Id.*, at 86–87. (quoting *Whole Woman's Health*, 579 U. S., at 610); see also 250 F. Supp. 3d, at 86–87 (summarizing conclusions).
- There was also "no credible evidence in the record that Act 620 would further the State's interest in women's health beyond that which is already insured under existing Louisiana law." *Id.*, at 65.

Turning to Act 620's impact on women's access to abortion, the District Court found that:

- Approximately 10,000 women obtain abortions in Louisiana each year. *Id.*, at 39. At the outset of this litigation, those women were served by six doctors at five abortion clinics. *Id.*, at 40, 41–44. By the time the court rendered its decision, two of those clinics had closed, and one of the doctors (Doe 4) had retired, leaving only Does 1, 2, 3, 5, and 6. *Ibid.*
- "[N]otwithstanding the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence." *Id.*, at 78.
- These doctors' inability to secure privileges was "caused by Act 620 working in concert with existing laws and practices," including hospital bylaws and criteria that "preclude or, at least greatly discourage, the granting of privileges to abortion providers." *Id.*, at 50.

- These requirements establish that admitting privileges serve no "'relevant credentialing function'" because physicians may be denied privileges "for reasons unrelated to competency." *Id.*, at 87 (quoting *Whole Woman's Health*, 579 U. S., at 613).
- They also make it "unlikely that the [a]ffected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges." 250 F. Supp. 3d, at 82.
- Doe 3 testified credibly "that, as a result of his fears, and the demands of his private OB/GYN practice, if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions." *Id.*, at 79; see also *id.*, at 78–79 (summarizing that testimony).
- Enforcing the admitting-privileges requirement would therefore "result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state," Does 3 and 5, who would only be allowed to practice in Shreveport and New Orleans. *Id.*, at 87. Depending on whether Doe 3 stopped practicing, or whether his retirement was treated as legally relevant, the impact would be a 55%–70% reduction in capacity. *Id.*, at 81.
- "The result of these burdens on women and providers, taken together and in context, is that many women seeking a safe, legal abortion in Louisiana will be unable to obtain one. Those who can will face substantial obstacles in exercising their constitutional right to choose abortion due to the dramatic reduction in abortion services." *Id.*, at 88; see *id.*, at 79, 82, 87–88.
- In sum, "Act 620 does not advance Louisiana's legitimate interest in protecting the health of women seeking abor-

> tions. Instead, Act 620 would increase the risk of harm to women's health by dramatically reducing the availability of safe abortion in Louisiana." *Id.*, at 87; see also *id.*, at 65–66.

The District Court added that

> "there is no legally significant distinction between this case and [*Whole Woman's Health*]: Act 620 was modeled after the Texas admitting privileges requirement, and it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits." *Id.*, at 88.

On the basis of these findings, the court held that Act 620 and its implementing regulations are unconstitutional. It entered an injunction permanently forbidding their enforcement.

E

The State appealed. A divided panel of the Court of Appeals reversed the District Court's judgment. The panel majority concluded that Act 620's impact was "dramatically less" than that of the Texas law invalidated in *Whole Woman's Health*. *June Medical Services L. L. C.* v. *Gee*, 905 F. 3d 787, 791 (CA5 2018). "Despite its diligent effort to apply [*Whole Woman's Health*] faithfully," the majority thought that the District Court had "clearly erred in concluding otherwise." *Id.*, at 815.

With respect to the Act's asserted benefits, the majority thought that, "[u]nlike Texas, Louisiana presents some evidence of a minimal benefit." *Id.*, at 805. Rejecting the District Court's contrary finding, it concluded that the admitting-privileges requirement "performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." *Id.*, at 806. The majority believed that the process of obtaining privileges would help to "verify an applicant's surgical ability,

training, education, experience, practice record, and criminal history." *Id.*, at 805, and n. 53. And it accepted the State's argument that the law "brings the requirements regarding outpatient abortion clinics into conformity with the *preexisting* requirement that physicians at ambulatory surgical centers ('ASCs') must have privileges at a hospital within the community." *Id.*, at 805.

Moving on to Act 620's burdens, the appeals court wrote that "everything turns on whether the privileges requirement actually would prevent doctors from practicing in Louisiana." *Id.*, at 807. Although the State challenged the District Court's findings only with respect to Does 2 and 3, the Court of Appeals went further. It disagreed with nearly every one of the District Court's findings, concluding that "the district court erred in finding that only Doe 5 would be able to obtain privileges and that the application process creates particular hardships and obstacles for abortion providers in Louisiana." *Id.*, at 810. The court noted that "[a]t least three hospitals have proven willing to extend privileges." *Ibid.* It thought that "only Doe 1 has put forth a good-faith effort to get admitting privileges," while "Doe 2, Doe 5, and Doe 6 could likely obtain privileges," *ibid.*, and "Doe 3's personal choice to stop practicing cannot be legally attributed to Act 620," *id.*, at 811.

Having rejected the District Court's findings with respect to all but one of the physicians, the Court of Appeals concluded that "there is no evidence that Louisiana facilities will close from Act 620." *Id.*, at 810. The appeals court allowed that the Baton Rouge clinic where Doe 5 had not obtained privileges would close. But it reasoned that "[b]ecause obtaining privileges is not overly burdensome, . . . the fact that one clinic would have to close is not a substantial burden that can currently be attributed to Act 620 as distinguished from Doe 5's failure to put forth a good-faith effort." *Ibid.* The Court of Appeals added that the additional work that Doe 2 and Doe 3 would have to do to compensate for Doe 1's inabil-

ity to perform abortions "does not begin to approach the capacity problem in" *Whole Woman's Health*. 905 F. 3d, at 812. It estimated that Act 620 would "resul[t] in a potential increase" in waiting times "of 54 minutes at one of the state's clinics for at most 30% of women." *Id.*, at 815.

On the basis of these findings, the panel majority concluded that Louisiana's admitting-privileges requirement would impose no "substantial burden at all" on Louisiana women seeking an abortion, "much less a substantial burden on a large fraction of women as is required to sustain a facial challenge." *Ibid.* Judge Higginbotham dissented.

The Court of Appeals denied the plaintiffs' petition for en banc rehearing over dissents by Judges Dennis and Higginson, joined by four of their colleagues. See *June Medical Services, L. L. C.* v. *Gee*, 913 F. 3d 573 (2019) (*per curiam*). The plaintiffs then asked this Court to stay the Fifth Circuit's judgment. We granted their application, thereby allowing the District Court's injunction to remain in effect. *June Medical Services, L. L. C.* v. *Gee*, 586 U. S. 1135 (2019). The plaintiffs subsequently filed a petition for certiorari addressing the merits of the appeals court's decision. The State filed a cross-petition, challenging the plaintiffs' authority to maintain this action. We granted both petitions.

II

We initially consider a procedural argument that the State raised for the first time in its cross-petition for certiorari. As we have explained, the plaintiff abortion providers and clinics in this case have challenged Act 620 on the ground that it infringes their patients' rights to access an abortion. The State contends that the proper parties to assert these rights are the patients themselves. We think that the State has waived that argument.

The State's argument rests on the rule that a party cannot ordinarily "'rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski* v. *Tesmer*, 543 U. S.

125, 129 (2004) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975)). This rule is "prudential." 543 U. S., at 128–129. It does not involve the Constitution's "case-or-controversy requirement." *Id.*, at 129; see *Craig* v. *Boren*, 429 U. S. 190, 193 (1976); *Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976). And so, we have explained, it can be forfeited or waived. See *Craig*, 429 U. S., at 193–194.

As we pointed out, *supra*, at 310, the State's memorandum opposing the plaintiffs' TRO request urged the District Court to proceed swiftly to the merits of the plaintiffs' undue-burden claim. It argued that there was "no question that the physicians had standing to contest" Act 620. App. 44. And it told the District Court that the Fifth Circuit had found that doctors challenging Texas' "identical" law "had third-party standing to assert their patients' rights." *Id.*, at 43–44. Noting that the Texas law had "already been upheld," the State asserted that it had "a keen interest in removing any cloud upon the validity of its law." *Id.*, at 45. It insisted that this suit was "the proper vehicle to do so." *Ibid.* The State did not mention its current objection until it filed its cross-petition—more than five years after it argued that the plaintiffs' standing was beyond question.

The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs' undue-burden claims bars our consideration of it here. See *Wood* v. *Milyard*, 566 U. S. 463, 474 (2012); cf. *post*, at 400–401 (ALITO, J., dissenting) (addressing the Court's approach to claims forfeited rather than waived); *post*, at 415–416 (GORSUCH, J., dissenting) (addressing waiver of structural rather than prudential objections).

The State refers to the Fifth Circuit's finding of standing in *Whole Woman's Health* as an excuse for its concession. Brief for Respondent in No. 18–1323, p. 52 (Brief for Respondent). But the standing argument the State makes here rests on reasons that it tells us are specific to abortion providers *in Louisiana*. See *id.*, at 41–48. We are not per-

suaded that the State could have thought it was precluded from making those arguments by a decision with respect to *Texas* doctors.

And even if the State had merely forfeited its objection by failing to raise it at any point over the last five years, we would not now undo all that has come before on that basis. What we said some 45 years ago in *Craig* applies equally today: "[A] decision by us to forgo consideration of the constitutional merits"—after "the parties have sought or at least have never resisted an authoritative constitutional determination" in the courts below—"in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." 429 U. S., at 193–194 (quotation altered).

In any event, the rule the State invokes is hardly absolute. We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations. See, *e. g.*, *Whole Woman's Health*, 579 U. S., at 592; *Gonzales*, 550 U. S., at 133; *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 324 (2006); *Stenberg* v. *Carhart*, 530 U. S. 914, 922 (2000); *Mazurek* v. *Armstrong*, 520 U. S. 968, 969–970 (1997) (*per curiam*); *Casey*, 505 U. S., at 845 (majority opinion); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 440, n. 30 (1983); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U. S. 179, 188–189 (1973).

And we have generally permitted plaintiffs to assert third-party rights in cases where the "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U. S., at 130 (quoting *Warth*, 422 U. S., at 510); see, *e. g.*, *Department of Labor* v. *Triplett*, 494 U. S. 715, 720 (1990) (Scalia, J., for the Court) (attorney raising rights of clients

to challenge restrictions on fee arrangements); *Craig*, 429 U. S., at 192 (convenience store raising rights of young men to challenge sex-based restriction on beer sales); *Doe*, 410 U. S., at 188 (abortion provider raising the rights of pregnant women to access an abortion); *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977) (distributors of contraceptives raising rights of prospective purchasers to challenge restrictions on sales of contraceptives); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972) (similar); *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965) (similar); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969) (white property owner raising rights of black contractual counterparty to challenge discriminatory restrictions on ability to contract); *Barrows* v. *Jackson*, 346 U. S. 249 (1953) (similar). In such cases, we have explained, "the obvious claimant" and "the least awkward challenger" is the party upon whom the challenged statute imposes "legal duties and disabilities." *Craig*, 429 U. S., at 196–197; see *Akron*, 462 U. S., at 440, n. 30; *Danforth*, 428 U. S., at 62; *Doe*, 410 U. S., at 188.

The case before us lies at the intersection of these two lines of precedent. The plaintiffs are abortion providers challenging a law that regulates their conduct. The "threatened imposition of governmental sanctions" for noncompliance eliminates any risk that their claims are abstract or hypothetical. *Craig*, 429 U. S., at 195. That threat also assures us that the plaintiffs have every incentive to "resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Ibid.* And, as the parties who must actually go through the process of applying for and maintaining admitting privileges, they are far better positioned than their patients to address the burdens of compliance. See *Singleton*, 428 U. S., at 117 (plurality opinion) (observing that "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against,"

a woman's decision to have an abortion). They are, in other words, "the least awkward" and most "obvious" claimants here. *Craig*, 429 U. S., at 197.

Our dissenting colleagues suggest that this case is different because the plaintiffs have challenged a law ostensibly enacted to protect the women whose rights they are asserting. See *post*, at 401–402 (opinion of ALITO, J.); *post*, at 415 (opinion of GORSUCH, J.). But that is a common feature of cases in which we have found third-party standing. The restriction on sales of 3.2% beer to young men challenged by a drive-through convenience store in *Craig* was defended on "public health and safety" grounds, including the premise that young men were particularly susceptible to driving while intoxicated. 429 U. S., at 199–200; see Hager, Gender Discrimination and the Courts: New Ground to Cover, Washington Post, Sept. 26, 1976, p. 139. And the rule requiring approval from the Department of Labor for attorney fee arrangements challenged by a lawyer in *Triplett* was "designed to protect [their clients] from their improvident contracts, in the interest not only of themselves and their families but of the public." 494 U. S., at 722 (internal quotation marks omitted).

Nor is this the first abortion case to address provider standing to challenge regulations said to protect women. Both the hospitalization requirement in *Akron*, 462 U. S., at 435, and the hospital-accreditation requirement in *Doe*, 410 U. S., at 195, were defended as health and safety regulations. And the ban on saline amniocentesis in *Danforth* was based on the legislative finding "that the technique is deleterious to maternal health." 428 U. S., at 76 (internal quotation marks omitted).

In short, the State's strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing. We consequently proceed to consider the merits of the plaintiffs' claims.

III

A

Turning to the merits, we apply the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman's Health*. At the risk of repetition, we remind the reader of the standards we described above. In *Whole Woman's Health*, we quoted *Casey* in explaining that "'a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.'" 579 U. S., at 607 (quoting *Casey*, 505 U. S., at 877 (plurality opinion)). We added that "'*[u]nnecessary* health regulations'" impose an unconstitutional "'undue burden'" if they have "'the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.'" 579 U. S., at 607 (quoting *Casey*, 505 U. S., at 878; emphasis added).

We went on to explain that, in applying these standards, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at 607. We cautioned that courts "must review legislative 'factfinding under a deferential standard.'" *Id.*, at 608 (quoting *Gonzales*, 550 U. S., at 165). But they "must not 'place dispositive weight' on those 'findings,'" for the courts "'retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.'" 579 U. S., at 600 (quoting *Gonzales*, 550 U. S., at 165; emphasis deleted).

We held in *Whole Woman's Health* that the trial court faithfully applied these standards. It "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony." 579 U. S., at 609. It "then weighed the asserted benefits" of the law "against the burdens" it imposed on abortion access. *Ibid.* And it

concluded that the balance tipped against the statute's constitutionality. The District Court in this suit did the same.

B

The Court of Appeals disagreed with the District Court, not so much in respect to the legal standards that we have just set forth, but because it did not agree with the factual findings on which the District Court relied in assessing both the burdens that Act 620 imposes and the health-related benefits it might bring. Compare, *e. g.*, *supra*, at 311–314, with *supra*, at 314–316. We have consequently reviewed the record in detail ourselves. In doing so, we have applied well-established legal standards.

We start from the premise that a district court's findings of fact, "whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. Rule Civ. Proc. 52(a)(6). In "'applying [this] standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985) (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969)). Where "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U. S., at 573–574. "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper* v. *Harris*, 581 U. S. 285, 293 (2017).

Our dissenting colleagues suggest that a different, less-deferential standard should apply here because the District Court enjoined the admitting-privileges requirement before it was enforced. See *post*, at 387–388 (opinion of ALITO, J.); *post*, at 419–422 (opinion of GORSUCH, J.). We are aware of no

authority suggesting that appellate scrutiny of factual determinations varies with the timing of a plaintiff's lawsuit or a trial court's decision. And, in any event, the record belies the dissents' claims that the District Court's findings in this case were "conjectural" or premature. As we have explained, the District Court's order on the plaintiffs' motion for a temporary restraining order suspended only Act 620's penalties. The plaintiffs were required to continue in their efforts to obtain admitting privileges. See *supra*, at 310. The District Court supervised those efforts through the trial and beyond. See 250 F. Supp. 3d, at 77. It based its findings on this real-world evidence, not speculative guesswork. Nor can we agree with the suggestion that the timing of the District Court's decision somehow prejudiced the State. From the start, the State urged that the District Court decide the merits of the plaintiffs' claims without awaiting a decision on their applications for admitting privileges. See App. 43–44. And, when this case returned to the District Court in August 2016, following our decision in *Whole Woman's Health*, the State stipulated that the case was ripe for decision on the record as it stood in June 2015. See *supra*, at 310–311. In short, we see no legal or practical basis to depart from the familiar standard that applies to all "[f]indings of fact." Fed. Rule Civ. Proc. 52(a).

Under that familiar standard, we find that the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's ultimate conclusion that, "[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden." 250 F. Supp. 3d, at 88.

IV

The District Court's Substantial-Obstacle Determination

The District Court found that enforcing the admitting-privileges requirement would "result in a drastic reduction

in the number and geographic distribution of abortion providers." *Id.*, at 87. In light of demographic, economic, and other evidence, the court concluded that this reduction would make it impossible for "many women seeking a safe, legal abortion in Louisiana . . . to obtain one" and that it would impose "substantial obstacles" on those who could. *Id.*, at 88. We consider each of these findings in turn.

A

Act 620's Effect on Abortion Providers

We begin with the District Court's findings in respect to Act 620's impact on abortion providers. As we have said, the court found that the Act would prevent Does 1, 2, and 6 from providing abortions. And it found that the Act would bar Doe 5 from working in his Baton Rouge-based clinic, relegating him to New Orleans. See *supra*, at 312–313.

1

In *Whole Woman's Health*, we said that, by presenting "direct testimony" from doctors who had been unable to secure privileges, and "plausible inferences to be drawn from the timing of the clinic closures" around the law's effective date, the plaintiffs had "satisfied their burden" to establish that the Texas admitting-privileges requirement caused the closure of those clinics. 579 U. S., at 614.

We wrote that these inferences were bolstered by the submissions of *amici* in the medical profession, which "describe[d] the undisputed general fact that hospitals often" will restrict admitting privileges to doctors likely to seek a "certain number of admissions per year." *Id.*, at 612 (internal quotation marks omitted). The likely effect of such requirements was that abortion providers "would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit." *Id.*, at 613. We also referred to "common prerequisites to

obtaining admitting privileges that have nothing to do with ability to perform medical procedures"; for example, requirements that doctors have "treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors." *Ibid.*

To illustrate how these criteria impacted abortion providers, we noted the example of an obstetrician with 38 years' experience who had been denied admitting privileges for reasons "'not based on clinical competence considerations.'" *Ibid.* This, we said, showed that the law served no "relevant credentialing function," but prevented qualified providers from serving women who seek an abortion. *Ibid.* And that, in turn, "help[ed] to explain why the new [law's admitting-privileges] requirement led to the closure of" so many Texas clinics. *Id.*, at 612.

The evidence on which the District Court relied in this case is even stronger and more detailed. The District Court supervised Does 1, 2, 5, and 6 for over a year and a half as they tried, and largely failed, to obtain conforming privileges from 13 relevant hospitals. See 250 F. Supp. 3d, at 77–78; App. 48–55, 64–82. The court heard direct evidence that some of the doctors' applications were denied for reasons that had nothing to do with their ability to perform abortions safely. 250 F. Supp. 3d, at 68–70, 76–77; App. 1310, 1435–1436. It also compiled circumstantial evidence that explains why other applications were denied and explains why, given the costs of applying and the reputational risks that accompany rejection, some providers could have chosen in good faith *not* to apply to every qualifying hospital. *Id.*, at 1135, 1311 (discussing the costs associated with unsuccessful applications). That circumstantial evidence includes documents and testimony that described the processes Louisiana hospitals follow when considering applications for admitting privileges, including requirements like the ones we cited in *Whole Woman's Health* that are unrelated to a doctor's competency

to perform abortions. See generally Brief for Medical Staff Professionals as *Amici Curiae* 11–30 (reviewing the hospital bylaws in the record).

The evidence shows, among other things, that the fact that hospital admissions for abortion are vanishingly rare means that, unless they also maintain active OB/GYN practices, abortion providers in Louisiana are unlikely to have any recent in-hospital experience. 250 F. Supp. 3d, at 49. Yet such experience can well be a precondition to obtaining privileges. Doe 2, a board-certified OB/GYN with nearly 40 years' experience, testified that he had not "done any in-hospital work in ten years" and that just two of his patients in the preceding 5 years had required hospitalization. App. 387, 400. As a result, he was unable to comply with one hospital's demand that he produce data on "patient admissions and management, consultations, and procedures performed" in-hospital before his application could be "processed." *Id.*, at 1435; see *id.*, at 437–438. Doe 1, a board-certified family doctor with over 10 years' experience, was similarly unable to "submit documentation of hospital admissions and management of patients." *Id.*, at 1436.

The evidence also shows that many providers, even if they could initially obtain admitting privileges, would be unable to keep them. That is because, unless they have a practice that requires regular in-hospital care, they will lose the privileges for failing to use them. Doe 6, a board-certified OB/GYN practitioner with roughly 50 years' experience, provides only medication abortions. *Id.*, at 1308. Of the thousands of women he served over the decade before the District Court's decision, during which he also performed surgical abortions, just two required a direct transfer to a hospital and one of them was treated without being admitted. *Id.*, at 1309. That safety record would make it impossible for Doe 6 to maintain privileges at any of the many Louisiana hospitals that require newly appointed physicians to undergo a process of "focused professional practice evalua-

tion," in which they are observed by hospital staff as they perform in-hospital procedures. See Record 2635, 2637, 2681, 9054; Brief for Medical Staff Professionals as *Amici Curiae* 28–29 (describing this practice); cf. Record 10755 (requiring an "on-going review" of practice "in the Operating Room"). And it would likewise disqualify him at hospitals that require physicians to admit a minimum number of patients, either initially or on an ongoing basis. See, *e. g.*, *id.*, at 9040, 9068–9069, 9150–9153; cf. App. 1193, 1182 (provider with no patient contacts in first year assigned to "Affiliate" status, without admitting privileges).

The evidence also shows that opposition to abortion played a significant role in some hospitals' decisions to deny admitting privileges. 250 F. Supp. 3d, at 48–49, 51–53 (collecting evidence). Some hospitals expressly bar anyone with privileges from performing abortions. App. 1180, 1205. Others are unwilling to extend privileges to abortion providers as a matter of discretion. *Id.*, at 1127–1129. For example, Doe 2 testified that he was told not to bother asking for admitting privileges at University Health in Shreveport because of his abortion work. *Id.*, at 383–384. And Doe 1 was told that his abortion work was an impediment to his application. *Id.*, at 1315–1316.

Still other hospitals have requirements that abortion providers cannot satisfy because of the hostility they face in Louisiana. Many Louisiana hospitals require applicants to identify a doctor (called a "covering physician") willing to serve as a backup should the applicant admit a patient and then for some reason become unavailable. See Record 9154, 9374, 9383, 9478, 9667, 10302, 10481, 10637, 10659–10661, 10676. The District Court found "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician." 250 F. Supp. 3d, at 49; cf. *Whole Woman's Health*, 579 U. S., at 613 (citing testimony describing similar problems faced by Texas providers seeking covering physicians). Doe 5 is a

board-certified OB/GYN who had been practicing for more than nine years at the time of trial. Of the thousands of abortions he performed in the three years prior to the District Court's decision, not one required a direct transfer to a hospital. App. 1134. Yet he was unable to secure privileges at three Baton Rouge hospitals because he could not find a covering physician willing to be publicly associated with an abortion provider. *Id.*, at 1335–1336. Doe 3, a board-certified OB/GYN with nearly 45 years of experience, testified that he, too, had difficulty arranging coverage because of his abortion work. *Id.*, at 200–202.

Just as in *Whole Woman's Health*, the experiences of the individual doctors in this case support the District Court's factual finding that Louisiana's admitting-privileges requirement, like that in Texas' law, serves no " 'relevant credentialing function.' " 250 F. Supp. 3d, at 87 (quoting *Whole Woman's Health*, 579 U. S., at 613).

2

The Court of Appeals found another explanation for the doctors' inability to obtain privileges more compelling. It conceded that Doe 1 would not be able to obtain admitting privileges in spite of his good-faith attempts. It concluded, however, that Does 2, 5, and 6 had acted in bad faith. 905 F. 3d, at 807. The problem is that the law requires appellate courts to review a trial court's findings under the deferential clear-error standard we have described. See *supra*, at 322–323. Our review of the record convinces us that the Court of Appeals misapplied that standard.

JUSTICE ALITO does not dispute that the District Court's findings are not "clearly erroneous." He argues instead that both the District Court and the Court of Appeals applied the wrong legal standard to the record in this case. By asking whether the doctors acted in "good faith," he contends, the courts below failed to account for the doctors' supposed "incentive to do as little as" possible to obtain conforming privi-

leges. *Post*, at 388–390 (dissenting opinion); cf. *post*, at 419–420 (GORSUCH, J., dissenting). But that is not a legal argument at all. It is simply another way of saying that the doctors acted in *bad* faith. The District Court, after monitoring the doctors' efforts for a year and a half, found otherwise. And "[w]hen the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." *Anderson*, 470 U. S., at 577.

Doe 2

The District Court found that Doe 2 tried in good faith to get admitting privileges within 30 miles of his Shreveport-area clinic. 250 F. Supp. 3d, at 68. The Court of Appeals thought that conclusion clearly erroneous for three reasons.

First, the appeals court suggested that Doe 2 failed to submit the data needed to process his application to Bossier's Willis-Knighton Health Center. 905 F. 3d, at 808. It is true that Doe 2 submitted no additional information in response to the last letter he received from Willis-Knighton. But the record explains that failure. Doe 2 reasonably believed there was no point in doing so. The hospital's letter explained that the data Doe 2 had already "submitted supports the outpatient [abortion] procedures you perform[ed]." App. 1435. But, the letter added, this data did "not support your request for hospital privileges" because it did not allow the hospital to "evaluate patient admissions and management, consultations, and procedures performed." *Ibid.* Doe 2 testified at trial that he understood this to mean that he would have to submit records of *hospital* admissions, even though he had not "done any in-hospital work in ten years." *Id.*, at 387; see *id.*, at 437 ("I've explained that that information doesn't exist"). Doe 2's understanding was consistent with Willis-Knighton's similar letter to Doe 1, which explicitly stated that "we require that you submit documentation of hospital admissions and management of patients . . . ."

Id., at 1436. The record also shows that Doe 2 could not have maintained the "adequate number of inpatient contacts" Willis-Knighton requires to support continued privileges. Record 9640; see App. 387–390, 404. JUSTICE ALITO faults Doe 2 for failing to pursue an application for "courtesy staff" privileges. See *post*, at 394. For one thing, it is far from clear that courtesy privileges entitle a physician to admit patients, as Act 620 requires. Compare, *e. g.*, Record 9640 with *id.*, at 9643. For another, that would not solve the problem that Doe 2 lacked the required in-hospital experience. JUSTICE ALITO wonders whether Willis-Knighton might have conferred courtesy privileges even without that experience. But the factors the hospital considers for both tiers of privileges are facially identical. *Id.*, at 9669. We have no license to reverse a trial court's factual findings based on speculative inferences from facts not in evidence.

Second, the Court of Appeals found Doe 2's explanation that Christus Schumpert Hospital "would not staff an abortion provider" to be "blatantly contradicted by the record." 905 F. 3d, at 808. The record, however, contains Christus' bylaws. They state that "[n]o activity prohibited by" the Ethical and Religious Directives to which the hospital subscribes "shall be engaged in by any Medical Staff appointee or other person exercising clinical privileges at the Health System." App. 1180. These directives provide that abortion "is never permitted." *Id.*, at 1205. And they warn against "the danger of scandal in any association with abortion providers." *Ibid.*

The State suggests that the Court of Appeals, in speaking of a "contradic[tion]," was referring to the fact that Doe 3 had admitting privileges at Christus, as had Doe 2 at an earlier time. Brief for Respondent 75. Doe 3 testified, however, that he did not know whether Christus was "aware that I was performing abortions" and that he did not "feel like testing the waters there"—*i. e.*, by "asking [Christus] how they would feel" if they were aware that he "was performing

abortions." App. 273. And nothing in the record suggests that Christus, 10 years earlier, was aware of Doe 2's connection with abortion. JUSTICE ALITO imagines a number of ways that Christus may have become aware of Doe 2's or Doe 3's abortion practice. See *post*, at 393–394, and n. 10 (dissenting opinion). The State apparently did not see fit to test these theories or probe the doctors' accounts on cross-examination, however. And the District Court's finding of good faith is plainly permissible on the record before us.

Finally, the Court of Appeals faulted Doe 2 for failing to apply to Minden Hospital. The record also explains that decision. Minden subjects all new appointees to "not less than" six months of "focused professional practice evaluation." Record 9281; see also *id.*, at 9252. That evaluation requires an assessment of the provider's in-hospital work. See *supra*, at 326–327. Doe 2 could not meet that requirement because, as we have said, Doe 2 does not do in-hospital work, and only two of his patients in the past five years have required hospitalization. App. 400. Moreover, Minden's bylaws express a preference for applicants whom "members of the current Active Staff of the Hospital" have recommended. *Id.*, at 1211. Doe 2 testified that Minden Hospital was "a smaller hospital," "very close to the [geographic] limits," where he "[did]n't really know anyone." *Id.*, at 454. He applied to those hospitals where he believed he had the highest likelihood of success. *Ibid.* Given this evidence, the Fifth Circuit was wrong to conclude that the District Court's findings in respect to Doe 2 were "clearly erroneous." See *Anderson*, 470 U. S., at 575.

Doe 5

The District Court found that Doe 5 was unable to obtain admitting privileges at three hospitals in range of his Baton Rouge clinic in spite of his good-faith efforts to satisfy each hospital's requirement that he find a covering physician. 250 F. Supp. 3d, at 76; see App. 1334–1335 (Women's Hospi-

tal); Record 2953 (Baton Rouge General), 10659–10661 (Lane Regional). The Court of Appeals disagreed. It thought that Doe 5's efforts reflected a "lackluster approach" because he asked only one doctor to cover him. 905 F. 3d, at 809.

The record shows, however, that Doe 5 asked the doctor most likely to respond affirmatively: the doctor with whom Doe 5's Baton Rouge clinic already had a patient transfer agreement. App. 1135. Yet Doe 5 testified that even this doctor was "too afraid to be my covering physician at the hospital" because, while the transfer agreement could apparently be "kept confidential," he feared that an agreement to serve as a covering physician would not remain a secret. *Id.*, at 1135–1136. And, if the matter became well known, the doctor whom Doe 5 asked worried that it could make him a target of threats and protests. *Ibid.*

Doe 5 was familiar with the problem. Anti-abortion protests had previously forced him to leave his position as a staff member of a hospital northeast of Baton Rouge. *Id.*, at 1137–1138, 1330. And activists had picketed the school attended by the children of a former colleague, who then stopped performing abortions as a result. Record 14036–14037.

With his own experience and their existing relationship in mind, Doe 5 could have reasonably thought that, if this doctor wouldn't serve as his covering physician, no one would. And it was well within the District Court's discretion to credit that reading of the record. Cf. *Cooper*, 581 U. S., at 293. Doe 5's testimony was internally consistent and consistent with what the District Court called the "mountain of un-contradicted and un-objected to evidence" in the record that supported its general finding "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician," including Doe 3's similar experience. 250 F. Supp. 3d, at 51, 49; see *id.*, at 51–53; App. 200–202.

The Court of Appeals did not address this general finding or the evidence the District Court relied on to support it, and neither do our dissenting colleagues. Cf. *post*, at 396–397 (opinion of ALITO, J.); *post*, at 420 (opinion of GORSUCH, J.). The Court of Appeals pointed to what it described as Doe 4's testimony that "finding a covering physician is not overly burdensome." 905 F. 3d, at 809. Doe 4's actual testimony was that he did not believe requiring doctors to obtain a covering physician was "an overburdensome requirement for admitting privileges." Record 14154. In context, that statement is most naturally read as saying that such a requirement was reasonable, not that it was easy to fulfill. In fact, Doe 4 testified that he had been unable to apply to two hospitals for admitting privileges because he could not find a covering physician. *Id.*, at 14154–14155. Moreover, Doe 4's statement referred to his efforts to obtain admitting privileges in New Orleans, not in Baton Rouge. *Ibid.* Doe 5 testified that he could more easily find a covering physician in New Orleans (where he did obtain privileges) because attitudes toward abortion there were less hostile than in Baton Rouge, so the doctors' testimony would be consistent even under the Fifth Circuit's view. App. 1335–1336. Once again, the appeals court's conclusion cannot be squared with the standard of review. Cf. *Anderson*, 470 U. S., at 575.

Doe 6

Finally, the District Court found that, notwithstanding his good-faith efforts, Doe 6 would not be able to obtain admitting privileges within 30 miles of the clinic in New Orleans where he worked. The Court of Appeals did not question Doe 6's decision not to apply to Tulane Hospital. Nor did it take issue with the District Court's finding that his application to East Jefferson Hospital had been denied *de facto* through no fault of his own. 250 F. Supp. 3d, at 77; App. 54. But the appeals court reversed the District Court's finding

on the ground that Doe 6 should have (but did not) apply for admitting privileges at seven other hospitals in New Orleans, including Touro Hospital, which had granted limited privileges to Doe 5. 905 F. 3d, at 809–810.

Doe 6 testified that he did not apply to other hospitals because he did not admit a sufficient number of patients to receive active admitting privileges. App. 1310. As we have explained, *supra*, at 326–327, Doe 6 provides only medication abortions involving no surgical intervention. See App. 1308. The *State's* own admitting-privileges expert, Dr. Robert Marier, testified that a doctor in Doe 6's position would "probably not" be able to obtain "active admitting and surgical privileges" at *any* hospital. *Id.*, at 884; see 250 F. Supp. 3d, at 44 (finding Dr. Marier "generally well qualified" to express an opinion on "the issue of admitting privileges and hospital credentialing").

The record contains the bylaws of four of the seven hospitals to which the Court of Appeals referred. All four directly support the testimony of Doe 6 and the State's expert. Three hospitals require doctors who receive admitting privileges to undergo a process of "focused professional practice evaluation." See Record 2635, 2637, 2681 (Touro Hospital), 9054 (New Orleans East Hospital), 10755 (East Jefferson Hospital). As we have explained, this evaluation requires hospital staff to observe a doctor with admitting privileges while he or she performs a certain number of procedures. See *supra*, at 326–327. If the doctor admits no patients (and Doe 6 has no patients requiring admission), there is nothing to observe. Another hospital requires physicians to admit a minimum number of patients, either initially or after receiving admitting privileges. Record 9150–9153 (West Jefferson Hospital). And one requires both. *Id.*, at 9040, 9069 (New Orleans East Hospital). The record apparently is silent as to the remaining three hospitals, but that silence cannot contradict the well-supported testimony of Doe 6 and the State's expert that Doe 6 would not receive admitting privileges

from any of them. Good faith does not require an exercise in futility.

We recognize that Doe 5 was able to secure limited admitting privileges at Touro Hospital, to which Doe 6 did not apply. But, unlike Doe 6, Doe 5 primarily performs surgical abortions. App. 1330. And while Doe 5 was a hospital-based physician as recently as 2012, Doe 6 has not held privileges at any hospital since 2005. *Id.*, at 1310, 1329. Doe 5's success therefore does not directly contradict the evidence that we have described in respect to Doe 6 or render the District Court's conclusion as to Doe 6 clearly erroneous. And, as we have said, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 581 U. S., at 293.

Without actually disputing any of the evidence we have discussed, JUSTICE ALITO maintains that the plaintiffs could have introduced still more evidence to support the District Court's determination. See *post*, at 396. As we have said, however, "the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road."'" *Anderson*, 470 U. S., at 575. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level"—let alone another nine in this Court—"is requiring too much." *Ibid.*

Other Doctors

Finally, JUSTICE ALITO and JUSTICE GORSUCH suggest that the District Court failed to account for the possibility that new abortion providers might eventually replace Does 1, 2, 3, 5, and 6. See *post*, at 387–388 (opinion of ALITO, J.); *post*, at 419–421 (opinion of GORSUCH, J.). But the Court of Appeals did not dispute, and the record supports, the District Court's additional finding that, for "the same reasons that Does 1, 2, 4, 5, and 6 have had difficulties getting active

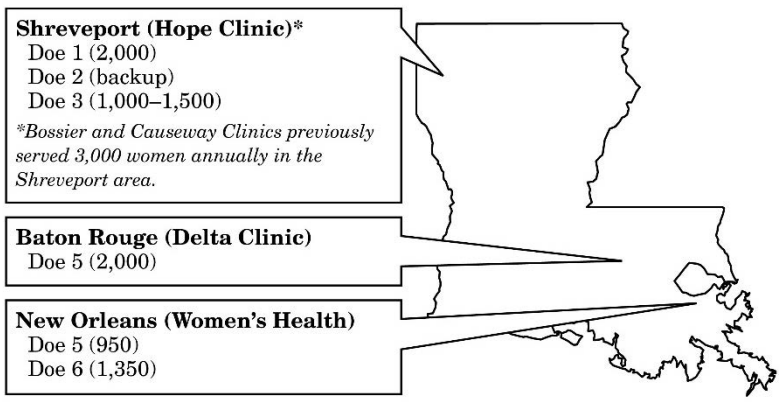
admitting privileges, reasons unrelated to their competence, . . . it is unlikely that the [a]ffected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges." 250 F. Supp. 3d, at 82.

B

Act 620's Impact on Abortion Access

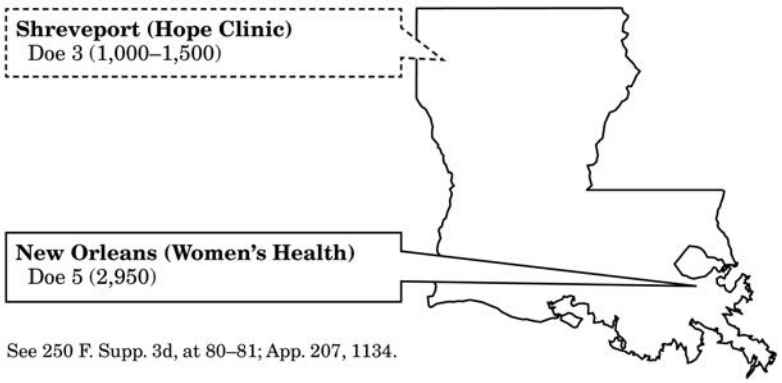
The District Court drew from the record evidence, including the factual findings we have just discussed, several conclusions in respect to the burden that Act 620 is likely to impose upon women's ability to access abortions in Louisiana. To better understand the significance of these conclusions, the reader should keep in mind the geographic distribution of the doctors and their clinics. Figure 1 shows the distribution of doctors and clinics at the time of the District Court's decision. Figure 2 shows the projected distribution if the admitting-privileges requirement were enforced, as found by the District Court. The figures in parentheses indicate the approximate number of abortions each physician performed annually, according to the District Court.

Figure 1 — Distribution of Abortion Clinics and Providers at the Time of the District Court's Decision



See 250 F. Supp. 3d, at 40–41; App. 1122, 1125, 1134, 1138, 1141, 1256.

Figure 2 — Projected Distribution of Abortion Clinics and Providers Following Enforcement of Act 620



1

As we have seen, enforcing the admitting-privileges requirement would eliminate Does 1, 2, and 6. The District Court credited Doe 3's uncontradicted, in-court testimony that he would stop performing abortions if he was the last provider in northern Louisiana. 250 F. Supp. 3d, at 79; see App. 263–265. So the departure of Does 1 and 2 would also eliminate Doe 3. That would leave only Doe 5. And Doe 5's inability to obtain privileges in the Baton Rouge area would leave Louisiana with just one clinic with one provider to serve the 10,000 women annually who seek abortions in the State. 250 F. Supp. 3d, at 80, 87–88; cf. *Whole Woman's Health*, 579 U. S., at 613–614.

Working full time in New Orleans, Doe 5 would be able to absorb no more than about 30% of the annual demand for abortions in Louisiana. App. 1134, 1331; see *id.*, at 1129. And because Doe 5 does not perform abortions beyond 18 weeks, women between 18 weeks and the state legal limit of 20 weeks would have little or no way to exercise their constitutional right to an abortion. *Id.*, at 1330–1331.

Those women not altogether prevented from obtaining an abortion would face other burdens. As in *Whole Woman's*

Health, the reduction in abortion providers caused by Act 620 would inevitably mean "longer waiting times, and increased crowding." 579 U. S., at 613. The District Court heard testimony that delays in obtaining an abortion increase the risk that a woman will experience complications from the procedure and may make it impossible for her to choose a noninvasive medication abortion. App. 220, 290, 312–313; see also *id.*, at 1139, 1305, 1313, 1316, 1323.

Even if they obtain an appointment at a clinic, women who might previously have gone to a clinic in Baton Rouge or Shreveport would face increased driving distances. New Orleans is nearly a five hour drive from Shreveport; it is over an hour from Baton Rouge; and Baton Rouge is more than four hours from Shreveport. The impact of those increases would be magnified by Louisiana's requirement that every woman undergo an ultrasound and receive mandatory counseling at least 24 hours before an abortion. La. Rev. Stat. Ann. § 40:1061.10(D). A Shreveport resident seeking an abortion who might previously have obtained care at one of that city's local clinics would either have to spend nearly 20 hours driving back and forth to Doe 5's clinic twice, or else find overnight lodging in New Orleans. As the District Court stated, both experts and laypersons testified that the burdens of this increased travel would fall disproportionately on poor women, who are least able to absorb them. App. 106–107, 178, 502–508, 543; see also *id.*, at 311–312.

2

We note that the Court of Appeals also faulted the District Court for factoring Doe 3's departure into its calculations. The appeals court thought that Doe 3's personal choice to stop practicing could not be attributed to Act 620. 905 F. 3d, at 810–811. That is beside the point. Even if we pretended as though (contrary to the record evidence) Doe 3 would continue to provide abortions at Shreveport-based Hope Clinic, the record nonetheless supports the District Court's alterna-

tive finding that Act 620's burdens would remain substantial. See 250 F. Supp. 3d, at 80–81, 84, 87.

The record tells us that Doe 3 is presently able to see roughly 1,000–1,500 women annually. *Id.*, at 81; see App. 207, 243–244. Doe 3 testified that this was in addition to "working very, very long hours maintaining [his] private [OB/GYN] practice." *Id.*, at 265, 1323; see *id.*, at 118, 1147. And, the District Court found that Doe 5 can perform no more than roughly 3,000 abortions annually. See *supra*, at 337. So even if Doe 3 remained active in Shreveport, the annual demand for abortions in Louisiana would be more than double the capacity. And although the availability of abortions in Shreveport might lessen the driving distances faced by some women, it would still leave thousands of Louisiana women with no practical means of obtaining a safe, legal abortion, and it would not meaningfully address the health risks associated with crowding and delay for those able to secure an appointment with one of the State's two remaining providers.

* * *

Taken together, we think that these findings and the evidence that underlies them are sufficient to support the District Court's conclusion that Act 620 would place substantial obstacles in the path of women seeking an abortion in Louisiana.

V

Benefits

We turn finally to the law's asserted benefits. The District Court found that there was "'no significant health-related problem that the new law helped to cure.'" 250 F. Supp. 3d, at 86 (quoting *Whole Woman's Health*, 579 U. S., at 610). It found that the admitting-privileges requirement "[d]oes [n]ot [p]rotect [w]omen's [h]ealth," provides "no significant health benefits," and makes no improvement to women's health "compared to prior law." 250 F. Supp. 3d,

at 86 (boldface deleted). Our examination of the record convinces us that these findings are not "clearly erroneous."

First, the District Court found that the admitting-privileges requirement serves no "relevant credentialing function." *Id.*, at 87 (quoting *Whole Woman's Health*, 579 U. S., at 613). As we have seen, hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions. And Act 620's requirement that physicians obtain privileges at a hospital within 30 miles of the place where they perform abortions further constrains providers for reasons that bear no relationship to competence.

Moreover, while "competency is a factor" in credentialing decisions, 250 F. Supp. 3d, at 46, hospitals primarily focus upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions. App. 877, 1373; see *id.*, at 907; Brief for Medical Staff Professionals as *Amici Curiae* 26; Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 12. Indeed, the State's admitting-privileges expert, Dr. Robert Marier, testified that, when he served as the Executive Director of Louisiana's Board of Medical Examiners, he concurred in the Board's position that a physician was competent to perform first-trimester surgical abortions and to "recognize and address complications from the procedure" so long as they had completed an accredited residency in obstetrics and gynecology or been trained in abortion procedures during another residency—irrespective of their affiliation with any hospital. App. 872–873, 1305; cf. *post*, at 381–382 (ALITO, J., dissenting). And nothing in the record indicates that the background vetting for admitting privileges adds significantly to the vetting that the State Board of Medical Examiners already provides. 250 F. Supp. 3d, at 87; App. 1355–1356, 1358–1359.

Second, the District Court found that the admitting-privileges requirement "does not conform to prevailing medi-

cal standards and will not improve the safety of abortion in Louisiana." 250 F. Supp. 3d, at 64; see *id.*, at 64–66. As in *Whole Woman's Health*, the expert and lay testimony presented at trial shows:

- "Complications from surgical abortion are relatively rare," and "[t]hey very rarely require transfer to a hospital or emergency room and are generally not serious." App. 287; see *id.*, at 129; cf. *Whole Woman's Health*, 579 U. S., at 610–611.
- For those patients who do experience complications at the clinic, the transfer agreement required by existing law is "sufficient to ensure continuity of care for patients in an emergency." App. 1050; see *id.*, at 194, 330–332, 1059.
- The "standard protocol" when a patient experiences a complication after returning home from the clinic is to send her "to the hospital that is nearest and able to provide the service that the patient needs," which is not necessarily a hospital within 30 miles of the clinic. *Id.*, at 351; see *id.*, at 115–116, 180, 793; La. Rev. Stat. Ann. § 40:1061.10(A)(2)(b)(ii) (requiring abortion providers to furnish patients with the name and telephone number of the hospital nearest to their home); cf. *Whole Woman's Health*, 579 U. S., at 611.

As in *Whole Woman's Health*, the State introduced no evidence "showing that patients have better outcomes when their physicians have admitting privileges" or "of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment." 250 F. Supp. 3d, at 64; *Whole Woman's Health*, 579 U. S., at 611–612; see also Centers for Medicare and Medicaid Services, 84 Fed. Reg. 51790–51791 (2019) ("Under modern procedures, emergency responders (and patients themselves) take patients to hospital emergency rooms without regard to prior agreements between particular physicians and particu-

lar hospitals"); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6 (local admitting-privileges requirements for abortion providers offer no medical benefit and do not meaningfully advance continuity of care).

VI

Conclusion

We conclude, in light of the record, that the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support. None is "clearly erroneous." Given the facts found, we must also uphold the District Court's related factual and legal determinations. These include its determination that Louisiana's law poses a "substantial obstacle" to women seeking an abortion; its determination that the law offers no significant health-related benefits; and its determination that the law consequently imposes an "undue burden" on a woman's constitutional right to choose to have an abortion. We also agree with its ultimate legal conclusion that, in light of these findings and our precedents, Act 620 violates the Constitution.

VII

As a postscript, we explain why we have found unconvincing several further arguments that the State has made. First, the State suggests that the record supports the Court of Appeals' conclusion that Act 620 poses no substantial obstacle to the abortion decision. See Brief for Respondent 73, 80. This argument misconceives the question before us. "The question we must answer" is "not whether the [Fifth] Circuit's interpretation of the facts was clearly erroneous, but whether the *District Court's* finding[s were] clearly erroneous." *Anderson*, 470 U. S., at 577 (emphasis added). As we have explained, we think the District Court's factual findings here are plausible in light of the record as a whole.

Nothing in the State's briefing furnishes a basis to disturb that conclusion.

Second, the State says that the record does not show that Act 620 will burden *every* woman in Louisiana who seeks an abortion. Brief for Respondent 69–70 (citing *United States* v. *Salerno*, 481 U. S. 739, 745 (1987)). True, but beside the point. As we stated in *Casey*, a State's abortion-related law is unconstitutional on its face if "it will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases in which [it] is relevant." 505 U. S., at 895 (majority opinion). In *Whole Woman's Health*, we reaffirmed that standard. We made clear that the phrase refers to a large fraction of "those women for whom the provision is an actual rather than an irrelevant restriction." 579 U. S., at 626 (quoting *Casey*, 505 U. S., at 895; brackets omitted). That standard, not an "every woman" standard, is the standard that must govern in this case.

Third, the State argues that Act 620 would not make it "nearly impossible" for a woman to obtain an abortion. Brief for Respondent 71–72. But, again, the words "nearly impossible" do not describe the legal standard that governs here. Since *Casey*, we have repeatedly reiterated that the plaintiff 's burden in a challenge to an abortion regulation is to show that the regulation's "purpose or effect" is to "plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U. S., at 877 (plurality opinion); see *Whole Woman's Health*, 579 U. S., at 595–596; *Gonzales*, 550 U. S., at 156; *Stenberg*, 530 U. S., at 921; *Mazurek*, 520 U. S., at 971.

Finally, the State makes several arguments about the standard of review that it would have us apply in cases where a regulation is found *not* to impose a substantial obstacle to a woman's choice. Brief for Respondent 60–66. That, however, is not this case. The record here establishes

that Act 620's admitting-privileges requirement places a substantial obstacle in the path of a large fraction of those women seeking an abortion for whom it is a relevant restriction.

* * *

This case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion. Act 620 is unconstitutional. The Court of Appeals' judgment is erroneous. It is

Reversed.

CHIEF JUSTICE ROBERTS, concurring in judgment.

In July 2013, Texas enacted a law requiring a physician performing an abortion to have "active admitting privileges at a hospital . . . located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A) (West Cum. Supp. 2019). The law caused the number of facilities providing abortions to drop in half. In *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016), the Court concluded that Texas's admitting privileges requirement "places a substantial obstacle in the path of women seeking a previability abortion" and therefore violated the Due Process Clause of the Fourteenth Amendment. *Id.*, at 591 (citing *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 878 (1992) (plurality opinion)).

I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case. See *Moore* v. *Texas*, 586 U. S. 133, 143 (2019) (ROBERTS, C. J., concurring).

Today's case is a challenge from several abortion clinics and providers to a Louisiana law nearly identical to the Texas law struck down four years ago in *Whole Woman's Health*. Just like the Texas law, the Louisiana law requires

physicians performing abortions to have "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (West Cum. Supp. 2020). Following a six-day bench trial, the District Court found that Louisiana's law would "result in a drastic reduction in the number and geographic distribution of abortion providers." *June Medical Services LLC* v. *Kliebert*, 250 F. Supp. 3d 27, 87 (MD La. 2017). The law would reduce the number of clinics from three to "one, or at most two," and the number of physicians providing abortions from five to "one, or at most two," and "therefore cripple women's ability to have an abortion in Louisiana." *Id.*, at 87–88.

The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

I

Stare decisis ("to stand by things decided") is the legal term for fidelity to precedent. Black's Law Dictionary 1696 (11th ed. 2019). It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason . . . in each man is small, . . . individuals would do better to avail themselves of the general bank and capital of nations and of ages." 3 E. Burke, Reflections on the Revolution in France 110 (1790).

Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944).

The doctrine also brings pragmatic benefits. Respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). In that way, "*stare decisis* is an old friend of the common lawyer." Jackson, *supra*, at 334.

Stare decisis is not an "inexorable command." *Ramos* v. *Louisiana*, 590 U. S. 83, 105 (2020) (internal quotation marks omitted). But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018).

Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following" the recent departure. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 231 (1995) (plurality opinion). *Stare decisis* is pragmatic and contextual, not "a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

II

A

Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana's law. Brief for Petitioners in No. 18–1323, pp. 45–47; Brief for Respondent in No. 18–1323, pp. 60–62. Neither party has asked us to reassess the constitutional validity of that standard.

Casey reaffirmed "the most central principle of *Roe* v. *Wade*," a "woman's right to terminate her pregnancy before viability." *Casey*, 505 U. S., at 871 (plurality opinion).[1] At the same time, it recognized that the State has "important and legitimate interests in . . . protecting the health of the pregnant woman and in protecting the potentiality of human life." *Id.*, at 875–876 (internal quotation marks and brackets omitted).

To serve the former interest, the State may, "[a]s with any medical procedure," enact "regulations to further the health or safety of a woman seeking an abortion." *Id.*, at 878. To serve the latter interest, the State may, among other things, "enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.*, at 872. The State's freedom to enact such rules is "consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn." *Id.*, at 873.

Under *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion. "A finding of an undue burden is a shorthand for the conclusion that a

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[1] Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks* v. *United States*, 430 U. S. 188, 193 (1977), as the narrowest position supporting the judgment.

state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877. Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are "reasonably related" to a legitimate state interest. *Id.*, at 878.

After faithfully reciting this standard, the Court in *Whole Woman's Health* added the following observation: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at 607. The plurality repeats today that the undue burden standard requires courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Ante*, at 306–307 (internal quotation marks omitted).

Read in isolation from *Casey*, such an inquiry could invite a grand "balancing test in which unweighted factors mysteriously are weighed." *Marrs* v. *Motorola, Inc.*, 577 F. 3d 783, 788 (CA7 2009). Under such tests, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. *Casey*, 505 U. S., at 851 (opinion of the Court); *id.*, at 871 (plurality opinion) (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy,"

Bendix Autolite Corp. v. *Midwesco Enterprises, Inc.*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment). Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part).

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent with *Casey*." *Gonzales* v. *Carhart*, 550 U. S. 124, 163 (2007). *Casey* instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. See, *e. g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 694–695 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under the Religious Freedom Restoration Act); *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 748 (2011) (asking whether a law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); *Murphy* v. *United Parcel Service, Inc.*, 527 U. S. 516, 521 (1999) (asking, in the context of the Americans with Disabilities Act, whether an individual's impairment "substantially limits one or more major life activities" (internal quotation marks omitted)).

Casey's analysis of the various restrictions that were at issue in that case is illustrative. For example, the opinion recognized that Pennsylvania's 24-hour waiting period for abortions "has the effect of increasing the cost and risk of delay of abortions," but observed that the District Court did not find that the "increased costs and potential delays amount to substantial obstacles." 505 U. S., at 886 (joint

opinion of O'Connor, Kennedy, and Souter, JJ.) (internal quotation marks omitted). The opinion concluded that "given the statute's definition of medical emergency," the waiting period did not "impose[ ] a real health risk." *Ibid.* Because the law did not impose a substantial obstacle, *Casey* upheld it. And it did so notwithstanding the District Court's finding that the law did "not further the state interest in maternal health." *Ibid.* (internal quotation marks omitted).

Turning to the State's various recordkeeping and reporting requirements, *Casey* found those requirements do not "impose a substantial obstacle to a woman's choice" because "[a]t most they might increase the cost of some abortions by a slight amount." *Id.*, at 901. "While at some point increased cost could become a substantial obstacle," there was "no such showing on the record" before the Court. *Ibid.* The Court did not weigh this cost against the benefits of the law.

The same was true for Pennsylvania's parental consent requirement. *Casey* held that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.*, at 899 (citing, among other cases, *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 510–519 (1990)). *Casey* relied on precedent establishing that judicial bypass procedures "prevent another person from having an absolute veto power over a minor's decision to have an abortion." *Akron*, 497 U. S., at 510. Without a judicial bypass, parental consent laws impose a substantial obstacle to a minor's ability to obtain an abortion and therefore constitute an undue burden. See *Casey*, 505 U. S., at 899 (joint opinion).

The opinion similarly looked to whether there was a substantial burden, not whether benefits outweighed burdens, in analyzing Pennsylvania's requirement that physicians provide certain "truthful, nonmisleading information" about the nature of the abortion procedure. *Id.*, at 882. The opinion

concluded that the requirement "cannot be considered a substantial obstacle to obtaining an abortion, and, *it follows*, there is no undue burden." *Id.*, at 883 (emphasis added).

With regard to the State's requirement that a physician, as opposed to a qualified assistant, provide the woman this information, the opinion reasoned: "*Since* there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden." *Id.*, at 884–885 (emphasis added). This was so "even if an objective assessment might suggest that those same tasks could be performed by others," meaning the law had little if any benefit. *Id.*, at 885.

The only restriction *Casey* found unconstitutional was Pennsylvania's spousal notification requirement. On that score, the Court recited a bevy of social science evidence demonstrating that "millions of women in this country . . . may have justifiable fears of physical abuse" or "devastating forms of psychological abuse from their husbands." *Id.*, at 893 (opinion of the Court). In addition to "physical violence" and "child abuse," women justifiably feared "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Ibid.* The spousal notification requirement was "thus likely to prevent a significant number of women from obtaining an abortion." *Ibid.* It did not "merely make abortions a little more difficult or expensive to obtain; for many women, it [imposed] a substantial obstacle." *Id.*, at 893–894. The Court emphasized that it would not "blind [itself] to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.*, at 894.

The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.

To be sure, the Court at times discussed the benefits of the regulations, including when it distinguished spousal notification from parental consent. See *Whole Woman's Health*, 579 U. S., at 607–608 (citing *Casey*, 505 U. S., at 887–898 (opinion of the Court)); *id.*, at 899–901 (joint opinion). But in the context of *Casey*'s governing standard, these benefits were not placed on a scale opposite the law's burdens. Rather, *Casey* discussed benefits in considering the threshold requirement that the State have a "legitimate purpose" and that the law be "reasonably related to that goal." *Id.*, at 878 (plurality opinion); *id.*, at 882 (joint opinion).

So long as that showing is made, the only question for a court is whether a law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877 (plurality opinion). *Casey* repeats that "substantial obstacle" standard nearly verbatim no less than 15 times. *Id.*, at 846, 894, 895 (opinion of the Court); *id.*, at 877, 878 (plurality opinion); *id.*, at 883, 884, 885, 886, 887, 901 (joint opinion).[2]

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[2] JUSTICE GORSUCH correctly notes that *Casey* "expressly disavowed any test as strict as strict scrutiny." *Post*, at 428 (dissenting opinion). But he certainly is wrong to suggest that my position is in any way inconsistent with that disavowal. Applying strict scrutiny would require "*any* regulation touching upon the abortion decision" to be the least restrictive means to further a compelling state interest. *Casey*, 505 U. S., at 871 (plurality opinion) (emphasis added). *Casey* however recognized that such a test would give "too little acknowledgment and implementation" to the State's "legitimate interests in the health of the woman and in protecting the potential life within her." *Ibid.* Under *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being "reasonably related" to a "legitimate purpose." *Id.*, at 878; *id.*, at 882 (joint opinion).

The only place a balancing test appears in *Casey* is in Justice Stevens's partial dissent. "Weighing the State's interest in potential life and the woman's liberty interest," Justice Stevens would have gone further than the plurality to strike down portions of the State's informed consent requirements and 24-hour waiting period. *Id.*, at 916–920 (opinion concurring in part and dissenting in part). But that approach did not win the day.

Mazurek v. *Armstrong* places this understanding of *Casey*'s undue burden standard beyond doubt. 520 U. S. 968 (1997) (*per curiam*). *Mazurek* involved a challenge to a Montana law restricting the performance of abortions to licensed physicians. 520 U. S., at 969. It was "uncontested that there was insufficient evidence of a 'substantial obstacle' to abortion." *Id.*, at 972. Therefore, once the Court found that the Montana Legislature had not acted with an "unlawful motive," the Court's work was complete. *Ibid.* In fact, the Court found the challengers' argument—that the law was invalid because "all health evidence contradicts the [State's] claim that there is any health basis for the law"—to be "*squarely foreclosed* by *Casey* itself." *Id.*, at 973 (internal quotation marks omitted; emphasis added).

We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*. The opinion in *Whole Woman's Health* began by saying, "We must here decide whether two provisions of [the Texas law] violate the Federal Constitution as interpreted in *Casey*." 579 U. S., at 590. Nothing more. The Court explicitly stated that it was applying "the standard, as described in *Casey*," and reversed the Court of Appeals for applying an approach that did "not match the standard that this Court laid out in *Casey*." *Id.*, at 607, 608.

Here the plurality expressly acknowledges that we are not considering how to analyze an abortion regulation that does not present a substantial obstacle. "That," the plurality explains, "is not this case." *Ante*, at 343. In this case, *Casey*'s

requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*. In neither case, nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration. Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.

B

Whole Woman's Health held that Texas's admitting privileges requirement placed "a substantial obstacle in the path of women seeking a previability abortion," independent of its discussion of benefits. 579 U. S., at 591 (citing *Casey*, 505 U. S., at 878 (plurality opinion)).[3] Because Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent.[4]

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[3] JUSTICE GORSUCH considers this is a "nonexistent ruling" nowhere to be found in *Whole Woman's Health*. *Post*, at 427 (dissenting opinion). I disagree. *Whole Woman's Health* first surveyed the benefits of Texas's admitting privileges requirement. 579 U. S., at 610–611. The Court then transitioned to examining the law's burdens: "*At the same time*, the record evidence indicates that the admitting-privileges requirement places a substantial obstacle in the path of a woman's choice." *Id.*, at 612 (internal quotation marks omitted; emphasis added). And the Court made clear that a law which has the purpose or effect of placing "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" imposes an "undue burden" and therefore violates the Constitution. *Id.*, at 589–590 (internal quotation marks omitted; emphasis deleted). Thus the discussion of benefits in *Whole Woman's Health* was not necessary to its holding.

[4] For the reasons the plurality explains, *ante*, at 316–320, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.

To begin, the two laws are nearly identical. Prior to enactment of the Texas law, abortion providers were required either to possess local hospital admitting privileges or to have a transfer agreement with a physician who had such privileges. Tex. Admin. Code, tit. 25, § 139.56(a) (2009). The new law, adopted in 2013, eliminated the option of having a transfer agreement. Providers were required to "[h]ave active admitting privileges at a hospital . . . located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A).

Likewise, Louisiana law previously required abortion providers to have either admitting privileges or a transfer agreement. La. Admin. Code, tit. 48, pt. I, § 4407(A)(3) (2003), 29 La. Reg. 706–707 (2003). In 2014, Louisiana removed the option of having a transfer agreement. Just like Texas, Louisiana now requires abortion providers to "[h]ave active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a).

Crucially, the District Court findings indicate that Louisiana's law would restrict access to abortion in just the same way as Texas's law, to the same degree or worse. In Texas, "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20." *Whole Woman's Health*, 579 U. S., at 612. Eight abortion clinics closed in the months prior to the law's effective date. *Ibid.* Another 11 clinics closed on the day the law took effect. *Ibid.*

Similarly, the District Court found that the Louisiana law would "result in a drastic reduction in the number and geographic distribution of abortion providers." 250 F. Supp. 3d, at 87. At the time of the District Court's decision, there were three clinics and five physicians performing abortions in Louisiana. *Id.*, at 40, 41. The District Court found that the new law would reduce "the number of clinics to one, or at most two," and the number of physicians in Louisiana to

"one, or at most two," as well. *Id.*, at 87. Even in the best case, "the demand for services would vastly exceed the supply." *Ibid.*

Whole Woman's Health found that the closures of the abortion clinics led to "fewer doctors, longer waiting times, and increased crowding." 579 U. S., at 613. The Court also found that "the number of women of reproductive age living in a county more than 150 miles from a provider increased from approximately 86,000 to 400,000 and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." *Id.*, at 614 (internal quotation marks and alterations omitted).

The District Court here likewise found that the Louisiana law would result in "longer waiting times for appointments, increased crowding and increased associated health risk." 250 F. Supp. 3d, at 81. The court found that Louisiana women already "have difficulty affording or arranging for transportation and childcare on the days of their clinic visits" and that "[i]ncreased travel distance" would exacerbate this difficulty. *Id.*, at 83. The law would prove "particularly burdensome for women living in northern Louisiana . . . who once could access a clinic in their own area [and] will now have to travel approximately 320 miles to New Orleans." *Ibid.*

In Texas, "common prerequisites to obtaining admitting privileges that [had] nothing to do with ability to perform medical procedures," including "clinical data requirements, residency requirements, and other discretionary factors," made it difficult for well-credentialed abortion physicians to obtain such privileges. *Whole Woman's Health*, 579 U. S., at 613. In particular, the Court found that "hospitals often condition[ed] admitting privileges on reaching a certain number of admissions per year." *Id.*, at 612 (internal quotation marks omitted). But because complications requiring hospitalization are relatively rare, abortion providers were "unlikely to have any patients to admit" and thus were "unable

to maintain admitting privileges or obtain those privileges for the future." *Id.*, at 613.

So too here. "While a physician's competency is a factor in assessing an applicant for admitting privileges" in Louisiana, "it is only one factor that hospitals consider in whether to grant privileges." 250 F. Supp. 3d, at 46. Louisiana hospitals "may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," including "the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, the needs of the hospital, the mission of the hospital, or the business model of the hospital." *Ibid.*[5]

And the District Court found that, as in Texas, Louisiana "hospitals often grant admitting privileges to a physician because the physician plans to provide services in the hospital" and that "[i]n general, hospital admitting privileges are not provided to physicians who never intend to provide services in a hospital." *Id.*, at 49. But "[b]ecause, by all accounts, abortion complications are rare, an abortion provider is unlikely to have a consistent need to admit patients." *Id.*, at 50 (citations omitted).[6]

Importantly, the District Court found that "since the passage of [the Louisiana law], all five remaining doctors have attempted *in good faith* to comply" with the law by applying

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[5] JUSTICE ALITO misunderstands my discussion of credentials as focusing on the law's lack of benefits. See *post*, at 380 (dissenting opinion). But my analysis, like *Casey*, is limited to the law's effect on the availability of abortion.

[6] I agree with JUSTICE ALITO that the validity of admitting privileges laws "depend[s] on numerous factors that may differ from State to State." *Post*, at 385 (dissenting opinion). And I agree with JUSTICE GORSUCH that "[w]hen it comes to the factual record, litigants normally start the case on a clean slate." *Post,* at 422 (dissenting opinion). Appreciating that others may in good faith disagree, however, I cannot view the record here as in any pertinent respect sufficiently different from that in *Whole Woman's Health* to warrant a different outcome.

for admitting privileges, yet have had very little success. *Id.*, at 77–78 (emphasis added). This finding was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to the new law rather than a half-hearted attempt to obtain privileges. Only then could the District Court accurately identify the Louisiana law's burden on abortion access.

The question is not whether we would reach the same findings from the same record. These District Court findings "entail[ed] primarily . . . factual work" and therefore are "review[ed] only for clear error." *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 394, 396 (2018). Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts. "While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living." *Taglieri* v. *Monasky*, 907 F. 3d 404, 408 (CA6 2018) (en banc).

We accordingly will not disturb the factual conclusions of the trial court unless we are "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. *Ante*, at 323–339. The District Court findings therefore bind us in this case.

* * *

Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

JUSTICE THOMAS, dissenting.

Today a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction. As is often the case with legal challenges to abortion regulations, this suit was brought by abortionists and abortion clinics. Their sole claim before this Court is that Louisiana's law violates the purported substantive due process right of a woman to abort her unborn child. But they concede that this right does not belong to them, and they seek to vindicate no private rights of their own. Under a proper understanding of Article III, these plaintiffs lack standing to invoke our jurisdiction.

Despite the fact that we granted Louisiana's petition specifically to address whether "abortion providers [can] be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients," Conditional Cross-Pet. in No. 18–1460, p. i, a majority of the Court all but ignores the question. The plurality and THE CHIEF JUSTICE ultimately cast aside this jurisdictional barrier to conclude that Louisiana's law is unconstitutional under our precedents. But those decisions created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled. Because we have neither jurisdiction nor constitutional authority to declare Louisiana's duly enacted law unconstitutional, I respectfully dissent.

I

For most of its history, this Court maintained that private parties could not bring suit to vindicate the constitutional rights of individuals who are not before the Court. *Kowalski* v. *Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring) (citing *Clark* v. *Kansas City*, 176 U. S. 114, 118 (1900)). But in the 20th century, the Court began to deviate from this traditional rule against third-party standing. See *Truax* v. *Raich*, 239 U. S. 33, 38–39 (1915); *Pierce* v. *Society of Sis-*

ters, 268 U. S. 510, 535–536 (1925). From these deviations emerged our prudential third-party standing doctrine, which allows litigants to vicariously assert the constitutional rights of others when "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski*, *supra*, at 130 (quoting *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991)).[1]

The plurality feints toward this doctrine, claiming that third-party standing for abortionists is well settled by our precedents. But, ultimately, it dodges the question, claiming that Louisiana's standing challenge was waived below. Both assertions are erroneous. First, there is no controlling precedent that sets forth the blanket rule advocated for by plaintiffs here—*i. e.*, abortionists may challenge health and safety regulations based solely on their role in the abortion process. Second, I agree with JUSTICE ALITO that Louisi-

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[1] In practice, this doctrine's application has been unconvincing and unpredictable, which has long caused me to question its legitimacy. See, *e. g.*, *United States* v. *Sineneng-Smith*, 590 U. S. 371, 388–390 (2020) (THOMAS, J., concurring); *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 629–633 (2016) (THOMAS, J., dissenting); *Kowalski*, 543 U. S., at 135 (THOMAS, J., concurring). For example, the Court has held that attorneys cannot bring suit to vindicate the Sixth Amendment rights of their potential clients due to the lack of a current close relationship, *id.*, at 130–131, but the Court permits defendants to seek relief based on the Fourteenth Amendment equal protection rights of potential jurors whom they have never met, *Powers*, 499 U. S., at 410–416; *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994). And today, the plurality reaffirms our precedent allowing beer vendors to assert the Fourteenth Amendment rights of their potential customers. *Ante*, at 319 (citing *Craig* v. *Boren*, 429 U. S. 190, 192 (1976)). But it is fair to wonder whether gun vendors could expect to receive the same privilege if they seek to vindicate the Second Amendment rights of their customers. Given this Court's ad hoc approach to third-party standing and its tendency to treat the Second Amendment as a second-class right, their time would be better spent waiting for Godot.

ana did not waive its standing challenge below. *Post*, at 400–401 (dissenting opinion).

But even if there were a waiver, it would not be relevant. Louisiana argues that the abortionists and abortion clinics lack standing under Article III to assert the putative rights of their potential clients. No waiver, however explicit, could relieve us of our independent obligation to ensure that we have jurisdiction before addressing the merits of a case. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 341 (2006). And under a proper understanding of Article III's case-or-controversy requirement, plaintiffs lack standing to invoke our jurisdiction because they assert no private rights of their own, seeking only to vindicate the putative constitutional rights of individuals not before the Court.

A

The Court has previously asserted that the traditional rule against third-party standing is "not constitutionally mandated, but rather stem[s] from a salutary 'rule of self-restraint'" motivated by "prudential" concerns. *Craig* v. *Boren*, 429 U. S. 190, 193 (1976) (quoting *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953)). The plurality repeats this well-rehearsed claim, accepting its validity without question. See *ante*, at 316–317. But support for this assertion is shallow, to say the least, and it is inconsistent with our more recent standing precedents.

As an initial matter, this Court has never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential. Many cases reciting this claim rely on the Court's decision in *Barrows*, which stated that the rule against third-party standing is a "rule of self-restraint" "[a]part from the jurisdictional requirement" of Article III, 346 U. S., at 255. But *Barrows* provides no reasoning to support that distinction and even admits that the rule against third-party standing is "not al-

ways clearly distinguished from the constitutional limitation[s]" on standing. *Ibid.* The sole authority *Barrows* cites in support of the rule's "prudential" label is a single-Justice concurrence in *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (opinion of Brandeis, J.).

Justice Brandeis' concurrence, however, raises more questions than it answers. The opinion does not directly reference third-party standing. It only obliquely refers to the concept by invoking the broader requirement that a plaintiff must "show that he is injured by [the law's] operation." *Id.*, at 347. Justice Brandeis claims that this requirement was adopted by the Court "for its own governance in the cases confessedly within its jurisdiction." *Id.*, at 346. But most of the cases he cites frame the matter in terms of the Court's jurisdiction and authority; none of them invoke prudential justifications. See, *e. g.*, *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 407–410 (1900); *Hendrick* v. *Maryland*, 235 U. S. 610, 621 (1915); *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923). Thus, the "prudential" label for the rule against third-party standing remains a bit of a mystery.

It is especially puzzling that a majority of the Court insists on continuing to treat the rule against third-party standing as prudential when our recent decision in *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118 (2014), questioned the validity of our prudential standing doctrine more generally. In that case, we acknowledged that requiring a litigant who has Article III standing to also demonstrate "prudential standing" is inconsistent "with our recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."'" *Id.*, at 125–126 (quoting *Sprint Communications, Inc.* v. *Jacobs*, 571 U. S. 69, 77 (2013)). The Court therefore suggested that the "prudential" label for these doctrines was "inapt." *Lexmark*, 572 U. S., at 127, n. 3. As an example, it noted that the Court previously considered the rule against generalized grievances to be "pru-

dential" but now recognizes that rule to be a part of Article III's case-or-controversy requirement. *Ibid.* The Court specifically questioned the prudential label for the rule against third-party standing, but because *Lexmark* did not involve any questions of third-party standing, the Court stated that "consideration of that doctrine's proper place in the standing firmament [could] await another day." *Id.*, at 128, n. 3.

The Court's previous statements on the rule against third-party standing have long suggested that the "proper place" for that rule is in Article III's case-or-controversy requirement. The Court has acknowledged that the traditional rule against third-party standing is "closely related to Art[icle] III concerns." *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975). It has repeatedly noted that the rule "is not completely separable from Art[icle] III's requirement that a plaintiff have a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy." *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955, n. 5 (1984) (internal quotation marks omitted); see also *Barrows*, *supra*, at 255 (the rule against third-party standing is "not always clearly distinguished from the constitutional limitation[s]" on standing). Moreover, the Court has even expressly stated that the rule against third-party standing is "grounded in Art[icle] III limits on the jurisdiction of federal courts to actual cases and controversies." *New York* v. *Ferber*, 458 U. S. 747, 767, n. 20 (1982).

And most recently, in *Spokeo, Inc.* v. *Robins*, 578 U. S. 330 (2016), the Court appeared to incorporate the rule against third-party standing into its understanding of Article III's injury-in-fact requirement. There, the Court stated that to establish an injury-in-fact a plaintiff must "show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.*, at 339 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). The Court

further explained that whether a plaintiff "alleges that [the defendant] violated *his* statutory rights" rather than "the statutory rights of other people " was a question of "particularization" for an Article III injury. 578 U. S., at 340 (internal quotation marks omitted). It is hard to reconcile this language in *Spokeo* with the plurality's assertion that third-party standing is permitted under Article III.

B

A brief historical examination of Article III's case-or-controversy requirement confirms what our recent decisions suggest: The rule against third-party standing is constitutional, not prudential. The judicial power is limited to "'"cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."'" *Id.*, at 343 (THOMAS, J., concurring) (quoting *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 774 (2000)); see also *Muskrat* v. *United States*, 219 U. S. 346, 356–357 (1911). Thus, to ascertain the scope of Article III's case-or-controversy requirement, "we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.'" *Spokeo*, *supra*, at 344 (THOMAS, J., concurring) (quoting *Honig* v. *Doe*, 484 U. S. 305, 340 (1988) (Scalia, J., dissenting)). "One focus" of these traditional limitations was "on the particular parties before the court, and whether the rights that they [were] invoking [were] really theirs to control." Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 732 (2004). An examination of these limitations reveals that a plaintiff could not establish a case or controversy by asserting the constitutional rights of others.

The limitations imposed on suits at common law varied based on the type of right the plaintiff sought to vindicate. *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring). The rights adjudicated by common-law courts generally fell into

one of two categories: public or private. Public rights are those "owed 'to the whole community . . . in its social aggregate capacity.'" *Id.*, at 345 (quoting 4 W. Blackstone, Commentaries *5). Private rights, on the other hand, are those "'belonging to individuals, considered as individuals.'" *Spokeo*, *supra*, at 344 (THOMAS, J., concurring) (quoting 3 Blackstone, Commentaries *2).

When a plaintiff sought to vindicate a private right, "courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Spokeo*, *supra*, at 344 (THOMAS, J., concurring). But a plaintiff generally "need[ed] to have a private interest of his or her own to litigate; otherwise, no sufficient interest [was] at stake on the plaintiff's side, and the clash of interests necessary for a 'Case' or 'Controversy' [did] not exist." Woolhandler & Nelson, *supra*, at 723. Thus, 19th-century judges uniformly refused to "listen to an objection made to the constitutionality of an act by a party whose rights" were not at issue. *Clark*, 176 U. S., at 118 (internal quotation marks omitted); see also, *e. g.*, *Tyler*, 179 U. S., at 406–407; *Supervisors* v. *Stanley*, 105 U. S. 305, 311 (1882); *United States* v. *Ferreira*, 13 How. 40, 51–52 (1852); *Owings* v. *Norwood's Lessee*, 5 Cranch 344, 348 (1809) (Marshall, C. J.); *In re Wellington*, 33 Mass. 87, 96 (1834) (Shaw, C. J.).[2]

Moreover, it was not enough for a plaintiff to allege *damnum*—*i. e.*, real-world damages or practical injury—if the

[2] Common-law courts' recognition of prochein ami or "next friend" standing is not inconsistent with this point. In those cases, the third party was "no party to the suit in the technical sense" but rather served as "an officer of the court" and was legally "appointed by [the court] to look after the interests of [the party lacking legal capacity]," who remained the real party in interest on "whom the judgment in the action [was] consequently binding." *Blumenthal* v. *Craig*, 81 F. 320, 321–322 (CA3 1897) (internal quotation marks omitted). In contrast, the real parties in interest here—women seeking abortions in Louisiana—cannot be bound by a judgment against abortionists and abortion clinics.

law he was challenging did not violate a legally protected interest of his own. At common law, this sort of "factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief." Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 280–281 (2008). As Justice Dodderidge explained in 1625, "injuria & damnum are the two grounds for the having [of] all actions, and without [both of] these, no action lieth." *Cable* v. *Rogers*, 3 Bulst. 311, 312, 81 Eng. Rep. 259. In the 18th century, many common-law courts ceased requiring *damnum* in suits alleging violations of private rights. See, *e. g.*, *Ashby* v. *White*, 2 Raym. Ld. 938, 92 Eng. Rep. 126, 137 (K. B.) (Holt, C. J.), aff'd, 3 Raym. Ld. 320, 92 Eng. Rep. 710, 712 (H. L. 1703); see also *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507 (No. 17,322) (CC Me. 1838) (Story, J.). But they continued to require legal injury, adhering to the "obvious" and "ancient maxim" that one's real-world damages alone cannot "lay the foundation of an action." *Parker* v. *Griswold*, 17 Conn. 288, 302–303 (1846). Thus, a plaintiff had to assert "[a]n injury, [which,] legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right." *Id.*, at 302.

This brief historical review demonstrates that third-party standing is inconsistent with the case-or-controversy requirement of Article III. When a private plaintiff seeks to vindicate someone else's legal injury, he has no private right of his own genuinely at stake in the litigation. Even if the plaintiff has suffered damages as a result of another's legal injury, he has no standing to challenge a law that does not violate his own private rights.

C

Applying these principles to the case at hand, plaintiffs lack standing under Article III and we, in turn, lack jurisdiction to decide these cases. Thus, "[i]n light of th[e] 'overriding and time-honored concern about keeping the Judiciary's

power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to "settle" it for the sake of convenience and efficiency.'" *Hollingsworth* v. *Perry*, 570 U. S. 693, 704–705 (2013) (ROBERTS, C. J., for the Court) (quoting *Raines* v. *Byrd*, 521 U. S. 811, 820 (1997)).

1

Contrary to the plurality's assertion otherwise, *ante*, at 320, abortionists' standing to assert the putative rights of their clients has not been settled by our precedents. It is true that this Court has reflexively allowed abortionists and abortion clinics to vicariously assert a woman's putative right to abortion. But oftentimes the Court has not so much as addressed standing in those cases. See, *e. g.*, *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016); *Gonzales* v. *Carhart*, 550 U. S. 124 (2007); *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320 (2006); *Stenberg* v. *Carhart*, 530 U. S. 914 (2000); *Mazurek* v. *Armstrong*, 520 U. S. 968 (1997) (*per curiam*); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). And questions "merely lurk[ing] in the record, neither brought to the attention of the court nor ruled upon," are not "considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925); see also *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 183 (1979). Specifically, when it comes "to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952) (citing *United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C. J., for the Court)).

The first—and only—time the Court squarely addressed this question with a reasoned decision was in *Singleton* v.

Wulff, 428 U. S. 106 (1976).[3] In that case, a fractured Court concluded that two abortionists had standing to challenge a State's refusal to provide Medicaid reimbursements for abortions. Perfunctorily applying this Court's requirements for third-party standing, Justice Blackmun, joined by three other Justices, asserted that abortionists generally had standing to litigate their clients' rights. *Id.*, at 113–118 (plurality opinion). Justice Stevens concurred on considerably narrower grounds, reasoning that the abortionists had standing because they had a financial stake in the outcome of the litigation and sought to vindicate their own constitutional rights as well. *Id.*, at 121 (opinion concurring in part). Notably, Justice Stevens declined to join the plurality's discussion of third-party standing, explaining that he was "not sure whether [that analysis] would, or should, sustain the doctors' standing, apart from" their own legal rights and financial interests being at stake in that specific case. *Id.*, at 122. The

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[3] Although the Court concluded that the abortionists had standing to challenge the constitutionality of abortion regulations in *Doe* v. *Bolton*, 410 U. S. 179 (1973), it did so only in dicta, *id.*, at 188–189. The abortionists' coplaintiffs were pregnant women whom the Court determined had standing to assert their own rights, and thus whether the abortionists had standing was "a matter of no great consequence." *Id.*, at 188. Even so, the Court only cursorily considered the question whether the threat of prosecution faced by the abortionists was a sufficiently direct injury under the Court's then-existing standing doctrine, *id.*, at 188–189, which was considerably more lenient than our current understanding. The Court did not engage in any meaningful Article III analysis or refer to this Court's third-party standing doctrine. *Ibid.*; see also *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 440, n. 30 (1983) (concluding without any analysis that an abortionist had standing to raise a claim on behalf of his minor patients). And notably, the abortionists in that case had brought suit to vindicate their own constitutional rights to "practic[e] their . . . professio[n]." *Doe*, *supra*, at 186; see also *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 62 (1976) (concluding, without any analysis of Article III or the third-party standing doctrine, that abortionists had standing in a suit alleging violations of both their own constitutional rights and those of their clients).

four remaining Justices dissented in part, concluding that the abortionists lacked standing to litigate the rights of their clients. *Id.*, at 122–131 (Powell, J., concurring in part and dissenting in part). Because Justice Stevens' opinion "concurred in the judgmen[t] on the narrowest grounds," it is the controlling opinion regarding abortionists' third-party standing. *Marks* v. *United States*, 430 U. S. 188, 193 (1977).[4]

To the extent Justice Stevens' opinion could be read as concluding that abortionists have standing to vicariously assert their clients' rights so long as the abortionists establish standing on their own legal claims, his position has been abrogated by this Court's more recent decisions, which have "confirm[ed] that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.*, 547 U. S., at 352. But more importantly, Justice Stevens' opinion does not support the abortionists in these cases, because his opinion rested on case-specific facts not implicated here—namely, the fact that the abortionists would directly receive Medicaid payments from the defendant agency if they prevailed and that they asserted violations of *their own* constitutional rights. In these cases, there is no dispute that the abortionists' sole claim before this Court is that Louisiana's law violates the purported substantive due process rights *of their clients*.

2

Under a proper understanding of Article III, plaintiffs lack standing. As explained above, in suits seeking to vindicate private rights, the owners of those rights can establish a sufficient injury simply by asserting that their rights have been violated. Constitutional rights are generally considered

[4] Three Justices of this Court have recently taken the position that this rule from *Marks*, 430 U. S. 188, does not necessarily apply in all 4–1–4 cases, and that such decisions can sometimes produce "no controlling opinion at all." *Ramos* v. *Louisiana*, 590 U. S. 83, 103 (2020) (principal opinion). But even under their view, Justice Blackmun's plurality in *Singleton* would not be considered binding precedent.

"private rights" to the extent they "'belon[g] to individuals, considered as individuals.'" *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring) (quoting 3 Blackstone, Commentaries *2); see also *United States* v. *Sineneng-Smith*, 590 U. S. 371, 389 (2020) (THOMAS, J., concurring). And the purported substantive due process right to abort an unborn child is no exception—it is an individual right that is inherently personal. After all, the Court "creat[ed the] right" based on the notion that abortion "'involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.'" *Whole Woman's Health*, 579 U. S., at 632–633 (THOMAS, J., dissenting) (quoting *Casey*, 505 U. S., at 851 (majority opinion)). Because this right belongs to the woman making that choice, not to those who provide abortions, plaintiffs cannot establish a personal legal injury by asserting that this right has been violated.[5]

The only injury asserted by plaintiffs in this suit is the possibility of facing criminal sanctions if the abortionists conduct abortions without admitting privileges in violation of the law. See Response and Reply for Petitioners (No. 18–1460)/Cross-Respondents (No. 18–1323), p. 34. But plaintiffs do not claim any right to provide abortions, nor do they contest that the State has authority to regulate such procedures.[6] They have therefore demonstrated only real-world damages (or more accurately, the *possibility* of real-world damages), but no legal injury, or "invasion of a legally pro-

[5] Notably, plaintiffs point to no evidence in the record of women who seek abortions in Louisiana actually opposing this law on the ground that it violates their constitutional rights.

[6] Although plaintiffs initially argued that Louisiana's law also violated their procedural due process rights by requiring them to obtain admitting privileges in an unreasonably short time, App. 24, 28, they have since abandoned that claim. And even if they had asserted violations of their own rights before this Court, those legal injuries would be insufficient to establish standing for a distinct claim based on their clients' putative rights. See *supra*, at 369.

tected interest," that belongs to them. *Spokeo*, *supra*, at 339 (internal quotation marks omitted). Thus, under a proper understanding of Article III, plaintiffs lack standing and, consequently, this Court lacks jurisdiction.

II

Even if the plaintiffs had standing, the Court would still lack the authority to enjoin Louisiana's law, which represents a constitutionally valid exercise of the State's traditional police powers. The plurality and THE CHIEF JUSTICE claim that the Court's judgment is dictated by "our precedents," particularly *Whole Woman's Health*. *Ante*, at 342 (plurality opinion); see also *ante*, at 344–345, 354–358 (ROBERTS, C. J., concurring in judgment). For the detailed reasons explained by JUSTICE ALITO, this is not true. *Post*, at 379–399 (dissenting opinion).

But today's decision is wrong for a far simpler reason: The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process, *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment). As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.

A

The Court first conceived a free-floating constitutional right to privacy in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). In that case, the Court declared unconstitutional a state law prohibiting the use of contraceptives, finding that it violated a married couple's "right of privacy." *Id.*, at 486. The Court explained that this right could be found in the "penumbras" of *five* different Amendments to the Constitution—the First, Third, Fourth, Fifth, and Ninth. *Id.*, at 484. Rather than explain what free speech or the quartering of

troops had to do with contraception, the Court simply declared that these rights had created "zones of privacy" with their "penumbras," which were "formed by emanations from those guarantees that help give them life and substance." *Ibid.* This reasoning is as mystifying as it is baseless.

As Justice Black observed in his dissent, this general "right of privacy" was never before considered a constitutional guarantee protecting citizens from governmental intrusion. *Id.*, at 508–510. Rather, the concept was one of tort law, championed by Samuel Warren and the future Justice Louis Brandeis in their 1890 Harvard Law Review article entitled, "The Right to Privacy." 4 Harv. L. Rev. 193. Over 20 years after the Fourteenth Amendment was ratified and a century after the Bill of Rights was adopted, Warren and Brandeis were among the first to advocate for this privacy right in the context of tort relief for those whose personal information and private affairs were exploited by others. *Id.*, at 193, 195–196, 214–220. By "exalting a phrase . . . used in discussing grounds for tort relief, to the level of a constitutional rule," the Court arrogated to itself the "power to invalidate any legislative act which [it] find[s] irrational, unreasonable[,] or offensive" as an impermissible "interfere[nce] with 'privacy.'" *Griswold*, *supra*, at 510, n. 1, 511 (Black, J., dissenting).

Just eight years later, the Court utilized its newfound power in *Roe* v. *Wade*, 410 U. S. 113 (1973). There, the Court struck down a Texas law restricting abortion as a violation of a woman's constitutional "right of privacy," which it grounded in the "concept of personal liberty" purportedly protected by the Due Process Clause of the Fourteenth Amendment. *Id.*, at 153. The Court began its legal analysis by openly acknowledging that the Constitution's text does not "mention any right of privacy." *Id.*, at 152. The Court nevertheless concluded that it need not bother with our founding document's text, because the Court's prior decisions—chief among them *Griswold*—had already divined

such a right from constitutional penumbras. *Roe*, 410 U. S., at 152. Without any legal explanation, the Court simply concluded that this unwritten right to privacy was "broad enough to encompass a woman's [abortion] decision." *Id.*, at 153.

B

Roe is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment. *Roe* suggests that the Due Process Clause's reference to "liberty" could provide a textual basis for its novel privacy right. *Ibid.* But that Clause does not guarantee liberty *qua* liberty. Rather, it expressly contemplates the *deprivation* of liberty and requires only that such deprivations occur through "due process of law." Amdt. 14, §1. As I have previously explained, there is "'considerable historical evidence support[ing] the position that "due process of law" was [originally understood as] a separation-of-powers concept . . . forbidding only deprivations not authorized by legislation or common law.'" *Johnson* v. *United States*, 576 U. S. 591, 623 (2015) (opinion concurring in judgment) (quoting D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985)). Others claim that the original understanding of this Clause requires that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review." Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1679 (2012). But, whatever the precise requirements of the Due Process Clause, "[t]he notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald*, 561 U. S., at 811 (opinion of THOMAS, J.).

More specifically, the idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical. See *Roe*, 410 U. S., at 174–175 (Rehnquist, J., dissenting). In 1868, when the Fourteenth Amendment was ratified, a majority of the States and numerous Territories had laws on the books that limited (and in many cases nearly prohibited) abortion. See *id.*, at 175, n. 1.[7] It would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion. The fact that it took this Court over a century to find that right all but proves that it was more than hidden—it simply was not (and is not) there.

C

Despite the readily apparent illegitimacy of *Roe*, "the Court has doggedly adhered to [its core holding] again and

[7] See, *e. g.*, Ala. Rev. Code § 3605 (1867); Terr. of Ariz., Howell Code, ch. 10, § 45 (1865); Ark. Rev. Stat., ch. 44, div. III, Art. II, § 6 (1838); 1861 Cal. Stat., ch. 521, § 45, p. 588; Colo. (Terr.) Rev. Stat. § 42 (1868); Conn. Gen. Stat., Tit. 12, §§ 22–24 (1861); Fla. Acts 1st Sess., ch. 1637, subch. III, §§ 10, 11, ch. 8, §§ 9, 10 (1868); Terr. of Idaho Laws, Crimes and Punishments § 42 (1864); Ill. Stat., ch. 30, § 47 (1868); Ind. Laws ch. LXXXI, § 2 (1859); Iowa Rev. Gen. Stat., ch. 165, § 4221 (1860); Kan. Gen. Stat., ch. 31, §§ 14, 15, 44 (1868); La. Rev. Stat., Crimes and Offenses § 24 (1856); Me. Rev. Stat., Tit. XI, ch. 124, § 8 (1857); 1868 Md. Laws ch. 179, § 2, p. 315; Mass. Gen. Stat., ch. 165, § 9 (1860); Mich. Rev. Stat., Tit. XXX, ch. 153, §§ 32, 33, 34 (1846); Terr. of Minn. Rev. Stat., ch. 100, §§ 10, 11 (1851); Miss. Rev. Code, ch. LXIV, Arts. 172, 173 (1857); Mo. Rev. Stat., Art. II, §§ 9, 10, 36 (1835); Terr. of Mont. Laws, Criminal Practice Acts § 41 (1864); Terr. of Neb. Rev. Stat., Crim. Code § 42 (1866); Terr. of Nev. Laws ch. 28, § 42 (1861); 1848 N. H. Laws ch. 743, §§ 1, 2, p. 708; 1849 N. J. Laws pp. 266–267; 1854 Terr. of N. M. Laws ch. 3, §§ 10, 11, p. 88; 1846 N. Y. Laws ch. 22, § 1, p. 19; 1867 Ohio Laws § 2, pp. 135–136; Ore. Gen. Laws, Crim. Code, ch. XLIII, § 509 (1845–1864); 1860 Pa. Laws no. 374, §§ 87, 88, 89, pp. 404–405; Tex. Gen. Stat. Dig., Penal Code, ch. VII, Arts. 531–536 (1859); 1867 Vt. Acts & Resolves no. 57, §§ 1, 3, pp. 64–66; 1848 Va. Acts, Tit. II, ch. 3, § 9, p. 96; Terr. of Wash. Stat., ch. II, §§ 37, 38 (1854); Wis. Rev. Stat., ch. 164, §§ 10, 11, ch. 169, §§ 58, 59 (1858).

again, often to disastrous ends." *Gamble* v. *United States*, 587 U. S. 678, 725 (2019) (THOMAS, J., concurring). In doing so, the Court has repeatedly invoked *stare decisis*. See, *e. g.*, *Casey*, 505 U. S., at 854–869. And today, a majority of the Court insists that this doctrine compels its result. See *ante*, at 344 (plurality opinion); *ante*, at 344–345, 354 (opinion of ROBERTS, C. J.).

The Court's current "formulation of the *stare decisis* standard does not comport with our judicial duty under Article III," which requires us to faithfully interpret the Constitution. *Gamble*, 587 U. S., at 711 (THOMAS, J., concurring). Rather, when our prior decisions clearly conflict with the text of the Constitution, we are required to "privilege [the] text over our own precedents." *Id.*, at 719. Because *Roe* and its progeny are premised on a "demonstrably erroneous interpretation of the Constitution," we should not apply them here. 587 U. S., at 719 (THOMAS, J., concurring).

Even under THE CHIEF JUSTICE's approach to *stare decisis*, continued adherence to these precedents cannot be justified. *Stare decisis* is "not an inexorable command," *ante*, at 346 (internal quotation marks omitted), and this Court has recently overruled a number of poorly reasoned precedents that have proved themselves to be unworkable, see *Knick* v. *Township of Scott*, 588 U. S. 180, 202–205 (2019) (ROBERTS, C. J., for the Court); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248–249 (2019); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 916–929 (2018). As I have already demonstrated, *supra*, at 371–374, *Roe*'s reasoning is utterly deficient—in fact, not a single Justice today attempts to defend it.

Moreover, the fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy. Since the Court decided *Roe*, Members of this Court have decried the unworkability of our abortion case law and repeatedly called for course corrections of varying degrees.

See, *e. g.*, 410 U. S., at 171–178 (Rehnquist, J., dissenting); *Doe* v. *Bolton*, 410 U. S. 179, 221–223 (1973) (White, J., dissenting); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452–466 (1983) (O'Connor, J., dissenting); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 785–797 (1986) (White, J., dissenting); *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 532–537 (1989) (Scalia, J., concurring in part and concurring in judgment); *Casey*, 505 U. S., at 944–966 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.*, at 979–1002 (Scalia, J., concurring in judgment in part and dissenting in part); *Stenberg*, 530 U. S., at 953–956 (Scalia, J., dissenting); *id.*, at 980–983 (THOMAS, J., dissenting); *Whole Woman's Health*, 579 U. S., at 633–638 (THOMAS, J., dissenting). In *Casey*, the majority claimed to clarify this "jurisprudence of doubt," 505 U. S., at 844, but our decisions in the decades since then have only demonstrated the folly of that assertion, see *Stenberg*, 530 U. S., at 953–956 (Scalia, J., dissenting); *id.*, at 960–979 (Kennedy, J., dissenting); *Whole Woman's Health*, *supra*, at 633–638 (THOMAS, J., dissenting). They serve as further evidence that this Court's abortion jurisprudence has failed to deliver the "'principled and intelligible'" development of the law that *stare decisis* purports to secure. *Ante*, at 346 (opinion of ROBERTS, C. J.) (quoting *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986)).

THE CHIEF JUSTICE advocates for a Burkean approach to the law that favors adherence to "'the general bank and capital of nations and of ages.'" *Ante*, at 345 (quoting 3 E. Burke, Reflections on the Revolution in France 110 (1790)). But such adherence to precedent was conspicuously absent when the Court broke new ground with its decisions in *Griswold* and *Roe*. And no one could seriously claim that these revolutionary decisions—or *Whole Woman's Health*, decided just four Terms ago—are part of the "*inheritance from our forefathers*," fidelity to which demonstrates "reverence to antiquity." E. Burke, Reflections on the Revolution in France 27–28 (J. Pocock ed. 1987).

More importantly, we exceed our constitutional authority whenever we "appl[y] demonstrably erroneous precedent instead of the relevant law's text." *Gamble*, *supra*, at 711–712 (THOMAS, J., concurring). Because we can reconcile neither *Roe* nor its progeny with the text of our Constitution, those decisions should be overruled.

* * *

Because we lack jurisdiction and our abortion jurisprudence finds no basis in the Constitution, I respectfully dissent.[8]

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, with whom JUSTICE THOMAS joins except as to Parts III–C and IV–F, and with whom JUSTICE KAVANAUGH joins as to Parts I, II, and III, dissenting.

The majority bills today's decision as a facsimile of *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016), and it's true they have something in common. In both, the abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way.

In *Whole Woman's Health*, res judicata and our standard approach to severability were laid low. Even *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), was altered.

Today's decision claims new victims. The divided majority cannot agree on what the abortion right requires, but it nevertheless strikes down a Louisiana law, Act 620, that the legislature enacted for the asserted purpose of protecting

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[8] I agree with JUSTICE ALITO's application of our precedents except in Part IV–F of his opinion, but I would not remand for further proceedings. Because plaintiffs lack standing under Article III, I would instead remand with instructions to dismiss for lack of jurisdiction. Alternatively, if I were to reach the merits because a majority of the Court concludes we have jurisdiction, I would affirm, as plaintiffs have failed to carry their burden of demonstrating that Act 620 is unconstitutional, even under our precedents.

women's health. To achieve this end, the majority misuses the doctrine of *stare decisis*, invokes an inapplicable standard of appellate review, and distorts the record.

The plurality eschews the constitutional test set out in *Casey* and instead employs the balancing test adopted in *Whole Woman's Health*. The plurality concludes that the Louisiana law does nothing to protect the health of women, but that is disproved by substantial evidence in the record. And the plurality upholds the District Court's finding that the Louisiana law would cause a drastic reduction in the number of abortion providers in the State even though this finding was based on an erroneous legal standard and a thoroughly inadequate factual inquiry.

THE CHIEF JUSTICE stresses the importance of *stare decisis* and thinks that precedent, namely, *Whole Woman's Health*, dooms the Louisiana law. But at the same time, he votes to overrule *Whole Woman*'s *Health* insofar as it changed the *Casey* test.

Both the plurality and THE CHIEF JUSTICE hold that abortion providers can invoke a woman's abortion right when they attack state laws that are enacted to protect a woman's health. Neither waiver nor *stare decisis* can justify this holding, which clashes with our general rule on third-party standing. And the idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to protect the third party is stunning. Given the apparent conflict of interest, that concept would be rejected out of hand in a case not involving abortion.

For these reasons, I cannot join the decision of the Court. I would remand the case to the District Court and instruct that court, before proceeding any further, to require the joinder of a plaintiff with standing. If a proper plaintiff is added, the District Court should conduct a new trial and determine, based on proper evidence, whether enforcement of Act 620 would diminish the number of abortion providers in the State to such a degree that women's access to abor-

tions would be substantially impaired. In making that determination, the court should jettison the nebulous "good faith" test that it used in judging whether the physicians who currently lack admitting privileges would be able to obtain privileges and thus continue to perform abortions if Act 620 were permitted to take effect. Because the doctors in question (many of whom are or were plaintiffs in this case) stand to lose, not gain, by obtaining privileges, the court should require the plaintiffs to show that these doctors sought admitting privileges with the degree of effort that they would expend if their personal interests were at stake.

I

Under our precedent, the critical question in this case is whether the challenged Louisiana law places a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U. S., at 877 (plurality opinion). If a law like that at issue here does not have that effect, it is constitutional. *Id.*, at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

Petitioners urge us to adopt a rule that is more favorable to abortion providers. At oral argument, their attorney maintained that a law that has no effect on women's access to abortion is nevertheless unconstitutional if it is not needed to protect women's health. See Tr. of Oral Arg. 18–19. Of course, that is precisely the argument one would expect from a business that wishes to be free from burdensome regulations. But unless an abortion law has an adverse effect *on women*, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety. See *Casey*, 505 U. S., at 884–885 (joint opinion). Many state and local laws that are justified as safety measures rest on debatable empirical grounds. But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if

"it might be thought that the particular legislative measure was a rational way" to serve a valid interest. See *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955). The test that petitioners advocate would give abortion providers an unjustifiable advantage over all other regulated parties, and for that reason, it was rejected in *Casey*. See 505 U. S., at 851 (majority opinion).

Casey also rules out the balancing test adopted in *Whole Woman's Health*. *Whole Woman's Health* simply misinterpreted *Casey*, and I agree that *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test. Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard.

II

Because the plurality adheres to the balancing test adopted in *Whole Woman's Health*, it considers whether the Louisiana law helps to protect the health of women seeking abortions, and it concludes that "nothing in the record indicates that the background vetting for admitting privileges adds significantly to the vetting that the State Board of Medical Examiners already provides." *Ante*, at 380. THE CHIEF JUSTICE seems to agree, *ante*, at 356–357 (opinion concurring in judgment), although it is unclear why this issue matters under the test he favors.

In any event, contrary to the view taken by the plurality and (seemingly) by THE CHIEF JUSTICE, there is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice. In deciding whether to grant admitting privileges, hospitals typically undertake a rigorous investigative process to ensure that a doctor is responsible and competent and has the training and experience needed to perform the procedures for which the privileges are sought. As the Fifth Cir-

cuit explained, "hospitals verify an applicant's surgical ability, training, education, experience, practice record, and criminal history. These factors are reviewed by a board of multiple physicians." *June Medical Services, L. L. C.* v. *Gee*, 905 F. 3d 787, 805, n. 53 (2018).

The standards used by the great majority of hospitals in deciding whether to grant privileges clearly show that hospitals demand proof of a higher level of competence. The Joint Commission, a nonprofit organization that accredits healthcare institutions, has issued standards for granting admitting privileges, and all of the hospitals whose rules are relevant here (and the vast majority of Louisiana hospitals) comply with those standards.[1] These standards call for an examination of each applicant's licensure, education, training, and current competence. See Joint Commission, 2020 Hospital Accreditation Standards, pp. MS–23, 25, 26, 29. They require an examination of a doctor's health records, clinical data on performance, and peer recommendations, and they demand that a hospital make a careful assessment of the procedures a physician may perform. *Ibid.*

Dr. Robert Marier, the former director of the Louisiana Board of Medical Examiners (and the former dean of Louisiana State University Medical School), testified that the process conducted by hospitals in deciding whether to grant admitting privileges is "the primary way of determining competency." App. 818. That process, he explained, "thoroughly vet[s] the qualifications of [applicants] to ensure that [they] are competent to provide the services that are in question." *Ibid.*

June Medical's expert, Dr. Eva Pressman, agreed that "admitting privileges can serve the function of providing an

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[1] Quality Check, Find a Gold Seal Health Care Organization (2020), https://www.qualitycheck.org/search/?keyword=louisiana#keyword=louisiana&accreditationprogram=Hospital (listing "[o]rganizations that have achieved The Gold Seal of Approval from the Joint Commission").

evaluation mechanism for physician competency." *Id.*, at 1042, 1091; Record 10864. Doe 3, one of the doctors who currently performs abortions in Louisiana, also acknowledged the credentialing value of admitting privileges, App. 247–248, as did Doe 4, another Louisiana abortion doctor, Record 14155.

Although the plurality contends that the review conducted by hospitals adds little to the vetting undertaken by the State Board of Medical Examiners (Board), that is not true. Hospitals look beyond the mere possession of a license, and they do that for very obvious reasons. If nothing else, their review process serves the hospitals' interests by diminishing the risk of awards for malpractice committed by doctors practicing on their premises. In Louisiana, hospitals that perform negligent credentialing cannot benefit from the State's medical malpractice cap. See *Billeaudeau* v. *Opelousas General Hospital Auth.*, 2016–0846, p. 21 (La. 10/19/16), 218 So. 3d 513, 527. In addition, a hospital's "Medicare participation and other certifications depend on completing the credentialing process."[2]

The review conducted by hospitals goes beyond that of the Board in another way: it is continuous. Under the Joint Commission Standards, hospitals must monitor physicians with admitting privileges and can therefore make a running assessment of their competence. See Record 11850. The Board, on the other hand, conducts an inquiry before initially issuing a license, but the annual license renewal process entails nothing more than completing a standard form, paying the required fee, and documenting a certain number of con-

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[2] Ryan, Negligent Credentialing: A Cause of Action for Hospital Peer Review Decisions, 59 How. L. J. 413, 419 (2016); see also Eskine, Square Pegs and Round Holes: Antitrust Law and the Privileging Decision, 44 U. Kan. L. Rev. 399, 401 (1996) ("[H]ospitals have strong incentives to award staff privileges only to those physicians who have proven to be capable and knowledgeable professionals").

tinuing medical education credits. See 46 La. Admin. Code, pt. XLV, § 417 (2020).

Because hospitals continue to evaluate doctors after privileges are granted, they may discover information that assists the Board in carrying out its responsibilities. In the past, hospitals have forwarded such information to the Board, and such referrals have led the Board to take serious disciplinary actions.[3]

The record shows that the vetting conducted by hospitals goes far beyond what is done at Louisiana abortion clinics. Some clinics demand nothing more than possession of a license. Take the example of petitioner June Medical. Doe 3, the only person at that clinic who evaluates applicants, testified that he does not perform background checks of any kind, not even criminal records checks. App. 249–250. In the past, Doe 3 hired a radiologist and ophthalmologist to perform abortions. *Id.*, at 249.

Delta Clinic in Baton Rouge and Women's Clinic in New Orleans have similarly lax practices. Leroy Brinkley, the president of both clinics, testified before a Pennsylvania grand jury that, in making hiring decisions, "'I don't judge the license. If they have a license and the state gave the license, it's not for me to determine if they are capable.'"[4] A "'background check,'" he said, is not within his "'framework.'"[5]

Doe 4, who practiced at the now-defunct Causeway Clinic near New Orleans, recounted the meager vetting that occurred when he was hired at that facility. He had to produce a valid medical license and DEA license but was

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[3] Brief for 207 Members of Congress as *Amici Curiae* 18–19 (lifetime ban from obstetric surgery in Louisiana); *id.*, at 19–20 (one-year probation of medical license).

[4] Brief for Louisiana State Legislators as *Amici Curiae* 8–9; App. to *id.*, at 67a.

[5] *Ibid.*

not required "to undergo anything similar to review by a credentials committee." Record 14156.

In light of these practices, it is no surprise that the Louisiana Department of Health has issued Statements of Deficiency against abortion facilities for failing to adopt "'a detailed credentialing process for physicians,'" failing to investigate "'possible restrictions'" on physicians' licenses, and failing to look into "'evidence of prior malpractice claims/settlements.'"[6]

Louisiana adopted Act 620 in the aftermath of the Kermit Gosnell grand jury report, which expounded on the failures of regulatory oversight that allowed Gosnell's practices to continue for an extended period. See Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011). The grand jury concluded that closer supervision would have uncovered Gosnell's egregious health and safety violations. Gosnell had a medical license, but it is doubtful that any hospital would have given him admitting privileges.

In sum, contrary to the plurality's assertion, there is ample evidence in the record showing that requiring admitting privileges has health and safety benefits. There is certainly room for debate about the need for this requirement, but under our case law, this Court's task is not to ascertain whether a law "adds significantly" to the existing regulatory framework. Instead, when confronted with a genuine dispute about a law's benefits, we have afforded legislatures "wide discretion" in assessing whether a regulation serves a legitimate medical need and is medically reasonable even in the face of medical and scientific uncertainty. *Gonzales* v. *Carhart*, 550 U. S. 124, 163 (2007); *Mazurek* v. *Armstrong*, 520 U. S. 968, 973 (1997) (*per curiam*); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 458 (1983) (O'Connor, J., dissenting) ("[L]egislatures are better suited" than courts "to make the necessary factual judgments in this

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[6] *Id.*, at 9.

area"); accord, *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U. S. 442, 451 (1954) (State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Louisiana easily satisfied this standard.

For these reasons, both the plurality and THE CHIEF JUSTICE err in concluding that the admitting-privileges requirement serves no valid purpose.

III

They also err in their assessment of Act 620's likely effect on access to abortion. They misuse the doctrine of *stare decisis* and the standard of appellate review for findings of fact.

A

Stare decisis is a major theme in the plurality opinion and that of THE CHIEF JUSTICE. Both opinions try to create the impression that this case is the same as *Whole Woman's Health* and that *stare decisis* therefore commands the same result. In truth, however, the two cases are very different. While it is certainly true that the Texas and Louisiana *statutes* are largely the same, the two cases are not. The decision in *Whole Woman's Health* was not based on the face of the Texas statute, but on an empirical question, namely, the effect of the statute on access to abortion in that State. 579 U. S., at 612. The Court's answer to that question depended on numerous factors that may differ from State to State, including the demand for abortions, the number and location of abortion clinics and physicians, the geography of the State, the distribution of the population, and the ability of physicians to obtain admitting privileges. *Id.*, at 612–614. There is no reason to think that a law requiring admitting privileges will necessarily have the same effect in every State. As a result, just because the Texas admitting-privileges requirement was found by this Court, based on evidence in the record of that case, to have substantially re-

duced access to abortion in that State, it does not follow that Act 620 would have comparable effects in Louisiana. See *id.*, at 610–614 (reviewing Texas record). The two States are neighbors, but they are not the same. Accordingly, the record-based empirical determination in *Whole Woman's Health* is not controlling here.

The suggestion that *Whole Woman's Health* is materially identical to this case is ironic, since the two cases differ in a way that was critical to the Court's reasoning in *Whole Woman's Health*, *i. e.*, the difference between a pre-enforcement facial challenge and a post-enforcement challenge based on evidence of the law's effects. See *id.*, at 599. Before the Texas law went into effect, abortion providers mounted an unsuccessful facial challenge, arguing that the law would drastically limit abortion access. The Fifth Circuit held that the plaintiffs had not shown that the law would create a substantial obstacle for women seeking abortions, and a final judgment was entered against them. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F. 3d 583, 590, 605 (2014). Then, after the law had been in operation for some time, many of the same plaintiffs filed a second suit and again argued that the admitting-privileges requirement violated *Casey*. *Whole Woman's Health* v. *Cole*, 790 F. 3d 563, 577, and n. 14 (CA5 2015). The state defendants sought dismissal based on the doctrine of claim preclusion, but the *Whole Woman's Health* majority rejected that argument. 579 U. S., at 599.

Why? Two words: "changed circumstances." *Id.*, at 601. According to the Court, the pre-enforcement facial challenge was not the same "claim" as the post-enforcement claim because the "postenforcement consequences" of the challenged Texas law were "*unknowable* before [the law] went into effect." *Id.*, at 602 (emphasis added); see also *ibid.* ("[I]t was still unclear how many clinics would be affected"); *id.*, at 599 (discussing "new material facts"); *id.*, at 602 (recounting "later, concrete factual developments").

The present case is in the same posture as the pre-enforcement facial challenge to the Texas law, and it should therefore be obvious that this Court's decision in *Whole Woman's Health* is not controlling.

B

1

Aside from suggesting that *Whole Woman's Health* is dispositive, the plurality and THE CHIEF JUSTICE provide one other reason for concluding that Act 620, if allowed to go into effect, would create a substantial obstacle for women seeking abortions. Pointing to the District Court's finding that the Louisiana law would have a drastic effect on abortion access, *June Medical Services, LLC* v. *Kliebert*, 250 F. Supp. 3d 27, 87 (MD La. 2017), the plurality and THE CHIEF JUSTICE note that findings of fact may be overturned only if clearly erroneous, and they see no such error here. *Ante*, at 322 (opinion of BREYER, J.); *ante*, at 358 (opinion of ROBERTS, C. J.). In taking this approach, they overlook the flawed legal standard on which the District Court's finding depends, and they ignore the gross deficiencies of the evidence in the record.

Because the Louisiana law was not allowed to go into effect for any appreciable time, it was necessary for the District Court to predict what its effects would be. Attempting to do that, the court apparently concluded that none of the doctors who currently perform abortions in the State would be replaced if the admitting-privileges requirement forced them to leave abortion practice. 250 F. Supp. 3d, at 82. That inference is debatable, as it primarily rests on the anecdotal testimony of June Medical's administrator. See *id.*, at 81–82; App. 113–114. Neither the plurality nor THE CHIEF JUSTICE explains why it should be accepted. That alone casts doubt on the finding to which the majority defers, but the problems with the finding do not stop there.

The finding was based on a fundamentally flawed test. In attempting to ascertain how many of the doctors who perform abortions in the State would have to leave abortion practice for lack of admitting privileges, the District Court received evidence in a variety of forms—some live testimony, but also deposition transcripts, declarations, and even letters from counsel—about the doctors' unsuccessful efforts to obtain privileges. The District Court considered whether these doctors had proceeded in "good faith"; it found that they all met that standard; and it therefore concluded that the law would leave the State with very few abortion providers.

2

Under the reasoning just described, the factual finding on which the plurality and THE CHIEF JUSTICE rely—that the Louisiana law would drastically reduce access to abortion in the State—depends on the District Court's finding that the doctors in question exercised "good faith" in their quest for privileges, but that test is woefully deficient.

It has aptly been said that "good faith" " 'is an elusive idea, taking on different meanings and emphases as we move from one context to another.' " Black's Law Dictionary 836 (11th ed. 2019). What the District Court understood the term to mean in the present context is uncertain, but this is clear: The District Court ignored a factor of the utmost importance, the incentives of the doctors in question.

When the District Court made its assessment of the doctors' "good faith," enforcement of Act 620 had been preliminarily enjoined, and the doctors surely knew that enforcement would be permanently barred if the lawsuit was successful. Thus, the doctors had everything to lose and nothing to gain by obtaining privileges.[7] Two of the doc-

[7] Petitioners maintain that an unsuccessful admitting-privileges application is a "stain" on a doctor's medical record, because the rejection could appear in a federal database and would need to be disclosed on future applications for admitting privileges. Brief for Petitioners in No. 18–

tors—Does 1 and 2—are petitioners and cross-respondents in this Court. Two others, Does 5 and 6, were plaintiffs earlier but dropped out for unexplained reasons. See App. 1327. And Doe 3, although not a plaintiff, is the medical director of June Medical, a party to this case. *Id.*, at 186, 206, 245.

If these doctors had secured privileges, that would have tended to defeat the lawsuit. Not only that, acquiring privileges would have subjected all the doctors to the previously described hospital monitoring, as well as any other obligations that a hospital imposed on doctors with privileges, such as providing unpaid care for the indigent. See *infra*, at 396–397. Thus, in light of the situation at the time when the doctors made their attempts to get privileges, they had an incentive to do as little as they thought the District Court would demand, not as much as they would if they stood to benefit from success.

Given this incentive structure, the District Court's "good faith" test was not up to the task. Although the District Court did not define exactly what the test required, "good faith" might easily mean only that a doctor lacked the subjective intent to avoid getting privileges. See Black's Law Dictionary, at 836 (defining "good faith" to mean, among other things, "absence of intent to defraud or seek unconscionable advantage").

In light of the doctors' incentives, more should have been required. The court should have asked whether the doctors' efforts to acquire privileges were equal to the efforts they

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1323, p. 41, n. 7. As the record in this case shows, there is reason to doubt that the prospect of rejection provides a sufficient incentive for doctors to pursue privileges vigorously. See *infra*, at 390–399. Perhaps that is because only rejections for lack of "professional competence or professional conduct" need to be disclosed to the relevant federal database. 45 CFR §§ 60.12, 60.3 (2019). Petitioners also have not explained how a non-competence-based rejection would have any bearing on future applications for privileges.

would have made if they knew that their ability to continue to perform abortions was at stake. The District Court did not do that, and because its finding on abortion access rests on the wrong legal standard, it cannot stand. A finding based on an erroneous legal test is invalid; it cannot be sustained under the "clearly erroneous" rule. See *Abbott* v. *Perez*, 585 U. S. 379, 607 (2018) ("'An appellate cour[t has] power to correct errors of law, including those that . . . infect . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law'" (quoting *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984))); *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982) (similar); see also 9C C. Wright & A. Miller, Federal Practice and Procedure § 2585, p. 392 (3d ed. 2008) (Wright & Miller) ("[I]t is axiomatic that the conclusions of law of the trial judge are not protected by the 'clearly erroneous' test").[8]

3

Not only did the District Court apply the wrong test, but the evidence in the record fails to show that the doctors made anything more than perfunctory efforts to obtain privileges.

There are three abortion clinics in Louisiana: June Medical, d/b/a Hope Clinic, in Shreveport; Delta Clinic in Baton Rouge; and Women's Clinic in New Orleans. Five doctors perform abortions at those three locations: Doe 1, Doe 2, and Doe 3 at June Medical; Doe 5 at Delta Clinic and Women's

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[8] The plurality claims that my criticism of the District Court's "good faith" standard "is not a legal argument," and instead reflects a view of the facts—namely, that the Does acted in "bad faith." *Ante*, at 328–329. But the District Court used "good faith" as the legal standard to assess whether Act 620 would cause the Does to stop performing abortions. Neither the District Court nor the plurality has defined "good faith." Unless that term reflects what the doctors would have done if the incentives had been reversed—and the plurality does not argue that it does—there is a legal issue.

Clinic; and Doe 6 at Women's Clinic. For purposes of the analysis that follows, I assume that Doe 1 could not get privileges.[9] If we also assume that none of these doctors would be replaced if they ceased to perform abortions, the impact of the challenged law on abortion access in the State depends on the ability of four doctors to secure such privileges: Doe 2 (June Medical, Shreveport), Doe 3 (June Medical, Shreveport), Doe 5 (Delta Clinic, Baton Rouge, and Women's Clinic, New Orleans), and Doe 6 (Women's Clinic, New Orleans). As I will show, under the correct legal standard, June Medical failed to prove that Act 620 would drive these four doctors out of the abortion practice.

Doe 2. The District Court concluded that Doe 2 made a good-faith effort to obtain privileges, and the Court now affirms that holding. *Ante*, at 331. It is painfully obvious, however, that Doe 2 did not act in the way one would expect if compliance with Act 620 had been to his benefit.

E-mails in the record reveal that Doe 2 only half-heartedly applied for privileges, did so on the advice of counsel, and calculated that an outright denial would be best for his legal challenge. See App. 1452 ("The lawyers think it is important that I at least have an application pending at a hospital"); *id.*, at 1453 ("It may, however, be more important from

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[9] The Fifth Circuit concluded that it would be "nearly impossible" for Doe 1 to get privileges, *June Medical Services L. L. C.* v. *Gee*, 905 F. 3d 787, 812 (2018), and for this reason, the plurality does not linger on Doe 1. *Ante*, at 328. Under the correct legal standard, however, it is not at all clear that Doe 1 made the effort required, at least with respect to Christus Health in Shreveport. He applied there for courtesy privileges, received letters instructing him to pick up a badge, and when he called to clarify the meaning of letters sent to him, an unnamed doctor supposedly told him that he should apply for "some kind of a nonstaff caregiver type" position, App. 725, and he then ceased all efforts to get courtesy staff privileges at Christus, *id.*, at 728. A person with a strong personal incentive to obtain courtesy privileges would not necessarily have taken this somewhat cryptic advice as a definite rejection of his application.

a legal challenge standpoint against this Bill just to have an application pending *or even denied*" (emphasis added)).

Consistent with this attitude, Doe 2 declined to apply for privileges at a Shreveport-area hospital, Christus Health, where he previously had privileges while performing abortions offsite and where another doctor who performed abortions, Doe 3, maintained privileges. *Id.*, at 382. Doe 2 knew that Doe 3 had privileges at Christus Health, a hospital that grants "courtesy privileges," which allow doctors to admit patients but do not require a minimum number of admissions. See *id.*, at 406; Record 12125 (bylaws).

Doe 2's stated reasons for not applying to Christus Health are not reasons that are likely to have deterred an individual with a strong personal incentive to obtain privileges. He testified that Christus is a Catholic hospital and that he did not apply there for that reason. App. 405–406. He added that he applied to other hospitals where he "knew people and might feel more comfortable," "places that [he] thought meant something" and where he would have "the highest likelihood" of obtaining privileges. *Id.*, at 454. A person with a strong personal incentive to get privileges is not likely to have found these reasons sufficient to justify failing even to apply.

The District Court did not address Doe 2's failure to apply to Christus Health. 250 F. Supp. 3d, at 68–74. The plurality, however, argues that Christus would not have granted Doe 2 privileges because its bylaws object to abortion practice. *Ante*, at 330–331. But as noted, Christus Health had previously granted privileges to doctors who perform abortions. Not only did Doe 2 have privileges there while he was performing abortions, but Doe 3 has had privileges at Christus "off and on" for "30 years" and was reappointed to the Christus Health staff in 2012 and again in 2014. App. 272; Record 12102 (2012–2014); *id.*, at 12112 (2014–2016). Throughout this time, he performed abortions. App. 206, 210.

Attempting to justify Doe 2's decision not to (re)apply to Christus, the plurality suggests that Doe 3 (and by extension Doe 2) successfully concealed their abortion practice from Christus, and that if Doe 2 had applied for privileges, Christus would have discovered that he was performing abortions and denied his application on that ground. It is doubtful that Christus was actually in the dark, and speculative that an application would have been denied for this reason.[10] But the important point is that a doctor with a strong

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[10] The suggestion that Doe 2's abortion practice could have eluded Christus (and therefore that it would be an impediment to obtaining privileges again) blinks reality. There is no evidence that the hospital was unaware of Doe 2's abortion practice when he was on staff. Nor is there reason to believe that Christus would not have reviewed Doe 2's professional practice history, Record 12190–12191, or demanded disclosure of past malpractice claims at the time he held privileges there, *id.*, at 12194; App. 374 (medical malpractice claim against Doe 2 arising from practice at June Medical); see also *supra*, at 380–383 (reviewing hospital credentialing).

The notion that Doe 3's abortion practice has escaped attention for 30 years is even harder to believe. Christus has reappointed Doe 3 in recent years based on a biennial process that assesses "[p]erformance and conduct in each hospital and/or other healthcare organizatio[n]" outside of Christus. Record 12136; see also *ibid.* (requiring staff members to submit "reapplication form [with] complete information to update his/her file on items listed in his/her original application"). Doe 3 spends "Thursday afternoon" and "all day on Saturday" at the abortion clinic, App. 206, and therefore presumably is unavailable for his on-call duties at Christus at those times, Record 12123. Doe 3 is affiliated with the National Abortion Federation and has attended "many" of their national conferences to obtain continuing medical education credits. App. 203. And Doe 3 indicated that all eight OB/GYNs in Bossier City learned of his abortion practice when discussing a possible on-call rotation system. See *id.*, at 200–202. If those facts did not tip off the hospital, perhaps Christus learned about Doe 3's abortion practice when one of his patients was transferred directly from June Medical to Christus, bleeding and in need of a hysterectomy, *id.*, at 217–218, or when Doe 1's privileges application named Doe 3 as a peer reference, Record 13025. Whatever the Christus bylaws say, abortion practice does not appear to have presented an obstacle to a successful association with the hospital.

personal incentive would have tried and not simply gone through the motions.

Instead of applying to Christus Health, Doe 2 made a formal application to Willis-Knighton Bossier City (WKBC) and an informal inquiry at University Hospital, but the record does not show that he pursued those requests with any zeal. At WKBC, he did not apply for courtesy privileges, which do not require a minimum number of admissions, Record 9642–9643, but instead sought an active staff position, *id.*, at 9751, and according to Doe 2, this application was doomed because he could not satisfy the minimum-admissions requirement for such a position, App. 384–390. Doe 2 later sent a three-paragraph e-mail to a WKBC e-mail address purporting to amend his 102-page application so as to seek only courtesy privileges, *id.*, at 1446, but the record does not reflect whether that e-mail was received or processed, and subsequent correspondence from WKBC does not acknowledge it, *id.*, at 1435. Doe 2 stated that he sought an active staff position "to keep [his] practice options for the future open," Record 9756, but that does not explain his lack of diligence in seeking courtesy staff privileges. Although it is true that WKBC requested inpatient records from Doe 2 for an active staff position, we do not know whether the hospital would have made the same request had Doe 2 applied for courtesy privileges. App. 1435.[11]

Doe 2 said he made an informal inquiry about admitting privileges at University Hospital, where he has consulting privileges, but that the head of the OB/GYN Department,

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[11] Each year, a physician with courtesy staff privileges at WKBC may have as many as 49 "patient contacts," which are defined as "any admission and management, consultation, procedure, response to emergency call, and newborns." *Id.*, at 9628, 9642 (capitalization omitted). And contrary to the plurality's suggestion, the fact that WKBC imposes the same "[f]actors for [e]valuation" for courtesy and active staff-applicants says little, since those factors do not set out any quantum of patient records, and require only "relevant . . . experience" for the position sought. *Id.*, at 9669.

Dr. Groome, "essentially said" that the hospital would not upgrade his credentials. *Id.*, at 384. Doe 2 attributed this to "the political nature of what I do and the controversy of what I do." *Ibid.* But Doe 2 did not introduce evidence (or seek to elicit testimony from Dr. Groome) substantiating his account of this informal inquiry.

Doe 2's account raises obvious questions. Since he was *already* a member of the University Hospital staff, it is not apparent why the hospital would reject his request for upgraded privileges because of "the political nature" of his practice. *Id.*, at 440–441. And University Hospital has long been on notice of Doe 2's abortion practice. He has been affiliated with that hospital since 1979, Record 9757, and has performed abortions since 1980, *id.*, at 9759.

In sum, Doe 2 all but admitted in his e-mails that his efforts to obtain privileges were perfunctory; he declined to apply at a hospital where he previously had privileges; at the only hospital where he made a formal application, he sought a position he knew he could not get for lack of a sufficient number of admissions; and at one other hospital (where he already had consulting privileges) he did no more than make an informal inquiry. The District Court should have considered whether Doe 2's efforts were consistent with the conduct of a person who really wanted to get privileges.

Doe 5. Doe 5 is an OB/GYN who performs abortions at Women's Clinic in New Orleans and Delta Clinic in Baton Rouge. Doe 5 did not testify at the hearing in District Court, but the District Court found that he proceeded in "good faith" based on a declaration and the transcript of a deposition. 250 F. Supp. 3d, at 75–76.

Doe 5 obtained courtesy privileges at Touro Hospital in New Orleans, see App. 1401, and therefore all agree that Act 620 would not prevent him from practicing at Women's Clinic, *id.*, at 1397. The remaining question is whether the law would bar him from performing abortions in Baton Rouge.

Doe 5 could continue to do that if one hospital in that area granted him admitting privileges, and Doe 5 testified that one, Woman's Hospital, will grant him privileges once he finds a doctor who is willing to cover him when he is not available. See *id.*, at 1334. Doe 5 asked exactly one doctor to serve as his covering physician. That does not show that he "could not find a covering physician," *ante*, at 328, if he made other inquiries.

The plurality justifies Doe 5's meager effort based on pure speculation. Because the one doctor Doe 5 asked had a transfer agreement with the Baton Rouge abortion clinic, the plurality reasons that "Doe 5 could have reasonably thought that, if this doctor wouldn't serve as his covering physician, no one would." *Ante*, at 332. The plurality goes on to say that "it was well within the District Court's discretion to credit that reading of the record." *Ibid.*

This argument shows how far the plurality is willing to go to strike down the Louisiana law. The plurality relies on speculation about why Doe 5 made only one inquiry and why the District Court found this one inquiry sufficient. In fact, however, Doe 5 never explained why he asked only one doctor, and he never intimated that he gave up because that doctor had a transfer agreement with the clinic. Nor did the District Court rely on that inference in finding that Doe 5 exhibited good faith. See 250 F. Supp. 3d, at 75–76. And in any event, even if Doe 5 had a particularly strong reason to hope that the doctor he asked would agree to cover for him, it hardly follows that other inquiries would necessarily fail.

Doe 5 applied for privileges at two other area hospitals, Lane and Baton Rouge, but he did not even call back to check on them because he thought his "best chances for privileges [were] at Woman's Hospital," App. 1334, and he noted that Lane and Baton Rouge require that their doctors treat some indigent patients "for free basically" while opening them-

selves up to liability, *id.*, at 1335. Also, Doe 5 explained, Lane is "further away" from the Delta Clinic than the other hospitals. *Ibid.*

To sum up Doe 5's situation: The challenged law would have no effect on him if he could find a covering doctor in Baton Rouge, but he asked only one doctor. He did little to pursue applications at two other hospitals because he was not optimistic about his chances and those hospitals required a certain amount of unpaid service to the poor.

Doe 6. Doe 6 is a Board-certified OB/GYN who practices at Women's Clinic in New Orleans. There are nine qualifying New Orleans-area hospitals, and according to his affidavit, Doe 6 made an informal inquiry at one and filed a formal application at another. The District Court found that he attempted in "good faith" to obtain admitting privileges even though Doe 6 did not testify and was never subjected to adversarial questioning. The only relevant information before the court were several paragraphs in Doe 6's declaration, *id.*, at 1307–1313, and hearsay in the declaration of the Women's Clinic administrator, *id.*, at 1119–1131; see also 250 F. Supp. 3d, at 76–77.

These questionable sources left many important questions unanswered, for example, why Doe 6 did not apply for privileges at Touro Hospital, where Doe 5, who also performs abortions at Women's Clinic, has privileges.

The plurality provides an explanation that is found nowhere in the record, *i.e.*, that Doe 6 could not get privileges at Touro because, unlike Doe 5, who performs both surgical and medication abortions, Doe 6 performs only medication abortions. *Ante*, at 335. Not only is this pure speculation, but it is not evident why this difference might matter. The plurality notes that Doe 6's medication abortion patients have never been admitted to a hospital, but the plurality also argues that very few surgical abortion patients are admitted. *Ante*, at 334, 341. If Doe 6 had testified or been deposed, he

could have been asked about his decision not to apply at Touro, but that did not occur.

Aside from Touro, there are eight other hospitals in the New Orleans area, but Doe 6 apparently made no attempt to get privileges at six of these, and nothing in the scant record explains why. He stated that he formally applied at East Jefferson Hospital and made an informal inquiry at Tulane Hospital, but much about these efforts is unknown. No representative from Tulane or East Jefferson testified or was deposed, and no documents relating to either application were offered.

With respect to Doe 6's informal inquiry at Tulane, all that the District Court had before it was a single paragraph in Doe 6's declaration in which he stated that he spoke to an unnamed individual and was told he should not bother to apply because he did not have the requisite number of admissions per year. App. 1310. Nothing in the record reveals the type of privileges about which Doe 6 inquired.

Doe 6 furnished even less information about his formal application to East Jefferson hospital—a hospital which offers courtesy privileges, and does not impose an admissions requirement for those privileges. Record 10679. In his declaration, which he signed in September 2014, Doe 6 wrote that he had applied but had not received a response. App. 1311. A few weeks later, June Medical's counsel informed the District Court by letter that Doe 6 had complied with East Jefferson's request for additional information, *id.*, at 54, but the record says nothing about any later developments. Presumably, East Jefferson did not grant privileges, but the record does not disclose why. Did Doe 6 provide all the information that the hospital requested and do everything else required by the application process? The record is silent, and the District Court was incurious.

Doe 3. Doe 3, who performs abortions at the June Medical clinic in Shreveport, would not be directly affected by Act

620 because he maintains privileges at two area hospitals, Christus Health and WKBC, but he stated that he would stop performing abortions if, as a result of that law, he was left as the only abortion doctor in the northern part of the State. *Id.*, at 236. Thus, if Doe 1 or Doe 2 got privileges and continued to perform abortions, Doe 3, according to his testimony, would remain as well.[12]

Putting all this together, it is apparent that the record does not come close to showing that Doe 2, Doe 5, and Doe 6 made the sort of effort that one would expect if their ability to continue performing abortions had depended on success. These doctors had an incentive to do the bare minimum that they thought the judge would demand—and as it turned out, the judge did not demand much, not even an appearance in his courtroom. In short, the record does not show that Act 620 would drive any of these doctors out of abortion practice, and therefore the Act would not lead Doe 3 to leave either. It follows that the District Court's finding on Act 620's likely effects cannot stand.

C

The Court should remand this case for a new trial under the correct legal standards. The District Court should apply *Casey*'s "substantial obstacle" test, not the *Whole Woman's Health* balancing test. And it should require those challenging Act 620 to demonstrate that the doctors who lack admitting privileges attempted to obtain them with the same zeal they would have exhibited if the Act were in effect and they stood to lose by failing in those efforts.

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[12] The plurality suggests that, if Doe 3 were to leave abortion practice, it would be attributable to Act 620. But even the most ardent opponents of Act 620 did not contemplate that the law would prompt abortion doctors who *satisfied* the law's requirements to quit. Record 11231–11234, 11291. And if this outcome was not foreseeable at the time of enactment, it is hard to see how the District Court could blame Act 620 for causing Doe 3 to leave abortion practice. Cf. Restatement (Second) of Torts § 440, § 442A (1964).

IV

On remand, the District Court should not permit June Medical to assert the rights of women wishing to obtain an abortion. The court should require the joinder of a plaintiff whose own rights are at stake. Our precedents rarely permit a plaintiff to assert the rights of a third party, and June Medical cannot satisfy our established test for third-party standing. Indeed, what June Medical seeks is something we have never allowed. It wants to rely on the rights of third parties whose interests conflict with its own.

A

The plurality holds that Louisiana waived any objection to June Medical's third-party standing, *ante,* at 316, but that is a misreading of the record. The plurality relies on a passing statement in a brief filed by the State in District Court in connection with the plaintiffs' request for a temporary restraining order, but the statement is simply an accurate statement of Circuit precedent on the standing of abortion providers. See App. 44. It does not constitute a waiver.

It is true that Louisiana did not affirmatively make the third-party standing argument until it filed its cross-petition for certiorari, but "[w]e may make exceptions to our general approach to claims not raised below." *Polar Tankers, Inc.* v. *City of Valdez,* 557 U. S. 1, 14 (2009) (plurality opinion). A party's failure to raise an issue does not deprive us of the power to take it up, so long as the court below has passed on the question. See *Lebron* v. *National Railroad Passenger Corporation,* 513 U. S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below" (emphasis deleted)); S. Shapiro et al., Supreme Court Practice § 6–26(b), p. 6–104 (11th ed. 2019) (collecting cases).

In this case, no one disputes that the Fifth Circuit passed on the issue of third-party standing in Louisiana's appeal from the District Court's entry of a preliminary injunction.

June Medical Services, L. L. C. v. *Gee*, 814 F. 3d 319, 322–323 (2016). And when we granted the State's cross-petition, we took up this question and received briefing and argument on it. 588 U. S. 948 (2019).

We have a strong reason to decide the question of third-party standing because it implicates the integrity of future proceedings that should occur in this case. This case should be remanded for a new trial, and we should not allow that to occur without a proper plaintiff. Nothing compels us to forbear from addressing this issue. See *Carlson* v. *Green*, 446 U. S. 14, 17, n. 2 (1980); Shapiro, Supreme Court Practice § 6.26(h), at 6–111.

B

This case features a blatant conflict of interest between an abortion provider and its patients. Like any other regulated entity, an abortion provider has a financial interest in avoiding burdensome regulations such as Act 620's admitting-privileges requirement. Applying for privileges takes time and energy, and maintaining privileges may impose additional burdens. See App. 1335. Women seeking abortions, on the other hand, have an interest in the preservation of regulations that protect their health. The conflict inherent in such a situation is glaring.

Some may not see the conflict in this case because they are convinced that the admitting-privileges requirement does nothing to promote safety and is really just a ploy. But an abortion provider's ability to assert the rights of women when it challenges ostensible safety regulations should not turn on the merits of its claim.

The problem with the rule that the plurality embraces is highlighted if we consider challenges to other safety regulations. Suppose, for example, that a clinic in a State that allows certified non-physicians to perform abortions claims that the State's certification requirements are too onerous and that they imperil the clinic's continued operation. Should the clinic be able to assert the rights of women in

attacking this regulation, which the state lawmakers thought was important to protect women's health?

When an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights of women. Like any other party unhappy with burdensome regulation, the provider should be limited to its own rights.

C

This rule is supported by precedent and follows from general principles regarding conflicts of interest. We have already held that third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. In *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 9, 15, and n. 7 (2004), a potential conflict of interest between the plaintiff and his daughter arose on appeal. The father had asserted that his daughter had a constitutional right not to hear others recite the words "'under God'" when the pledge of allegiance was recited at her public school, but the child's mother maintained that her daughter had "no objection either to reciting or hearing" the full pledge. *Id.*, at 5, 9. The Court held that the father lacked prudential standing, because "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." *Id.*, at 15. The lower court's judgment (based, as it was, on a presentation by a conflicted party) was therefore reversed.

Newdow recognized the seriousness of conflicts of interest in the specific context of third-party claims, but the law is always sensitive to potential conflicts when a party sues in a representative capacity. Parties naturally "tailor their own presentation to the interest that each of them has," and a conflict therefore creates "a risk that the party will not provide adequate representation of the interest of the absentee." See 7C Wright & Miller § 1909 (2007). Thus, in class-action

suits, Federal Rule of Civil Procedure 23(a)(4) demands that the named plaintiff possess "the same interest and suffer the same injury" as class members. *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 156 (1982) (internal quotation marks omitted). That requirement, we have said, "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 625 (1997). Similarly, under Federal Rule of Civil Procedure 17(c), a party representing a minor or incompetent person may be replaced if the representative has conflicting interests. See *Sam M.* v. *Carcieri*, 608 F. 3d 77, 86 (CA1 2010); 6A Wright & Miller § 1570 (2010). And of course, an attorney cannot represent a client if their interests conflict.[13]

D

The conflict of interest inherent in a case like this is reason enough to reject third-party standing, and our standard rules on third-party standing provide a second, independent reason. As a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). We have recognized a "limited" exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski* v. *Tesmer*, 543 U. S. 125, 129–130 (2004); see also *Powers* v. *Ohio*, 499 U. S. 400, 410–411 (1991).

The record shows that abortion providers cannot satisfy either prong of this test. First, a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited. In Louisiana, a woman may make her first visit to an abortion

[13] See, *e. g.*, ABA Model Rules of Professional Conduct 1.7–1.9, 1.18 (2016).

clinic the day before the procedure, and if she goes to June Medical, she is likely to have a short meeting with a counselor, not the doctor who will actually perform the procedure. See App. 784–786. She will typically meet the abortion doctor for the first time just before the procedure, and if Doe 1's description is representative, their relationship consists of the doctor's telling the woman what he will do, offering to answer questions, informing her of his progress as the abortion is performed, and asking her to remain calm. *Id.*, at 688. Doe 4 testified that the surgical procedure itself takes "two or three minutes." Record 14144. Doe 3 testified that he can perform six abortions an hour and once performed 64 abortions in a 2-day period. App. 207, 243.

In the case of medication abortions, patients are required to schedule a follow-up appointment three weeks after the procedure, see *id.*, at 129–131, 690, but surgical abortions, which constitute the majority of the procedures at June Medical and across the State, do not require any follow-up, *id.*, at 691, and the great majority of women never return to the clinic, *id.*, at 131; accord, *id.*, at 1342 (Doe 5).

This description of doctor-patient interactions at June Medical is similar to those recounted in testimony heard by the legislature. See Record 11263 ("there was no doctor/patient relationship"); *id.*, at 11226 ("I can tell you, women I've counseled, many times they don't know who the abortion provider is"). *Amici* who have had abortions recount similarly distant relationships with their abortion doctors.[14] For these reasons, the first prong of the third-party standing rule cannot be met.

Nor can the second, which requires that there be a hindrance to the ability of the third party to bring suit. See *Kowalski*, 543 U. S., at 130. The plurality opinion in *Single-*

[14] See Brief for 2,624 Women Injured by Abortion et al. as *Amici Curiae* 14–22 (firsthand accounts of abortion procedures in Louisiana); Brief for Priests for Life et al. as *Amici Curiae* 7–8, and App. (accounts from Louisiana and other States).

ton v. *Wulff*, 428 U. S. 106, 117 (1976), found that women seeking abortions were hindered from bringing suit, but the reasoning in that opinion is hard to defend. The opinion identified two purported obstacles to suits by women wishing to obtain abortions—the women's desire to protect their privacy and the prospect of mootness. *Ibid.* But as Justice Powell said at the time, these "alleged 'obstacles' . . . are chimerical." *Id.*, at 126 (opinion concurring in part and dissenting in part).

First, a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so. *Ibid.* ("Our docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision"). Other precautions may be taken during the course of litigation to avoid revealing their identities. See App. 196.[15] And there is little reason to think that a woman who challenges an abortion restriction will have to pay for counsel. See Brief for Respondent/Cross-Petitioner 40–41.

Second, if a woman seeking an abortion brings suit, her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness. See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973) ("Pregnancy provides a classic justification for a conclusion of non-

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[15] Four cases to reach this Court have featured exclusively women plaintiffs. See *Beal* v. *Doe*, 432 U. S. 438 (1977); *Maher* v. *Roe*, 432 U. S. 464 (1977); *Poelker* v. *Doe*, 432 U. S. 519 (1977) (*per curiam*); *H. L.* v. *Matheson*, 450 U. S. 398 (1981). But there are a number of cases in which women have been co-plaintiffs along with abortion clinics or providers. See *Leavitt* v. *Jane L.*, 518 U. S. 137 (1996) (*per curiam*); *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990); *Hodgson* v. *Minnesota*, 497 U. S. 417 (1990); *Williams* v. *Zbaraz*, 448 U. S. 358 (1980); *Harris* v. *McRae*, 448 U. S. 297 (1980); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); *Roe* v. *Wade*, 410 U. S. 113 (1973). More recently, abortion patients have litigated in the lower courts using their names, those of legal guardians, or pseudonyms. Brief for Respondent/Cross-Petitioner 39; see also Brief for State of Arkansas et al. as *Amici Curiae* 3, and n. 1.

mootness"). To be sure, when the pregnancy terminates, an individual plaintiff's immediate interest in prosecuting the case may diminish. But this is generally true whenever the capable-of-repetition-yet-evading-review exception applies. See 13C Wright & Miller § 3533.8 (2008) (collecting examples).

The *Singleton* plurality opinion is the only opinion in which any Members of this Court have ever attempted to justify third-party standing for abortion providers, and judged on its own merits, the opinion is thoroughly unconvincing.

E

The Court does not address the conflict of interest inherent in this challenge, or plaintiffs' failure to satisfy the two prongs of our third-party standing doctrine. See *Kowalski*, 543 U. S., at 130. Instead, the plurality says that it "is . . . common" in third-party standing case law for "plaintiffs [to] challeng[e] a law ostensibly enacted to protect [a third party] whose rights they are asserting." *Ante*, at 320. In support of this strange proposition, the plurality cites two of our prior decisions, but neither decision acknowledged or addressed any potential conflict of interest, and both cases involved circumstances very different from those present here. Both cases also featured facts ensuring that third-party interests were fairly represented.

In the first case, *Craig* v. *Boren*, 429 U. S. 190 (1976), the sole appellant with a live claim at the time of decision was a beer vendor who challenged a law that allowed females to purchase 3.2% beer at the age of 18 but barred males from making such purchases until they turned 21. *Id.*, at 193. The Court's lead explanation for its refusal to dismiss had nothing to do with the merits of the vendor's third-party standing claim. The Court noted that the other appellant, Curtis Craig, had been under the age of 21 during the proceedings below, that the appellees had not raised a standing objection below, and that they had not pressed an objection in this Court. *Id.*, at 192–194.

Only after this discussion did the Court say anything about the merits of the third-party claim, and even then, the Court said nothing about a conflict of interest between the vendor and underage males. The plurality now claims there was a potential conflict: Young men under the age of 21 had an interest in being barred from buying beer in order to protect themselves from their own reckless conduct. Suffice it to say that there is no indication that this supposed conflict occurred to anybody when *Craig* was before this Court.

The plurality's second case, *Department of Labor* v. *Triplett*, 494 U. S. 715 (1990), is even weaker. A state bar ethics committee filed a disciplinary proceeding in state court against a lawyer who had entered into an attorney-fee arrangement that was prohibited by a provision of the Black Lung Benefits Act. When the State Supreme Court ruled in favor of the lawyer on the ground that the provision in question violated Black Lung claimants' constitutional right to counsel, both the bar ethics committee and the Department of Labor, which had intervened in state court, successfully petitioned for review in this Court. We then held that the attorney could defend the decision below based on the rights of his client.

Triplett is inapposite here for at least two reasons. First, the lawyer in that case did not initiate the litigation. Second, because the case arose in state court, his right to invoke his client's rights in that forum was a question of state law. Had we prevented him from asserting those rights in this Court, he would have been unable to defend himself against the petitioners' arguments. And on top of all this, *Triplett*, as we noted in *Kowalski*, "involved the representation of known claimants," and that "existing attorney-client relationship [was] quite different from the hypothetical . . . relationship" between the abortion providers and clients in the present case. 543 U. S., at 131 (emphasis deleted). That *Craig* and *Triplett* are the best authorities the plurality can find is telling proof of the weakness of its position.

F

As THE CHIEF JUSTICE points out, *stare decisis* generally counsels adherence to precedent, and in deciding whether to overrule a prior decision, we consider factors beyond the strength of the precedent's reasoning. *Ante*, at 346. But here, such factors weigh in favor of overruling.

Reexamination of a precedent may be appropriate when it is an "outlier" and its reasoning cannot be reconciled with other established precedents, see *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248 (2019); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 925 (2018); *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989), and that is true of the rule allowing abortion providers to assert their patients' rights. The parties have not brought to our attention any other situation in which a party is allowed to invoke the right of a third party with blatantly adverse interests. The rule that the majority applies here is an abortion-only rule.

THE CHIEF JUSTICE properly notes that subsequent legal developments may support overruling a precedent, *ante*, at 346, and that factor too is present here. Both our general standing jurisprudence and our treatment of third-party standing have changed since *Singleton*. We have stressed the importance of insisting that a plaintiff assert an injury that is particular to its own situation. See, *e. g.*, *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 339 (2016); *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409 (2013); *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). Moreover, in *Kowalski*, 543 U. S. 125, we refined our rule for third-party standing, and in *Newdow*, 542 U. S. 1, we made it clear that a plaintiff cannot sue on behalf of a third party if the parties' interests may conflict.

The presence or absence of reliance is often a critical factor in applying the doctrine of *stare decisis*, see, *e. g.*, *Franchise Tax Bd.*, 587 U. S., at 248; *Janus*, 585 U. S., at 926;

South Dakota v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018); *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 206–207 (1991), but neither the plurality nor THE CHIEF JUSTICE claims that any reliance interests are at stake here. Women wishing to obtain abortions have not taken any action in reliance on the ability of abortion providers to sue on their behalf, and eliminating third-party standing for providers would not interfere with the ability of women to sue. Nor does it appear that abortion providers have done anything in reliance on the special third-party standing rule they have enjoyed. If that rule were abrogated, they could still ask to intervene or appear as an *amicus curiae* in a suit brought by a woman, but it is deeply offensive to our rules of standing to permit them to sue in the name of their patients when they challenge laws enacted to protect their patients' safety.

On remand, the District Court should permit the joinder of a plaintiff with standing and should not proceed until such a plaintiff appears.

* * *

The decision in this case, like that in *Whole Woman's Health*, twists the law, and I therefore respectfully dissent.

JUSTICE GORSUCH, dissenting.

The judicial power is constrained by an array of rules. Rules about the deference due the legislative process, the standing of the parties before us, the use of facial challenges to invalidate democratically enacted statutes, and the award of prospective relief. Still more rules seek to ensure that any legal tests judges may devise are capable of neutral and principled administration. Individually, these rules may seem prosaic. But, collectively, they help keep us in our constitutionally assigned lane, sure that we are in the business of saying what the law is, not what we wish it to be.

Today's decision doesn't just overlook one of these rules. It overlooks one after another. And it does so in a case

touching on one of the most controversial topics in contemporary politics and law, exactly the context where this Court should be leaning most heavily on the rules of the judicial process. In truth, *Roe* v. *Wade*, 410 U. S. 113 (1973), is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.

*

When confronting a constitutional challenge to a law, this Court ordinarily reviews the legislature's factual findings under a "deferential" if not "[u]ncritical" standard. *Gonzales* v. *Carhart*, 550 U. S. 124, 165–166 (2007). When facing such a challenge, too, this Court usually accepts that "the public interest has been declared in terms well-nigh conclusive" by the legislature's adoption of the law—so we may review the law only for its constitutionality, not its wisdom. *Berman* v. *Parker*, 348 U. S. 26, 32 (1954). Today, however, the plurality declares that the law before us holds no benefits for the public and bears too many social costs. All while sharing virtually nothing about the facts that led the legislature to conclude otherwise. The law might as well have fallen from the sky.

Of course, that's hardly the case. In Act 620, Louisiana's legislature found that requiring abortion providers to hold admitting privileges at a hospital within 30 miles of the clinic where they perform abortions would serve the public interest by protecting women's health and safety. Those in today's majority never bother to say so, but it turns out that Act 620's admitting privileges requirement for abortion providers tracks longstanding state laws governing physicians who perform relatively low-risk procedures like colonoscopies, Lasik eye surgeries, and steroid injections at ambulatory surgical centers. In fact, the Louisiana legislature passed Act 620 only after extensive hearings at which ex-

perts detailed how the Act would promote safer abortion treatment—by providing "a more thorough evaluation mechanism of physician competency," promoting "continuity of care" following abortion, enhancing inter-physician communication, and preventing patient abandonment.

Testifying physicians explained, for example, that abortions carry inherent risks including uterine perforation, hemorrhage, cervical laceration, infection, retained fetal body parts, and missed ectopic pregnancy. Unsurprisingly, those risks are minimized when the physician providing the abortion is competent. Yet, unlike hospitals which undertake rigorous credentialing processes, Louisiana's abortion clinics historically have done little to ensure provider competence. Clinics have failed to perform background checks or to inquire into the training of doctors they brought on board. Clinics have even hired physicians whose specialties were unrelated to abortion—including a radiologist and an ophthalmologist. Requiring hospital admitting privileges, witnesses testified, would help ensure that clinics hire competent professionals and provide a mechanism for ongoing peer review of physician proficiency. Loss of admitting privileges, as well, might signal a problem meriting further investigation by state officials. At least one Louisiana abortion provider's loss of admitting privileges following a patient's death alerted the state licensing board to questions about his competence, and ultimately resulted in restrictions on his practice.

The legislature also heard testimony that Louisiana's clinics and the physicians who work in them have racked up dozens of citations for safety and ethical violations in recent years. Violations have included failing to use sterile equipment, maintaining unsanitary conditions, failing to monitor patients' vital signs, permitting improper administration of medications by unauthorized persons, and neglecting to obtain informed consent from patients. Some clinics have

failed to maintain supplies of emergency medications and medical equipment for treating surgical complications. One clinic used single-use hoses and tubes on multiple patients, and the solution needed to sterilize instruments was changed so infrequently that it often had pieces of tissue floating in it. Hospital credentialing processes, witnesses suggested, could help prevent such violations. In the course of the credentialing process, physicians' prior safety lapses, including criminal violations and medical malpractice suits, would be revealed and investigated, and incompetent doctors might be weeded out.

The legislature heard, too, from affected women and emergency room physicians about clinic doctors' record of abandoning their patients. One woman testified that, while she was hemorrhaging, her abortion provider told her, "'You're on your own. Get out.'" Eventually, the woman went to a hospital where an emergency room physician removed fetal body parts that the abortion provider had left in her body. Another patient who complained of severe pain following her abortion was told simply to go home and lie down. When she decided for herself to go to the emergency room, physicians discovered a tear in her uterus and a large hematoma containing a fetal head. The woman required an emergency hysterectomy. In another case, a clinic physician allowed a patient to bleed for three hours, yet a clinic employee testified that the physician would not let her call 911 because of possible media involvement. In the end, the employee called anyway and emergency room personnel discovered that the woman had a perforated uterus and needed a hysterectomy. A different physician explained that she routinely treats abortion complications in the emergency room when the physician who performed the abortion lacks admitting privileges. In her experience, that situation "puts a woman's health at an unnecessary, unacceptable risk that results from a delay of care . . . and a lack of continuity of care." Admitting privileges would mitigate these risks, she

testified, because "the physician who performed the procedure would be the one best equipped to evaluate and treat the patient."

Nor did the legislature neglect to consider the law's potential burdens. As witnesses explained, the admitting privileges requirement in Act 620 for abortion clinic providers would parallel existing requirements for many physicians who work at ambulatory surgical centers. And there is no indication this parallel admitting privileges requirement has led to the closing of any surgical centers or otherwise presented obstacles to quality care in Louisiana. Further, legislators learned that at least one Louisiana abortion provider already had qualifying admitting privileges, suggesting other competent abortion providers would be able to comply with the new regulation as well.

Since trial, the State continues to accrue evidence supporting Act 620, and the State has sought to lodge that evidence with this Court. In particular, the State has learned of additional safety violations at Louisiana clinics, including evidence of an abortion provider deviating from the standard of care in a way that can result in the live births of nonviable fetuses. The State has also proffered new evidence of potential criminal conduct by Louisiana abortion providers, including the failure to report the forcible rape of a minor and performing an abortion on a minor without parental consent or judicial bypass.

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After overlooking so many facts and the deference owed to the legislative process, today's decision misapplies many of the rules that normally constrain the judicial process. Start with the question who can sue. To establish standing in federal court, a plaintiff typically must assert an injury to her own legally protected interests—not the rights of someone else. *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). This rule ensures that the judiciary stays focused on the "factual situation before [it]," *New York* v. *Ferber*, 458 U. S. 747, 768 (1982),

while "questions of wide public significance" remain with "governmental institutions . . . more competent to address" them, *Warth*, 422 U. S., at 500.

No one even attempts to suggest this usual prerequisite is satisfied here. The plaintiffs before us are abortion providers. They do not claim a constitutional right to perform that procedure, and no one on the Court contends they hold such a right. Instead, the abortion providers before us seek only to assert the constitutional rights of an undefined, unnamed, indeed unknown, group of women who they hope will be their patients in the future.

In narrow circumstances, to be sure, this Court has allowed cases to proceed based on "third-party standing." But to qualify, the plaintiff must demonstrate both that he has a "'close' relationship" with the person whose rights he wishes to assert *and* that some "'hindrance'" hampers the right-holder's "ability to protect his own interests." *Kowalski* v. *Tesmer*, 543 U. S. 125, 130 (2004). Think of parents and children, guardians and wards. In these special cases, the logic goes, the plaintiff's interests are so aligned with those of a particular right-holder that the litigation will proceed in much the same way as if the right-holder herself were present.

Nothing like that exists here. In the first place, the plaintiff abortion providers identify no reason to think affected women are unable to assert their own rights if they wish. Instead, the plaintiffs merely gesture to a 1976 plurality opinion suggesting that women seeking abortions "generally" face a hindrance in asserting their own rights. *Singleton* v. *Wulff*, 428 U. S. 106, 118 (1976). But whatever the supposition of a 1976 plurality, in the years since interested women have challenged abortion regulations on their own behalf in case after case. See, *e. g.*, *McCormack* v. *Herzog*, 788 F. 3d 1017 (CA9 2015); *Jane L.* v. *Bangerter*, 102 F. 3d 1112 (CA10 1996); *Margaret S.* v. *Edwards*, 794 F. 2d 994 (CA5 1986); see also *Whole Woman's Health* v. *Hellerstedt*,

579 U. S. 582, 631–632 (2016) (THOMAS, J., dissenting) (collecting additional examples). And no one suggests this suit differs from those cases in any meaningful way. The truth is transparent: The plaintiffs hardly try to carry their burden of showing a hindrance because they can't.

Separately and additionally, the abortion providers cannot claim a "close relationship" with the women whose rights they assert. Normally, the fact that the plaintiffs do not even know who those women are would be enough to preclude third-party standing. This Court has held, for example, that a future "*hypothetical* attorney-client relationship" (as opposed to an "*existing*" one) cannot confer third-party standing. *Kowalski*, 543 U. S., at 131. Likewise, this Court has held that a pediatrician lacks standing to *defend* a State's abortion laws on the theory that fetuses are his future potential patients. *Diamond* v. *Charles*, 476 U. S. 54, 66 (1986). If standing isn't present in cases like those, it is hard to see how it might be present in this one.

Nor is that the end of the plaintiffs' standing problems. Even when a plaintiff can identify an actual and close relationship, this Court will normally refuse third-party standing if the plaintiff has a potential conflict of interest with the person whose rights are at issue. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 15, 17–18 (2004). And it's pretty hard to ignore the potential for conflict here. After all, Louisiana's law expressly aims to protect women from the unsafe conditions maintained by at least some abortion providers who, like the plaintiffs, are either unwilling or unable to obtain admitting privileges. Cf. *ante*, at 401–403 (ALITO, J., dissenting).

Seeking to set all these difficulties aside, today's decision contends that Louisiana has waived its prudential standing arguments. But in doing so, today's decision mistakes three more legal principles. First, what the plurality characterizes as a waiver arises from the State's admission that applicable circuit law allowed the plaintiffs standing. At worst,

that reflects a forfeiture of, or a failure to pursue, a possible argument against standing, not an affirmative waiver of the argument, or an intentional relinquishment of any interest in the issue. Cf. *ante*, at 400–401 (ALITO, J., dissenting). Second, this Court typically relies on a forfeiture or even a waiver only if the issue was "'not pressed or passed upon'" in the lower courts. *United States* v. *Williams*, 504 U. S. 36, 41 (1992). That rule's disjunctive phrasing is no accident—it "permit[s] review of an issue not pressed so long as it has been passed upon" below. *Ibid.* Here, the Fifth Circuit *did* pass upon the standing question—so forfeiture or waiver presents no impediment to our review. See *June Medical Services, L.L.C.* v. *Gee*, 814 F. 3d 319, 322–323 (2016). Finally, this Court has held that even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue. *Freytag* v. *Commissioner*, 501 U. S. 868, 878–880 (1991). Both conditions are present here.

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Next consider our rules about facial challenges. Generally, courts decide the constitutionality of statutes as applied to specific people in specific situations and disfavor facial challenges seeking to forestall a law's application in every circumstance. The reasons for this rule are many. Not least, when a court focuses on the parties before it, it is able to assess the law's application within a real factual context, rather than left to imagine "every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953). Importantly, too, as-applied challenges reduce the risk that a court will "short circuit the democratic process" by interfering with legislation any more than necessary to remedy a complaining party's injury. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 451 (2008).

As a result, the path for a litigant pursuing a facial challenge is deliberately difficult. Typically, a plaintiff seeking to render a law unenforceable in all of its applications must show that the law cannot be constitutionally applied against *anyone* in *any* situation. *United States* v. *Stevens*, 559 U. S. 460, 472–473 (2010). This Court has carved out an exception to this high bar for overbreadth challenges under the First Amendment. Some suggest this exception is ill-advised. *United States* v. *Sineneng-Smith*, 590 U. S. 371, 386–388 (2020) (THOMAS, J., concurring). But even in First Amendment overbreadth challenges, a plaintiff still must show that the law in question has "'a substantial number of . . . applications [that] are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U. S., at 473 (quoting *Washington State Grange*, 552 U. S., at 449, n. 6); see also *Stevens*, 559 U. S., at 481–482 (holding law unconstitutional under First Amendment where "impermissible applications . . . far outnumber[ed] any permissible ones").

Today, it seems any of these standards would demand too much. Instead of asking whether the law has a "substantial number of unconstitutional applications" compared to its "legitimate sweep," the plurality asks whether the law will impose a "'substantial obstacle'" for a "'large fraction'" of "'those women for whom the provision is an actual rather than an irrelevant restriction.'" *Ante*, at 343. Concededly, the two tests sound similar—after all, who could say whether a "substantial number" is more or less than a "large fraction"? But notice the switch at the end, where the plurality limits our focus to women for whom the law is an "actual" restriction. Because of that limitation, it doesn't matter how many women continue to have convenient access to abortions: Any woman not burdened by the challenged law is deemed "irrelevant" to the analysis. So instead of asking how the law's unconstitutional applications compare to its legitimate sweep, the plurality winds up asking only whether the law burdens a very large fraction of the people that it

burdens. The words might sound familiar, but this circular test is unlike anything we apply to facial challenges anywhere else.

Abandoning our usual caution with facial challenges leads, predictably, to overbroad conclusions. Suppose that for a substantial number of women Louisiana's law imposes no burden at all. These women might live in an area well-served by well-qualified abortion providers who can easily obtain admitting privileges. No one could dispute the law is constitutional as applied to these women and providers. But suppose the law makes it difficult to obtain an abortion on the other side of the State, where qualified providers are fewer and farther between. Under the standard applied today, it seems the entire law would fall statewide, notwithstanding its undeniable constitutionality in many applications.

Nor is this possibility farfetched. Today's decision declares the admitting privileges requirement unconstitutional even as applied to Does 3 and 5, each of whom holds admitting privileges. Not a single woman would be burdened by requiring these doctors to maintain the privileges they already have. Yet the State may not enforce the law even against them. In effect, the standard for facial challenges has been flipped on its head: Rather than requiring that a law be unconstitutional in all its applications to fall, today's decision requires that Louisiana's law be constitutional in all its applications to stand.

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Even when it comes to assessing the law's effects on the subset of women deemed "relevant," this case proves unusual. Normally, to obtain a prospective injunction like the one approved today, a plaintiff must show that irreparable injury is not just possible, but likely. *O'Shea* v. *Littleton*, 414 U. S. 488, 501–502 (1974); *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 22 (2008). Yet, nothing like that standard can be found at work today.

The plaintiffs allege that statewide enforcement of Act 620 would irreparably injure Louisiana women by making it difficult for them to obtain abortions. To justify injunctive relief on that theory, however, it can't be enough to show that the law would induce any particular doctor or clinic to stop providing abortions. Instead, the plaintiffs would have to show that a sufficient number of clinics would close (without enough new clinics opening) so that supply would no longer meet demand for abortion in the State. And when assessing claims like *that*, we usually proceed with caution, aware of "the difficulties and uncertainties involved in determining how [a] relevant market" would behave in response to changed circumstances. *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 743 (1977). At a minimum, we expect one change in a marketplace—such as the introduction of a new regulation—will induce other responsive changes. *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 307–309 (1997). When "the claim is one that simply makes no economic sense," too, the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986).

Rather than follow these rules, today's decision proceeds to accept one speculative proposition after another to arrive at what can only be called a worst case scenario. Take the question whether existing providers will be able to continue their existing practices. On its way to predicting dire results, the plurality uncritically accepts that, if Act 620 went into effect, Doe 5 would be unable to obtain admitting privileges in Baton Rouge. The plurality does so even though it is undisputed that the sole remaining step for him to obtain privileges is to find a doctor willing to cover for him—and that Doe 5 gave up on that effort after asking only one doctor. Similarly, the plurality takes it as given that Doe 2 would be denied admitting privileges even though he dropped a pending application when the hospital simply sent him a request for additional information. Maybe these phy-

sicians didn't feel it was worth putting in much effort to obtain admitting privileges given their chances of prevailing in this lawsuit. But it "taxes the credulity of the credulous" to think they would have treated the process so lightly if their livelihood depended on securing admitting privileges. *Maryland* v. *King*, 569 U. S. 435, 466 (2013) (Scalia, J., dissenting). Cf. *ante*, at 388–399 (ALITO, J., dissenting).

That example only begins to illustrate the remarkably static view of the market on display here. Today's decision also appears to assume that, if Louisiana's law took effect, not a single hospital would amend its rules to permit abortion providers easier access to admitting privileges; no clinic would choose to relocate closer to a hospital that offers admitting privileges rather than permanently close its doors; the prospect of significant unmet demand would not prompt a single Louisiana doctor with established admitting privileges to begin performing abortions; and unmet demand would not induce even one out-of-state abortion provider to relocate to Louisiana.

All these assumptions are open to question. Hospitals can (and do) change their policies in response to regulations. Clinic operators have opened, closed, and relocated clinics numerous times. There are hundreds of OB/GYNs with active admitting privileges in Louisiana who could lawfully perform abortions tomorrow. Millions of Americans move between States every year to pursue their profession. Yet with conditions ripe for market entry and expansion, today's decision foresees nothing but clinic closures and unmet demand.

Not only questionable, the plurality's assumptions are already contradicted by emerging evidence. For example, a major hospital reacted to the law by developing a new type of admitting privileges expressly for an abortion provider seeking to comply with Act 620. Whether this type of privileges satisfies the statute is yet unknown—so, again assuming the worst, today's decision simply ignores the possibility.

If nothing else, this development belies the prediction that hospitals statewide would stand idly by as thousands upon thousands of requests for abortions go unfulfilled.

What's more, as this suit was in progress, the State discovered two additional Louisiana abortion providers not reflected in the district court's opinion. No one disputes the accuracy of the State's information about these two providers. Nor could anyone deny the importance of this information, when so much of today's decision seems to turn on the exact quantity and distribution of a relatively small number of abortion providers. Normally, this Court might hesitate to deliver a fact-bound decision premised on facts we know to be incorrect. But today's decision, assuming the worst once more, simply proceeds as if these providers didn't exist.

If there is a silver lining, though, it may be here. This Court generally recognizes that facts can change over time—and that, when they do, legal conclusions based on them may have to change as well. Even so-called "permanent injunctions" are actually provisional—open to modification "to prevent the possibility that [they] may operate injuriously in the future." *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 179 (1933) (*per curiam*). After all, when the facts change, the law cannot pretend nothing has happened. For that reason, we have instructed lower courts to reconsider injunctions "when the party seeking relief . . . can show a significant change either in factual conditions or in law." *Agostini* v. *Felton*, 521 U. S. 203, 215 (1997) (internal quotation marks omitted). And, given the fact-intensive nature of today's analysis, the relief directed might well need to be reconsidered below if, for example, hospitals start offering qualifying admitting privileges to abortion providers, a handful of abortion providers relocate from other States, or even a tiny fraction of Louisiana's existing OB/GYNs decide to begin performing abortions. Given the post-trial developments Louisiana has already identified but no court has yet consid-

ered, there's every reason to think the factual context here is prone to significant changes.

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Another background rule, another exception. When it comes to the factual record, litigants normally start the case on a clean slate. While a previous case's legal rules can create precedent binding in the current dispute, earlier "fact-bound" decisions typically "provide only minimal help when other courts consider" later cases with different factual "circumstances." *Buford* v. *United States*, 532 U. S. 59, 65–66 (2001). We've long recognized that this arrangement is required by due process—because while the law binds everyone equally, parties are normally entitled to the chance to present evidence about their own unique factual circumstances. See *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313, 329 (1971).

No hint of these rules can be found in today's decision. From beginning to end, the plurality treats *Whole Woman's Health*'s fact-laden predictions about how a Texas law would impact the availability of abortion in that State in 2016 as if they obviously and necessarily applied to Louisiana in 2020. Most notably, the plurality cites *Whole Woman's Health* for the proposition that admitting privileges requirements offer no benefit when it comes to patient safety or otherwise. But *Whole Woman's Health* found an absence of benefit based only on the particular factual record before it. Nothing in the decision suggested that its conclusions about the costs and benefits of the Texas statute were universal principles of law, medicine, or economics true in all places and at all times. See, *e. g.*, 579 U. S., at 610–611, 613–614, 619. Yet that is exactly how the plurality treats those conclusions—all while leaving unmentioned the facts Louisiana amassed in an effort to show that its law promises patient benefits in this place at this time.

Not only does today's decision treat factual questions as if they were legal ones, it treats legal questions as if they were facts. We have previously explained that it would "be inconsistent with the idea of a unitary system of law" for the Supreme Court to defer to lower court legal holdings. *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996). Yet, the plurality today reviews for clear error not only the district court's findings about how the law will affect abortion access, but also the lower court's judgment that the law's effects impose a "substantial obstacle." The plurality defers not only to the district court's findings about the extent of the law's benefits, but also to the lower court's judgment that the benefits are so limited that the law's burden on abortion access is "undue." By declining to apply our normal *de novo* standard of review to questions of law like these, today's decision proceeds on the remarkable premise that, even if the district court was wrong on the law, a duly enacted statute must fall because the lower court wasn't *clearly* wrong.

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After so much else, one might at least hope that the legal test lower courts are tasked with applying in this area turns out to be replicable and predictable. After all, "[l]iving under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'" *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972) (quotation modified). The existence of an administrable legal test even lies at the heart of what makes a case justiciable—as we have put it, federal courts may not entertain a question unless there are "'judicially discoverable and manageable standards for resolving it.'" *Rucho* v. *Common Cause*, 588 U. S. 684, 700 (2019). Nor does the need for clear rules dissipate as the stakes grow. If anything, the judicial responsibility to avoid standardless decisionmaking is at its apex in "'the most heated partisan issues.'" *Id.*, at 704.

Consider, for example, our precedents involving the First Amendment's right to free speech. In an effort to keep judges from straying into the political fray, this Court has provided a detailed roadmap: A court must determine whether protected speech is at issue, whether the restriction is content based or content neutral, whether the State's asserted interest is compelling or substantial, and whether the State might rely on less restrictive alternatives to achieve the same goals. At no point may a judge simply "'balanc[e]' the governmental interests . . . against the First Amendment rights" at stake because, as we have recognized, it would be "inappropriate" for any court "to label one as being more important or more substantial than the other." *United States* v. *Robel*, 389 U. S. 258, 268, n. 20 (1967). Any such raw balancing of competing social interests must be left to the legislature—"[o]ur inquiry is more circumscribed." *Ibid.* Nor is this idea unique to the First Amendment context. This Court has consistently rejected the idea that courts may decide constitutional issues by relying on "abstract opinions . . . of the justice of the decision" or "of the merits of the legislation" at issue. *Davidson* v. *New Orleans*, 96 U. S. 97, 104 (1878).

By contrast, and as today's concurrence recognizes, the legal standard the plurality applies when it comes to admitting privileges for abortion clinics turns out to be exactly the sort of all-things-considered balancing of benefits and burdens this Court has long rejected. Really, it's little more than the judicial version of a hunter's stew: Throw in anything that looks interesting, stir, and season to taste. In another context, this Court has described the sort of decisionmaking on display today as "*inherently*, and therefore *permanently*, unpredictable." *Crawford* v. *Washington*, 541 U. S. 36, 68, n. 10 (2004). Under its terms, "[w]hether a [burden] is deemed [undue] depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.*, at 63.

What was true there turns out to be no less true here. The plurality sides with the district court in concluding that the time and cost some women might have to endure to obtain an abortion outweighs the benefits of Act 620. Perhaps the plurality sees that answer as obvious, given its apparent conclusion that the Act would offer the public no benefits of any kind. But for its test to provide any helpful guidance, it must be capable of resolving cases the plurality can't so easily dismiss. Suppose, for example, a factfinder credited the State's evidence of medical benefit, finding that a small number of women would obtain safer medical care if the law went into effect. But suppose the same factfinder *also* credited a plaintiff's evidence of burden, finding that a large number of women would have to endure longer wait times and farther drives, and that a very small number of women would be unable to obtain an abortion at all. How is a judge supposed to balance, say, a few women's emergency hysterectomies against many women spending extra hours traveling to a clinic? The plurality's test offers no guidance. Nor can it. The benefits and burdens are incommensurable, and they do not teach such things in law school.

When judges take it upon themselves to assess the raw costs and benefits of a new law or regulation, it can come as no surprise that "[s]ome courts wind up attaching the same significance to opposite facts," and even attaching the opposite significance to the same facts. *Ibid.* It can come as no surprise, either, that judges retreat to their underlying assumptions or moral intuitions when deciding whether a burden is undue. For what else is left?

Some judges have thrown up their hands at the task put to them by the Court in this area. If everything comes down to balancing costs against benefits, they have observed, "the only institution that can give an authoritative answer" is this Court, because the question isn't one of law at all and the only "balance" that matters is the one this Court strikes. *Planned Parenthood of Ind. & Ky.* v. *Box*, 949 F. 3d 997, 999

(CA7 2019) (Easterbrook, J., concurring in denial of rehearing en banc). The lament is understandable. Missing here is exactly what judges usually depend on when asked to make tough calls: an administrable legal rule to follow, a neutral principle, something outside themselves to guide their decision.

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Setting aside the other departures from the judicial process on display today, the concurrence suggests it can remedy at least this one. We don't need to resort to a raw balancing test to resolve today's dispute. A deeper respect for *stare decisis* and existing precedents, the concurrence assures us, supplies the key to a safe way out. Unfortunately, however, the reality proves more complicated.

Start with the concurrence's discussion of *Whole Woman's Health*. Immediately after paying homage to *stare decisis*, the concurrence *refuses* to follow the all-things-considered balancing test that decision employed when striking down Texas's admitting privileges law. In the process, the concurrence rightly recounts many of the problems with raw balancing tests. But then, switching directions again, the concurrence insists we are bound by an *alternative* holding in *Whole Woman's Health*. According to the concurrence, this alternative holding declared that the Texas law imposed an impermissible "substantial obstacle" to abortion access in light *only* of the burdens the law imposed—"independent of [any] discussion of [the law's] benefits." *Ante,* at 354 (ROBERTS, C. J., concurring in judgment). And, the concurrence concludes, because the facts of this suit look like those in *Whole Woman's Health*, we must find an impermissible substantial obstacle here too.

But in this footwork lie at least two missteps. For one, the facts of this suit cannot be so neatly reduced to *Whole Woman's Health* redux. See *ante,* at 307–310; *ante,* at 385–387, 390–399 (ALITO, J., dissenting). For another, *Whole Woman's Health* nowhere issued the alternative holding on which the

concurrence pins its argument. At no point did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle. To the contrary, *Whole Woman's Health* insisted that the substantial obstacle test "*requires* that courts consider the burdens a law imposes on abortion access together with the benefits th[e] la[w] confer[s]." 579 U. S., at 607 (emphasis added). And whatever else respect for *stare decisis* might suggest, it cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court.

The concurrence's fallback argument doesn't solve the problem either. So what if *Whole Woman's Health* rejected the benefits-free version of the "substantial obstacle" test the concurrence endorses? The concurrence assures us that *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), specified this form of the test, so we must (or at least may) do the same, whatever *Whole Woman's Health* says.

But here again, the concurrence rests on at least one mistaken premise. In the context of laws implicating only the State's interest in fetal life previability, the *Casey* plurality did describe its "undue burden" test as asking whether the law in question poses a substantial obstacle to abortion access. 505 U. S., at 878. But when a State enacts a law "to further the health or safety of a woman seeking an abortion," the *Casey* plurality added a key qualification: Only "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Ibid.* (emphasis added). That qualification is clearly applicable here, yet the concurrence nowhere addresses it, applying instead a new test of its own creation. In the context of medical regulations, too, the concurrence's new test might even prove stricter than strict scrutiny. After all, it's possible for a regulation to survive strict scrutiny if it is narrowly tailored to

advance a compelling state interest. And no one doubts that women's health can be such an interest. Yet, under the concurrence's test it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access. Such a result would appear to create yet another discontinuity with *Casey*, which expressly disavowed any test as strict as strict scrutiny. *Id.*, at 871.

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To arrive at today's result, rules must be brushed aside and shortcuts taken. While the concurrence parts ways with the plurality at the last turn, the road both travel leads us to a strangely open space, unconstrained by many of the neutral principles that normally govern the judicial process. The temptation to proceed this direction, closer with each step toward an unobstructed exercise of will, may be always with us, a danger inherent in judicial review. But it is an impulse this Court normally strives mightily to resist. Today, in a highly politicized and contentious arena, we prove unwilling, or perhaps unable, to resist that temptation. Either way, respectfully, it is a sign we have lost our way.

JUSTICE KAVANAUGH, dissenting.

I join Parts I, II, and III of JUSTICE ALITO's dissent. A threshold question in this case concerns the proper standard for evaluating state abortion laws. The Louisiana law at issue here requires doctors who perform abortions to have admitting privileges at a hospital within 30 miles of the abortion clinic. The State asks us to assess the law by applying the undue burden standard of *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992).[1] The plaintiffs ask us to apply the cost-benefit standard of *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582 (2016).

[1] The State has not asked the Court to depart from the *Casey* standard.

Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard. *Ante*, at 347–354 (ROBERTS, C. J., concurring in judgment); *ante*, at 371–377 (THOMAS, J., dissenting); *ante*, at 379–380 (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., dissenting); *ante*, at 423–426 (GORSUCH, J., dissenting). A different five Members of the Court conclude that Louisiana's admitting-privileges law is unconstitutional because it "would restrict women's access to abortion to the same degree as" the Texas law in *Whole Woman's Health*. *Ante*, at 354 (opinion of ROBERTS, C. J.); see also *ante*, at 321–344 (opinion of BREYER, J., joined by GINSBURG, SOTOMAYOR, and KAGAN, JJ.).

I agree with the first of those two conclusions. But I respectfully dissent from the second because, in my view, additional factfinding is necessary to properly evaluate Louisiana's law. As JUSTICE ALITO thoroughly and carefully explains, the factual record at this stage of plaintiffs' facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors (Does 2, 5, and 6) cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law. I expressed the same concern about the incomplete factual record more than a year ago during the stay proceedings, and the factual record has not changed since then. See *June Medical Services, L.L.C.* v. *Gee*, 586 U. S. 1135 (2019) (opinion dissenting from grant of application for stay). In short, I agree with JUSTICE ALITO that the Court should remand the case for a new trial and additional factfinding under the appropriate legal standards.[2]

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[2] In my view, the District Court on remand should also address the State's new argument (raised for the first time in this Court) that these doctors and clinics lack third-party standing.

Syllabus

AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. *v.* ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

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

No. 19–177. Argued May 5, 2020—Decided June 29, 2020

In the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as relevant here, Congress limited the funding of American and foreign nongovernmental organizations to those with "a policy explicitly opposing prostitution and sex trafficking." 22 U. S. C. § 7631(f). In 2013, that Policy Requirement, as it is known, was held to be an unconstitutional restraint on free speech when applied to American organizations. *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205. Those American organizations now challenge the requirement's constitutionality when applied to their legally distinct foreign affiliates. The District Court held that the Government was prohibited from enforcing the requirement against the foreign affiliates, and the Second Circuit affirmed.

Held: Because plaintiffs' foreign affiliates possess no First Amendment rights, applying the Policy Requirement to them is not unconstitutional. Two bedrock legal principles lead to this conclusion. As a matter of American constitutional law, foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. See, *e. g.*, *Boumediene* v. *Bush*, 553 U. S. 723, 770–771. And as a matter of American corporate law, separately incorporated organizations are separate legal units with distinct legal rights and obligations. See, *e. g.*, *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474–475. That conclusion corresponds to Congress's historical practice of conditioning funding to foreign organizations, which helps ensure that U. S. foreign aid serves U. S. interests.

Plaintiffs' counterarguments are unpersuasive. First, they claim that because a foreign affiliate's policy statement may be attributed to them, American organizations themselves possess a First Amendment right against the Policy Requirement's imposition on their foreign affiliates. First Amendment cases involving speech misattribution between formally distinct speakers, see, *e. g.*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574–575, however, are premised on something missing here: Government compulsion to associate with another entity. Even protecting the free speech rights of only those foreign organizations that are closely identified with American organizations would deviate from the fundamental principle

that foreign organizations operating abroad do not possess rights under the U. S. Constitution and enmesh the courts in difficult line-drawing exercises. Second, plaintiffs assert that the Court's 2013 decision encompassed both American organizations and their foreign affiliates. That decision did not facially invalidate the Act's funding condition, suggest that the First Amendment requires the Government to exempt plaintiffs' foreign affiliates or other foreign organizations from the Policy Requirement, or purport to override longstanding constitutional law and corporate law principles. Pp. 433–440.

911 F. 3d 104, reversed.

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, *post*, p. 440. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 441. KAGAN, J., took no part in the consideration or decision of the case.

Christopher G. Michel argued the cause for petitioners. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Benjamin H. Torrance*, and *Sharon Swingle*.

David W. Bowker argued the cause for respondents. With him on the brief were *Catherine M. A. Carroll*, *David A. Stoopler*, *Kevin M. Lamb*, *Alex Hemmer*, and *Emily J. Barnet*.*

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2003, Congress passed and President George W. Bush signed the United States Leadership Against HIV/AIDS,

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**Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber* filed a brief for the American Center for Law and Justice as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Adventist Development and Relief Agency International by *Eugene Volokh*, *Andrew L. Frey*, and *Cleland B. Welton II*; for the Cato Institute by *Megan L. Brown*, *Scott B. Wilkens*, and *Ilya Shapiro*; for Current and Former Members of Congress by *Carter G. Phillips* and *Tobias S. Loss-Eaton*; for Professors of Public Health et al. by *Jessica Ring Amunson*; and for the Washington Legal Foundation by *Douglas W. Dunham*, *Cory L. Andrews*, and *Corbin K. Barthold*.

Tuberculosis, and Malaria Act, known as the Leadership Act. 117 Stat. 711, as amended, 22 U. S. C. § 7601 *et seq.* Aiming to enhance America's response to the ravages of the global HIV/AIDS crisis, the Leadership Act launched "the largest international public health program of its kind ever created." § 7601(29). The Act has helped save an estimated 17 million lives, primarily in Africa, and is widely viewed as the most successful American foreign aid program since the Marshall Plan.

To advance the global relief effort, Congress has allocated billions of dollars to American and foreign nongovernmental organizations that combat HIV/AIDS abroad. As relevant here, Congress sought to fund only those organizations that have, or agree to have, a "policy explicitly opposing prostitution and sex trafficking." § 7631(f); see also § 7631(e); 45 CFR § 89.1 (2019). Congress imposed that condition on funding, known as the Policy Requirement, because Congress found that prostitution and sex trafficking "are additional causes of and factors in the spread of the HIV/AIDS epidemic" and that prostitution and sex trafficking "are degrading to women and children." § 7601(23).

Plaintiffs are American nongovernmental organizations that receive Leadership Act funds to fight HIV/AIDS abroad. Plaintiffs have long maintained that they do not want to express their agreement with the American commitment to eradicating prostitution. Plaintiffs consider a public stance of neutrality toward prostitution more helpful to their sensitive work in some parts of the world and also to their full participation in the global efforts to prevent HIV/AIDS.

After enactment of the Leadership Act, plaintiffs challenged the Policy Requirement, alleging that it violated the First Amendment. In 2013, this Court agreed, concluding that the Policy Requirement ran afoul of the free speech principle that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally pro-

tected . . . freedom of speech." *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205, 214 (2013) (internal quotation marks omitted). Therefore, the Policy Requirement no longer applies to *American* organizations that receive Leadership Act funds, meaning that American organizations can obtain Leadership Act funds even if they do not have a policy explicitly opposing prostitution and sex trafficking.

But as has been the case since 2003, *foreign* organizations that receive Leadership Act funds remain subject to the Policy Requirement and still must have a policy explicitly opposing prostitution and sex trafficking. Following this Court's 2013 decision barring the Government from enforcing the Policy Requirement against American organizations, plaintiffs returned to court, invoking the First Amendment and seeking to bar the Government from enforcing the Policy Requirement against plaintiffs' legally distinct foreign affiliates. The U. S. District Court for the Southern District of New York agreed with plaintiffs and prohibited the Government from enforcing the Policy Requirement against plaintiffs' foreign affiliates. The U. S. Court of Appeals for the Second Circuit affirmed. Judge Straub dissented. He described as "startling" the proposition that the First Amendment could extend to foreign organizations operating abroad. 911 F. 3d 104, 112 (2018). The Second Circuit's decision was stayed pending this Court's review, meaning that foreign organizations currently remain subject to the Policy Requirement.

We granted certiorari, 589 U. S. 1119 (2019), and now reverse the judgment of the Second Circuit. Plaintiffs' position runs headlong into two bedrock principles of American law.

First, it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution. Plaintiffs do

not dispute that fundamental principle. Tr. of Oral Arg. 58–59; see, *e. g.*, *Boumediene* v. *Bush*, 553 U. S. 723, 770–771 (2008); *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 558–559 (2004) (Scalia, J., dissenting); *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265–275 (1990); *Johnson* v. *Eisentrager*, 339 U. S. 763, 784 (1950); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 292 (1904); U. S. Const., Preamble.

As the Court has recognized, foreign citizens *in the United States* may enjoy certain constitutional rights—to take just one example, the right to due process in a criminal trial. See, *e. g.*, *Verdugo-Urquidez*, 494 U. S., at 270–271; *Plyler* v. *Doe*, 457 U. S. 202, 210–213 (1982); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596 (1953); *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886); cf. *Bluman* v. *Federal Election Comm'n*, 800 F. Supp. 2d 281, 286–289 (DC 2011), aff'd, 565 U. S. 1104 (2012). And so too, the Court has ruled that, under some circumstances, foreign citizens in the U. S. Territories—or in "a territory" under the "indefinite" and "complete and total control" and "within the constant jurisdiction" of the United States—may possess certain constitutional rights. *Boumediene*, 553 U. S., at 755–771. But the Court has not allowed foreign citizens outside the United States or such U. S. territory to assert rights under the U. S. Constitution. If the rule were otherwise, actions by American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries would be constrained by the foreign citizens' purported rights under the U. S. Constitution. That has never been the law. See *Verdugo-Urquidez*, 494 U. S., at 273–274; *Eisentrager*, 339 U. S., at 784.* To be

*As Justice Jackson stated for the Court in *Eisentrager*:

"If the Fifth Amendment confers its rights on all the world . . . , the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the

sure, Congress may seek to enact laws that afford foreign citizens abroad statutory rights or causes of action against misconduct by U. S. Government officials, or laws that otherwise regulate the conduct of U. S. officials abroad. See *Verdugo-Urquidez*, 494 U. S., at 275; cf. 10 U. S. C. §§ 2734(a), 2734a(a); 18 U. S. C. § 2340A; 21 U. S. C. § 904; 22 U. S. C. §§ 2669, 2669–1; 42 U. S. C. § 2000dd; but see 28 U. S. C. § 2680(k) (Federal Tort Claims Act's exception for torts "arising in a foreign country"). Plaintiffs did not raise any such statutory claim in this case.

Second, it is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations. See *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474–475 (2003); *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 163 (2001); P. Blumberg, K. Strasser, N. Georgakopoulos, & E. Gouvin, Corporate Groups §§ 6.01, 6.02, 6.05 (2020 Supp.).

Plaintiffs' foreign affiliates were incorporated in other countries and are legally separate from plaintiffs' American organizations. Even though the foreign organizations have affiliated with the American organizations, the foreign organizations remain legally distinct from the American organizations. Plaintiffs do not ask this Court to pierce the corporate veil, nor do they invoke any other relevant exception to

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American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

"Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes* v. *Bidwell*, 182 U. S. 244. None of the learned commentators on our Constitution has even hinted at it." 339 U. S., at 784–785.

that fundamental corporate law principle. Tr. of Oral Arg. 54.

Those two bedrock principles of American constitutional law and American corporate law together lead to a simple conclusion: As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment.

That conclusion corresponds to historical practice regarding American foreign aid. The United States supplies more foreign aid than any other nation in the world. Cong. Research Serv., Foreign Assistance: An Introduction to U. S. Programs and Policy (2020) (Summary). Acting with the President in the legislative process, Congress sometimes imposes conditions on foreign aid. See 22 U. S. C. §§ 2271, 2272, 2371, 7110(g)(2). Congress may condition funding on a foreign organization's ideological commitments—for example, pro-democracy, pro-women's rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like. Doing so helps ensure that U. S. foreign aid serves U. S. interests. By contrast, plaintiffs' approach would throw a constitutional wrench into American foreign policy. In particular, plaintiffs' approach would put Congress in the untenable position of either cutting off certain funding programs altogether, or instead funding foreign organizations that may not align with U. S. values. We see no constitutional justification for the Federal Judiciary to interfere in that fashion with American foreign policy and American aid to foreign organizations.

In short, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights.

To overcome that conclusion, plaintiffs advance two main arguments. But neither persuades us.

First, plaintiffs theorize that the foreign affiliates' required statement of policy against prostitution and sex traf-

ficking may be incorrectly attributed to the American organizations. Therefore, the theory goes, the American organizations themselves possess a First Amendment right against imposition of the Policy Requirement on their foreign affiliates.

As support, plaintiffs point to First Amendment cases involving speech misattribution between formally distinct speakers. See, *e. g.*, *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574–575 (1995); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 15 (1986) (plurality opinion); cf. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87 (1980). But the constitutional issue in those cases arose because the State forced one speaker to host another speaker's speech. See *Hurley*, 515 U. S., at 572–573; *Pacific Gas*, 475 U. S., at 15; cf. *PruneYard*, 447 U. S., at 85, 87. Here, by contrast, the United States is not forcing plaintiffs to affiliate with foreign organizations. Plaintiffs are free to choose whether to affiliate with foreign organizations and are free to disclaim agreement with the foreign affiliates' required statement of policy. Any alleged misattribution in this case and any effect on the American organizations' message of neutrality toward prostitution stems from their choice to affiliate with foreign organizations, not from U. S. Government compulsion. Because the First Amendment misattribution cases are premised on government compulsion to associate with another entity, those cases do not apply here.

In support of their misattribution argument, plaintiffs also cite *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 544–545, and n. 6 (1983). But as relevant here, that case simply explained that a speech restriction on a corporate entity did not prevent a separate affiliate from speaking, a point that is not disputed in this case.

We appreciate that plaintiffs would prefer to affiliate with foreign organizations that do not oppose prostitution. But

Congress required foreign organizations to oppose prostitution in return for American funding. And plaintiffs cannot export their own First Amendment rights to shield foreign organizations from Congress's funding conditions.

Stressing that their position is limited, plaintiffs emphasize that the Court could narrowly decide to protect the free speech rights of only those foreign organizations that are *closely identified* with American organizations—for example, those foreign affiliates that share similar names, logos, and brands with American organizations. According to plaintiffs, those "closely identified" scenarios greatly increase the risk of misattribution. But again, the First Amendment cases involving speech misattribution arose when the State forced one speaker to host another speaker's speech. No compulsion is present here. Moreover, plaintiffs' proposed line-drawing among foreign organizations would blur a clear rule of American law: Foreign organizations operating abroad do not possess rights under the U. S. Constitution. Plaintiffs' carve-out not only would deviate from that fundamental principle, but also would enmesh the courts in difficult line-drawing exercises—how closely identified is close enough?—and leave courts without any principled basis for making those judgments. We discern no good reason to invent a new and legally unmoored exception to longstanding principles of American constitutional and corporate law.

Second, plaintiffs argue that the Court's 2013 decision in this case encompassed both plaintiffs' American organizations and their foreign affiliates, meaning that, in plaintiffs' view, the Court has already resolved the issue before us. That is not correct. The plaintiffs in the 2013 case were these same American organizations. It is true that the Court considered the possibility that an American organization could work through affiliates to potentially avoid the burdens of the otherwise-unconstitutional application of the

Policy Requirement. But the Court rejected that alternative, which in essence would have compelled the American organizations to affiliate with other organizations. The Court instead ruled that the Policy Requirement may not be applied to plaintiffs' American organizations. Therefore, plaintiffs' current affiliations with foreign organizations are their own choice, not the result of any U. S. Government compulsion.

Stated simply, in the prior decision, the Court did not facially invalidate the Act's condition on funding. The Court did not hold or suggest that the First Amendment requires the Government to exempt plaintiffs' foreign affiliates or other foreign organizations from the Policy Requirement. And the Court did not purport to override the longstanding constitutional law principle that foreign organizations operating abroad do not possess constitutional rights, or the elementary corporate law principle that each corporation is a separate legal unit.

The dissent emphasizes that this case concerns "the First Amendment rights of American organizations." *Post*, at 441 (opinion of BREYER, J.). We respectfully disagree with that characterization of the question presented. The Court's prior decision recognized the First Amendment rights of American organizations and held that American organizations do not have to comply with the Policy Requirement. This case instead concerns foreign organizations that are voluntarily affiliated with American organizations. Those foreign organizations are legally separate from the American organizations. And because foreign organizations operating abroad do not possess constitutional rights, those foreign organizations do not have a First Amendment right to disregard the Policy Requirement.

In sum, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad possess no rights under the U. S. Constitution. We reverse the

judgment of the U. S. Court of Appeals for the Second Circuit.

It is so ordered.

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

JUSTICE THOMAS, concurring.

I agree with the Court that the Policy Requirement does not violate the First Amendment as applied to respondents' foreign affiliates, and I agree that nothing about this Court's decision in *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205 (2013) (*AOSI I*), suggests otherwise. See *ante*, at 439. I write separately to note my continued disagreement with *AOSI I* and to explain that the Policy Requirement does not violate the First Amendment for a far simpler reason: It does not compel anyone to say anything.

In *AOSI I*, the Court erred by holding that the Policy Requirement violated respondents' First Amendment rights by conditioning their receipt of Leadership Act* funds on the affirmation of certain program objectives. "The First Amendment does not mandate a viewpoint-neutral government." *AOSI I*, 570 U. S., at 221 (Scalia, J., joined by THOMAS, J., dissenting). Thus, the Government may require those who seek to carry out federally funded programs to support the Government's objectives with regard to those programs. *Ibid.* After all, the Constitution itself "impos[es] affirmative ideological commitments prerequisite to assisting in the government's work." *Id.*, at 227. It excludes viewpoints such as communism and anarchism, stating that those engaged in government work must swear an oath

*As the Court explains, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U. S. C. § 7601 *et seq.*, "allocate[s] billions of dollars to American and foreign nongovernmental organizations that combat HIV/AIDS abroad." *Ante*, at 432.

to support our Constitution's republican form of government. See Art. VI, cl. 3.

Moreover, the mere conditioning of funds on "'the affirmation of a belief'" tied to the purpose of a government program involves "no compulsion at all." *AOSI I*, 570 U. S., at 226 (Scalia, J., joined by THOMAS, J., dissenting). Such a condition is "the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject." *Ibid.* Just as respondents are not compelled to associate with their foreign affiliates, see *ante*, at 436–438, they are not compelled to participate in the Leadership Act program.

The Policy Requirement does not violate the First Amendment, regardless of whether it is applied to respondents, respondents' legally distinct foreign affiliates, or any other organization, foreign or domestic. Because the Court properly rejects respondents' attempt to extend our erroneous precedent, I join its opinion in full.

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

The Court, in my view, asks the wrong question and gives the wrong answer. This case is not about the First Amendment rights of foreign organizations. It is about—and has always been about—the First Amendment rights of American organizations.

The last time this case came before us, those American organizations vindicated their constitutional right to speak freely, both at home and abroad. In *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205 (2013) (*AOSI I*), we held that the First Amendment forbids the Government from distorting their speech by requiring, as a condition of receiving federal funds, that they "pledge allegiance" to a state-sponsored message. *Id.*, at 220.

This time, the question is whether the American organizations enjoy that same constitutional protection against

government-compelled distortion when they speak through clearly identified affiliates that have been incorporated overseas. The answer to that question, as I see it, is yes. I dissent from the Court's contrary conclusion.

I

To understand the issue now before us, one must appreciate how it got here. Given this litigation's lengthy history, that requires a rather detailed look at why this dispute first arose, what we decided in our prior decision (namely, *AOSI I*), and where the case proceeded from there.

A

As we explained in *AOSI I*, the plaintiffs in this action (respondents in this Court then and now) "are a group of domestic organizations engaged in combating HIV/AIDS overseas." *Id.*, at 210. Their lifesaving work spans multiple continents. *Id.*, at 211. For example, respondents run "programs aimed at limiting injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan, preventing mother-to-child HIV transmission in Kenya, and promoting safer sex practices in India." *Ibid.* Respondents also counsel high-risk populations such as sex workers, encourage foreign governments to adopt beneficial public policies, and share information about best practices in publications and at conferences. See *ibid.*; App. 171, 217, 222, 419. To support these international efforts, respondents must make fundraising appeals to donors worldwide. See, *e. g.*, *id.*, at 366, 384, 431–433, 457. But crucially for both their mission and for this case, respondents also "receive billions [of dollars] annually in financial assistance from the United States." *AOSI I*, 570 U. S., at 210.

One of respondents' primary sources of federal funding is the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003. 117 Stat. 711, as amended, 22 U. S. C. § 7601 *et seq.* (Leadership Act). Congress en-

acted the Leadership Act with the goal of creating "a 'comprehensive, integrated' strategy to combat HIV/AIDS around the world." *AOSI I*, 570 U. S., at 209 (quoting § 7611(a)). To that end, the statute allocates considerable federal dollars to nongovernmental organizations fighting HIV/AIDS abroad. *Id.*, at 209–211.

But Leadership Act funding comes with strings attached. Two, in particular. First, no Leadership Act funds "'may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.'" *Id.*, at 210 (quoting § 7631(e)). Second, with some exceptions not relevant here, any recipient of Leadership Act funds must have "'a policy explicitly opposing prostitution and sex trafficking.'" *Id.*, at 210 (quoting § 7631(f)). The first condition limiting how Leadership Act funds may be spent has never been challenged in this litigation. *Id.*, at 210. What has driven this decades-long dispute is the second condition, the "Policy Requirement" that requires recipients to espouse a government message. *Ibid.*

Concerned that "adopting a policy explicitly opposing prostitution" could "alienate certain host governments" and "mak[e] it more difficult to work with prostitutes in the fight against HIV/AIDS," respondents sued. *Id.*, at 211. They asserted that the Policy Requirement put an unconstitutional condition on the receipt of federal funds and was thus unenforceable. *Id.*, at 212. Accordingly, as the case came to us in *AOSI I*, the question was whether this funding condition violated respondents' First Amendment rights. *Id.*, at 211.

B

The answer, we held in *AOSI I*, was yes. Our reasoning then demands close inspection now.

To begin, we observed in *AOSI I* that "the Policy Requirement would plainly violate the First Amendment" if it operated "as a direct regulation of speech." *Id.*, at 213. Commanding someone to speak a government message

contravenes the "basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Ibid.* (quoting *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 61 (2006) (*FAIR*)); see also, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943); *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977).

That the Policy Requirement is a funding condition, rather than a direct command, complicated the analysis in *AOSI I* but did not change the outcome. True, Congress' Article I spending power "includes the authority to impose limits on the use of [federal] funds to ensure they are used" as "Congress intends," even conditions that "may affect the recipient's exercise of its First Amendment rights." *AOSI I*, 570 U. S., at 213–214. That is all the first (and unchallenged) Leadership Act condition does by forbidding federal funds from being used to promote prostitution or sex trafficking. See *id.*, at 217–218. Congress may not, however, "leverage funding to regulate speech outside the contours" of the program it has chosen to subsidize. *Id.*, at 214–215. *That*, as we will see, is what the Policy Requirement does—and why we held in *AOSI I* that this second condition violated respondents' First Amendment rights.

The constitutional line is whether a funding condition helps "specify the activities Congress wants to subsidize" or instead seeks to "reach [speech] outside" the federal program. *Id.*, at 214, 217. We recognized in *AOSI I* that this line "is not always self-evident." *Id.*, at 217. To "hel[p] illustrate the distinction," our decision gave two examples from our precedents. *Id.*, at 215.

As an example of what the Government may *not* do, we pointed to our decision *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984). There, the Government required noncommercial broadcasters receiving federal financial assistance to refrain from editorializing entirely; they could not even "establish [an] 'affiliate' organizatio[n]" to editorialize

on their behalf "with nonfederal funds." *Id.*, at 400. By giving a broadcaster no way "to make known its views on matters of public importance," the funding condition in *League of Women Voters* violated the First Amendment. *Id.*, at 400–401. That condition, as we put it in *AOSI I*, "went beyond" ensuring that federal funds did not subsidize the broadcasters' editorial content and therefore distorted their "speech outside the scope of the program." 570 U. S., at 216.

Just the opposite was true in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983), the case we cited in *AOSI I* as an example of what the Government *may* do. In *Regan*, a nonprofit group received tax-exempt status as a § 501(c)(3) organization on the condition that the organization not engage in lobbying. *AOSI I*, 570 U. S., at 215 (citing *Regan*, 461 U. S., at 544). Even though this condition on federal financial assistance affected the nonprofit's exercise of First Amendment rights, the condition was constitutional because it "did not prohibit [the nonprofit] from lobbying Congress altogether." 570 U. S., at 215.

Specifically, the nonprofit in *Regan*—unlike the broadcasters in *League of Women Voters*—was permitted to establish an affiliate to carry on its lobbying activities as a § 501(c)(4) organization. *AOSI I*, 570 U. S., at 215 (citing *Regan*, 461 U. S., at 544). The nonprofit could thus act (and speak) through two corporate entities: The § 501(c)(3) organization could get the tax exemption (but not lobby), while the § 501(c)(4) organization could lobby (but not get the tax exemption). 570 U. S., at 215. Since requiring the nonprofit to adopt this "'dual structure'" was not "'unduly burdensome,'" the condition in *Regan* "did not deny the [nonprofit] a government benefit 'on account of its intention to lobby.'" 570 U. S., at 215 (quoting *Regan*, 461 U. S., at 545, and n. 6). The condition was thus constitutional, even though it essentially compelled the nonprofit to affiliate with other organizations. See 570 U. S., at 215.

In *AOSI I*, we held "that the Policy Requirement falls on the unconstitutional side of the line" separating *League of Women Voters* (unconstitutional) and *Regan* (constitutional). 570 U. S., at 217. Like the funding condition in *League of Women Voters*, we explained, the Policy Requirement affects protected speech outside the scope of the federal program. 570 U. S., at 218. "By requiring recipients to profess a specific belief," it "goes beyond defining" the program "to defining the recipient" in the eyes of their global audience. *Ibid.* Respondents cannot "avow [a] belief dictated by" the Government "when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality," when acting on their "own time and dime." *Ibid.* The Policy Requirement thus conditioned funding on an across-the-board distortion of respondents' message. See *ibid.*

We further explained in *AOSI I*—and this is critical—why we could not accept the Government's suggestion that the case was just a redux of *Regan*. In *AOSI I*, the Government suggested a similar "dual-structure" solution to the First Amendment problem. Like the nonprofit in *Regan*, the Government noted, respondents could act (and speak) through two corporate entities: One organization could receive Leadership Act funds on respondents' behalf (and comply with the Policy Requirement), while a legally separate affiliate could communicate respondents' preferred message (and not receive Leadership Act funds)—or vice versa. *AOSI I*, 570 U. S., at 219. True enough. But we *rejected* the Government's argument all the same.

Why did we reject it? Because corporate formalities do nothing to ward off speech distortion where—like *AOSI I*, but unlike *Regan*—the Government has required a speaker to "espouse a specific belief as its own." 570 U. S., at 219. "If the affiliate is distinct from the recipient," we reasoned, "the arrangement does not afford a means for the *recipient* to express *its* beliefs." *Ibid.* And if "the affiliate is more clearly identified with the recipient, the recipient can express

those beliefs only at the price of evident hypocrisy." *Ibid.* With respect to the latter situation, in other words, compelling a recipient to disavow a message involuntarily uttered by its clearly identified affiliate is forced hypocrisy, not free speech. See *ibid.*

In sum, the Policy Requirement conditioned federal funds on an unavoidable and irreversible distortion of respondents' protected speech. We therefore held in *AOSI I* that the Policy Requirement "violates the First Amendment and cannot be sustained." *Id.*, at 221.

C

On remand from our decision, the District Court did what district courts ought to do. It "tailor[ed] 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation'" that we identified in *AOSI I*. *Hills* v. *Gautreaux*, 425 U. S. 284, 294 (1976) (quoting *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974)).

The District Court, like our Court, recognized that respondents' work—and with it their protected speech—has a global reach. But respondents, it turns out, use different organizational structures to deliver services in different places. 106 F. Supp. 3d 355, 360–361 (SDNY 2015). Sometimes, particularly when foreign governments (or our own government) require, respondents operate through legally separate affiliates incorporated abroad. *Ibid.*; see also, *e. g.*, App. 368, 373–375.

In the District Court's view, those corporate formalities did not meaningfully change the First Amendment calculus. See 106 F. Supp. 3d, at 360–361. Respondents, together with their affiliates, convey a clear, consistent message to high-risk populations, government officials, healthcare professionals, prospective employees, and private donors across the globe. See, *e. g.*, App. 370–371, 391, 460–461. They share the same name, logo, and branding—all of which use identical colors, fonts, and imagery. See, *e. g.*, *id.*, at 445–455. They adhere to shared values, work towards common goals, and

coordinate their collective message. See, *e. g.*, *id.*, at 385–386, 404–429. To an outside observer, respondents and their affiliates are a single, cohesive unit. They speak as one.

The District Court consequently concluded that imposing the Policy Requirement on respondents' affiliates—wherever they happen to have been incorporated—would force respondents to "expres[s] contrary positions on the same matter through [their] different organizational components." 106 F. Supp. 3d, at 361. To prevent that from happening, and in keeping with the principles we set forth in *AOSI I*, the District Court enjoined enforcement of the Policy Requirement against respondents and their clearly identified affiliates, including affiliates that were incorporated overseas. *Id.*, at 363. The District Court thought that remedial order necessary to protect respondents' *own* First Amendment rights—rights that, as American organizations, respondents unquestionably have. *Id.*, at 361.

The Court of Appeals understood the District Court's order that way, too. "The narrow issue before" us, the Court of Appeals explained, "is whether applying the Policy Requirement to [respondents'] closely aligned foreign affiliates violates [respondents'] own First Amendment rights." 911 F. 3d 104, 109 (CA2 2018). The Court of Appeals held that the answer was yes and affirmed on that basis. *Ibid.* We granted certiorari to review the Court of Appeals' decision.

II

The road has been long, but we have arrived at the specific question now before us: whether enforcing the Policy Requirement against respondents' clearly identified foreign affiliates violates respondents' own First Amendment rights. Like the District Court and the Court of Appeals, I believe the answer is yes.

Our reasoning in *AOSI I*, along with the body of precedent on which it relied, should decide this case. Just as com-

pelling a clearly identified *domestic* affiliate to espouse a government message distorts respondents' own protected speech, *AOSI I*, 570 U. S., at 219, so too does compelling a clearly identified *foreign* affiliate to espouse the same government message. Either way, federal funding conditioned on that affirmative avowal of belief comes at an unconstitutionally high "price of evident hypocrisy." *Ibid.*

Properly understood, our speech-misattribution cases—in particular *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995)—confirm that commonsense conclusion. Any other result would undermine First Amendment protections for the countless American speakers who address audiences overseas.

A

Respondents should prevail here for the same reasons they prevailed in *AOSI I*. When respondents speak through legally separate but clearly identified affiliates, we held, that speech is attributed to respondents for First Amendment purposes. *AOSI I*, 570 U. S., at 219. So when the Government demands as a condition of federal funding that their clearly identified affiliate "espouse a specific belief as its own," respondents may express a contrary view through some other corporate channel only on pain of appearing hypocritical. *Ibid.* Leveraging Congress' Article I spending power to distort respondents' protected speech in this way therefore violates *respondents'* First Amendment rights—whatever else might be said about the affiliate's own First Amendment rights (or asserted lack thereof). *Ibid.*

These principles apply with full force to the dispute now before us. Respondents and their affiliates receive federal funding to fight HIV/AIDS *overseas*. What has been at stake in this case from the beginning, then, is protected speech often aimed at audiences abroad. Our decision in *AOSI I* shielded respondents' global message from government-compelled distortion in the eyes of those foreign

audiences, as well as listeners here at home. *Ibid.* Yet in the wake of our ruling, respondents have continued to suffer that exact same First Amendment harm.

True, respondents' international mission sometimes requires that they convey their message through affiliates incorporated in far-off countries, rather than registered here at home. But so what? Audiences everywhere attribute speech based on whom they perceive to be speaking, not on corporate paperwork they will never see. What mattered in *AOSI I* was thus how "clearly identified" the affiliates were with respondents, not the fact that the affiliates were incorporated as separate legal entities. *Ibid.* And what matters now is once again how "clearly identified" the affiliates are with respondents, not the fact that the affiliates were incorporated as *foreign* legal entities.

The First Amendment question therefore hinges, as it did before, on what an objective observer sees, hears, and understands when respondents speak through their foreign affiliates. As to that, not even the Government meaningfully disputes that respondents and their foreign affiliates are clearly identified with one another. Their appearances are the same. Their goals are the same. Their values are the same. *Their message* is the same. Leveraging Congress' spending power to demand speech from respondents' foreign affiliates distorts that shared message—and violates respondents' First Amendment rights. So while respondents and their clearly identified foreign affiliates may be technically different entities with respect to such matters as contracts, taxes, and torts, they are constitutionally the same speaker when it comes to the protected speech at issue in this case.

This two-entities-one-speaker principle is an established part of our First Amendment jurisprudence. Take *Regan.* To refresh, in that case we upheld a ban on engaging in certain protected speech (lobbying) that the federal tax code imposed on a nonprofit's §501(c)(3) organization because the

nonprofit could still speak through a separate § 501(c)(4) organization. See 461 U. S., at 544. Put simply, one speaker (the nonprofit) could act (and speak) through two legally separate entities (the § 501(c)(3) and § 501(c)(4) organizations).

Recall also our similar observation in *League of Women Voters*. There we noted that a funding condition's ban on editorializing would have been constitutional if, in contrast to the law at issue, the statute let noncommercial broadcasters "make known" their "views on matters of public importance" by speaking through legally separate "editorializing affiliate[s]." 468 U. S., at 400. Once again, we made clear that a single speaker can act (and speak) through two legally separate entities. But because the speaker in *League of Women Voters* was not free to do so, we held that the Government's funding condition violated the First Amendment. *Id.*, at 400–401.

Regan and *League of Women Voters* are far from our only precedents recognizing this firmly entrenched First Amendment principle. See *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 546 (2001) (observing that organizational affiliates may provide "alternative channel[s] for expression" by a single speaker); *Rust* v. *Sullivan*, 500 U. S. 173, 196–198 (1991) (similar). We reiterated that rule once again in *AOSI I*. See 570 U. S., at 215–217, 219.

Thus, in the First Amendment context, the corporate veil is not an iron curtain. Just the opposite. We attribute speech across corporate lines all the time.

Rightly so. When a funding condition restricts speech, this familiar framework often avoids First Amendment problems by allowing "alternative channel[s]" for speakers to express themselves. *Velazquez*, 531 U. S., at 546. And when a funding condition *compels* speech, the same logic leads to a similarly sensible result: The Government may not require you to speak out of both sides of your mouth, even if each side happens to have been incorporated as a separate legal entity. See *AOSI I*, 570 U. S., at 219.

A contrary approach would have led to a rather surprising result in *AOSI I*. Assume for a moment that the Policy Requirement simply commanded respondents' clearly identified affiliates to speak—the kind of "direct regulation of speech" that we said "would plainly violate the First Amendment," *id.*, at 213. Treating corporate lines as ironclad would mean that respondents could not object to that direct distortion of their own message. Under all the cases just discussed, however, that cannot be right. And as discussed below, it is equally wrong under our cases involving speech misattribution.

B

The First Amendment protects speakers from government compulsion that is likely to cause an audience to mistake someone else's message for the speaker's own views. See, *e. g.*, *Hurley*, 515 U. S., at 572–573; *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 15–16 (1986). Corporate separation makes no meaningful difference in this speech-misattribution context, either.

Consider our unanimous decision in *Hurley*. In that case, a group called the South Boston Allied War Veterans Council organized a parade. 515 U. S., at 560. The Irish-American Gay, Lesbian and Bisexual Group of Boston—a separate group who called themselves "GLIB" for short—wanted to participate. *Id.*, at 561. After the Veterans Council said no, GLIB obtained a court order directing the Veterans Council to let GLIB march in the parade. *Id.*, at 561–562. Recognizing that "every participating unit affects the message conveyed by the parade organizers," we held in *Hurley* that the order distorted the Veterans Council's protected speech. *Id.*, at 572–573. Because GLIB wanted to "carr[y] its own banner" with its own message, and because onlookers would understand GLIB as "contribut[ing] something to" the parade's "common theme," the order "essentially requir[ed]" the Veterans Council "to alter the expressive content of their

parade." *Id.*, at 572–573, 576. That violated the First Amendment. *Id.*, at 573.

The First Amendment violation in this case is even more apparent. In *Hurley*, the Veterans Council had merely "combin[ed] multifarious voices" of disparate groups without bothering to "isolate an exact message," yet the First Amendment protected its message from government-compelled distortion all the same. *Id.*, at 569. Respondents in this case have done the Veterans Council one better. They have carefully constructed a cogent message and marshaled their clearly identified foreign affiliates to express it across the globe. See *supra*, at 447–448, 450.

Furthermore, in *Hurley* we could only speculate about what GLIB's exact message was and why the Veterans Council did not want to be associated with it. See 515 U. S., at 574–575. But here we know exactly what the challenged message is ("a policy explicitly opposing prostitution and sex trafficking") and why respondents don't want to be associated with it (the message, among other things, purportedly "'stigmatizes one of the very groups whose trust [respondents] must earn to conduct effective HIV/AIDS prevention'"). 22 U. S. C. § 7631(f); Brief for Respondents 11. For that reason as well, the First Amendment injury in this case is open, obvious, and unusually well defined.

True, *Hurley* and our other speech-misattribution cases dealt with a speaker complaining about being forced to affiliate with someone else's speech, rather than (as here) their pre-existing affiliate being forced to speak. Cf. *ante*, at 436–437. But that factual distinction makes no constitutional difference. From a First Amendment perspective, the latter situation is just as bad or even worse, not better.

Consider *Hurley* again. If, rather than requiring the Veterans Council to let GLIB march while carrying its banner, the state court had ordered a previously invited marcher (or worse still, *all* previously invited marchers) to display GLIB's banner, the Veterans Council would have prevailed

all the same. By compelling speech from an existing affiliate (or all of them), that order would have required, even more brazenly, that the Veterans Council "alter the expressive content of their parade" in violation of the Veterans Council's First Amendment rights. 515 U. S., at 572–573. So too if the state court had decreed that GLIB's banner must adorn a horse, oxen, or for that matter R2–D2, a robot—even though those entities lack their own First Amendment rights. Whether the transmitter of a speaker's protected message does (or does not) have its own First Amendment rights is beside the point. Cf. *Wooley*, 430 U. S., at 717 (prohibiting New Hampshire from requiring that the state motto adorn a driver's car, even though cars do not have First Amendment rights).

There is a reason why, until today, we had not confronted a case like the one just described. Cf. *ante*, at 436–437. Requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do. See, *e. g.*, *FAIR*, 547 U. S., at 65 (holding that the Government may require law schools to host speech from military recruiters); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87–88 (1980) (holding that the Government may require the owner of a private shopping mall to host speech from politically minded pamphleteers). Even the court order at issue in *Hurley* was an understandable (though unconstitutional) application of a "venerable" civil rights law. See 515 U. S., at 571. But because compelling people to profess a belief they do not hold is almost always unconstitutional, see *AOSI I*, 570 U. S., at 213, the Government rarely dares try. The Government's well-founded reticence in the past is no reason to bless its boldness at present.

Bottom line: The critical question here, as in *Hurley*, is simply whether the Government has demanded a profession of belief that will distort the speaker's message. *How* the Government causes that distortion makes no constitutional difference. And as explained, enforcing the Policy Require-

ment against respondents' clearly identified foreign affiliates would plainly distort *respondents'* message. See *supra*, at 447–448, 450. That violates respondents' First Amendment rights.

C

So far as I am aware, we have never before held that an American speaker forfeits First Amendment protection when it speaks though foreign affiliates to reach audiences overseas. It is easy to understand why.

Many American news networks operate through clearly identified foreign affiliates when speaking abroad. Viewers attribute that speech to an American speaker: the network. That is the whole point of using *clearly identified* foreign affiliates. For example, CNN speaks to audiences in the Philippines, Brazil, Indonesia, and other countries using foreign affiliates, usually styled as CNN Philippines, CNN Brazil, CNN Indonesia, and so on. See CNN Worldwide Fact Sheet (Oct. 2019), https://cnnpressroom.blogs.cnn.com/cnn-fact-sheet. But does that corporate structure mean that CNN—*i. e.*, the American parent organization—has no First Amendment protection against a Government effort to, say, prevent CNN Mexico from covering the fatal shooting of a Mexican child by a U. S. Border Patrol agent? Cf. *Hernández* v. *Mesa*, 589 U. S. 93 (2020) (*Hernández II*). Or to *compel* CNN Mexico to run a different story, perhaps one produced by Government personnel, that praises American policy at the border?

We should be highly skeptical. If the Government commandeered CNN's clearly identified foreign affiliate in these or similar ways, whether by monetary pressure or some other means, CNN should have constitutional recourse. Some critical foreign policy interests might complicate the First Amendment calculus—say, a wartime need to keep future battle plans secret. But nothing like that is present here. And it is difficult to accept the notion that the First Amendment permits the Government to suppress,

compel, or otherwise distort any and all American speech transmitted abroad through a clearly identified foreign affiliate.

III

The upshot is: (1) The messages at issue here belong to American speakers; (2) clearly identified foreign affiliates are a critical means of conveying those messages overseas; and (3) enforcing the Policy Requirement against those affiliates distorts respondents' own protected speech—and thus violates respondents' own First Amendment rights.

The majority justifies its contrary result on three main grounds, two of which it says are "bedrock principles" of American law. See *ante*, at 433–436, 438–439. I do not find these arguments persuasive.

A

The first "bedrock principle" on which the majority relies is the supposedly long-settled, across-the-board rule "that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution." *Ante*, at 433. That sweeping assertion is neither relevant to this case nor correct on the law.

It is not relevant because, as I have said, this case does not concern the constitutional rights of foreign organizations. This case concerns the constitutional rights of *American* organizations. Every respondent here is—and has always been—American. *AOSI I*, 570 U. S., at 210; see also Brief for Petitioners 7, 19 (acknowledging as much). No foreign entities are party to this case, and respondents have never claimed that the Policy Requirement violates anyone's First Amendment rights apart from their own. Both the District Court and the Court of Appeals decided the case on that basis. The question before us is clear: whether the First Amendment protects *Americans* when they speak through clearly identified foreign affiliates to reach audiences over-

seas. See *supra*, at 448. Whether the foreign affiliates themselves have their own First Amendment rights is not at issue. See Brief for Respondents 36, n. 3.

Even taken on its own terms, the majority's blanket assertion about the extraterritorial reach of our Constitution does not reflect the current state of the law. The idea that foreign citizens abroad *never* have constitutional rights is not a "bedrock" legal principle. At most, one might say that they are unlikely to enjoy very often extraterritorial protection under the Constitution. Or one might say that the matter is undecided. But this Court has studiously avoided establishing an absolute rule that forecloses that protection in all circumstances.

In *Hernández* v. *Mesa*, 582 U. S. 548 (2017) (*per curiam*) (*Hernández I*), for example, we specifically declined to decide the "sensitive" question whether, on the facts then before us, a Mexican citizen standing on Mexican soil had Fourth Amendment rights—precisely because the answer to that extraterritoriality question "may have consequences that are far reaching." *Id.*, at 554. *Hernández* later came to this Court again, and we decided the case on alternative grounds. See *Hernández II*, 589 U. S., at 113–114. Were the majority's categorical rule of (non)extraterritoriality etched in stone, we could have disposed of *Hernández* the first time around in a few short sentences.

Nor do the cases that the majority cites support an absolute rule. See *ante*, at 434. The exhaustive review of our precedents that we conducted in *Boumediene* v. *Bush*, 553 U. S. 723 (2008), pointed to the opposite conclusion. In *Boumediene*, we rejected the Government's argument that our decision in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), "adopted a formalistic" test "for determining the reach" of constitutional protection to foreign citizens on foreign soil. 553 U. S., at 762. This is to say, we rejected the position that the majority propounds today. See *ante*, at 434, 435, and n. (quoting *Eisentrager* at length). Its "constricted reading"

of *Eisentrager* and our other precedents is not the law. See *Boumediene*, 553 U. S., at 764; see also, *e. g.*, Neuman, Understanding Global Due Process, 23 Geo. Immigration L. J. 365, 400 (2009) (describing our cases as rejecting any absolute view).

The law, we confirmed in *Boumediene*, is that constitutional "questions of extraterritoriality turn on objective factors and practical concerns" present in a given case, "not formalism" of the sort the majority invokes today. 553 U. S., at 764. Those considerations include the extent of *de facto* U. S. Government control (if any) over foreign territory. See *ante*, at 434. But they also include the nature of the constitutional protection sought, how feasible extending it would be in a given case, and the foreign citizen's status vis-à-vis the United States, among other pertinent circumstances that might arise. 553 U. S., at 766; see also *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 278 (1990) (Kennedy, J., concurring) (providing the decisive fifth vote for rejecting a foreign citizen's claim to constitutional protection on foreign soil outside U. S. control because "[t]he conditions and considerations of *this case* would make adherence to *the Fourth Amendment's warrant requirement* impracticable and anomalous" (emphasis added)). Our precedents reject absolutism. Indeed, even our most sweeping statements about foreign citizens' (lack of) constitutional rights while outside U. S. Territory have come with limits. See, *e. g.*, *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982) (noting that "an alien seeking initial admission to" this country "has no constitutional rights *regarding his application*" (emphasis added)); *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972) (similar).

There is wisdom in our past restraint. Situations where a foreign citizen outside U. S. Territory might fairly assert constitutional rights are not difficult to imagine. Long-term permanent residents are "foreign citizens." Does the Constitution therefore allow American officials to assault them

at will while "outside U. S. territory"? Many international students attend college in the United States. Does the First Amendment permit a public university to revoke their admission based on an unpopular political stance they took on social media while home for the summer? Foreign citizens who have never set foot in the United States, for that matter, often protest when Presidents travel overseas. Does that mean Secret Service agents can, consistent with our Constitution, seriously injure peaceful protestors abroad without any justification?

We have never purported to give a single "bedrock" answer to these or myriad other extraterritoriality questions that might arise in the future. To purport to do so today, in a case where the question is not presented and where the matter is not briefed, is in my view a serious mistake.

And there is no need to set forth an absolute rule here. Respondents have conceded that their foreign affiliates lack First Amendment rights of their own while acting abroad. See *ante*, at 433–434. If in spite of everything else, the majority considers this point material to its decision, all that need be said is: "We accept respondents' concession and proceed on that basis." To say so much more "run[s] contrary to the fundamental principal of judicial restraint," a principle that applies with particular force to constitutional interpretation. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008); see also, *e. g.*, *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 445 (1988); *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 158 (1984); *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

B

The majority's second supposedly "bedrock principle" is that "separately incorporated organizations are separate

legal units with distinct legal rights and obligations." *Ante*, at 435. Sometimes true, sometimes not. This baseline rule gives way in many contexts, and our First Amendment precedents (including *AOSI I*) refute any suggestion that a workaday principle of corporate law somehow resolves the constitutional issue here in dispute.

As the majority acknowledges, corporate law itself permits courts to pierce or otherwise disregard the corporate veil in a variety of circumstances. See *ante*, at 435–436. Those narrow exceptions, however, are not the only time the law looks past corporate formalities. For instance, we have treated "several nominally separate business entities" as "a single employer" for purposes of federal labor law. *Radio & Television Technicians* v. *Broadcast Service of Mobile, Inc.*, 380 U. S. 255, 256 (1965) (*per curiam*). Earlier this Term, we reaffirmed that one corporate entity may sometimes invoke the right of another, legally separate entity to compel arbitration. See *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA, LLC*, 590 U. S. 432, 437 (2020). And these are far from the only relevant examples. See, *e. g.*, *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 196 (2010) (observing that, in many antitrust cases, corporate formalities are "not determinative").

More to the point, our First Amendment precedents leave no doubt that corporate formalities have little to say about the issue now before us. We have made clear again and again (and again) that speech may be attributed across corporate lines in the First Amendment context—including in our previous opinion in this very case. See *AOSI I*, 570 U. S., at 219 (concluding that speech uttered involuntarily by legally separate affiliates may be attributed to respondents if the affiliates are "clearly identified" with respondents); *League of Women Voters*, 468 U. S., at 400 (observing that funding conditions that restrict speech can survive constitutional scrutiny if the speaker may "make known its views on matters of public importance through" a legally separate

affiliate—and if not, not); *Regan*, 461 U. S., at 544 (similar); *Rust*, 500 U. S., at 196–198 (similar); *Velazquez*, 531 U. S., at 546–547 (similar). And these precedents further establish that merely requiring speakers to work through affiliates is "not unduly burdensome" and can therefore cure, rather than create, First Amendment concerns. *Regan*, 461 U. S., at 545, n. 6. Contra, *ante*, at 438–439 (suggesting that such a requirement would be unconstitutional). Small wonder the majority can muster only two context-specific and statute-specific cases—one addressing the Foreign Sovereign Immunities Act, the other involving the Racketeer Influenced and Corrupt Organizations Act—as affirmative support for its conclusion that corporate formalities somehow control the First Amendment question before us. See *ante*, at 435 (citing *Dole Food Co.* v. *Patrickson*, 538 U. S. 468 (2003), and *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158 (2001)).

The majority also attempts to distinguish the facts before us now from the facts that were before us last time. It asserts that, in contrast to the affiliations we addressed in *AOSI I*, respondents' "current affiliations with foreign organizations are their own choice." *Ante*, at 439. There are two problems with this. First, the description is not accurate. Foreign governments—and increasingly, the U. S. Government—often require respondents to work through foreign affiliates. See, *e. g.*, App. 368, 373–375. Second, even if respondents' associations with foreign affiliates *were* voluntary, it would not solve the First Amendment problem.

In *Wooley*, for example, it was the drivers' choice to own a car, but that did not mean they could be compelled to convey the Government's message on their car's license plate. See 430 U. S., at 717. And in *Hurley*, as explained, the Government would have violated the parade organizers' First Amendment rights just the same if it had compelled speech from a previously invited marcher, whether human, animal, or droid. See *supra*, at 453–454. Can the majority really mean to suggest otherwise, simply because the parade orga-

nizers' decision to invite the marcher in the first place was "their own choice"?

C

The majority also makes two practical arguments, but neither justifies the First Amendment costs of its decision.

The majority first says that a ruling in respondents' favor would disrupt American foreign policy by requiring the Government to fund "organizations that may not align with U. S. values." *Ante*, at 436. We dismissed this same concern in *AOSI I*. The Policy Requirement, we explained, does not merely help the Government "enlist the assistance of those with whom it already agrees." *AOSI I*, 570 U. S., at 218. It pressures funding recipients "*to adopt* a particular belief." *Ibid.* (emphasis added). All that is at stake here, in other words, is whether the Government may leverage the power of the purse to win converts to its cause. That bare desire to regulate protected speech is far from any foreign policy interest that could conceivably overcome a speaker's First Amendment right to convey its message free from government-compelled distortion. Cf. *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) (*per curiam*).

The majority also fears that determining whether Government action creates a risk of speech misattribution (and with it speech distortion) is a "legally unmoored" standard rife with "difficult line-drawing exercises." *Ante*, at 438. But we have drawn just this kind of line many times. See, *e. g.*, *PruneYard*, 447 U. S., at 87 (holding that "views expressed by members of the public" in a privately owned shopping mall "will not likely be identified with those of the owner"); *Hurley*, 515 U. S., at 572 (holding that a marcher's message will likely be attributed to the parade organizer's, since "every participating unit" in a parade "affects the [overall] message"); *FAIR*, 547 U. S., at 65 (holding that nothing about having military recruiters on campus "suggests that law schools agree with any speech by recruiters"). I should think that the price of making difficult judgment calls is well

worth paying to protect First Amendment rights. See *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185, 209 (2014); *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 570 (1972). And "on the facts presented in this case," at any rate, "the answer is clear." *Id.*, at 570. Enforcing the Policy Requirement violates respondents' First Amendment rights, just as it did before.

* * *

The Court today concludes that respondents' foreign affiliates "do not have a First Amendment right to disregard the Policy Requirement." *Ante*, at 439. Respondents have never argued otherwise. Rather, throughout this litigation they have asserted their own First Amendment right to speak their mind, rather than the Government's message. Here, respondents claim First Amendment protection when they speak through foreign affiliates to address audiences abroad. By denying respondents that protection, I fear the Court's decision will seriously impede the countless American speakers who communicate overseas in a similar way. That weakens the marketplace of ideas at a time when the value of that marketplace for Americans, and for others, reaches well beyond our shores. With respect, I dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 463 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 18 THROUGH
JUNE 29, 2020

JUNE 18, 2020

Miscellaneous Order

No. 19–1348. BOURGEOIS ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Motion to expedite consideration of the petition for writ of certiorari granted. Respondents are directed to file a response to the petition on or before 5 p.m., Friday, June 19, 2020. Petitioners may file a reply brief on or before 5 p.m., Monday, June 22, 2020. *Amicus curiae* briefs may be filed on or before 5 p.m., Friday, June 19, 2020.

JUNE 22, 2020

Certiorari Dismissed

No. 19–8327. IBEABUCHI *v.* BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 19–8365. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 19M143. ROJAS *v.* MEINSTER ET AL.; and

No. 19M144. SESZTAK ET UX. *v.* GREAT NORTHERN INSURANCE CO., INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 19M145. In re Wright;

No. 19M146. In re Wright; and

No. 19M147. Albritton *v.* Brnovich, Attorney General of Arizona, et al.; and Albritton *v.* Shinn, Director, Arizona Department of Corrections. Motions for leave to proceed as veterans denied.

No. 19–7597. Wazney *v.* Nelson, Warden. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1304] denied.

No. 19–8575. In re Robinson; and

No. 19–8578. In re Smith. Petitions for writs of habeas corpus denied.

No. 19–8276. In re Spence; and

No. 19–8278. In re Spence. Petitions for writs of mandamus denied.

Certiorari Denied

No. 19–601. Collabo Innovations, Inc. *v.* Sony Corp. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 778 Fed. Appx. 954.

No. 19–868. Miner et al. *v.* Picatti. Sup. Ct. Idaho. Certiorari denied. Reported below: 165 Idaho 611, 449 P. 3d 403.

No. 19–924. Indiana *v.* Ruiz. Sup. Ct. Ind. Certiorari denied. Reported below: 123 N. E. 3d 675.

No. 19–937. Cherokee Nation *v.* Bernhardt, Secretary of the Interior, et al. C. A. 10th Cir. Certiorari denied. Reported below: 936 F. 3d 1142.

No. 19–939. Gustus *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 926 F. 3d 1037.

No. 19–980. Ariana M. *v.* Humana Health Plan of Texas, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 287.

No. 19–1001. Cooper et al. *v.* Flaig et al. C. A. 5th Cir. Certiorari denied. Reported below: 779 Fed. Appx. 269.

No. 19–1008. Hodge et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 933 F. 3d 468.

No. 19–1009. Altera Corporation & Subsidiaries *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 926 F. 3d 1061.

No. 19–1037. Sok Bun *v.* United States; and
No. 19–8000. Peterson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 945 F. 3d 144.

No. 19–1062. CJ CheilJedang Corp. et al. *v.* International Trade Commission et al. C. A. Fed. Cir. Certiorari denied. Reported below: 932 F. 3d 1342.

No. 19–1074. Celgene Corp. *v.* Peter, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director, Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 931 F. 3d 1342.

No. 19–1134. Baley et al. *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 942 F. 3d 1312.

No. 19–1153. Suzuki et al. *v.* Deedy. C. A. 9th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 549.

No. 19–1173. Comcast Corp. et al. *v.* International Trade Commission et al. C. A. Fed. Cir. Certiorari denied. Reported below: 951 F. 3d 1301.

No. 19–1177. American Institute for International Steel, Inc., et al. *v.* United States et al. C. A. Fed. Cir. Certiorari denied.

No. 19–1216. Botofan-Miller *v.* Miller. Sup. Ct. Ore. Certiorari denied.

No. 19–1222. Duckworth *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 573.

No. 19–1224. Manning *v.* Kim. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 19–1229. Mulcahy *v.* Aspen Skiing Co. Ct. App. Colo. Certiorari denied.

No. 19–1230. Knight *v.* Chenega Security, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 286.

No. 19–1232. BANK *v.* AL JOHNSON'S SWEDISH RESTAURANT & BUTIK, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 795 Fed. Appx. 822.

No. 19–1233. DOYLE *v.* PALMER, CLERK, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 787 Fed. Appx. 794.

No. 19–1235. CLARK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–1237. WHEELER *v.* NORTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 19–1243. ARMSTRONG *v.* WILSON COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 19–1256. LEVIN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 284 So. 3d 1072.

No. 19–1262. GREER *v.* MEHIEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 805 Fed. Appx. 25.

No. 19–1266. H. B., A MINOR, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO SHIRLEY, BY AND THROUGH HIS GUARDIAN AD LITEM, SHIRLEY *v.* CITY OF TORRANCE, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 60.

No. 19–1313. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 95.

No. 19–7260. KAUFMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 3d 377.

No. 19–7310. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 284 So. 3d 452.

No. 19–7382. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 370.

No. 19–7544. WAGGY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 936 F. 3d 1014.

No. 19–7699. CARR *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 19–7743. LANGLEY *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 19–7794. Fogleman *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 283 So. 3d 685.

No. 19–7834. Soto *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 158 Ohio St. 3d 44, 2019-Ohio-4430, 139 N. E. 3d 889.

No. 19–7865. Mecham *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 3d 257.

No. 19–7991. Garcia *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 936 F. 3d 1128.

No. 19–8037. Ruttkamp *v.* Bank of New York Mellon, fka Bank of New York. App. Ct. Conn. Certiorari denied.

No. 19–8229. Harris *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2019 OK CR 22, 450 P. 3d 933.

No. 19–8272. Tate *v.* Ford, Warden. Sup. Ct. Ga. Certiorari denied. Reported below: 307 Ga. 383, 835 S. E. 2d 198.

No. 19–8280. Jaime Jimenez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–8281. Abdullah *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–8283. Toney *v.* Dickson et al. C. A. 8th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 612.

No. 19–8288. Truong et al. *v.* Barnard et al. C. A. 2d Cir. Certiorari denied.

No. 19–8289. Yeyille *v.* Altonaga et al. C. A. 11th Cir. Certiorari denied.

No. 19–8292. Tinsley *v.* Yates, Administrator, Adult Diagnostic and Treatment Center, et al. C. A. 3d Cir. Certiorari denied.

No. 19–8298. Kissi *v.* United States District Court for the District of Maryland. C. A. 4th Cir. Certiorari denied.

No. 19–8299. Pattioay *v.* Hawaii. C. A. 9th Cir. Certiorari denied.

No. 19–8303. METOYER *v.* FUDGE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE OKLAHOMA PARDON AND PAROLE BOARD, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 849.

No. 19–8305. ONONUJU *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–8306. NWAGU *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–8307. LOPEZ *v.* COOK, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. App. Ct. Conn. Certiorari denied. Reported below: 195 Conn. App. 904, 224 A. 3d 938.

No. 19–8309. FISHER *v.* FRONTLINE NATIONAL. C. A. 4th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 125.

No. 19–8313. TULLY *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 426.

No. 19–8314. WARD *v.* CROW, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 712.

No. 19–8320. TALLEY *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 791 Fed. Appx. 291.

No. 19–8321. CARNEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–8323. COODEY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 19–8324. HORNSBY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–8331. RODRIGUEZ *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 19–8343. ALLEN *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–8360. PARRA-INTERIAN *v.* OBENLAND. C. A. 9th Cir. Certiorari denied.

No. 19–8369. HOSKINS *v.* GE AVIATION. C. A. 5th Cir. Certiorari denied. Reported below: 803 Fed. Appx. 740.

No. 19–8404. GITTENS *v.* KELLY, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, ERIE COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 790 Fed. Appx. 439.

No. 19–8413. POPE *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 19–8445. CURRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 267.

No. 19–8459. BECKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 762 Fed. Appx. 668.

No. 19–8474. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 283.

No. 19–8477. KENDRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–8493. STINSON *v.* HENDRIX, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–8503. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 321.

No. 19–8504. ANTONIO GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 801 Fed. Appx. 525.

No. 19–8508. VILLAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 764.

No. 19–8509. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied. Reported below: 42 Cal. App. 5th 1144, 256 Cal. Rptr. 3d 325.

No. 19–8510. GARCIA TORRES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 267.

No. 19–8512. MHLANGA *v.* HICKS. C. A. 6th Cir. Certiorari denied.

No. 19–8513. CATANO LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 431.

No. 19–8515. MUNDAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 566.

No. 19–8530. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 934 F. 3d 843.

No. 19–8535. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 805 Fed. Appx. 740.

No. 19–8537. SU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 349.

No. 19–8543. BURDICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 789 Fed. Appx. 886.

No. 19–8544. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 554.

No. 19–8546. ANNAMALAI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 819.

No. 19–8558. HARDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–1020. BIKUNDI *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 926 F. 3d 761.

No. 19–1031. CAPRON ET AL. *v.* OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 944 F. 3d 9.

No. 19–1051. KANSAS *v.* BOETTGER (Reported below: 310 Kan. 800, 450 P. 3d 805); and KANSAS *v.* JOHNSON (310 Kan. 835, 450 P. 3d 790). Sup. Ct. Kan. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

JUSTICE THOMAS, dissenting.

Kansas asks us to decide whether the First Amendment prohibits States from criminalizing threats to "[c]ommit violence . . . in reckless disregard of the risk of causing . . . fear." Kan. Stat. Ann. §21–5415(a)(1) (2018). Respondent Timothy Boettger was

convicted for telling the son of a police detective that he "'was going to end up finding [his] dad in a ditch.'" 310 Kan. 800, 802, 450 P. 3d 805, 807 (2019). Respondent Ryan Johnson was separately convicted for telling his mother that he "'wish[ed] [she] would die,'" that he would "'help [her] get there,'" and that he was "'going to f***ing kill [her] a***.'" 310 Kan. 835, 837, 450 P. 3d 790, 792 (2019). The Kansas Supreme Court overturned both convictions and held that reckless threats are protected by the First Amendment, relying on *Virginia* v. *Black*, 538 U. S. 343 (2003).

In my view, the Constitution likely permits States to criminalize threats even in the absence of any intent to intimidate. See *Elonis* v. *United States*, 575 U. S. 723, 760–767 (2015) (dissenting opinion). It appears to follow that threats of violence made in reckless disregard of causing fear may be prohibited. The Kansas Supreme Court reached the opposite conclusion by overreading our decision in *Black*, which did not answer the question presented here. Other courts looking to *Black*, however, have upheld similar statutes. *State* v. *Taupier*, 330 Conn. 149, 193 A. 3d 1 (2018); *Major* v. *State*, 301 Ga. 147, 800 S. E. 2d 348 (2017). I would grant the petition for certiorari to resolve the split on this important question.

I

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." §1. As I have previously explained, "[t]he evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution." *McDonald* v. *Chicago*, 561 U. S. 742, 823 (2010) (opinion concurring in part and concurring in judgment). One of those rights is "the freedom of speech" in the First Amendment. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 2765 (1866) (speech of Sen. Howard).

It does not appear that the ratifiers of the First or Fourteenth Amendments understood the freedom of speech to protect reckless threats. In 1754, Parliament passed a statute making it a crime to "knowingly send any Letter without any Name subscribed thereto, or signed with a fictitious Name . . . threatening to kill or murder any of his Majesty's Subject or Subjects, or to burn their [property], though no Money or Venison, or other

valuable Thing shall be demanded." 27 Geo. 2, ch. 15. English courts interpreted this statute to require what is known today as general intent—"that is, that the defendant posses[s] knowledge with respect to the *actus reus* of the crime." *Carter* v. *United States*, 530 U. S. 255, 268 (2000). As the trial court instructed the jurors in one leading case, "if they were of opinion that" the "terms of the letter conveyed an actual threat to kill or murder . . . and that the prisoner knew the contents of it, they ought to find him guilty." *King* v. *Girdwood*, 1 Leach 142, 143, 168 Eng. Rep. 173 (1776). Only "if they thought [the defendant] did not know the contents, or that the words might import any thing less than to kill or murder" should they acquit. *Ibid.* The Court of Crown approved this instruction. *Ibid.*, 168 Eng. Rep., at 174; see also *Rex* v. *Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (N. P. 1831).

More than a dozen States and Territories enacted "copies" of this statute between the founding and Reconstruction. *Elonis*, *supra*, at 761 (THOMAS, J., dissenting). New Jersey, for example, made it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded." 1796 N. J. Laws § 57, p. 108; see also Colo. Rev. Stat., ch. 22, § 112 (1868); 1864 Mont. Laws p. 205; 1864 Idaho Sess. Laws ch. 8, § 116; 1860 Pa. Laws p. 390; 1859 Neb. Laws p. 64; 1850 Cal. Stats. ch. 99, § 110; Mo. Rev. Stat. ch. 47, Art. 7, § 16 (1845); 1839 Iowa Acts p. 161; 1832 Fla. Laws § 34, pp. 68–69; 1827 Ill. Laws p. 145; 1816 Mich. Pub. Acts p. 24; 1816 Ga. Laws p. 178. The founding and Reconstruction generations would have understood these statutes to require a mental state of general intent. *Girdwood* and other English decisions were familiar to American lawyers. See, *e. g.*, 7 N. Dane, A General Abridgement and Digest of American Law 31–32 (1824). And "where English statutes . . . have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829); see also *Elonis*, *supra*, at 760–763 (THOMAS, J., dissenting). The prevalence of statutes from the founding through Reconstruction that did not require intent to intimidate provides strong

evidence of the meaning of the freedom of speech protected by the Fourteenth Amendment.

This evidence is reinforced by the fact that many of these States also guaranteed the freedom of speech in their constitutions. See, *e. g.*, Fla. Const., Art. I, § 5 (1838); Mich. Const., Art. I, § 7 (1835); Mo. Const., Art. XIII, § 16 (1820); Ill. Const., Art. VIII, § 22 (1818); N. J. Const., Art. I, § 5 (1844); Pa. Const., Art. IX, § 7 (1790). If statutes criminalizing reckless threats violated the freedom of speech, one would expect these States not to have such laws, but many of them did. At the very least, one would expect state courts to hold such laws unconstitutional, but it appears that none did. Near the end of the 19th century, one court observed that these laws had "never been supposed to be obnoxious to freedom of speech." *State* v. *McCabe*, 135 Mo. 450, 459, 37 S. W. 123, 126 (1896).

Finally, none of this Court's precedents have held that the First Amendment requires States to include intent to intimidate as an element in criminal threat statutes. The Court's decision in *Watts* v. *United States*, 394 U. S. 705 (1969) (*per curiam*), "expressly declined to address the mental state required under the First Amendment for a 'true threat.'" *Elonis*, 575 U. S., at 765 (THOMAS, J., dissenting). The state statute in *Black* required "intent to intimidate," Va. Code Ann. § 18.2–423 (1996), so the Court did not decide whether such intent was required to make the law comport with the First Amendment, *Elonis*, 575 U. S., at 765 (THOMAS, J., dissenting).

II

The Kansas Supreme Court, however, concluded that *Black* prohibited the State from criminalizing reckless threats. In reaching that conclusion, the court created a split with the Supreme Courts of Connecticut and Georgia. We should resolve this conflict and provide clear guidance to the lower courts.

In *Black*, a majority of the Court stated in passing that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U. S., at 359. The majority also stated in passing that "[t]he speaker need not actually intend to carry out the threat." *Id.*, at 359–360. Four Members of the majority added that "[t]he First Amendment does not permit" state law to "ignor[e] all of the contextual factors that are necessary to decide

whether [an act] is intended to intimidate." *Id.*, at 367 (plurality opinion).

State courts of last resort have divided over the meaning of this language. The Kansas Supreme Court held the State's reckless threat statute unconstitutional, relying on *Black*'s statement that "'[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.'" 310 Kan., at 822, 450 P. 3d, at 818 (quoting *Black*, 538 U. S., at 360; emphasis deleted). But two other state courts of last resort have read *Black* differently. The Supreme Court of Connecticut found that "nothing in *Black* itself suggests that the [C]ourt intended to overrule the preexisting consensus among the federal circuit courts of appeals that threatening speech may be punished under the [F]irst [A]mendment when a reasonable person would interpret the speech as a serious threat." *Taupier*, 330 Conn., at 173, 193 A. 3d, at 18–19. And the Supreme Court of Georgia likewise read *Black* to allow States to prohibit threats made with reckless disregard. *Major*, 301 Ga., at 151, 800 S. E. 2d, at 352.

This split regarding the mental state required by the First Amendment for these offenses will only deepen with time. Sixteen States and the District of Columbia filed an *amicus* brief representing that numerous statutes would be subject to challenge under the reasoning of the Supreme Court of Kansas. Brief for Virginia et al. as *Amici Curiae* 11–12. If state high courts hold even a fraction of these statutes unconstitutional, we will have no choice but to intervene. I would do so now to address the problem caused by our language in *Black*.

* * *

The decisions in these cases—and the split among state courts of last resort—resulted from the lack of clarity in *Black*. Because the Court should squarely decide whether the Constitution permits States to criminalize threats of violence made in reckless disregard of causing fear, I respectfully dissent from the denial of certiorari.

No. 19–1097. ENZO LIFE SCIENCES, INC. *v.* BECTON, DICKINSON & CO. ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 780 Fed. Appx. 903.

No. 19–8506. WARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 19–8540. SPENCER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari before judgment denied.

No. 19–8548. HARRISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 785 Fed. Appx. 534.

Rehearing Denied

No. 18–9554. IN RE ALLEN, 590 U. S. 941;

No. 19–955. HIRSHAUER *v.* AQ HOLDINGS, LLC, ET AL., 589 U. S. 1295;

No. 19–6961. NAVARRO *v.* UNITED STATES, 589 U. S. 1184;

No. 19–7349. OSORNIO *v.* SUPREME COURT OF THE UNITED STATES ET AL., 589 U. S. 1282;

No. 19–7405. GRANT *v.* WILLIAMS, 589 U. S. 1296;

No. 19–7461. CHEEKS *v.* JOYNER, 589 U. S. 1297;

No. 19–7576. DAVIS *v.* ANGLETON INDEPENDENT SCHOOL DISTRICT ET AL., 589 U. S. 1298;

No. 19–7749. BRIDGES *v.* GRAY, WARDEN, 589 U. S. 1288; and

No. 19–8148. COLE *v.* UNITED STATES, 590 U. S. 927. Petitions for rehearing denied.

JUNE 25, 2020

Miscellaneous Order

No. 19A1054. THOMPSON ET AL. *v.* DEWINE, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Application to vacate stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied.

JUNE 26, 2020

Miscellaneous Order

No. 19A1055. TEXAS DEMOCRATIC PARTY ET AL. *v.* ABBOTT, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Application to vacate stay, presented to JUSTICE ALITO, and by him referred to the Court, denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of application to vacate stay.

This application raises weighty but seemingly novel questions regarding the Twenty-sixth Amendment. I do not disagree with the decision to refrain from addressing them for the first time here, in the context of an emergency application to vacate a stay of an injunction. But I hope that the Court of Appeals will consider the merits of the legal issues in this case well in advance of the November election.

JUNE 29, 2020

Certiorari Dismissed

No. 19–8585. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 19A1045. BUGARENKO *v.* BARR, ATTORNEY GENERAL. Application for stay of removal, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 19M149. SCHUBERT *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 19–1039. PENNEAST PIPELINE CO., LLC *v.* NEW JERSEY ET AL. C. A. 3d Cir.; and

No. 19–1143. FMC CORP. *v.* SHOSHONE-BANNOCK TRIBES. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 19–7905. ARUNACHALAM *v.* EXXON MOBIL CORP. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 940] denied.

No. 19–7910. ARUNACHALAM *v.* INTUIT, INC. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 940] denied.

No. 19–8029. ARUNACHALAM *v.* LYFT, INC. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 941] denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 19–8059. ARUNACHALAM *v.* UBER TECHNOLOGIES, INC. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 957] denied.

No. 19–8374. IN RE SIMS. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 20, 2020, within which to pay the docketing fee required by this Court's Rule 38(a).

No. 19–8626. IN RE DECARLO. 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 Denied

No. 18–1469. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* CASA DE MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 924 F. 3d 684.

No. 19–185. MUTOND ET AL. *v.* LEWIS. C. A. D. C. Cir. Certiorari denied. Reported below: 918 F. 3d 142.

No. 19–638. N. B. D. *v.* KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES. Sup. Ct. Ky. Certiorari denied.

No. 19–673. LUNA-GARCIA *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 932 F. 3d 285.

No. 19–814. MCCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 164.

No. 19–874. PESNELL ET AL. *v.* SESSIONS ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 52,646 (La. App. 2 Cir. 5/22/19), 274 So. 3d 697.

No. 19–933. MONEX DEPOSIT CO. ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 931 F. 3d 966.

No. 19–975. CENTER FOR BIOLOGICAL DIVERSITY ET AL. *v.* WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. D. C. D. C. Certiorari denied.

No. 19–1022. MATTHEWS *v.* BARR, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 19–1035. Rose *v.* Select Portfolio Servicing, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 226.

No. 19–1059. Hamm et vir *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 589 S. W. 3d 765.

No. 19–1082. Linder *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 3d 1087.

No. 19–1087. Hallinan *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 787 Fed. Appx. 81.

No. 19–1100. Cropper *v.* Arizona. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 19–1115. American Bankers Assn. *v.* National Credit Union Administration. C. A. D. C. Cir. Certiorari denied. Reported below: 934 F. 3d 649.

No. 19–1121. Welsh *v.* Fort Bend Independent School District. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 3d 818.

No. 19–1123. Lech et al. *v.* Jackson, Chief of Police, Greenwood Village, Colorado, et al. C. A. 10th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 711.

No. 19–1124. Chrimar Systems, Inc., dba CMS Technologies, Inc., et al. *v.* Ale USA Inc. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 785 Fed. Appx. 854.

No. 19–1145. Ng Lap Seng *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 934 F. 3d 110.

No. 19–1154. Robinson Nursing and Rehabilitation Center, LLC, et al. *v.* Phillips, as Personal Representative of the Estate of Phillips, et al. Sup. Ct. Ark. Certiorari denied. Reported below: 2019 Ark. 305, 586 S. W. 3d 624.

No. 19–1158. Airbus Helicopters, Inc. *v.* Riggs et al. C. A. 9th Cir. Certiorari denied. Reported below: 939 F. 3d 981.

No. 19–1166. Dine Citizens Against Ruining Our Environment et al. *v.* Bureau of Indian Affairs et al. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 3d 843.

No. 19–1195. PALACIOS-SOLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 3d 567.

No. 19–1214. FRIEND *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 134 N. E. 3d 441.

No. 19–1244. JOHNSON *v.* STORIX, INC. C. A. 9th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 501.

No. 19–1249. DAVIS *v.* ECHO VALLEY CONDOMINIUM ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 3d 483.

No. 19–1250. CLARK *v.* CELEBRITY CRUISES, INC., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 271 So. 3d 1169.

No. 19–1263. THOMPSON *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 811.

No. 19–1268. SPRINGER ET AL. *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 721.

No. 19–1270. FODGE ET AL. *v.* TRUSTMARK NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 880.

No. 19–1274. ARNOLD *v.* SLATERY, ATTORNEY GENERAL OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 19–1275. THOMAS *v.* BLOCKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 799 Fed. Appx. 131.

No. 19–1308. MORELLO ET AL. *v.* SEAWAY CRUDE PIPELINE CO., LLC. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 585 S. W. 3d 1.

No. 19–1333. MONSTER ENERGY CO., FKA HANSEN BEVERAGE CO. *v.* CITY BEVERAGES LLC, DBA OLYMPIC EAGLE DISTRIBUTING. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 3d 1130.

No. 19–1345. BUTCHER *v.* VISHNIAC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 483 Mass. 742, 136 N. E. 3d 719.

No. 19–7487. BLADES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 200 A. 3d 230.

No. 19–7603. JENSEN *v.* POLLARD. C. A. 7th Cir. Certiorari denied. Reported below: 924 F. 3d 451.

No. 19–7674. CLARK *v.* LINDSAY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 936 F. 3d 467.

No. 19–7753. PINEDA-FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 252.

No. 19–7780. HARPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 385.

No. 19–7821. CANTU-SIGUERO *v.* UNITED STATES (Reported below: 794 Fed. Appx. 424); GOMEZ-LOPEZ, AKA ANTONIO TRUJILLO, AKA ESCALANTE *v.* UNITED STATES (789 Fed. Appx. 494); GUTIERREZ-MURILLO *v.* UNITED STATES (793 Fed. Appx. 302); HERNANDEZ CASTELLANOS *v.* UNITED STATES (792 Fed. Appx. 352); PALACIOS GUEVARA *v.* UNITED STATES (791 Fed. Appx. 508); PALOMEQUE-RAMOS, AKA LOPEZ *v.* UNITED STATES (791 Fed. Appx. 501); VARGOS CASTRO *v.* UNITED STATES (791 Fed. Appx. 507); ZARATE-HERNANDEZ *v.* UNITED STATES (792 Fed. Appx. 336); and TREVINO-VILLARREAL *v.* UNITED STATES (793 Fed. Appx. 353). C. A. 5th Cir. Certiorari denied.

No. 19–7996. MAYORGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 263.

No. 19–8043. STEWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 188.

No. 19–8045. MATA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 304 Neb. 326, 934 N. W. 2d 475.

No. 19–8061. WEIXING WANG *v.* MARCOTTE. Sup. Ct. N. H. Certiorari denied.

No. 19–8090. SMITH *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 718, 449 P. 3d 460.

No. 19–8107. GUZMAN-IBAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 588.

No. 19–8175. POWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 702, 448 P. 3d 552.

No. 19–8192. BEJARANO *v.* GITTERE, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 613, 448 P. 3d 551.

No. 19–8239. YBARRA *v.* GITTERE, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 740, 448 P. 3d 551.

No. 19–8317. TAEBEL *v.* DUCEY, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8330. SPATARU *v.* FLORIDA DEPARTMENT OF TRANSPORTATION ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 275 So. 3d 248.

No. 19–8335. WILLOUGHBY *v.* HART, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 506.

No. 19–8346. JONES *v.* CAPOZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8347. DANIELS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 19–8348. KEHANO *v.* HARRINGTON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 964.

No. 19–8349. CHAREST *v.* STANKOSKI, JUDGE, CIRCUIT COURT OF ALABAMA, BALDWIN COUNTY. Sup. Ct. Ala. Certiorari denied.

No. 19–8352. K. S. *v.* PRICE ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 222 A. 3d 817.

No. 19–8354. ROMERO *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 19–8355. RAY *v.* STITT, GOVERNOR OF OKLAHOMA. Ct. Civ. App. Okla. Certiorari denied.

No. 19–8356. LOGAN ET AL. *v.* LOGAN. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 19–8357. LOUT *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 398 Mont. 447, 455 P. 3d 457.

No. 19–8358. MEADS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2019 IL App (4th) 170229–U.

No. 19–8359. PHILLIPS *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–8367. COLEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–8368. GITTENS *v.* TRANSFORCE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 168.

No. 19–8370. FISHER *v.* WALGREEN CO. C. A. 4th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 61.

No. 19–8372. ISMAIYL *v.* NUGENT. C. A. 6th Cir. Certiorari denied.

No. 19–8373. ROQUE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 19–8377. KNIGHT *v.* MONTEREY COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 19–8395. GAKUBA *v.* O'BRIEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–8397. LOCKHART *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 19–8402. PACCHIANA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 289 So. 3d 857.

No. 19–8406. SHAHADDAH *v.* GOTCHER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 277.

No. 19–8408. MCPHERSON *v.* TOMPKINS TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 Fed. Appx. 142.

No. 19–8410. PINNEY *v.* PAYNE, DIRECTOR, ARKANSAS DIVISION OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 19–8417. STONE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 19–8426. TWITTY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 138 N. E. 3d 974.

No. 19–8497. LYMAN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 311 Kan. 1, 455 P. 3d 393.

No. 19–8520. MOHN *v.* PROGRESSIVE INSURANCE. C. A. 10th Cir. Certiorari denied. Reported below: 802 Fed. Appx. 391.

No. 19–8523. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 800 Fed. Appx. 290.

No. 19–8524. COKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 341.

No. 19–8525. GABRIEL DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 491.

No. 19–8542. BROWN *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 76.

No. 19–8555. TROIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–8557. DORSETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 19–8559. JEPSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 944 F. 3d 1019.

No. 19–8562. ROSENBLATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 960.

No. 19–8563. LEE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–8564. OJEDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 951 F. 3d 66.

No. 19–8566. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 350.

No. 19–8567. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 52.

No. 19–8568. THORPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 803 Fed. Appx. 691.

No. 19–8569. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 19–8570. VEGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 918.

No. 19–8572. CHAMBERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 993.

No. 19–8576. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 200.

No. 19–8579. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 374.

No. 19–8582. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8584. KIDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 221.

No. 19–8586. RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 521.

No. 19–8589. ACOSTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8603. WHITE *v.* INTERNAL REVENUE SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 168.

No. 19–1026. FORD MOTOR CO. *v.* UNITED STATES. C. A. Fed. Cir. Motion of American Association of Exporters and Importers for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 926 F. 3d 741.

No. 19–1251. ARMSTRONG *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 19–1259. LOUMIET *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 948 F. 3d 376.

No. 19–1348 (19A1050). BOURGEOIS ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Application for stay of mandate pending disposition of the petition for writ of certiorari, presented to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the application and the petition for writ of certiorari. Reported below: 955 F. 3d 106.

No. 19–8350. DESMOND *v.* DELAWARE. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 792 Fed. Appx. 241.

Rehearing Denied

No. 19–6483. ROBINSON *v.* MASON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, 589 U. S. 1147;

No. 19–6963. PRENATT *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 589 U. S. 1216;

No. 19–7337. PALMER *v.* UNITED STATES, 589 U. S. 1228;

No. 19–7556. JACOBS *v.* MARICOPA INTEGRATED HEALTH CARE SYSTEM, 589 U. S. 1307;

No. 19–7644. JONES *v.* GRIFFITH, WARDEN, 589 U. S. 1308;

No. 19–7673. EL BEY, FKA WARREN *v.* WEAVER ET AL., 590 U. S. 908;

No. 19–7678. EL BEY, FKA WARREN *v.* DOUGHTERY COUNTY STATE COURT ET AL., 590 U. S. 909;

No. 19–7679. BROWNLEE *v.* HEARNS ET AL., 589 U. S. 1308;

No. 19–7693. MILLS *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY, 590 U. S. 931;

No. 19–7697. LOVELL *v.* CHILDREN'S CORNER DAYCARE, 589 U. S. 1287;

No. 19–7701. KERNS *v.* WENNER, 590 U. S. 924;

No. 19–7702. JACKSON *v.* BEREAN ET AL., 590 U. S. 924;

No. 19–7727. IN RE DAVIS, 590 U. S. 922;

No. 19–7968. NDOROMO *v.* BARR, ATTORNEY GENERAL, ET AL., 590 U. S. 947;

No. 19–8011. DELLINGER *v.* TENNESSEE, 590 U. S. 948; and

No. 19–8067. MOHAMMED *v.* DUPAGE LEGAL ASSISTANCE FOUNDATION ET AL., 590 U. S. 926. Petitions for rehearing denied.

No. 19–7625. SWINTON *v.* FLORIDA, 589 U. S. 1286. Motion for leave to file petition for rehearing denied.