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JUNE 30 THROUGH SEPTEMBER 29, 2023

REBECCA A. WOMELDORF
REPORTER OF DECISIONS

Reporter's Note

The next page is purposely numbered 901. The numbers between 640 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 30 THROUGH SEPTEMBER 29, 2023

June 30, 2023

Certiorari Granted—Vacated and Remanded

No. 22–204. Klein et vir *v.* Oregon Bureau of Labor and Industries. Ct. App. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *303 Creative LLC* v. *Elenis*, 600 U. S. 570 (2023). Reported below: 317 Ore. App. 138, 506 P. 3d 1108.

No. 22–362. Huffman, President of the Ohio Senate, et al. *v.* Neiman et al. Sup. Ct. Ohio. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Moore* v. *Harper*, 600 U. S. 1 (2023). Reported below: 169 Ohio St. 3d 565, 2022-Ohio-2471, 207 N. E. 3d 607.

No. 22–374. Olhausen *v.* Arriva Medical, LLC, et al. C. A. 11th Cir.; and

No. 22–593. United States ex rel. Sheldon *v.* Allergan Sales, LLC. C. A. 4th Cir. Reported below: 49 F. 4th 873. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States ex rel. Schutte* v. *Supervalu Inc.*, 598 U. S. 739 (2023). Justice Alito took no part in the consideration or decision of these petitions.

No. 22–582. United States *v.* Hernandez-Calvillo et al. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Hansen*, 599 U. S. 762 (2023). Reported below: 39 F. 4th 1297.

Certiorari Granted

No. 22–666. Wilkinson *v.* Garland, Attorney General. C. A. 3d Cir. Certiorari granted.

No. 22–721. McElrath *v.* Georgia. Sup. Ct. Ga. Certiorari granted. Reported below: 315 Ga. 126, 880 S. E. 2d 518.

No. 22–859. Securities and Exchange Commission *v.* Jarkesy et al. C. A. 5th Cir. Certiorari granted. Reported below: 34 F. 4th 446.

No. 22–193. Muldrow *v.* City of St. Louis, Missouri, et al. C. A. 8th Cir. Certiorari granted limited to the following question: "Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?" Reported below: 30 F. 4th 680.

No. 22–674. Campos-Chaves *v.* Garland, Attorney General (Reported below: 54 F. 4th 314). C. A. 5th Cir.; and

No. 22–884. Garland, Attorney General *v.* Singh (Reported below: 24 F. 4th 1315); and Garland, Attorney General *v.* Mendez-Colin. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument.

No. 22–915. United States *v.* Rahimi. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 61 F. 4th 443.

Certiorari Denied

No. 21–763. Ham *v.* Breckon, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 3d 682.

No. 21–926. Cooper Tire & Rubber Co. *v.* McCall. Sup. Ct. Ga. Certiorari denied. Reported below: 312 Ga. 422, 863 S. E. 2d 81.

No. 21–8190. Luczak *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 26 F. 4th 387.

No. 22–118. Shaw *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 22–369. Monteiro Silva *v.* Garland, Attorney General. C. A. 1st Cir. Certiorari denied. Reported below: 27 F. 4th 95.

No. 22–738. Mangine *v.* Withers, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 4th 443.

No. 22–991. Jarkesy et al. *v.* Securities and Exchange Commission. C. A. 5th Cir. Certiorari denied. Reported below: 34 F. 4th 446.

No. 22–5345. Karr *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 22–5828. Bullock *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 35 F. 4th 666.

No. 22–5993. Ross *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 29 F. 4th 1003.

No. 22–6212. Cain *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 22–6386. Sanchez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 4th 970.

No. 22–6680. Stapleton *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 4th 1320.

No. 22–6736. Martin *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 22–6815. Merry *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 22–6838. Beachem *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 22–6940. Little *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 22–7148. Jenkins *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 21–1557. McClinton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 23 F. 4th 732.

Statement of Justice Sotomayor respecting the denial of certiorari.

The prosecution in this case argued that Dayonta McClinton, then 17 years old, shot and killed his friend in a dispute over the proceeds of a pharmacy robbery. The jury unanimously acquitted him of killing his friend and convicted him only of robbing the pharmacy.

After that, however, something happened that might strike the average person as quite strange. At McClinton's sentencing for the robbery conviction, the prosecution again argued that McClinton had killed his friend. When the judge agreed, this caused McClinton's Sentencing Guidelines range to skyrocket. While the ultimate sentencing decision is discretionary, "[t]he Guidelines are the framework for sentencing and anchor the district court's discretion." *Molina-Martinez* v. *United States*, 578 U. S. 189, 198–199 (2016) (internal quotation marks and alterations omitted). McClinton's Guidelines range had initially been approximately five to six years. Yet taking into account the killing, the judge sentenced McClinton to 19 years in prison.

As many jurists have noted, the use of acquitted conduct to increase a defendant's Sentencing Guidelines range and sentence[1] raises important questions that go to the fairness and perceived fairness of the criminal justice system. See *Jones* v. *United States*, 574 U. S. 948, 949–950 (2014) (Scalia, J., joined by THOMAS and Ginsburg, JJ., dissenting from denial of certiorari); see also *United States* v. *Bell*, 808 F. 3d 926, 928 (CADC 2015) (Kavanaugh, J., concurring in denial of reh'g en banc); *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1331 (CA10 2014) (Gorsuch, J.); *United States* v. *Watts*, 519 U. S. 148, 170 (1997) (Kennedy, J., dissenting).[2]

These concerns arise partly from a tension between acquitted-conduct sentencing and the jury's historical role. Juries are democratic institutions called upon to represent the community as "a bulwark between the State and the accused," and their verdicts are the tools by which they do so. *Southern Union Co.* v. *United States*, 567 U. S. 343, 350 (2012) (internal quotation marks omitted); see also *Blakely* v. *Washington*, 542 U. S. 296, 305–306 (2004)

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[1] For brevity, I will refer to this as "acquitted-conduct sentencing."

[2] Many other state and federal judges have questioned the practice. See also, *e. g.*, *State* v. *Melvin*, 248 N. J. 321, 349–352, 258 A. 3d 1075, 1092–1094 (2021); *People* v. *Beck*, 504 Mich. 605, 625–629, 939 N. W. 2d 213, 224–227 (2019); *State* v. *Marley*, 321 N. C. 415, 424–425, 364 S. E. 2d 133, 138–139 (1988); *State* v. *Cote*, 129 N. H. 358, 375–376, 530 A. 2d 775, 785 (1987); *Jefferson* v. *State*, 256 Ga. 821, 827, 353 S. E. 2d 468, 474 (1987); *United States* v. *Tapia*, 2023 WL 2942922, *2, n. 2 (CA2, Apr. 14, 2023); *United States* v. *Brown*, 892 F. 3d 385, 408–409 (CADC 2018) (Millett, J., concurring); *United States* v. *White*, 551 F. 3d 381, 391–397 (CA6 2008) (Merritt, J., dissenting); *United States* v. *Canania*, 532 F. 3d 764, 776–778 (CA8 2008) (Bright, J., concurring); *United States* v. *Mercado*, 474 F. 3d 654, 658, 662–665 (CA9 2007) (Fletcher, J., dissenting); *United States* v. *Baylor*, 97 F. 3d 542, 550–553 (CADC 1996) (Wald, J., concurring); *United States* v. *Concepcion*, 983 F. 2d 369, 395–396 (CA2 1992) (Newman, J., dissenting).

("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary"). Consistent with this, juries were historically able to use acquittals in various ways to limit the State's authority to punish, an ability that the Founders prized. See *Jones* v. *United States*, 526 U. S. 227, 245–246 (1999). With an acquittal, the jury as representative of the community has been asked by the State to authorize punishment for an alleged crime and has refused to do so.

This helps explain why acquittals have long been "accorded special weight," *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980), distinguishing them from conduct that was never charged and passed upon by a jury.[3] This special weight includes traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was "mistaken." *Id.*, at 130. In contrast, there appears to be little record of acquitted-conduct sentencing before the 1970s. See C. Murray, Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1444, 1427–1437, 1450–1455 (2010) (describing the role of federal statutes and especially the Guidelines in the rise of acquitted-conduct sentencing).[4]

The argument for acquitted-conduct sentencing is generally based on standards of proof. A sentencing judge makes findings by a preponderance of the evidence, whereas a jury applies the higher beyond-a-reasonable-doubt standard. Because an acquittal could reflect a jury's conclusion that the evidence of guilt fell just short of the beyond-a-reasonable-doubt standard, the argument goes, there is no conflict with a judge making a contrary finding of guilt under a lower evidentiary standard.

Yet there is a tension between this narrower conception of an acquittal and the manner in which juries historically used acquittals. See *Jones*, 526 U. S., at 245–246; see also *Blakely*, 542 U. S.,

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[3] The history and nature of acquittals distinguishes the narrow question of acquitted-conduct sentencing from broader questions posed by JUSTICE ALITO about the other kinds of facts judges may consider at sentencing.

[4] Many sentencing courts throughout history have thus gone without acquitted conduct and various States have expressly limited such consideration for decades. See *Cote*, 129 N. H., at 375–376, 530 A. 2d, at 785; *Jefferson*, 256 Ga., at 827, 353 S. E. 2d, at 474; *Marley*, 321 N. C., at 424–425, 364 S. E. 2d, at 138–139. This suggests that JUSTICE ALITO's workability concerns may not be as dire as he fears.

at 305–306 (jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure"). Further, an acquittal could also reflect a jury's conclusion that the State's witnesses were lying and that the defendant is innocent of the alleged crime. In that case, it is questionable that a jury's refusal to authorize punishment is consistent with the judge giving the defendant additional years in prison for the same alleged crime. The fact is that even though a jury's specific reasons for an acquittal will typically be unknown, the jury has formally and finally determined that the defendant will not be held criminally culpable for the conduct at issue. So far as the criminal justice system is concerned, the defendant "has been set free or judicially discharged from an accusation; released from a charge or *suspicion* of guilt." *State* v. *Marley*, 321 N. C. 415, 424, 364 S. E. 2d 133, 138 (1988) (internal quotation marks and alterations omitted).

There are also concerns about procedural fairness and accuracy when the State gets a second bite at the apple with evidence that did not convince the jury coupled with a *lower* standard of proof. Even defendants with strong cases may understandably choose not to exercise their right to a jury trial when they learn that even if they are acquitted, the State can get another shot at sentencing.

Finally, acquitted-conduct sentencing also raises questions about the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system. Various jurists have observed that the woman on the street would be quite taken aback to learn about this practice. See, *e. g.*, *United States* v. *Canania*, 532 F. 3d 764, 778 (CA8 2008) (Bright, J., concurring).

This is also true for jurors themselves. One juror, after learning about acquitted-conduct sentencing, put it this way: " 'We, the jury, all took our charge seriously. We virtually gave up our private lives to devote our time to the cause of justice . . . . What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty.' " *Id.*, at 778, n. 4. In this Nation, juries have historically been venerated as "a free school . . .

to which each juror comes to learn about his rights." 1 A. de Tocqueville, Democracy in America 316 (A. Goldhammer transl. 2004). One worries about the lesson jurors learn from acquitted-conduct sentencing.

The Court's denial of certiorari today should not be misinterpreted.[5] The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted-conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.

Statement of JUSTICE KAVANAUGH, with whom JUSTICE GORSUCH and JUSTICE BARRETT join, respecting the denial of certiorari.

As JUSTICE SOTOMAYOR explains, the Court's denial of certiorari today should not be misinterpreted. The use of acquitted conduct to alter a defendant's Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari in a case involving the use of acquitted conduct.

JUSTICE ALITO, concurring.

This Court does not lobby government entities to make preferred policy decisions, and no one should misinterpret my colleagues' statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing. Even if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts, and therefore the constitutional issue will remain.

The fundamental argument advanced in support of the proposition that consideration of such conduct at sentencing violates the Sixth Amendment right to a jury trial relies on what, I submit,

[5] The Court today will deny certiorari in a series of similar cases involving acquitted-conduct sentencing, and the issues discussed here apply to those cases as well.

is a flawed understanding of the meaning of that right when the Amendment was adopted, namely, that a defendant's sentence may be based only on facts that a jury has found beyond a reasonable doubt. As scholars have noted, there is strong evidence that this was not the understanding of the jury-trial right in 1791. See, *e. g.*, S. Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1123–1132 (2001); R. Little & T. Chen, The Lost History of *Apprendi* and the *Blakely* Petition for Rehearing, 17 Fed. Sentencing Rep. 69 (2004). In that era, federal criminal statutes often gave sentencing judges the authority to impose any sentence that fell within a prescribed range, and in exercising that authority, judges necessarily took into account facts that the jury had not found at trial. See K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9–10 (1998). It is particularly significant that several federal criminal statutes enacted by the First Congress followed this approach. See Act of Apr. 30, 1790, 1 Stat. 112–118. That same Congress framed and proposed the Sixth Amendment and sent it to the States for ratification, and we have often reasoned that statutes enacted by that Congress are "persuasive evidence of what the Constitution means." *Harmelin* v. *Michigan*, 501 U. S. 957, 980 (1991) (opinion of Scalia, J.); see also, *e. g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986); *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983).

If, as the First Congress apparently believed, a sentencing judge may consider facts not proved at trial, that principle undermines the fundamental argument advanced to show that so-called acquitted conduct may not be considered.* Facts that simply

*Without the benefit of full briefing and argument, I am reluctant to opine on the history of the consideration of acquitted conduct at sentencing. See *ante*, at 904–905 (SOTOMAYOR, J., statement respecting denial of certiorari). But because, as I explain, there is no relevant difference for these purposes between acquitted conduct and uncharged conduct, the historical evidence supporting consideration of uncharged conduct is highly relevant to the consideration of acquitted conduct. Indeed, the sources JUSTICE SOTOMAYOR cites in her historical discussion support my arguments regarding the propriety of considering conduct not implicated by the jury's verdict and the logical connection between that and considering acquitted conduct. See *Jones* v. *United States*, 526 U. S. 227, 248 (1999) ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution"); C. Murray, Hard Cases Make Good Law: The affect a sentence "can be proved . . . by a preponderance of the evidence," *United States* v. *O'Brien*, 560 U. S. 218, 224 (2010), but facts needed to establish an element of a criminal offense must be proved beyond a reasonable doubt, *In re Winship*, 397 U. S. 358, 364 (1970). Therefore, the most that can be inferred from a not-guilty verdict is that this high standard was not met. *United States* v. *Watts*, 519 U. S. 148, 155 (1997) (*per curiam*). It cannot be inferred that the facts needed to convict were not shown by even a preponderance of the evidence, and that is why, it has been thought, acquitted conduct may be considered at sentencing. *Ibid.*

JUSTICE SOTOMAYOR mentions three other arguments in favor of a rule barring consideration of acquitted conduct, *ante*, at 906–907 (statement respecting denial of certiorari), but all of these arguments have weaknesses. The first argument is that a jury that returns a not-guilty verdict may have thought that even the preponderance-of-the-evidence standard was not met, but it would be odd indeed to base a constitutional rule on such speculation. Second, JUSTICE SOTOMAYOR claims that jurors who vote for acquittal may be surprised and even offended when they learn that the judge took acquitted conduct into account at sentencing, but jurors are not typically given the authority to choose the sentence that is imposed on a defendant they convict. That is usually the prerogative of the judge, and therefore any jurors who feel that the judge has infringed on their authority do not understand the scope of their role. In addition, juror surprise about either the severity or leniency of the sentence that a judge selects is almost certainly not confined to situations in which the sentence was affected by acquitted conduct. Third, JUSTICE SOTOMAYOR asserts that "the woman on the street" would be surprised to learn that a sentence was based on acquitted conduct. *Ante*, at 906 (statement respecting denial of certiorari). If that is true, it shows only that many people do not understand that "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984).

Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1423–1425 (2010) (explaining that the reasons that justify considering uncharged conduct apply as a matter of logic to considering acquitted conduct).

If we eventually take up the acquitted-conduct issue, we will have to consider whether *stare decisis* stands in the way. In *United States* v. *Watts*, we said that there is no "prohibition against considering certain types of evidence at sentencing," including "uncharged or acquitted conduct." 519 U. S., at 152–155. Although the only specific constitutional challenge to consideration of acquitted conduct in *Watts* was based on the Double Jeopardy Clause, rather than due process or the jury-trial right, we framed our holding in broad terms, stating that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.*, at 157. Justice Stevens's dissent evinces the same broad understanding of the Court's decision. *Id.*, at 165 ("The precise question here" is "the burden of proof applicable to sentencing facts"). And subsequent decisions reflect this same understanding. *United States* v. *Booker*, 543 U. S. 220, 251 (2005) (characterizing *Watts* as holding "that a sentencing judge [can] rely for sentencing purposes upon a fact that a jury had found unproved" (emphasis deleted)); *Alabama* v. *Shelton*, 535 U. S. 654, 665 (2002) (Defendant was sentenced "in accord with *due process* . . . even if he [was] acquitted of the" conduct the sentence was in part based on (citing *Watts*; emphasis added)).

If holding that the Constitution prohibits the consideration of acquitted conduct at sentencing would require us to overrule *Watts*, we would also have to assess whether the resulting rule would be workable. See, *e. g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 459–460 (2015) (analyzing the workability not only of the precedent, but of the proposed new rule as well). And while the *Watts* regime has been shown to be eminently workable, significant practical concerns pervade the alternatives.

First, it will frequently be "impossible to know exactly why a jury found a defendant not guilty on a certain charge." *Watts*, 519 U. S., at 155. Take the example of an acquittal in a felony-murder case. How could a court tell whether the failure of proof concerned the killing or the underlying felony? If a defendant was acquitted for murder in aid of racketeering activity, see 18 U. S. C. § 1959(a)(1), how could a court know whether the verdict was because the murder was unproved or because racketeering was not established? In the case of an acquittal for traveling in interstate commerce with the intent to commit a crime of violence from which death in fact results, see § 1952(a)(2)(B), how could it be determined whether the prosecution failed to prove the requisite intent or failed to show that the defendant traveled in interstate commerce? No doubt, special-verdict forms would proliferate in such a system, despite the fact that they are generally disfavored in criminal cases and thought to disadvantage defendants.

Second, barring consideration of acquitted conduct would raise the issue of considering the conduct needed to convict on a count on which the jury was unable to reach a verdict. Suppose that a jury convicts on one count of an indictment but deadlocks on the other, and suppose that the prosecution is content to proceed to sentencing. Can the sentencing court consider conduct underlying the deadlocked count?

Finally, consider the following hypothetical. Suppose a crime has three elements, A, B, and C. Suppose that the jury acquits a defendant of the charge, and suppose that a special-verdict form reveals that every juror found that the prosecution had not proved A. If the facts needed to prove B or C have a bearing on the appropriate sentence for a separate offense for which the defendant was found guilty, what is the trial judge to do? Must the jury keep deliberating on B and C? Perhaps the jury, having decided that the showing on A was obviously deficient, gave little thought to either of those elements. But sending the jury back to continue deliberating on B or C after it has already reached a verdict of acquittal would be odd and unprecedented.

If the Court in some future case takes up the question of the constitutionality of considering acquitted conduct at sentencing, better arguments on both sides of the issue may be presented to us, and nothing that I have written here should be understood as the expression of a firm position on that question. But because my colleagues have laid out some of the arguments in favor of one side, I thought it appropriate to outline some of the countervailing arguments.

No. 22–398. Santiago *v.* Streeval. C. A. 7th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. See 28 U. S. C. § 455(b)(3) and Code of Conduct for U. S. Judges, Canon 3C(1)(e) (prior government employment). Reported below: 36 F. 4th 700.

No. 22–412. HARNESS ET AL. *v.* WATSON, MISSISSIPPI SECRETARY OF STATE. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 4th 296.

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting.

The President of the 1890 Mississippi Constitutional Convention said it plain: "Let us tell the truth if it bursts the bottom of the Universe . . . . We came here to exclude the negro. Nothing short of this will answer."[1] To further that agenda, the Convention placed nine crimes in § 241 of the State's Constitution as bases for disenfranchisement, believing that more Black people would be convicted of those crimes than White people. See *Williams* v. *Mississippi*, 170 U. S. 213, 222–223 (1898) (acknowledging that purpose, but expressing "no concern" regarding the Conventioneers' objective); *Ratliff* v. *Beale*, 74 Miss. 247, 265, 20 So. 865, 868 (1896) (similar); 47 F. 4th 296, 300 (CA5 2022) (*per curiam*) (en banc) (case below) (recognizing § 241's discriminatory aim).

Eight of those crimes have remained in § 241 since 1890, without interruption. Thus, the Convention's avowed goals continue to be realized via its chosen mechanism: Today (just as in the Convention's aftermath), thousands of Black Mississippians cannot vote due to § 241's operation.[2] Petitioners brought this legal action to challenge § 241's continued use of the eight crimes as bases for felon disenfranchisement. 47 F. 4th, at 302.

The Court of Appeals for the Fifth Circuit properly recognized that, under this Court's settled precedent, the mere passage of time cannot insulate from constitutional challenge a law that was invidious at its inception. See *id.*, at 300, 304. That court could not escape acknowledging the similarities between this case and *Hunter* v. *Underwood*, 471 U. S. 222 (1985) (Rehnquist, J., for the Court), in which this Court unanimously invalidated an Alabama constitutional provision passed in 1901 because its "enactment was motivated by a desire to discriminate against blacks on account of race" and it "continue[d] to th[at] day to have that effect." *Id.*, at 233. But en route to affirming the District Court's grant of summary judgment against petitioners, the Fifth Circuit pro-

[1] N. McMillen, Dark Journey: Black Mississippians in the Age of Jim Crow 41 (1989) (internal quotation marks omitted); see also *id.*, at 39–43.

[2] See *id.*, 44–48; Report of Dov Rothman in No. 3:17–cv–00791 (SD Miss., Oct. 25, 2018), ECF Doc. 77–9, p. 6, ¶10.

ceeded to make two egregious analytical errors that ought to be corrected.

First, it seized upon the idea that § 241 had somehow been "reenacted" in full when the citizens of Mississippi twice amended parts of that provision years later. 47 F. 4th, at 306. To be sure, later amendments changed bases for disenfranchisement other than the eight at issue here: In 1950, burglary was removed from the list of disenfranchising crimes via the State's amendment processes, and, in 1968, murder and rape were added via the same processes. See *id.*, at 300–301. But, for federal constitutional purposes, the State never enacted any "new" version of the original eight grounds for disenfranchisement. In 1950, voters could have either removed burglary from § 241 or left § 241 unchanged. So, too, in 1968—voters could have added murder and rape or left § 241 unchanged. *Id.*, at 319, 323–324 (Graves, J., dissenting). No other change to the original list of crimes was ever on offer. Therefore, the same discriminatory list of crimes that the 1890 Constitution's ratifiers "ma[d]e into law by authoritative act" operates to disenfranchise Mississippians who commit those crimes today. Black's Law Dictionary 666 (11th ed. 2019) (defining "enact").

Accordingly, the Fifth Circuit was wrong to believe that the amendments rendered the 1890 Convention's discriminatory purpose irrelevant and to reject petitioners' claim on the ground that they could show no discriminatory purpose, see 47 F. 4th, at 307, 309–310. Quite to the contrary, here, just as in *Hunter*, the "remaining crimes" from § 241's pernicious origin still work the very harm the 1890 Convention intended—denying Black Mississippians the vote. 471 U. S., at 232–233.

Second, the Fifth Circuit's alternative holding—that even if § 241 is tainted by discriminatory purpose, petitioners have no viable claim because the disenfranchisement provision would have been adopted anyway, see 47 F. 4th, at 310–311—was equally misguided. Under our well-established precedents, in order to defeat a challenge to a state law that was motivated by discriminatory purpose, the State bears the burden of showing that "the law would have been enacted without" that purpose. *Hunter*, 471 U. S., at 228. Here, the Fifth Circuit assumed for argument's sake that petitioners had shown discriminatory purpose, but concluded that the State had discharged its burden because certain legislators and a state task force considered recommending changes to § 241's list of crimes in the 1980s. 47 F. 4th, at 302, 310. And the Fifth Circuit held that the State's burden was satisfied even though that consideration never yielded an actual change to § 241. See *id.*, at 310–311.

This alternative holding was infused with the faulty "reenactment" rationale, insofar as the Fifth Circuit assumed, *arguendo*, "discriminatory intent arising *from the 1968* amendment." *Id.*, at 310 (emphasis added). Moreover, and even more fundamentally, the Fifth Circuit misread (or misunderstood) this Court's holdings about the nature of the necessary inquiry. The burden is not to demonstrate a theoretical possibility that *any* legislature could have adopted the enactment at issue absent discrimination. Rather, courts must assess whether *the discriminatory actor* (here, the 1890 Convention) "would have" enacted the provision sans the discriminatory intent that was its actual motivation. *Hunter*, 471 U. S., at 228; see also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270–271, and n. 21 (1977) (State's "burden" is to "establis[h] that the same decision *would have resulted*" (emphasis added)). And *that* question cannot possibly be answered by looking to the unconsummated considerations of legislative actors a near century after the enactment.

In sum, I would have granted this petition to correct the Fifth Circuit's clear and constitutionally momentous errors, and the Court could have done so in a straightforward and narrow (but significant) manner. All that is needed to resolve this dispute is (1) the indisputable fact that § 241's disenfranchisement provisions were adopted for an illicit discriminatory purpose, and (2) the (unusually undeniable) understanding that, far from being subsequently "reenacted," § 241 has persisted, without change—doing the harmful work that it was designed to do—ever since its initial invidious inception.

* * *

The other day, this Court declared that the " 'Constitution deals with substance, not shadows,' and the [constitutional] prohibition against racial discrimination is 'levelled at the thing, not the name.' " *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U. S. 181, 230–231 (2023). There are no shadows in § 241, only the most toxic of substances.

Thus, the majority's decision *not* to take up this matter is doubly unfortunate. We were asked to address this problem 125 years ago in *Williams*, and declined to do so. See 170 U. S., at 219–223, 225 (rejecting challenge to § 241). And this Court blinks again today. So, at the same time that the Court undertakes to slay other giants, Mississippians can only hope that they will not have to wait another century for a judicial knight-errant. Constitutional wrongs do not right themselves. With its failure to take action, the Court has missed yet another opportunity to learn from its mistakes.

No. 22–510. Lombardo et al. *v.* City of St. Louis, Missouri, et al. C. A. 8th Cir. Certiorari denied. Justice Jackson would grant the petition for writ of certiorari. Reported below: 38 F. 4th 684.

Justice Sotomayor, dissenting.

"It hurts. Stop." These were the words of Nicholas Gilbert just before he died at the hands of St. Louis police officers. *Lombardo* v. *St. Louis*, 594 U. S. 464, 466 (2021) (*per curiam*). The police arrested Gilbert for trespassing and for failing to show up in court for a traffic ticket. They took him into custody. Six hours later, Gilbert was dead. The facts, taken in the light required at this stage of litigation, show that six officers in a small holding cell held Gilbert face down on the ground in handcuffs and leg irons while at least one officer pressed down on his back for 15 minutes—that is, until Gilbert stopped breathing.

Gilbert's parents sued. They argued that the police used excessive force against their son, in violation of the United States Constitution. The parents demanded a jury trial. The courts below, however, decided that a trial was unnecessary because qualified immunity shielded the officers. A Federal District Court concluded that the officers did not violate a constitutional right that was clearly established at the time of Gilbert's death. *Lombardo* v. *Saint Louis City*, 361 F. Supp. 3d 882, 895 (ED Mo. 2019). The Court of Appeals for the Eighth Circuit went a step further, deciding that the officers did not violate any constitutional right at all. 956 F. 3d 1009, 1014 (2020). Both courts focused on Gilbert's perceived "resistance": Prior to his death, Gilbert tied a piece of clothing around the bars of his cell and put it around his neck, attempting to hang himself. When three officers responded, Gilbert struggled. According to Gilbert's parents, however, the evidence shows that after the police handcuffed Gilbert's arms behind his back; shackled his legs; surrounded him with six officers; held Gilbert's limbs down at the shoulders, biceps, and legs; and put deadly pressure on his back, Gilbert's only movements were that of a restrained man desperately trying to breathe. Or, at least, a jury could so find. The Court of Appeals for the Eighth Circuit ignored that possibility, the parents argued.

This Court summarily vacated the decision of the Eighth Circuit. *Lombardo*, 594 U. S., at 468. The Court explained that the inquiry into whether the officers used excessive force required " 'careful attention to the facts and circumstances of' " the case. *Id.*, at 467 (quoting *Graham* v. *Connor*, 490 U. S. 386, 396 (1989)). The Court then identified evidence that the Eighth Circuit improperly "failed to analyze" or "characterized" "as insignificant": "the duration of the restraint"; "the fact that Gilbert was handcuffed and leg shackled at the time"; the fact "that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation"; "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk"; and the fact that such "guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands." 594 U. S., at 467–468. This evidence, the Court said, was "pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers." *Id.*, at 468.

On remand, the Eighth Circuit did not attend to these facts in deciding whether the officers used excessive force. Instead the court simply decided that, even if Gilbert had a constitutional right to be free from excessive force in such circumstances, that right was not "clearly established." 38 F. 4th 684, 686 (2022). In reaching that conclusion, the Eighth Circuit, once again, focused myopically on Gilbert's perceived resistance. The court also ignored that a jury could determine that any actions by Gilbert did not warrant the use of deadly force. The St. Louis police were well aware that prolonged prone restraint with chest compression can cause suffocation.* Yet the officers applied such force to Gil-

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*When asked whether holding a subject in a prone position and pressing on his back could cause suffocation, a representative of the city of St. Louis confirmed, "We train to that, yes." *Lombardo* v. *Saint Louis City*, No. 4:16–cv–01637 (ED Mo., Aug. 31, 2018), ECF Doc. 77–10, p. 26 (deposition of Offibert anyway, even though he was handcuffed and shackled, and even though six officers were present to hold his limbs down. The Eighth Circuit assumed Gilbert's subsequent movements amounted to "ongoing resistance," *id.*, at 692, rather than efforts to breathe, and the court therefore analogized his case to Circuit precedent in which the subject was actively resisting. On that basis, the Court of Appeals concluded that whatever Gilbert's constitutional rights were in this situation, they were not clearly established. See *id.*, at 691.

Respectfully, I would not let this Court's mandate be so easily avoided. Instead, I would again vacate the decision of the Eighth Circuit and remand for that court to resolve the question of qualified immunity without assuming that Gilbert's final movements were those of a dangerously noncompliant person posing a threat, rather than of a dying man struggling to breathe while adequately restrained by handcuffs and leg shackles and surrounded by six officers in a secure cell. That factual determination, between resistance or desperation, belongs to the jury. It should not be assumed by a court in assessing whether clearly established law exists. By usurping the jury's role, the courts below guaranteed that Gilbert's parents will never obtain the trial they have long sought.

The "clearly established" prong of the qualified immunity analysis can pose a very high bar for plaintiffs seeking to vindicate their rights. Even when government officials violate the law, qualified immunity shields them from damages liability unless "the violative nature of [the] *particular* conduct is clearly established." *Mullenix* v. *Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (internal quotation marks omitted). When taken too far, as here, this requirement allows lower courts to split hairs in distinguishing facts or otherwise defining clearly established law at a low level of generality, which impairs the ability of constitutional torts to deter and remedy official misconduct. See, *e. g.*, J. Jeffries, The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 256 (2013) ("It is as if the one-bite rule for bad dogs started over with every change in weather conditions").

Making matters worse, a court may grant qualified immunity based on the clearly established prong without ever resolving the

cer Philip Green). The city's expert likewise agreed that officers should "not compress [a subject's] chest" because "if you compress the chest you can kill somebody." ECF Doc. 77–14, at 7 (deposition of Ronald E. Schwint).

merits of plaintiffs' claims. This inhibits the development of the law. "Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books." *Zadeh* v. *Robinson*, 902 F. 3d 483, 499 (CA5 2018) (Willett, J., concurring *dubitante*). If this Court is going to endorse this "Escherian Stairwell," *ibid.*, then it should instead reexamine the doctrine of qualified immunity and the assumptions underlying it. The doctrine is a creation of our own design.

The Constitution's command is clear: Police officers may not use deadly force unless they reasonably believe that a suspect poses a significant threat of death or serious injury to the officers or others. *Tennessee* v. *Garner*, 471 U. S. 1, 3 (1985). We must give officers leeway to use judgment in close situations, but not so much leeway that we nullify the Constitution's protections or permit officers to escape scrutiny by juries. Here, the Eighth Circuit improperly seized the jury's role and went too far in holding that there is no claim for unconstitutionally excessive force when six police officers handcuff, leg-shackle, and surround a man in a secure cell, put him face down on the floor, and push into his back for 15 minutes until he slowly dies. Nicholas Gilbert deserved better from the police. His parents and society deserve better from our courts.

No. 22–556. N. S., Only Child of Decedent, Stokes, By and Through Her Natural Mother and Next Friend, Lee, et al. *v.* Kansas City Board of Police Commissioners et al. C. A. 8th Cir. Certiorari denied. Reported below: 35 F. 4th 1111.

Justice Sotomayor, dissenting.

The evidence in this case, taken in the light required at this stage of litigation, tells a disturbing story. Ryan Stokes was an unarmed Black man in the process of surrendering to the police when Officer Thompson, without warning, shot him in the back and killed him. Stokes was only suspected of cell phone theft, there had been no reports he was violent or threatening, and the unarmed Stokes was peacefully surrendering to a different officer after a brief foot chase. This arresting officer, Officer Straub, had already holstered his gun because he could tell that Stokes did not present a risk. Indeed, Stokes was facing Straub and lifting his hands to surrender. Straub was therefore "shocked" when, without any warning, Stokes was shot from behind by Thompson. App. in No. 20–1526 (CA8), p. 2058.

Stokes' daughter sued over her father's killing and sought a jury trial. The Court of Appeals for the Eighth Circuit, however, ensured that this case never made it to a jury. At the summary judgment stage, the court granted Thompson qualified immunity on the ground that it was not clearly established that Thompson had used excessive force when he shot and killed Stokes. The court reached this result through a two-step that is all too familiar.

First, the Eighth Circuit improperly drew factual inferences in the police officer's favor. It is the jury's role to decide factual disputes over what happened and draw factual inferences from the evidence presented. Summary judgment deprives the jury of this crucial role, and thus "is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan* v. *Cotton*, 572 U. S. 650, 656–657 (2014) (*per curiam*) (quoting Fed. Rule Civ. Proc. 56(a)). In assessing whether summary judgment is warranted, "a court must view the evidence in the light most favorable to the opposing party" and "adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U. S., at 657, 660 (internal quotation marks omitted). This ensures that it is a jury that will hear evidence and determine which story is credible, not a judge reading a paper record. This role of the jury is particularly important in qualified immunity cases, where the stakes are not just about the parties involved, but whether there will be accountability when public officials violate the Constitution. Cf. *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975) (the jury represents "the . . . judgment of the community").

Here, however, the Eighth Circuit did not follow this well-settled law. In this case, as in many qualified immunity cases, a key question at summary judgment was whether, resolving factual disputes in favor of Stokes' daughter, "a jury could reasonably infer that [Stokes' actions], in context, did not amount" to a threat that he would "inflict harm" on Straub. *Tolan*, 572 U. S., at 658. Yet in answering this question and in setting out the version of the facts most favorable to Stokes' daughter, the Eighth Circuit failed to draw all factual inferences in the daughter's favor.

To be sure, the court below correctly acknowledged that the evidence showed the following when taking the daughter's version of disputed facts: Stokes never had a gun, he was lifting his hands to surrender, and Thompson "fired without warning." 35 F. 4th 1111, 1113–1114 (2022). The Eighth Circuit then departed from the proper approach, however, when it somehow concluded that even viewing this evidence in the light most favorable to Stokes' daughter, Thompson "faced a . . . choice here: use deadly force or face the possibility that Stokes might shoot a fellow officer." *Id.*, at 1114. The court drew this inference from two facts: First, Stokes was raising his hands (while surrendering to Straub) with his back turned toward Thompson; and second, prior to surrendering, Stokes had briefly opened and then closed the door to his friend's car.

Yet even assuming an inference of danger could reasonably be drawn in Thompson's favor (which is debatable), drawing such an inference here would still be inconsistent with "the fundamental principle" that "reasonable inferences should be drawn in favor" of Stokes' daughter. *Tolan*, 572 U. S., at 660. A jury could instead infer that an officer in Thompson's position did not have an objective reason to fear imminent violence from Stokes because: (1) no gun was seen; (2) there was no reason to suspect Stokes was violent, much less prepared to kill a police officer; (3) opening the car door could have multiple nonthreatening explanations, including hiding a stolen cell phone; and (4) Stokes was unwarned, not disobeying any orders, and his actions showed he was surrendering. A reasonable juror could have similarly placed greater weight on the facts that tended toward showing that Stokes' actions, even from Thompson's vantage point, were harmless. In other words, "[a] jury could well have concluded that a reasonable officer would have [seen Stokes' actions] not as a threat" of imminent deadly violence, but as what they were: the actions of an unarmed man surrendering to the police. *Id.*, at 659. The court below may have disagreed with that inference, but it was the jury's to make.

Second, the Eighth Circuit compounded this error through its analysis of whether Thompson had violated Stokes' clearly established rights. This Court has clearly established that an officer cannot use deadly force against an unarmed suspect who is not behaving violently and does not pose an immediate risk of serious physical injury or death to others. See *Tennessee* v. *Garner*, 471

U. S. 1, 9–12 (1985). Indeed, in *Garner* the suspect was at least refusing to follow a direct order, *id.*, at 4, while here Stokes was peaceably surrendering. Circuit precedent only further established that officers cannot, without warning and without an objective suspicion of imminent violence, shoot unarmed people who are not resisting arrest. See *Nance* v. *Sammis*, 586 F. 3d 604, 610–611 (CA8 2009); *Ngo* v. *Storlie*, 495 F. 3d 597, 599–601, 603–605 (CA8 2007).

The court below dodged this precedent by identifying immaterial differences between the facts of cases. Yet factually identical cases are not required for law to be clearly established. See, *e. g.*, *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). The evidence here, when properly interpreted at this stage, matches the key holdings of those cases about the use of lethal force against unarmed, unwarned people who do not pose a danger to others.

Instead, the Eighth Circuit analogized the facts here to a case involving "an armed robbery," "a report of shots fired," and an officer ordering the suspect to stop before firing. *Thompson* v. *Hubbard*, 257 F. 3d 896, 898 (CA8 2001). This analogy was "[c]entral" to the court's "conclusion." 35 F. 4th, at 1114. Had the Eighth Circuit drawn the proper inferences in the daughter's favor, it simply could not have plausibly concluded as a matter of law that "Officer Thompson faced a similar choice here." *Ibid.*

These dual mistakes—resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—have become the calling card of many courts' qualified immunity jurisprudence. See, *e. g.*, *Lombardo* v. *St. Louis*, 600 U. S. 915, 916–917 (2023) (SOTOMAYOR, J., dissenting from denial of certiorari); *Ramirez* v. *Guadarrama*, 597 U. S. 928, 929–930 (2022) (same); *James* v. *Bartelt*, 595 U. S. 983 (2021) (same); *Kisela* v. *Hughes*, 584 U. S. 100, 109, 120 (2018) (SOTOMAYOR, J., dissenting); *Mullenix* v. *Luna*, 577 U. S. 7, 23–25 (2015) (same).

The result is that a purportedly "qualified" immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations. Officers are told "that they can shoot first and think later," because a court will find some detail to excuse their conduct after the fact. *Kisela*, 584 U. S., at 121 (SOTOMAYOR, J., dissenting). The public is told "that palpably unreasonable conduct will go unpunished." *Ibid.* And surviving family members like Stokes' daughter are told that their losses are not worthy of remedy. I would summarily reverse the court below to break this trend. It is time to restore some reason to a doctrine that is becoming increasingly unreasonable. If this Court is unwilling to do so, then it should reexamine its judge-made doctrine of qualified immunity writ large.

No. 22–633. Kincaid, Sheriff, Fairfax County, Virginia *v.* Williams. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 4th 759.

Justice Alito, with whom Justice Thomas joins, dissenting.

This case presents a question of great national importance that calls out for prompt review. The Fourth Circuit has effectively invalidated a major provision of the Americans with Disabilities Act (ADA), and that decision is certain to have far-reaching and highly controversial effects. The ADA provides that "transvestism," "transsexualism," "gender identity disorders not resulting from physical impairments," and "other sexual behavior disorders" are not " 'disabilit[ies]' " within the meaning of its terms. 42 U. S. C. § 12211(b). Nevertheless, the Fourth Circuit held that because "gender identity disorder" is a "now-obsolete" term in the field of psychiatry, that statutory category "*no longer exists*" and has therefore ceased to have any effect. 45 F. 4th 759, 768–769, and n. 5 (2022) (emphasis in original). As a result, all entities covered by the ADA must make "accommodations" for any "feeling[s] of stress and discomfort" that result from a person's "assigned sex." *Id.*, at 768 (internal quotation marks omitted); see, *e. g.*, §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii).

This decision will raise a host of important and sensitive questions regarding such matters as participation in women's and girls' sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the administration of sex reassignment therapy (both the performance of surgery and the administration of hormones) by physicians and at hospitals that object to such treatment on religious or moral grounds.

If the Fourth Circuit's decision is correct, there should be no delay in providing the protection of the ADA to all Americans who suffer from "feeling[s] of stress and discomfort" resulting from their "assigned sex." But if the Fourth Circuit's decision is wrong—and there is certainly a reasonable argument to that effect—then the 32 million residents of the Fourth Circuit should not have to bear the consequences while other courts wrestle with the same legal issue.

There are times when it is prudent for this Court to deny review of a questionable court of appeals decision because we may learn from the way in which other courts of appeals and district courts handle the same question, but in this case that prudential consideration is not sufficient to justify the denial of prompt review. The majority and dissenting opinions below lay out the opposing arguments, and if we granted review, we would undoubtedly receive thorough briefing from the parties and in *amicus* briefs filed by experts and other interested parties, including in all likelihood the Federal Government. Under these circumstances, in my judgment, there is no good reason for delay.

I

The ADA was landmark legislation that resulted from a bipartisan effort to "eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 801 (1999). In light of its bold ambitions, the ADA sweeps across nearly every facet of public life. It binds all employers of meaningful size and demands that they refrain from various forms of discrimination and, in certain circumstances, requires that they offer needed accommodations. 42 U. S. C. §§ 12111(5), 12112(a), (b). It requires all state and local government entities to ensure that no one is "excluded from participation in or . . . denied the benefits of" public programs and services "by reason of [a] disability." § 12132. It requires a wide variety of private entities, including numerous businesses and private schools, to ensure that persons with disabilities receive "the full and equal enjoyment" of those entities' "goods, services, facilities, privileges, advantages, [and] accommodations" in a variety of ways. §§ 12181(7), 12182.

The ADA is far-reaching, but like all other statutes, it has its limits. It expressly excludes coverage for a disparate group of traits, habits, and mental conditions, including sexual orientation, conditions arising from drug use, and gambling addiction. § 12211. And relevant here, the ADA also excludes mental dispositions and conditions that relate to gender expression or gender identity. See § 12211(b)(1) (referring to "transvestism, transsexualism, . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"); accord, § 12208.

In this case, the plaintiff, Kesha Williams, brought suit against Stacey Kincaid, the sheriff of Fairfax County, Virginia, based on alleged mistreatment during a stay in a county detention center. Some of Williams's claims arose under state tort law—for example, a gross negligence claim based on injuries allegedly inflicted during a body search—and Kincaid does not ask us to consider any of those claims. Rather, she contends only that she cannot be sued under the ADA for failing to accommodate Williams's "gender dysphoria," by, among other things, placing Williams in men's housing, failing to offer hormone therapy, and permitting "persistent and intentional misgendering and harassment." 45 F. 4th, at 763.

The Fourth Circuit panel majority found that Williams had pleaded a covered disability, notwithstanding the exclusions noted above, and it relied on two separate rationales.

First, the majority found that the condition alleged by Williams, *i. e.*, "gender dysphoria," does not constitute what the ADA calls a "gender identity disorder." The panel majority concluded that the term "gender identity disorders" in the ADA refers *only* to a so-named psychological condition that was used in the American Psychiatric Association's Diagnostic and Statistical Manual at the time of the ADA's enactment, and because leading organizations in that field no longer recognize that concept, the panel majority held that the term is now "obsolete." *Id.*, at 769. In the panel majority's view, the concept of gender identity disorder encompassed all "cross-gender identification," while the now-accepted concept of "gender dysphoria" is defined by stress that goes beyond "being trans alone." *Id.*, at 768–769 (internal quotation marks omitted). As a result, the panel majority reasoned that "gender identity disorder" as a category "*no longer exists*," and thus the statutory exclusion is without any effect. *Id.*, at 769, n. 5 (emphasis in original).

Second, the majority found that Williams had adequately pleaded an ADA claim by alleging gender dysphoria resulting from a physical impairment. As noted, the ADA's definition of disability excludes "gender identity disorders not resulting from physical impairments," § 12211(b)(1), and therefore, if a person's "gender dysphoria" results from a physical impairment, that condition may qualify as a disability. The ground on which the majority concluded that Williams's complaint sufficiently alleged a physical impairment is not entirely clear, but the majority's reasoning appears to be that Williams has a physical need for hormonal treatment because, without it, Williams experiences " 'physical distress.' " 45 F. 4th, at 771 (emphasis deleted). In addition, the majority noted "medical and scientific research identifying possible physical bases of gender dysphoria." *Ibid.*

The panel majority sought to bolster its interpretation of the ADA by invoking the doctrine of constitutional avoidance. The majority argued that even if the ADA's text did not *require* this interpretation, it would nevertheless be necessary in order "to avoid a serious constitutional question" under the Equal Protection Clause. *Id.*, at 772. Citing Circuit precedent, the majority found that "the ADA's exclusion of 'gender identity disorders' " from the definition of disability was "evidence of . . . discriminatory animus" by Congress, and to support this conclusion, the majority pointed to "moral judgment[s]" expressed by legislators who backed the exclusion for "gender identity disorders." *Id.*, at 773.

This ground-breaking interpretation of the ADA is remarkable in itself, but the Fourth Circuit panel majority went even further and noted that its reasoning applied equally to Williams's claim under the Rehabilitation Act of 1973, which extends disability-accommodation requirements to a different set of entities that benefit from various forms of federal financial assistance. 45 F. 4th, at 765, n. 1; see 29 U. S. C. § 794.

Judge Quattlebaum dissented in relevant part, and set out a reasonable contrary argument. Looking to the diagnostic criteria for gender identity disorder in 1990, he concluded that "when the ADA was signed into law, gender identity disorder was understood to include what Williams alleges to be gender dysphoria," that is, "distress and discomfort from identifying as a gender different from the gender assigned at birth." 45 F. 4th, at 782–783. He also argued that the majority's interpretation of the ADA provision excluding gender-identity conditions causes that provision to nullify itself. His understanding of the claim that the majority accepted was that gender dysphoria results from a physical impairment whenever a person has the "physical characteristics" of a gender with which that person does not identify and suffers distress and discomfort as a result. *Id.*, at 788. But that interpretation, he wrote, "would read 'not resulting from physical impairments' out of the statute." *Ibid.*

By a narrow 8-to-6 vote, the Fourth Circuit denied en banc review. 50 F. 4th 429 (2022).

II

Without full briefing and argument, I would not take a firm view on the proper interpretation of the ADA, let alone on the merits of Williams's particular case. But several aspects of the Fourth Circuit's reasoning are troubling.

First, as Judge Quattlebaum noted in dissent, *both* gender identity disorder and gender dysphoria have long been identified by " 'persistent or recurrent discomfort' " in connection with " 'one's assigned sex.' " 45 F. 4th, at 782 (quoting American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 77 (rev. 3d ed. 1987)). So the change in the field's terminology does not obviously place gender dysphoria outside the category of gender identity disorders. But even setting aside Judge Quattlebaum's important point, the Fourth Circuit's narrow focus on the phrase "gender dysphoria" does not engage with the broad brush used by Congress, which barred application of the ADA not only to "transsexualism" and "gender identity disorders not resulting from physical impairments," but also to "*other sexual behavior disorders*." § 12211(b)(1) (emphasis added). This final catch-all category suggests that Congress sought to prohibit the ADA's application to conditions that are sufficiently similar to the more specific categories of conditions that precede. At a minimum, the Fourth Circuit should have explained why the catch-all provision was insufficient to encompass gender dysphoria.

Second, the Fourth Circuit's understanding of when a gender identity disorder "result[s] from physical impairments" does not meaningfully distinguish physical impairments from "mental impairment[s]," which the ADA recognizes as a distinct category. §§ 12102(1)(A), 12211(b)(1). Many common mental impairments, such as depression and anxiety disorders, cause real and sometimes powerful physical distress and are treated by chemical interventions. That does not mean, however, that those mental impairments are caused by an independent physical trait that *itself* qualifies as an impairment.[1] Significantly more analysis would be needed to accept an interpretation of the exception to the exclusion that swallows the exclusion whole.

Finally, the Fourth Circuit's animus analysis relies too heavily on statements made by a few Members of Congress and does not sufficiently take into account the many considerations that Congress may have had in mind in adopting a piece of major legislation like the ADA. A legislative body "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." Williams-Yulee v. Florida Bar, 575 U. S. 433, 449 (2015). Congress may also have thought that coverage of gender-identity-related conditions would raise special free speech and free exercise concerns. It seems more than uncharitable to say, as the Fourth Circuit did, that "[t]he only reason we can glean" for excluding gender identity disorders is " 'a bare . . . desire to harm a politically unpopular group.' " 45 F. 4th, at 773.

III

The potential impact of the Fourth Circuit's decision is difficult to overstate. Consider, first, the claims that the panel majority allowed to go forward in this particular case. Those claims sought relief for the distress caused by sex-specific housing, the failure to provide or facilitate hormone treatment, and the use in relation to Williams of the pronoun "he," forms of address like "mister" and "sir," and the term "gentleman." *Id.*, at 764 (internal quotation marks omitted). Permitting such claims suggests numerous further consequences. If the ADA requires that a person be given access to facilities reserved for the sex with which that person identifies whenever that is needed to avoid substantial distress, then such a claim may be brought against any "place of lodging," "service establishment," "elementary, secondary, undergraduate, or postgraduate private school," or "homeless shelter" with sex-specific bathrooms or dormitories. See §§ 12181(7)(A),

[1] The Fourth Circuit's reasoning is also unneeded to give meaning to the "physical impairments" exception, as gender identity disorders *do* arise in connection with physical traits that clearly qualify as independent impairments. See 45 F. 4th 759, 788, n. 7 (2022) (Quattlebaum, J., dissenting) (discussing " 'physical intersexuality' " of the sex organs).

(F), (J), (K).[2] Educational institutions that sponsor girls' or women's athletic competitions, and facilities that host such events, may be sued if they exclude any individual who identifies as female. §§ 12181(7)(C), (J), (L), 12182(b)(1)(A)(iii). If the ADA allows a cause of action for not facilitating hormone treatment, an ADA claim may presumably be filed against any "hospital" or "health care provider" that declines to provide hormone treatment or surgical procedures as part of a process of gender transition, at least where it would provide such hormones or similar surgery for other medical reasons. § 12181(7)(F). If the ADA allows a cause of action against an institution whose employees decline to refer to a co-worker using the pronoun or form of address that this co-worker prefers, then any of the above institutions or any other (broadly defined) place of public accommodation is put to the choice between, on the one hand, firing all employees who refuse (perhaps for religious reasons) to speak contrary to their beliefs on gender transition or, on the other hand, risking ruinous lawsuits.

In short, the Fourth Circuit's ruling leaves a great many people and institutions under the looming threat of liability, forcing them to change their behavior—behavior that may be deeply rooted in moral or religious principles—or face an unending stream of lawsuits. If it is at least *possible* that the ADA does not require these results, we should be willing to resolve the question now rather than later.

* * *

The Fourth Circuit's decision makes an important provision of a federal law inoperative and, given the broad reach of the ADA and the Rehabilitation Act, will have far-reaching and important effects across much of civil society in that Circuit. Voters in the affected States and the legislators they elect will lose the authority to decide how best to address the needs of transgender persons in single-sex facilities, dormitory housing, college sports, and the like. Given that impact, and with the legal issues well aired

[2] Of course, the uniquely dangerous context of prison presents dangers well beyond personal distress, and such dangers may trigger numerous legal obligations apart from the ADA. In light of the possibility that Williams was actually endangered by being housed with men, the Fourth Circuit allowed a state tort claim to proceed; that holding is not challenged, and I do not question it here.

below and in a variety of prior federal court decisions, I would grant certiorari now.[3] Because the Court declines to do so, I respectfully dissent.

No. 22–672. Northstar Wireless, LLC, et al. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Justice Jackson took no part in the consideration or decision of this petition. See 28 U. S. C. § 455 and Code of Conduct for U. S. Judges, Canon 3C (prior judicial service). Reported below: 38 F. 4th 190.

No. 22–757. Roberts et al. *v.* McDonald, Commissioner, New York State Department of Health, et al. C. A. 2d Cir. Certiorari denied.

Statement of Justice Alito, with whom Justice Thomas joins, respecting the denial of certiorari.

The circumstances underlying the dispute below have long since come and gone, and I therefore agree with the Court's decision to deny review. But I write to note that this case involves an issue of ongoing importance: whether the Equal Protection Clause permits governments to use race or ethnicity as a proxy for health risk and therefore "prioritize the treatment of patients" on that basis. *Roberts* v. *Bassett,* 2022 WL 16936210, *3, n. 2 (CA2, Nov. 15, 2022) (Cabranes, J., concurring) (noting the "portentous legal issues" implicated by such policies).

When "several new COVID–19 treatments for high-risk patients" were approved in late 2021, the treatments were "briefly in short supply" relative to need. *Id.*, at *1 (summary order). New York State "instruct[ed] providers to follow" its guidance on "higher priority risk group[s]" so long as the "supply shortage persisted." *Ibid.* Echoing similar guidance from the federal Centers for Disease Control and Prevention, the State's guidance specified that " '[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor' " when prioritizing patients. *Id.*, at *1, *3 (alteration in original); *Roberts* v. *Bassett*, 2022 WL 785167, *2 (EDNY, Mar. 15, 2022). The State justified the use of race and ethnicity as proxies for health risk by appealing

[3] See, *e. g., Parker* v. *Strawser Constr., Inc.,* 307 F. Supp. 3d 744, 754 (SD Ohio 2018) (surveying case law as of 2018 and concluding that "[t]he majority of federal cases have concluded" that the ADA excludes even those gender identity disorders that "substantially limit a major life activity").

to "'longstanding systemic health and social inequities.'" *Ibid.*

As we have stated many times and have recently reaffirmed, the Equal Protection Clause places a "daunting" obstacle in the way of any government seeking to allocate benefits or burdens based on race or ethnicity, typically giving way only when the measure in question is "'narrowly tailored'"—that is, "'necessary'"—to "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U. S. 181, 206–207 (2023). Therefore, government actors may not provide or withhold services based on race or ethnicity as a response to generalized discrimination or as a convenient or rough proxy for another trait that the government believes to be "'characteristic'" of a racial or ethnic group. *Id.*, at 211.

Under that precedent, New York's general reference to "longstanding systemic health and social inequities" would not have sufficed to allow the State to deny a person medical treatment simply because that person is viewed by the State as being a member of the wrong racial or ethnic group. The shortage at issue in this case appears, thankfully, to have concluded. But in the event that any government again resorts to racial or ethnic classifications to ration medical treatment, there would be a very strong case for prompt review by this Court.

No. 22–823. Thompson *v.* Henderson. Sup. Ct. Wash. Certiorari denied. Reported below: 200 Wash. 2d 417, 518 P. 3d 1011.

Statement of Justice Alito, with whom Justice Thomas joins, respecting the denial of certiorari.

I concur in the denial of certiorari because this case is in an interlocutory posture, and it is not clear whether it presents any "federal issue" that has been "finally decided by the" Washington Supreme Court. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975); see 28 U. S. C. § 1257. But if the Washington courts understand the decision below to be as sweeping as it appears, review may eventually be required.

This case started as an ordinary tort suit over a car accident. The victim of the accident, plaintiff Janelle Henderson, is black, as was her trial counsel. Alicia Thompson, the defendant, is white, as was her trial counsel. Thompson admitted fault, so the suit was over damages. Henderson claimed that the whiplash she suffered from the accident "seriously exacerbated" her Tourette's syndrome, and she asked for $3.5 million in damages. 200 Wash. 2d 417, 422–424, 518 P. 3d 1011, 1017 (2022). Defense counsel naturally tried to convince the jury that such a large award was not justified, and the jury, which awarded Henderson only $9,200, was apparently persuaded. *Id.*, at 422, 518 P. 3d, at 1017. Henderson moved for a new trial, claiming that the small award was based on racial bias, but the trial court denied the motion without a hearing. *Id.*, at 428, 518 P. 3d, at 1019–1020.

In a remarkable decision, the Washington Supreme Court reversed due to the possibility that the jury's award was tainted by prejudice, and it remanded for a hearing that appears to have no precedent in American law. In support of its decision, the court cited several statements made by defense counsel in her closing argument. It pointed to defense counsel's description of Henderson as "*quite combative*" on the witness stand and her description of Thompson as "*intimidated and emotional* about the process." *Id.*, at 425, 518 P. 3d, at 1018 (internal quotation marks omitted; emphasis in original). The court found that these comments played on stereotypes about the " 'angry Black woman' " and the "victimhood" of white women. *Id.*, at 436–437, and n. 8, 518 P. 3d, at 1023–1024, and n. 8. The court also cited defense counsel's insinuation that Henderson was motivated by a desire for a financial windfall, as well as her suggestion that Henderson could not have suffered $3.5 million in damages since she had not even mentioned the accident when she saw her doctor a short time thereafter. *Id.*, at 425, 518 P. 3d, at 1018. The court thought that this argument "alluded to racist stereotypes"—that black women are "lazy, deceptive, and greedy" and are "untrustworthy and motivated by the desire to acquire an unearned financial windfall." *Id.*, at 437, 518 P. 3d, at 1024. The court also faulted defense counsel for suggesting that Henderson's lay witnesses, all of whom were black, had been prepared or coached because they all used the same phrase—" 'life of the party' "—to describe Henderson's personality before the accident. *Ibid.* The court viewed this tactic as inviting jurors to make decisions about these witnesses "as a group and . . . based on biases about race and truthfulness." *Id.*, at 438, 518 P. 3d, at 1024.

Because of these comments by defense counsel, the court found that an objective observer "*could* conclude that racism was a factor in the verdict," and it therefore held "that Henderson is entitled to an evidentiary hearing on her new trial motion." *Id.*, at 429, 439, 518 P. 3d, at 1020, 1025 (emphasis in original). The court added that "[a]t that hearing, the [trial] court must presume racism was a factor in the verdict and Thompson bears the burden of proving it was not." *Id.*, at 429, 518 P. 3d, at 1020.

The Washington Supreme Court's decision raises serious and troubling issues of due process and equal protection. In some cases, it will have the practical effect of inhibiting an attorney from engaging in standard and long-accepted trial practices: attempting to undermine the credibility of adverse witnesses, seeking to bolster the credibility of the attorney's client, raising the possibility of a counterparty's pecuniary motives, and suggesting that witnesses may have been coached or coordinated their stories. Such tactics are common and have long been viewed as proper features of our adversarial system. See, *e. g.*, *Geders* v. *United States*, 425 U. S. 80, 89–90 (1976) (emphasizing that "[s]killful cross-examination" is a remedy to deal with "'coached' witnesses"); *Marcic* v. *Reinauer Transp. Cos.*, 397 F. 3d 120, 125 (CA2 2005) ("A claim for money damages does create a financial incentive to be untruthful, and it was not improper for opposing counsel to invoke this incentive in an attempt to impeach plaintiff"); Fed. Rule Evid. 801(d)(1)(B)(i) (contemplating impeachment based on "improper influence or motive").

"'Due process requires that there be an opportunity to present every available defense,'" *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (quoting *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168 (1932)), but the decision below attaches a high price to the use of these run-of-the-mill defenses in cases where parties are of particular races. The Washington Supreme Court endorsed an evidentiary hearing based on the mere "*possibility*" of bias, and its analysis appears to hold that such litigation strategies *per se* raise at least the "possibility" of such bias. 200 Wash. 2d, at 434, 518 P. 3d, at 1023 (emphasis added). Moreover, the State Supreme Court's rule requires the nonmoving party to prove at a hearing *not* that it did not intend to appeal to racial bias, but that racial bias (perhaps even subconscious bias) had no *impact on the jurors*. See *ibid.* How the Washington Supreme Court thinks this can be done is unclear.

In sum, the opinion below, taken at face value, appears to mean that in any case between a white party and a black party, the attorney for the white party must either operate under special, crippling rules or expect to face an evidentiary hearing at which racism will be presumed and the attorney will bear the burden of somehow proving his or her innocence. It is possible that the Washington Supreme Court will subsequently interpret its brand-new decision more narrowly, but the procedures it appears to set out would raise serious due-process concerns.

The Washington Supreme Court's opinion is also on a collision course with the Equal Protection Clause, as our recent opinion in *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U. S. 181 (2023) (*SFFA*), demonstrates. The procedures the state court has imposed appear likely to have the effect of cordoning off otherwise-lawful areas of inquiry and argument solely because of race, violating the central constitutional command that the law must "be the same for the black as for the white; that all persons . . . shall stand equal before the laws of the States." *Id.*, at 202 (quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1880)). The Washington Supreme Court justified its prophylactic rules in part by reasoning that "[r]acism is endemic" in our society, 200 Wash. 2d, at 421, 518 P. 3d, at 1016, and that "*implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State," *id.*, at 435, 518 P. 3d, at 1023 (emphasis in original). But as we reaffirmed in *SFFA*, the Fourteenth Amendment's equal-treatment principle yields only when necessary to remediate "specific, identified instances of . . . discrimination that violat[e] the Constitution or a statute," not generalized past or ongoing discrimination. 600 U. S., at 207. The decision of the Washington Supreme Court, however, threatens "to inject racial considerations into every [litigation] decision" parties make. *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. 519, 543 (2015).

Nothing in the papers before us suggests that defense counsel would have tried this case differently or that the jury award would have been larger if the races of the plaintiff and defendant had been different. As a result, the decision below, far from combating racism, institutionalizes a variation of that odious practice. See *SFFA*, 600 U. S., at 229 (discussing the unfitness of the judiciary to determine whether reliance on race is benevolent rather than malign).

The decision below, like the decision in *Roberts* v. *McDonald*, No. 22–757, in which I have filed a separate statement, illustrates the danger of departing from the foundational principle that in the United States all people are entitled to "equal justice under law," as the façade of our building proclaims. Every one of the 330 million inhabitants of our country is a unique individual and must be treated as such by the law. It is not an exaggeration to say that our extraordinarily diverse population will not be able to live and work together harmoniously and productively if we depart from that principle and succumb to the growing tendency in many quarters to divide Americans up by race or ancestry.

No. 22–5329. Fulks *v.* Watson, Warden. C. A. 7th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. See 28 U. S. C. § 455(b)(3) and Code of Conduct for U. S. Judges, Canon 3C(1)(e) (prior government employment). Reported below: 4 F. 4th 586.

No. 22–6057. Clark *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 343 So. 3d 943.

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

Just a few years ago, this Court took an admirable stand to defend its landmark decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). *Batson* plays a vital role in preserving the integrity of our judicial system by ensuring that people are not prevented from serving as jurors because of their race. Yet not all courts were heeding *Batson*'s command. In particular, the Mississippi Supreme Court rejected evidence that a juror was struck based on his race in a death penalty case, where the stakes could not have been higher. In reversing that decision, this Court emphasized the importance of "vigorously enforc[ing] and reinforc[ing]" *Batson* and the need to "guar[d] against any backsliding." *Flowers* v. *Mississippi*, 588 U. S. 284, 301 (2019). That decision was a powerful articulation of the equal protection principles that *Batson* vindicates.

In defending *Batson*, this Court was not just protecting the rights of criminal defendants. *Flowers* also safeguarded the rights of other Black Mississippians, who were being denied the chance to fulfill their civic duty of serving as jurors in trials of their peers. "Other than voting," *Flowers* explained, such jury service "is the most substantial opportunity that most citizens have to participate in the democratic process." 588 U. S., at 293. Nor is the harm of *Batson* erosion limited to minority groups, as *Batson* is crucial to "public confidence in the fairness of the criminal justice system." 588 U. S., at 301. Simply put, when people are prevented from serving as jurors based on their race, it is a stain on our justice system.

Flowers made sure that lower courts understood how to apply *Batson* properly by expressly identifying factors that are relevant to the *Batson* analysis. These include "statistical evidence" of racial disparities in strikes, "evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors," and "a prosecutor's misrepresentations of the record when defending the strikes." 588 U. S., at 302. The Mississippi Supreme Court's misapplication of these and other factors warranted reversal in *Flowers*. *Id.*, at 316.

Apparently *Flowers* was not clear enough for the Mississippi Supreme Court, however. In yet another death penalty case involving a Black defendant, that court failed to address not just one but three of the factors *Flowers* expressly identified. This was a direct repudiation of this Court's decision. This can only be read as a signal from the Mississippi Supreme Court that it intends to carry on with business as usual, no matter what this Court said in *Flowers*. By allowing the same court to make the same mistakes applying the same standard, this Court acquiesces in the Mississippi Supreme Court's noncompliance. Today, this Court tells the Mississippi Supreme Court that it has called our bluff, and that this Court is unwilling to do what is necessary to defend its own precedent. The result is that *Flowers* will be toothless in the very State where it appears to be still so needed. I therefore respectfully dissent.

I

During jury selection in this case, petitioner Tony Terrell Clark twice raised *Batson* challenges based on a pattern of racial disparities in the prosecution's strikes. This triggered the familiar "three-step process for determining when a strike is discriminatory." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016). At the first step, the trial court twice found that Clark had satisfied his burden, which requires "a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Ibid.* (internal quotation marks omitted). For the second step, the trial court required the prosecution to provide race-neutral justifications. At the third step, the trial court concluded that Clark had not shown purposeful discrimination.

Later, when the jury was deliberating about appropriate punishment, it had trouble reaching consensus. On the second day of deliberations, the jury sent out a note stating they were " 'unable to agree unanimously on punishment' " and asking what would happen if they could not agree. 343 So. 3d 943, 1010–1011 (Miss. 2022) (Kitchens, P. J., dissenting). After the trial court declined to inform the jury of the consequences of disagreement, and after more hours of deliberation, the jury finally agreed on a verdict of death. *Ibid.* A fractured Mississippi Supreme Court affirmed over two separate dissents by Presiding Justice Kitchens and Presiding Justice King. Both dissents were joined by a third Justice, Justice Ishee.

II

Petitioner presented substantial evidence that the prosecution had engaged in racially motivated strikes. This evidence tracked the factors this Court identified as important in *Flowers*. Instead of engaging in the requisite context-specific inquiry, however, the majority below never addressed this evidence in its *Batson* analysis. That should make this an easy case. Because of this plain legal error, there is no need for this Court to engage in *Batson*'s fact-dependent inquiry. Instead, this Court could merely vacate the judgment below and direct the Mississippi Supreme Court to conduct that analysis properly in the first instance. That appears to be too much for this Court today.

The majority below ignored three *Flowers* factors in its analysis. First, the majority did not address jarring statistical disparities. *Flowers* spoke plainly on this point: When the statistics show that the State struck Black jurors at a significantly higher rate than white jurors, that is "evidence suggesting that the State was motivated in substantial part by discriminatory intent." 588 U. S., at 307. Here, approximately 34.5 percent of the members of the initial venire were Black. 343 So. 3d, at 1015 (King, P. J., dissenting). After the State had used all of its peremptory strikes, however, "[t]he jury ultimately consisted of eleven white jurors, one black juror, and two white alternate jurors." *Ibid.* Black jurors had thus dwindled down to 7 percent. To get there, at the peremptory strike stage, the State struck seven out of the eight remaining Black prospective jurors, or "87.5 percent of the black jurors it encountered and only 16.7 percent of the white jurors." *Ibid.* In other words, the State was over five times more likely to strike a Black prospective juror than a white one.

These are the kinds of numbers that in the past this Court has found to be evidence of discrimination. For example, the Court found there was statistical evidence of discrimination when an initial venire panel was 18.5 percent Black, the peremptory strike rate of eligible Black venire members was 91 percent, and only one Black juror ended up on the jury. See *Miller-El* v. *Dretke*, 545 U. S. 231, 240–241 (2005). These numbers are quite similar to those here.

Just as in *Miller-El*, the fact that the State allowed a single Black juror to serve does not undermine these statistics. To the contrary, this Court has on several occasions "skeptically viewed the State's decision to accept one black juror" as "an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors." *Flowers*, 588 U. S., at 307 (quoting *Miller-El*, 545 U. S., at 250). That same skepticism is more than warranted here, where the State appears to have struck as many Black prospective jurors as it thought it could get away with.

The majority below responded to these telling statistics with an equally telling silence, failing even to mention them in its *Batson* analysis. There is simply no way to square this with *Flowers*.

Second, the majority below failed to engage with the fact that the State conducted special investigations into some of the most qualified Black prospective jurors in an attempt to disqualify them. "[T]his Court's cases explain that disparate . . . investigation of prospective jurors on the basis of race" can be evidence of racially motivated strikes. *Flowers*, 588 U. S., at 310. When Clark raised his *Batson* challenges, the State sought to justify its strikes with the results of two previously undisclosed investigations it had conducted into two of the Black prospective jurors. Specifically, the State had run database searches and compiled printouts showing people with criminal records who happened to have the same last names as the Black prospective jurors.

For prospective juror Kathy Luckett, a Black woman, the State's investigation detailed all the " 'felony convictions and charges we have on Lucketts in the . . . area.' " 343 So. 3d, at 958. The State presented no evidence that any of these individuals were actually related to Kathy Luckett, and "under oath, Luckett indicated that she did not have any close family members who had been prosecuted for a felony." *Id.*, at 1022 (King, P. J., dissenting). During *voir dire*, the State never questioned Luckett about any such family ties, which could have revealed whether these supposedly disqualifying ties even existed. See *Flowers*, 588 U. S., at 312 ("'[F]ailure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination'"); *ibid.* (noting failure to "ask individual follow-up questions to determine the nature of [a supposedly relevant] relationship").

The exact same thing happened with prospective juror Alicia Esco-Johnson, another Black woman. To justify its strike, the State again "show[ed] all the felony convictions and charges it had on the name Esco in Madison County." 343 So. 3d, at 957. Once again, Esco-Johnson had indicated under oath that she did not have any close family members who had been prosecuted for felonies, and once again, the State never brought up potential family ties in questioning her.

As *Flowers* explained, by "conducting additional inquiry into th[e] backgrounds" of only Black jurors, "a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike." 588 U. S., at 310. Then at the same time, "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors." *Ibid.* This case is a perfect illustration. "No evidence exists that the State had investigated similarly situated white jurors it accepted." 343 So. 3d, at 1016 (King, P. J., dissenting). This closely mirrors *Flowers*, where "[t]he State apparently did not conduct similar investigations of white prospective jurors." 588 U. S., at 309. Indeed, the State here accepted white prospective jurors without questioning them about family members that they admitted had been arrested or prosecuted, or were currently incarcerated. This included close family members, such as one prospective juror's stepson.

Further, the State had asserted during jury selection that when it came to family ties, it was only interested in whether "a close family member [had] ever been charged with a felony," not a "third cousin twice removed that you see every fifth year at the family reunion." Tr. 394. Yet for these two Black prospective jurors, similar last names were sufficient for the prosecutor to disqualify them from service.

The majority once again responded to this pattern of disparate treatment with silence. Its *Batson* analysis did not address the fact that the State only carried out special investigations into two Black jurors, the State's inconsistent assertion that it was uninterested in extended family, or the oddity of treating people with similar names as family while never actually questioning the prospective jurors about extended family. Once again, this silence alone would be sufficient to vacate the judgment below, as *Flowers* could not have been clearer: "A court confronting that kind of pattern cannot ignore it." 588 U. S., at 310.

Third, the majority failed to address the State's "misrepresentations" when it was "defending the strikes." *Id.*, at 302. In justifying its strikes of Black prospective jurors, the State stated it was "not accepting anybody that equivocates on their questionnaire on the death penalty." Tr. 1587. Yet not only did the State accept white jurors who equivocated about the death penalty, the State accepted jurors who evinced far more reluctance to impose the death penalty than Black jurors it struck on that very same ground. See *Foster*, 578 U. S., at 505 (prosecutor's explanations were "difficult to credit because the State willingly accepted White jurors with the same traits that supposedly rendered [a Black juror] an unattractive juror").

For example, Question 36 on the juror questionnaire asked about views on capital punishment, to which answers ranged from A (most opposed) to E (most supportive). Luckett, one of the Black women who was struck, answered "D," the second most pro-death penalty answer: "in favor of capital punishment except in a few cases where it may not be appropriate." 343 So. 3d, at 956, n. 2. At *voir dire*, she testified she would impose the death penalty if the law and facts called for it, which would depend on the case. The prosecution explained that it struck her because her answers supposedly showed she was insufficiently supportive of capital punishment.

Yet a white juror the prosecution did not strike answered "B," the second most anti-death penalty answer: "opposed to capital punishment except in a few cases where it may be appropriate." *Ibid.* He also stated that it should " 'only be an option for extremely heinous cases.' " *Id.*, at 968. On further questioning he "spoke of his involvement in prison ministries," "cried . . . in speaking about it," and reaffirmed that the death penalty " 'should only be done in extreme cases.' " *Id.*, at 1021 (King, P. J., dissenting). Two other white prospective jurors that the government did not strike also answered "B." *Id.*, at 1021–1022. One of these jurors stated that " 'I am more for a life sentence as opposed to the death penalty,' " *id.*, at 969 (majority opinion); the other stated that the death penalty was only appropriate for "particularly vicious," "evil," and "heinous" crimes, Tr. 1270. Two additional white jurors answered "C," indicating they were " 'neither generally opposed to nor in favor of capital punishment,' " and that it would depend on the case. 343 So. 3d, at 1021–1022 (King, P. J., dissenting).

The majority never explained how the State's decision not to strike these white jurors could be squared with the State's categorical assertion that it would not accept "anybody" who even "equivocate[d]" as to "the death penalty." Tr. 1587. The record reveals a double standard where the State struck Black jurors who took anything but the most hardline pro-death penalty position, but not white jurors who expressed serious doubts about the death penalty.

III

The failure of the court below to engage with several factors expressly identified in *Flowers* cannot stand if *Batson* is to retain its force in the State of Mississippi. This Court has "made it clear" beyond any room for doubt "that . . . in reviewing a ruling claimed to be [a] *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 578 U. S., at 501 (internal quotation marks omitted). This requires "a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Ibid.* (internal quotation marks omitted). Relevant evidence with respect to some jurors can also place evidence about other jurors in a different light. Failing to consider the challenged strikes "in the context of all the facts and circumstances" is thus entirely inconsistent with *Batson*. *Flowers*, 588 U. S., at 315.

While the majority's silence as to each one of these factors would be sufficient to vacate the judgment below, the cumulative effect cries out for intervention by this Court. To take just one example, the only reasons the State gave for striking Luckett were the list of people with the same last name and her views about the death penalty. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose," *id.*, at 303, yet the court below did not even address the serious concerns about both of those justifications, especially in light of the grievous statistical disparity between strikes of Black and white prospective jurors.

Summary disposition is warranted when the decision below "was not just wrong" but "committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux*, 585 U. S. 961, 967 (2018) (*per curiam*). Here, the Mississippi Supreme Court was not just wrong, but wrong in the very same way it had been wrong just a few years ago. The absence of important evidence from the majority's analysis meant it "either failed to analyze such evidence" or saw it as "insignificant," neither of which would be consistent with the "careful, context-specific analysis" clearly required by this Court's precedent. *Lombardo* v. *St. Louis*, 594 U. S. 464, 468 (2021) (*per curiam*). In such situations, this Court has "grant[ed] the petition for certiorari, vacate[d] the judgment," and "remand[ed] the case to give the court the opportunity to employ" the proper inquiry. *Ibid.*

Today, however, this Court is unwilling to take even that modest step to preserve the force of its own recent precedent. It is the people of Mississippi who will pay the price of this inaction. Defendants like Clark will watch as they are condemned by juries that may have been racially gerrymandered. Prospective jurors like Kathy Luckett, a nursing aide and mother, will learn that the color of their skin might deprive them of the right to sit as jurors in judgment of their peers. Finally, courts throughout the State will take note and know that this Court does not always mean what it says.

* * *

Because this Court refuses to intervene, a Black man will be put to death in the State of Mississippi based on the decision of a jury that was plausibly selected based on race. That is a tragedy, and it is exactly the tragedy that *Batson* and *Flowers* were supposed to prevent. I respectfully dissent from the Court's denial of certiorari.

No. 22–7438. Nellom *v.* United States District Court for the Eastern District of Pennsylvania. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 22–7508. MEDINA REYNA *v.* PNC BANK, N. A., ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

JULY 14, 2023

Dismissal Under Rule 46

No. 22–1166. WILLIAMS, WARDEN, ET AL. *v.* SABIR ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 52 F. 4th 51.

JULY 19, 2023

Dismissal Under Rule 46

No. 22–436. XIAOJIE HE *v.* GARLAND, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 24 F. 4th 1220.

JULY 21, 2023

Certiorari Denied

No. 23–5145 (23A51). BARBER *v.* IVEY, GOVERNOR OF ALABAMA, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Just last year in Alabama, in three consecutive executions by lethal injection, prison officials spent multiple hours digging for prisoners' veins in an attempt to set IV lines. Two of the men survived and reported experiencing extreme pain, including, in one case, nerve pain equivalent to electrocution. After those executions failed, the State began what it claimed would be a "top-to-bottom" review of its lethal injection process. *Barber* v. *Governor of Ala.*, 73 F. 4th 1306, 1327 (CA11 2023) (Pryor, J., dissenting). During this review, conducted by the very agency that botched the executions, the State offered no explanations for the failures and reported "[n]o deficiencies" in its protocols. *Id.*, at 1329.

Now, the State seeks to execute James Edward Barber. Barber has timely raised an Eighth Amendment method of execution claim in federal court, arguing that he will be subject to the same fate as last year's prisoners. Yet Alabama plans to kill him by lethal injection in a matter of hours, without ever allowing him discovery into what went wrong in the three prior executions and whether the State has fixed those problems. The Eighth Amendment demands more than the State's word that this time will be different. The Court should not allow Alabama to test the efficacy of its internal review by using Barber as its "guinea pig." *Id.*, at 1324. It should grant Barber's application for a stay of his execution.

I

Governor Kay Ivey paused executions in Alabama and ordered a review of the State's execution protocols after three lethal injections in a row went wrong. First, in July 2022, Joe Nathan James, Jr., was concealed behind a curtain for three hours as medical personnel struggled to establish IV access. There were no witnesses to what happened other than those personnel but a state autopsy revealed James had been punctured multiple times, including at both of his inner forearms, wrists, and hands, as well as his right foot. After the curtain between the execution chamber and the observation room finally lifted, observers reported that James was nonresponsive. He never spoke the last words he had allegedly planned.

Alabama next tried to execute Alan Eugene Miller in September. Beforehand, in an affidavit, the commissioner of the Alabama Department of Corrections (ADOC) swore that, despite the evident problems with the James execution, ADOC was " 'ready to carry out [Miller's] sentence by lethal injection.' " 73 F. 4th, at 1335 (Pryor, J., dissenting). Nevertheless, medical personnel spent one and a half hours puncturing both of Miller's elbows, arms, and his right hand and foot in an attempt to establish IV access. Miller reported that a puncture in his foot " 'caused sudden and severe pain' " like he " 'had been electrocuted,' " likely because attempts to access a vein in his foot hit a nerve. *Id.*, at 1334. His " 'entire body sh[ook] in the restraints.' " *Ibid.* Shortly before midnight, when his death warrant was set to expire, the execution was called off.

Just two months later, in November, Alabama tried to execute Kenneth Eugene Smith. Medical personnel spent an hour repeatedly puncturing Smith's elbows, arms, and hands in their attempts to locate a vein. Eventually, they tilted him upside down, bringing his feet above his head. Smith reported that they began injecting an unknown clear substance into his neck area. Finally, medical personnel attempted a central line procedure, which involves trying to insert a longer catheter into a large vein in the torso before it enters the heart. The IV team's move from his extremities to his collarbone to attempt the central line procedure terrified Smith because he had no idea what was happening. The repeated needle insertions in that area felt like " 'stabbing.' " *Id.*, at 1326. After the central line procedure failed, the execution was called off.

Four days after Smith's failed execution, in November 2022, Governor Ivey paused all executions in Alabama, including Barber's. Rather than convene an independent investigation, as other States had done, see n. 1, *infra*, the Governor asked ADOC (the agency responsible for the faulty executions) to conduct a " 'top-to-bottom review' " of the State's lethal-injection execution process. 73 F. 4th, at 1327. A little under three months later, ADOC reported that its review was complete. ADOC claimed that it was " 'as prepared as possible to carry out death sentences going forward, consistent with the Constitution.' " 1 App. to Pet. for Cert. 75a. There was no published report. Instead, the ADOC commissioner's one-and-a-half page letter to the Governor, without reporting any flaws or explanations for the prior failures, reported ADOC's decision " 'to add to its pool of available medical personnel for executions,' " and that it had " 'ordered and obtained new equipment.' " 73 F. 4th, at 1327 (Pryor, J., dissenting). The commissioner also noted that ADOC now had more time to carry out executions. Under new rules from the Supreme Court of Alabama, death warrants no longer expire at midnight, but instead last as long as a " 'time frame' " set by the Governor permits. *Id.*, at 1328, n. 7.

On the same day ADOC concluded its review, Governor Ivey moved the Alabama Supreme Court for permission to set Barber's execution date. Barber opposed the motion in state court and asked for discovery into ADOC's internal review. After the Alabama Supreme Court denied Barber's requests, he filed this case in federal court, alleging that his Eighth Amendment rights would be violated if Alabama attempted to execute him by lethal injection and requesting that he instead be executed using nitrogen hypoxia (a state-approved alternative), which would not require setting an IV line. Five days later, Governor Ivey set the date for Barber's execution on July 20, 2023, which was less than two months away.

Barber moved for a preliminary injunction and sought information about ADOC's review. He received little response other than assertions of privilege and a cursory statement that the review found " '[n]o deficiencies.' " 1 App. to Pet. for Cert. 175a. The District Court denied Barber's motion and he appealed to the Eleventh Circuit, requesting a stay of his execution. The Eleventh Circuit affirmed the District Court's denial of Barber's motion for a preliminary injunction and denied his request for a stay. Judge Jill Pryor dissented, arguing that Barber has "raised a serious and substantial Eighth Amendment claim that the pattern [of botched executions] will continue to repeat itself." 73 F. 4th, at 1341. I agree with her concerns that ADOC has refused to provide discovery that could answer crucial questions about what caused past problems with Alabama's executions and how any changes would address those specific causes.

II

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." It forbids " 'punishments of torture, . . . and all others in the same line of unnecessary cruelty,' " in which " 'terror, pain, or disgrace [are] superadded' to the sentence." *Baze* v. *Rees*, 553 U. S. 35, 48 (2008) (plurality opinion) (quoting *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879)). A method of execution violates the Eighth Amendment when it causes "a ' "substantial risk of serious harm," ' an objectively intolerable risk of harm that prevents prison officials from pleading that they were ' "subjectively blameless for purposes of the Eighth Amendment." ' " *Glossip* v. *Gross*, 576 U. S. 863, 877 (2015) (quoting *Baze*, 553 U. S., at 50). For instance, " 'a series of abortive attempts [at execution]' unlike an 'innocent misadventure,' would demonstrate an 'objectively intolerable risk of harm' that officials may not ignore." *Id.*, at 50 (plurality opinion) (citation omitted).

Barber has alleged that ADOC's attempt to insert an IV line to administer lethal injection presents him with a substantial risk of serious harm based on its track record of faulty and failed executions. Clearly, something went wrong in Alabama in 2022. Although much about what happened is still mysterious, the State had " 'a series of abortive attempts' " at execution. *Ibid.* At the least, medical personnel in three consecutive executions spent hours repeatedly puncturing prisoners in increasingly painful attempts to locate a vein for an IV line. They failed entirely in two of the three instances, despite likely puncturing at least one man's nerve. Based on the testimony of the surviving prisoners, these attempts caused " 'great pain and fear,' " 73 F. 4th, at 1334 (Pryor, J., dissenting), over and above what anyone should experience from the setting of an IV line.

Yet the State has never accounted for these issues. There is no evidence in the record explaining what may have caused such difficulties. Nor is there evidence that the State has addressed what went wrong. It has replaced its IV team with new members, but revealed nothing about how those members are different from or similar to its 2022 team. It has obtained new medical equipment, which it described in its discovery responses as solely " '[a]dditional straps for securing an inmate on the execution gurney.' " *Id.,* at 1327, n. 6. Finally, ADOC has secured several more hours in which to carry out its executions. These piecemeal changes appear designed only to ensure that ADOC has an even greater period of time in which to search the bodies of its prisoners for IV access. They do not address the unnecessary pain those prisoners may experience. Indeed, the State represented to the District Court that it considered James' execution "successful" solely because ultimately it succeeded in killing him. 2 App. to Pet. for Cert. 454a. Without any evidence about what went wrong and only the State's word that it has been fixed, Barber's allegations that he will experience the same "needless suffering" as James, Miller, and Smith are more than justified.

Barber is not to blame for the lack of factual development in his case. Alabama, unlike other States that have sought to address issues with their lethal injection protocols,[1] has conducted

[1] In contrast to Alabama's cursory and largely secret review, other States facing a similar history of issues with their executions have conducted thorough investigations resulting in public reports. For example, in October 2015, the Oklahoma Attorney General asked for a pause in executions. He convened a 77-county grand jury to investigate issues with two lethal injection attempts. The grand jury received evidence over eight months and

a secret, internal review with no published report or finding. The State has not only failed publicly to account for what went wrong, but also actively obstructed Barber's attempts to find out what happened. Because Governor Ivey set Barber's execution for a date only two months after he filed his complaint, discovery was necessarily abridged and the State, within that abridged discovery, provided hardly any information about its investigation or its new process.

After an unbroken sequence of faulty executions, Alabama asks the Court to trust that this time will be different. If it takes hours to set Barber's IV line, like Miller and Smith before him, the State may subject Barber to an intolerable level of pain under the Eighth Amendment. If it successfully executes him anyway, like James, it will have mooted his claim. The Eighth Amendment does not tolerate playing such games with a man's life. I, like Judge Pryor, would stay Barber's execution for long enough to allow the District Court to complete full discovery into what went wrong with the 2022 executions and what has been done to address it. Only then can it make an informed decision about the merits of Barber's Eighth Amendment claim.

III

Today's decision is another troubling example of this Court stymying the development of Eighth Amendment law by pushing forward executions without complete information. In both Miller's and Smith's cases, this Court issued unreasoned orders vacating

issued an over 100-page report detailing specific failures with the execution attempts. See Oklahoma Office of the Attorney General, Press Release, AG Pruitt Announces Conclusion of MCGJ Investigation of DOC, Execution Protocol (May 19, 2016). Similarly, in May 2022, the Tennessee Governor appointed U. S. Attorney Ed Stanton to conduct an independent review of the State's execution process. The review produced a 166-page independent report that detailed the investigation's methodology and scope, the issues with a specific scheduled execution, and detailed findings and recommendations. See Butler Snow LLP, Tennessee Lethal Injection Protocol Investigation: Report and Findings (Dec. 13, 2022). Most recently, in January 2023, the Arizona Governor established a Death Penalty Independent Review Commissioner tasked with reviewing the State's execution protocols after alleged issues inserting an IV line during three recent executions. Arizona, Executive Order No. 2023–05, Establishing a Death Penalty Independent Review Commissioner; see J. Jenkins, States Under Scrutiny for Recent Lethal Injection Failures, Arizona Republic (Nov. 22, 2022).

long, well-reasoned stays issued by the Eleventh Circuit.[2] See *Hamm* v. *Miller*, 597 U. S. 965 (2022); *Hamm* v. *Smith*, 598 U. S. 1076 (2022). Both Miller and Smith argued that Alabama would likely botch their execution just as it had botched preceding executions. They were both right. Had this Court not vacated the Eleventh Circuit's stays, perhaps the State would have been forced to produce evidence in discovery that could explain what kept going wrong and avoided inflicting unnecessary pain on these two men.

This Court has so prioritized expeditious executions that it has disregarded well-reasoned lower court conclusions, preventing both the meaningful airing of prisoners' challenges and the development of Eighth Amendment law. Cf. *United States* v. *Higgs*, 592 U. S. 1207, 1210 (2021) (SOTOMAYOR, J., dissenting) ("The Court has . . . intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges [to a new federal execution protocol] would never receive a meaningful airing"). Unfortunately, lower courts are receiving the message. The Eleventh Circuit here made both factual and legal errors seemingly based on this Court's unreasoned vacaturs.

First, in denying Barber's request for a stay, the Eleventh Circuit emphasized that this Court had previously vacated its grant of Smith's stay. "By vacating the stay," the panel reasoned, "the Supreme Court implicitly told us that the balance of equities in *Smith* weighed in favor of the State's and the victim's strong interest." 73 F. 4th, at 1320, n. 19, (majority opinion). That is plainly wrong. Under well-established equitable principles, courts evaluating a stay must consider the applicant's likelihood of success on the merits and potential for irreparable injury, as well as other parties' injury

[2] In Miller's case, the District Court had issued a preliminary injunction, which the Eleventh Circuit upheld in a 20-page opinion. *Miller* v. *Commissioner, Ala. Dept. of Corrections*, No. 22–13136, (CA11, Sept. 22, 2022) (*per curiam*) ECF Doc. 19–1, p. 20. In Smith's case, the Eleventh Circuit reversed the District Court's denial of his motion to amend his complaint in a long, well-reasoned opinion holding that he had stated a plausible Eighth Amendment claim to relief. *Smith* v. *Commissioner, Ala. Dept. of Corrections*, No. 22–13781, 2022 WL 17069492 (CA11 Nov. 17, 2022) (*per curiam*), cert. denied, 598 U. S. 1288 (2023). Hours later, the Eleventh Circuit granted Smith a stay of his execution to allow him to pursue that claim. *Smith* v. *Commissioner, Ala. Dept. of Corrections*, No. 22–13846, (CA11, Nov. 17, 2022) ECF Doc. 10–1.

and the public interest. See *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). Barber has established a substantial likelihood of success on the merits of his claim that he will suffer a substantial risk of harm when ADOC attempts to set his IV line. Barber submitted evidence that Alabama has subjected three prisoners to unnecessary pain and terror through its struggles to set their IV lines during lethal injection executions. The State has failed to produce any evidence that it has identified or remedied these problems. Additionally, in a capital case like Barber's, where a plaintiff has diligently pursued his method-of-execution claim and asked only for an injunction that permits an alternative, available method of execution, the equities of irreparable harm tip strongly in his favor. See *Bucklew* v. *Precythe*, 587 U. S. 119, 172 (2019) (SOTOMAYOR, J., dissenting) ("[T]he equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits"). For the State, the harm is using an alternative method of execution that it has already approved. It can still vindicate its interest in enforcing the criminal judgment. Far more consequentially for the plaintiff, the potential harm is experiencing excruciating and unnecessary pain.

Second, the Eleventh Circuit appears to have concluded that "repeatedly and futilely pricking an inmate with a needle does not rise to an unconstitutional level of pain." 73 F. 4th, at 1320, n. 20, 1332–1333 (majority opinion); see *id.*, at 19 (Pryor, J., dissenting). This Court's precedent forecloses any such categorical rule. Whether a given method of execution creates a "substantial risk of serious harm" is a fact-intensive inquiry. A court must analyze whether a given method " 'creates a demonstrated risk of severe pain' " to a particular plaintiff. *Glossip*, 576 U. S., at 878 (quoting *Baze*, 553 U. S., at 61 (plurality opinion)). Evidence of past faulty or failed executions is relevant to that analysis. *Id.*, at 50. So is the potential pain or suffering caused by the suggested alternative. See *Bucklew* v. *Precythe*, 587 U. S. 119, 147–148 (2019). Here, the District Court would have needed several kinds of information to assess the risk of serious harm resulting from setting an IV line. At a minimum, it had to know ADOC's standard process for setting IV lines, including the expertise of the team setting the line. For instance, if an IV team contains no one with meaningful experience setting hard-to-access IV lines, that would be relevant to the risk of serious harm if the team tries to insert one in any context. Only then could it know the impact and relevance of any of Barber's additional risk factors on his potential to experience unnecessary pain.

The Eleventh Circuit's categorical rule ignores crucial Eighth Amendment questions. How much pain or psychological torment amounts to serious harm? How long is too long to set an IV line? How many punctures with a needle, where, and how deeply, may cause superadded pain? These questions require a factual foundation, developed with the assistance of medical experts. The answers may be different in different cases, under different protocols, and with different people.

If the Court continues to endorse state executions scheduled before meaningful discovery, these questions may never be answered. The harm is not speculative. Miller and Smith survived to describe the intense fear and pain they experienced during Alabama's tortuous attempts to execute them. This Court's intervention lifting stays granted by the Eleventh Circuit permitted those attempts. This Court's decision denying Barber's request for a stay allows Alabama to experiment again with a human life. I respectfully dissent.

July 24, 2023

Miscellaneous Orders

No. D–3120. In Re Watkins. Donald Varnado Watkins, of West Sacramento, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on May 22, 2023, [598 U. S. 1301] is discharged.

No. 141, Orig. Texas *v.* New Mexico et al. Third Interim Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Surreplies, if any, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.,* 589 U. S. 1130.]

Rehearing Denied

No. 22–836. Perez Soto *v.* Oronoz-Rodriguez, Chief Justice, Supreme Court of Puerto Rico, et al., 598 U. S. 1281;

No. 22–854. Archer *v.* Winn Dixie Stores, Inc., et al., 598 U. S. 1281;

No. 22–881. Zielinski *v.* Wisconsin Labor and Industry Review Commission et al., 598 U. S. 1281;

No. 22–882. Stewart *v.* RRL Holding Company of Ohio, LLC, et al., 598 U. S. 1281;

No. 22–921. Cherner *v.* Westchester Jewish Community Services, Inc., et al., 598 U. S. 1312;

No. 22–949. Vashisht-Rota *v.* Hagen, Justice, Supreme Court of Utah, et al., 598 U. S. 1318;

No. 22–975. Wellman *v.* HEB Grocery Co., 598 U. S. 1282;

No. 22–980. Noble *v.* Texas, 598 U. S. 1304;

No. 22–6660. Diggs *v.* Schmidt et al., 598 U. S. 1234;

No. 22–6789. Turcios *v.* Texas, 598 U. S. 1248;

No. 22–6905. Nunez Carrillo *v.* Thornell, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al., 598 U. S. 1249;

No. 22–6946. Mosseri *v.* 7 West 21 LI LLC, 598 U. S. 1250;

No. 22–7006. Johnson, aka Porter *v.* Pettigrew, Warden, et al., 598 U. S. 1250;

No. 22–7072. Sims *v.* Fox Ridge Apartments, 598 U. S. 1306;

No. 22–7133. Stancu *v.* Southern Methodist University, 598 U. S. 1275; and

No. 22–7325. Brown *v.* City of New York, New York, et al., 598 U. S. 1322. Petitions for rehearing denied.

July 27, 2023

Miscellaneous Order

No. 23A35. Mountain Valley Pipeline, LLC *v.* Wilderness Society et al. Application to vacate stays, presented to The Chief Justice, and by him referred to the Court, granted. The July 10, 2023, stay orders of the United States Court of Appeals for the Fourth Circuit, case Nos. 23–1592 and 23–1594, and the July 11, 2023, stay order of the Fourth Circuit, case No. 23–1384, are hereby vacated. Although the Court does not reach applicant's suggestion that it treat the application as a petition for writ of mandamus at this time, that determination is without prejudice to further consideration in light of subsequent developments.

August 1, 2023

Certiorari Denied

No. 23–5147 (23A63). Johnson *v.* Vandergriff, Warden. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to Justice Kavanaugh, and by him referred to the Court, denied. Certiorari denied.

No. 23–5243 (23A93). Johnson *v.* Vandergriff, Warden. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to Justice Kavanaugh, and by him referred to the Court, denied. Certiorari denied.

No. 23–5244 (23A90). Johnson *v.* Vandergriff, Warden. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to Justice Kavanaugh, and by him referred to the Court, denied. Certiorari denied.

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting from the denial of application for stay and denial of certiorari.

Executing a prisoner who has lost his sanity has, for centuries, been branded inhuman. See *Ford* v. *Wainwright*, 477 U. S. 399, 409 (1986) ("[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today"). The Eighth Amendment recognizes as much. Our Constitution therefore prohibits executing a prisoner who lacks capacity to form a rational understanding of the reason for his execution. To safeguard this constitutional guarantee, once a prisoner makes a substantial threshold showing of insanity, courts must provide a fair hearing to determine a prisoner's competency to be executed. See *Panetti* v. *Quarterman*, 551 U. S. 930 (2007).

Johnny A. Johnson has a decades-long documented history of severe mental illness, including schizophrenia. Johnson alleges that he is incompetent to be executed, and requested a hearing to evaluate his competence before Missouri executes him. This request came after a psychiatrist found him incompetent because "he does not have a rational understanding of the link between his crime and his punishment." App. to Pet. for Cert. 53a. In fact, Johnson believes that "Satan [is] 'using' the State of Missouri to execute him in order to bring about the end of the world." *Id.*, at 54a.

The Supreme Court of Missouri, over a noted dissent, denied Johnson a competency hearing because it concluded that he had not made a substantial threshold showing of insanity. That was error. A federal District Court then denied Johnson habeas relief. A panel of the Eighth Circuit stayed his execution and issued a certificate of appealability (COA), which would have permitted his competency claim to be fully briefed and argued on the merits. But the en banc Eighth Circuit, over a dissent from three judges, vacated that stay and declined to issue a COA because it concluded that no reasonable jurist could disagree with the District Court. That too was error. Because reasonable jurists could, did, and still debate whether the District Court should have granted habeas relief, the Eighth Circuit should have authorized an appeal. I would grant the petition for a writ of certiorari, summarily vacate the order of the Eighth Circuit denying a COA, and grant Johnson's request for a stay of execution pending appeal.

I

Counsel for Johnson filed a habeas petition in the Supreme Court of Missouri arguing that his execution would violate the Eighth and Fourteenth Amendments because he is incompetent to be executed. The petition sought a stay of Johnson's execution and an evidentiary hearing on his competency claim.

In support of his petition, Johnson submitted a 55-page report from a psychiatrist, Dr. Bhushan Agharkar, who reviewed his medical records and conducted an over two hour in-person evaluation before finding him incompetent to be executed. Dr. Agharkar concluded that "Johnson is aware he is on death row and that he was convicted of murder. However, he does not have a rational understanding of the link between his crime and his punishment. His understanding of the reason for his execution is irrational and delusional, because he believes it is Satan 'using' the State of Missouri to execute him in order to bring about the end of the world and that the voice of Satan confirmed this plan to him. He believes he has been marked with the 'Seventh Sign' and the world will be destroyed were he to die." *Id.*, at 53a–54a.

Johnson also submitted medical records detailing his decades-long history of psychotic mental illness, including schizophrenia and delusions. He previously experienced visual and auditory hallucinations that told him to kill himself and hurt others, and reported seeing "demons" and hearing the voice of "Leviathan."

At one point, he heard voices telling him to cut his own arm off and he cut himself repeatedly with a razor; in another incident, he wrote "we're dead" and "die" on the wall with his own feces and blood. Over the years, Johnson has also expressed delusions about his death, including repeatedly observing that the world will end when he dies. See, *e. g.*, *id.*, at 63a ("I think I'm the 7th sign. I'm the end of the world when I die"); *id.*, at 68a ("I think that the world will end if I die"); *id.*, at 74a (prison psychologist reporting that Johnson "ha[d] heard God's voice talking directly to him and sometimes he 'can hear the other side of the world and different spirits' ").

In response to this compelling evidence, Missouri submitted only a one-and-a-half-page affidavit from Ashley Skaggs, the institutional chief of mental health at Johnson's prison. Missouri does not dispute that Skaggs, a licensed professional counselor, is not qualified under state law to make a formal determination of competence to be executed. Nor is there any dispute that Skaggs did not evaluate Johnson for the purpose of determining his competency for execution, but instead met with him for a few minutes sporadically during a three-year period to discuss his ongoing treatment. In response to Dr. Agharkar's report, Skaggs attested that Johnson "has never expressed these kinds of hallucinations or delusional beliefs. On the contrary, in recent months Mr. Johnson has reported that his auditory hallucinations are well managed by medication and has denied more severe symptoms or side effects. . . . From my observations, Mr. Johnson appears to understand the nature of his upcoming execution." *Id.*, at 58a–59a.

The Supreme Court of Missouri, over a dissent, concluded that Johnson was not entitled to an evidentiary hearing because he did not make a " 'substantial threshold showing of insanity' required by *Panetti* and *Ford*." 668 S. W. 3d 574, 576 (2023). Johnson challenged this denial in federal habeas proceedings. The District Court denied his petition on the merits, and Johnson moved the Eighth Circuit for a stay of execution and applied for a COA. An Eighth Circuit panel stayed the execution and granted the certificate limited to the claim that Johnson was incompetent to be executed. Missouri sought rehearing, and the en banc Eighth Circuit, over dissent from Chief Judge Smith, Judge Kelly, and Judge Erickson, granted the petition for rehearing, denied the application for a COA, and denied the motion for a stay of execution.

II

A state prisoner whose habeas petition is denied by a district court can appeal only if a judge issues a COA. Issuing a COA requires that the prisoner make "a substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c)(2). To make that showing, the prisoner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (internal quotation marks omitted).

The Eighth Circuit erred in denying a COA for two reasons.[1] To start, the Eighth Circuit was too demanding in assessing whether reasonable jurists could debate the merits of Johnson's habeas petition. The Missouri Supreme Court, with a dissent, denied Johnson's claim, a panel of the Eighth Circuit granted a stay of execution and a COA, and three judges dissented when the en banc court vacated the panel's order.[2] There was, of course, good reason for those judges to debate the merits of Johnson's habeas petition: It was objectively unreasonable for the Supreme Court of Missouri to conclude that Johnson did not establish even a threshold showing of incompetence. "Those facts alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of [Johnson's] claim." *Jordan* v. *Fisher*, 576 U. S. 1071, 1076 (2015) (SOTOMAYOR, J., dissenting from denial of certiorari).

The Eighth Circuit's second mistake was failing to "limit its examination to a threshold inquiry." *Miller-El* v. *Cockrell*, 537 U. S. 322, 327 (2003). The only issue before the court was the threshold jurisdictional question whether to issue a COA. When

[1] The en banc Eighth Circuit's rationale is found in Judge Gruender's concurrence, which is joined by all seven judges in the majority.

[2] As a general matter, courts of appeals will rehear a case en banc only when en banc consideration "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." Fed. Rule App. Proc. 35(a). It is more than unusual that an en banc Eighth Circuit concluded that a grant of a COA by a panel met this high standard.

a court of appeals departs from the limited COA inquiry, without even full briefing or oral argument, and instead opines on the merits of an appeal, “ ‘it is in essence deciding an appeal without jurisdiction.’ ” *Buck* v. *Davis*, 580 U. S. 100, 115 (2017) (quoting *Miller-El*, 537 U. S., at 336–337). The majority nevertheless extensively discussed the merits of Johnson’s habeas claim, concluding that “[t]he Supreme Court of Missouri’s decision was not ‘contrary to’ *Panetti*,” “[n]or has Johnson made a substantial showing that the Supreme Court of Missouri’s decision was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ ” App. to Pet. for Cert. 132a, 133a. These are merits determinations, and “a COA ruling is not the occasion for a ruling on the merit of [a] petitioner’s claim.” *Miller-El*, 537 U. S., at 331.

The COA requirement erects an important but not insurmountable barrier to an appeal. When a habeas petitioner makes a substantial showing that his constitutional rights were violated, a COA should issue. This is especially true in this context, where competency has to be determined at the time of execution, and that determination requires contemporaneous factual development. The only question before the Eighth Circuit was whether reasonable jurists could debate the District Court’s disposition of Johnson’s habeas petition. That question, in turn, depends on whether reasonable jurists could debate whether the Missouri Supreme Court contravened or unreasonably applied clearly established federal law. See 28 U. S. C. § 2254(d). Here, reasonable jurists can and do have that debate.

III

Because Johnson made “ ‘a substantial threshold showing of insanity,’ ” he is entitled to a “ ‘fair hearing’ in accord with fundamental fairness.” *Panetti*, 551 U. S., at 949 (quoting *Ford*, 447 U. S., at 426). The central question to determine competency is “whether a prisoner’s concept of reality is so impair[ed] that he cannot grasp the execution’s meaning and purpose or the link between [his] crime and its punishment.” *Madison* v. *Alabama*, 586 U. S. 265, 269 (2019) (internal quotation marks omitted; alterations in original). At minimum, reasonable jurists could debate whether the Supreme Court of Missouri contravened or unreasonably applied clearly established federal law—namely, *Ford* and *Panetti*—in determining that Johnson did not make a threshold showing of incompetency. Here, the Supreme Court of Missouri made at least two errors.

First, the Supreme Court of Missouri confronted facts that were "materially indistinguishable" from *Panetti*, but "arrive[d] at a result opposite to ours." *Williams* v. *Taylor*, 529 U. S. 362, 405 (2000). In *Panetti*, this Court conducted an "independent review of the record" and concluded that the prisoner met the threshold showing of incompetence based on a letter from his doctor following an 85-minute examination as well as "extensive evidence of mental dysfunction considered in earlier legal proceedings." 551 U. S., at 950. The prisoner in *Panetti* suffered "mental problems . . . indicative of schizo-affective disorder, . . . resulting in a genuine delusion" that his execution was " 'part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light.' " *Id.*, at 954 (internal quotation marks omitted). This Court noted that there was "much in the record to support the conclusion that [Panetti] suffers from severe delusions." *Id.*, at 956. *Panetti* is strikingly similar to this case. As Judge Kelly noted in dissent, "Johnson's evidence of incompetency [is] materially indistinguishable from the evidence deemed sufficient in *Panetti*." App. to Pet. for Cert. 137a. Johnson submitted a 55-page report from his doctor summarizing his " 'long-documented history of psychotic mental illness' " and concluding that he was incompetent to be executed, as well as voluminous medical records detailing his decades-long history of mental illness. The record further reflects that, because of his "severe psychotic mental illness and a cognitively impaired brain," Johnson believes that "Satan [is] 'using' the State of Missouri to execute him in order to bring about the end of the world." *Id.*, at 54a.

Second, the Supreme Court of Missouri unreasonably applied *Panetti*'s legal standard. *Panetti* focuses on whether a prisoner can reach a "rational understanding of the reason for [his] execution." 551 U. S., at 958. Despite reciting the correct standard, the Supreme Court of Missouri applied the wrong one. The court found the persuasiveness of Dr. Agharkar's 55-page report "significantly weakened by Skaggs' [one-and-a-half-page] report" and Johnson's medical records. 668 S. W. 3d, at 579, n. 7. The court relied in part on Skaggs' affidavit to discredit Dr. Agharkar's report even though Dr. Agharkar applied *Panetti*'s legal standard while Skaggs, unqualified to render an opinion on competency, only proffered that Johnson "appears to understand the nature of his upcoming execution." App. to Pet. for Cert. 59a. The Eighth Circuit highlighted Skaggs' opinion and concluded that "to understand the nature of an execution is to have a rational understanding of the reason for it." *Id.*, at 134a. That is plainly wrong. Understanding the nature of an execution is distinct from understanding rationally the reason for an execution. Even a "prisoner's awareness of the State's rationale for an execution," his acknowledgment that "he will be executed," and his understanding that "the reason the State has given for the execution is his commission of the crimes in question" does not resolve the inquiry into whether he has a "rational understanding of the reason for the execution." *Panetti*, 551 U. S., at 956–959. Here, for example, although Johnson understands he will be executed and die by lethal injection, his delusions lead him to believe that "Satan [is] 'using' the State of Missouri to execute him in order to bring about the end of the world," that "the underworld can influence the State to not execute him for Satan's purposes," and that "he is a vampire and able to 'reanimate' his organs" and "enter an animal's mind if he can learn the right 'code' in order to go on living after his execution." App. to Pet. for Cert. 54a.

The Supreme Court of Missouri also discounted Dr. Agharkar's testimony based on evidence that was at best tangential to the *Panetti* inquiry. Specifically, the court emphasized Johnson's statements that he was " 'very ashamed of killing his best friend's daughter' " and that he was " 'working with his attorneys to fight his case as best as he can,' " as well as notes in his medical records stating that medications are controlling his auditory hallucinations. 668 S. W. 3d, at 578–579. None of this evidence provides meaningful insight into whether Johnson "grasp[s] the . . . 'meaning and purpose' " of his execution—much less calls into question Dr. Agharkar's conclusion about competency or Johnson's delusional belief that Satan is using the State of Missouri to execute him. *Madison*, 586 U. S., at 269.

Put simply, it is beyond question that Johnson's habeas claim is "reasonably debatable." *Buck*, 580 U. S., at 117. Members of this Court, the Eighth Circuit, and the Supreme Court of Missouri have already done so. To nevertheless maintain that Johnson should be denied a COA because no reasonable jurist could debate the District Court's denial of his habeas petition defies common sense. Under well-established equitable principles, courts evaluating a stay must consider the applicant's likelihood of success on the merits and potential for irreparable injury, as well as other parties' injury and the public interest. See *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). For the reasons above, Johnson has established a substantial likelihood of success on the merits of his claim. The equities here, as in almost all death penalty cases where a prisoner has shown a reasonable probability of success on the merits, favor Johnson. See *Bucklew* v. *Precythe*, 587 U. S. 119, 172 (2019) (Sotomayor, J., dissenting). I would therefore grant the petition for a writ of certiorari, summarily vacate the order of the Eighth Circuit denying a COA, and grant Johnson's request for a stay of execution pending appeal.

In sum, Johnson presented extensive threshold evidence of incompetency—including voluminous medical records documenting his decades-long struggle with mental illness and a 55-page report from his psychiatrist. That entitled him to a competency hearing under *Panetti*. Anything less denies Johnson a meaningful opportunity to be heard.

* * *

The Court today paves the way to execute a man with documented mental illness before any court meaningfully investigates his competency to be executed. There is no moral victory in executing someone who believes Satan is killing him to bring about the end of the world. Reasonable jurists have already disagreed on Johnson's entitlement to habeas relief. He deserves a hearing where a court can finally determine whether his execution violates the Eighth Amendment. Instead, this Court rushes to finality, bypassing fundamental procedural and substantive protections. I respectfully dissent.

August 4, 2023

Miscellaneous Order

No. 23A73. City of Tulsa, Oklahoma *v.* Hooper. C. A. 10th Cir. Application for stay of the mandate, presented to Justice Gorsuch, and by him referred to the Court, denied. The order heretofore entered by Justice Gorsuch is vacated.

Statement of Justice Kavanaugh, with whom Justice Alito joins, respecting the denial of the application for stay.

The City of Tulsa's application for a stay raises an important question: whether the City may enforce its municipal laws against

American Indians in Tulsa. For example, may Indians in Tulsa violate the City's traffic safety laws without enforcement by the City?

The application, however, arises in an interlocutory posture. The District Court granted the City's motion to dismiss on the ground that the Curtis Act of 1898, see ch. 517, 30 Stat. 495, gives the City jurisdiction over municipal violations committed by all persons, including Indians. But the Court of Appeals for the Tenth Circuit reversed, holding that the Curtis Act confers no such jurisdiction. The Court of Appeals then remanded the case to the District Court for further proceedings.

Importantly, the Court of Appeals declined for now to reach an additional argument raised by the State of Oklahoma as *amicus curiae*: that the City may exercise jurisdiction under the reasoning in *Oklahoma* v. *Castro-Huerta*, 597 U. S. 629 (2022). On remand in the District Court, the City may presumably raise that argument. Moreover, as I understand it, nothing in the decision of the Court of Appeals prohibits the City from continuing to enforce its municipal laws against all persons, including Indians, as the litigation progresses.

No. 22–674. Campos-Chaves *v.* Garland, Attorney General. C. A. 5th Cir.; and

No. 22–884. Garland, Attorney General *v.* Singh; and Garland, Attorney General *v.* Mendez-Colin. C. A. 9th Cir. [Certiorari granted, 600 U. S. 902.] Briefing proposal set forth in the Solicitor General's letter of July 27, 2023, adopted. The Solicitor General shall file a consolidated opening brief on the merits, limited to 17,000 words, on or before August 29, 2023. Any brief of an *amicus curiae* in support, or in support of neither party, shall bear a light green cover. Petitioner in No. 22–674 and respondents in No. 22–884 may each file a response brief on the merits on or before October 18, 2023, and the briefs shall bear light red covers. Any brief of an *amicus curiae* in support shall bear a dark green cover. The Solicitor General shall file a consolidated reply brief limited to 9,000 words.

August 8, 2023

Miscellaneous Order

No. 23A82. Garland, Attorney General, et al. *v.* Vanderstok et al. Application for stay, presented to Justice Alito, and by him referred to the Court, granted. The June 30, 2023, order and July 5, 2023, judgment of the United States District Court for the Northern District of Texas, case No. 4:22–cv–691, insofar as they vacate the final rule of the Bureau of Alcohol, Tobacco, Firearms and Explosives, 87 Fed. Reg. 24652 (April 26, 2022), are stayed pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for writ of certiorari, if such writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would deny the application for stay.

AUGUST 10, 2023

Miscellaneous Order

No. 22–429. ACHESON HOTELS, LLC *v.* LAUFER. C. A. 1st Cir. [Certiorari granted, 598 U. S. 1220.] Respondent's request that we dismiss the case as moot at this time is denied. The question of mootness will be subject to further consideration at oral argument in addition to the question presented.

Certiorari Granted

No. 23–124 (23A87) HARRINGTON, UNITED STATES TRUSTEE, REGION 2 *v.* PURDUE PHARMA L. P. ET AL. C. A. 2d Cir. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted. The mandate of the United States Court of Appeals for the Second Circuit in case No. 22–110 and the consolidated cases is recalled and stayed. Applicant suggested this Court treat the application as a petition for writ of certiorari; doing so, the petition is granted. The parties are directed to brief and argue the following question: "Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against non-debtor third parties, without the claimants' consent." The Clerk is directed to establish a briefing schedule that will allow the case to be argued in the December 2023 argument session. The stay shall terminate upon the sending down of the judgment of this Court. Reported below: 69 F. 4th 45.

AUGUST 17, 2023

Miscellaneous Order

No. 23A116. GRACE, INC., ET AL. *v.* CITY OF MIAMI, FLORIDA. C. A. 11th Cir. Application to vacate stay, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

AUGUST 21, 2023

Miscellaneous Orders

No. 22–448. CONSUMER FINANCIAL PROTECTION BUREAU ET AL. *v.* COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., ET AL. C. A. 5th Cir. [Certiorari granted, 598 U. S. 1187.] Motion of West Virginia et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 22–704. VIDAL, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE *v.* ELSTER. C. A. Fed. Cir. [Certiorari granted, 598 U. S. 1318.] Motion of petitioner to dispense with printing joint appendix granted.

No. 22–846. DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT RURAL HOUSING SERVICE *v.* KIRTZ. C. A. 3d Cir. [Certiorari granted, 599 U. S. 911.] Motion of petitioner to dispense with printing joint appendix granted.

No. 22–859. SECURITIES AND EXCHANGE COMMISSION *v.* JARKESY ET AL. C. A. 5th Cir. [Certiorari granted, 600 U. S. 902.] Motion of petitioner to dispense with printing joint appendix granted.

No. 22–6389. BROWN *v.* UNITED STATES. C. A. 3d Cir.; and
No. 22–6640. JACKSON *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 598 U. S. 1280.] Motion of petitioner to dispense with printing joint appendix in No. 22–6640 granted.

Rehearing Denied

No. 22–687. GOULDING *v.* SECURITIES AND EXCHANGE COMMISSION, 598 U. S. 1318;
No. 22–810. LIEBMAN *v.* OCWEN LOAN SERVICING, LLC, ET AL., 598 U. S. 1271;

No. 22–971. Henderson *v.* Sony Pictures Entertainment Inc. et al., 599 U. S. 903;

No. 22–1004. Garrison *v.* City of Ottawa, Kansas, et al., 599 U. S. 912;

No. 22–1028. Brunson *v.* Adams et al., 599 U. S. 927;

No. 22–1049. Bo Peng *v.* F. M. Tarbell Co., 599 U. S. 920;

No. 22–1060. Mizell *v.* Citizens Bank et al., 599 U. S. 920;

No. 22–1086. Drevaleva *v.* Department of Veteran Affairs et al., 599 U. S. 913;

No. 22–1088. Morris *v.* Texas et al., 599 U. S. 913;

No. 22–1109. Rounds *v.* Healey, Governor of Massachusetts, et al., 599 U. S. 921;

No. 22–1120. Parisi *v.* Anderson, United States Trustee for Region 16, 599 U. S. 921;

No. 22–6212. Cain *v.* United States, 600 U. S. 903;

No. 22–6243. Berry et ux. *v.* Wells Fargo Bank, N. A., et al., 598 U. S. 1319;

No. 22–6896. Mason *v.* Farris, Warden, 598 U. S. 1274;

No. 22–6992. Reaves *v.* Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al., 598 U. S. 1284;

No. 22–7022. Winston *v.* United States District Court for the Eastern District of Virginia, 598 U. S. 1251;

No. 22–7042. Serrano *v.* Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 598 U. S. 1305;

No. 22–7057. Pniewski *v.* Artis, Acting Warden, 598 U. S. 1261;

No. 22–7102. Komatsu *v.* NTT Data, Inc., et al., 598 U. S. 1314;

No. 22–7107. In re Johnson et al., 598 U. S. 1311;

No. 22–7116. In re Wright, 598 U. S. 1302;

No. 22–7164. Bernard *v.* Michigan, 1320;

No. 22–7196. Prelle *v.* Chief Executive Officer of New Jersey et al., 598 U. S. 1321;

No. 22–7294. Tatum *v.* Lucas et al., 599 U. S. 906;

No. 22–7333. Jah *v.* United States, 598 U. S. 1307;

No. 22–7347. Elkins *v.* Miller, 599 U. S. 922;

No. 22–7357. Collier *v.* Tessier-Lavigne et al., 599 U. S. 923;

No. 22–7370. Dingle *v.* United States, 598 U. S. 1322;

No. 22–7472. PATEL *v.* UNITED STATES, 599 U. S. 923;
No. 22–7581. BEITER *v.* UNITED STATES, 599 U. S. 924;
No. 22–7593. IN RE RUBIS, 599 U. S. 902;
No. 22–7637. BEITER *v.* UNITED STATES, 599 U. S. 925; and
No. 22–7661. BEITER *v.* UNITED STATES, 599 U. S. 925. Petitions for rehearing denied.

No. 22–7144. IN RE PRIESTER, 598 U. S. 1258. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

AUGUST 29, 2023

Dismissal Under Rule 46

No. 23–5065. REYNOSO *v.* UNITED STATES. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 8, 2023

Miscellaneous Orders

No. 22A999. DREXLER *v.* SPAHN, JUDGE, ET AL. Application for certificate of appealability, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 22A1065. SMARTT *v.* UNITED STATES. Application for bail, addressed to JUSTICE JACKSON and referred to the Court, denied.

No. 22A1087. D'OLIVIO, AKA ANDER, AKA BRIGETTA *v.* HUTSON. Ct. App. Tex., 5th Dist. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 22–429. ACHESON HOTELS, LLC *v.* LAUFER. C. A. 1st Cir. [Certiorari granted, 598 U. S. 1220.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 22–666. WILKINSON *v.* GARLAND, ATTORNEY GENERAL. C. A. 3d Cir. [Certiorari granted, 600 U. S. 901.] Motion of petitioner to dispense with printing joint appendix granted.

No. 22–800. MOORE ET UX. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 599 U. S. 918.] Motion of petitioners to dispense with printing joint appendix granted.

Statement of JUSTICE ALITO.

In a letter to THE CHIEF JUSTICE dated August 3, 2023, Senator Richard Durbin, the Chair of the Senate Judiciary Committee, "urge[d]" THE CHIEF JUSTICE "to take appropriate steps to ensure" that I recuse in this case.[1] Recusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit.[2] Because this case is scheduled to be heard soon, and because of the attention my planned participation in this case has already received, I respond to these concerns now.

There is no valid reason for my recusal in this case. Senator Durbin's letter expressed the view that recusal is necessary because I participated in two interviews that resulted in two articles about my work that appeared in the Wall Street Journal. The interviews were jointly conducted, and the resulting articles were jointly written, by James Taranto and David B. Rivkin, Jr. Mr. Taranto, a prominent journalist, presumably either wrote or approved everything that appeared in the articles under his byline, and Senator Durbin's letter makes no objection relating to his participation in this project. Senator Durbin argues, however, that Mr. Rivkin's participation requires me to recuse because Mr. Rivkin, who is both a much-published opinion-journalist[3] and a practicing attorney, is one of the attorneys in this case.

This argument is unsound. When Mr. Rivkin participated in the interviews and co-authored the articles, he did so as a journalist, not an advocate. The case in which he is involved was never mentioned; nor did we discuss any issue in that case either directly or indirectly. His involvement in the case was disclosed in the second article, and therefore readers could take that into account.

There was nothing out of the ordinary about the interviews in question. Over the years, many Justices have participated in interviews with representatives of media entities that have fre-

[1] Letter from R. Durbin to J. Roberts (Aug. 3, 2023).

[2] See attachment to letter from THE CHIEF JUSTICE to R. Durbin (Apr. 25, 2023).

[3] Mr. Rivkin has published hundreds of articles, op-eds, and book reviews on a wide variety of subjects in newspapers and magazines, including the Wall Street Journal, the Washington Post, the New York Times, USA Today, and the Los Angeles Times.

quently been parties in cases before the Court, including NPR,[4] the New York Times,[5] CBS,[6] Fox News,[7] National Review,[8] and ABC.[9] Similarly, many of my colleagues have been interviewed by attorneys who have also practiced in this Court,[10] and some have co-authored books with such attorneys.[11] Those interviews did not result in or require recusal.

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[4] Justices Breyer and SOTOMAYOR have interviewed with NPR and did not recuse from a case in which NPR was respondent. See *Yeager* v. *National Pub. Radio*, No. 19–6442; A. Chang, Justice Stephen Breyer on What the Court Does Behind Closed Doors, and Hamilton, NPR (Dec. 13, 2015); N. Totenberg, A Justice Deliberates: Sotomayor on Love, Health and Family, NPR (Jan. 12, 2013).

[5] JUSTICE SOTOMAYOR has interviewed with a journalist for the New York Times and did not recuse in a case in which the Times was a party. See *Brimelow* v. *The New York Times Co.*, No. 21–1030; Justice S. Sotomayor & L. Greenhouse, A Conversation with Justice Sotomayor, 123 Yale L. J. Forum 375 (2014).

[6] Justices Breyer and SOTOMAYOR interviewed with CBS News and did not recuse in cases in which CBS News was a party. See *Personal Audio, LLC* v. *CBS Corp.*, No. 20–260; *Vernon* v. *CBS Television Studios*, No. 19–5161; *Den Hollander* v. *CBS News Inc.*, No. 17–1452; *Moline* v. *CBS News Inc.*, No. 14–9173; CBS News, Justice Sotomayor Prefers "Sonia from the Bronx" (Jan. 29, 2013); CBS News, Q&A: Justice Stephen Breyer (Sept. 13, 2015).

[7] JUSTICE GORSUCH interviewed with Fox News and did not recuse in a case in which Fox News was a party. See *Bralich* v. *Fox News Network, LLC*, No. 21–7528; Fox News, Justice Neil Gorsuch in "Fox & Friends" Interview: Pay Attention to "Separation of Powers" (Dec. 17, 2019).

[8] JUSTICE GORSUCH has interviewed with National Review and did not recuse in a case in which National Review was petitioner. See *National Review, Inc.* v. *Mann*, No. 18–1451; C. Cooke, A Conversation with Justice Neil Gorsuch, Nat. Rev. (Oct. 10, 2019).

[9] CHIEF JUSTICE ROBERTS interviewed with ABC and did not recuse in a case in which ABC was petitioner. See *American Broad. Cos.* v. *Aereo, Inc.*, No. 13–461; ABC News, Interview with Chief Justice Roberts (Nov. 13, 2006).

[10] For instance, Bryan Garner has interviewed several Justices, and he argued a case three Terms ago. See LawProse with Bryan A. Garner, YouTube, https://www.youtube.com/@lawprosewithbryana.garner6732; T. Mauro, How Grammar Guru Bryan Garner Made His Way to the Supreme Court, Nat. L. J. (Dec. 11, 2020); *Facebook, Inc.* v. *Duguid*, No. 19–511.

[11] See, *e. g.*, R. Ginsburg & A. Tyler, Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union (2021); Brief for Federal Courts Scholars as *Amici Curiae* in *McDonough* v. *Smith*, O. T. 2018, No. 18–485; N. Gorsuch, A Republic, If You Can Keep It (2019) (with J. Nitze & D. Feder); Brief for The Rutherford Institute as *Amicus Curiae* in *Sorenson* v. *Massachusetts*, O. T. 2021, No. 20–1747 (signed by D. Feder).

Senator Durbin's request for my recusal is presumably based on the theory that my vote in *Moore* will be affected in some way by the content of the articles that resulted from the interviews, but that theory fundamentally misunderstands the circumstances under which Supreme Court Justices must work. We have no control over the attorneys whom parties select to represent them, and as a result, we are often presented with cases in which one of the attorneys has spoken favorably or unfavorably about our work or character. Similarly, we regularly receive briefs filed by or on behalf of Members of Congress who have either supported or opposed our confirmations, or who have made either favorable or unfavorable comments about us or our work.[12] We participate in cases in which one or more of the attorneys is a former law clerk, a former colleague, or an individual with whom we have long been acquainted. If we recused in such cases, we would regularly have less than a full bench, and the Court's work would be substantially disrupted and distorted.

In all the instances mentioned above, we are required to put favorable or unfavorable comments and any personal connections with an attorney out of our minds and judge the cases based solely on the law and the facts. And that is what we do.

For these reasons, there is no sound reason for my recusal in this case, and in accordance with the duty to sit, I decline to recuse.

Rehearing Denied

No. 22–914. Waleski *v.* Montgomery, McCracken, Walker & Rhoads, LLP, et al., 599 U. S. 926;

No. 22–1032. Vinkov *v.* Brotherhood Mutual Insurance Co., 599 U. S. 920;

No. 22–6949. McDowell *v.* Reeves, 598 U. S. 1284;

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[12] See, *e. g.*, Brief for Appellees in *Federal Election Comm'n* v. *Ted Cruz for Senate*, O. T. 2021, No. 21–12; Brief on Jurisdiction for Respondent The Bipartisan Legal Advisory Group of the U. S. House of Representatives in *United States* v. *Windsor*, O. T. 2012, No. 12–307; Brief for Current and Former Members of Congress as *Amici Curiae* in *Consumer Financial Protection Bureau* v. *Community Fin. Servs. Assn. of Am.*, O. T. 2022, No. 22–448; Brief for Current Members of the United States Congress as *Amici Curiae* in *Mountain Valley Pipeline, LLC* v. *The Wilderness Soc.*, O. T. 2022, No. 23A35; Brief for Members of the United States Senate et al. as *Amici Curiae* in *Groff* v. *DeJoy*, O. T. 2022, No. 22–174; Brief for 228 Members of Congress as *Amici Curiae* and Brief for 236 Members of Congress as *Amici Curiae* in *Dobbs* v. *Jackson Women's Health Org.*, O. T. 2019, No. 19–1392.

No. 22–6969. Shetskie *v.* Colorado, 598 U. S. 1284;
No. 22–7245. DiBiase *v.* United States, 598 U. S. 1286;
No. 22–7447. In re McCaster, 598 U. S. 1311;
No. 22–7473. In re Patel, 599 U. S. 918;
No. 22–7476. D'Antonio *v.* Borough of Allendale, New Jersey, et al., 599 U. S. 923;
No. 22–7492. O'Neal *v.* Hughes, Warden, 599 U. S. 915;
No. 22–7519. Rodriguez *v.* United States, 599 U. S. 907;
No. 22–7575. Edmond *v.* Williams, Warden, 599 U. S. 908;
No. 22–7578. In re Seino, 599 U. S. 902; and
No. 22–7656. In re Edmonds, 599 U. S. 911. Petitions for rehearing denied.

September 12, 2023

Miscellaneous Order

No. 23A204. Fulton County, Pennsylvania, et al. *v.* Secretary of Pennsylvania et al. Sup. Ct. Pa. Application for stay, presented to Justice Alito, and by him referred to the Court, denied.

September 21, 2023

Certiorari Denied

No. 23–5617 (23A254). Castillo Sanchez *v.* Quick, Warden. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to Justice Kavanaugh, and by him referred to the Court, denied. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this application and this petition.

September 26, 2023

Miscellaneous Orders

No. 23A231. Allen *v.* Alabama Secretary of State *v.* Milligan et al. D. C. N. D. Ala. Application for stay, presented to Justice Thomas, and by him referred to the Court, denied.

No. 23A241. Allen, Alabama Secretary of State *v.* Caster et al. D. C. N. D. Ala. Application for stay, presented to Justice Thomas, and by him referred to the Court, denied.

No. 22–660. Murray *v.* UBS Securities, LLC, et al. C. A. 2d Cir. [Certiorari granted, 598 U. S. 1270.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 22–807. Alexander, President of the South Carolina Senate, et al. *v.* South Carolina State Conference of the NAACP et al. D. C. S. C. [Probable jurisdiction noted, 598 U. S. 1280.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

September 29, 2023

Certiorari Granted

No. 22–899. Smith *v.* Arizona. Ct. App. Ariz. Certiorari granted.

No. 22–913. Devillier et al. *v.* Texas. C. A. 5th Cir. Certiorari granted. Reported below: 53 F. 4th 904.

No. 22–1008. Corner Post, Inc. *v.* Board of Governors of the Federal Reserve System. C. A. 8th Cir. Certiorari granted. Reported below: 55 F. 4th 634.

No. 22–1074. Sheetz *v.* County of El Dorado, California. Ct. App. Cal., 3d App. Dist. Certiorari granted. Reported below: 84 Cal. App. 5th 394, 300 Cal. Rptr. 3d 308.

No. 22–1165. Macquarie Infrastructure Corp. et al. *v.* Moab Partners, L. P., et al. C. A. 2d Cir. Certiorari granted.

No. 22–1178. Federal Bureau of Investigation et al. *v.* Fikre. C. A. 9th Cir. Certiorari granted. Reported below: 35 F. 4th 762.

No. 22–1238. Office of the United States Trustee *v.* John Q. Hammons Fall 2006, LLC, et al. C. A. 10th Cir. Certiorari granted.

No. 23–51. Bissonnette et al. *v.* LePage Bakeries Park St., LLC, et al. C. A. 2d Cir. Certiorari granted. Reported below: 49 F. 4th 655.

No. 22–277. Moody, Attorney General of Florida, et al. *v.* NetChoice, LLC, dba NetChoice, et al. C. A. 11th Cir. Certiorari granted limited to Questions 1 and 2 presented by the

Solicitor General in her brief for the United States as *amicus curiae*. Reported below: 34 F. 4th 1196.

No. 22–555. NetChoice, LLC, dba NetChoice, et al. *v.* Paxton, Attorney General of Texas. C. A. 5th Cir. Certiorari granted limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as *amicus curiae*. Reported below: 49 F. 4th 439.

No. 22–1078. Warner Chappell Music, Inc., et al. *v.* Nealy et al. C. A. 11th Cir. Certiorari granted limited to the following question: "Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U. S. C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit." Reported below: 60 F. 4th 1325.

No. 22–7386. McIntosh *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 58 F. 4th 606.