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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2014

MARCH 3 THROUGH JUNE 5, 2015

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2020

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.
SONIA SOTOMAYOR, ASSOCIATE JUSTICE.
ELENA KAGAN, ASSOCIATE JUSTICE.

RETIRED

JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

ERIC H. HOLDER, JR., ATTORNEY GENERAL.[1]
LORETTA E. LYNCH, ATTORNEY GENERAL.[2]
DONALD B. VERRILLI, JR., SOLICITOR GENERAL.
SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] Attorney General Holder resigned effective April 27, 2015.

[2] The Honorable Loretta E. Lynch, of New York, was nominated by President Obama on November 8, 2014, to be Attorney General; the nomination was confirmed by the Senate on April 23, 2015; she was commissioned and took the oath of office on April 27, 2015. She was presented to the Court on May 18, 2015. See *post*, p. VII.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 28, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

(For next previous allotment, see 561 U. S., p. vi.)

PRESENTATION OF THE ATTORNEY GENERAL

Supreme Court of the United States

WEDNESDAY, MAY 18, 2015

Present: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Ginsburg, Justice Breyer, Justice Alito, and Justice Kagan.

The Chief Justice said:

The Court now recognizes the Solicitor General of the United States.

Solicitor General Verrilli said:

Mr. Chief Justice, and may it please the Court. I have the privilege to present to the Court the Eighty-third Attorney General of the United States, Loretta Lynch of New York.

The Chief Justice said:

General Lynch, on behalf of the Court, I welcome you as the Chief Legal Officer of the United States and as an officer of this Court. We recognize the very important responsibilities that are entrusted to you. Your commission as Attorney General of the United States will be noted on the records of the Court. We wish you well in the discharge of the duties of your new office.

Attorney General Lynch said:

Thank you MR. CHIEF JUSTICE.

THE CHIEF JUSTICE said:

Thank you General for coming to the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2014

DIRECT MARKETING ASSOCIATION *v.* BROHL, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE

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

No. 13–1032. Argued December 8, 2014—Decided March 3, 2015

Colorado requires residents who purchase tangible personal property from a retailer that does not collect sales or use taxes to file a return and remit those taxes directly to the State Department of Revenue. To improve compliance, Colorado enacted legislation requiring noncollecting retailers to notify any Colorado customer of the State's sales and use tax requirement and to report tax-related information to those customers and the Colorado Department of Revenue.

Petitioner, a trade association of retailers, many of which sell to Colorado residents but do not collect taxes, sued respondent, the Director of the Colorado Department of Revenue, in Federal District Court, alleging that Colorado's law violates the United States and Colorado Constitutions. The District Court granted petitioner partial summary judgment and permanently enjoined enforcement of the notice and reporting requirements, but the Tenth Circuit reversed. That court held that the Tax Injunction Act (TIA), which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," 28 U. S. C. § 1341, deprived the District Court of jurisdiction over the suit.

Syllabus

Held: Petitioner's suit is not barred by the TIA. Pp. 7–16.

(a) The relief sought by petitioner would not "enjoin, suspend or restrain the assessment, levy or collection" of Colorado's sales and use taxes. Pp. 7–14.

(1) The terms "assessment," "levy," and "collection" do not encompass Colorado's enforcement of its notice and reporting requirements. These terms, read in light of the Federal Tax Code, refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability. Information gathering has long been treated as a phase of tax administration that occurs before assessment, levy, or collection. See, *e. g.*, 26 U. S. C. § 6041 *et seq.* Respondent portrays the notice and reporting requirements as part of the State's assessment and collection process, but the State's assessment and collection procedures are triggered after the State has received the returns and made the deficiency determinations that the notice and reporting requirements are meant to facilitate. Enforcement of the requirements may improve the State's ability to assess and ultimately collect its sales and use taxes, but the TIA is not keyed to all such activities. Such a rule would be inconsistent with the statute's text and this Court's rule favoring clear boundaries in the interpretation of jurisdictional statutes. See *Hertz Corp.* v. *Friend*, 559 U. S. 77, 94. Pp. 7–12.

(2) Petitioner's suit cannot be understood to "restrain" the "assessment, levy or collection" of Colorado's sales and use taxes merely because it may inhibit those activities. While the word "restrain" can be defined as broadly as the Tenth Circuit defined it, it also has a narrower meaning used in equity, which captures only those orders that stop acts of assessment, levy, or collection. The context in which the TIA uses the word "restrain" resolves this ambiguity in favor of this narrower meaning. First, the verbs accompanying "restrain"—"enjoin" and "suspend"—are terms of art in equity and refer to different equitable remedies that restrict or stop official action, strongly suggesting that "restrain" does the same. Additionally, "restrain" acts on "assessment," "levy," and "collection," a carefully selected list of technical terms. The Tenth Circuit's broad meaning would defeat the precision of that list and render many of those terms surplusage. Assigning "restrain" its meaning in equity is also consistent with this Court's recognition that the TIA "has its roots in equity practice," *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73, and with the principle that "[j]urisdictional rules should be clear," *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 321 (THOMAS, J., concurring). Pp. 12–14.

(b) The Court takes no position on whether a suit such as this might be barred under the "comity doctrine," which "counsels lower federal

courts to resist engagement in certain cases falling within their jurisdiction," *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 421. The Court leaves it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado. P. 15.

735 F. 3d 904, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 16. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, and in which SOTOMAYOR, J., joined in part, *post*, p. 19.

George S. Isaacson argued the cause for petitioner. With him on the briefs was *Matthew P. Schaefer*.

Daniel D. Domenico, Solicitor General of Colorado, argued the cause for respondent. With him on the brief were *John W. Suthers*, Attorney General, *Melanie J. Snyder*, Deputy Attorney General, and *Grant T. Sullivan* and *Michael Francisco*, Assistant Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Pratik A. Shah*, *Hyland Hunt*, *John B. Capehart*, *Kathryn Comerford Todd*, and *Warren Postman*; for the Council on State Taxation by *Frederick Nicely*, *Karl Frieden*, *Douglas Lindholm*, and *Wm. Gregory Turner*; for the Institute for Professionals in Taxation by *Mary T. Benton*, *Clark R. Calhoun*, *Cass D. Vickers*, and *Keith G. Landry*; for NFIB Small Business Legal Center et al. by *Thomas M. Christina* and *Jeffrey P. Dunlaevy*; and for the Tax Foundation by *Joseph D. Henchman*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E. Shapiro*, Solicitor General, *Brett E. Legner*, Deputy Solicitor General, and *Richard S. Huszagh*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Thomas J. Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Greg Abbott* of Texas, *Sean D. Reyes* of Utah, *William H. Sorrell* of Ver-

JUSTICE THOMAS delivered the opinion of the Court.

In an effort to improve the collection of sales and use taxes for items purchased online, the State of Colorado passed a law requiring retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the Colorado Department of Revenue. We must decide whether the Tax Injunction Act, which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U. S. C. § 1341, bars a suit to enjoin the enforcement of this law. We hold that it does not.

I

A

Like many States, Colorado has a complementary sales-and-use tax regime. Colorado imposes both a 2.9 percent tax on the sale of tangible personal property within the State, Colo. Rev. Stat. §§ 39–26–104(1)(a), 39–26–106(1)(a)(II) (2014), and an equivalent use tax for any property stored, used, or consumed in Colorado on which a sales tax was not paid to a retailer, §§ 39–26–202(1)(b), 39–26–204(1). Retailers with a physical presence in Colorado must collect the sales or use tax from consumers at the point of sale and remit the proceeds to the Colorado Department of Revenue (Department). §§ 39–26–105(1), 39–26–106(2)(a). But under our negative Commerce Clause precedents, Colorado may not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department. See *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 315–318 (1992). Thus, Colorado requires its consumers who pur-

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mont, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for Interested Law Professors by *Alan B. Morrison*, *pro se*; for the Multistate Tax Commission by *Joe Huddleston*, *Helen Hecht*, *Sheldon Laskin*, and *Thomas Shimkin*; and for the National Governors Association et al. by *Ronald A. Parsons, Jr.*, and *Lisa Soronen*.

chase tangible personal property from a retailer that does not collect these taxes (a "noncollecting retailer") to fill out a return and remit the taxes to the Department directly. § 39–26–204(1).

Voluntary compliance with the latter requirement is relatively low, leading to a significant loss of tax revenue, especially as Internet retailers have increasingly displaced their brick-and-mortar kin. In the decade before this suit was filed in 2010, e-commerce more than tripled. App. 28. With approximately 25 percent of taxes unpaid on Internet sales, Colorado estimated in 2010 that its revenue loss attributable to noncompliance would grow by more than $20 million each year. App. 30–31.

In hopes of stopping this trend, Colorado enacted legislation in 2010 imposing notice and reporting obligations on noncollecting retailers whose gross sales in Colorado exceed $100,000. Three provisions of that Act, along with their implementing regulations, are at issue here.

First, noncollecting retailers must "notify Colorado purchasers that sales or use tax is due on certain purchases . . . and that the state of Colorado requires the purchaser to file a sales or use tax return." § 39–21–112(3.5)(c)(I); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(2) (2014), online at http://www.sos.co.us/CRR (as visited Feb. 27, 2015, and available in the Clerk of Court's case file). The retailer must provide this notice during each transaction with a Colorado purchaser, *ibid.*, and is subject to a penalty of $5 for each transaction in which it fails to do so, Colo. Rev. Stat. § 39–21–112(3.5)(c)(II).

Second, by January 31 of each year, each noncollecting retailer must send a report to all Colorado purchasers who bought more than $500 worth of goods from the retailer in the previous year. § 39–21–112(3.5)(d)(I); 1 Colo. Code Regs. §§ 201–1:39–21–112.3.5(3)(a), (c). That report must list the dates, categories, and amounts of those purchases. Colo. Rev. Stat. § 39–21–112(3.5)(d)(I); see also 1 Colo. Code Regs.

§§ 201–1:39–21–112.3.5(3)(a), (c). It must also contain a notice stating that Colorado "requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer." Colo. Rev. Stat. § 39–21–112(3.5)(d)(I)(A). The retailer is subject to a penalty of $10 for each report it fails to send. § 39–21–112(3.5)(d)(III)(A); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(3)(d).

Finally, by March 1 of each year, noncollecting retailers must send a statement to the Department listing the names of their Colorado customers, their known addresses, and the total amount each Colorado customer paid for Colorado purchases in the prior calendar year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(II)(A); 1 Colo. Code Regs. § 201–1:39–21–112.3.5(4). A noncollecting retailer that fails to make this report is subject to a penalty of $10 for each customer that it should have listed in the report. Colo. Rev. Stat. § 39–21–112(3.5)(d)(III)(B); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(4)(f).

B

Petitioner Direct Marketing Association is a trade association of businesses and organizations that market products directly to consumers, including those in Colorado, via catalogs, print advertisements, broadcast media, and the Internet. Many of its members have no physical presence in Colorado and choose not to collect Colorado sales and use taxes on Colorado purchases. As a result, they are subject to Colorado's notice and reporting requirements.

In 2010, Direct Marketing Association brought suit in the United States District Court for the District of Colorado against the Executive Director of the Department, alleging that the notice and reporting requirements violate provisions of the United States and Colorado Constitutions. As relevant here, Direct Marketing Association alleged that the provisions (1) discriminate against interstate commerce and (2) impose undue burdens on interstate commerce, all in vio-

lation of this Court's negative Commerce Clause precedents. At the request of both parties, the District Court stayed all challenges except these two, in order to facilitate expedited consideration. It then granted partial summary judgment to Direct Marketing Association and permanently enjoined enforcement of the notice and reporting requirements. App. to Pet. for Cert. B–1 to B–25.

Exercising appellate jurisdiction under 28 U. S. C. § 1292(a)(1), the United States Court of Appeals for the Tenth Circuit reversed. Without reaching the merits, the Court of Appeals held that the District Court lacked jurisdiction over the suit because of the Tax Injunction Act (TIA), 28 U. S. C. § 1341. Acknowledging that the suit "differs from the prototypical TIA case," the Court of Appeals nevertheless found it barred by the TIA because, if successful, it "would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." 735 F. 3d 904, 913 (2013).

We granted certiorari, 573 U. S. 957 (2014), and now reverse.

II

Enacted in 1937, the TIA provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." § 1341. The question before us is whether the relief sought here would "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." Because we conclude that it would not, we need not consider whether "a plain, speedy and efficient remedy may be had in the courts of" Colorado.

A

The District Court enjoined state officials from enforcing the notice and reporting requirements. Because an injunction is clearly a form of equitable relief barred by the TIA,

the question becomes whether the enforcement of the notice and reporting requirements is an act of "assessment, levy or collection." We need not comprehensively define these terms to conclude that they do not encompass enforcement of the notice and reporting requirements at issue.

In defining the terms of the TIA, we have looked to federal tax law as a guide. See, *e. g.*, *Hibbs* v. *Winn*, 542 U. S. 88, 100 (2004). Although the TIA does not concern federal taxes, it was modeled on the Anti-Injunction Act (AIA), which does. See *Jefferson County* v. *Acker*, 527 U. S. 423, 434–435 (1999). The AIA provides in relevant part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U. S. C. § 7421(a). We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code. *Hibbs*, 542 U. S., at 102–105; *id.*, at 115 (KENNEDY, J., dissenting). Read in light of the Federal Tax Code at the time the TIA was enacted (as well as today), these three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability.

To begin, the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection. See §§ 6001–6117; §§ 1500–1524 (1934 ed.); see also § 1533 ("All provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply . . . "). This step includes private reporting of information used to determine tax liability, see, *e. g.*, § 1511(a), including reports by third parties who do not owe the tax, see, *e. g.*, § 6041 *et seq.* (2012 ed.); see also §§ 1512(a)–(b) (1934 ed.) (authorizing a collector or the Commissioner of Internal Revenue, when a taxpayer fails to file a return, to make a return "from his own knowledge and from such information as he can obtain through testimony or otherwise").

"Assessment" is the next step in the process, and it refers to the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority. See § 1530. In *Hibbs*, the Court noted that "assessment," as used in the Internal Revenue Code, "involves a 'recording' of the amount the taxpayer owes the Government." 542 U. S., at 100 (quoting § 6203 (2000 ed.)). It might also be understood more broadly to encompass the process by which that amount is calculated. See *United States* v. *Galletti*, 541 U. S. 114, 122 (2004); see also *Hibbs*, *supra*, at 100, n. 3. But even understood more broadly, "assessment" has long been treated in the Tax Code as an official action taken based on information already reported to the taxing authority. For example, not many years before it passed the TIA, Congress passed a law providing that the filing of a return would start the running of the clock for a timely assessment. See, *e. g.*, Revenue Act of 1924, Pub. L. 68–176, § 277(a), 43 Stat. 299. Thus, assessment was understood as a step in the taxation process that occurred after, and was distinct from, the step of reporting information pertaining to tax liability.

"Levy," at least as it is defined in the Federal Tax Code, refers to a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer's property. See 26 U. S. C. § 6331 (2012 ed.); § 1582 (1934 ed.). Because the word "levy" does not appear in the AIA, however, one could argue that its meaning in the TIA is not tied to the meaning of the term as used in federal tax law. If that were the case, one might look to contemporaneous dictionaries, which defined "levy" as the legislative function of laying or imposing a tax and the executive functions of assessing, recording, and collecting the amount a taxpayer owes. See Black's Law Dictionary 1093 (3d ed. 1933) (Black's); see also Webster's New International Dictionary 1423 (2d ed. 1939) ("[t]o raise or collect, as by assessment, execution or other legal process, etc.; to exact or impose by

authority . . . "); §§ 1540, 1544 (using "levying" and "levied" in the more general sense of an executive imposition of a tax liability). But under any of these definitions, "levy" would be limited to an official governmental action imposing, determining the amount of, or securing payment on a tax.

Finally, "collection" is the act of obtaining payment of taxes due. See Black's 349 (defining "collect" as "to obtain payment or liquidation" of a debt or claim). It might be understood narrowly as a step in the taxation process that occurs after a formal assessment. Consistent with this understanding, we have previously described it as part of the "enforcement process . . . that 'assessment' sets in motion." *Hibbs*, *supra*, at 102, n. 4. The Federal Tax Code at the time the TIA was enacted provided for the Commissioner of Internal Revenue to certify a list of assessments "to the proper collectors . . . who [would] proceed to collect and account for the taxes and penalties so certified." § 1531. That collection process began with the collector "giv[ing] notice to each person liable to pay any taxes stated [in the list] . . . stating the amount of such taxes and demanding payment thereof." § 1545(a). When a person failed to pay, the Government had various means to collect the amount due, including liens, § 1560, distraint, § 1580, forfeiture, and other legal proceedings, § 1640. Today's Tax Code continues to authorize collection of taxes by these methods. § 6302 (2012 ed.). "Collection" might also be understood more broadly to encompass the receipt of a tax payment before a formal assessment occurs. For example, at the time the TIA was enacted, the Tax Code provided for the assessment of money already received by a person "required to *collect* or withhold any internal-revenue tax from any other person," suggesting that at least some act of collection might occur before a formal assessment. § 1551 (1934 ed.) (emphasis added). Either way, "collection" is a separate step in the taxation process from assessment and the reporting on which assessment is based.

So defined, these terms do not encompass Colorado's enforcement of its notice and reporting requirements. The Executive Director does not seriously contend that the provisions at issue here involve a "levy"; instead she portrays them as part of the process of assessment and collection. But the notice and reporting requirements precede the steps of "assessment" and "collection." The notice given to Colorado consumers, for example, informs them of their use-tax liability and prompts them to keep a record of taxable purchases that they will report to the State at some future point. The annual summary that the retailers send to consumers provides them with a reminder of that use-tax liability and the information they need to fill out their annual returns. And the report the retailers file with the Department facilitates audits to determine tax deficiencies. After each of these notices or reports is filed, the State still needs to take further action to assess the taxpayer's use-tax liability and to collect payment from him. See Colo. Rev. Stat. § 39–26–204(3) (describing the procedure for "assessing and collecting [use] taxes" on the basis of returns filed by consumers and collecting retailers). Colorado law provides for specific assessment and collection procedures that are triggered after the State has received the returns and made the deficiency determinations that the notice and reporting requirements are meant to facilitate. See § 39–26–210; 1 Colo. Code Regs. § 201–1:39–21–107(1) ("The statute of limitations on assessments of . . . sales [and] use . . . tax . . . shall be three years from the date the return was filed . . . ").

Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes. See *Hertz Corp.* v. *Friend*, 559 U. S. 77,

94 (2010). The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.[1]

B

Apparently concluding that enforcement of the notice and reporting requirements was not itself an act of "assessment, levy or collection," the Court of Appeals did not rely on those terms to hold that the TIA barred the suit. Instead, it adopted a broad definition of the word "restrain" in the TIA, which bars not only suits to "enjoin . . . assessment, levy or collection" of a state tax but also suits to "suspend or restrain" those activities. Specifically, the Court of Appeals concluded that the TIA bars any suit that would "limit, restrict, or hold back" the assessment, levy, or collection of state taxes. 735 F. 3d, at 913. Because the notice and reporting requirements are intended to facilitate collection of taxes, the Court of Appeals reasoned that the relief Direct Marketing Association sought and received would "limit, restrict, or hold back" the Department's collection efforts. That was error.

"Restrain," standing alone, can have several meanings. One is the broad meaning given by the Court of Appeals,

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[1] Our decision in *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982), is not to the contrary. In that case, California churches and religious schools sought "to enjoin the State from collecting both tax information and the state [unemployment] tax," based, in part, on the argument that "recordkeeping, registration, and reporting requirements" violate the Establishment Clause by creating the potential for excessive entanglement with religion. *Id.*, at 398, 415. We held that the TIA barred that suit. *Id.*, at 396. But nowhere in their brief to this Court did the plaintiffs in *Grace Brethren Church* separate out their request to enjoin the tax from their request for relief from the recordkeeping and reporting requirements. See Brief for Grace Brethren Church et al. in *California* v. *Grace Brethren Church*, O. T. 1981, No. 81–31 etc., pp. 34–38. *Grace Brethren Church* thus cannot fairly be read as resolving, or even considering, the question presented in this case.

which captures orders that merely *inhibit* acts of "assessment, levy or collection." See Black's 1548. Another, narrower meaning, however, is "[t]o prohibit from action; to put compulsion upon . . . to enjoin," *ibid.*, which captures only those orders that stop (or perhaps compel) acts of "assessment, levy or collection."

To resolve this ambiguity, we look to the context in which the word is used. *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). The statutory context provides several clues that lead us to conclude that the TIA uses the word "restrain" in its narrower sense. Looking to the company "restrain" keeps, *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961), we first note that the words "enjoin" and "suspend" are terms of art in equity, see *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 126, and n. 13 (1981) (Brennan, J., concurring). They refer to different equitable remedies that restrict or stop official action to varying degrees, strongly suggesting that "restrain" does the same. See *Hibbs*, 524 U. S., at 118 (KENNEDY, J., dissenting); see also *Jefferson County*, 572 U. S., at 433.

Additionally, as used in the TIA, "restrain" acts on a carefully selected list of technical terms—"assessment, levy, collection"—not on an all-encompassing term, like "taxation." To give "restrain" the broad meaning selected by the Court of Appeals would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to "hold back" "collection." Such a broad construction would thus render "assessment [and] levy"—not to mention "enjoin [and] suspend"—mere surplusage, a result we try to avoid. See *Hibbs*, *supra*, at 101 (interpreting the terms of the TIA to avoid superfluity).

Assigning the word "restrain" its meaning in equity is also consistent with our recognition that the TIA "has its roots in equity practice." *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976). Under the comity doctrine that the TIA partially codifies, *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 431–

432 (2010), courts of equity exercised their "sound discretion" to withhold certain forms of extraordinary relief, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297 (1943); see also *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871). Even while refusing to grant certain forms of equitable relief, those courts did not refuse to hear every suit that would have a negative impact on States' revenues. See, *e. g.*, *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 127 (1930); see also 5 R. Paul & J. Mertens, Law of Federal Income Taxation § 42.139 (1934) (discussing the word "restraining" in the AIA in its equitable sense). The Court of Appeals' definition of "restrain," however, leads the TIA to bar every suit with such a negative impact. This history thus further supports the conclusion that Congress used "restrain" in its narrower, equitable sense, rather than in the broad sense chosen by the Court of Appeals.

Finally, adopting a narrower definition is consistent with the rule that "[j]urisdictional rules should be clear." *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 321 (2005) (THOMAS, J., concurring); see also *Hertz Corp.*, 559 U. S., at 94. The question—at least for negative injunctions—is whether the relief to some degree stops "assessment, levy or collection," not whether it merely inhibits them. The Court of Appeals' definition of "restrain," by contrast, produces a "'vague and obscure'" boundary that would result in both needless litigation and uncalled-for dismissal, *Sisson* v. *Ruby*, 497 U. S. 358, 375 (1990) (SCALIA, J., concurring in judgment), all in the name of a jurisdictional statute meant to protect state resources.

Applying the correct definition, a suit cannot be understood to "restrain" the "assessment, levy or collection" of a state tax if it merely inhibits those activities.[2]

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[2] Because the text of the TIA resolves this case, we decline the parties' invitation to derive various *per se* rules from our decision in *Hibbs* v. *Winn*, 542 U. S. 88 (2004). In *Hibbs*, the Court held that the TIA did not bar an Establishment Clause challenge to a state tax credit for charitable

III

We take no position on whether a suit such as this one might nevertheless be barred under the "comity doctrine," which "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Levin*, 560 U. S., at 421. Under this doctrine, federal courts refrain from "interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. " *Id.*, at 422 (internal quotation marks omitted).

Unlike the TIA, the comity doctrine is nonjurisdictional. And here, Colorado did not seek comity from either of the courts below. Moreover, we do not understand the Court of Appeals' footnote concerning comity to be a holding that comity compels dismissal. See 735 F. 3d, at 920, n. 11 ("Although we remand to dismiss [petitioner's] claims pursuant to the TIA, we note that the doctrine of comity also militates in favor of dismissal"). Accordingly, we leave it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado.

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donations to organizations that provided scholarships for children to attend parochial schools. *Id.*, at 94–96. Direct Marketing Association argues that *Hibbs* stands for the proposition that the TIA has no application to third-party suits by nontaxpayers who do not challenge their own liability. Brief for Petitioner 18–21. The Executive Director acknowledges that *Hibbs* created an exception to the TIA, but argues that the exception does not apply to suits that restrain activities that have a collection-propelling function. Brief for Respondent 25–33.

In *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413 (2010), we emphasized the narrow reach of *Hibbs*, explaining that it was not "a run-of-the-mine tax case," 560 U. S., at 430. As we explained, *Hibbs* held only "that the TIA did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision." 560 U. S., at 430; accord, *id.*, at 434 (THOMAS, J., concurring in judgment). Because we have already concluded that the TIA does not preclude this challenge, it is unnecessary to consider whether and how the narrow rule announced in *Hibbs* would apply to suits like this one.

* * *

Because the TIA does not bar petitioner's suit, we reverse the judgment of the Court of Appeals. Like the Court of Appeals, we express no view on the merits of those claims, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

The opinion of the Court has my unqualified join and assent, for in my view it is complete and correct. It does seem appropriate, and indeed necessary, to add this separate statement concerning what may well be a serious, continuing injustice faced by Colorado and many other States.

Almost half a century ago, this Court determined that, under its Commerce Clause jurisprudence, States cannot require a business to collect use taxes—which are the equivalent of sales taxes for out-of-state purchases—if the business does not have a physical presence in the State. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967). Use taxes are still due, but under *Bellas Hess* they must be collected from and paid by the customer, not the out-of-state seller. *Id.*, at 758.

Twenty-five years later, the Court relied on *stare decisis* to reaffirm the physical presence requirement and to reject attempts to require a mail-order business to collect and pay use taxes. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 311 (1992). This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), "contemporary Commerce Clause jurisprudence might not dictate the same result" as the Court had reached in *Bellas Hess*. *Quill Corp.*, 504 U. S., at 311. In other words, the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided. Still, the Court determined vendors who had no physical presence in a State did not have the " 'sub-

stantial nexus with the taxing State'" necessary to impose tax-collection duties under the Commerce Clause. *Id.*, at 311–313. Three Justices concurred in the judgment, stating their votes to uphold the rule of *Bellas Hess* were based on *stare decisis* alone. 504 U. S., at 319 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment). This further underscores the tenuous nature of that holding—a holding now inflicting extreme harm and unfairness on the States.

In *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy. There is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently "substantial nexus" to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet. After all, "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988). This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. 504 U. S., at 329 (White, J., concurring in part and dissenting in part). But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States. App. 28.

Because of *Quill* and *Bellas Hess*, States have been unable to collect many of the taxes due on these purchases. California, for example, has estimated that it is able to collect only about 4% of the use taxes due on sales from out-of-state vendors. See California State Board of Equalization, Revenue Estimate: Electronic Commerce and Mail Order Sales, Rev. 8/13, p. 7 (2013) (Table 3). The result has been a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay

taxes at the register. The facts of this case exemplify that trend: Colorado's losses in 2012 are estimated to be around $170 million. See D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses From Electronic Commerce 11 (2009) (Table 5). States' education systems, healthcare services, and infrastructure are weakened as a result.

The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. See PricewaterhouseCoopers, Understanding How U. S. Online Shoppers Are Reshaping the Retail Experience 3 (Mar. 2012) (nearly 70% of American consumers shopped online in 2011). Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier. See *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (*stare decisis* weakened where "experience has pointed up the precedent's shortcomings"). It should be left in place only if a powerful showing can be made that its rationale is still correct.

The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appro-

priate case for this Court to reexamine *Quill* and *Bellas Hess*.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.*

I write separately to make two observations.

First, as the Court has observed, Congress designed the Tax Injunction Act not "to prevent federal-court interference with all aspects of state tax administration," *Hibbs* v. *Winn*, 542 U. S. 88, 105 (2004) (internal quotation marks omitted), but more modestly to stop litigants from using federal courts to circumvent States' "pay without delay, then sue for a refund" regimes. See *id.*, at 104–105 ("[I]n enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority."). This suit does not implicate that congressional objective. The Direct Marketing Association is not challenging its own or anyone else's tax liability or tax collection responsibilities. And the claim is not one likely to be pursued in a state refund action. A different question would be posed, however, by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, *e. g.*, an employer or an in-state retailer, litigation in lieu of a direct challenge to an "assessment," "levy," or "collection." The Court does not reach today the question whether the claims in such a suit, *i. e.*, claims suitable for a refund action, are barred by the Tax Injunction Act. On that understanding, I join the Court's opinion.

Second, the Court's decision in this case, I emphasize, is entirely consistent with our decision in *Hibbs*. The plaintiffs in *Hibbs* sought to enjoin certain state tax credits. That suit, like the action here, did not directly challenge

*JUSTICE SOTOMAYOR joins this opinion with respect to the first observation.

"acts of assessment, levy, and collection themselves," *ante*, at 12. See *Hibbs*, 542 U. S., at 96, 99–102. Moreover, far from threatening to deplete the State's coffers, "the relief requested [in *Hibbs*] would [have] result[ed] in the state's receiving *more* funds that could be used for the public benefit." *Id.*, at 96 (internal quotation marks omitted; emphasis added). Even a suit that somewhat "inhibits" "assessment, levy, or collection," the Court holds today, falls outside the scope of the Tax Injunction Act. *Ante*, at 14. That holding casts no shadow on *Hibbs*' conclusion that a suit further removed from the Act's "state-revenue-protective moorings," 542 U. S., at 106, remains outside the Act's scope.

Syllabus

ALABAMA DEPARTMENT OF REVENUE ET AL. *v.* CSX TRANSPORTATION, INC.

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

No. 13–553. Argued December 9, 2014—Decided March 4, 2015

Alabama imposes sales and use taxes on railroads when they purchase or consume diesel fuel, but exempts from those taxes trucking transport companies (motor carriers) and companies that transport goods interstate through navigable waters (water carriers), both railroad competitors. Motor carriers pay an alternative fuel-excise tax on diesel, but water carriers pay neither the sales tax nor the excise tax. Respondent (CSX), an interstate rail carrier that operates in Alabama, sought to enjoin state officers from collecting sales tax on its diesel fuel purchases, claiming that the State's asymmetrical tax treatment "discriminates against a rail carrier" in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, or 4–R Act, 49 U. S. C. § 11501(b)(4). This Court held that a tax "discriminates" under subsection (b)(4) when it treats "groups [that] are similarly situated" differently without sufficient "justification for the difference in treatment," *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 287 (*CSX I*). On remand, the District Court rejected CSX's claim. Reversing, the Eleventh Circuit held that CSX could establish discrimination by showing that Alabama taxed rail carriers differently than their competitors, but rejected Alabama's argument that imposing a fuel-excise tax on motor carriers, but not rail carriers, justified imposing the sales tax on rail carriers, but not motor carriers.

Held:

1. The Eleventh Circuit properly concluded that CSX's competitors are an appropriate comparison class for its subsection (b)(4) claim.

All general and commercial taxpayers may be *an* appropriate comparison class for a subsection (b)(4) claim, but it is not the only one. Nothing in the ordinary meaning of the word "discrimination" suggests that it occurs only when the victim is singled out relative to the population at large. Context confirms this reading. The 4–R Act is an "asymmetrical statute." *CSX I*, *supra*, at 296. In subsections (b)(1) to (b)(3)—which specify prohibitions directed toward property taxes—the comparison class is limited to commercial and industrial property in the same assessment jurisdiction. But subsection (b)(4) contains no such limitation, so the comparison class is to be determined based on the theory of discrimination alleged in the claim. Thus, when a railroad alleges that a tax disadvan-

tages it compared to its transportation industry competitors, its competitors in that jurisdiction are the comparison class. Because subsection (b)(4) requires a showing of *discrimination*, however, the comparison class must consist of individuals similarly situated to the claimant.

Subsection (b)(4) would be deprived of all real-world effect if "similarly situated" were given the same narrow construction the concept has in the Equal Protection Clause context, where it would be permissible for a State to tax a rail carrier more than a motor carrier, despite their seemingly similar lines of business. The category of "similarly situated" (b)(4) comparison classes must at least include the commercial and industrial taxpayers specified in the other subsections. But it also can include a railroad's competitors. Discrimination in favor of that class both falls within the ordinary meaning of "discrimination" and frustrates the 4–R Act's purpose of "restor[ing] the financial stability of the [Nation's] railway system" while "foster[ing] competition among all carriers by railroad and other modes of transportation," 90 Stat. 33. Contrary to Alabama's argument, normal rules of interpretation would say that the explicit limitation to "commercial and industrial" in the first three provisions, and its absence in the fourth, suggests that no such limitation applies to the fourth. Alabama's additional arguments are also unavailing. Pp. 26–30.

2. The Eleventh Circuit erred in refusing to consider whether Alabama could justify its decision to exempt motor carriers from its sales and use taxes through its decision to subject motor carriers to a fuel-excise tax. It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt, since *both* competitors could then claim to be discriminated against relative to each other. The Court's negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479–480. Similarly, an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory. CSX's counterarguments are rejected. On remand, the Eleventh Circuit is to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption. Although the State cannot offer a similar defense with respect to its water carrier exemption, the court should also examine whether any of the State's alternative rationales justify that exemption. Pp. 30–32.

720 F. 3d 863, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined.

THOMAS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 32.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for petitioners. With him on the briefs were *Luther Strange*, Attorney General, *Megan A. Kirkpatrick*, Assistant Solicitor General, *Mark Griffin*, Chief Legal Counsel, and *Margaret Johnson McNeill* and *Keith Maddox*, Assistant Attorneys General.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Stewart*, *Anthony J. Steinmeyer*, *Mark W. Pennak*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, *Joy K. Park*, and *Melissa Porter*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Jacqueline G. Cooper*, *Paul J. Sampson*, *James W. McBride*, *Stephen D. Goodwin*, *Ellen M. Fitzsimmons*, *Joel W. Pangborn*, and *Peter J. Schudtz*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Tennessee et al. by *Robert E. Cooper, Jr.*, Attorney General of Tennessee, *Joseph F. Whalen*, Acting Solicitor General, *Charles L. Lewis*, Deputy Attorney General, and *Talmage M. Watts*, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Lori Swanson* of Minnesota, *Catherine Cortez Masto* of Nevada, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Marty J. Jackley* of South Dakota, *Sean D. Reyes* of Utah, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for Alabama Cities et al. by *Florence A. Kessler*, *E. Erich Bergdolt*, *Frank C. Ellis, Jr.*, *J. Bentley Owens III*, *C. McDowell Crook, Jr.*, *Kimberly O. Fehl*, *Brian Kilgore*, and *Robert M. Spence*; for the American Trucking Associations, Inc., by *Richard Pianka* and *Prasad Sharma*; for the Multistate Tax Commission by *Joe Huddleston* and *Helen Hecht*; and for State & Local Government Organizations by *Sarah M. Shalf* and *Lisa Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Betty Jo Christian*, *Timothy M. Walsh*, *Jessica I. Rothschild*, *Louis P. Warchot*, and *Janet L. Bartelmay*; for the Council

JUSTICE SCALIA delivered the opinion of the Court.

Federal law prohibits States from imposing taxes that "discriminat[e] against a rail carrier." 49 U. S. C. §11501(b)(4). We are asked to decide whether a State violates this prohibition by taxing diesel fuel purchases made by a rail carrier while exempting similar purchases made by its competitors; and if so, whether the violation is eliminated when other tax provisions offset the challenged treatment of railroads.

I

Alabama taxes businesses and individuals for the purchase or use of personal property. Ala. Code §§40–23–2(1), 40–23–61(a) (2011). Alabama law sets the general tax rate at 4% of the value of the property purchased or used. *Ibid.*

The State applies the tax, at the usual 4% rate, to railroads' purchase or use of diesel fuel for their rail operations. But it exempts from the tax purchases and uses of diesel fuel made by trucking transport companies (whom we will call motor carriers) and companies that transport goods interstate through navigable waters (water carriers). Motor carriers instead pay a 19-cent-per-gallon fuel-excise tax on diesel; water carriers pay neither the sales nor fuel-excise tax on their diesel. §40–17–325(a)(2) and (b); §40–23–4(a)(10) (2014 Cum. Supp.). The parties stipulate that rail carriers, motor carriers, and water carriers compete.

Respondent CSX Transportation, a rail carrier operating in Alabama and other States, believes this asymmetrical tax treatment "discriminates against a rail carrier" in violation of the alliterative Railroad Revitalization and Regulatory Reform Act of 1976, or 4–R Act. 49 U. S. C. §11501(b)(4). It sought to enjoin petitioners, the Alabama Department of

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on State Taxation by *Karl Frieden*, *Frederick Nicely*, and *Douglas Lindholm*; and for the Tax Foundation by *Walter Hellerstein*, *Eric S. Tresh*, *Maria M. Todorova*, *Jonathan A. Feldman*, and *Joseph D. Henchman*.

Revenue and its Commissioner (Alabama or State), from collecting sales tax on its diesel fuel purchases.

At first, the District Court and Eleventh Circuit both rejected CSX's complaint. *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 350 Fed. Appx. 318 (2009). On this lawsuit's first trip here, we reversed. We rejected the State's argument that sales-and-use tax exemptions cannot "discriminate" within the meaning of subsection (b)(4), and remanded the case for further proceedings. *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 296–297 (2011) (*CSX I*).

On remand, the District Court rejected CSX's claim after a trial. 892 F. Supp. 2d 1300 (ND Ala. 2012). The Eleventh Circuit reversed. 720 F. 3d 863 (2013). It held that, on CSX's challenge, CSX could establish discrimination by showing the State taxed rail carriers differently than their competitors—which, by stipulation, included motor carriers and water carriers. But it rejected Alabama's argument that the fuel-excise taxes offset the sales taxes—in other words, that because it imposed its fuel-excise tax on motor carriers, but not rail carriers, it was justified in imposing the sales tax on rail carriers, but not motor carriers. *Ibid.*

We granted certiorari to resolve whether the Eleventh Circuit properly regarded CSX's competitors as an appropriate comparison class for its subsection (b)(4) claim. 573 U. S. 957 (2014). We also directed the parties to address whether, when resolving a claim of unlawful tax discrimination, a court should consider aspects of a State's tax scheme apart from the challenged provision. *Ibid.*

II

The 4–R Act provides:

> "(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

> "(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> "(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> "(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> "(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." § 11501(b)(1)–(4).

In our last opinion in this case, we held that "discriminates" in subsection (b)(4) carries its ordinary meaning, and that a tax discriminates under subsection (b)(4) when it treats "groups [that] are similarly situated" differently without sufficient "justification for the difference in treatment." *CSX I*, *supra*, at 287. Here, we address the meaning of these two quoted phrases.

A

The first question in this case is who is the "comparison class" for purposes of a subsection (b)(4) claim. Alabama argues that the only appropriate comparison class for a subsection (b)(4) claim is all general commercial and industrial taxpayers. We disagree. While all general and commercial taxpayers is *an* appropriate comparison class, it is not the only one.

Nothing in the ordinary meaning of the word "discrimination" suggests that it occurs only when the victim is singled out relative to the population at large. If, for example, a State offers free college education to all returning combat veterans, but arbitrarily excepts those who served in the

Marines, we would say that Marines have experienced discrimination. That would remain the case even though the Marines are treated the same way as members of the general public, who have to pay for their education.

Context confirms that the comparison class for subsection (b)(4) is not limited as Alabama suggests. The 4–R Act is an "asymmetrical statute." *Id.*, at 296. Subsections (b)(1) to (b)(3) contain three specific prohibitions directed towards property taxes. Each requires comparison of railroad property to commercial and industrial property in the same assessment jurisdiction. The Act therefore limits the comparison class for challenges under those provisions. Even if the jurisdiction treats railroads less favorably than residential property, no violation of these subsections has occurred. Subsection (b)(4) contains no such limitation, leaving the comparison class to be determined as it is normally determined with respect to discrimination claims. And we think that depends on the theory of discrimination alleged in the claim. When a railroad alleges that a tax targets it for worse treatment than local businesses, all other commercial and industrial taxpayers are the comparison class. When a railroad alleges that a tax disadvantages it compared to its competitors in the transportation industry, the railroad's competitors in that jurisdiction are the comparison class.

So, picking a comparison class is extraordinarily easy. Unlike under subsections (b)(1)–(3), the railroad is not limited to all commercial and industrial taxpayers; all the world, or at least all the world within the taxing jurisdiction, is its comparison-class oyster. But that is not as generous a concession as might seem. What subsection (b)(4) requires, and subsections (b)(1)–(3) do not, is a showing of *discrimination*—of a failure to treat similarly situated persons alike. A comparison class will thus support a discrimination claim only if it consists of individuals similarly situated to the claimant.

That raises the question of when a proposed comparison class qualifies as similarly situated. In the Equal Protection Clause context, very few taxpayers are regarded as similarly

situated and thus entitled to equal treatment. There, a State may tax different lines of businesses differently with near-impunity, even if they are apparently similar. We have upheld or approved of distinctions between utilities—including a railroad—and other corporations, *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 579 (1938), between wholesalers and retailers in goods, *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 120–121 (1941), between chain retail stores and independent retail stores, *State Bd. of Tax Comm'rs of Ind.* v. *Jackson*, 283 U. S. 527, 535, 541–542 (1931), between anthracite coal mines and bituminous coal mines, *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 254, 257 (1922), and between sellers of coal oil and sellers of coal, *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121 (1910). As one treatise has observed, we recognize a "wide latitude state legislatures enjoy in drawing tax classifications under the Equal Protection Clause." 1 J. Hellerstein & W. Hellerstein, State Taxation ¶3.03[1], p. 3–5 (3d ed. 2001–2005). This includes the power to impose "widely differing taxes on various trades or professions." *Id.*, at 3–5 to 3–6. It would be permissible—as far as the Equal Protection Clause is concerned—for a State to tax a rail carrier more than a motor carrier, despite the seeming similarity in their lines of business.

The concept of "similarly situated" individuals cannot be so narrow here. That would deprive subsection (b)(4) of all real-world effect, providing protection that the Equal Protection Clause already provides. Moreover, the category of "similarly situated" (b)(4) comparison classes must include commercial and industrial taxpayers. There is no conceivable reason why the statute would forbid property taxes higher than what that class enjoys (or suffers), but permit other taxes that discriminate in favor of that class vis-à-vis railroads. And we think the competitors of railroads can be another "similarly situated" comparison class, since discrimination in favor of that class most obviously frustrates the

purpose of the 4–R Act, which was to "restore the financial stability of the railway system of the United States," § 101(a), 90 Stat. 33, while "foster[ing] competition among all carriers by railroad and other modes of transportation," § 101(b)(2). We need not, and thus do not, express any opinion on what other comparison classes may qualify. Sufficient unto the day is the evil thereof.

Alabama claims that because subsections (b)(1) and (b)(3) (and (b)(2) through reference to (b)(1)) establish a comparison class of "commercial and industrial property," subsection (b)(4) must establish a comparison class of "general commercial and industrial taxpayers." This inverts normal rules of interpretation, which would say that the explicit limitation to "commercial and industrial" in the first three provisions, and the absence of such a limitation in the fourth, suggests that no such limitation applies to the fourth. Moreover, Alabama's interpretation would require us to dragoon the modifier "commercial and industrial"—but not the noun "property"—from the first three provisions, append "general" in front of it and "taxpayers" after, both words foreign to the preceding subsections. We might also have to strip away the restrictions in the definition of "commercial and industrial property," which excludes land primarily used for agricultural purposes and timber growing. 49 U. S. C. § 11501(a)(4). This is not our concept of fidelity to a statute's text.

Alabama responds that the introductory clause of § 11501(b)—which declares that the "following acts unreasonably burden and discriminate against interstate commerce"—"binds its four subsections together," Brief for Petitioners 23 (emphasis deleted), and gives them a common object and scope. The last time this case appeared before us, Alabama made a similar argument in support of the claim that, because subsections (b)(1)–(3) cover only property taxes, so too does subsection (b)(4). See Brief for Respondents in *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, O. T.

2010, No. 09–520, pp. 25–26. We rejected this argument then, and we reject it again now.

Alabama persists that a case-specific inquiry allows a railroad to "hand-pick [its] comparison class," Brief for Petitioners 41, which would be unfair—a "windfall" to railroads. *Ibid.* As we have described above, picking a class is easy, but it is not easy to establish that the selected class is "similarly situated" for purposes of discrimination in taxation. The Eleventh Circuit properly concluded that, in light of CSX Transportation's complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination. We therefore turn to the court's refusal to consider Alabama's alternative tax justifications.

B

A State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers. As we have discussed above, a rail carrier and its competitors can be considered similarly situated for purposes of this provision. But what about the claim that those competitors are subject to *other* taxes that the railroads avoid? We think Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax.

It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt. If that were true, *both* competitors could claim to be disfavored—discriminated against—relative to each other. Our negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479–480 (1932). We think that an alternative, roughly equivalent tax

is one possible justification that renders a tax disparity nondiscriminatory.

CSX claims that because the statutory prohibition forbids "[i]mpos[ing] another tax that discriminates against a rail carrier," 49 U. S. C. § 11501(b)(4)—"tax" in the singular—the appropriate inquiry is whether the challenged *tax* discriminates, not whether the tax code as a whole does so. It is undoubtedly correct that the "tax" (singular) must discriminate—but it does not discriminate unless it treats railroads differently from other *similarly situated* taxpayers *without sufficient justification*. A comparable tax levied on a competitor may justify not extending that competitor's exemption from a general tax to a railroad. It is easy to display the error of CSX's single-tax-provision approach. Under that model, the following tax would violate the 4–R Act: "(1) All railroads shall pay a 4% sales tax. (2) All other individuals shall also pay a 4% sales tax."

CSX would undoubtedly object that not every case will be so easy, and that federal courts are ill qualified to explore the vagaries of state tax law. We are inclined to agree, but that cannot carry the day. Congress assigned this task to the courts by drafting an antidiscrimination command in such sweeping terms. There is simply no discrimination when there are roughly comparable taxes. If the task of determining when that is so is "Sisyphean," as the Eleventh Circuit called it, 720 F. 3d, at 871, it is a Sisyphean task that the statute imposes. We therefore cannot approve of the Eleventh Circuit's refusal to consider Alabama's tax-based justification, and remand for that court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption.

C

While the State argues that the existence of a fuel-excise tax justifies its decision to exempt motor carriers from the sales and use tax, it cannot offer a similar defense with re-

spect to its exemption for water carriers. Water carriers pay neither tax.

The State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law. The Eleventh Circuit failed to examine these justifications, asserting that the water carriers were the beneficiaries of a discriminatory tax regime. We do not consider whether Alabama's alternative rationales justify its exemption, but leave that question for the Eleventh Circuit on remand.

* * *

The judgment of the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GINSBURG joins, dissenting.

In order to violate 49 U. S. C. § 11501(b)(4), "a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 297–298 (2011) (*CSX I*) (THOMAS, J., dissenting). Because CSX cannot prove facts that would satisfy that standard, I would reverse the judgment below and remand for the entry of judgment in favor of the Alabama Department of Revenue.

I

A

Last time this case was before the Court, I explained in detail my reasons for interpreting "another tax that discriminates against a rail carrier" in § 11501(b)(4) to refer to a tax "that targets or singles out railroads as compared to other commercial and industrial taxpayers." *Id.*, at 298. I briefly summarize that reasoning here.

Because the meaning of "discriminates" is ambiguous at first glance, I look to the term's context to resolve this uncertainty. *Id.*, at 298–299. Both the structure and background of the statute indicate that subsection (b)(4) prohibits only taxes that single out railroads as compared to other commercial and industrial taxpayers.

Subsection (b)(4) is a residual clause, the meaning of which is best understood by reference to the provisions that precede it. Subsection (b) begins by announcing that "[t]he following acts . . . discriminate against interstate commerce" and are prohibited. § 11501(b). Subsections (b)(1) through (b)(3) then list three tax-related actions that single out rail carriers by treating rail property differently from all other commercial and industrial property. §§ 11501(b)(1)–(3); *id.*, at 300. Subsections (b)(1) and (b)(3) explicitly identify "commercial and industrial property" as the comparison class, and subsection (b)(2) incorporates that comparison class by reference. § 11501(b); *id.*, at 300. Subsection (b)(4) refers back to these provisions when it forbids "[i]mpos[ing] *another* tax that discriminates against a rail carrier." § 11501(b)(4) (emphasis added); *id.*, at 300. The statutory structure therefore supports the conclusion that a tax "discriminates against a rail carrier" within the meaning of subsection (b)(4) if it singles out railroads for unfavorable treatment as compared to the general class of commercial and industrial taxpayers. *Id.*, at 300–301.

The statutory background supports the same conclusion. When Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, it was apparent that railroads were "easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Id.*, at 301 (internal quotation marks omitted). Subsections (b)(1) through (b)(3) thus "establish a political check" by preventing States from imposing excessive property taxes on railroads "without imposing the same taxes

more generally on voting, resident local businesses." *Ibid.* Subsection (b)(4) is best understood as addressing the same problem in the same way. *Id.*, at 301–302.

B

Alabama's tax scheme cannot be said to "discriminat[e] against a rail carrier." *Id.*, at 302. To begin, the scheme does not single out rail carriers. Although one would not know it from the majority opinion, the tax is not directed at rail carriers, their property, their activity, or goods uniquely consumed by them. It is instead a generally applicable sales tax. It applies (with other exemptions not at issue here) to all goods purchased, used, or stored in the State of Alabama. Ala. Code §§ 40–23–2(1), 40–23–61(a) (2011). The only relevant good exempted from the tax is diesel on which the motor fuel tax has been paid, § 40–17–325(b), and no provision of law prevents rail carriers from buying such diesel. See Brief for Respondent 46, n. 13 (acknowledging that CSX pays the motor fuel tax on the diesel fuel it uses in trucks and other on-road vehicles). Water carriers, it is true, enjoy a special carveout from this sales tax, § 40–23–4(a)(10) (2014 Cum. Supp.), but that exemption singles out *water* carriers, not *rail* carriers.

Even if this constellation of exemptions to Alabama's sales tax could be said to single out rail carriers from the general class of their interstate competitors, the tax surely does not single out rail carriers as compared to commercial and industrial taxpayers. Those taxpayers are subject to exactly the same generally applicable sales and use tax regime as are rail carriers.

II

A

The Court started off on the wrong track in *CSX I* when it relied on a generic dictionary definition of "discriminates" in the face of a statutory context suggesting a more specific

definition. See 562 U. S., at 304. Today's decision continues that error.

The Court uncritically accepts the conclusion that the "discriminat[ion]" addressed by the statute encompasses *any* distinction between rail carriers and their comparison class, *ante*, at 26, as opposed to mere "singling out" or something in between, even though the word "discriminates" is ambiguous in that way. *CSX I*, *supra*, at 299. The Court's usual practice has not been to treat the meaning of "discriminates" so casually. See generally *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 590–593 (1983) (opinion of White, J.) (discussing the Court's shifting definition of the ambiguous term "discrimination").

Today's decision compounds this error by holding that a rail carrier may make out a claim of discrimination using any comparison class so long as that class consists of "individuals similarly situated to the claimant" rail carrier. *Ante*, at 27. The majority purports to derive this limitation from the dictionary, but then finds itself unable to proceed: After all, Black's Law Dictionary contains no entry defining what it means to be "similarly situated" for the purpose of subsection (b)(4). Forced finally to turn to the statutory context, the majority rejects the statutorily defined competitor class of commercial and industrial taxpayers in favor of a shifting comparison class of its own creation.

B

The majority disregards the commercial and industrial property comparison class identified in subsections (b)(1) through (b)(3) because subsection (b)(4) does not explicitly include language from those provisions. See *ante*, at 27, 29. It asserts that defining the comparison class for the purpose of subsection (b)(4) by reference to the comparison class identified in subsections (b)(1) through (b)(3) "would require us to dragoon the modifier 'commercial and industrial'—but not the noun 'property'—from the first three

provisions, append 'general' in front of it and 'taxpayers' after, both words foreign to the preceding subsections." *Ante*, at 29.

The majority's accusation of grammatical conscription misses the point. Subsection (b)(4) is a residual clause, explicitly marked as such by the use of the word "another." See *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003). Like other residual clauses, it need not use the same language as the clauses it follows to derive meaning from those clauses. See, *e. g.*, *Sossamon* v. *Texas*, 563 U. S. 277, 292 (2011); *James* v. *United States*, 550 U. S. 192, 217–218 (2007) (SCALIA, J., dissenting). Where, as here, a residual clause includes an ambiguous word like "discriminates," we must look to the clauses that precede it to guide our understanding of its scope.

In some sense, my task in giving meaning to the statutory term "discriminates" is no different from the majority's: to determine what type of differential treatment the statute forbids. The first three clauses provide important clues that the statute forbids singling out rail carriers from other commercial and industrial taxpayers because commercial and industrial taxpayers are the ones who pay taxes on "commercial and industrial property." The majority pursues the same logical train of thought when it opines that "the category of 'similarly situated' (b)(4) comparison classes must include commercial and industrial taxpayers" because "[t]here is no conceivable reason why the statute would forbid property taxes higher than what that class enjoys (or suffers), but permit other taxes that discriminate in favor of that class vis-à-vis railroads." *Ante*, at 28. Where we part ways is in the inferences we draw from the statutory context.

Treating subsection (b)(4) as a residual clause does not require the grammatical distortions that the majority alleges. The word "discriminates" in subsection (b)(4) is not a referential phrase whose antecedent is uncertain. If it were,

then it would be necessary to select an antecedent that would fit grammatically in place of "discriminates." Instead, I look to § 11501(b)(1) to (b)(3) merely to clarify an ambiguity in the *meaning* of "discriminates," a task that does not require me to "dragoon" the language of the prior clauses into subsection (b)(4).

Nor does my approach rely on the first three clauses of § 11501(b) to supply a general limitation on the independent prohibition that appears in subsection (b)(4). See *United States* v. *Aguilar*, 515 U. S. 593, 615 (1995) (SCALIA, J., concurring in part and dissenting in part) (criticizing this type of argument). That is what Alabama sought to do in *CSX I* when it argued that subsection (b)(4) is limited to property taxes (or their equivalent "in lieu" taxes). *Ante*, at 29–30; *CSX I*, 562 U. S., at 285 (majority opinion). I joined the majority in rejecting that argument. *Id.*, at 297 (dissenting opinion). But whereas there is no uncertainty about the meaning of "taxes" in subsection (b)(4) that would justify importing the property tax limitation from the three preceding subsections, *id.*, at 284–285 (majority opinion), there is a good deal of uncertainty about the meaning of "discriminates." This uncertainty justifies looking to the three previous clauses to understand the type of differential treatment § 11501(b) is meant to prohibit. *Id.*, at 298–299 (dissenting opinion); see *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588–589 (1980). And those three previous clauses easily supply the answer to the comparison class question.

C

Unwilling to so limit the range of available comparison classes, the majority takes an approach to determining which individuals are "similarly situated" for purposes of the statute that "is almost entirely ad hoc." *James*, *supra*, at 215 (SCALIA, J., dissenting). It asserts that the comparison class will "depen[d] on the theory of discrimination alleged in the claim." *Ante*, at 27. Sometimes the comparison class will

be "all other commercial and industrial taxpayers," sometimes it will be "the railroad's competitors" in a particular jurisdiction, and sometimes it may be some other comparison class entirely. *Ibid.*

The sole evidence on which the majority relies to conclude that competitors are similarly situated, and therefore qualify as a comparison class, is the professed purposes of the Act: "to 'restore the financial stability of the railway system of the United States,' while 'foster[ing] competition among all carriers by railroad and other modes of transportation.'" *Ante*, at 29 (quoting §§ 101(a), (b)(2), 90 Stat. 33). Interpreting statutory text solely in light of purpose, absent any reliance on text or structure, is dangerous business because it places courts in peril of substituting their policy judgment for that of Congress. In considering statutory purpose, therefore, we should be careful that any inferences of purpose are tied to text rather than instinct.

The majority throws such caution to the wind. Its two-sentence argument is a perfect illustration of the dangers of a purely purpose-based approach. The majority cherry-picks two of a number of stated goals of a complex piece of legislation over 100 pages long and assumes that this specific provision was assigned to those specific purposes. And then it interprets the statute to perform in the manner the majority believes is best designed to "restore . . . financial stability" and "foster . . . competition." *Ante*, at 29 (alteration omitted).

I have no reason to doubt the economic soundness of the majority's conclusion that discrimination between rail carriers and their competitors threatens their financial stability and impedes competition, but I lack the majority's certitude that § 11501(b)(4) is designed to further *those goals* by combating *that evil*, at least in *the way* the majority asserts. Instead, the first three subsections provide strong textual evidence that § 11501(b) was designed to stabilize rail carriers by protecting them from discrimination against inter-

state commerce. And they provide evidence of Congress' chosen mechanism for accomplishing that goal: tying the fate of interstate rail carriers to the broader class of commercial and industrial taxpayers. See *supra*, at 33.

The introductory clause of § 11501(b) provides further evidence that the evil at which subsection (b)(4) is targeted is not discrimination between rail carriers and their competitors, but "acts [that] unreasonably burden and discriminate against interstate commerce." The majority's response to this evidence—that the Court rejected a similar argument when it refused to limit subsection (b)(4) to property taxes or their kin, *ante*, at 30—is a non sequitur. The introductory clause contains no reference to property taxes that "binds its four subsections together" as prohibitions on discriminatory property taxes. *Ante*, at 29 (internal quotation marks omitted). But it *does* have a reference to discrimination against interstate commerce, which *does* tie the sections together to serve *that* common statutory purpose. This, in turn, weighs against the majority's inferences about how § 11501(b) relates to the stated purposes of the Act.

The majority's conclusion that competitors are a permissible comparison class completely ignores these contextual clues, permitting subsection (b)(4) to serve different statutory goals by a different mechanism than its three predecessor clauses. And it leads to odd inconsistencies. If we were to understand the provision as prohibiting *only* discrimination between rail carriers and their competitors, then it might well further the goal of promoting competition between interstate carriers. But the majority instead selects a shifting-comparison-class approach, requiring rail carriers to be treated at least as well as their competitors and *any other* similarly situated taxpayers. See *ante*, at 27. This most-favored taxpayer status is a position the competitors do not enjoy, so the majority's position could result in tax schemes that *impede* competition between interstate carriers rather than promote it.

Identifying "similarly situated" taxpayers by the undisciplined approach the majority endorses could well lead to other unanticipated consequences. This is why the policy judgments needed to link statutory mechanisms to statutory purposes are best left to Congress. If this Court is going to adopt a shifting-comparison-class approach to § 11501(b)(4), then it should at least demand a stronger textual link between the comparison class a claimant seeks to import into subsection (b)(4) and any purpose that the claimant argues it serves.

III

Because the majority adopts an interpretation of § 11501(b)(4) that is not grounded in the text, it should come as no surprise that this interpretation is difficult to apply, as this case demonstrates. It is easy to see how, accepting water carriers as a comparison class, the scheme treats water carriers and rail carriers differently when it grants water carriers, but not rail carriers, an exemption from the sales tax. Ala. Code § 40–23–4(a)(10). Identifying the difference in treatment between rail and motor carriers, by contrast, requires a good deal more imagination.

The majority's approach exhibits that imagination. It glosses over the general applicability of the provisions that apply to rail and motor carriers, stating that "[t]he State applies the [sales or use] tax, at the usual 4% rate, to railroads' purchase or use of diesel fuel for their rail operations," but "exempts from the tax purchases and uses of diesel fuel made by [motor carriers]." *Ante*, at 24. A quick glimpse at the code reveals that this is not quite the case. The applicability of the sales and use taxes does not depend on the identity of the purchaser, but on whether the purchaser pays another excise tax, § 40–17–325(b), which in turn depends on the nature of the product purchased and its use, §§ 40–17–328, 40–17–329, which in turn merely correlates to the carriers' operations.

As far as I can tell, the rail carriers use dyed diesel that is exempt from the motor fuel tax—and therefore subject to the sales and use taxes—as a matter of choice rather than necessity. Dyed diesel has no special properties that make it more suitable for use in a train engine; the dye merely identifies it as exempt from the federal excise tax, § 40–17–322(21). And no law prohibits rail carriers from using undyed diesel. To the contrary, it is the motor carriers who are prohibited from using the dyed variant for on-road use.

Assuming, *arguendo*, that state law provides that only dyed diesel may be used in rail operations, it becomes a little easier to make an argument that the State treats rail carriers differently *in this case*. But the majority still faces a line-drawing problem. Is it necessary that the good subject to the challenged tax be the same as the good on which the competitor enjoys an exemption? Could a rail carrier that relies on natural gas rather than diesel for motive power make the same claim of discrimination if natural gas is not entitled to the same sales-tax exemption as diesel? Is it necessary that the rail carrier and its competitor rely on the good for the same purpose? Could a rail carrier that uses diesel for motive power challenge a hypothetical provision that exempted from the sales and use taxes diesel that motor carriers use for refrigeration in refrigerated trailers?

The majority never answers these questions. "Sufficient unto the day is the evil thereof," it intones. *Ante*, at 29. "That gets this case off our docket, sure enough. But it utterly fails to do what this Court is supposed to do: provide guidance concrete enough to ensure that the" statute is applied consistently. *James*, 550 U. S., at 215 (SCALIA, J., dissenting). We have demanded clarity from Congress when it comes to statutes that "se[t] limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 344–345 (1994). We should demand the same of ourselves when we interpret

those statutes. Yet after today's decision, lower courts, soon to be met with an oyster's shellful of comparison classes, *ante*, at 27, will have no idea how to determine when a tax exemption that is not tied to the taxpayer's status constitutes differential treatment of two taxpayers.

* * *

The majority's interpretation of § 11501(b)(1) derails ambiguous text from clarifying context. The result it reaches is predictably unworkable. And it prolongs Alabama's burden of litigating a baseless claim of discrimination that should have been dismissed long ago. I respectfully dissent.

Syllabus

DEPARTMENT OF TRANSPORTATION ET AL. *v.* ASSOCIATION OF AMERICAN RAILROADS

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

No. 13–1080. Argued December 8, 2014—Decided March 9, 2015

In 1970, Congress created the National Railroad Passenger Corporation (Amtrak). Congress has given Amtrak priority to use track systems owned by the freight railroads for passenger rail travel, at rates agreed to by the parties or, in case of a dispute, set by the Surface Transportation Board. And in 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" addressing the performance and scheduling of passenger railroad services, see § 207(a), 122 Stat. 4907, including Amtrak's on-time performance and train delays caused by host railroads. Respondent, the Association of American Railroads, sued petitioners—the Department of Transportation, the FRA, and two officials—claiming that the metrics and standards must be invalidated because it is unconstitutional for Congress to allow and direct a private entity like Amtrak to exercise joint authority in their issuance. Its argument rested on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected respondent's claims, but the District of Columbia Circuit reversed as to the separation-of-powers claim, reasoning in central part that Amtrak is a private corporation and thus cannot constitutionally be granted regulatory power under § 207.

Held: For purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Pp. 50–56.

(a) In concluding otherwise, the Court of Appeals relied on the statutory command that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U. S. C. § 24301(a)(3), and the pronouncement that Amtrak "shall be operated and managed as a for profit corporation," § 24301(a)(2). But congressional pronouncements are not dispositive of Amtrak's status as a governmental entity for purposes of separation-of-powers analysis under the Constitution, and an independent inquiry reveals the Court of Appeals' premise that Amtrak is a private entity was flawed. As Amtrak's ownership and corporate structure show, the political branches control most of Amtrak's stock and its Board of Directors, most of whom are appointed by the President, § 24302(a)(1), confirmed by the Senate, *ibid.*, and under-

stood by the Executive Branch to be removable by the President at will. The political branches also exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. See, *e. g.*, § 24315. Also of significance, Amtrak is required by statute to pursue broad public objectives, see, *e. g.*, §§ 24101(b), 24307(a); certain aspects of Amtrak's day-to-day operations are mandated by Congress, see, *e. g.*, §§ 24101(c)(6), 24902(b); and Amtrak has been dependent on federal financial support during every year of its existence. Given the combination of these unique features and Amtrak's significant ties to the Government, Amtrak is not an autonomous private enterprise. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in jointly issuing the metrics and standards with the FRA, Amtrak acted as a governmental entity for separation-of-powers purposes. And that exercise of governmental power must be consistent with the Constitution, including those provisions relating to the separation of powers. Pp. 50–54.

(b) Respondent's reliance on congressional statements about Amtrak's status is misplaced. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor, for the political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Pp. 54–55.

(c) The Court of Appeals may address in the first instance any properly preserved issues respecting the lawfulness of the metrics and standards that may remain in this case, including questions implicating the Constitution's structural separation of powers and the Appointments Clause. Pp. 55–56.

721 F. 3d 666, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 56. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 66.

Curtis E. Gannon argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Assistant*

Attorney General Delery, *Deputy Solicitor General Kneedler*, *Mark B. Stein*, *Michael S. Raab*, *Daniel Tenny*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, *Joy K. Park*, and *Melissa Porter*.

Thomas H. Dupree, Jr., argued the cause for respondent. With him on the brief were *Amir C. Tayrani*, *Lucas C. Townsend*, *Louis P. Warchot*, and *Daniel Saphire*.*

JUSTICE KENNEDY delivered the opinion of the Court.

In 1970, Congress created the National Railroad Passenger Corporation, most often known as Amtrak. Later, Congress granted Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" that address the performance and scheduling of passenger railroad services. Alleging that the metrics and standards have substantial and adverse effects upon its members' freight services, respondent—the Association of American Railroads—filed this suit to challenge their validity. The defendants below, petitioners here, are the Department of Transportation, the FRA, and two individuals sued in their official capacity.

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and

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**Karen E. Torrent* filed a brief for the Environmental Law and Policy Center et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of Trustees and Alumni et al. by *Shannen W. Coffin* and *Jill C. Maguire*; for the Association of Independent Passenger Rail Operators by *Richard B. Katskee* and *Craig W. Canetti*; for the Cato Institute by *Jeffrey S. Bucholtz*, *Ilya Shapiro*, *Karen Harned*, and *Elizabeth Milito*; for the Center for the Rule of Law by *C. Boyden Gray*, *Adam J. White*, and *Ronald A. Cass*; for the Chamber of Commerce of the United States of America by *C. Frederick Beckner III*, *Jonathan F. Cohn*, *Joshua J. Fougere*, and *Kate Comerford Todd*; for Resolute Forest Products Inc. by *David B. Rivkin, Jr.*, and *Andrew M. Grossman*; and for Alexander Volokh by *Sarah M. Shalf*.

John C. Eastman and *Anthony T. Caso* filed a brief for the Center for Constitutional Jurisprudence as *amicus curiae*.

it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. This argument rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected both of respondent's claims. The Court of Appeals for the District of Columbia Circuit reversed, finding that, for purposes of this dispute, Amtrak is a private entity and that Congress violated nondelegation principles in its grant of joint authority to Amtrak and the FRA. On that premise the Court of Appeals invalidated the metrics and standards.

Having granted the petition for writ of certiorari, 573 U. S. 930 (2014), this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 383–384 (1995); *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 453–457 (1985); see also Rail Passenger Service Act of 1970, 84 Stat. 1328. Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their common-carrier duties,

Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U. S. C. §§ 561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U. S. C. § 24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See § 24308(c).

The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122 Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

> "Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." *Id.*, at 4916.

Section 207(d) of the PRIIA further provides:

> "If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transporta-

tion Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.*, at 4917.

The PRIIA specifies that the metrics and standards created under §207(a) are to be used for a variety of purposes. Section 207(b) requires the FRA to "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. *Id.*, at 4916–4917. Section 207(c) provides that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." *Id.*, at 4917. And §222(a) obliges Amtrak, within one year after the metrics and standards are established, to "develop and implement a plan to improve on-board service pursuant to the metrics and standards for such service developed under [§207(a)]." *Id.*, at 4932.

Under §213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the STB may initiate an investigation "to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators." *Id.*, at 4925–4926. While conducting an investigation under §213(a), the STB "has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays" and shall "obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.*, at 4926. Following an investigation, the STB may award damages if it "determines that delays or failures to achieve minimum standards . . . are

attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *Ibid.* The STB is further empowered to "order the host rail carrier to remit" damages "to Amtrak or to an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

B

In March 2009, Amtrak and the FRA published a notice in the Federal Register inviting comments on a draft version of the metrics and standards. App. 75–76. The final version of the metrics and standards was issued jointly by Amtrak and the FRA in May 2010. *Id.*, at 129–144. The metrics and standards address, among other matters, Amtrak's financial performance, its scores on consumer satisfaction surveys, and the percentage of passenger trips to and from underserved communities.

Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. *Id.*, at 133–135. With respect to "host-responsible delays"—that is to say, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that "[d]elays must not be more than 900 minutes per 10,000 Train-Miles." *Id.*, at 138. Amtrak conductors determine responsibility for particular delays. *Ibid.*, n. 23.

In the District Court for the District of Columbia, respondent alleged injury to its members from being required to modify their rail operations, which mostly involve freight traffic, to satisfy the metrics and standards. Respondent claimed that § 207 "violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to

regulate." *Id.*, at 176–177, Complaint ¶51. Respondent also asserted that § 207 violates the Fifth Amendment Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]." *Id.*, at 177, ¶¶53–54. In its prayer for relief respondent sought, among other remedies, a declaration of § 207's unconstitutionality and invalidation of the metrics and standards. *Id.*, at 177.

The District Court granted summary judgment to petitioners on both claims. See 865 F. Supp. 2d 22 (DC 2012). Without deciding whether Amtrak must be deemed private or governmental, it rejected respondent's nondelegation argument on the ground that the FRA, the STB, and the political branches exercised sufficient control over promulgation and enforcement of the metrics and standards so that § 207 is constitutional. See *id.*, at 35.

The Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court as to the nondelegation and separation-of-powers claim, reasoning in central part that because "Amtrak is a private corporation with respect to Congress's power to delegate . . . authority," it cannot constitutionally be granted the "regulatory power prescribed in § 207." 721 F. 3d 666, 677 (2013). The Court of Appeals did not reach respondent's due process claim. See *ibid.*

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as "regulatory power," *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court's analysis treated as controlling Congress' statutory command that Amtrak "'is not a department, agency, or instrumentality of the United States Government.'" *Id.*, at 675 (quoting 49 U. S. C. § 24301(a)(3)). The Court of Appeals also relied on Congress' pronouncement that Amtrak "'shall be operated

and managed as a for-profit corporation.' " 721 F. 3d, at 675 (quoting § 24301(a)(2)); see also *id.*, at 677 ("Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive"). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to "delegate regulatory authority to a private entity." *Id.*, at 670; see also *ibid.* (holding *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress' authority to address, see, *e. g.*, *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F. 3d 488, 491–492 (CADC 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation-of-powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. § 24302(a)(1). These eight Board members, in turn, select Amtrak's president. § 24302(a)(1)(B); § 24303(a). Amtrak's Board members are subject to salary limits set by Congress, § 24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an

individual's prior experience in the transportation industry, § 24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, § 24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." § 24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. § 24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. § 552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a "'designated Federal entity,'" 5 U. S. C. App. § 8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. See, *e. g.*, Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak).

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U. S. C. § 24101(b); "minimize Government subsidies," § 24101(d); provide reduced fares to the disabled and elderly, § 24307(a); and ensure mobility in times of national disaster, § 24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. 122 Stat. 4934. When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. § 24902(b). And when Amtrak purchases materials worth more than $1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. § 24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually. See Brief for Petitioners 5, and n. 2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with

the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§ 24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by § 207(a).

On that point this Court's decision in *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station. The artist sued Amtrak, alleging a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that "its charter's disclaimer of agency status prevent[ed] it from being considered a Government entity." *Id.*, at 392. The Court rejected this contention, holding "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Ibid.* To hold otherwise would allow the Government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.*, at 397. Noting that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," *id.*, at 398, and that the Government exerts its control over Amtrak "not as a creditor but as a policymaker," the Court held Amtrak "is

an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," *id.*, at 394, 399.

Lebron teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. *Lebron* involved a First Amendment question, while in this case the challenge is to Amtrak's joint authority to issue the metrics and standards. But "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. 211, 222 (2011). Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

III

Because the Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated. On remand, the Court of Appeals, after identifying the issues that are properly preserved and before it, will then have the instruction of the analysis set forth here. Respondent argues that the selection of Amtrak's president, who is appointed "not by the President . . . but by the other eight Board Members," "call[s] into question Amtrak's structure under the Appointments Clause," Brief for Respondent 42; that § 207(d)'s arbitrator provision "is a plain violation of the nondelegation principle" and the Appointments Clause requiring invalidation of § 207(a), *id.*, at 26; and that Congress violated the Due Proc-

ess Clause by "giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry," *id.*, at 43. Petitioners, in turn, contend that "the metrics and standards do not reflect the exercise of 'rulemaking' authority or permit Amtrak to 'regulate other private entities,'" and thus do not raise nondelegation concerns. Reply Brief 5 (citation omitted). Because "[o]urs is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012) (internal quotation marks omitted), those issues—to the extent they are properly before the Court of Appeals—should be addressed in the first instance on remand.

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

It is so ordered.

JUSTICE ALITO, concurring.

I entirely agree with the Court that Amtrak is "a federal actor or instrumentality," as far as the Constitution is concerned. *Ante*, at 55. "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Ante*, at 53. The Government even "specif[ies] many of its day-to-day operations" and "for all practical purposes, set[s] and supervise[s] its annual budget." *Ante*, at 55. The District of Columbia Circuit understandably heeded 49 U. S. C. §24301(a)(3), which proclaims that Amtrak "is *not* a department, agency, or instrumentality of the United States Government," but this statutory label cannot control for constitutional purposes. (Emphasis added.) I therefore join the Court's opinion in full. I write separately to discuss what follows from our judgment.

I

This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a

vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995).

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

II

I begin with something that may seem mundane on its face but that has a significant relationship to the principle of accountability. Under the Constitution, all officers of the United States must take an oath or affirmation to support the Constitution and must receive a commission. See Art. VI, cl. 3 ("[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution"); Art. II, § 3, cl. 6 (The President "shall Commission all the Officers of the United States"). There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States. See 14 Op. Atty. Gen. 406, 408 (1874) ("[A] Representative . . . does not become a member of the House until he takes the oath of office"); 15 Op. Atty. Gen. 280, 281 (1877) (similar).* And this Court certainly has never treated a commission from the President as a mere wall ornament. See, *e. g.*, *Marbury* v. *Madison*, 1

*It is noteworthy that the first statute enacted by Congress was "An Act to regulate the Time and Manner of administering certain Oaths." Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23.

Cranch 137, 156 (1803); see also *id.*, at 179 (noting the importance of an oath).

Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.

Here, respondent tells the Court that "Amtrak's board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority." Brief for Respondent 47. The Government says not a word in response. Perhaps there is an answer. The rule, however, is clear. Because Amtrak is the Government, *ante*, at 55, those who run it need to satisfy basic constitutional requirements.

III

I turn next to the Passenger Rail Investment and Improvement Act of 2008's (PRIIA) arbitration provision. 122 Stat. 4907. Section 207(a) of the PRIIA provides that "the Federal Railroad Administration [(FRA)] and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." *Id.*, at 4916. In addition, § 207(c) commands that "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate [those] metrics and standards . . . into their access and service agreements." Under § 213(a) of the PRIIA, moreover, "the metrics and standards also may play a role in prompting investigations by the [Surface Transportation Board (STB)] and in subsequent enforcement actions." *Ante*, at 48.

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA "shall jointly" create new standards, cf., *e. g.*, 12 U. S. C. § 1831m(g)(4)(B) ("The appro-

priate Federal banking agencies shall jointly issue rules of practice to implement this paragraph"), and that Amtrak and *private rail carriers* "shall incorporate" those standards into their agreements whenever "practicable," cf., *e. g.*, *BP America Production Co.* v. *Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to "'audit and reconcile, to the extent practicable, all current and past lease accounts'" as creating "duties" for the Secretary of the Interior (quoting 30 U. S. C. § 1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

"As is often the case in administrative law," moreover, "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." 721 F. 3d 666, 672 (CADC 2013). Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, see Brief for Petitioners 31–32 (citing 49 U. S. C. §§ 24308(c), (f))), the metrics and standards inherently have a "coercive effect," *Bennett* v. *Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is "perhaps some incentivizing effect associated with the metrics and standards." Brief for Petitioners 30. Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. See *Bennett*, *supra*, at 169–171. That is regulatory power.

The language from § 207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an "agency." 49 U. S. C. § 24301(a)(3). But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did.

The oddity continues, however. Section 207(d) of the PRIIA also provides that if the FRA and Amtrak cannot

agree about what the regulatory standards should say, then "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The statute says nothing more about this "binding arbitration," including who the arbitrator should be.

Looking to Congress' use of the word "arbitrator," respondent argues that because the arbitrator can be a private person, this provision by itself violates the private nondelegation doctrine. The United States, for its part, urges the Court to read the term "arbitrator" to mean "public arbitrator" in the interests of constitutional avoidance.

No one disputes, however, that the arbitration provision is fair game for challenge, even though no arbitration occurred. The obvious purpose of the arbitration provision was to force Amtrak and the FRA to compromise, or else a third party would make the decision for them. The D. C. Circuit is correct that when Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised. See 721 F. 3d, at 674. "[S]tack[ing] the deck in favor of compromise" was the whole point. *Ibid.* Unsurprisingly, this Court has upheld standing to bring a separation-of-powers challenge in comparable circumstances. See *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 264–265 (1991) ("[T]his 'personal injury' to respondents is 'fairly traceable' to the Board of Review's veto power *because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors*" (emphasis added)); see also *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 512, n. 12 (2010) ("We cannot assume . . . that the Chairman would have made the same appointments acting alone").

As to the merits of this arbitration provision, I agree with the parties: If the arbitrator can be a private person, this

law is unconstitutional. Even the United States accepts that Congress "cannot delegate regulatory authority to a private entity." 721 F. 3d, at 670. Indeed, Congress, vested with enumerated "legislative Powers," Art. I, § 1, cannot delegate its "exclusively legislative" authority at all. *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825) (Marshall, C. J.). The Court has invalidated statutes for that very reason. See *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); see also *Mistretta* v. *United States*, 488 U. S. 361, 373, n. 7 (1989) (citing, *inter alia*, *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 646 (1980)).

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. See *INS* v. *Chadha*, 462 U. S. 919, 959 (1983). It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, see, *e. g.*, Manning, Lawmaking Made Easy, 10 Green Bag 2d 202 (2007) ("[B]icameralism and presentment make lawmaking difficult *by design*" (citing, *inter alia*, The Federalist No. 62, p. 378 (J. Madison), and No. 63, at 443–444 (A. Hamilton))), not something to be lamented and evaded.

Of course, this Court has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 474–475 (2001) (quoting *Mistretta*, *supra*, at 416 (SCALIA, J., dissenting)). But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution. Rather, the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking.

See, *e. g.*, *Arlington* v. *FCC*, 569 U. S. 290, 304–305, n. 4 (2013) (explaining that agency rulemakings "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, § 1, cl. 1)). Even so, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." 569 U. S., at 315 (ROBERTS, C. J., dissenting).

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, § 1. Nor are they vested with the "executive Power," Art. II, § 1, cl. 1, which belongs to the President. Indeed, it raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating "binding" tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term "arbitrator" refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. See 721 F. 3d, at 674 ("[T]hat the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional" (citing *Whitman*, *supra*, at 473)).

As I read the Government's briefing, it does not dispute any of this (other than my characterization of the PRIIA as

regulatory, which it surely is). Rather than trying to defend a private arbitrator, the Government argues that the Court, for reasons of constitutional avoidance, should read the word "arbitrator" to mean "public arbitrator." The Government's argument, however, lurches into a new problem: Constitutional avoidance works only if the statute is susceptible to an alternative reading and that such an alternative reading would itself be constitutional.

Here, the Government's argument that the word "arbitrator" does not mean "private arbitrator" is in some tension with the ordinary meaning of the word. Although Government arbitrators are not unheard of, we usually think of arbitration as a form of "private dispute resolution." See, *e. g.*, *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

Likewise, the appointment of a public arbitrator here would raise serious questions under the Appointments Clause. Unless an "inferior Office[r]" is at issue, Article II of the Constitution demands that the President appoint all "Officers of the United States" with the Senate's advice and consent. Art. II, §2, cl. 2. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people. See *Free Enterprise Fund*, 561 U. S., at 497–498 (citing The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)). The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*), and further that an officer who acts without supervision must be a principal officer, see *Edmond* v. *United States*, 520 U. S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). While some officers may be principal even if they have a supervisor, it is common ground that an

officer without a supervisor must be principal. See *id.*, at 667 (Souter, J., concurring in part and concurring in judgment).

Here, even under the Government's public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is "binding arbitration." Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that "shall" become part of a private railroad's contracts with Amtrak whenever "practicable." As to that "binding" decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it. See 75 Fed. Reg. 26839 (2010) (placing the metrics and standards in the Federal Register); *Edmond*, *supra*, at 665.

IV

Finally, the Board of Amtrak, and, in particular, Amtrak's president, also poses difficult constitutional problems. As the Court observes, "Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. These eight Board members, in turn, select Amtrak's president." *Ante*, at 51 (citation omitted). In other words, unlike everyone else on the Board, Amtrak's president has not been appointed by the President and confirmed by the Senate.

As explained above, accountability demands that principal officers be appointed by the President. See Art. II, § 2, cl. 2. The President, after all, must have "the general administrative control of those executing the laws," *Myers* v. *United States*, 272 U. S. 52, 164 (1926), and this principle applies with special force to those who can "exercis[e] significant authority" without direct supervision, *Buckley*, *supra*, at 126; see also *Edmond*, *supra*, at 663. Unsurprisingly then, the United States defends the non-Presidential appointment of

Amtrak's president on the ground that the Amtrak president is merely an inferior officer. Given Article II, for the Government to argue anything else would be surrender.

This argument, however, is problematic. Granted, a multimember body may head an agency. See *Free Enterprise Fund*, *supra*, at 512–513. But those who head agencies must be principal officers. See *Edmond*, *supra*, at 663. It would seem to follow that because agency heads must be principal officers, every member of a multimember body heading an agency must also be a principal officer. After all, every member of a multimember body could cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer.

The Government's response is tucked away in a footnote. It contends that because Amtrak's president serves at the pleasure of the other Board members, he is only an inferior officer. See Reply Brief for Petitioners 14, n. 6. But the Government does not argue that the president of Amtrak cannot cast tie-breaking votes. Assuming he can vote when the Board of Directors is divided, it makes no sense to think that the side with which the president *agrees* will demand his removal.

In any event, even assuming that Amtrak's president could be an inferior officer, there would still be another problem: Amtrak's Board may lack constitutional authority to appoint inferior officers. The Appointments Clause provides an exception from the ordinary rule of Presidential appointment for "inferior Officers," but that exception has accountability limits of its own, namely, that Congress may only vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, §2, cl. 2. Although a multimember body like Amtrak's Board *can* head a department, here it is not at all clear that Amtrak *is* a department.

A "Department" may not be "subordinate to or contained within any other such component" of the Executive Branch. *Free Enterprise Fund*, 561 U. S., at 511. As explained above, however, in jointly creating metrics and standards, Amtrak may have to give way to an arbitrator appointed by the STB. Does that mean that Amtrak is "subordinate to" the STB? See also 49 U. S. C. § 24308 (explaining the STB's role in disputes between Amtrak and rail carriers). At the same time, the Secretary of Transportation sits on Amtrak's Board and controls some aspects of Amtrak's relationship with rail carriers. See, *e. g.*, §§ 24302(a)(1), 24309(d)(2). The Secretary of Transportation also has authority to exempt Amtrak from certain statutory requirements. See § 24305(f)(4). Does that mean that Amtrak is "subordinate to or contained within" the Department of Transportation? (The STB, of course, also may be "subordinate to or contained within" the Department of Transportation. If so, this may further suggest that Amtrak is not a department, and also further undermine the STB's ability to appoint an arbitrator.) All of these are difficult questions.

* * *

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded.

JUSTICE THOMAS, concurring in the judgment.

We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand in hand with an executive agency to craft rules that

have the force and effect of law, our primary question—indeed, the primary question the parties ask us to answer—is whether that market participant is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom.

I agree with the Court that the proper disposition in this case is to vacate the decision below and to remand for further consideration of respondent's constitutional challenge to the metrics and standards. I cannot join the majority's analysis, however, because it fails to fully correct the errors that require us to vacate the Court of Appeals' decision. I write separately to describe the framework that I believe should guide our resolution of delegation challenges and to highlight serious constitutional defects in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) that are properly presented for the lower courts' review on remand.

I

The Constitution does not vest the Federal Government with an undifferentiated "governmental power." Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. Those Clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," Art. I, § 1, "[t]he executive Power shall be vested in a President of the United States," Art. II, § 1, cl. 1, and "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1.

These grants are exclusive. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001) (legislative power); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010) (executive power); *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011) (ju-

dicial power). When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.

In addition to allocating power among the different branches, the Constitution identifies certain restrictions on the *manner* in which those powers are to be exercised. Article I requires, among other things, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . ." Art. I, § 7, cl. 2. And although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates. *Myers* v. *United States*, 272 U. S. 52, 117 (1926), overruled in part on unrelated grounds in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935).

When the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly "delegates" legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power. See *Whitman*, *supra*, at 472. It also improperly "delegates" legislative power to itself when it authorizes itself to act without bicameralism and presentment. See, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919 (1983). And Congress improperly "delegates"—or, more precisely, authorizes the exercise of, see *Perez* v. *Mortgage Bankers Assn.*, *post*, at 131, 132 (THOMAS, J., concurring in judgment) (noting that Congress may not "delegate" power it does not possess)—executive power when it authorizes individuals or groups outside of the President's control to perform a function that requires the exercise of that power. See, *e. g.*, *Free Enterprise Fund*, *supra*.

In order to be able to adhere to the provisions of the Constitution that allocate and constrain the exercise of these powers, we must first understand their boundaries. Here, I do not purport to offer a comprehensive description of these powers. My purpose is to identify principles relevant to today's dispute, with an eye to offering guidance to the lower courts on remand. At issue in this case is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution.

II

The allocation of powers in the Constitution is absolute, *Perez*, *post*, at 115–119 (opinion of THOMAS, J.), but it does not follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. Resolution of claims against the Government is the classic example. At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. See *ibid.* Or Congress may resolve the claims itself, legislating by special Act. See *ibid.* The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it. For example, although this Court has long recognized that it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself, there are certain core functions that require the exercise of legislative power and that only Congress can perform. *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825) (distinguishing between those functions

Congress must perform itself and those it may leave to another branch).

The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

A

The idea that the Executive may not formulate generally applicable rules of private conduct emerged even before the theory of the separation of powers on which our Constitution was founded.

The idea has ancient roots in the concept of the "rule of law," which has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone. M. Vile, Constitutionalism and the Separation of Powers 25 (2d ed. 1998); 2 Bracton, De Legibus et Consuetudinibus Angliae 33 (G. Woodbine ed., S. Thorne transl. 1968). The principle that a ruler must govern according to law "presupposes at least two distinct operations, the making of law, and putting it into effect." Vile, *supra*, at 24. Although it was originally thought "that the rule of law was satisfied if a king made good laws and always acted according to them," it became increasingly apparent over time that the rule of law demanded that the operations of "making" law and of "putting it into effect" be kept separate. W. Gwyn, The Meaning of the Separation of Powers 35 (1965); see also *id.*, at 8–9. But when the King's power was at its height, it was still accepted that his "principal duty . . . [was] to govern *his people* according to *law*." 1 W. Blackstone, Commentaries on the Laws of England 226 (1765) (Commentaries) (emphasis added).

An early expression of this idea in England is seen in the "constitutional" law concerning crown proclamations. Even before a more formal separation of powers came about during the English Civil War, it was generally thought that the King could not use his proclamation power to alter the rights and duties of his subjects. P. Hamburger, Is Administrative Law Unlawful? 33–34 (2014) (Hamburger). This power could be exercised by the King only in conjunction with Parliament and was exercised through statutes. *Ibid.*; see also M. Hale, The Prerogatives of the King 141, 171–172 (D. Yale ed. 1976). The King might participate in "the legislative power" by giving his "assent" to laws created by the "concurrence" of "lords and commons assembled in parliament," but he could not of his own accord "make a law or impose a charge." *Id.*, at 141.

In 1539, King Henry VIII secured what might be called a "delegation" of the legislative power by prevailing on Parliament to pass the Act of Proclamations. Hamburger 35–36. That Act declared that the King's proclamations would have the force and effect of an Act of Parliament. *Id.*, at 37. But the Act did not permit the King to deprive his subjects of their property, privileges and franchises, or their lives, except as provided by statutory or common law. *Id.*, at 37–38. Nor did the Act permit him to invalidate " 'any acts, [or] common laws standing at [that] time in strength and force.' " *Id.*, at 38 (quoting An Act that Proclamations Made by the King Shall be Obeyed, 31 Hen. VIII, ch. 8, in Eng. Stat. at Large 263 (1539)).

Even this limited delegation of lawmaking power to the King was repudiated by Parliament less than a decade later. Hamburger 38. Reflecting on this period in history, David Hume would observe that, when Parliament "gave to the king's proclamation the same force as to a statute enacted by parliament," it "made by one act a total subversion of the English constitution." 3 D. Hume, The History of England From the Invasion of Julius Caesar to the Revolution in 1688,

p. 266 (1983). By the 17th century, when English scholars and jurists began to articulate a more formal theory of the separation of powers, delegations of the type afforded to King Henry VIII were all but unheard of. Hale, *supra*, at 172–173.

This is not to say that the Crown did not endeavor to exercise the power to make rules governing private conduct. King James I made a famous attempt, see *Perez*, *post*, at 124–125 (opinion of THOMAS, J.), prompting the influential jurist Chief Justice Edward Coke to write that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611). Coke associated this principle with chapter 39 of Magna Carta,[1] which he understood to guarantee that no subject would be deprived of a private right—that is, a right of life, liberty, or property—except in accordance with "the law of the land," which consisted only of statutory and common law. Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1688 (2012). When the King attempted to fashion rules of private conduct unilaterally, as he did in the *Case of Proclamations*, the resulting enforcement action could not be said to accord with "the law of the land."

John Locke echoed this view. "[F]reedom of men under government," he wrote, "is to have a standing rule to live by, common to every one of that society, and made by the *legislative power* erected in it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another

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[1] Chapter 39 of 1215 Magna Carta declared that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A. Howard, Magna Carta: Text and Commentary 43 (1964).

man." J. Locke, Second Treatise of Civil Government § 22, p. 13 (J. Gough ed. 1947) (Locke) (emphasis added). It followed that this freedom required that the power to make the standing rules and the power to enforce them not lie in the same hands. See *id.*, § 143, at 72. He further concluded that "[t]he legislative c[ould not] transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it [could not] pass it over to others." *Id.*, § 141, at 71.[2]

William Blackstone, in his Commentaries, likewise maintained that the English Constitution required that no subject be deprived of core private rights except in accordance with the law of the land. See 1 Commentaries 129, 134, 137–138. He defined a "law" as a generally applicable "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.*, at 44 (internal quotation marks omitted). And he defined a tyrannical government as one in which "the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men," for "wherever these two powers are united together, there can be no public liberty." *Id.*, at 142. Thus, although Blackstone viewed Parliament as sovereign and capable of changing the constitution, *id.*, at 156, he thought a delegation of lawmaking

[2] Locke and his contemporaries also believed that requiring laws to be made in Parliament secured the common interest. W. Gwyn, The Meaning of the Separation of Powers 75 (1965). Parliament would assemble to do the business of legislation, but then its members would disperse to live as private citizens under the laws they had created, providing them an incentive to legislate in the common interest. During Parliament's absence, the King might meet certain emergencies through the exercise of prerogative power, but in order to make new, permanent laws, he would be required to call Parliament into session. Locke §§ 143–144, at 72–73. If the King were not dependent on Parliament to legislate, then this beneficial cycle of periodic lawmaking interspersed with representatives' living as private citizens would be broken.

power to be "disgrace[ful]," 4 *id.*, at 424; see also Hamburger 39, n. 17.

B

These principles about the relationship between private rights and governmental power profoundly influenced the men who crafted, debated, and ratified the Constitution. The document itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct.

The Framers' dedication to the separation of powers has been well documented, if only half-heartedly honored. See, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 380–381 (1989). Most famously, in The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." *Ibid.*; see also *Perez*, *post,* at 117–119 (opinion of THOMAS, J.).

This devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it. The Framers were concerned not just with the starting allocation, but with the "gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (J. Madison). It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis. *Ibid.*; see also *Perez*, *post,* at 117–119 (opinion of THOMAS, J.).

In this sense, the founding generation did not subscribe to Blackstone's view of parliamentary supremacy. Parliament's violations of the law of the land had been a significant

complaint of the American Revolution, Chapman & McConnell, 121 Yale L. J., at 1699–1703. And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law. *Perez*, *post*, at 117 (opinion of THOMAS, J.). James Wilson explained the Constitution's break with the legislative supremacy model at the Pennsylvania ratification convention:

> "Sir William Blackstone will tell you, that in Britain . . . the Parliament may alter the form of the government; and that its power is absolute, without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. . . .
>
> "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states." 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1863).

See also 4 *id.*, at 63 (A. Maclaine) (contrasting Congress, which "is to be guided by the Constitution" and "cannot travel beyond its bounds," with the Parliament described in Blackstone's Commentaries). As an illustration of Blackstone's contrasting model of sovereignty, Wilson cited the Act of Proclamations, by which Parliament had delegated legislative power to King Henry VIII. 2 *id.*, at 432 (J. Wilson); see *supra*, at 72.

At the center of the Framers' dedication to the separation of powers was individual liberty. The Federalist No. 47, at 302 (J. Madison) (quoting Baron de Montesquieu for the proposition that "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'"). This was not liberty in the sense of freedom from all constraint, but liberty as described by Locke: "to have a standing rule to live by . . . made by the *legislative power*," and to be free from "the inconstant, uncertain,

unknown, arbitrary will of another man." Locke § 22, at 13. At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free. See D. Currie, The Constitution in the Supreme Court: The First One Hundred Years, 1789–1888, p. 272, and n. 268 (1985).[3]

This history confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make "law" in the Blackstonian sense of generally applicable rules of private conduct.

III

Even with these sound historical principles in mind, classifying governmental power is an elusive venture. *Wayman*, 10 Wheat., at 43; The Federalist No. 37, at 228 (J. Madison). But it is no less important for its difficulty. The "check" the Judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review. *Perez*, *post*, at 124 (opinion of THOMAS, J.). We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law. *Perez*, *post*, at 124–126.

We have been willing to check the improper allocation of executive power, see, *e. g.*, *Free Enterprise Fund*, 561 U. S. 477; *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252 (1991), although probably not as often as we should, see, *e. g.*,

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[3] I do not mean to suggest here that the Framers believed an Act of the Legislature was *sufficient* to deprive a person of private rights; only that it was necessary. See generally Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1715, 1721–1726 (2012) (discussing historical evidence that the Framers believed the Due Process Clause limited Congress' power to provide by law for the deprivation of private rights without judicial process).

Morrison v. *Olson*, 487 U. S. 654 (1988). Our record with regard to legislative power has been far worse.

We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, *Whitman*, 531 U. S., at 472, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out "an intelligible principle" to guide the rulemaker's discretion. *Ibid.* Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.

A

The Court first announced the intelligible-principle test in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928). That case involved a challenge to a tariff assessed on a shipment of barium dioxide. *Id.*, at 400. The rate of the tariff had been set by proclamation of the President, pursuant to the so-called flexible tariff provision of the Tariff Act of 1922. *Ibid.* That provision authorized the President to increase or decrease a duty set by the statute if he determined that the duty did not "'equalize . . . differences in costs of production [of the item to which the duty applied] in the United States and the principal competing country.'" *Id.*, at 401 (quoting 19 U. S. C. § 154 (1925 ed.)). The importer of the barium dioxide challenged the provision as an unconstitutional delegation of legislative power to the Presi-

dent. 276 U. S., at 404. Agreeing that Congress could not delegate legislative power, the Court nevertheless upheld the Act as constitutional, setting forth the now-famous formulation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409.

Though worded broadly, the test rested on a narrow foundation. At the time *J. W. Hampton* was decided, most "delegations" by Congress to the Executive, including the delegation at issue in that case, had taken the form of conditional legislation. See *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 683–689 (1892). That form of legislation "makes the suspension of certain provisions and the going into operation of other provisions of an act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation." *Id.*, at 683.

The practice of conditional legislation dates back at least to the Third Congress in 1794. *Id.*, at 683–689 (collecting statutes). It first came before the Court in *Cargo of Brig Aurora* v. *United States*, 7 Cranch 382 (1813). There, the Court considered whether a Presidential proclamation could, by declaring that France had ceased to violate the neutral commerce of the United States, reinstate a legislative Act embargoing British goods. *Id.*, at 384, 388. The Court concluded that the proclamation was effective, seeing "no sufficient reaso[n] why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct." *Id.*, at 388.

At least as defined by the Court in *Field*, the practice of conditional legislation does not seem to call on the President to exercise a core function that demands an exercise of legislative power. Congress creates the rule of private conduct, and the President makes the *factual* determination that causes that rule to go into effect. That type of factual de-

termination seems similar to the type of factual determination on which an enforcement action is conditioned: Neither involves an exercise of policy discretion, and both are subject to review by a court. See *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386 (1907) (explaining that, when the Secretary of War determined whether bridges unreasonably obstruct navigation, he "could not be said to exercise strictly legislative . . . power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under general rules prescribed by Congress, are entitled to pensions").

As it happens, however, conditional statutes sometimes did call for the President to make at least an implicit policy determination. For example, a 1794 provision entitled "An Act to authorize the President of the United States to lay, regulate and revoke Embargoes," ch. 41, 1 Stat. 372, called on the President to impose an embargo on shipping "whenever, in his opinion, the public safety shall so require . . . ." *Ibid.* The statutes at issue in *Field* and *J. W. Hampton* could similarly be viewed as calling for built-in policy judgments. See Schoenbrod, The Delegation Doctrine: Could The Court Give It Substance? 83 Mich. L. Rev. 1223, 1263–1264 (1985).[4]

[4] The statute at issue in *Field* authorized the President to reimpose statutory duties on exports from a particular country if he found that the country had imposed "reciprocally unequal and unreasonable" duties on U. S. exports. 143 U. S., at 692. At least insofar as the terms "unequal" and "unreasonable" did not have settled common-law definitions that could be applied mechanically to the facts, they could be said to call for the President to exercise policy judgment about which duties qualified. See *id.*, at 699 (Lamar, J., dissenting but concurring in judgment) (The statute "does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deputes to the President the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation . . . to be 'reciprocally unequal and unreasonable . . . '"). Similarly, the statute at issue in *J. W. Hampton* called on the President, with the aid of a commission, to determine the "'costs of production'" for various goods—a calculation that

Such delegations of policy determinations pose a constitutional problem because they effectively permit the President to define some or all of the content of that rule of conduct. He may do so expressly—by setting out regulations specifying what conduct jeopardizes "the public safety," for example—or implicitly—by drawing distinctions on an ad hoc basis. In either event, he does so based on a policy judgment that is not reviewable by the courts, at least to the extent that the judgment falls within the range of discretion permitted him by the law. See *id.*, at 1255–1260.

The existence of these statutes should not be taken to suggest that the Constitution, as originally understood, would permit such delegations. The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power. See *id.*, at 1260–1263 (distinguishing the tariff statute at issue in *Field* and *J. W. Hampton* on these grounds).[5] Moreover, the

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could entail an exercise of policy judgment about the appropriate wage and profit rates in the relevant industries. 276 U. S., at 401.

[5] The definition of "law" in England at the time of the ratification did not necessarily include rules—even rules of private conduct—dealing with external relations. For example, while "every Englishman [could] claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law," the King "by his royal prerogative, [could] issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence." 1 Commentaries 133. It is thus likely the Constitution grants the President a greater measure of discretion in the realm of foreign relations, and the conditional tariff Acts must be understood accordingly. See *Clinton* v. *City of New York*, 524 U. S. 417, 445 (1998) (distinguishing *Field* on the ground that the statute at issue in *Field* regulated foreign trade); see also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936) ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). This Court has at least once expressly relied on this rationale to sanction a delegation of power to make rules

statute was never subjected to constitutional scrutiny. And when a statute of its kind—that is, a tariff statute calling for an exercise of policy judgment—finally came before this Court for consideration in *Field*, the Court appeared to understand the statute as calling for no more than a *factual* determination. 143 U. S., at 693. The Court thus did not in that case endorse the principle that the Executive may fashion generally applicable rules of private conduct and appears not to have done so until the 20th century.

More to the point, *J. W. Hampton* can be read to adhere to the "factual determination" rationale from *Field*. The Court concluded its delegation analysis in *J. W. Hampton not* with the "intelligible principle" language, but by citing to *Field* for the proposition that the "Act did not in any real sense invest the President with the power of legislation, *because nothing involving the expediency or just operation* of such legislation was left to the determination of the President." 276 U. S., at 410 (emphasis added); *Field*, 143 U. S., at 692 (explaining that an Act did not "in any real sense, invest the President with the power of legislation"). Congress had created a "named contingency," and the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *J. W. Hampton*, *supra*, at 410–411.[6]

The analysis in *Field* and *J. W. Hampton* may have been premised on an incorrect assessment of the statutes before

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governing private conduct in the area of foreign trade. See *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904).

[6] Contemporary perceptions of the statute were less sanguine. One editorial deemed it "the most dangerous advance in bureaucratic government ever attempted in America." D. Schoenbrod, Power Without Responsibility 36 (1993) (quoting Letter from J. Cotton (Feb. 7, 1929), in With Our Readers, 13 Constitutional Review 98, 101 (1929)). President-elect Hoover stirred the public with promises of a repeal: "There is only one commission to which delegation of [the] authority [to set tariffs] can be made. That is the great commission of [the people's] own choosing, the Congress of the United States and the President." Public Papers of the Presidents, Herbert Hoover, 1929, p. 565 (1974); see also Schoenbrod, *supra*, at 36.

the Court, see n. 4, *supra*, but neither purported to define executive power as including the discretion to make generally applicable rules governing private conduct. To the extent that our modern jurisprudence treats them as sanctioning the "delegation" of such power, it misunderstands their historical foundations and expands the Court's holdings.

B

It is nevertheless true that, at the time *J. W. Hampton* was decided, there was a growing trend of cases upholding statutes pursuant to which the Executive exercised the power of "making . . . subordinate rules within prescribed limits." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421 (1935); see also *id.*, at 429 (collecting cases). These cases involved executive power to make "binding rules of conduct," and they were found valid "as subordinate rules . . . [when] within the framework of the policy which the legislature ha[d] sufficiently defined." *Id.*, at 428–429. To the extent that these cases endorsed authorizing the Executive to craft generally applicable rules of private conduct, they departed from the precedents on which they purported to rely.

The key decision to which these cases purport to trace their origin is *Wayman*, 10 Wheat. 1, but that decision does not stand for the proposition those cases suggest. Although it upheld a statute authorizing courts to set rules governing the execution of their own judgments, *id.*, at 50, its reasoning strongly suggests that rules of private conduct were not the proper subject of rulemaking by the courts. Writing for the Court, Chief Justice Marshall surveyed a number of choices that could be left to rulemaking by the courts, explaining that they concerned only "the regulation of the conduct of the officer of the Court in giving effect to its judgments." *Id.*, at 45. When it came to specifying "the mode of obeying the mandate of a writ," however, he lamented that "so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which

the legislature must expressly and directly provide." *Id.*, at 46.

This important passage reflects two premises that Chief Justice Marshall took for granted, but which are disregarded in later decisions relying on this precedent: First, reflected in his discussion of "blending" permissible with impermissible discretion is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules is the premise that the rules "for which the legislature must expressly and directly provide" are those regulating private conduct rather than those regulating the conduct of court officers.

Thus, when Chief Justice Marshall spoke about the "difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts," *ibid.*, he did not refer to the difficulty in discerning whether the Legislature's policy guidance is "sufficiently defined," see *Panama Refining*, *supra*, at 429, but instead the difficulty in discerning which rules affected substantive private rights and duties and which did not. We continue to wrestle with this same distinction today in our decisions distinguishing between substantive and procedural rules both in diversity cases and under the Rules Enabling Act. See, *e. g.*, *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 406–407 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U. S. C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' § 2072(b)").[7]

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[7] Another early precedent on which the errant "subordinate rulemaking" line of cases relies involves rules governing mining claims on public land. *Jackson* v. *Roby*, 109 U. S. 440, 441 (1883); see also *United States* v. *Grimaud*, 220 U. S. 506 (1911) (sustaining an Act authorizing the Secretary of Agriculture to make rules and regulations governing the use

C

Today, the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power. To the extent that the "intelligible principle" test was ever an adequate means of enforcing that distinction, it has been decoupled from the historical understanding of the legislative and executive powers and thus does not keep executive "lawmaking" within the bounds of inherent executive discretion. See *Whitman*, 531 U. S., at 487 (THOMAS, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power"). Perhaps we were led astray by the optical illusion caused by different branches carrying out the same functions, believing that the separation of powers would be substantially honored so long as the encroachment were not too great. See, *e. g.*, *Loving* v. *United States*, 517 U. S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between two political branches of the Government, each contributing to a lawful objective through its own processes"). Or perhaps we deliberately departed from the separation, bowing to the exigencies of modern Government that were so often cited in cases upholding challenged delegations of rulemaking authority.[8] See, *e. g.*, *Mistretta*, 488 U. S., at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and

and occupancy of public forest reservations). Although perhaps questionable on its own terms, *Jackson* is distinguishable because it did not involve the Government's reaching out to regulate private conduct, but instead involved the Government's setting rules by which individuals might enter onto public land to avail themselves of resources belonging to the Government.

[8] Much of the upheaval in our delegation jurisprudence occurred during the Progressive Era, a time marked by an increased faith in the technical expertise of agencies and a commensurate cynicism about principles of popular sovereignty. See *Perez* v. *Mortgage Bankers Assn.*, *post*, at 129–130, n. 6 (THOMAS, J., concurring in judgment).

more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

For whatever reason, the intelligible-principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law. And because the Court has " 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,' " *Whitman*, *supra*, at 474–475 (majority opinion) (quoting *Mistretta*, *supra*, at 416 (SCALIA, J., dissenting)), the level of specificity it has required has been very minimal indeed, see 531 U. S., at 474 (collecting cases upholding delegations to regulate in the "public interest"). Under the guise of the intelligible-principle test, the Court has allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is "unfair" or "unnecessary." See, *e. g.*, *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946). It has permitted the Executive to make tradeoffs between competing policy goals. See, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414, 420, 423–426 (1944) (approving authorization for agency to set prices of commodities at levels that "will effectuate the [sometimes conflicting] purposes of th[e] Act"); see also *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 686–687 (1980) (Rehnquist, J., concurring in judgment) ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge"). It has even permitted the Executive to decide which policy goals it wants to pursue. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218–223 (2009) (concluding that Congress gave the Environmental Protection Agency

(EPA) discretion to decide whether it should consider costs in making certain rules). And it has given sanction to the Executive to craft significant rules of private conduct. See, *e. g.*, *Whitman*, 531 U. S., at 472–476 (approving delegation to EPA to set national standards for air quality); see also *id.*, at 488–489 (Stevens, J., concurring in part and concurring in judgment) (arguing that the Clean Air Act effects a delegation of legislative power because it authorizes EPA to make prospective, generally applicable rules of conduct).

Our reluctance to second-guess Congress on the *degree* of policy judgment is understandable; our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct. To understand the "intelligible principle" test as permitting Congress to delegate policy judgment in this context is to divorce that test from its history. It may never be possible perfectly to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not enacted by Congress pursuant to Article I.

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable. In anticipating that result and accepting it, I am in good company. John Locke, for example, acknowledged that a legislative body "is usually too numerous, and so too slow for the dispatch requisite to execution." Locke § 160, at 80. But he saw that as a benefit for legislation, for he believed that the creation of rules of private conduct should be an irregular and infrequent occurrence. See *id.*, § 143, at 72. The Framers, it appears, were inclined to agree. As Alexander Hamilton explained in another context, "It may perhaps be said that the power

of preventing bad laws includes that of preventing good ones . . . . But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments." The Federalist No. 73, at 443–444. I am comfortable joining his conclusion that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." *Id.*, at 444.

IV

Although the majority corrects an undoubted error in the framing of the delegation dispute below, it does so without placing that error in the context of the constitutional provisions that govern respondent's challenge to § 207 of the PRIIA.

A

Until the case arrived in this Court, the parties proceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control.[9] The Court of Appeals agreed. 721 F. 3d 666, 674–677 (CADC 2013). Because it also concluded that Congress delegated regulatory power to Amtrak, *id.*, at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677.

Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically

[9] See Brief for Appellees in No. 12–5204 (DC), pp. 23–29 (defending § 207 under cases upholding statutes "assign[ing] an important role to a private party"); *id.*, at 29 ("Amtrak . . . is not a private entity comparable to the [private parties in a relevant precedent]. Although the government does not control Amtrak's day-to-day operations, the government exercises significant structural control").

from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit," *ante*, at 53 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegatee of that power than is a purely private one. To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for "delegation" purposes.

B

The first step in the Court of Appeals' analysis on remand should be to classify the power that § 207 purports to authorize Amtrak to exercise. The second step should be to determine whether the Constitution's requirements for the exercise of that power have been satisfied.

1

Under the original understanding of the legislative and executive power, Amtrak's role in the creation of metrics and

standards requires an exercise of legislative power because it allows Amtrak to decide the applicability of standards that provide content to generally applicable rules of private conduct.

Specifically, the metrics and standards alter the railroads' common-carrier obligations under 49 U. S. C. § 11101. Host railroads may enter into contracts with Amtrak under §§ 10908 and 24308 to fulfill their common-carrier obligations. The metrics and standards shape the types of contracts that satisfy the common-carrier obligations because § 207 provides that "Amtrak and its host rail carriers *shall*" include the metrics and standards in their contracts "[t]o the extent practicable." PRIIA § 207(c), 49 U. S. C. § 24101 (note) (emphasis added). As JUSTICE ALITO explains, it matters little that the railroads may avoid incorporating the metrics and standards by arguing that incorporation is impracticable; the point is that they have a legal duty to try—a duty the substance of which is defined by the metrics and standards. See *ante*, at 58–59 (concurring opinion). And that duty is backed up by the Surface Transportation Board's coercive power to impose "reasonable terms" on host railroads when they fail to come to an agreement with Amtrak. § 24308(a)(2)(A)(ii). Presumably, when it is "practicable" to incorporate the metrics and standards, the Board is better positioned to deem such terms "reasonable" and to force them upon the railroads.

Although the Government's argument to the contrary will presumably change now that the Court has held that Amtrak is a governmental entity, it argued before this Court that Amtrak did not exercise meaningful power because other "governmental entities had sufficient control over the development and adoption of the metrics and standards." Brief for Petitioners 19–26. For support, the Government relied on two questionable precedents in which this Court held that Congress may grant private actors the power to determine whether a government regulation will go into effect: *Currin*

v. *Wallace*, 306 U. S. 1 (1939), and *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939). Those precedents reason that it does not require an exercise of legislative power to decide whether and when legally binding rules of private conduct will go into effect. *Currin*, *supra*, at 16–18; *Rock Royal*, *supra*, at 574–577. But as I have explained above, to the extent that this decision involves an exercise of policy discretion, it requires an exercise of legislative power. *Supra*, at 85–87. In any event, these precedents are directly contrary to our more recent holding that a discretionary "veto" necessarily involves an exercise of legislative power. See *INS* v. *Chadha*, 462 U. S., at 952–953; see also *id.*, at 987 (White, J., dissenting) (noting that the power Congress reserved to itself was virtually identical to the power it conferred on private parties in *Currin* and *Rock Royal*). As such, *Currin* and *Rock Royal* have been discredited and lack any force as precedents.

Section 207 therefore violates the Constitution. Article I, § 1, vests the legislative power in Congress, and Amtrak is not Congress. The procedures that § 207 sets forth for enacting the metrics and standards also do not comply with bicameralism and presentment. Art. I, § 7. For these reasons, the metrics and standards promulgated under this provision are invalid.

2

I recognize, of course, that the courts below will be bound to apply our "intelligible principle" test. I recognize, too, that that test means so little that the courts are likely to conclude that § 207 calls for nothing more than the exercise of executive power. Having made that determination, the Court of Appeals must then determine whether Amtrak is constitutionally eligible to exercise executive power.

As noted, Article II of the Constitution vests the executive power in a "President of the United States of America." Art. II, § 1. Amtrak, of course, is not the President of the United States, but this fact does not immediately disqualify

it from the exercise of executive power. Congress may authorize subordinates of the President to exercise such power, so long as they remain subject to Presidential control.

The critical question, then, is whether Amtrak is adequately subject to Presidential control. See *Myers*, 272 U. S., at 117. Our precedents treat appointment and removal powers as the primary devices of executive control, *Free Enterprise Fund*, 561 U. S., at 492, and that should be the starting point of the Court of Appeals' analysis. As JUSTICE ALITO's concurrence demonstrates, however, there are other constitutional requirements that the Court of Appeals should also scrutinize in deciding whether Amtrak is constitutionally eligible to exercise the power § 207 confers on it.

* * *

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Syllabus

PEREZ, SECRETARY OF LABOR, ET AL. *v.* MORTGAGE BANKERS ASSOCIATION ET AL.

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

No. 13–1041. Argued December 1, 2014—Decided March 9, 2015*

The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U. S. C. § 551(5). The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, see §§ 553(b), (c), and have the "force and effect of law," *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303. "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99, do not require notice-and-comment rulemaking, and "do not have the force and effect of law," *ibid.*

In 1999 and 2001, the Department of Labor's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938. In 2004, the Department issued new regulations regarding the exemption. Respondent Mortgage Bankers Association (MBA) requested a new interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006 opinion letter and issued an Administrator's Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending, as relevant here, that the Administrator's Interpretation was procedurally invalid under the D. C. Circuit's decision in *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579. The *Paralyzed Veterans* doctrine holds that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The District Court granted summary

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*Together with No. 13–1052, *Nickols et al.* v. *Mortgage Bankers Association*, also on certiorari to the same court.

judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

Held: The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements. Pp. 100–107.

(a) The APA's categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit's reading of the APA conflates the differing purposes of §§ 2 and 4 of the Act. Section 2 requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, see 5 U. S. C. § 551(5), but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of § 4. And § 4 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule. Pp. 100–101.

(b) This straightforward reading of the APA harmonizes with longstanding principles of this Court's administrative law jurisprudence, which has consistently held that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513. The APA's rulemaking provisions are no exception: Section 4 establishes "the maximum procedural requirements" that courts may impose upon agencies engaged in rulemaking. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress' standards. Pp. 101–103.

(c) MBA's reasons for upholding the *Paralyzed Veterans* doctrine are unpersuasive. Pp. 103–107.

(1) MBA asserts that an agency interpretation of a regulation that significantly alters the agency's prior interpretation effectively amends the underlying regulation. That assertion conflicts with the ordinary meaning of the words "amend" and "interpret," and it is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. MBA's theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine, which applies only when an agency has previously adopted an interpretation of its regulation. MBA fails to explain why its argument regarding revised interpretations should not also extend to the agency's first interpretation. *Christensen* v. *Harris County*, 529 U. S. 576, and *Sha-*

Syllabus

lala v. *Guernsey Memorial Hospital*, 514 U. S. 87, distinguished. Pp. 103–105.

(2) MBA also contends that the *Paralyzed Veterans* doctrine reinforces the APA's goal of procedural fairness. But the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decisionmaking, *e. g.*, the arbitrary and capricious standard. In addition, Congress may include safe-harbor provisions in legislation to shelter regulated entities from liability when they rely on previous agency interpretations. See, *e. g.*, 29 U. S. C. §§ 259(a), (b)(1). Pp. 105–106.

(3) MBA has waived its argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. From the beginning, this suit has been litigated on the understanding that the Administrator's Interpretation is an interpretive rule. Neither the District Court nor the Court of Appeals addressed this argument below, and MBA did not raise it here in opposing certiorari. P. 107.

720 F. 3d 966, reversed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined except for Part III–B. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 107. SCALIA, J., *post*, p. 108, and THOMAS, J., *post*, p. 112, filed opinions concurring in the judgment.

Deputy Solicitor General Kneedler argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 13–1041 were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Anthony A. Yang*, *Douglas N. Letter*, *Anthony J. Steinmeyer*, and *M. Patricia Smith*. *Adam W. Hansen* filed briefs for petitioners in No. 13–1052. With him on the briefs were *Paul J. Lukas*, *Rachhana T. Srey*, and *Sundeep Hora*.

Allyson Ho argued the cause for respondent Mortgage Bankers Association in both cases. With her on the brief were *John C. Sullivan*, *Sam S. Shaulson*, and *Michael W. Steinberg*.†

†Briefs of *amici curiae* urging affirmance in both cases were filed for the American Hospital Association et al. by *Beth Heifetz*, *Catherine E. Livingston*, and *Frank Trinity*; for the Cato Institute et al. by *C. Boyden*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. § 553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.

I

A

The APA establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." § 551(5). "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are

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Gray, Adam J. White, and *Ilya Shapiro*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Chamber of the Commerce of the United States of America et al. by *Shay Dvoretzsky, Jeffrey Johnson*, *Richard Moskowitz*, and *Kate Comerford Todd*; for the National Federation of Independent Business et al. by *Evan A. Young*; for the National Mining Association by *Michael S. Giannotto* and *William M. Jay*; for Quicken Loans Inc. by *Robert J. Muchnick*, *William D. Sargent*, and *Jeffrey B. Morganroth*; for State and Local Government Associations by *James C. Ho*, *Ashley E. Johnson*, and *Lisa E. Soronen*; for the Thomas Jefferson Institute for Public Policy by *M. Miller Baker*; for the Utility Air Regulatory Group et al. by *F. William Brownell*, *William L. Wehrum*, and *Makram B. Jaber*; and for the Washington Legal Foundation et al. by *Richard A. Samp* and *Cory L. Andrews*.

designed to "implement, interpret, or prescribe law or policy." § 551(4).

Section 4 of the APA, 5 U. S. C. § 553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. § 553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." § 553(c). An agency must consider and respond to significant comments received during the period for public comment. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971); *Thompson* v. *Clark*, 741 F. 2d 401, 408 (CADC 1984). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." § 553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303 (1979) (internal quotation marks omitted).

Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U. S. C. § 553(b)(A). The term "interpretative rule," or "interpretive rule,"[1] is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. See generally Pierce, Distinguishing Legislative Rules From Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004). We need not, and do not, wade into that debate here. For our pur-

[1] The latter is the more common phrasing today, and the one we use throughout this opinion.

poses, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.*

B

These cases began as a dispute over efforts by the Department of Labor to determine whether mortgage-loan officers are covered by the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* The FLSA "establishe[s] a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek" for many employees. *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. 27, 31 (2014). Certain classes of employees, however, are exempt from these provisions. Among these exempt individuals are those "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." § 213(a)(1). The exemption for such employees is known as the "administrative" exemption.

The FLSA grants the Secretary of Labor authority to "defin[e]" and "delimi[t]" the categories of exempt administrative employees. *Ibid.* The Secretary's current regulations regarding the administrative exemption were promulgated in 2004 through a notice-and-comment rulemaking. As relevant here, the 2004 regulations differed from the previous regulations in that they contained a new section providing several examples of exempt administrative employees. See 29 CFR § 541.203. One of the examples is "[e]mployees in

the financial services industry," who, depending on the nature of their day-to-day work, "generally meet the duties requirements for the administrative exception." § 541.203(b). The financial services example ends with a caveat, noting that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *Ibid.*

In 1999 and again in 2001, the Department's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption. See Opinion Letter, Loan Officers/Exempt Status, 6A LRR, Wages and Hours Manual 99:8351 (Feb. 16, 2001); Opinion Letter, Mortgage Loan Officers/Exempt Status, *id.*, at 99:8249. (May 17, 1999). In other words, the Department concluded that the FLSA's minimum wage and maximum hour requirements applied to mortgage-loan officers. When the Department promulgated its current FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA), a national trade association representing real estate finance companies, requested a new opinion interpreting the revised regulations. In 2006, the Department issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. See App. to Pet. for Cert. in No. 13–1041, pp. 70a–84a. Four years later, however, the Wage and Hour Division again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage-loan officers. *Id.*, at 49a–69a. Reviewing the provisions of the 2004 regulations and judicial decisions addressing the administrative exemption, the Department's 2010 Administrator's Interpretation concluded that mortgage-loan officers "have a primary duty of making sales for their employers, and, therefore, do not qualify" for the administrative exemption. *Id.*, at 49a, 69a. The Department accordingly withdrew its 2006 opinion letter, which it now viewed as relying on "misleading assumption[s] and selective and narrow analysis" of the exemption example in § 541.203(b). *Id.*, at 68a. Like the 1999, 2001, and 2006

opinion letters, the 2010 Administrator's Interpretation was issued without notice or an opportunity for comment.

C

MBA filed a complaint in Federal District Court challenging the Administrator's Interpretation. MBA contended that the document was inconsistent with the 2004 regulation it purported to interpret, and thus arbitrary and capricious in violation of § 10 of the APA, 5 U. S. C. § 706. More pertinent to these cases, MBA also argued that the Administrator's Interpretation was procedurally invalid in light of the D. C. Circuit's decision in *Paralyzed Veterans*, 117 F. 3d 579. Under the *Paralyzed Veterans* doctrine, if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." *Alaska Professional Hunters Assn., Inc.* v. *FAA*, 177 F. 3d 1030, 1034 (CADC 1999). Three former mortgage-loan officers—Beverly Buck, Ryan Henry, and Jerome Nickols—subsequently intervened in the case to defend the Administrator's Interpretation.[2]

The District Court granted summary judgment to the Department. *Mortgage Bankers Assn.* v. *Solis*, 864 F. Supp. 2d 193 (DC 2012). Though it accepted the parties' characterization of the Administrator's Interpretation as an interpretive rule, *id.*, at 203, n. 7, the District Court determined that the *Paralyzed Veterans* doctrine was inapplicable because MBA had failed to establish its reliance on the contrary interpretation expressed in the Department's 2006 opinion letter. The Administrator's Interpretation, the District Court further determined, was fully supported by the text of the 2004 FLSA regulations. The court accordingly held that the 2010 interpretation was not arbitrary or capricious.[3]

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[2] Buck, Henry, and Nickols are petitioners in No. 13–1052 and respondents in No. 13–1041.

[3] MBA did not challenge this aspect of the District Court's decision on appeal.

The D. C. Circuit reversed. *Mortgage Bankers Assn.* v. *Harris*, 720 F. 3d 966 (2013). Bound to the rule of *Paralyzed Veterans* by precedent, the Court of Appeals rejected the Government's call to abandon the doctrine. 720 F. 3d, at 967, n. 1. In the court's view, "[t]he only question" properly before it was whether the District Court had erred in requiring MBA to prove that it relied on the Department's prior interpretation. *Id.*, at 967. Explaining that reliance was not a required element of the *Paralyzed Veterans* doctrine, and noting the Department's concession that a prior, conflicting interpretation of the 2004 regulations existed, the D. C. Circuit concluded that the 2010 Administrator's Interpretation had to be vacated.

We granted certiorari, 573 U. S. 916 (2014), and now reverse.

II

The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978).

A

The text of the APA answers the question presented. Section 4 of the APA provides that "notice of proposed rule making shall be published in the Federal Register." 5 U. S. C. § 553(b). When such notice is required by the APA, "the agency shall give interested persons an opportunity to participate in the rule making." § 553(c). But § 4 further states that unless "notice or hearing is required by statute," the Act's notice-and-comment requirement "does not apply . . . to interpretative rules." § 553(b)(A). This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

Rather than examining the exemption for interpretive rules contained in § 4(b)(A) of the APA, the D. C. Circuit in *Paralyzed Veterans* focused its attention on § 2 of the Act. That section defines "rule making" to include not only the initial issuance of new rules, but also "repeal[s]" or "amend-[ments]" of existing rules. See § 551(5). Because notice-and-comment requirements may apply even to these later agency actions, the court reasoned, "allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment" would undermine the APA's procedural framework. 117 F. 3d, at 586.

This reading of the APA conflates the differing purposes of §§ 2 and 4 of the Act. Section 2 defines what a rule-making is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of § 4. And § 4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D. C. Circuit correctly read § 2 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Where the court went wrong was in failing to apply that accurate understanding of § 2 to the exemption for interpretive rules contained in § 4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

B

The straightforward reading of the APA we now adopt harmonizes with longstanding principles of our administrative law jurisprudence. Time and again, we have reiterated

that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *Id.*, at 513. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee*, 435 U. S., at 549. To do otherwise would violate "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Id.*, at 544.

These foundational principles apply with equal force to the APA's procedures for rulemaking. We explained in *Vermont Yankee* that § 4 of the Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.*, at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.*

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts. We trust that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules. See *Vermont Yankee*, 435 U. S., at 523 (when Congress enacted the APA, it "settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest" (internal quotation marks omitted)). In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations. That the D. C. Circuit would have struck the balance differently does not permit that court or

this one to overturn Congress' contrary judgment. Cf. *Law* v. *Siegel*, 571 U. S. 415, 427 (2014).

III

MBA offers several reasons why the *Paralyzed Veterans* doctrine should be upheld. They are not persuasive.

A

MBA begins its defense of the *Paralyzed Veterans* doctrine by attempting to bolster the D. C. Circuit's reading of the APA. "*Paralyzed Veterans*," MBA contends, "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself," something that under the APA requires use of notice-and-comment procedures. Brief for Respondent MBA 20–21.

The act of "amending," however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of "interpreting." Compare Black's Law Dictionary 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of" or "formally alter . . . by striking out, inserting, or substituting words") with *id.*, at 943 (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"). One would not normally say that a court "amends" a statute when it interprets its text. So too can an agency "interpret" a regulation without "effectively amend[ing]" the underlying source of law. MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. See *Chrysler Corp.*, 441 U. S., at 302, n. 31 (citing Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

MBA's "interpretation-as-amendment" theory is particularly odd in light of the limitations of the *Paralyzed Veterans*

doctrine. Recall that the rule of *Paralyzed Veterans* applies only when an agency has previously adopted an interpretation of its regulation. Yet in that initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text—the very act MBA insists requires notice and comment. MBA is unable to say why its arguments regarding revised interpretations should not also extend to the agency's first interpretation.[4]

Next, MBA argues that the *Paralyzed Veterans* doctrine is more consistent with this Court's "functional" approach to interpreting the APA. Relying on *Christensen* v. *Harris County*, 529 U. S. 576 (2000), and *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, MBA contends that we have already recognized that an agency may not "avoid notice-and-comment procedures by cloaking its actions in the mantle of mere 'interpretation.'" Brief for Respondent MBA 23–24.

Neither of the cases MBA cites supports its argument. Our decision in *Christensen* did not address a change in agency interpretation. Instead, we there refused to give deference to an agency's interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency "to create *de facto* a new regulation." 529 U. S., at 588. Put differently, *Christensen* held that the agency

[4] MBA alternatively suggests that interpretive rules have the force of law because an agency's interpretation of its own regulations may be entitled to deference under *Auer* v. *Robbins*, 519 U. S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (*Auer* deference is inappropriate "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment" (internal quotation marks omitted)); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 515 (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)).

interpretation at issue was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret. That holding is irrelevant to this suit and to the *Paralyzed Veterans* rule, which assesses whether an agency interpretation is *procedurally* invalid.

As for *Guernsey*, that case is fully consistent with—indeed, confirms—what the text of the APA makes plain: "Interpretive rules do not require notice and comment." 514 U. S., at 99. Sidestepping this inconvenient language, MBA instead quotes a portion of the Court's opinion stating that "APA rulemaking would still be required if [an agency] adopted a new position inconsistent with . . . existing regulations." *Id.*, at 100. But the statement on which MBA relies is dictum. Worse, it is dictum taken out of context. The "regulations" to which the Court referred were two provisions of the Medicare reimbursement scheme. And it is apparent from the Court's description of these regulations in Part II of the opinion that they were legislative rules, issued through the notice-and-comment process. See *id.*, at 91–92 (noting that the disputed regulations were codified in the Code of Federal Regulations). Read properly, then, the cited passage from *Guernsey* merely means that "an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations." Brief for Petitioners in No. 13–1052, p. 44.

B

In the main, MBA attempts to justify the *Paralyzed Veterans* doctrine on practical and policy grounds. MBA contends that the doctrine reinforces the APA's goal of "procedural fairness" by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. Brief for Respondent MBA 16.

There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in

such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters." 556 U. S., at 515 (citation omitted); see also *id.*, at 535 (KENNEDY, J., concurring in part and concurring in judgment).

In addition, Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests. For that reason, Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations. The FLSA includes one such provision: As amended by the Portal-to-Portal Act of 1947, 29 U. S. C. §251 *et seq.*, the FLSA provides that "no employer shall be subject to any liability" for failing "to pay minimum wages or overtime compensation" if it demonstrates that the "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Department's Wage and Hour Division, even when the guidance is later "modified or rescinded." §§259(a), (b)(1). These safe harbors will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position.[5]

[5] The United States acknowledged at argument that even in situations where a statute does not contain a safe-harbor provision similar to the one included in the FLSA, an agency's ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactivity. See Tr. of Oral Arg. 44–45. We have no occasion to consider how such principles might apply here.

C

MBA changes direction in the second half of its brief, contending that if the Court overturns the *Paralyzed Veterans* rule, the D. C. Circuit's judgment should nonetheless be affirmed. That is so, MBA says, because the agency interpretation at issue—the 2010 Administrator's Interpretation—should in fact be classified as a legislative rule.

We will not address this argument. From the beginning, the parties litigated this suit on the understanding that the Administrator's Interpretation was—as its name suggests—an interpretive rule. Indeed, if MBA did not think the Administrator's Interpretation was an interpretive rule, then its decision to invoke the *Paralyzed Veterans* doctrine in attacking the rule is passing strange. After all, *Paralyzed Veterans* applied only to interpretive rules. Consequently, neither the District Court nor the D. C. Circuit considered MBA's current claim that the Administrator's Interpretation is actually a legislative rule. Beyond that, and more important still, MBA's brief in opposition to certiorari did not dispute petitioners' assertions—in their framing of the question presented and in the substance of their petitions—that the Administrator's Interpretation is an interpretive rule. Thus, even assuming MBA did not waive the argument below, it has done so in this Court. See this Court's Rule 15.2; *Carcieri* v. *Salazar*, 555 U. S. 379, 395–396 (2009).

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed.

It is so ordered.

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

I join the opinion of the Court except for Part III–B. I agree that the doctrine of *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997), is incompatible

with the Administrative Procedure Act. The creation of that doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). I do not dismiss these concerns, but the *Paralyzed Veterans* doctrine is not a viable cure for these problems. At least one of the three factors noted above, however, concerns a matter that can be addressed by this Court. The opinions of JUSTICE SCALIA and JUSTICE THOMAS offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. See also *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158–159 (2012) (citing, *inter alia*, Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996)). I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's decision, and all of its reasoning demonstrating the incompatibility of the D. C. Circuit's *Paralyzed Veterans* holding with the Administrative Procedure Act. *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997). I do not agree, however, with the Court's portrayal of the result it produces as a vindication of the balance Congress struck when it "weighed the costs and benefits of placing more rigorous . . . restrictions on the issuance of interpretive rules." *Ante,* at 102. That depiction is accurate enough if one looks at this case in isolation. Considered alongside our law of deference to administrative determinations, however, today's decision produces a balance

between power and procedure quite different from the one Congress chose when it enacted the APA.

"The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644 (1950). The Act guards against excesses in rulemaking by requiring notice and comment. Before an agency makes a rule, it normally must notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose. 5 U. S. C. § 553(b)–(c); *ante*, at 96.

The APA exempts interpretive rules from these requirements. § 553(b)(A). But this concession to agencies was meant to be more modest in its effects than it is today. For despite exempting interpretive rules from notice and comment, the Act provides that "the *reviewing court* shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." § 706 (emphasis added). The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. In such a regime, the exemption for interpretive rules does not add much to agency power. An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means.

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court . . . interpret . . . statutory provisions," we have held that *agencies* may authorita-

tively resolve ambiguities in statutes. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). And never mentioning § 706's directive that the "reviewing court . . . determine the meaning or applicability of the terms of an agency action," we have—relying on a case decided before the APA, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945)—held that *agencies* may authoritatively resolve ambiguities in regulations. *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997).

By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

The Court's reasons for resisting this obvious point would not withstand a gentle breeze. Even when an agency's interpretation gets deference, the Court argues, "it is the court that ultimately decides whether [the text] means what the agency says." *Ante*, at 104, n. 4. That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to "decide" that the text means what the agency says. The Court continues that "deference is not an inexorable command in all cases," because (for example) it does not apply to plainly erroneous interpretations. *Ibid.* True, but beside the point. Saying *all* interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying *all* substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretive rule must meet certain conditions before it gets deference—the interpretation

must, for instance, be reasonable—but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.

The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes. But an agency's interpretation of its own regulations is another matter. By giving that category of interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

Still and all, what are we to do about the problem? The *Paralyzed Veterans* doctrine is a courageous (indeed, brazen) attempt to limit the mischief by requiring an interpretive rule to go through notice and comment if it revises an earlier definitive interpretation of a regulation. That solution is unlawful for the reasons set forth in the Court's opinion: It contradicts the APA's unqualified exemption of interpretive rules from notice-and-comment rulemaking.

But I think there is another solution—one unavailable to the D. C. Circuit since it involves the overruling of one of this Court's decisions (that being even a greater fault than merely ignoring the APA). As I have described elsewhere, the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where "[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive."

United States v. *Mead Corp.*, 533 U. S. 218, 243 (2001) (SCALIA, J., dissenting). I am unaware of any such history justifying deference to agency interpretations of its own regulations. And there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means. See *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 616–621 (2013) (SCALIA, J., concurring in part and dissenting in part). I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.

JUSTICE THOMAS, concurring in the judgment.

I concur in the Court's holding that the doctrine first announced in *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997), is inconsistent with the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, and must be rejected. An agency's substantial revision of its interpretation of a regulation does not amount to an "amendment" of the regulation as that word is used in the statute.

I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents, beginning with *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other

branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.

I

The doctrine of deference to an agency's interpretation of regulations is usually traced back to this Court's decision in *Seminole Rock*, *supra*, which involved the interpretation of a wartime price control regulation, *id.*, at 411. Along with a general price freeze, the Administrator of the Office of Price Administration had promulgated specialized regulations governing the maximum price for different commodities. *Id.*, at 413. When the Administrator brought an enforcement action against a manufacturer of crushed stone, the manufacturer challenged the Administrator's interpretation of his regulations.

The lower courts agreed with the manufacturer's interpretation, *id.*, at 412–413, but this Court reversed. In setting out the approach it would apply to the case, the Court announced—without citation or explanation—that an administrative interpretation of an ambiguous regulation was entitled to "controlling weight":

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*, at 413–414.

The Court then concluded that the rule "clearly" favored the Administrator's interpretation, rendering this discussion dictum. *Id.*, at 415–417.

From this unsupported rule developed a doctrine of deference that has taken on a life of its own.[1] It has been broadly applied to regulations issued by agencies across a broad spectrum of subjects. See, *e. g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 358–359 (1989) (forests); *Ehlert* v. *United States*, 402 U. S. 99, 104–105 (1971) (Selective Service); *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969) (deportation); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965) (oil and gas leases). It has even been applied to an agency's interpretation of another agency's regulations. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696–699 (1991). And, it has been applied to an agency interpretation that was inconsistent with a previous interpretation of the same regulation. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170–171 (2007). It has been applied to formal and informal interpretations alike, including those taken during litigation. See *Auer* v. *Robbins*, 519 U. S. 452, 462 (1997). Its reasoning has also been extended outside the context of traditional agency regulations into the realm of criminal sentencing. See *Stinson* v. *United States*, 508 U. S. 36, 44–45 (1993) (concluding that the Sentencing Commission's commentary on its Guidelines is analogous to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference).

The Court has even applied the doctrine to an agency interpretation of a regulation cast in such vague aspirational terms as to have no substantive content. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512–513 (1994); see also *id.*, at 518 (THOMAS, J., dissenting).

On this steady march toward deference, the Court only once expressly declined to apply *Seminole Rock* deference

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[1] Although the Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools. See, *e. g.*, C. Nelson, Statutory Interpretation 701 (2011). Such tools might not be entitled to such effect. Because resolution of that issue is not necessary to my conclusion here, I leave it for another day.

on the ground that the agency's interpretation was plainly erroneous.[2] In that case, we were faced with the predictable consequence of this line of precedents: An agency sought deference to an opinion letter that interpreted a permissive regulation as mandatory. See *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000). We rejected that request for deference as an effort, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Ibid.* This narrow limit on the broad deference given the agency interpretations, though sound, could not save a doctrine that was constitutionally infirm from the start. *Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns.

II

We have not always been vigilant about protecting the structure of our Constitution. Although this Court has repeatedly invoked the "separation of powers" and "the constitutional system of checks and balances" as core principles

[2] The Court has also twice expressly found *Seminole Rock* deference inapplicable for other reasons. *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158–159 (2012) ("[W]here, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. . . . [W]hatever the general merits of *Auer* deference, it is unwarranted here"); *Gonzales* v. *Oregon*, 546 U. S. 243, 256–257 (2006) ("In our view *Auer* and the standard of deference it accords to an agency are inapplicable here. . . . The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference").

Occasionally, Members of this Court have argued in separate writings that the Court failed appropriately to apply *Seminole Rock* deference, but in none of those cases did the majority opinions of the Court expressly refuse to do so. See *Ballard* v. *Commissioner*, 544 U. S. 40 (2005); *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359 (1998); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267 (1994); *United States* v. *Swank*, 451 U. S. 571 (1981); *Peters* v. *Hobby*, 349 U. S. 331 (1955).

of our constitutional design, essential to the protection of individual liberty, see, *e. g.*, *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011) (internal quotation marks omitted), it has also endorsed a "more pragmatic, flexible approach" to that design when it has seemed more convenient to permit the powers to be mixed, see, *e. g.*, *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 442 (1977). As the history shows, that approach runs the risk of compromising our constitutional structure.

A

The Constitution's particular blend of separated powers and checks and balances was informed by centuries of political thought and experiences. See M. Vile, Constitutionalism and the Separation of Powers 38, 168–169 (2d ed. 1998) (Vile). Though the theories of the separation of powers and checks and balances have roots in the ancient world, events of the 17th and 18th centuries played a crucial role in their development and informed the men who crafted and ratified the Constitution.

Over a century before our War of Independence, the English Civil War catapulted the theory of the separation of powers to prominence. As political theorists of the day witnessed the conflict between the King and Parliament, and the dangers of tyrannical government posed by each, they began to call for a clear division of authority between the two. *Id.*, at 44–45, 48–49. A 1648 work titled The Royalist's Defence offered perhaps the first extended account of the theory of the separation of powers: "[W]hilst the *Supreamacy*, the *Power* to Judge the Law, and *Authority* to make new Lawes, are kept in *severall hands*, the known Law is *preserved*, but *united*, it is *vanished*, instantly thereupon, and *Arbytrary* and *Tyrannicall* power is introduced." The Royalist's Defence 80 (italics in original).

John Locke and Baron de Montesquieu endorsed and expanded on this concept. See Vile 63–64. They agreed with the general theory set forth in The Royalist's Defence, em-

phasizing the need for a separation of powers to protect individual liberty. J. Locke, Second Treatise of Civil Government §§ 143–144, p. 72 (J. Gough ed. 1947); Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949). But they also advocated a system of checks and balances to reinforce that separation. Vile 72–73, 102. For instance, they agreed that the executive should have the power to assemble and dismiss the legislature and to consent to laws passed by it. See Locke, *supra*, §§ 151, 156, at 75, 77–78; Montesquieu, Spirit of the Laws, at 157, 159. Montesquieu warned that "power should be a check to power" lest the legislature "arrogate to itself what authority it pleased . . . [and] soon destroy all the other powers." *Id.*, at 150, 157.

The experience of the States during the period between the War of Independence and the ratification of the Constitution confirmed the wisdom of combining these theories. Although many State Constitutions of the time included language unequivocally endorsing the separation of powers, they did not secure that separation with checks and balances, Vile 147, and actively placed traditional executive and judicial functions in the legislature, G. Wood, The Creation of the American Republic 1776–1787, pp. 155–156 (1969). Under these arrangements, state legislatures arrogated power to themselves and began to confiscate property, approve the printing of paper money, and suspend the ordinary means for the recovery of debts. *Id.*, at 403–409.[3]

When the Framers met for the Constitutional Convention, they understood the need for greater checks and balances to reinforce the separation of powers. As Madison remarked, "experience has taught us a distrust" of the separation of

[3] The practices of the time can perhaps best be summarized by the following commentary from a contemporaneous magazine: "[S]o many *legal infractions* of sacred right—so many public invasions of private property—so many wanton abuses of legislative powers!" Hickory (Noah Webster), Government, The American Magazine, Mar. 1788, p. 206.

powers alone as "a sufficient security to each [branch] [against] encroachments of the others." 2 Records of the Federal Convention of 1787, p. 77 (M. Farrand rev. 1966). "[I]t is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper." *Ibid.* The Framers thus separated the three main powers of Government—legislative, executive, and judicial—into the three branches created by Articles I, II, and III. But they also created checks and balances to reinforce that separation. For example, they gave Congress specific enumerated powers to enact legislation, Art. I, § 8, but gave the President the power to veto that legislation, subject to congressional override by a supermajority vote, Art. I, § 7, cls. 2, 3. They gave the President the power to appoint principal officers of the United States, but gave the Senate the power to give advice and consent to those appointments. Art. II, § 2, cl. 2. They gave the House and Senate the power to agree to adjourn for more than three days, Art. I, § 5, cl. 4, but gave the President the power, "in Case of Disagreement between them," to adjourn the Congress "to such Time as he shall think proper." Art. II, § 3, cl. 3. During the ratification debates, Madison argued that this structure represented "the great security" for liberty in the Constitution. The Federalist No. 51, p. 321 (C. Rossiter ed. 1961).

To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution. See *Mistretta* v. *United States*, 488 U. S. 361, 426 (1989) (SCALIA, J., dissenting) ("[The Constitution] is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling [of governmental powers] was, in the generality of things, acceptable, and set forth their conclusions in the document"). The Judiciary—no less than the other two branches—has an obligation to guard

against deviations from those principles. The *Seminole Rock* line of precedent is one such deviation.

B

Seminole Rock raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a "check" on the political branches.

1

When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the "judicial Power of the United States." Art. III, § 1. For the reasons I explain in this section, the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.

Those who ratified the Constitution knew that legal texts would often contain ambiguities. See generally Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 20–21, and n. 66 (2000); Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 525–526 (2003). As James Madison explained, "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . . ." The Federalist No. 37, at 229.

The judicial power was understood to include the power to resolve these ambiguities over time. See *ibid.* Alexander Hamilton lauded this power, arguing that "[t]he interpretation of the laws is the proper and peculiar province of the courts." *Id.*, No. 78, at 467. It is undoubtedly true that the other branches of Government have the authority and obligation to interpret the law, but only the judicial interpre-

tation would be considered authoritative in a judicial proceeding. Vile 360.

Although the Federalists and Anti-Federalists engaged in a public debate about this interpretive power, that debate centered on the dangers inherent in the power, not on its allocation under the Constitution. See, *e. g.*, Letters from The Federal Farmer XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315–316 (H. Storing ed. 1981) (arguing that the interpretive power made the Judiciary the most dangerous branch). Writing as "Brutus," one leading Anti-Federalist argued that judges "w[ould] not confine themselves to any fixed or established rules, but w[ould] determine, according to what appears to them, the reason and spirit of the constitution." Essays of Brutus (Jan. 31, 1788), in 2 *id.*, at 420. The Federalists rejected these arguments, assuring the public that judges would be guided "by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, at 471 (A. Hamilton). Those rules included principles of interpretation that had been set out by jurists for centuries. See, *e. g.*, 2 S. von Pufendorf, De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo 83–86 (1682) (F. Moore transl. 1927); see also 1 W. Blackstone, Commentaries on the Laws of England 59–61 (1765).

One of the key elements of the Federalists' arguments in support of the allocation of power to make binding interpretations of the law was that Article III judges would exercise independent judgment. Although "judicial independence" is often discussed in terms of independence from external threats, the Framers understood the concept to also require independence from the "internal threat" of "human will." P. Hamburger, Law and Judicial Duty 507, 508 (2008); see also The Federalist No. 78, at 465 (A. Hamilton) ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . . "). Independent judgment required judges to decide cases in accordance with the law

of the land, not in accordance with pressures placed upon them through either internal or external sources. Internal sources might include personal biases, while external sources might include pressure from the political branches, the public, or other interested parties. See Hamburger, *supra*, at 508–521.

The Framers made several key decisions at the Convention with these pressures in mind. For example, they rejected proposals to include a federal council of revision after several participants at the Convention expressed concern that judicial involvement in such a council would foster internal biases. Rufus King of Maryland, for example, asserted that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." 1 Records of the Federal Convention of 1787, at 98. Alexander Hamilton repeated these concerns in The Federalist, arguing that "the judges, who are to be interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities" or "be induced to embark too far in the political views of [the Executive]" from too much association with him. The Federalist No. 73, at 446; see also Hamburger, *supra*, at 508–512.

The Framers also created structural protections in the Constitution to free judges from external influences. They provided, for example, that judges should "hold their Offices during good Behaviour" and receive "a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1. Hamilton noted that such unequivocal language had been shown necessary by the experience of the States, where similar state constitutional protections for judges had not been "sufficiently definite to preclude legislative evasions" of the separation of the judicial power. The Federalist No. 79, at 472. Because "power over a man's subsistence amounts to a power over his will," he argued that Article III's structural protections would help ensure that

judges fulfilled their constitutional role. *Ibid.* (emphasis deleted).

The Framers made the opposite choice for legislators and the Executive. Instead of insulating them from external pressures, the Constitution tied them to those pressures. It provided for election of Members of the House of Representatives every two years, Art. I, § 2, cl. 1; and selection of Members of the Senate every six years, Art. I, § 3, cl. 1. It also provided for the President to be subject to election every four years. Art. II, § 1, cl. 1. "The President is [thus] directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . . ." *Morrison* v. *Olson*, 487 U. S. 654, 729 (1988) (SCALIA, J., dissenting). To preserve that accountability, we have held that executive officers *must* be subject to removal by the President to ensure accountability within the Executive Branch. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 495 (2010); see also *Morrison*, *supra*, at 709 (opinion of SCALIA, J.) ("It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are").

Given these structural distinctions between the branches, it is no surprise that judicial interpretations are definitive in cases and controversies before the courts. Courts act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Federalist No. 78, at 467 (A. Hamilton). The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is dutybound to exercise independent judgment in applying the law.

Interpreting agency regulations calls for that exercise of independent judgment. Substantive regulations have the

force and effect of law. See, *e. g.*, *United States* v. *Mead Corp.*, 533 U. S. 218, 231–232 (2001).[4] Agencies and private parties alike can use these regulations in proceedings against regulated parties. See, *e. g.*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 152–153 (2012) (private party relying on Department of Labor regulations); *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. 239, 248 (2012) (agency issuing notices of liability under regulations). Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties. Defining the legal meaning of the regulation is one aspect of that determination.

Seminole Rock deference, however, precludes judges from independently determining that meaning. Rather than judges' applying recognized tools of interpretation to determine the best meaning of a regulation, this doctrine demands

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[4] These cases also raise constitutional questions about the distinction in administrative law between "substantive" (or "legislative") and interpretative rules. The United States Court of Appeals for the D. C. Circuit has defined a legislative rule as "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties" and an interpretative rule as "[a]n agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *National Mining Assn.* v. *McCarthy*, 758 F. 3d 243, 251–252 (2014). And our precedents make clear that administrative agencies must exercise only executive power in promulgating these rules. *Arlington* v. *FCC*, 569 U. S. 290, 304, n. 4 (2013). But while it is easy to see the promulgation of interpretative rules as an "executive" function—executive officials necessarily interpret the laws they enforce—it is difficult to see what authority the President has "to impose legally binding obligations or prohibitions on regulated parties." That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner. Because these troubling questions are not directly implicated here, I leave them for another case. See *Department of Transportation* v. *Association of American Railroads*, *ante*, at 84–87 (THOMAS, J., concurring in judgment).

that courts accord "controlling weight" to the agency interpretation of a regulation, subject only to the narrow exception for interpretations that are plainly erroneous or inconsistent with the regulation. That deference amounts to a transfer of the judge's exercise of interpretive judgment to the agency. See 1 S. Johnson, Dictionary of the English Language 499 (4th ed. 1773) (defining "[d]efer" as "to leave to another's judgment"). But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.

2

Seminole Rock is constitutionally questionable for an additional reason: It undermines the judicial "check" on the political branches. Unlike the Legislative and Executive Branches, each of which possesses several political checks on the other, the Judiciary has one primary check on the excesses of political branches. That check is the enforcement of the rule of law through the exercise of judicial power.

Judges have long recognized their responsibility to apply the law, even if they did not conceive of it as a "check" on political power. During the 17th century, for example, King James I sought to pressure Chief Justice Coke to affirm the lawfulness of his efforts to raise revenue without the participation of Parliament. Hamburger, Law and Judicial Duty, at 200–201. Coke sought time to confer with his fellow jurists to "make an advised answer according to law and reason." *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611). But the King's representative, Lord Chancellor Ellesmere, responded that "he would advise the Judges to maintain the power and prerogative of the King" and suggested that, "in cases in which there is no authority and precedent," the judiciary should "leave it to the

King to order in it according to his wisdom." *Ibid.* Coke famously responded, "[T]he King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ibid.* When James I later attempted to do just that, Coke declared the proclamations "'utterly against Law and reason, and for that void.'" Hamburger, *supra*, at 202.

The Framers expected Article III judges to engage in similar efforts, by applying the law as a "check" on the excesses of both the Legislative and Executive Branches. See, *e. g.*, 3 J. Elliot, Debates in the Several Conventions on the Adoption of the Federal Constitution 553 (1863) (J. Marshall) ("If [the Government of the United States] make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void"); see also Vile 174. The Framers "contemplated [the Constitution], as a rule for the government of *courts*, as well as of the legislature." *Marbury* v. *Madison*, 1 Cranch 137, 179–180 (1803). Thus, if a case involved a conflict between a law and the Constitution, judges would have a duty "to adhere to the latter and disregard the former." The Federalist No. 78, at 468 (A. Hamilton); see also *Marbury*, 1 Cranch, at 178. Similarly, if a case involved an executive effort to extend a law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution. Cf. *id.*, at 157–158 (considering the scope of the President's constitutional power of appointment). As this Court said long ago, "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument." *Id.*, at 180.

Article III judges cannot opt out of exercising their check. As we have long recognized, "the Judiciary has a responsibility to decide cases properly before it, even those it 'would

gladly avoid.'" *Zivotofsky* v. *Clinton*, 566 U. S. 189, 194 (2012) (quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821)). This responsibility applies not only to constitutional challenges to particular statutes, see, *e. g.*, *Shelby County* v. *Holder*, 570 U. S. 529, 536 (2013), including those based on the separation of powers, *Free Enterprise Fund*, 561 U. S., at 501–502, but also to more routine questions about the best interpretation of statutes, see, *e. g.*, *Whitfield* v. *United States*, 574 U. S. 265, 267–268 (2015), or the compatibility of agency actions with enabling statutes, *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 315 (2014). In each case, the Judiciary is called upon to exercise its independent judgment and apply the law.

But we have not consistently exercised the judicial check with respect to administrative agencies. Even though regulated parties have repeatedly challenged agency interpretations as inconsistent with existing regulations, we have just as repeatedly declined to exercise independent judgment as to those claims. Instead, we have deferred to the executive agency that both promulgated the regulations and enforced them. Although an agency's interpretation of a regulation might be the best interpretation, it also might not. When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against. See The Federalist No. 47, at 302 (J. Madison).

C

This accumulation of governmental powers allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties. It is precisely this problem that the United States Court of Appeals for the D. C. Circuit attempted to address by requiring agencies to undertake notice-and-comment procedures before

substantially revising definitive interpretations of regulations. *Paralyzed Veterans*, 117 F. 3d 579. Though legally erroneous, the Court of Appeals' reasoning was practically sound. When courts give "controlling weight" to an administrative interpretation of a regulation—instead of to the *best* interpretation of it—they effectively give the interpretation—and not the regulation—the force and effect of law. To regulated parties, the new interpretation might as well be a new regulation.

These cases provide a classic example of the problem. The Fair Labor Standards Act of 1938 establishes federal minimum wage and overtime requirements, but exempts from these requirements "any employee engaged in a bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)." 29 U. S. C. § 213(a)(1). The Department of Labor has accordingly promulgated regulations providing that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 CFR § 541.203(b) (2015).

Unsure whether certain mortgage-loan officers qualified as employees whose primary duty is selling financial products, the Mortgage Bankers Association asked the Department of Labor for advice. In 2006, the Department concluded that the officers are not employees whose primary duty is selling financial products. But in 2010, the Department reversed course, concluding exactly the opposite. If courts accord "controlling weight" to both the 2006 and 2010 interpretations, the regulated entities are subject to two opposite legal rules imposed under the same regulation.

This practice turns on its head the principle that the United States is "a government of laws, and not of men." *Marbury*, *supra*, at 163. Regulations provide notice to regulated parties in only a limited sense because their mean-

ing will ultimately be determined by agencies rather than by the "strict rules and precedents" to which Alexander Hamilton once referred.[5]

III

Although this Court offered no theoretical justification for *Seminole Rock* deference when announcing it, several justifications have been proposed since. None is persuasive.

A

Probably the most oft-recited justification for *Seminole Rock* deference is that of agency expertise in administering technical statutory schemes. Under this justification, deference to administrative agencies is necessary when a "regulation concerns 'a complex and highly technical regulatory program' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.*, 512 U. S., at 512.

This defense of *Seminole Rock* deference misidentifies the relevant inquiry. The proper question faced by courts in in-

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[5] The notice problem is exacerbated by agency departures from the procedures established for rulemaking in the APA. Although almost all rulemaking is today accomplished through informal notice and comment, the APA actually contemplated a much more formal process for most rulemaking. To that end, it provided for elaborate trial-like hearings in which proponents of particular rules would introduce evidence and bear the burden of proof in support of those proposed rules. See 5 U. S. C. § 556.

Today, however, formal rulemaking is the Yeti of administrative law. There are isolated sightings of it in the ratemaking context, but elsewhere it proves elusive. It is somewhat ironic for the Court so adamantly to insist that agencies be subject to no greater procedures than those required by the APA when we have not been adamant in requiring agencies to comply with even those baseline procedures. See *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224, 237–238 (1973) (concluding that the APA's formal procedures, which were to apply "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing," § 553(c), were not triggered by a statute that permitted an agency to engage in rulemaking only "'after [a] hearing'").

terpreting a regulation is not what the best policy choice might be, but what the regulation means. Because this Court has concluded that "substantive agency regulations have the 'force and effect of law,' " *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295 (1979), such regulations should be interpreted like any other law. Thus, we should "assum[e] that the ordinary meaning of the [regulation's language] expresses" its purpose and enforce it "according to its terms." See *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010) (internal quotation marks omitted). Judges are at least as well suited as administrative agencies to engage in this task. Cf. *Marbury*, *supra*, at 177 ("It is emphatically the province and duty of the judicial department to say what the law is"). Indeed, judges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language. See, *e. g.*, *Barber* v. *Gonzales*, 347 U. S. 637, 640–643 (1954) (interpreting deportation statute according to technical meaning).

Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.[6] "But policy argu-

[6] Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action. See A. Link, Woodrow Wilson and the Progressive Era 1910–1917, p. 1 (1954). That move also reflected a deep disdain for the theory of popular sovereignty. As Woodrow Wilson wrote before he attained the Presidency: "Our peculiar American difficulty in organizing administration is not the danger of losing liberty, but the danger of not being able or willing to separate its essentials from its accidents. Our success is made doubtful by that besetting error of ours, the error of trying to do too much by vote." The Study of Administration, 2 Pol. Sci. Q. 197, 214 (1887). In President Wilson's view, public criticism would be beneficial in the formation of overall policy, but "a clumsy nuisance" in the daily life of Government—"a rustic handling delicate machinery." *Id.*, at 215. Re-

ments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised." *INS* v. *Chadha*, 462 U. S. 919, 945 (1983). Even in the face of a perceived necessity, the Constitution protects us from ourselves. *New York* v. *United States*, 505 U. S. 144, 187–188 (1992).

B

Another oft-recited justification for *Seminole Rock* deference is that agencies are better situated to define the original intent behind their regulations. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 152–153 (1991). Under this justification, "[b]ecause the Secretary [of Labor] promulgates th[e] standards, the Secretary is in a better position . . . to reconstruct the purpose of the regulations in question." *Id.*, at 152.

This justification rings hollow. This Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter. See *Pauley*, 501 U. S., at 696–698 (applying *Seminole Rock* deference to one agency's interpretation of another agency's regulations because Congress had delegated authority to both to administer the program). It has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations. See, *e. g.*, *Long Island Care at Home*, 551 U. S., at 170–171.

Even if the scope of *Seminole Rock* deference more closely matched the original-drafter justification, it would still fail. It is the text of the regulations that have the force and effect of law, not the agency's intent. "Citizens arrange their

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flecting this belief that bureaucrats might more effectively govern the country than the American people, the Progressives ushered in significant expansions of the administrative state, ultimately culminating in the New Deal. See generally M. Keller, Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933 (1990).

affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated." *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S. 81, 119 (2007) (SCALIA, J., dissenting). Cf. *Wyeth* v. *Levine*, 555 U. S. 555, 586–587 (2009) (THOMAS, J., concurring in judgment) (noting that only "federal standards . . . that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures"—not Congress' "purposes and objectives"—can become the "law of the land"). "To be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.' " *Zuni Public School Dist. No. 89*, *supra*, at 119 (SCALIA, J., dissenting). Only the text of a regulation goes through the procedures established by Congress for agency rulemaking. And it is that text on which the public is entitled to rely. For the same reasons that we should not accord controlling weight to postenactment expressions of intent by individual Members of Congress, see *Sullivan* v. *Finkelstein*, 496 U. S. 617, 631–632 (1990) (SCALIA, J., concurring in part), we should not accord controlling weight to expressions of intent by administrators of agencies.

C

A third asserted justification for *Seminole Rock* deference is that Congress has delegated to agencies the authority to interpret their own regulations. See, *e. g.*, *Martin*, 499 U. S., at 151. The theory is that, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, . . . the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Ibid.*

This justification fails because Congress lacks authority to delegate the power. As we have explained in an analogous context, "[t]he structure of the Constitution does not permit

Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986). Similarly, the Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency.

To hold otherwise would be to vitiate the separation of powers and ignore the "sense of a sharp necessity to separate the legislative from the judicial power . . . [that] triumphed among the Framers of the new Federal Constitution." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 221 (1995). As this Court has explained, the "essential balance" of the Constitution is that the Legislature is "possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' [is] 'the proper and peculiar province of the courts.'" *Id.*, at 222 (third brackets added). Although the Constitution imposes a duty on all three branches to interpret the laws within their own spheres, the power to create legally binding interpretations rests with the Judiciary. See *Marbury*, 1 Cranch, at 177, 179–180.

D

A final proposed justification for *Seminole Rock* deference is that too much oversight of administrative matters would imperil the "independence and esteem" of judges. See, *e. g.*, Hughes, Speech before the Elmira Chamber of Commerce, May 3, 1907, in Addresses of Charles Evans Hughes, 1906–1916, p. 185 (2d ed. 1916). The argument goes that questions of administration are those which "lie close to the public impatience," *id.*, at 186, and thus the courts' resolution of such questions could "expose them to the fire of public criticism," *id.*, at 187.

But this argument, which boils down to a policy judgment of questionable validity, cannot vitiate the constitutional allo-

cation of powers. The Judicial Branch is separate from the political branches for a reason: It has the obligation to apply the law to cases and controversies that come before it, and concerns about the popular esteem of individual judges—or even the Judiciary as a whole—have no place in that analysis. Our system of Government could not long survive absent adherence to the written Constitution that formed it.

* * *

Although on the surface these cases require only a straightforward application of the APA, closer scrutiny reveals serious constitutional questions lurking beneath. I have "acknowledge[d] the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means." *McDonald* v. *Chicago*, 561 U. S. 742, 812 (2010) (THOMAS, J., concurring in part and concurring in judgment). By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.

KANSAS *v.* NEBRASKA ET AL.

ON BILL OF COMPLAINT

No. 126, Orig. Decree entered May 19, 2003—Argued October 14, 2014—Decided February 24, 2015—Decree entered March 9, 2015

Decree entered.

Decree reported: 538 U. S. 720; opinion reported 574 U. S. 445.

DECREE

The Court having exercised original jurisdiction over this controversy between three sovereign States; the issues having been tried before the Special Master appointed by the Court; the Court having received briefs and heard oral argument on the parties' exceptions to the Report of the Special Master; and the Court having issued its opinion on all issues announced in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED AS FOLLOWS:

1. The RRCA Accounting Procedures are hereby reformed as shown on the attached Appendix to be effective for the accounting of Compact Year 2007 and thereafter.

2. Nebraska is not liable for evaporative losses from Harlan County Lake during 2006.

3. Evaporation from the Non-Federal Reservoirs located in Nebraska is a Beneficial Consumptive Use under the Compact and must be accounted for as such.

4. Nebraska's consumption in 2005 and 2006 exceeded its Compact allocation by 70,869 acre feet, said amount equaling the combined rather than average exceedences for those two years.

5. Nebraska must pay Kansas within sixty (60) days of the date of this Order, Five Million Five Hundred Thousand Dollars ($5,500,000.00).

6. Except as herein provided, the claims of all parties in this action are denied and their prayers for relief dismissed with prejudice.

7. The parties' respective responsibilities for the fees and costs awarded to the Special Master are as follows: Kansas (40%); Nebraska (40%); and Colorado (20%).

8. The parties' previous payments made to the Special Master and the printer of the Report of the Special Master discharge in full their respective obligations to pay for or share among themselves fees and costs awarded to the Special Master together with any costs that might have otherwise been assessed in this action.

9. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.

APPENDIX

Changes to the Accounting Procedures

III A 3. Imported Water Supply Credit Calculation: The amount of Imported Water Supply Credit shall be determined by the RRCA Groundwater Model. The Imported Water Supply Credit of a State shall not be included in the Virgin Water Supply and shall be counted as a credit/offset against the Computed Beneficial Consumptive Use of water allocated to that State. Currently, the Imported Water Supply Credits shall be determined using two runs of the RRCA Groundwater Model:

a. The "base" run shall be the run with all groundwater pumping, groundwater pumping recharge, and surface water recharge within the model study boundary for the current accounting year turned "on." ~~This will be the same "base" run used to determine groundwater Computed Beneficial Consumptive Uses.~~

b. The "no NE import" run shall be the run with the same model inputs as the base run with the exception that surface water recharge associated with Nebraska's Imported Water Supply shall be turned "off." This will be the same "no NE

import" run used to determine groundwater Computed Beneficial Consumptive Uses.

The Imported Water Supply Credit shall be the difference in stream flows between these two model runs. Differences in stream flows shall be determined at the same locations as identified in Subsection III.D.1 for the "no pumping" runs.

Should another State import water into the Basin in the future, the RRCA will develop a similar procedure to determine Imported Water Supply Credits.

III D. Calculation of Annual Computed Beneficial Consumptive Use

1. Groundwater

Computed Beneficial Consumptive Use of groundwater shall be determined by use of the RRCA Groundwater Model. The Computed Beneficial Consumptive Use of groundwater for each State shall be determined as the difference in streamflows using two runs of the model:

The "~~base~~ no NE import" run shall be the run with all groundwater pumping, groundwater pumping recharge, and surface water recharge within the model study boundary for the current accounting year "on", with the exception that surface water recharge associated with Nebraska's Imported Water Supply shall be turned "off."

The "no State pumping" run shall be the run with the same model inputs as the "~~base~~ no NE import" run with the exception that all groundwater pumping and pumping recharge of that State shall be turned "off."

An output of the model is baseflows at selected stream cells. Changes in the baseflows predicted by the model between the "~~base~~ no NE import" run and the "no-State-pumping" model run is assumed to be the depletions to streamflows, *i. e.*, groundwater computed beneficial consumptive use, due to State groundwater pumping at that location. The values

for each Sub-basin will include all depletions and accretions upstream of the confluence with the Main Stem. The values for the Main Stem will include all depletions and accretions in stream reaches not otherwise accounted for in a Sub-basin. The values for the Main Stem will be computed separately for the reach above Guide Rock, and the reach below Guide Rock.

*Taken from the August 12, 2010, Accounting Procedures.

Syllabus

B&B HARDWARE, INC. *v.* HARGIS INDUSTRIES, INC., DBA SEALTITE BUILDING FASTENERS ET AL., ET AL.

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

No. 13–352. Argued December 2, 2014—Decided March 24, 2015

Respondent Hargis Industries, Inc. (Hargis), tried to register its trademark for SEALTITE with the United States Patent and Trademark Office pursuant to the Lanham Act. Petitioner, B&B Hardware, Inc. (B&B), however, opposed registration, claiming that SEALTITE is too similar to B&B's own SEALTIGHT trademark. The Trademark Trial and Appeal Board (TTAB) concluded that SEALTITE should not be registered because of the likelihood of confusion. Hargis did not seek judicial review of that decision.

Later, in an infringement suit before the District Court, B&B argued that Hargis was precluded from contesting the likelihood of confusion because of the TTAB's decision. The District Court disagreed. The Eighth Circuit affirmed, holding that preclusion was unwarranted because the TTAB and the court used different factors to evaluate likelihood of confusion, the TTAB placed too much emphasis on the appearance and sound of the two marks, and Hargis bore the burden of persuasion before the TTAB while B&B bore it before the District Court.

Held: So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before a district court, issue preclusion should apply. Pp. 147–160.

(a) An agency decision can ground issue preclusion. The Court's cases establish that when Congress authorizes agencies to resolve disputes, "courts may take it as given that Congress has legislated with the expectation that [issue preclusion] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108. Constitutional avoidance does not compel a different conclusion. Pp. 147–151.

(b) Neither the Lanham Act's text nor its structure rebuts the "presumption" in favor of giving preclusive effect to TTAB decisions where the ordinary elements of issue preclusion are met. *Astoria*, 501 U. S., at 108. This case is unlike *Astoria.* There, where exhausting the administrative process was a prerequisite to suit in court, giving preclusive effect to the agency's determination in that very administrative process could have rendered the judicial suit "strictly *pro forma*." *Id.*,

at 111. By contrast, registration involves a separate proceeding to decide separate rights. Pp. 151–153.

(c) There is no categorical reason why registration decisions can never meet the ordinary elements of issue preclusion. That many registrations will not satisfy those ordinary elements does not mean that none will. Pp. 153–160.

(1) Contrary to the Eighth Circuit's conclusion, the same likelihood-of-confusion standard applies to both registration and infringement. The factors that the TTAB and the Eighth Circuit use to assess likelihood of confusion are not fundamentally different, and, more important, the operative language of each statute is essentially the same.

Hargis claims that the standards are different, noting that the registration provision asks whether the marks "resemble" each other, 15 U. S. C. § 1052(d), while the infringement provision is directed toward the "use in commerce" of the marks, § 1114(1). That the TTAB and a district court do not always consider the *same usages*, however, does not mean that the TTAB applies a *different standard* to the usages it does consider. If a mark owner uses its mark in materially the same ways as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation. For a similar reason, the Eighth Circuit erred in holding that issue preclusion could not apply because the TTAB relied too heavily on "appearance and sound." Pp. 154–158.

(2) The fact that the TTAB and district courts use different procedures suggests only that sometimes issue preclusion might be inappropriate, not that it always is. Here, there is no categorical "reason to doubt the quality, extensiveness, or fairness," *Montana* v. *United States*, 440 U. S. 147, 164, n. 11, of the agency's procedures. In large part they are exactly the same as in federal court. Also contrary to the Eighth Circuit's conclusion, B&B, the party opposing registration, not Hargis, bore the burden of persuasion before the TTAB, just as it did in the infringement suit. Pp. 158–159.

(3) Hargis is also wrong that the stakes for registration are always too low for issue preclusion in later infringement litigation. When registration is opposed, there is good reason to think that both sides will take the matter seriously. Congress' creation of an elaborate registration scheme, with many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion. Pp. 159–160.

716 F. 3d 1020, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

GINSBURG, J., filed a concurring opinion, *post,* p. 160. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 161.

William M. Jay argued the cause for petitioner. With him on the briefs were *Jacob R. Osborn*, *Robert D. Carroll*, *Ira J. Levy*, and *Tim Cullen*.

John F. Bash argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Mark K. Freeman*, *Sydney Foster*, and *Scott C. Weidenfeller*.

Neal Kumar Katyal argued the cause for respondent Hargis Industries, Inc. With him on the brief were *Catherine E. Stetson*, *Mary Helen Wimberly*, *James C. Martin*, and *Colin E. Wrabley*.*

JUSTICE ALITO delivered the opinion of the Court.

Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.

This case concerns the application of issue preclusion in the context of trademark law. Petitioner, B&B Hardware,

*Briefs of *amici curiae* urging affirmance were filed for the Intellectual Property Law Section of the State Bar of Texas by *Richard L. Stanley* and *Jack C. Goldstein*; and for the New York Intellectual Property Law Association by *Dyan Finguerra-DuCharme*, *Anthony F. Lo Cicero*, and *Charles R. Macedo*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Nancy J. Merztel*; for the Intellectual Property Law Association of Chicago by *Charles W. Shifley* and *Donald W. Rupert*; and for the International Trademark Association by *David H. Bernstein* and *Michael Potenza*.

Inc. (B&B), and respondent Hargis Industries, Inc. (Hargis or respondent), both use similar trademarks; B&B owns SEALTIGHT while Hargis owns SEALTITE. Under the Lanham Act, 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, an applicant can seek to register a trademark through an administrative process within the United States Patent and Trademark Office (PTO). But if another party believes that the PTO should not register a mark because it is too similar to its own, that party can oppose registration before the Trademark Trial and Appeal Board (TTAB or Board). Here, Hargis tried to register the mark SEALTITE, but B&B opposed SEALTITE's registration. After a lengthy proceeding, the TTAB agreed with B&B that SEALTITE should not be registered.

In addition to permitting a party to object to the registration of a mark, the Lanham Act allows a mark owner to sue for trademark infringement. Both a registration proceeding and a suit for trademark infringement, moreover, can occur at the same time. In this case, while the TTAB was deciding whether SEALTITE should be registered, B&B and Hargis were also litigating the SEALTIGHT versus SEALTITE dispute in federal court. In both registration proceedings and infringement litigation, the tribunal asks whether a likelihood of confusion exists between the mark sought to be protected (here, SEALTIGHT) and the other mark (SEALTITE).

The question before this Court is whether the District Court in this case should have applied issue preclusion to the TTAB's decision that SEALTITE is confusingly similar to SEALTIGHT. Here, the Eighth Circuit rejected issue preclusion for reasons that would make it difficult for the doctrine ever to apply in trademark disputes. We disagree with that narrow understanding of issue preclusion. Instead, consistent with principles of law that apply in innumerable contexts, we hold that a court should give preclusive effect to TTAB decisions if the ordinary elements of issue

preclusion are met. We therefore reverse the judgment of the Eighth Circuit and remand for further proceedings.

I

A

Trademark law has a long history, going back at least to Roman times. See Restatement (Third) of Unfair Competition § 9, Comment *b* (1993). The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others. *Ibid.* One who first uses a distinct mark in commerce thus acquires rights to that mark. See 2 J. McCarthy, Trademarks and Unfair Competition § 16:1 (4th ed. 2014) (hereinafter McCarthy). Those rights include preventing others from using the mark. See 1 A. LaLonde, Gilson on Trademarks § 3.02[8] (2014) (hereinafter Gilson).

Though federal law does not create trademarks, see, *e. g.*, *Trade-Mark Cases*, 100 U. S. 82, 92 (1879), Congress has long played a role in protecting them. In 1946, Congress enacted the Lanham Act, the current federal trademark scheme. As relevant here, the Lanham Act creates at least two adjudicative mechanisms to help protect marks. First, a trademark owner can register its mark with the PTO. Second, a mark owner can bring a suit for infringement in federal court.

Registration is significant. The Lanham Act confers "important legal rights and benefits" on trademark owners who register their marks. 3 McCarthy § 19:3, at 19–21; see also *id.*, § 19:9, at 19–34 (listing seven of the "procedural and substantive legal advantages" of registration). Registration, for instance, serves as "constructive notice of the registrant's claim of ownership" of the mark. 15 U. S. C. § 1072. It also is "prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with

the goods or services specified in the certificate." § 1057(b). And once a mark has been registered for five years, it can become "incontestable." §§ 1065, 1115(b).

To obtain the benefits of registration, a mark owner files an application with the PTO. § 1051. The application must include, among other things, "the date of the applicant's first use of the mark, the date of the applicant's first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark." § 1051(a)(2). The usages listed in the application—*i. e.*, those goods on which the mark appears along with, if applicable, their channels of distribution—are critical. See, *e. g.*, 3 McCarthy § 20:24, at 20–83 ("[T]he applicant's right to register must be made on the basis of the goods described in the application"); *id.*, § 20:15, at 20–45 (explaining that if an "application does not delimit any specific trade channels of distribution, no limitation will be" applied). The PTO generally cannot register a mark which "so resembles" another mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U. S. C. § 1052(d).

If a trademark examiner believes that registration is warranted, the mark is published in the Official Gazette of the PTO. § 1062. At that point, "[a]ny person who believes that he would be damaged by the registration" may "file an opposition." § 1063(a). Opposition proceedings occur before the TTAB (or panels thereof). § 1067(a). The TTAB consists of administrative trademark judges and high-ranking PTO officials, including the Director of the PTO and the Commissioner of Trademarks. § 1067(b).

Opposition proceedings before the TTAB are in many ways "similar to a civil action in a federal district court." TTAB Manual of Procedure § 102.03 (2014) (hereinafter TTAB Manual), online at http://www.uspto.gov (as visited Mar. 20, 2015, and available in Clerk of Court's case file). These proceedings, for instance, are largely governed by the Federal Rules

of Civil Procedure and Evidence. See 37 CFR §§ 2.116(a), 2.122(a) (2014). The TTAB also allows discovery and depositions. See §§ 2.120, 2.123(a). The party opposing registration bears the burden of proof, see § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U. S. C. § 1063(b).

The primary way in which TTAB proceedings differ from ordinary civil litigation is that "proceedings before the Board are conducted in writing, and the Board's actions in a particular case are based upon the written record therein." TTAB Manual § 102.03. In other words, there is no live testimony. Even so, the TTAB allows parties to submit transcribed testimony, taken under oath and subject to cross-examination, and to request oral argument. See 37 CFR §§ 2.123, 2.129.

When a party opposes registration because it believes the mark proposed to be registered is too similar to its own, the TTAB evaluates likelihood of confusion by applying some or all of the 13 factors set out in *In re E. I. DuPont DeNemours & Co.*, 476 F. 2d 1357 (CCPA 1973). After the TTAB decides whether to register the mark, a party can seek review in the U. S. Court of Appeals for the Federal Circuit, or it can file a new action in district court. See 15 U. S. C. § 1071. In district court, the parties can conduct additional discovery and the judge resolves registration *de novo*. § 1071(b); see also 3 McCarthy § 21:20 (explaining differences between the forums); cf. *Kappos* v. *Hyatt*, 566 U. S. 431 (2012) (*de novo* review for analogous scheme in patent law).

The Lanham Act, of course, also creates a federal cause of action for trademark infringement. The owner of a mark, whether registered or not, can bring suit in federal court if another is using a mark that too closely resembles the plaintiff's. The court must decide whether the defendant's use of a mark in commerce "is likely to cause confusion, or to cause mistake, or to deceive" with regard to the plaintiff's mark. See 15 U. S. C. § 1114(1)(a) (registered marks);

§ 1125(a)(1)(A) (unregistered marks). In infringement litigation, the district court considers the full range of a mark's usages, not just those in the application.

B

Petitioner B&B and respondent Hargis both manufacture metal fasteners. B&B manufactures fasteners for the aerospace industry, while Hargis manufactures fasteners for use in the construction trade. Although there are obvious differences between space shuttles and A-frame buildings, both aerospace and construction engineers prefer fasteners that seal things tightly. Accordingly, both B&B and Hargis want their wares associated with tight seals. A feud of nearly two decades has sprung from this seemingly commonplace set of facts.

In 1993, B&B registered SEALTIGHT for "threaded or unthreaded metal fasteners and other related hardwar[e]; namely, self-sealing nuts, bolts, screws, rivets and washers, all having a captive o-ring, for use in the aerospace industry." App. 223a (capitalization omitted). In 1996, Hargis sought to register SEALTITE for "self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings." App. 70a (capitalization omitted). B&B opposed Hargis' registration because, although the two companies sell different products, it believes that SEALTITE is confusingly similar to SEALTIGHT.

The twists and turns in the SEALTIGHT versus SEALTITE controversy are labyrinthine. The question whether either of these marks should be registered, and if so, which one, has bounced around within the PTO for about two decades; related infringement litigation has been before the Eighth Circuit three times; and two separate juries have been empaneled and returned verdicts. The full story could fill a long, unhappy book.

For purposes here, we pick up the story in 2002, when the PTO published SEALTITE in the Official Gazette. This

prompted opposition proceedings before the TTAB, complete with discovery, including depositions. B&B argued that SEALTITE could not be registered because it is confusingly similar to SEALTIGHT. B&B explained, for instance, that both companies have an online presence, the largest distributor of fasteners sells both companies' products, and consumers sometimes call the wrong company to place orders. Hargis rejoined that the companies sell different products, for different uses, to different types of consumers, through different channels of trade.

Invoking a number of the *DuPont* factors, the TTAB sided with B&B. The Board considered, for instance, whether SEALTIGHT is famous (it's not, said the Board), how the two products are used (differently), how much the marks resemble each other (very much), and whether customers are actually confused (perhaps sometimes). See App. to Pet. for Cert. 55a–71a. Concluding that "the most critical factors in [its] likelihood of confusion analysis are the similarities of the marks and the similarity of the goods," *id.*, at 70a, the TTAB determined that SEALTITE—when "used in connection with 'self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings' "—could not be registered because it "so resembles" SEALTIGHT when "used in connection with fasteners that provide leakproof protection from liquids and gases, fasteners that have a captive o-ring, and 'threaded or unthreaded metal fasteners and other related hardware . . . for use in the aerospace industry' as to be likely to cause confusion," *id.*, at 71a. Despite a right to do so, Hargis did not seek judicial review in either the Federal Circuit or District Court.

All the while, B&B had sued Hargis for infringement. Before the District Court ruled on likelihood of confusion, however, the TTAB announced its decision. After a series of proceedings not relevant here, B&B argued to the District Court that Hargis could not contest likelihood of confusion because of the preclusive effect of the TTAB decision. The

District Court disagreed, reasoning that the TTAB is not an Article III court. The jury returned a verdict for Hargis, finding no likelihood of confusion.

B&B appealed to the Eighth Circuit. Though accepting for the sake of argument that agency decisions can ground issue preclusion, the panel majority affirmed for three reasons: first, because the TTAB uses different factors than the Eighth Circuit to evaluate likelihood of confusion; second, because the TTAB placed too much emphasis on the appearance and sound of the two marks; and third, because Hargis bore the burden of persuasion before the TTAB, while B&B bore it before the District Court. 716 F. 3d 1020 (2013). Judge Colloton dissented, concluding that issue preclusion should apply. After calling for the views of the Solicitor General, we granted certiorari. 573 U. S. 957 (2014).

II

The first question that we must address is whether an agency decision can ever ground issue preclusion. The District Court rejected issue preclusion because agencies are not Article III courts. The Eighth Circuit did not adopt that view, and, given this Court's cases, it was right to take that course.

This Court has long recognized that "the determination of a question directly involved in one action is conclusive as to that question in a second suit." *Cromwell* v. *County of Sac*, 94 U. S. 351, 354 (1877). The idea is straightforward: Once a court has decided an issue, it is "forever settled as between the parties," *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931), thereby "protect[ing]" against "the expense and vexation attending multiple lawsuits, conserv-[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent verdicts," *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979). In short, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

Although the idea of issue preclusion is straightforward, it can be challenging to implement. The Court, therefore, regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion. See, *e. g.*, *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009); *New Hampshire* v. *Maine*, 532 U. S. 742, 748–749 (2001); *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233, n. 5 (1998). The Restatement explains that subject to certain well-known exceptions, the general rule is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27, p. 250 (1980); see also *id.*, § 28, at 273 (listing exceptions such as whether appellate review was available or whether there were "differences in the quality or extensiveness of the procedures followed").

Both this Court's cases and the Restatement make clear that issue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies. Indeed, this Court has explained that because the principle of issue preclusion was so "well established" at common law, in those situations in which Congress has authorized agencies to resolve disputes, "courts may take it as given that Congress has legislated with the expectation that the principle [of issue preclusion] will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria*, *supra*, at 108. This reflects the Court's longstanding view that "'[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.'" *University of Tenn.* v. *Elliott*, 478 U. S. 788, 797–798 (1986) (quoting

United States v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966)); see also *Hayfield Northern R. Co.* v. *Chicago & North Western Transp. Co.*, 467 U. S. 622, 636, n. 15 (1984) (noting *Utah Construction*); *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 484–485, n. 26 (1982) (characterizing *Utah Construction*'s discussion of administrative preclusion as a holding); Restatement (Second) of Judgments § 83(1), at 266 (explaining that, with some limits, "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court").

Although apparently accepting *Astoria* and *Utah Construction*,[1] Hargis argues that we should not read the Lanham Act (or, presumably, many other federal statutes) as authorizing issue preclusion. Otherwise, Hargis warns, the Court would have to confront "'grave and doubtful questions' as to the Lanham Act's consistency with the Seventh Amendment and Article III of the Constitution." Brief for Respondent 38 (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)). We are not persuaded.

At the outset, we note that Hargis does not argue that giving issue-preclusive effect to the TTAB's decision would be unconstitutional. Instead, Hargis contends only that we should read the Lanham Act narrowly because a broad reading *might* be unconstitutional. See, *e. g.*, Brief for Respondent 37, 39, 40, 41–42. The likely reason that Hargis has not directly advanced a constitutional argument is that, at least

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[1] See Brief for Respondent 28 (acknowledging that administrative "[p]reclusion's status as part of the common-law backdrop means that courts may presume its application" absent contrary indication from Congress (citing *Astoria*, 501 U. S., at 110)); Brief for Respondent 34 (explaining that *Utah Construction* determined that "an administrative board's fact-finding . . . could . . . have preclusive effect in an Article III suit raising damages claims over which the board had no jurisdiction").

as to a jury trial right, Hargis did not even list the Seventh Amendment as an authority in its appellee brief to the Eighth Circuit. Moreover, although Hargis pressed an Article III argument below, in its opposition to certiorari in this Court, Hargis seemingly conceded that TTAB decisions *can sometimes* ground issue preclusion, though it now protests otherwise. See Supplemental Brief in Opposition 2. To the extent, if any, that there could be a meritorious constitutional objection, it is not before us. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 231–232 (1995).

We reject Hargis' statutory argument that we should jettison administrative preclusion in whole or in part to avoid potential constitutional concerns. As to the Seventh Amendment, for instance, the Court has already held that the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 337 (1979). It would seem to follow naturally that although the Seventh Amendment creates a jury trial right in suits for trademark damages, see *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 477, 479–480 (1962), TTAB decisions still can have preclusive effect in such suits. Hargis disputes this reasoning even though it admits that in 1791 "'a party was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity.'" Brief for Respondent 39 (quoting *Parklane Hosiery*, *supra*, at 333). Instead, Hargis contends that issue preclusion should not apply to TTAB registration decisions because there were no agencies at common law. But our precedent holds that the Seventh Amendment does not strip competent tribunals of the power to issue judgments with preclusive effect; that logic would not seem to turn on the nature of the competent tribunal. And at the same time, adopting Hargis' view would dramatically undercut agency preclusion, despite what the Court has already said to the contrary. Nothing in Hargis' avoidance argument is weighty enough to overcome these weaknesses.

The claim that we should read the Lanham Act narrowly to avoid Article III concerns is equally unavailing—and for similar reasons. Hargis argues that because it might violate Article III if an agency could make a decision with preclusive effect in a later proceeding before a federal court, we should conclude, as a statutory matter, that issue preclusion is unavailable. Such a holding would not fit with our precedent. For instance, in *Elliott*, the Court, relying on *Utah Construction*, explained that absent a contrary indication, Congress presumptively intends that an agency's determination (there, a state agency) has preclusive effect. 478 U. S., at 796–799; see also *Astoria*, 501 U. S., at 110 (recognizing the "presumption"). To be sure, the Court has never addressed whether such preclusion offends Article III. But because this Court's cases are so clear, there is no ambiguity for this Court to sidestep through constitutional avoidance.[2]

III

The next question is whether there is an "evident" reason why Congress would not want TTAB decisions to receive preclusive effect, even in those cases in which the ordinary elements of issue preclusion are met. *Id.*, at 108. We conclude that nothing in the Lanham Act bars the application of issue preclusion in such cases.

The Lanham Act's text certainly does not forbid issue preclusion. Nor does the Act's structure. Granted, one can seek judicial review of a TTAB registration decision in a *de novo* district court action, and some courts have concluded from this that Congress does not want unreviewed TTAB

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[2] Our dissenting colleagues argue that *Utah Construction*'s conclusion that courts "have not hesitated" to apply administrative preclusion, 384 U. S., at 422, was mistaken and certainly should not be applied to statutes—such as the Lanham Act—enacted prior to 1966. We do not decide who reads the history better. The Court has repeatedly endorsed *Utah Construction* and, importantly, neither party challenges its historical accuracy. For the same reason, we do not decide whether such preclusion is unconstitutional because the issue is not before us.

decisions to ground issue preclusion. See, *e. g.*, *American Heritage Life Ins. Co.* v. *Heritage Life Ins. Co.*, 494 F. 2d 3, 9–10 (CA5 1974). But that conclusion does not follow. Ordinary preclusion law teaches that if a party to a court proceeding does not challenge an adverse decision, that decision can have preclusive effect in other cases, even if it would have been reviewed *de novo.* See Restatement (Second) of Judgments § 28, Comment *a* and Illustration 1 (explaining that the failure to pursue an appeal does not undermine issue preclusion and including an example of an apparently unappealed district court's dismissal for failure to state a claim); cf. *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 398 (1981) (noting "the res judicata consequences of a final, unappealed judgment on the merits").

This case is also unlike *Astoria*, where a plaintiff claiming discrimination first went to an agency and then sued in court about the same alleged conduct. See 501 U. S., at 111. The Court concluded, quite sensibly, that the structure of that scheme indicated that the agency decision could not ground issue preclusion. When exhausting an administrative process is a prerequisite to suit in court, giving preclusive effect to the agency's determination in that very administrative process could render the judicial suit "strictly *pro forma*." *Ibid.*; see also *Elliott*, *supra*, at 795–796 (similar analysis). Here, if a party urged a district court reviewing a TTAB registration decision to give preclusive effect to the very TTAB decision under review, *Astoria* would apply. But that is not this case.

What matters here is that registration is not a prerequisite to an infringement action. Rather, it is a separate proceeding to decide separate rights. Neither is issue preclusion a one-way street. When a district court, as part of its judgment, decides an issue that overlaps with part of the TTAB's analysis, the TTAB gives preclusive effect to the court's judgment. See App. to Pet. for Cert. 54a–55a (giving preclusive effect to the District Court's earlier decision regard-

ing SEALTIGHT's distinctiveness because the issue "was actually litigated and necessarily determined").

Hargis also argues that allowing TTAB decisions to have issue-preclusive effect will adversely affect the registration process. Because of the TTAB's "'limited jurisdiction'" and "'the narrowness of the issues'" before it, Hargis contends, the Court should infer that TTAB proceedings are supposed to be more streamlined than infringement litigation. Brief for Respondent 30 (quoting TTAB Manual § 402.01). But, the argument goes, if TTAB decisions can have issue-preclusive effect in infringement litigation, parties may spend more time and energy before the TTAB, thus bogging down the registration process. This concern does not change our conclusion. Issue preclusion is available unless it is "evident," *Astoria*, *supra*, at 108, that Congress does not want it. Here, if a streamlined process in all registration matters was particularly dear to Congress, it would not have authorized *de novo* challenges for those "dissatisfied" with TTAB decisions. 15 U. S. C. § 1071(b). Plenary review serves many functions, but ensuring a streamlined process is not one of them. Moreover, as explained below, for a great many registration decisions issue preclusion obviously will not apply because the ordinary elements will not be met. For those registrations, nothing we say today is relevant.

IV

At last we turn to whether there is a categorical reason why registration decisions can never meet the ordinary elements of issue preclusion, *e. g.*, those elements set out in § 27 of the Restatement (Second) of Judgments. Although many registrations will not satisfy those ordinary elements, that does not mean that none will. We agree with Professor McCarthy that issue preclusion applies where "the issues in the two cases are indeed identical and the other rules of collateral estoppel are carefully observed." 6 McCarthy § 32:99, at 32–244; see also 3 Gilson § 11.08[4][i][iii][B], at 11–319 ("Ul-

timately, Board decisions on likelihood of confusion . . . should be given preclusive effect on a case-by-case basis").

A

The Eighth Circuit's primary objection to issue preclusion was that the TTAB considers different factors than it does. Whereas the TTAB employs some or all of the *DuPont* factors to assess likelihood of confusion, the Eighth Circuit looks to similar, but not identical, factors identified in *SquirtCo* v. *Seven-Up Co.*, 628 F. 2d 1086, 1091 (CA8 1980). The court's instinct was sound: "[I]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4417, p. 449 (2d ed. 2002) (hereinafter Wright & Miller). Here, however, the same likelihood-of-confusion standard applies to both registration and infringement.

To begin with, it does not matter that registration and infringement are governed by different statutory provisions. Often a single standard is placed in different statutes; that does not foreclose issue preclusion. See, *e. g.*, *Smith* v. *Bayer Corp.*, 564 U. S. 299, 307–308 (2011). Neither does it matter that the TTAB and the Eighth Circuit use different factors to assess likelihood of confusion. For one thing, the factors are not fundamentally different, and "[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion." *Id.*, at 312, n. 9. More important, if federal law provides a single standard, parties cannot escape preclusion simply by litigating anew in tribunals that apply that one standard differently. A contrary rule would encourage the very evils that issue preclusion helps to prevent.

The real question, therefore, is whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement. We conclude it is, for at least three reasons. First, the operative

language is essentially the same; the fact that the registration provision separates "likely" from "to cause confusion, or to cause mistake, or to deceive" does not change that reality.[3] See 2 Gilson § 5.01[2][a], at 5–17 (explaining that "[t]he same statutory test" applies). Second, the likelihood-of-confusion language that Congress used in these Lanham Act provisions has been central to trademark registration since at least 1881. See Act of Mar. 3, 1881, ch. 138, § 3, 21 Stat. 503 (using a "likely to cause confusion" standard for registration). That could hardly have been by accident. And third, district courts can cancel registrations during infringement litigation, just as they can adjudicate infringement in suits seeking judicial review of registration decisions. See 15 U. S. C. § 1119; 3 McCarthy § 21:20. There is no reason to think that the same district judge in the same case should apply two separate standards of likelihood of confusion.

Hargis responds that the text is not actually the same because the registration provision asks whether the marks "resemble" each other, 15 U. S. C. § 1052(d), while the infringement provision is directed toward the "use in commerce" of the marks, § 1114(1). Indeed, according to Hargis, the distinction between "resembl[ance]" and "use" has been key to trademark law for over a century. There is some force to this argument. It is true that "a party opposing an application to register a mark before the Board often relies only on its federal registration, not on any common-law rights in us-

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[3] Compare 15 U. S. C. § 1114(1) ("Any person who shall . . . use in commerce any . . . mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is *likely to cause confusion, or to cause mistake, or to deceive* . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided" (emphasis added)) with § 1052(d) ("No trademark . . . shall be refused registration . . . unless it . . . [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office . . . as to be *likely*, when used on or in connection with the goods of the applicant, *to cause confusion, or to cause mistake, or to deceive* . . . " (emphasis added)).

ages not encompassed by its registration," and "the Board typically analyzes the marks, goods, and channels of trade only as set forth in the application and in the opposer's registration, regardless of whether the actual usage of the marks by either party differs." Brief for United States as *Amicus Curiae* 23; see also *id.*, at 5 (explaining that "the Board typically reviews only the usages encompassed by the registration" (citing 3 Gilson § 9.03[2][a][ii])); 3 McCarthy § 20:15, at 20–45 (explaining that for registration "it is the mark as shown in the application and as used on the goods described in the application which must be considered, not the mark as actually used"). This means that unlike in infringement litigation, "[t]he Board's determination that a likelihood of confusion does or does not exist will not resolve the confusion issue with respect to non-disclosed usages." Brief for United States as *Amicus Curiae* 23.

Hargis' argument falls short, however, because it mistakes a reason not to apply issue preclusion in some or even many cases as a reason never to apply issue preclusion. Just because the TTAB does not always consider the *same usages* as a district court does, it does not follow that the Board applies a *different standard* to the usages it does consider.[4] If a mark owner uses its mark in ways that are materially the same as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation. By contrast, if a mark owner uses its mark in ways that are materially unlike the usages in its application, then the TTAB is not deciding the same issue. Thus, if the TTAB does not consider the marketplace usage of the parties' marks, the TTAB's decision should "have no later preclusive

[4] The parties dispute whether and how often the TTAB considers usages beyond those listed in the application and registration. We do not resolve that dispute here. Suffice it to say that when the TTAB adjudicates a usage *within its authority*, that adjudication can ground issue preclusion. See Restatement (Second) of Judgments § 11 (1980).

effect in a suit where actual usage in the marketplace is the paramount issue." 6 McCarthy § 32:101, at 32–246.

Materiality, of course, is essential—trivial variations between the usages set out in an application and the use of a mark in the marketplace do not create different "issues," just as trivial variations do not create different "marks." See generally 4 *id.*, § 23:50, at 23–265 (explaining that "adding descriptive or non-distinctive" elements to another's mark generally will not negate confusion). Otherwise, a party could escape the preclusive effect of an adverse judgment simply by adding an immaterial feature to its mark. That is not the law. See, *e. g.*, Restatement (Second) of Judgments § 27, Comment *c*, at 252–253 (explaining that "issue" must be understood broadly enough "to prevent repetitious litigation of what is essentially the same dispute"); *United States* v. *Stauffer Chemical Co.*, 464 U. S. 165, 172 (1984) (applying issue preclusion where a party sought to "litigate twice . . . an issue arising . . . from virtually identical facts" because the "factual differences" were "of no legal significance").

A fortiori, if the TTAB considers a different mark altogether, issue preclusion would not apply. Needless to say, moreover, if the TTAB has not decided the same issue as that before the district court, there is no reason why any deference would be warranted.

For a similar reason, the Eighth Circuit erred in holding that issue preclusion could not apply here because the TTAB relied too heavily on "appearance and sound." 716 F. 3d, at 1025. Undoubtedly there are cases in which the TTAB places more weight on certain factors than it should. When that happens, an aggrieved party should seek judicial review. The fact that the TTAB may have erred, however, does not prevent preclusion. As Judge Colloton observed in dissent, "'issue preclusion prevent[s] relitigation of wrong decisions just as much as right ones.'" *Id.*, at 1029 (quoting *Clark* v. *Clark*, 984 F. 2d 272, 273 (CA8 1993)); see

also Restatement (Second) of Judgments § 28, Comment *j*, at 284 (explaining that "refusal to give the first judgment preclusive effect should not . . . be based simply on a conclusion that [it] was patently erroneous").

B

Hargis also argues that registration is categorically incompatible with issue preclusion because the TTAB uses procedures that differ from those used by district courts. Granted, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana*, 440 U. S., at 164, n. 11; see also *Parklane Hosiery*, 439 U. S., at 331, and n. 15 (similar). But again, this only suggests that sometimes issue preclusion might be inappropriate, not that it always is.

No one disputes that the TTAB and district courts use different procedures. Most notably, district courts feature live witnesses. Procedural differences, by themselves, however, do not defeat issue preclusion. Equity courts used different procedures than did law courts, but that did not bar issue preclusion. See *id.*, at 333. Nor is there reason to think that the state agency in *Elliott* used procedures identical to those in federal court; nonetheless, the Court held that preclusion could apply. See 478 U. S., at 796–799. Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair. See *Montana*, 440 U. S., at 164, n. 11.

Here, there is no categorical "reason to doubt the quality, extensiveness, or fairness," *ibid.*, of the agency's procedures. In large part they are exactly the same as in federal court. See 37 CFR §§ 2.116(a), 2.122(a). For instance, although "[t]he scope of discovery in Board proceedings . . . is generally narrower than in court proceedings"—reflecting the fact that there are often fewer usages at issue—the TTAB has

adopted almost the whole of Federal Rule of Civil Procedure 26. TTAB Manual § 402.01; see also *id.*, § 401. It is conceivable, of course, that the TTAB's procedures may prove ill suited for a particular issue in a particular case, *e. g.*, a party may have tried to introduce material evidence but was prevented by the TTAB from doing so, or the TTAB's bar on live testimony may materially prejudice a party's ability to present its case. The ordinary law of issue preclusion, however, already accounts for those "rare" cases where a "compelling showing of unfairness" can be made. Restatement (Second) of Judgments § 28, Comments *g* and *j*, at 283–284.

The Eighth Circuit likewise erred by concluding that Hargis bore the burden of persuasion before the TTAB. B&B, the party opposing registration, bore the burden, see 37 CFR § 2.116(b); TTAB Manual § 702.04(a), just as it did in the infringement action. Hargis does not defend the decision below on this ground.

C

Hargis also contends that the stakes for registration are so much lower than for infringement that issue preclusion should never apply to TTAB decisions. Issue preclusion may be inapt if "the amount in controversy in the first action [was] so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." Restatement (Second) of Judgments § 28, Comment *j*, at 283–284. After all, "[f]ew . . . litigants would spend $50,000 to defend a $5,000 claim." Wright & Miller § 4423, at 612. Hargis is wrong, however, that this exception to issue preclusion applies to every registration. To the contrary: When registration is opposed, there is good reason to think that both sides will take the matter seriously.

The benefits of registration are substantial. Registration is "prima facie evidence of the validity of the registered mark," 15 U. S. C. § 1057(b), and is a precondition for a mark to become "incontestable," § 1065. Incontestability is a powerful protection. See, *e. g.*, *Park 'N Fly, Inc.* v. *Dollar*

Park & Fly, Inc., 469 U. S. 189, 194 (1985) (holding that an incontestable mark cannot be challenged as merely descriptive); see also *id.*, at 193 (explaining that "Congress determined that . . . 'trademarks should receive nationally the greatest protection that can be given them'" and that "[a]mong the new protections created by the Lanham Act were the statutory provisions that allow a federally registered mark to become incontestable" (quoting S. Rep. No. 1333, 79th Cong., 2d Sess., 6 (1946))).

The importance of registration is undoubtedly why Congress provided for *de novo* review of TTAB decisions in district court. It is incredible to think that a district court's adjudication of particular usages would not have preclusive effect in another district court. Why would unchallenged TTAB decisions be different? Congress' creation of this elaborate registration scheme, with so many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion.

V

For these reasons, the Eighth Circuit erred in this case. On remand, the court should apply the following rule: So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before the district court, issue preclusion should apply.

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

The Court rightly recognizes that "for a great many registration decisions issue preclusion obviously will not apply." *Ante*, at 153. That is so because contested registrations

are often decided upon "a comparison of the marks in the abstract and apart from their marketplace usage." 6 J. McCarthy, Trademarks and Unfair Competition § 32:101, p. 32–247 (4th ed. 2014). When the registration proceeding is of that character, "there will be no [preclusion] of the likel[ihood of] confusion issue . . . in a later infringement suit." *Ibid.* On that understanding, I join the Court's opinion.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today applies a presumption that when Congress enacts statutes authorizing administrative agencies to resolve disputes in an adjudicatory setting, it intends those agency decisions to have preclusive effect in Article III courts. That presumption was first announced in poorly supported dictum in a 1991 decision of this Court, and we have not applied it since. Whatever the validity of that presumption with respect to statutes enacted after its creation, there is no justification for applying it to the Lanham Act, passed in 1946. Seeing no other reason to conclude that Congress implicitly authorized the decisions of the Trademark Trial and Appeal Board (TTAB) to have preclusive effect in a subsequent trademark infringement suit, I would affirm the decision of the Court of Appeals.

I

A

The presumption in favor of administrative preclusion the Court applies today was first announced in *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). In that case, the Court confronted the question "whether claimants under the Age Discrimination in Employment Act of 1967 [(ADEA)] . . . are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency made with respect to an age-discrimination claim." *Id.*, at 106. It answered that ques-

tion in the negative, concluding that the availability of administrative preclusion was an issue of statutory construction and that the particular statute at issue "carrie[d] an implication that the federal courts should recognize no [such] preclusion." *Id.*, at 108, 110.

Despite rejecting the availability of preclusion, the Court nevertheless, in dictum, announced a presumption in favor of giving preclusive effect to administrative determinations "where Congress has failed expressly or impliedly to evince any intention on the issue." *Id.*, at 110. That dictum rested on two premises. First, that "Congress is understood to legislate against a background of common-law adjudicatory principles." *Id.*, at 108. And, second, that the Court had "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Id.*, at 107.

I do not quarrel with the first premise, but I have serious doubts about the second. The Court in *Astoria* offered only one decision predating the enactment of the ADEA to shore up its assertion that Congress had legislated against a background principle in favor of administrative preclusion—*United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966). See *Astoria*, *supra*, at 107.[1] And that decision cannot be read for the broad proposition asserted by the Court.

Like *Astoria* itself, *Utah Construction* discussed administrative preclusion only in dictum. The case arose out of a contract dispute between the United States and a private contractor. 384 U. S., at 400. The contract at issue contained a disputes clause providing for an administrative proc-

[1] The Court also cited *University of Tenn.* v. *Elliott*, 478 U. S. 788, 798 (1986), but because that decision postdated the enactment of the ADEA by almost two decades and itself primarily relied on *Utah Construction* it cannot be evidence of any background principle existing at the relevant time.

ess by which "'disputes concerning questions of fact arising under th[e] contract'" would be decided by the contracting officer, subject to written appeal to the head of the department. *Id.*, at 397–398. The Wunderlich Act of 1954 likewise provided that such administrative factfinding would be "final and conclusive" in a later breach-of-contract action "'unless the same is fra[u]dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.'" *Id.*, at 399. Because both "the disputes clause [of the contract] and the Wunderlich Act categorically state[d] that administrative findings on factual issues relevant to questions arising under the contract [would] be final and conclusive on the parties," the Court required the lower courts to accept those findings. *Id.*, at 419. Only after acknowledging that its decision "rest[ed] upon the agreement of the parties as modified by the Wunderlich Act" did the Court go on to comment that the decision was "harmonious with general principles of collateral estoppel." *Id.*, at 421.

To create a presumption based solely on dictum would be bad enough, but the principles *Utah Construction* referred to were far too equivocal to constitute "long-established and familiar" background principles of the common law of the sort on which we base our statutory inferences. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952). Although *Utah Construction* asserted that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose," it admitted that "courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings." 384 U. S., at 421–422. These contradictory signals are not typically the stuff of which background rules of common law are made. Cf. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 538 (2013) (presuming that Congress intended to retain

the "first sale" doctrine in copyright statutes based on that common-law doctrine's "impeccable historic pedigree").

B

If the occasion had arisen in *Astoria* for the Court to examine the history of administrative preclusion, it would have discovered that the issue was far from settled.

At common law, principles of res judicata and collateral estoppel applied only to a decision by a "court of competent jurisdiction." *Aurora City* v. *West*, 7 Wall. 82, 102 (1869); accord, *Hopkins* v. *Lee*, 6 Wheat. 109, 113 (1821); Restatement of Judgments §§ 4, 7, and Comment *f*, pp. 20, 41, 45 (1942). That rule came with the corollary requirement that the court be "legally constituted"—that is, a court "known to and recognized by the law." 2 H. Black, Law of Judgments § 516, p. 614 (1891). A court not "legally constituted" lacked jurisdiction to enter a legally binding judgment, and thus any such judgment could have no preclusive effect. *Ibid.*

Nineteenth century courts generally understood the term "court of competent jurisdiction" to include all courts with authority and jurisdiction conclusively to resolve a dispute. See J. Wells, A Treatise on the Doctrines of Res Judicata and Stare Decisis §§ 422–423, pp. 336–338 (1878); 2 Black, *supra*, § 516, at 613–614. Thus, courts of law, courts of equity, admiralty courts, and foreign courts could all satisfy the requirement of a "[c]ourt of competent jurisdiction." *Hopkins*, 6 Wheat., at 113. This broad definition served the interest in finality that supports preclusion doctrines, without which "an end could never be put to litigation." *Id.*, at 114.

But however broadly "[c]ourt of competent jurisdiction" was defined, it would require quite a leap to say that the concept encompasses administrative agencies, which were recognized as categorically different from courts. *E. g.*, *Pearson* v. *Williams*, 202 U. S. 281 (1906); F. Cooper, Admin-

istrative Agencies and the Courts 241–242 (1951) (taking the position that agencies "are not courts, and their determinations are not judgments"). This distinction stems from the Constitution itself, which vests the "judicial Power" not in administrative agencies, but in federal courts, whose independence is safeguarded by certain constitutional requirements. Art. III, § 1. One of the consequences of this allocation of judicial power is that agencies possess limited ability to act in a judicial capacity in cases resolving traditional disputes between private parties. See *infra*, at 171.

It is therefore unsurprising that federal courts—including this Court—have been far more hesitant than today's majority to extend common-law preclusion principles to decisions of administrative tribunals. In *Pearson*, for example, this Court declined to recognize any preclusive effect of a decision of an immigration board. 202 U. S., at 284–285. Writing for the Court, Justice Holmes explained that "[t]he board is an instrument of the executive power, not a court"; that it consisted of officials "whose duties are declared to be administrative by" statute; and that "[d]ecisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense." *Ibid.*

Other courts likewise declined to apply general preclusion principles to decisions of administrative agencies. For example, as late as 1947, the D. C. Circuit would rely on the "well settled doctrine that *res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals." *Churchill Tabernacle* v. *FCC*, 160 F. 2d 244, 246 (1947).

The Restatement of Judgments also reflected this practice: It contained no provision for administrative preclusion and explained that it would not address "the effect of the decisions of administrative tribunals." Scope Note, at 2. It rejected the idea of any consistent practice in favor of adminis-

trative preclusion, noting that "the question whether the decisions of a particular tribunal are binding in subsequent controversies depends upon the character of the tribunal and the nature of its procedure and the construction of the statute creating the tribunal and conferring powers upon it." *Ibid.*

Consistent with that comment, federal courts approved of administrative preclusion in narrow circumstances arguably involving only claims against the Government, over which Congress exercises a broader measure of control.[2] In the 19th century, for instance, this Court effectively gave preclusive effect to the decisions of the U. S. Land Department with respect to land patents when it held such patents unreviewable in federal court "for mere errors of judgment." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646 (1882) ("A patent, in a court of law, is conclusive as to all matters properly determined by the Land Department"). Commentators explained that these cases could not truly be understood to involve an application of res judicata or collateral estoppel—for, after all, administrative agencies are not courts—but rather a "species of equitable estoppel." Cooper, *supra*, at 242; see also 2 A. Freeman, Law of Judgments § 633, p. 1335 (5th ed. rev. 1925) (explaining that "the immunity from judicial review" for certain administrative decisions was "not based upon the doctrine of res judicata nor . . . governed by exactly the same rules"). As one commentator put it, res judicata could "not apply, in any strict or technical sense,

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[2] This distinction reaches at least as far back as 17th-century England. See Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 413 (1958) (explaining that, since the 17th century in England, courts have been "identified with the enforcement of private right, and administrative agencies with the execution of public policy"); see also *Hetley* v. *Boyer*, Cro. Jac. 336, 79 Eng. Rep. 287 (K. B. 1614) (reviewing the actions of the "commissioners of [the] sewers," who had exceeded the bounds of their traditional jurisdiction and had imposed on citizens' core private rights).

to the decisions of administrative agencies." Cooper, *supra*, at 241.

This history undercuts any suggestion in *Utah Construction* that administrative preclusion was widely accepted at common law. Accordingly, at least for statutes passed before *Astoria*, I would reject the presumption of administrative preclusion.[3]

II

In light of this history, I cannot agree with the majority's decision to apply administrative preclusion in the context of the Lanham Act.[4] To start, the Lanham Act was enacted in 1946, 20 years before this Court said—even in dictum—that administrative preclusion was an established common-law

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[3] I have no occasion to consider whether the discussion in *Astoria*, *Elliott*, or *Utah Construction* could be understood to create a background principle in favor of administrative preclusion that would apply, as a matter of statutory interpretation, to statutes passed after those decisions.

[4] The majority insists that we must apply the presumption of administrative preclusion because the Court has "repeatedly endorsed *Utah Construction*" and the parties do not challenge "its historical accuracy." *Ante*, at 151, n. 2. But regardless of whether the Court has endorsed *Utah Construction*'s dictum, the Court has never applied the presumption of administrative preclusion to the Lanham Act. Even if the Court's description of the presumption were not dictum, no principle of *stare decisis* requires us to extend a tool of statutory interpretation from one statute to another without first considering whether it is appropriate for that statute. Cf. *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) ("*[S]tare decisis*, designed to be a principle of stability or repose, [should not] become a vehicle of change whereby an error in one area metastasizes into others, thereby distorting the law"). As for the parties' lack of argument, I would not treat tools of statutory interpretation as claims that can be forfeited. If, for example, one party peppered its brief with legislative history, and the opposing party did not challenge the propriety of using legislative history, I still would not consider myself bound to rely upon it. The same is true here: Although the Court has commented in the past that the presumption of administrative preclusion would apply to other statutes, we are not bound to apply it now to the Lanham Act, even if the parties have assumed we would.

principle. Thus, even if one thought that the dictum in *Utah Construction* were sufficient to establish a common-law principle in favor of preclusion, that conclusion would not warrant applying *Astoria*'s presumption to this enactment from the 1940's. And, construing the Act on its own terms, I see no reason to conclude that Congress intended administrative preclusion to apply to TTAB findings of fact in a subsequent trademark infringement suit. The Act says nothing to indicate such an intent, and several features of the Act support the contrary inference.

The first feature indicating that Congress did not intend preclusion to apply is the limited authority the Act gives the TTAB. The Act authorizes the TTAB only to "determine and decide the respective rights of [trademark] registration," 15 U. S. C. § 1067(a), thereby withholding any authority from the TTAB to "determine the right to use" a trademark or to "decide broader questions of infringement or unfair competition," TTAB Manual of Procedure § 102.01 (2014). This limited job description indicates that TTAB's conclusions regarding registration were never meant to become decisive—through application of administrative preclusion—in subsequent infringement suits. See 15 U. S. C. § 1115(a) (providing that registration of a mark "shall be prima facie evidence of the validity of the registered mark" but "shall not preclude another person from proving any legal or equitable defense or defect"). Giving preclusive effect to the TTAB's decision on likelihood of confusion would be an end-run around the statutory limitation on its authority, as all parties agree that likelihood of confusion is the central issue in a subsequent infringement suit.

A second indication that Congress did not intend administrative preclusion to apply is the Lanham Act's provision for judicial review. After the TTAB issues a registration decision, a party "who is dissatisfied with the decision" may either appeal to the Federal Circuit or file a civil action in

district court seeking review. §§ 1071(a)(1), (b)(1).[5] And it is undisputed that a civil action in district court would entail *de novo* review of the TTAB's decision. *Ante*, at 144. Although under ordinary preclusion principles "the failure to pursue an appeal does not undermine issue preclusion," *ante*, at 152, the availability of *de novo* judicial review of an administrative decision does. That is true both because the judicial review afforded by the Act marks the first opportunity for consideration of the issue by an Article III court and because Congress has deviated from the usual practice of affording deference to the factfindings of an initial tribunal in affording *de novo* review of the TTAB's decisions.

The decision to provide this *de novo* review is even more striking in light of the historical background of the choice: Congress passed the Lanham Act the same year it passed the Administrative Procedure Act, following a lengthy period of disagreement in the courts about what deference administrative findings of fact were entitled to receive on direct review. The issue had been the subject of debate for over 50 years, with varying results. See generally 2 J. Dickinson, Administrative Justice and the Supremacy of Law 39–75 (1927). Sometimes this Court refused to review factual determinations of administrative agencies at all, *Smelting Co.*, 104 U. S., at 640, 646, and sometimes it allowed lower courts to engage in essentially *de novo* review of factual determinations, see *ICC* v. *Alabama Midland R. Co.*, 168 U. S. 144, 174 (1897); *Reckendorfer* v. *Faber*, 92 U. S. 347, 351–355 (1876).

In the early 20th century, the Court began to move toward substantial-evidence review of administrative determinations involving mixed questions of law and fact, *ICC* v. *Union Pacific R. Co.*, 222 U. S. 541, 546–548 (1912), but reserved the authority to review *de novo* any so-called "jurisdictional facts," *Crowell* v. *Benson*, 285 U. S. 22, 62–63

[5] The original 1946 Lanham Act provided for appeal to the Court of Customs and Patent Appeals. See § 21, 60 Stat. 435.

(1932). Courts then struggled to determine the boundary between jurisdictional and nonjurisdictional facts, and thus to determine the appropriate standard of review for administrative decisions. See, *e. g.*, *Estep* v. *United States*, 327 U. S. 114, 142 (1946) (Frankfurter, J., concurring in result) (noting the "casuistic difficulties spawned" in *Crowell* and the "attritions of that case through later decisions"). Although Congress provided for substantial-evidence review in the Administrative Procedure Act, 5 U. S. C. § 706(2)(E), it required *de novo* review in the Lanham Act.

I need not take a side in this historical debate about the proper level of review for administrative findings of fact to conclude that its existence provides yet another reason to doubt that Congress intended administrative preclusion to apply to the Lanham Act.

III

In addition to being unsupported by our precedents or historical evidence, the majority's application of administrative preclusion raises serious constitutional concerns.

A

Executive agencies derive their authority from Article II of the Constitution, which vests "[t]he executive Power" in "a President of the United States," Art. II, § 1, cl. 1. Executive agencies are thus part of the political branches of Government and make decisions "not by fixed rules of law, but by the application of governmental discretion or policy." Dickinson, *supra*, at 35–36; see, *e. g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (An agency "is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration"). They are not constituted to exercise "independent judgment," but to be responsive to the pressures of the political branches. *Perez* v.

Mortgage Bankers Assn., *ante,* at 119 (THOMAS, J., concurring in judgment).

Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights. Under our Constitution, the "judicial power" belongs to Article III courts and cannot be shared with the Legislature or the Executive. *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011); see also *Perez*, *ante*, at 119–122 (opinion of THOMAS, J.). And some historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts, at least absent the consent of the parties to adjudication in another forum. See Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 561–574 (2007) (hereinafter Nelson); see also *Department of Transportation* v. *Association of American Railroads*, *ante,* at 69 (THOMAS, J., concurring in judgment) (explaining that "there are certain core functions" that require the exercise of a particular constitutional power and that only one branch can constitutionally perform).

To the extent that administrative agencies could, consistent with the Constitution, function as courts, they might only be able to do so with respect to claims involving public or quasi-private rights. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 68–70 (1982) (plurality opinion); see also Nelson 561–574; Dickinson, *supra*, at 6. Public rights are those belonging to the public as a whole, see Nelson 566, whereas quasi-private rights, or statutory entitlements, are those "'privileges'" or "'franchises'" that are bestowed by the government on individuals, *id.*, at 567; see, *e. g.*, *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929) (discussing claims "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it").

The historical treatment of administrative preclusion is consistent with this understanding. As discussed above,

most administrative adjudications that were given preclusive effect in Article III courts involved quasi-private rights like land grants. See *Smelting Co.*, 104 U. S., at 646. And in the context of land grants, this Court recognized that once "title had passed from the government," a more complete form of judicial review was available because "the question became one of private right." *Johnson* v. *Towsley*, 13 Wall. 72, 87 (1871).

It is true that, in the New Deal era, the Court sometimes gave preclusive effect to administrative findings of fact in tax cases, which could be construed to implicate private rights. See, *e. g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404 (1940); *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620, 622–624 (1933). But administrative tax determinations may simply have enjoyed a special historical status, in which case this practice might be best understood as a limited deviation from a general distinction between public and private rights. See Nelson 588–590.

B

Trademark registration under the Lanham Act has the characteristics of a quasi-private right. Registration is a creature of the Lanham Act, which "confers important legal rights and benefits on trademark owners who register their marks." *Ante*, at 142 (internal quotation marks omitted). Because registration is merely a statutory government entitlement, no one disputes that the TTAB may constitutionally adjudicate a registration claim. See *Stern*, *supra*, at 491; Nelson 568–569.

By contrast, the right to adopt and exclusively use a trademark appears to be a private property right that "has been long recognized by the common law and the chancery courts of England and of this country." *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). As this Court explained when addressing Congress' first trademark statute, enacted in 1870, the exclusive right to use a trademark "was not created by the

act of Congress, and does not now depend upon it for its enforcement." *Ibid.* "The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." *Ibid.* Thus, it appears that the trademark infringement suit at issue in this case might be of a type that must be decided by "Article III judges in Article III courts." *Stern*, 564 U. S., at 484.

The majority, however, would have Article III courts decide infringement claims where the central issue—whether there is a likelihood of consumer confusion between two trademarks—has already been decided by an executive agency. This raises two potential constitutional concerns. First, it may deprive a trademark holder of the opportunity to have a core private right adjudicated in an Article III court. See *id.*, at 485–487. Second, it may effect a transfer of a core attribute of the judicial power to an executive agency. Cf. *Perez*, *ante*, at 120–122 (opinion of THOMAS, J.) (explaining that interpretation of regulations having the force and effect of law is likely a core attribute of the judicial power that cannot be transferred to an executive agency). Administrative preclusion thus threatens to "sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our own system, wherever fundamental rights depend . . . upon the facts, and finality as to facts becomes in effect finality in law." *Crowell*, 285 U. S., at 57.

At a minimum, this practice raises serious questions that the majority does not adequately confront. The majority does not address the distinction between private rights and public rights or the nature of the power exercised by an administrative agency when adjudicating facts in private-rights disputes. And it fails to consider whether applying administrative preclusion to a core factual determination in a private-rights dispute comports with the separation of powers.

* * *

I would hold that the TTAB's trademark-registration decisions are not entitled to preclusive effect in a subsequent infringement suit. The common law does not support a general presumption in favor of administrative preclusion for statutes passed before this Court's decision in *Astoria*, and the text, structure, and history of the Lanham Act provide no support for such preclusion. I disagree with the majority's willingness to endorse *Astoria*'s unfounded presumption and to apply it to an adjudication in a private-rights dispute, as that analysis raises serious constitutional questions. Because I can resolve this case on statutory grounds, however, I leave these questions for another day. I respectfully dissent.

Syllabus

OMNICARE, INC., ET AL. *v.* LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND ET AL.

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

No. 13–435. Argued November 3, 2014—Decided March 24, 2015

The Securities Act of 1933 requires that a company wishing to issue securities must first file a registration statement containing specified information about the issuing company and the securities offered. See 15 U. S. C. §§ 77g, 77aa. The registration statement may also include other representations of fact or opinion. To protect investors and promote compliance with these disclosure requirements, § 11 of the Act creates two ways to hold issuers liable for a registration statement's contents: A purchaser of securities may sue an issuer if the registration statement either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading." § 77k(a). In either case, the buyer need not prove that the issuer acted with any intent to deceive or defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381–382.

Petitioner Omnicare, a pharmacy services company, filed a registration statement in connection with a public offering of common stock. In addition to the required disclosures, the registration statement contained two statements expressing the company's opinion that it was in compliance with federal and state laws. After the Federal Government filed suit against Omnicare for allegedly receiving kickbacks from pharmaceutical manufacturers, respondents, pension funds that purchased Omnicare stock (hereinafter Funds), sued Omnicare under § 11. They claimed that Omnicare's legal compliance statements constituted "untrue statement[s] of . . . material fact" and that Omnicare "omitted to state [material] facts necessary" to make those statements not misleading.

The District Court granted Omnicare's motion to dismiss. Because the Funds had not alleged that Omnicare's officers knew they were violating the law, the court found that the Funds had failed to state a § 11 claim. The Sixth Circuit reversed. Acknowledging that the statements at issue expressed opinions, the court held that no showing of subjective disbelief was required. In the court's view, the Funds' allegations that Omnicare's legal compliance opinions were objectively false sufficed to support their claim.

Held:

1. A statement of opinion does not constitute an "untrue statement of . . . fact" simply because the stated opinion ultimately proves incorrect. The Sixth Circuit's contrary holding wrongly conflates facts and opinions. A statement of fact expresses certainty about a thing, whereas a statement of opinion conveys only an uncertain view as to that thing. Section 11 incorporates that distinction in its first clause by exposing issuers to liability only for "untrue statement[s] of . . . *fact.*" § 77k(a) (emphasis added). Because a statement of opinion admits the possibility of error, such a statement remains true—and thus is not an "untrue statement of . . . fact"—even if the opinion turns out to have been wrong.

But opinion statements are not wholly immune from liability under § 11's first clause. Every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. A statement of opinion thus qualifies as an "untrue statement of . . . fact" if *that fact* is untrue—*i. e.*, if the opinion expressed was not sincerely held. In addition, opinion statements can give rise to false-statement liability under § 11 if they contain embedded statements of untrue facts. Here, however, Omnicare's sincerity is not contested and the statements at issue are pure opinion statements. The Funds thus cannot establish liability under § 11's first clause. Pp. 182–186.

2. If a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself, then § 11's omissions clause creates liability. Pp. 186–197.

(a) For purposes of § 11's omissions clause, whether a statement is "misleading" is an objective inquiry that depends on a reasonable investor's perspective. Cf. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445. Omnicare goes too far by claiming that no reasonable person, in any context, can understand a statement of opinion to convey anything more than the speaker's own mindset. A reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about the speaker's basis for holding that view. Specifically, an issuer's statement of opinion may fairly imply facts about the inquiry the issuer conducted or the knowledge it had. And if the real facts are otherwise, but not provided, the opinion statement will mislead by omission.

An opinion statement, however, is not misleading simply because the issuer knows, but fails to disclose, some fact cutting the other way. A reasonable investor does not expect that every fact known to an issuer supports its opinion statement. Moreover, whether an omission makes an expression of opinion misleading always depends on context. Rea-

sonable investors understand opinion statements in light of the surrounding text, and § 11 creates liability only for the omission of material facts that cannot be squared with a fair reading of the registration statement as a whole. Omnicare's arguments to the contrary are unavailing. Pp. 186–195.

(b) Because neither court below considered the Funds' omissions theory under the right standard, this case is remanded for a determination of whether the Funds have stated a viable omissions claim. On remand, the court must review the Funds' complaint to determine whether it adequately alleges that Omnicare omitted from the registration statement some specific fact that would have been material to a reasonable investor. If so, the court must decide whether the alleged omission rendered Omnicare's opinion statements misleading in context. Pp. 195–197.

719 F. 3d 498, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 197. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 203.

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Joseph M. Terry*, *John S. Williams*, *Linda T. Coberly*, *Harvey Kurzweil*, *Richard W. Reinthaler*, *John E. Schreiber*, *Sarah K. Campbell*, and *Andrew C. Nichols*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Kevin K. Russell*, *Darren J. Robbins*, *Eric Alan Isaacson*, *Henry Rosen*, *Joseph D. Daley*, *Steven F. Hubachek*, *Amanda M. Frame*, and *Susannah R. Conn.*

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging vacatur and remand. With her on the brief were *Solicitor General Verrilli*, *Deputy Solicitor Stewart*, *Anne K. Small*, *Michael A. Conley*, *John W. Avery*, *Dominick V. Freda*, and *Stephen G. Yoder*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center for Audit Quality by *Carter G. Phillips*, *Jonathan F. Cohn*, *Eric D. McArthur*, and *Joshua J. Fougere*; for the Chamber of Commerce of the United States

JUSTICE KAGAN delivered the opinion of the Court.

Before a company may sell securities in interstate commerce, it must file a registration statement with the Securities and Exchange Commission (SEC). If that document either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading," a purchaser of the stock may sue for damages. 15 U. S. C. § 77k(a). This case requires us to decide how each of those phrases applies to statements of opinion.

I

The Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*, protects investors by ensuring that companies issuing securities (known as "issuers") make a "full and fair disclosure of information" relevant to a public offering. *Pinter* v. *Dahl*, 486 U. S. 622, 646 (1988). The linchpin of the Act is its registration requirement. With limited exceptions not relevant here, an issuer may offer securities to the public only after filing a registration statement. See §§ 77d, 77e. That statement must contain specified information about both the company itself and the security for sale. See §§ 77g, 77aa. Beyond those required disclosures, the issuer may include additional representations of either fact or opinion.

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of America et al. by *George T. Conway III* and *Kate Comerford Todd*; for the Securities Industry and Financial Markets Association by *Richard D. Bernstein*, *James C. Dugan*, and *Kevin M. Carroll*; and for the Washington Legal Foundation by *Douglas W. Greene*, *Claire Loebs Davis*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Jay E. Shushelsky*; for Common Law Scholars by *Ernest A. Young*, *James J. Sabella*, and *Darren Check*; for Institutional Investors by *Jonathan S. Massey* and *Max W. Berger*; for Occupy the SEC by *Akshat Tewary*; for Professors at Law and Business Schools by *J. Robert Brown* and *Lyman Johnson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, and *Paul Alan Levy*; and for the Wyoming Retirement System et al. by *Erik S. Jaffe*.

Section 11 of the Act promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals (directors, partners, underwriters, and so forth) for material misstatements or omissions in registration statements. As relevant here, that section provides:

> "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue." § 77k(a).

Section 11 thus creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out. Either way, the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381–382 (1983).

This case arises out of a registration statement that petitioner Omnicare filed in connection with a public offering of common stock. Omnicare is the nation's largest provider of pharmacy services for residents of nursing homes. Its registration statement contained (along with all mandated disclosures) analysis of the effects of various federal and state laws on its business model, including its acceptance of rebates from pharmaceutical manufacturers. See, *e. g.,* App. 88–107, 132–140, 154–166. Of significance here, two sentences in the registration statement expressed Omnicare's view of its compliance with legal requirements:

- "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws." *Id.,* at 95.

- "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." *Id.*, at 137.

Accompanying those legal opinions were some caveats. On the same page as the first statement above, Omnicare mentioned several state-initiated "enforcement actions against pharmaceutical manufacturers" for offering payments to pharmacies that dispensed their products; it then cautioned that the laws relating to that practice might "be interpreted in the future in a manner inconsistent with our interpretation and application." *Id.*, at 96. And adjacent to the second statement, Omnicare noted that the Federal Government had expressed "significant concerns" about some manufacturers' rebates to pharmacies and warned that business might suffer "if these price concessions were no longer provided." *Id.*, at 136–137.

Respondents here, pension funds that purchased Omnicare stock in the public offering (hereinafter Funds), brought suit alleging that the company's two opinion statements about legal compliance give rise to liability under § 11. Citing lawsuits that the Federal Government later pressed against Omnicare, the Funds' complaint maintained that the company's receipt of payments from drug manufacturers violated antikickback laws. See *id.*, at 181–186, 203–226. Accordingly, the complaint asserted, Omnicare made "materially false" representations about legal compliance. *Id.*, at 274. And so too, the complaint continued, the company "omitted to state [material] facts necessary" to make its representations not misleading. *Id.*, at 273. The Funds claimed that none of Omnicare's officers and directors "possessed reasonable grounds" for thinking that the opinions offered were truthful and complete. *Id.*, at 274. Indeed, the complaint noted that one of Omnicare's attorneys had warned that a particular contract "carrie[d] a heightened risk" of liability under antikickback laws. *Id.*, at 225 (emphasis deleted). At the same

time, the Funds made clear that in light of § 11's strict liability standard, they chose to "exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct." *Id.*, at 273.

The District Court granted Omnicare's motion to dismiss. See Civ. No. 2006–26 (ED Ky., Feb. 13, 2012), App. to Pet. for Cert. 28a, 38a–40a, 2012 WL 462551, *4–*5. In the court's view, "statements regarding a company's belief as to its legal compliance are considered 'soft' information" and are actionable only if those who made them "knew [they] were untrue at the time." App. to Pet. for Cert. 38a. The court concluded that the Funds' complaint failed to meet that standard because it nowhere claimed that "the company's officers knew they were violating the law." *Id.*, at 39a. The Court of Appeals for the Sixth Circuit reversed. See 719 F. 3d 498 (2013). It acknowledged that the two statements highlighted in the Funds' complaint expressed Omnicare's "opinion" of legal compliance, rather than "hard facts." *Id.*, at 504 (quoting *In re Sofamor Danek Group Inc.*, 123 F. 3d 394, 401–402 (CA6 1997)). But even so, the court held, the Funds had to allege only that the stated belief was "objectively false"; they did not need to contend that anyone at Omnicare "disbelieved [the opinion] at the time it was expressed." 719 F. 3d, at 506 (quoting *Fait* v. *Regions Financial Corp.*, 655 F. 3d 105, 110 (CA2 2011)).

We granted certiorari, 571 U. S. 1236 (2014), to consider how § 11 pertains to statements of opinion. We do so in two steps, corresponding to the two parts of § 11 and the two theories in the Funds' complaint. We initially address the Funds' claim that Omnicare made "untrue statement[s] of . . . material fact" in offering its views on legal compliance. § 77k(a); see App. 273–274. We then take up the Funds' argument that Omnicare "omitted to state a material fact . . . necessary to make the statements [in its registration filing] not misleading." § 77k(a); see App. 273–274. Unlike both

courts below, we see those allegations as presenting different issues.[1] In resolving the first, we discuss when an opinion itself constitutes a factual misstatement. In analyzing the second, we address when an opinion may be rendered misleading by the omission of discrete factual representations. Because we find that the Court of Appeals applied the wrong standard, we vacate its decision.

II

The Sixth Circuit held, and the Funds now urge, that a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an "untrue statement of a material fact." 15 U. S. C. § 77k(a); see 719 F. 3d, at 505; Brief for Respondents 20–26. As the Funds put the point, a statement of belief may make an implicit assertion about the belief's "subject matter": To say "we believe X is

[1] In his concurrence, JUSTICE THOMAS contends that the lower courts' erroneous conflation of these two questions should limit the scope of our review: We should say nothing about omissions, he maintains, because that issue was not pressed or passed on below. We disagree. Although the Funds could have written a clearer complaint, they raised a discrete omissions claim. See, *e. g.*, App. 191 ("[T]he Company's 2005 Registration Statement . . . omitted material information that was . . . necessary to make the Registration Statement not misleading"); *id.*, at 273 ("The Registration Statement . . . omitted to state facts necessary to make the statements made not misleading, and failed to adequately disclose material facts as described above"). The lower courts chose not to address that claim separately, but understood that the complaint alleged not only misstatements but also omissions. See App. to Pet. for Cert. 38a (describing the Funds' claims as relating to "misstatements/omissions" and dismissing the lot as "not actionable"); 719 F. 3d, at 501 (giving a single rationale for reversing the District Court's dismissal of the Funds' claims "for material misstatements and omissions"). And the omissions issue was the crux of the parties' dispute before this Court. The question was fully briefed by both parties (plus the Solicitor General), and omissions played a starring role at oral argument. Neither in its briefs nor at argument did Omnicare ever object that the Funds' omissions theory had been forfeited or was not properly before this Court. We therefore see no reason to ignore the issue.

true" is often to indicate that "X is in fact true." *Id.*, at 23; see Tr. of Oral Arg. 36. In just that way, the Funds conclude, an issuer's statement that "we believe we are following the law" conveys that "we in fact are following the law"—which is "materially false," no matter what the issuer thinks, if instead it is violating an anti-kickback statute. Brief for Respondents 1.

But that argument wrongly conflates facts and opinions. A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Id.*, at 1509. Most important, a statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. See *ibid.* ("An opinion, in ordinary usage . . . does not imply . . . definiteness . . . or certainty"); 7 Oxford English Dictionary 151 (1933) (an opinion "rest[s] on grounds insufficient for complete demonstration"). Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly. And Congress effectively incorporated just that distinction in § 11's first part by exposing issuers to liability not for "untrue statement[s]" full stop (which would have included ones of opinion), but only for "untrue statement[s] of . . . *fact*." § 77k(a) (emphasis added).

Consider that statutory phrase's application to two hypothetical statements, couched in ways the Funds claim are equivalent. A company's CEO states: "The TVs we manufacture have the highest resolution available on the market." Or, alternatively, the CEO transforms that factual statement into one of opinion: "I *believe*" (or "I think") "the TVs we manufacture have the highest resolution available on the market." The first version would be an untrue statement of fact if a competitor had introduced a higher resolution TV a month before—even assuming the CEO had not yet

learned of the new product. The CEO's assertion, after all, is not mere puffery, but a determinate, verifiable statement about her company's TVs; and the CEO, however innocently, got the facts wrong. But in the same set of circumstances, the second version would remain true. Just as she said, the CEO really did believe, when she made the statement, that her company's TVs had the sharpest picture around. And although a plaintiff could later prove that opinion erroneous, the words "I believe" themselves admitted that possibility, thus precluding liability for an untrue statement of fact. That remains the case if the CEO's opinion, as here, concerned legal compliance. If, for example, she said, "I believe our marketing practices are lawful," and actually did think that, she could not be liable for a false statement of fact—even if she afterward discovered a longtime violation of law. Once again, the statement would have been true, because all she expressed was a view, not a certainty, about legal compliance.

That still leaves some room for § 11's false-statement provision to apply to expressions of opinion. As even Omnicare acknowledges, every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. See Brief for Petitioners 15–16; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 109, p. 755 (5th ed. 1984) (Prosser and Keeton) ("[A]n expression of opinion is itself always a statement of . . . the fact of the belief, the existing state of mind, of the one who asserts it"). For that reason, the CEO's statement about product quality ("I believe our TVs have the highest resolution available on the market") would be an untrue statement of fact—namely, the fact of her own belief—if she knew that her company's TVs only placed second. And so too the statement about legal compliance ("I believe our marketing practices are lawful") would falsely describe her own state of mind if she thought her company was breaking the law. In such cases, § 11's first part would subject

the issuer to liability (assuming the misrepresentation were material).[2]

In addition, some sentences that begin with opinion words like "I believe" contain embedded statements of fact—as, once again, Omnicare recognizes. See Reply Brief 6. Suppose the CEO in our running hypothetical said: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access." That statement may be read to affirm not only the speaker's state of mind, as described above, but also an underlying fact: that the company uses a patented technology. See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1109 (1991) (SCALIA, J., concurring in part and concurring in judgment) (showing that a statement can sometimes be "most fairly read as affirming separately both the fact of the [speaker's] opinion and the accuracy of the facts" given to support or explain it (emphasis deleted)). Accordingly, liability under § 11's false-statement provision would follow (once again, assuming materiality) not only if

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[2] Our decision in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083 (1991), qualifies this statement in one respect. There, the Court considered when corporate directors' statements of opinion in a proxy solicitation give rise to liability under § 14(a) of the Securities Exchange Act, 15 U. S. C. § 78n(a), which bars conduct similar to that described in § 11. In discussing that issue, the Court raised the hypothetical possibility that a director could think he was lying while actually (*i. e.*, accidentally) telling the truth about the matter addressed in his opinion. See *Virginia Bankshares*, 501 U. S., at 1095–1096. That rare set of facts, the Court decided, would not lead to liability under § 14(a). See *ibid.* The Court reasoned that such an inadvertently correct assessment is unlikely to cause anyone harm and that imposing liability merely for the "impurities" of a director's "unclean heart" might provoke vexatious litigation. *Id.*, at 1096 (quoting *Stedman* v. *Storer*, 308 F. Supp. 881, 887 (SDNY 1969)). We think the same is true (to the extent this scenario ever occurs in real life) under § 11. So if our CEO did not believe that her company's TVs had the highest resolution on the market, but (surprise!) they really did, § 11 would not impose liability for her statement.

the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue.

But the Funds cannot avail themselves of either of those ways of demonstrating liability. The two sentences to which the Funds object are pure statements of opinion: To simplify their content only a bit, Omnicare said in each that "we believe we are obeying the law." And the Funds do not contest that Omnicare's opinion was honestly held. Recall that their complaint explicitly "exclude[s] and disclaim[s]" any allegation sounding in fraud or deception. App. 273. What the Funds instead claim is that Omnicare's belief turned out to be wrong—that whatever the company thought, it was in fact violating anti-kickback laws. But that allegation alone will not give rise to liability under § 11's first clause because, as we have shown, a sincere statement of pure opinion is not an "untrue statement of material fact," regardless whether an investor can ultimately prove the belief wrong. That clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments. In other words, the provision is not, as the Court of Appeals and the Funds would have it, an invitation to Monday morning quarterback an issuer's opinions.

III

A

That conclusion, however, does not end this case because the Funds also rely on § 11's omissions provision, alleging that Omnicare "omitted to state facts necessary" to make its opinion on legal compliance "not misleading." App. 273; see § 77k(a).[3] As all parties accept, whether a statement is "misleading" depends on the perspective of a reasonable in-

[3] Section 11's omissions clause also applies when an issuer fails to make mandated disclosures—those "required to be stated"—in a registration statement. § 77k(a). But the Funds do not object to Omnicare's filing on that score.

vestor: The inquiry (like the one into materiality) is objective. Cf. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445 (1976) (noting that the securities laws care only about the "significance of an omitted or misrepresented fact to a reasonable investor"). We therefore must consider when, if ever, the omission of a fact can make a statement of opinion like Omnicare's, even if literally accurate, misleading to an ordinary investor.

Omnicare claims that is just not possible. On its view, no reasonable person, in any context, can understand a pure statement of opinion to convey anything more than the speaker's own mindset. See Reply Brief 5–6. As long as an opinion is sincerely held, Omnicare argues, it cannot mislead as to any matter, regardless what related facts the speaker has omitted. Such statements of belief (concludes Omnicare) are thus immune from liability under § 11's second part, just as they are under its first.[4]

That claim has more than a kernel of truth. A reasonable person understands, and takes into account, the difference we have discussed above between a statement of fact and one of opinion. See *supra*, at 183–184. She recognizes the import of words like "I think" or "I believe," and grasps that they convey some lack of certainty as to the statement's content.

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[4] In a different argument that arrives at the same conclusion, Omnicare maintains that § 11, by its terms, bars only those omissions that make statements of *fact*—not opinion—misleading. See Reply Brief 3–5. The language of the omissions clause, however, is not so limited. It asks whether an omitted fact is necessary to make "statements" in "any part of the registration statement" not misleading; unlike in § 11's first clause, here the word "statements" is unmodified, thus including both fact and opinion. In any event, Omnicare's alternative interpretation succeeds merely in rephrasing the critical issue. Omnicare recognizes that every opinion statement is also a factual statement about the speaker's own belief. See *supra*, at 184. On Omnicare's view, the question thus becomes when, if ever, an omission can make a statement of *that fact* misleading to an ordinary investor. The following analysis applies just as well to that reformulation.

See, *e. g.*, Restatement (Second) of Contracts § 168, Comment *a*, p. 456 (1979) (noting that a statement of opinion "implies that [the speaker] . . . is not certain enough of what he says" to do without the qualifying language). And that may be especially so when the phrases appear in a registration statement, which the reasonable investor expects has been carefully wordsmithed to comply with the law. When reading such a document, the investor thus distinguishes between the sentences "we believe X is true" and "X is true." And because she does so, the omission of a fact that merely rebuts the latter statement fails to render the former misleading. In other words, a statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees, and § 11's omissions clause therefore does not treat them that way.

But Omnicare takes its point too far, because a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience. Consider an unadorned statement of opinion about legal compliance: "We believe our conduct is lawful." If the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete. In the context of the securities market, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry—rather than, say, on mere intuition, however sincere.[5] Similarly, if the issuer made the statement in the face of its lawyers' contrary advice, or with knowledge that the Federal Government was taking the opposite view, the investor again has cause to complain: He expects not just

[5] In some circumstances, however, reliance on advice from regulators or consistent industry practice might accord with a reasonable investor's expectations.

that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time.[6] Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability.[7]

An opinion statement, however, is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. Reasonable investors understand

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[6] The hypothetical used earlier could demonstrate the same points. Suppose the CEO, in claiming that her company's TV had the highest resolution available on the market, had failed to review any of her competitors' product specifications. Or suppose she had recently received information from industry analysts indicating that a new product had surpassed her company's on this metric. The CEO may still honestly believe in her TV's superiority. But under § 11's omissions provision, that subjective belief, in the absence of the expected inquiry or in the face of known contradictory evidence, would not insulate her from liability.

[7] Omnicare contends at length that *Virginia Bankshares* forecloses this result, see Brief for Petitioners 16–21, relying on the following sentence: "A statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says," 501 U. S., at 1095. But Omnicare's argument plucks that statement from its context and thereby transforms its meaning. *Virginia Bankshares* concerned an expression of opinion that the speaker did not honestly hold—*i. e.*, one making an "untrue statement of fact" about the speaker's own state of mind, § 77k(a). See *id.*, at 1090 ("[W]e interpret the jury verdict as finding that the . . . directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made"). The Court held that such a statement gives rise to liability under § 14(a) when it is also "false or misleading about its subject matter." *Id.*, at 1096. Having done so, the Court went on to consider the rare hypothetical case, described in this opinion's second footnote, in which a speaker expresses an opinion that she does not actually hold, but that turns out to be right. See *supra*, at 185, n. 2. The sentence Omnicare cites did no more than introduce that hypothetical; it was a way of saying "someone might object to a statement—even when the opinion it expressed proved correct—solely on the ground that it was disbelieved." And the Court then held, as noted above, that such an objection would fail. See *ibid.* The language thus provides no support for Omnicare's argument here.

that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty. See *supra,* at 183–184, 187–188. Suppose, for example, that in stating an opinion about legal compliance, the issuer did not disclose that a single junior attorney expressed doubts about a practice's legality, when six of his more senior colleagues gave a stamp of approval. That omission would not make the statement of opinion misleading, even if the minority position ultimately proved correct: A reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement.[8]

Moreover, whether an omission makes an expression of opinion misleading always depends on context. Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life. At the same time, an investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information. And the investor takes into account the customs and practices of the relevant industry. So an omission that renders misleading a statement of opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame. The reasonable investor understands a statement of opinion in its full context, and § 11 creates liabil-

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[8] We note, too, that a reasonable investor generally considers the specificity of an opinion statement in making inferences about its basis. Compare two new statements from our ever-voluble CEO. In the first, she says: "I believe we have 1.3 million TVs in our warehouse." In the second, she says: "I believe we have enough supply on hand to meet demand." All else equal, a reasonable person would think that a more detailed investigation lay behind the former statement.

ity only for the omission of material facts that cannot be squared with such a fair reading.

These principles are not unique to § 11: They inhere, too, in much common law respecting the tort of misrepresentation.[9] The Restatement of Torts, for example, recognizes that "[a] statement of opinion as to facts not disclosed and not otherwise known to the recipient may" in some circumstances reasonably "be interpreted by him as an implied statement" that the speaker "knows facts sufficient to justify him in forming" the opinion, or that he at least knows no facts "incompatible with [the] opinion." Restatement (Second) of Torts § 539, p. 85 (1976).[10] When that is so, the Restatement explains, liability may result from omission of facts—for example, the fact that the speaker failed to conduct any investigation—that rebut the recipient's predictable inference. See *id.*, Comment *a*, at 86; *id.*, Comment *b*, at 87. Similarly, the leading treatise in the area explains that "it has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it." Prosser and Keeton § 109, at 760. That is especially (and traditionally) the case, the treatise continues, where—as in a registration statement—a speaker "holds himself out or is understood as having special knowledge of the matter which is not available

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[9] Section 11 is, of course, "not coextensive with common-law doctrines of fraud"; in particular, it establishes "a stringent standard of liability," not dependent on proof of intent to defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381, 388–389 (1983); see *supra*, at 179; *infra*, at 192, n. 11. But we may still look to the common law for its insights into how a reasonable person understands statements of opinion.

[10] The Restatement of Contracts, discussing misrepresentations that can void an agreement, says much the same: "[T]he recipient of an assertion of a person's opinion as to facts not disclosed" may sometimes "properly interpret it as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it." Restatement (Second) of Contracts § 168, p. 455 (1979).

to the plaintiff." *Id.*, at 760–761 (footnote omitted); see Restatement (Second) of Torts § 539, Comment *b*, at 86 (noting that omissions relating to an opinion's basis are "particularly" likely to give rise to liability when the speaker has "special knowledge of facts unknown to the recipient"); *Smith* v. *Land and House Property Corp.*, [1884] 28 Ch. D. 7, 15 (App. Cas.) (appeal taken from Eng.) (opinion of Bowen, L. J.) (When "the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best . . . impliedly states that [the speaker] knows facts which justify his opinion").[11]

And the purpose of § 11 supports this understanding of how the omissions clause maps onto opinion statements. Congress adopted § 11 to ensure that issuers "tell[ ] the whole truth" to investors. H. R. Rep. No. 85, 73d Cong., 1st Sess., 2 (1933) (quoting President Roosevelt's message to Congress). For that reason, literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another. Omnicare would

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[11] In invoking these principles, we disagree with JUSTICE SCALIA's common-law-based opinion in two crucial ways. First, we view the common law's emphasis on special knowledge and expertise as supporting, rather than contradicting, our view of what issuers' opinion statements fairly imply. That is because an issuer has special knowledge of its business—including the legal issues the company faces—not available to an ordinary investor. Second, we think JUSTICE SCALIA's reliance on the common law's requirement of an intent to deceive is inconsistent with § 11's standard of liability. As we understand him, JUSTICE SCALIA would limit liability for omissions under § 11 to cases in which a speaker "subjectively intend[s] the deception" arising from the omission, on the ground that the common law did the same. *Post*, at 202 (opinion concurring in part and concurring in judgment) (emphasis deleted). But § 11 discards the common law's intent requirement, making omissions unlawful—regardless of the issuer's state of mind—so long as they render statements misleading. See *Herman & MacLean*, 459 U. S., at 382 (emphasizing that § 11 imposes liability "even for innocent" misstatements or omissions). The common law can help illuminate when an omission has that effect, but cannot change § 11's insistence on strict liability. See *supra*, at 191, n. 9.

nullify that statutory requirement for all sentences starting with the phrases "we believe" or "we think." But those magic words can preface nearly any conclusion, and the resulting statements, as we have shown, remain perfectly capable of misleading investors. See *supra*, at 188–189. Thus, Omnicare's view would punch a hole in the statute for half-truths in the form of opinion statements. And the difficulty of showing that such statements are literally false—which requires proving an issuer did not believe them, see *supra*, at 184–185—would make that opening yet more consequential: Were Omnicare right, companies would have virtual *carte blanche* to assert opinions in registration statements free from worry about § 11. That outcome would ill-fit Congress's decision to establish a strict liability offense promoting "full and fair disclosure" of material information. *Pinter*, 486 U. S., at 646; see *supra,* at 178–179.

Omnicare argues, in response, that applying § 11's omissions clause in the way we have described would have "adverse policy consequences." Reply Brief 17 (capitalization omitted). According to Omnicare, any inquiry into the issuer's basis for holding an opinion is "hopelessly amorphous," threatening "unpredictable" and possibly "massive" liability. *Id.*, at 2; Brief for Petitioners 34, 36. And because that is so, Omnicare claims, many issuers will choose not to disclose opinions at all, thus "depriving [investors] of potentially helpful information." Reply Brief 19; see Tr. of Oral Arg. 59–61.

But first, that claim is, just as Omnicare labels it, one of "policy"; and Congress gets to make policy, not the courts. The decision Congress made, for the reasons we have indicated, was to extend § 11 liability to all statements rendered misleading by omission. In doing so, Congress no doubt made § 11 less cut-and-dry than a law prohibiting only false factual statements. Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would

naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation she would expect an issuer to have before making the statement. See *supra*, at 188–189. All that, however, is a feature, not a bug, of the omissions provision.

Moreover, Omnicare way overstates both the looseness of the inquiry Congress has mandated and the breadth of liability that approach threatens. As we have explained, an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion. See *supra*, at 188. And to do so, the investor cannot just say that the issuer failed to reveal its basis. Section 11's omissions clause, after all, is not a general disclosure requirement; it affords a cause of action only when an issuer's failure to include a material fact has rendered a published statement misleading. To press such a claim, an investor must allege that kind of omission—and not merely by means of conclusory assertions. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). To be specific: The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. See *supra*, at 188–189. That is no small task for an investor.

Nor does the inquiry such a complaint triggers ask anything unusual of courts. Numerous legal rules hinge on what a reasonable person would think or expect. In requiring courts to view statements of opinion from an ordinary investor's perspective, § 11's omissions clause demands nothing more complicated or unmanageable. Indeed, courts have for decades engaged in just that inquiry, with no

apparent trouble, in applying the common law of misrepresentation. See *supra*, at 191–192.

Finally, we see no reason to think that liability for misleading opinions will chill disclosures useful to investors. Nothing indicates that § 11's application to misleading factual assertions in registration statements has caused such a problem. And likewise, common-law doctrines of opinion liability have not, so far as anyone knows, deterred merchants in ordinary commercial transactions from asserting helpful opinions about their products. That absence of fallout is unsurprising. Sellers (whether of stock or other items) have strong economic incentives to . . . well, *sell* (*i. e.*, hawk or peddle). Those market-based forces push back against any inclination to underdisclose. And to avoid exposure for omissions under § 11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief. Such ways of conveying opinions so that they do not mislead will keep valuable information flowing. And that is the only kind of information investors need. To the extent our decision today chills *misleading* opinions, that is all to the good: In enacting § 11, Congress worked to ensure better, not just more, information.

B

Our analysis on this score counsels in favor of sending the case back to the lower courts for decision. Neither court below considered the Funds' omissions theory with the right standard in mind—or indeed, even recognized the distinct statutory questions that theory raises. See *supra*, at 181–182. We therefore follow our ordinary practice of remanding for a determination of whether the Funds have stated a viable omissions claim (or, if not, whether they should have a chance to replead).

In doing so, however, we reemphasize a few crucial points pertinent to the inquiry on remand. Initially, as we have said, the Funds cannot proceed without identifying one or more facts left out of Omnicare's registration statement.

See *supra*, at 194. The Funds' recitation of the statutory language—that Omnicare "omitted to state facts necessary to make the statements made not misleading"—is not sufficient; neither is the Funds' conclusory allegation that Omnicare lacked "reasonable grounds for the belief" it stated respecting legal compliance. App. 273–274. At oral argument, however, the Funds highlighted another, more specific allegation in their complaint: that an attorney had warned Omnicare that a particular contract "carrie[d] a heightened risk" of legal exposure under anti-kickback laws. *Id.*, at 225 (emphasis deleted); see Tr. of Oral Arg. 42, 49; *supra*, at 180. On remand, the court must review the Funds' complaint to determine whether it adequately alleged that Omnicare had omitted that (purported) fact, or any other like it, from the registration statement. And if so, the court must determine whether the omitted fact would have been material to a reasonable investor—*i. e.*, whether "there is a substantial likelihood that a reasonable [investor] would consider it important." *TSC Industries*, 426 U. S., at 449.

Assuming the Funds clear those hurdles, the court must ask whether the alleged omission rendered Omnicare's legal compliance opinions misleading in the way described earlier—*i. e.*, because the excluded fact shows that Omnicare lacked the basis for making those statements that a reasonable investor would expect. See *supra*, at 188–189. Insofar as the omitted fact at issue is the attorney's warning, that inquiry entails consideration of such matters as the attorney's status and expertise and other legal information available to Omnicare at the time. See *supra*, at 189–190. Further, the analysis of whether Omnicare's opinion is misleading must address the statement's context. See *supra*, at 190–191. That means the court must take account of whatever facts Omnicare *did* provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement. The court should consider, for example, the information Omnicare offered that States had ini-

tiated enforcement actions against drug manufacturers for giving rebates to pharmacies, that the Federal Government had expressed concerns about the practice, and that the relevant laws could "be interpreted in the future in a manner" that would harm Omnicare's business. See App. 95–96, 136–137; *supra,* at 180.

* * *

With these instructions and for the reasons stated, we vacate the judgment below and remand the case for further proceedings.

It is so ordered.

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

Section 11 of the Securities Act of 1933 imposes liability where a registration statement "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact necessary to make the statements therein not misleading." 15 U. S. C. § 77k(a). I agree with the Court's discussion of what it means for an expression of opinion to state an untrue material fact. But an expression of opinion implies facts (beyond the fact that the speaker believes his opinion) only where a reasonable listener would understand it to do so. And it is only when expressions of opinion *do* imply these other facts that they can be "misleading" without the addition of other "material facts." The Court's view would count far more expressions of opinion to convey collateral facts than I—or the common law—would, and I therefore concur only in part.

The common law recognized that most listeners hear "I believe," "in my estimation," and other related phrases as *disclaiming* the assertion of a fact. Hence the (somewhat overbroad) common-law rule that a plaintiff cannot establish a misrepresentation claim "for misstatements of opinion, as distinguished from those of fact." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 109, p. 755

(5th ed. 1984) (Prosser & Keeton). A fraudulent misrepresentation claim based on an expression of opinion could lie for the one fact the opinion reliably conveyed: that the speaker in fact held the stated opinion. Restatement of Torts § 525, Comment *c*, p. 60 (1938). And, in some circumstances, the common law acknowledged that an expression of opinion reasonably implied "that the maker knows of no fact incompatible with his opinion." *Id.* § 539(1), at 91. The no-facts-incompatible-with-the-opinion standard was a demanding one; it meant that a speaker's judgment had to "var[y] so far from the truth that no reasonable man in his position could have such an opinion." Restatement of Contracts § 474(b), p. 902, and Comment *b* (1932). But without more, a listener could only reasonably interpret expressions of opinion as conveying this limited assurance of a speaker's understanding of facts.

In a few areas, the common law recognized the possibility that a listener could reasonably infer from an expression of opinion not only (1) that the speaker sincerely held it, and (2) that the speaker knew of no facts incompatible with the opinion, but also (3) that the speaker had a reasonable basis for holding the opinion. This exceptional recognition occurred only where it was "very reasonable or probable" that a listener should place special confidence in a speaker's opinion. Prosser & Keeton § 109, at 760–761. This included two main categories, both of which were carve-outs from the general rule that "the ordinary man has a reasonable competence to form his own opinion," and "is not justified in relying [on] the . . . opinion" of another. Restatement of Torts § 542, Comment *a*, at 95. First, expressions of opinion made in the context of a relationship of trust, such as between doctors and patients. Second, expressions of opinion made by an expert in his capacity as an expert (for example, a jeweler's statement of opinion about the value of a diamond). These exceptions allowed a listener to deal with those special expressions of opinion as though they were facts. As the

leading treatise put it, "the ordinary man is free to deal in reliance upon the opinion of an expert jeweler as to the value of a diamond [or] of an attorney upon a point of law." Prosser & Keeton § 109, at 761. But what reasonable person would assume that a lawyer's assessment of a diamond or a jeweler's opinion on a point of law implied an educated investigation?

The Court's expansive application of § 11's omissions clause to expressions of opinion produces a far broader field of misrepresentation; in fact, it produces almost the opposite of the common-law rule. The Court holds that a reasonable investor is right to expect a reasonable basis for *all* opinions in registration statements—for example, the conduct of a "meaningful . . . inquiry"—unless that is sufficiently disclaimed. *Ante*, at 188, 190–192, 194–195. Take the Court's hypothetical opinion regarding legal compliance. When a disclosure statement says "we believe our conduct is lawful," *ante*, at 188, the Court thinks this should be understood to suggest that a lawyer was consulted, since a reasonable investigation on this point would require consulting a lawyer. But this approach is incompatible with the common law, which had no "legal opinions are different" exception. See Restatement of Torts § 545, at 102.

It is also incompatible with common sense. It seems to me strange to suggest that a statement of opinion as generic as "we believe our conduct is lawful" conveys the implied assertion of fact "we have conducted a meaningful legal investigation before espousing this opinion." It is strange to ignore the reality that a director might rely on industry practice, prior experience, or advice from regulators—rather than a meaningful legal investigation—in concluding the firm's conduct is lawful. The effect of the Court's rule is to adopt a presumption of expertise on all topics volunteered within a registration statement.

It is reasonable enough to adopt such a presumption for those matters that are required to be set forth in a registra-

tion statement. Those are matters on which the management of a corporation *are* experts. If, for example, the registration statement said "we believe that the corporation has $5,000,000 cash on hand," or "we believe the corporation has 7,500 shares of common stock outstanding," the public is entitled to assume that the management has done the necessary research, so that the asserted "belief" is undoubtedly correct. But of course a registration statement would never preface such items, within the expertise of the management, with a "we believe that." Full compliance with the law, however, is another matter. It is not specifically required to be set forth in the statement, and when management prefaces *that* volunteered information with a "we believe that," it flags the fact that this is not within our area of expertise, but we think we are in compliance.

Moreover, even if one assumes that a corporation issuing a registration statement is (by operation of law) an "expert" with regard to all matters stated or opined about, I would still not agree with the Court's disposition. The Court says the following:

> "Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation *she would expect an issuer to have* before making the statement." *Ante*, at 193–194 (emphasis added).

The first sentence is true enough—but "what she [the reasonable (female) person, and even he, the reasonable (male) person] would naturally understand a statement [of opinion] to convey" is not that the statement has the foundation *she* (the reasonable female person) considers adequate. *She* is not an expert, and is relying on the advice of an expert—who ought to know how much "foundation" is needed. She would natu-

rally understand that the expert has conducted an investigation that *he* (or she or it) considered adequate. That is what relying upon the opinion of an expert means.

The common law understood this distinction. An action for fraudulent misrepresentation based on an opinion of an expert* was only allowed *when the expression of the opinion conveyed a fact*—the "fact" that summarized the expert's knowledge. Prosser & Keeton § 109, at 761. And a fact was actionable only if the speaker *knew* it was false, if he *knew* he did not know it, or if he *knew* the listener would understand the statement to have a basis *that the speaker knew was not true.* Restatement of Torts § 526, at 63–64. Ah!, the majority might say, so a speaker is liable for knowing he lacks *the listener's reasonable basis*! If the speaker *knows*—is actually aware—that the listener will understand an expression of opinion to have a specific basis that it does not have, then *of course* he satisfies this element of the tort.

But more often, when any basis is implied at all, both sides will understand that the speaker implied a "reasonable basis," but honestly disagree on what that means. And the common law supplied a solution for this: A speaker was liable for ambiguous statements—misunderstandings—as fraudulent misrepresentations *only* where he both knew of the ambiguity *and* intended that the listener fall prey to it. *Id.* § 527, at 66. In other words, even assuming both parties *knew* (a prerequisite to liability) that the expression of opinion implied a "reasonable investigation," if the speaker and listener honestly disagreed on the nature of that investiga-

*At the time of the Act's passage, the common law did not permit suit for negligent misrepresentation under the circumstances here. An action for negligent misrepresentation resting upon a statement of opinion would lie only if the opinion—a professional opinion—was "given upon facts equally well known to both the supplier and the recipient." Restatement of Torts § 552, Comment *b*, at 123 (1938). That is of course not the situation here. The typical opinion "given upon facts equally known to both the supplier and the recipient" is a lawyer's legal advice on facts described by his client.

tion, the speaker was not liable for a fraudulent misrepresentation unless *he subjectively intended* the deception. And so in no circumstance would the listener's belief of a "reasonable basis" control: If the speaker subjectively believes he lacks a reasonable basis, then his statement is simply a knowing misrepresentation. *Id.* § 526(a), at 63. If he does not know of the ambiguity, or knows of it, but does not intend to deceive, he is not liable. *Id.* § 527, at 66. That his basis for belief was "objectively unreasonable" does not impart liability, so long as the belief was genuine.

This aligns with common sense. When a client receives advice from his lawyer, it is surely implicit in that advice that the lawyer has conducted a reasonable investigation—reasonable, that is, *in the lawyer's estimation.* The client is relying on the expert lawyer's judgment for the amount of investigation necessary, no less than for the legal conclusion. To be sure, if the lawyer conducts an investigation that he does not believe is adequate, he would be liable for misrepresentation. And if he conducts an investigation that he believes is adequate but is *objectively unreasonable* (and reaches an incorrect result), he may be liable for malpractice. But on the latter premise he is not liable for misrepresentation; all that was implicit in his advice was that he had conducted an investigation *he* deemed adequate. To rely on an expert's opinion is to rely on the expert's evaluation of *how much time to spend* on the question at hand.

The objective test proposed by the Court—inconsistent with the common law and common intuitions about statements of opinion—invites roundabout attacks upon expressions of opinion. Litigants seeking recompense for a corporation's expression of belief that turned out, after the fact, to be incorrect can always charge that even though the belief rested upon an investigation the corporation thought to be adequate, the investigation was not "objectively adequate."

Nor is this objective test justified by § 11's absence of a *mens rea* requirement, as the Court suggests. *Ante,*

at 191, n. 10. Some of my citation of the common law is meant to illustrate *when* a statement of opinion contains an implied warranty of reasonable basis. But when it does so, the question then becomes *whose* reasonable basis. My illustration of the common-law requirements for misrepresentation is meant to show that a typical listener assumes that *the speaker's* reasonable basis controls. That showing is not contradicted by § 11's absence of a *mens rea* requirement.

Not to worry, says the Court. Sellers of securities need "only divulge an opinion's basis, or else make clear the real tentativeness of [their] belief[s]." *Ante,* at 195. One wonders what the function of "in my estimation" is, then, except as divulging such hesitation. Or what would be sufficient for the Court. "In my highly tentative estimation?" "In my estimation that, consistent with *Omnicare*, should be understood as an opinion only?" Reasonable speakers do not speak this way, and reasonable listeners do not receive opinions this way. When an expert expresses an opinion instead of stating a fact, it implies (1) that he genuinely believes the opinion, (2) that he believes his basis for the opinion is sufficient, and (most important) (3) that he is not certain of his result. Nothing more. This approach would have given lower courts and investors far more guidance and would largely have avoided the Funds' attack upon Omnicare's opinions as though Omnicare held those opinions out to be facts.

I therefore concur only in part and in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the statements of opinion at issue in this case do not contain an untrue statement of a material fact. 15 U. S. C. § 77k(a); *ante,* at 182–186. I write separately because I do not think it advisable to opine, as the majority does, on an additional theory of liability that is not properly before us.

The question whether and under what circumstances an omission may make a statement of opinion misleading is one that we should have left to the lower courts to decide on remand. As the majority acknowledges, that question was never passed on below. See *ante*, at 195. With good reason: Apart from a few conclusory allegations in their complaint and some *pro forma* references to "misleading statements and omissions" in their briefs, respondents did not elaborate on the omissions theory of liability before either the District Court or the Court of Appeals. They certainly did not articulate the theory the majority now adopts until they filed their merits brief before this Court. And it was not until oral argument that they identified a factual allegation in their complaint that *might* serve to state a claim under that theory. See *ante*, at 196. This delay is unsurprising given that, although various Courts of Appeals have discussed the theory, they have been reluctant to commit to it. See *MHC Mut. Conversion Fund, L. P.* v. *Sandler O'Neill & Partners, L. P.*, 761 F. 3d 1109, 1116 (CA10 2014) ("[I]t is difficult to find many [courts] actually holding a security issuer liable on this basis, . . . and . . . the approach has been questioned by others on various grounds"); see also *ibid.*, n. 5.

We should exercise the same caution. This Court rarely prides itself on being a pioneer of novel legal claims, as "[o]urs is a court of final review and not first view." *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012) (internal quotation marks omitted). Thus, as a general rule, "we do not decide in the first instance issues not decided below." *Ibid.* (internal quotation marks omitted). This includes fashioning innovative theories of liability as much as it includes applying those theories to the circumstances of the case.

The Court has previously relied on a lower court's failure to address an issue below as a reason for declining to address it here, even when the question was fairly presented in the petition and fully vetted by other lower courts. See, *e. g.*,

CSX Transp., Inc. v. *Alabama Dept. of Revenue*, 562 U. S. 277, 284, n. 5 (2011); see also *id.*, at 303, n. 3 (THOMAS, J., dissenting). Surely the feature that distinguishes this case—a novel legal theory that is not fairly included in the question presented—counsels more strongly in favor of avoidance.

As JUSTICE SCALIA's concurrence reveals, the scope of this theory of liability is far from certain. And the highly fact-intensive nature of the omissions theory provides an additional reason not to address it at this time. The majority acknowledges that the facts a reasonable investor may infer from a statement of opinion depend on the context. And yet it opines about certain facts an investor may infer from an issuer's legal compliance opinion: that such an opinion is based on legal advice, for example, or that it is not contradicted by the Federal Government. See *ante*, at 188. These inferences may seem sensible enough in a vacuum, but lower courts would do well to heed the majority's admonition that every statement of opinion must be considered "in a broader frame," *ante*, at 190, taking into account all the facts of the statement and its context. Would that the majority had waited for the "broader frame" of an actual case before weighing in on the omissions theory.

Syllabus

YOUNG *v.* UNITED PARCEL SERVICE, INC.

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

No. 12–1226. Argued December 3, 2014—Decided March 25, 2015

The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C §2000e(k). The Act's second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Ibid.* This case asks the Court to determine how the latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792. Under that framework, the plaintiff has "the initial burden" of "establishing a prima facie case" of discrimination. *Id.*, at 802. If she carries her burden, the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason[s] for" the difference in treatment. *Ibid.* If the employer articulates such reasons, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the reasons . . . were a pretext for discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who

were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons" but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" relevant "persons."

The District Court granted UPS summary judgment, concluding, *inter alia*, that Young could not make out a prima facie case of discrimination under *McDonnell Douglas*. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator[s]." The Fourth Circuit affirmed.

Held:

1. An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Pp. 219–231.

(a) The parties' interpretations of the Pregnancy Discrimination Act's second clause are unpersuasive. Pp. 220–228.

(i) Young claims that as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Brief for Petitioner 28. Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional "most-favored-nation" status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to *all* pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" who are similar in their ability or inability to work, nor does it specify the particular "other persons" Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual

reason for doing so. See, *e. g.*, *Burdine*, *supra*, at 252–258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach. Pp. 220–223.

(ii) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission (EEOC) guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, "consistency," and "thoroughness" of "consideration" necessary to "give it power to persuade." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance. Pp. 223–225.

(iii) UPS claims that the Act's second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act's second clause as UPS proposes would thus render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy. Pp. 226–228.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The employer may then seek to justify its refusal to accommodate the plaintiff by relying on a "legitimate, nondiscriminatory" reason for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a "legitimate, nondiscriminatory" reason, the plaintiff may show that it is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing

evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see *Burdine*, 450 U. S.; at 255, n. 10, and with Congress' intent to overrule *Gilbert*. Pp. 228–231.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situations cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual. Pp. 231–232.

707 F. 3d 437, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 232. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 241. KENNEDY, J., filed a dissenting opinion, *post*, p. 251.

Samuel R. Bagenstos argued the cause for petitioner. With him on the briefs was *Sharon Fast Gustafson*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Assistant Attorney General Moran*, *Deputy Solicitor General Gershengorn*, *Sarah E. Harrington*, *Dennis J. Dimsey*, *Holly A. Thomas*, *Bonnie I. Robin-Vergeer*, *P. David Lopez*, *Carolyn L. Wheeler*, and *Julie L. Gantz*.

Caitlin J. Halligan argued the cause for respondent. With her on the brief were *Mark A. Perry*, *Emmett F. McGee, Jr.*, *Jill S. Distler*, and *Rachel S. Brass*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Lenora M. Lapidus*, *Steven R. Shapiro*, *Deborah A. Jeon*, and *Dina Bakst*; for Bipartisan State and Local Legislators by *Ellen Eardley*; for Black Women's Health Imperative et al. by

JUSTICE BREYER delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U. S. C. § 2000e(k). We must decide how this latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. See *McDonnell*

Jonathan M. Cohen; for Health Care Providers et al. by *Katherine M. Kimpel* and *Judith L. Lichtman*; for Law Professors et al. by *Joanna L. Grossman* and *Deborah L. Brake*; for the Leadership Conference on Civil and Human Rights by *Maria T. Vullo*, *Wade J. Henderson*, and *Lisa M. Bornstein*; for Members of Congress by *Andrew H. Bart* and *Emily Martin*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Judith A. Scott*, *Nicole G. Berner*, *Jennifer L. Hunter*, *William Lurye*, *David Strom*, and *Nicholas W. Clark*; for U. S. Women's Chamber of Commerce et al. by *David C. Frederick*; and for 23 Pro-Life Organizations et al. by *Carrie Severino*, *Jonathan Keim*, *Thomas C. Berg*, *Teresa S. Collett*, *Ovide M. Lamontagne*, and *Clarke D. Forsythe*.

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations, Inc., by *Thomas R. McCarthy*, *William S. Consovoy*, *Prasad Sharma*, and *Richard Pianka*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Equal Employment Advisory Council et al. by *Rae T. Vann*, *Karen Harned*, and *Elizabeth Milito*; and for the Chamber of Commerce of the United States of America by *Lori Alvino McGill*, *Kathleen M. Sullivan*, *Lily Fu Claffee*, *Kate Comerford Todd*, and *Warren Postman*.

Douglas Corp. v. *Green*, 411 U. S. 792, 802 (1973). Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

I

A

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. App. 580. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). *Id.*, at 578. UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their . . . inability to work." She accordingly concluded that UPS must accommodate her as well. See Brief for Petitioner 30–31.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transpor-

tation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. § 12101 *et seq.* UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" relevant "persons." See Brief for Respondent 34.

B

Title VII of the Civil Rights Act of 1964 forbids a covered employer to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." 78 Stat. 253, 42 U. S. C. § 2000e–2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which added new language to Title VII's definitions subsection. The first clause of the 1978 Act specifies that Title VII's "ter[m] 'because of sex' . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e(k). The second clause says that

> "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." *Ibid.*

This case requires us to consider the application of the second clause to a "disparate-treatment" claim—a claim that an employer intentionally treated a complainant less favorably than employees with the "complainant's qualifications" but outside the complainant's protected class. *McDonnell Douglas*, *supra*, at 802. We have said that "[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 52 (2003) (ellipsis and internal quotation marks omitted). We have also made clear

that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985).

In *McDonnell Douglas*, we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must "carry the initial burden" of "establishing a prima facie case" of discrimination by showing

> "(i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

If a plaintiff makes this showing, then the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class. *Ibid.* If the employer articulates such a reason, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i. e.*, the employer] were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253 (1981).

We note that employment discrimination law also creates what is called a "disparate-impact" claim. In evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are unlawful irrespective of motivation or intent. See *Raytheon*, *supra*, at 52–53; see also *Ricci* v. *DeStefano*, 557 U. S. 557, 578 (2009). But Young has not alleged a disparate-impact claim.

Nor has she asserted what we have called a "pattern-or-practice" claim. See *Teamsters* v. *United States*, 431 U. S. 324, 359–360 (1977) (explaining that Title VII plaintiffs who allege a "pattern or practice" of discrimination may establish a prima facie case by "another means"); see also *id.*, at 357 (rejecting contention that the "burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas*").

C

In July 2007, Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR §1601.28 (2014). Young then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework. See App. 60–62.

After discovery, UPS filed a motion for summary judgment. See Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

1. Young worked as a UPS driver, picking up and delivering packages carried by air. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in No. 08–cv–02586 (D Md.), pp. 3–4 (hereinafter Memorandum).
2. Young was pregnant in the fall of 2006. *Id.*, at 15–16.
3. Young's doctor recommended that she "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." App. 580; see also Memorandum 17.

4. UPS required drivers such as Young to be able to "[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." App. 578; see also Memorandum 5.
5. UPS' occupational health manager, the official "responsible for most issues relating to employee health and ability to work" at Young's UPS facility, App. 568–569, told Young that she could not return to work during her pregnancy because she could not satisfy UPS' lifting requirements, see Memorandum 17–18; 2011 WL 665321, *5 (D Md., Feb. 14, 2011).
6. The manager also determined that Young did not qualify for a temporary alternative work assignment. *Ibid.*; see also Memorandum 19–20.
7. UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an *on-the-job* injury." App. 547 (emphasis added); see also Memorandum 8, 45–46.
8. The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply . . . with requests for a reasonable accommodation because of a permanent disability" under the ADA. App. 548; see also Memorandum 7.
9. The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. See App. 563–565; Memorandum 8.
10. When Young later asked UPS' capital division manager to accommodate her disability, he replied that, while she was pregnant, she was "'too much of a liability'" and could "not come back" until she "was no longer pregnant." *Id.*, at 20.

11. Young remained on a leave of absence (without pay) for much of her pregnancy. *Id.*, at 49.
12. Young returned to work as a driver in June 2007, about two months after her baby was born. *Id.*, at 21, 61.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the capital division manager (10 above). As evidence that she had made out a prima facie case under *McDonnell Douglas*, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job (7), those suffering from ADA disabilities (8), and those who had lost their DOT certifications (9). That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous "other persons," but not with respect to pregnant workers. See Memorandum 29.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS contests the correctness of some of these facts and the relevance of others. See Brief for Respondent 5, 6, 57. But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party, see *Scott* v. *Harris*, 550 U. S. 372, 380 (2007):

13. Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. See App. 400–401 (10-pound lifting limitation); *id.*, at 635 (foot injury); *id.*, at 637 (arm injury).
14. Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. See *id.*, at 381 (recurring knee injury); *id.*, at 655 (ankle injury); *id.*, at 655 (knee injury); *id.*, at 394–398 (stroke); *id.*, at 425, 636–637 (leg injury).

15. Several employees received "inside" jobs after losing their DOT certifications. See *id.*, at 372 (DOT certification suspended after conviction for driving under the influence); *id.*, at 636, 647 (failed DOT test due to high blood pressure); *id.*, at 640–641 (DOT certification lost due to sleep apnea diagnosis).
16. Some employees were accommodated despite the fact that their disabilities had been incurred off the job. See *id.*, at 446 (ankle injury); *id.*, at 433, 635–636 (cancer).
17. According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, *id.*, at 461, 463, "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant," *id.*, at 504.

The District Court granted UPS' motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. 2011 WL 665321, *10–*12. Nor could she make out a prima facie case of discrimination under *McDonnell Douglas*. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator[s]." 2011 WL 665321, *14. The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine issue of material fact as to whether that reason was pretextual. *Id.*, at *15.

On appeal, the Fourth Circuit affirmed. It wrote that "UPS has crafted a pregnancy-blind policy" that is "at least facially a 'neutral and legitimate business practice,' and not evidence of UPS's discriminatory animus toward pregnant workers." 707 F. 3d 437, 446 (2013). It also agreed with the District Court that Young could not show that "similarly-situated employees outside the protected class received more favorable treatment than Young." *Id.*, at 450. Specifically,

it believed that Young was different from those workers who were "disabled under the ADA" (which then protected only those with permanent disabilities) because Young was "not disabled"; her lifting limitation was only "temporary and not a significant restriction on her ability to perform major life activities." *Ibid.* Young was also different from those workers who had lost their DOT certifications because "no legal obstacle stands between her and her work" and because many with lost DOT certifications retained physical (*i. e.*, lifting) capacity that Young lacked. *Ibid.* And Young was different from those "injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury." *Id.*, at 450–451. Rather, Young more closely resembled "an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom would have been eligible for accommodation under UPS' policies. *Id.*, at 448.

Young filed a petition for certiorari essentially asking us to review the Fourth Circuit's interpretation of the Pregnancy Discrimination Act. In light of lower court uncertainty about the interpretation of the Act, we granted the petition. Compare *Ensley-Gaines* v. *Runyon*, 100 F. 3d 1220, 1226 (CA6 1996), with *Urbano* v. *Continental Airlines, Inc.*, 138 F. 3d 204, 206–208 (CA5 1998); *Reeves* v. *Swift Transp. Co.*, 446 F. 3d 637, 640–643 (CA6 2006); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F. 3d 540, 547–552 (CA7 2011); *Spivey* v. *Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312–1314 (CA11 1999).

D

We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered

disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. §§ 12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

II

The parties disagree about the interpretation of the Pregnancy Discrimination Act's second clause. As we have said, see Part I–B, *supra*, the Act's first clause specifies that discrimination "'because of sex'" includes discrimination "because of . . . pregnancy." But the meaning of the second clause is less clear; it adds: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*." 42 U. S. C. § 2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving "the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her [in]ability to work." Reply Brief 15. Suppose the employer would not give "*that [pregnant]employee*" the

"same accommodations" as another employee, but the employer's reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work." Brief for Petitioner 23. In other words, Young contends that the second clause means that whenever "an employer accommodates only a subset of workers with disabling conditions," a court should find a Title VII violation if "pregnant workers who are similar in the ability to work" do not "receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations." *Id.*, at 28.

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII. Cf. *post*, at 244 (SCALIA, J., dissenting) (hereinafter the dissent) (the clause "does not prohibit denying pregnant women accommodations . . . on the basis of an evenhanded policy").

A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as "an employer accommodates only a subset of workers with

disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Brief for Petitioner 28. She adds that, because the record here contains "evidence that pregnant and nonpregnant workers were not treated the same," that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*. Brief for Petitioner 47.

The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have been Congress' intent in passing the Pregnancy Discrimination Act. See, *e. g.*, *Urbano*, 138 F. 3d, at 206–208; *Reeves*, 466 F. 3d, at 641; *Serednyj*, 656 F. 3d, at 548–549; *Spivey*, 196 F. 3d, at 1312–1313. And Young partially agrees, for she writes that "the statute does not require employers to give" to "pregnant workers all of the benefits and privileges it extends to other" similarly disabled "employees when those benefits and privileges are . . . based on the employee's tenure or position within the company." Reply Brief 15–16; see also Tr. of Oral Arg. 22 ("[S]eniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits").

Young's last-mentioned concession works well with respect to seniority, for Title VII itself contains a seniority

defense, see 42 U. S. C. § 2000e–2(h). Hence, seniority is not part of the problem. But otherwise the most-favored-nation problem remains, and Young's concession does not solve it. How, for example, should a court treat special benefits attached to injuries arising out of, say, extrahazardous duty? If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special "causes"—for example, benefits for those who drive (and are injured) in extrahazardous conditions?

We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind.

Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, *e. g.*, *Raytheon*, 540 U. S., at 51–55; *Burdine*, 450 U. S., at 252–258; *McDonnell Douglas*, 411 U. S., at 802. There is no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach. Indeed, the relevant House Report specifies that the Act "reflect[s] no new legislative mandate." H. R. Rep. No. 95–948, pp. 3–4 (1978). And the Senate Report states that the Act was designed to "reestablis[h] the law as it was understood prior to" this Court's decision in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976).

S. Rep. No. 95–331, p. 8 (1978). See *Gilbert*, *supra*, at 147 (Brennan, J., dissenting) (lower courts had held that a disability plan that compensates employees for temporary disabilities but not pregnancy violates Title VII); see also *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 717, n. 2 (2009) (GINSBURG, J., dissenting).

B

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that "[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities" and that "the availability of . . . benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided: "Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 37 Fed. Reg. 6837 (1972) (codified in 29 CFR § 1604.10(b) (1973)).

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: "Disabilities caused or contributed to by pregnancy . . . for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions." § 1604.10(b) (1979). Moreover, the EEOC stated that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." 29 CFR pt. 1604, App., p. 918.

This post-Act guidance, however, does not resolve the ambiguity of the term "other persons" in the Act's second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related dis-

abilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e. g., a policy of providing light duty only to workers injured on the job)." 2 EEOC Compliance Manual § 626–I(A)(5), p. 626:0009 (July 2014). The EEOC also provided an example of disparate treatment that would violate the Act:

> "An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request." *Id.*, at 626:0013, Example 10.

The EEOC further added that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries." *Id.*, at 626:0028.

The Solicitor General argues that we should give special, if not controlling, weight to this guideline. He points out that we have long held that "the rulings, interpretations and opinions" of an agency charged with the mission of enforcing a particular statute, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift &*

Co., 323 U. S. 134, 140 (1944). See Brief for United States as *Amicus Curiae* 26.

But we have also held that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, *supra*, at 140. These qualifications are relevant here and severely limit the EEOC's July 2014 guidance's special power to persuade.

We come to this conclusion not because of any agency lack of "experience" or "informed judgment." Rather, the difficulties are those of timing, "consistency," and "thoroughness" of "consideration." The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. See Brief for Defendant-Appellee in *Ensley-Gaines* v. *Runyon*, No. 95–1038 (CA6 1996), pp. 26–27 (explaining that a reading of the Act like Young's was "simply incorrect" and "runs counter" to this Court's precedents). See also Brief for United States as *Amicus Curiae* 16, n. 2 ("The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries"). Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

C

We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. But that cannot be so.

The first clause accomplishes that objective when it expressly amends Title VII's definitional provision to make clear that Title VII's words "because of sex" and "on the basis of sex" "include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C. § 2000e(k). We have long held that " 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause' " is rendered " 'superfluous, void, or insignificant.' " *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001)). But that is what UPS' interpretation of the second clause would do.

The dissent, basically accepting UPS' interpretation, says that the second clause is not "superfluous" because it adds "clarity." *Post*, at 245 (internal quotation marks omitted). It makes "plain," the dissent adds, that unlawful discrimination "includes disfavoring pregnant women relative to other workers of similar inability to work." *Ibid.* Perhaps we fail to understand. *McDonnell Douglas* itself makes clear that courts normally consider how a plaintiff was treated relative to other "persons of [the plaintiff's] qualifications" (which here include disabilities). 411 U. S., at 802. If the second clause of the Act did not exist, we would still say that an employer who disfavored pregnant women relative to other workers of similar ability or inability to work had engaged in pregnancy discrimination. In a word, there is no need for the "clarification" that the dissent suggests the second sentence provides.

Moreover, the interpretation espoused by UPS and the dissent would fail to carry out an important congressional

objective. As we have noted, Congress' "unambiguou[s]" intent in passing the Act was to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983); see also *post*, at 246 (recognizing that "the object of the Pregnancy Discrimination Act is to displace this Court's conclusion in [*Gilbert*]"). In *Gilbert*, the Court considered a company plan that provided "nonoccupational sickness and accident benefits to all employees" without providing "disability-benefit payments for any absence due to pregnancy." 429 U. S., at 128, 129. The Court held that the plan did not violate Title VII; it did not discriminate on the basis of sex because there was "no risk from which men are protected and women are not." *Id.*, at 138 (internal quotation marks omitted). Although pregnancy is "confined to women," the majority believed it was not "comparable in all other respects to [the] diseases or disabilities" that the plan covered. *Id.*, at 136. Specifically, the majority explained that pregnancy "is not a 'disease' at all," nor is it necessarily a result of accident. *Ibid.* Neither did the majority see the distinction the plan drew as "a subterfuge" or a "pretext" for engaging in gender-based discrimination. *Ibid.* In short, the *Gilbert* majority reasoned in part just as the dissent reasons here. The employer did "not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.*" *Post*, at 242. It distinguished between them on a neutral ground—*i. e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See 429 U. S., at 136.

Simply including pregnancy among Title VII's protected traits (*i. e.*, accepting UPS' interpretation) would not overturn *Gilbert* in full—in particular, it would not respond to *Gilbert*'s determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. As we explained in *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), "the

first clause of the [Act] reflects Congress' disapproval of the reasoning in *Gilbert*" by "adding pregnancy to the definition of sex discrimination prohibited by Title VII." *Id.*, at 284. But the second clause was intended to do more than that—it "was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *Id.*, at 285. The dissent's view, like that of UPS, ignores this precedent.

III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is "not intended to be an inflexible rule." *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 575 (1978). Rather, an individual plaintiff may establish a prima facie case by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under" Title VII. *Id.*, at 576 (internal quotation marks omitted). The burden of making this showing is "not onerous." *Burdine*, 450 U. S., at 253. In particular, making this showing is not as burdensome as succeeding on "an ultimate finding of fact as to" a discriminatory employment action. *Furnco*, *supra*, at 576. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See *McDonnell Douglas*, *supra*, at 802 (burden met where plaintiff showed that employer hired other "qualified" individuals outside the protected class); *Furnco*, *supra*, at 575–

577 (same); *Burdine*, *supra*, at 253 (same). Cf. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 142 (2000) (similar).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. 411 U. S., at 802. But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently "legitimate, nondiscriminatory" reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large per-

centage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine*, *supra*, at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, see *post*, at 248–249) that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. 411 U. S., at 804–805. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines, cf. *post*, at 247–249.

Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert*'s reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else." *Post*, at 242–243. This logic would have found no problem with the employer plan in *Gilbert*,

which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees—*i. e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. See *post*, at 246–247. But Congress' intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer's disability plan as denying coverage to pregnant employees on a neutral basis.

IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. See Part I–C, *supra*. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. See App. 504 (shop steward's testimony that "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant"). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS' justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

* * *

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

As originally enacted, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1), made it an unlawful employment practice to discriminate "because of [an] individual's . . . sex" but made no mention of discrimination because of pregnancy. In *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 135–140 (1976), this Court held that Title VII did not reach pregnancy discrimination. Congress responded by enacting the Pregnancy Discrimination Act (PDA), which added subsection (k) to a definitional provision, § 2000e. Subsection (k) contains two clauses. The first is straightforward; the second is not.

I

The first clause provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy."[1] This clause has the effect of adding pregnancy to the list of prohibited grounds (race,

[1] While § 2000e–2(a) uses the phrase "because of . . . sex," other provisions governed by the definitions in § 2000e use the phrase "on the basis of . . . sex." See, *e. g.*, §§ 2000e–2(b), (k)(1)(A). Therefore, subsection (k) covers this phrase as well.

sex, etc.) originally included in § 2000e–2(a)(1). Claims of discrimination under that provision require proof of discriminatory intent. See, *e. g.*, *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009); *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 985–986 (1988). Thus, as a result of the first clause, an employer engages in unlawful discrimination under § 2000e–2(a)(1) if (and only if) the employer's intent is to discriminate because of or on the basis of pregnancy.

If an employer treats a pregnant woman unfavorably for any other reason, the employer is not guilty of an unlawful employment practice under § 2000e–2(a), as defined by the first clause of the PDA. And under this first clause, it does not matter whether the employer's ground for the unfavorable treatment is reasonable; all that matters is the employer's actual intent. Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination. But if the factfinder is convinced that the employer acted for some reason other than pregnancy, the employer cannot be held liable under this clause.

II

The PDA, however, does not simply prohibit discrimination because of or on the basis of pregnancy. Instead, the second clause in § 2000e(k) goes on to say the following: "and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." This clause raises several difficult questions of interpretation that are pertinent to the case now before us.

A

First, does this clause simply explain what is meant by discrimination because of or on the basis of pregnancy? Or

does it impose an additional restriction on employer conduct? I believe that this clause does not merely explain but instead adds to the language that precedes it.

This is the interpretation that is most consistent with the statutory text. This clause begins with the word "and," which certainly suggests that what follows represents an addition to what came before.

It is also revealing that the second clause makes no reference to intent, which is the linchpin of liability under the first clause, and that the second clause is an affirmative command (an employer "shall" provide equal treatment), while the first clause is negative (it prohibits discrimination). If a careful drafter wanted to make it clear that the second clause does no more than explain what is meant by the first, the language of the second clause would have to be substantially modified.

Finally, if the second clause does not set out an additional restriction on employer conduct, it would appear to be largely, if not entirely, superfluous. See, *e. g.*, *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage"). As noted, the first clause, by adding pregnancy to the list of prohibited grounds for adverse employment actions, mandates that discrimination because of pregnancy be treated like discrimination because of race, sex, etc. An employer commits an unlawful employment practice if it intentionally treats employees of a particular race or sex less favorably than other employees who are similar in their ability or inability to work. Accordingly, the first clause of the PDA is alone sufficient to make it clear that an employer is guilty of an unlawful employment practice if it intentionally treats pregnant employees less favorably than others who are similar in their ability or inability to work.[2] For these reasons, I conclude that the

[2] JUSTICE SCALIA's dissent argues, *post*, at 244–246, that the second clause serves the useful purpose of clarifying the meaning of discrimination because of pregnancy. Without the second clause, that dissent maintains,

second clause does not merely explain the first but adds a further requirement of equal treatment irrespective of intent.

B

This leads to the second question: In determining whether pregnant employees have been given the equal treatment that this provision demands, with whom must the pregnant employees be compared? I interpret the second clause to mean that pregnant employees must be compared with employees performing the same or very similar jobs. Pregnant employees, the second provision states, must be given the same treatment as other employees who are "similar in their ability or inability to work." An employee's ability to work—despite illness, injury, or pregnancy—often depends on the tasks that the employee's job includes. Different jobs have different tasks, and different tasks require different abilities. Suppose that an employer provides a period of leave with pay for employees whose jobs require tasks, *e. g.*, lifting heavy objects, that they cannot perform because of illness or injury. Must the employer provide the same benefits for pregnant employees who are unable to lift heavy objects but have desk jobs that do not entail heavy lifting? The answer is no. The treatment of pregnant employees must be compared with the treatment of nonpregnant employees whose jobs involve the performance of the same or very similar tasks.

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there might be uncertainty as to whether an employer would commit an unlawful employment practice if it excluded pregnancy from an otherwise complete disability benefits program. Contrary to the dissent, however, I think that the answer to this question would be quite obvious based on the first clause of the PDA alone. If an employer provided benefits for every employee who was temporarily unable to work due to any physical condition other than pregnancy, that employer would be in the same position as an employer who provided similar benefits for employees of every race but one. In both situations, the employer would clearly discriminate on a prohibited ground.

C

This conclusion leads to a third, even more difficult question: When comparing pregnant employees to nonpregnant employees in similar jobs, which characteristics of the pregnant and nonpregnant employees must be taken into account? The answer, I believe, must be found in the reference to "other employees who are similar in their ability or inability to work." I see two possible interpretations of this language. The first is that the capacity to perform the tasks required by a job is the only relevant characteristic, but like the Court, *ante*, at 220–223, I cannot accept this "most favored employee" interpretation.

This interpretation founders when, as in this case, an employer treats pregnant women less favorably than some but not all nonpregnant employees who have similar jobs and are similarly impaired in their ability to perform the tasks that these jobs require. In this case, as I will explain below, see Part III, *infra*, United Parcel Service (UPS) drivers who were unable to perform the physical tasks required by that job fell into three groups: first, nonpregnant employees who received favorable treatment; second, nonpregnant employees who do not receive favorable treatment; and third, pregnant employees who, like the nonpregnant employees in the second category, did not receive favorable treatment. Under these circumstances, would the "most favored employee" interpretation require the employer to treat the pregnant women like the employees in the first, favored group? Or would it be sufficient if the employer treated them the same as the nonpregnant employees in the second group who did not receive favorable treatment?

Recall that the second clause of § 2000e(k) requires that pregnant women "be treated the same for all employment-related purposes . . . as *other persons* not so affected but similar in their ability or inability to work." (Emphasis added.) Therefore, UPS could say that its policy treated the pregnant employees the same as "other persons" who were

similar in their ability or inability to work, namely, those nonpregnant employees in the second category. But at the same time, the pregnant drivers like petitioner could say that UPS did not treat them the same as "other employees" who were similar in their ability or inability to work, namely, the nonpregnant employees in the first group. An interpretation that leads to such a problem cannot be correct.[3]

I therefore turn to the other possible interpretation of the phrase "similar in their ability or inability to work," namely, that "similar in the ability or inability to work" means "similar *in relation* to the ability or inability to work."[4] Under this interpretation, pregnant and nonpregnant employees are not similar in relation to the ability or inability to work if they are unable to work for different reasons. And this means that these two groups of employees are not similar in the relevant sense if the employer has a neutral business reason for treating them differently. I agree with the Court

[3] The "most favored employee" interpretation would also lead to wildly implausible results. Suppose, for example, that an employer had a policy of refusing to provide any accommodation for any employee who was unable to work due to any reason but that the employer wished to make an exception for several employees who were seriously injured while performing acts of extraordinary heroism on the job, for example, saving the lives of numerous fellow employees during a fire in the workplace. If the ability to perform job tasks was the only characteristic that could be considered, the employer would face the choice of either denying any special treatment for the heroic employees or providing all the same benefits to all pregnant employees. It is most unlikely that this is what Congress intended. Such a requirement would go beyond anything demanded by any other antidiscrimination law.

[4] Opinions have often used the phrase "similar in" to mean "similar in relation to" or "similar with respect to." See, *e. g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 127 (2013) (BREYER, J., concurring in judgment) ("similar in character and specificity to piracy"); *Williams* v. *Illinois*, 567 U. S. 50, 112 (2012) (THOMAS, J., concurring in judgment) ("similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent"); *Sykes* v. *United States*, 564 U. S. 1, 9 (2011) ("similar in degree of danger to that involved in arson").

that a sufficient reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates." *Ante*, at 229.[5] Otherwise, however, I do not think that the second clause of the PDA authorizes courts to evaluate the justification for a truly neutral rule. The language used in the second clause of the PDA is quite different from that used in other antidiscrimination provisions that require such an evaluation. Cf. § 12112(b)(5)(A) (discrimination against a person with a disability includes "not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose *an undue hardship* on the operation of [its] business" (emphasis added)); § 2000e(j) (employer must reasonably accommodate religious observance, practice, and belief unless that would impose an "undue hardship on the conduct of the employer's business"); § 2000e–2(k)(1)(A)(i) (business necessity defense in Title VII disparate-impact cases).

III

I understand petitioner in this case to assert claims under both the first and second clauses of § 2000e(k). With respect to her claim under the first clause, I agree with the Court that the information in the summary judgment record is sufficient (albeit barely) to take the question to the trier of fact.

I believe that the judgment of the Court of Appeals with respect to petitioner's claim under the second clause must

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[5] If cost alone could justify unequal treatment of pregnant employees, the plan at issue in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), would be lawful. Cf. *id.*, at 138. But this Court has repeatedly said that the PDA rejected "'both the holding and the reasoning'" in *Gilbert*. *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 720 (2009) (GINSBURG, J., dissenting) (quoting *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983)).

also be vacated. Petitioner sought to be excused during her pregnancy from the lifting requirements that were among her tasks as a driver. Under the policy that UPS claims to have had in force at the time in question, drivers who were physically unable to perform the tasks required by that position fell into three groups.

First, some drivers were reassigned to less physically demanding positions. Included in this group were (1) those who were unable to work as drivers due to an injury incurred on the job, (2) those drivers who were unable to work as drivers due to a disability as defined by the Americans with Disabilities Act of 1990 (ADA), and (3) those drivers who, as the result of a medical condition or injury, lost the Department of Transportation (DOT) certification needed to work in that capacity.

The second group of drivers consisted of those who were not pregnant and were denied transfer to a light-duty job. Drivers who were injured off the job fell into this category. The third group was made up of pregnant drivers like petitioner.

It is obvious that respondent had a neutral reason for providing an accommodation when that was required by the ADA. Respondent also had neutral grounds for providing special accommodations for employees who were injured on the job. If these employees had not been permitted to work at all, it appears that they would have been eligible for workers' compensation benefits. See Md. Lab. & Empl. Code Ann. § 9–614 (2008).

The accommodations that are provided to drivers who lost their DOT certifications, however, are another matter. A driver may lose DOT certification for a variety of reasons, including medical conditions or injuries incurred off the job that impair the driver's ability to operate a motor vehicle. Such drivers may then be transferred to jobs that do not require physical tasks incompatible with their illness or injury. It does not appear that respondent has provided any

plausible justification for treating these drivers more favorably than drivers who were pregnant.

The Court of Appeals provided two grounds for distinguishing petitioner's situation from that of the drivers who had lost their DOT certifications, see 707 F. 3d 437, 450 (CA4 2013), but neither is adequate. First, the Court of Appeals noted that "no legal obstacle [stood] between [petitioner] and her work." *Ibid.* But the legal obstacle faced by drivers who have lost DOT certification only explains why those drivers could not continue to perform all the tasks required by their ordinary jobs; it does not explain why respondent went further and *provided such drivers with a work accommodation.* Petitioner's pregnancy prevented her from continuing her normal work as a driver, just as is the case for a driver who loses DOT certification. But respondent had a policy of accommodating drivers who lost DOT certification but not accommodating pregnant women, like petitioner. The legal obstacle of lost certification cannot explain this difference in treatment.

Second, the Court of Appeals observed that "'those with DOT certification maintai[n] the ability to perform any number of demanding physical tasks,'" *ibid.*, but it is doubtful that this is true in all instances. A driver can lose DOT certification due to a great variety of medical conditions, including loss of a limb, 49 CFR §391.41(b)(1) (2013); impairments of the arm, hand, finger, foot, or leg, §§391.41(b)(2)(i) and (ii); cardiovascular disease, §391.41(b)(4); respiratory dysfunction, §391.41(b)(5); high blood pressure, §391.41(b)(6); arthritis, §391.41(b)(7); and epilepsy §391.41(b)(8). It is not evident—and as far as I am aware, the record does not show—that all drivers with these conditions are nevertheless able to perform a great many physically demanding tasks. Nevertheless, respondent says that it was its policy to transfer such drivers to so-called inside jobs when such positions were available. Presumably, respondent did not assign these drivers to jobs that they were physically unable

to perform. So in at least some instances, they must have been assigned to jobs that did not require them to perform tasks that they were incapable of performing due to the medical condition that caused the loss of DOT certification. Respondent has not explained why pregnant drivers could not have been given similar consideration.

For these reasons, it is not at all clear that respondent had any neutral business ground for treating pregnant drivers less favorably than at least some of its nonpregnant drivers who were reassigned to other jobs that they were physically capable of performing. I therefore agree with the Court that the decision of the Court of Appeals with respect to petitioner's claim under the second clause of the PDA must be vacated, and the case must be remanded for further proceedings with respect to that claim.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To "treat" pregnant workers "the same . . . as other persons," we are told, means refraining from adopting policies that impose "significant burden[s]" upon pregnant women without "sufficiently strong" justifications. *Ante*, at 229. Where do the "significant burden" and "sufficiently strong justification" requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice.

I

Title VII forbids employers to discriminate against employees "because of . . . sex." 42 U. S. C. §2000e–2(a)(1). The Pregnancy Discrimination Act adds a provision to Title VII's definitions section:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." § 2000e(k).

Title VII's prohibition of discrimination creates liability for both disparate treatment (taking action with "discriminatory motive") and disparate impact (using a practice that "fall[s] more harshly on one group than another and cannot be justified by business necessity"). *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977). Peggy Young did not establish pregnancy discrimination under either theory. She argued that United Parcel Service's refusal to accommodate her inability to work amounted to disparate treatment, but the Court of Appeals concluded that she had not mustered evidence that UPS denied the accommodation with intent to disfavor pregnant women. 707 F. 3d 437, 449–451 (CA4 2013). And Young never brought a claim of disparate impact.

That is why Young and the Court leave behind the part of the law defining pregnancy discrimination as sex discrimination, and turn to the part requiring that "women affected by pregnancy . . . be treated the same . . . as other persons not so affected but similar in their ability or inability to work." § 2000e(k). The most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.* Here, that means pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions. If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been "treated

the same" as everyone else. UPS's accommodation for drivers who lose their certifications illustrates the point. A pregnant woman who loses her certification gets the benefit, just like any other worker who loses his. And a pregnant woman who keeps her certification does not get the benefit, again just like any other worker who keeps his. That certainly sounds like treating pregnant women and others the same.

There is, however, another way to understand "treated the same," at least looking at that phrase on its own. One could read it to mean that an employer may not distinguish *at all* between pregnant women and others of similar ability. Here, that would mean pregnant women are entitled, not to accommodations on the same terms as others, but to *the same accommodations* as others, no matter the differences (other than pregnancy) between them. UPS's accommodation for decertified drivers illustrates this usage too. There is a sense in which a pregnant woman denied an accommodation (because she kept her certification) has *not* been treated the same as an injured man granted an accommodation (because he lost his certification). He got the accommodation and she did not.

Of these two readings, only the first makes sense in the context of Title VII. The point of Title VII's bans on discrimination is to prohibit employers from treating one worker differently from another *because of a protected trait*. It is not to prohibit employers from treating workers differently for reasons that have nothing to do with protected traits. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 259 (1981). Against that backdrop, a requirement that pregnant women and other workers be treated the same is sensibly read to forbid distinctions that discriminate against pregnancy, not all distinctions whatsoever.

Prohibiting employers from making *any* distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If

Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of *equal* treatment, here alone creates a guarantee of *favored* treatment.

Let it not be overlooked, moreover, that the thrust of the Pregnancy Discrimination Act is that pregnancy discrimination is sex discrimination. Instead of creating a freestanding ban on pregnancy discrimination, the Act makes plain that the existing ban on sex discrimination reaches discrimination because of pregnancy. Reading the same-treatment clause to give pregnant women special protection unavailable to other women would clash with this central theme of the Act, because it would mean that pregnancy discrimination differs from sex discrimination after all.

All things considered, then, the right reading of the same-treatment clause prohibits practices that discriminate against pregnant women relative to workers of similar ability or inability. It does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy.

II

The Court agrees that the same-treatment clause is not a most-favored-employee law, *ante,* at 221, but at the same time refuses to adopt the reading I propose—which is the only other reading the clause could conceivably bear. The Court's reasons for resisting this reading fail to persuade.

The Court starts by arguing that the same-treatment clause must do more than ban distinctions on the basis of pregnancy, lest it add nothing to the part of the Act defining pregnancy discrimination as sex discrimination. *Ante,* at 226. Even so read, however, the same-treatment clause *does*

add something: clarity. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678, n. 14 (1983) ("[T]he specific language in the second clause . . . explains the application of the [first clause]"). Just defining pregnancy discrimination as sex discrimination does not tell us what it means to discriminate because of pregnancy. Does pregnancy discrimination include, in addition to disfavoring pregnant women relative to the workplace in general, disfavoring them relative to disabled workers in particular? Concretely, does an employer engage in pregnancy discrimination by excluding pregnancy from an otherwise complete disability-benefits program? Without the same-treatment clause, the answers to these questions would not be obvious. An employer could argue that people do not necessarily think of pregnancy and childbirth as disabilities. Or that it would be anomalous to read a law defining pregnancy discrimination as sex discrimination to require him to treat *pregnancy* like a disability, when Title VII does not require him to treat *sex* like a disability. Or that even if pregnancy were a disability, it would be *sui generis*—categorically different from all other disabling conditions. Cf. *Geduldig* v. *Aiello*, 417 U. S. 484, 494–495 (1974) (holding that a State has a rational basis for excluding pregnancy-related disabilities from a disability-benefits program). With the same-treatment clause, these doubts disappear. By requiring that women affected by pregnancy "be treated the same . . . *as other persons not so affected but similar in their ability or inability to work*" (emphasis added), the clause makes plain that pregnancy discrimination includes disfavoring pregnant women relative to other workers of similar inability to work.

This clarifying function easily overcomes any charge that the reading I propose makes the same-treatment clause "'superfluous, void, or insignificant.'" *Ante,* at 226. Perhaps, as the Court suggests, even without the same-treatment clause the best reading of the Act would prohibit disfavoring pregnant women relative to disabled workers.

But laws often make explicit what might already have been implicit, "for greater caution" and in order "to leave nothing to construction." The Federalist No. 33, pp. 205–206 (J. Cooke ed. 1961) (A. Hamilton). That is why we have long acknowledged that a "sufficient" explanation for the inclusion of a clause can be "found in the desire to remove all doubts" about the meaning of the rest of the text. *McCulloch* v. *Maryland*, 4 Wheat. 316, 420 (1819). This explanation looks all the more sensible once one remembers that the object of the Pregnancy Discrimination Act is to displace this Court's conclusion in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), that pregnancy discrimination is not sex discrimination. What could be more natural than for a law whose object is superseding earlier judicial interpretation to include a clause whose object is leaving nothing to future judicial interpretation?

That brings me to the Court's remaining argument: the claim that the reading I have set forth would not suffice to overturn our decision in *Gilbert*. *Ante*, at 226–228. Wrong. *Gilbert* upheld an otherwise comprehensive disability-benefits plan that singled pregnancy out for disfavor. The most natural reading of the Act overturns that decision, because it prohibits singling pregnancy out for disfavor.

The Court goes astray here because it mistakenly assumes that the *Gilbert* plan excluded pregnancy on "a neutral ground"—covering sicknesses and accidents but nothing else. *Ante*, at 227. In reality, the plan in *Gilbert* was not neutral toward pregnancy. It "place[d] . . . pregnancy in a class by itself," treating it differently from "any other kind" of condition. 429 U. S., at 161 (Stevens, J., dissenting). At the same time that it denied coverage for pregnancy, it provided coverage for a comprehensive range of other conditions, including many that one would not necessarily call sicknesses or accidents—like "sport injuries, attempted suicides, . . . disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery," *id.*, at 151 (Brennan,

J., dissenting). What is more, the plan denied coverage even to sicknesses, if they were related to pregnancy or childbirth. *Ibid.* For that matter, the plan denied coverage to sicknesses that were *unrelated* to pregnancy or childbirth, if they were suffered during recovery from the birth of a child. *Ibid.* *Gilbert*, there can be no doubt, involved "the lone exclusion of pregnancy from [a] program." *Ibid.* The most natural interpretation of the Act easily suffices to make that unlawful.

III

Dissatisfied with the only two readings that the words of the same-treatment clause could possibly bear, the Court decides that the clause means something in-between. It takes only a couple of waves of the Supreme Wand to produce the desired result. Poof!: The same-treatment clause means that a neutral reason for refusing to accommodate a pregnant woman is pretextual if "the employer's policies impose a significant burden on pregnant workers." *Ante*, at 229. Poof!: This is so only when the employer's reasons "are not sufficiently strong to justify the burden." *Ibid.*

How we got here from the same-treatment clause is anyone's guess. There is no way to read "shall be treated the same"—or indeed anything else in the clause—to mean that courts must balance the significance of the burden on pregnant workers against the strength of the employer's justifications for the policy. That is presumably why the Court does not even *try* to connect the interpretation it adopts with the text it purports to interpret. The Court has forgotten that statutory purpose and the presumption against superfluity are tools for choosing among competing reasonable readings of a law, not authorizations for making up new readings that the law cannot reasonably bear.

The fun does not stop there. Having ignored the terms of the same-treatment clause, the Court proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact. Normally, liability for disparate

treatment arises when an employment policy has a "discriminatory motive," while liability for disparate impact arises when the effects of an employment policy "fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters*, 431 U. S., at 336, n. 15. In the topsy-turvy world created by today's decision, however, a pregnant woman can establish disparate *treatment* by showing that the *effects* of her employer's policy fall more harshly on pregnant women than on others (the policies "impose a significant burden on pregnant workers," *ante*, at 229) and are inadequately justified (the "reasons are not sufficiently strong to justify the burden," *ibid.*). The change in labels may be small, but the change in results assuredly is not. Disparate-treatment and disparate-impact claims come with different standards of liability, different defenses, and different remedies. *E. g.,* 42 U. S. C. §§ 1981a, 2000e–2(k). For example, plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate-impact cases can get equitable relief only. See §§ 1981a, 2000e–5(g). A sound reading of the same-treatment clause would preserve the distinctions so carefully made elsewhere in the Act; the Court's reading makes a muddle of them.

But (believe it or not) it gets worse. In order to make sense of its conflation of disparate impact with disparate treatment, the Court claims that its new test is somehow "limited to the Pregnancy Discrimination Act context," yet at the same time "consistent with" the traditional use of circumstantial evidence to show intent to discriminate in Title VII cases. *Ante*, at 230. A court in a Title VII case, true enough, may consider a policy's effects and even its justifications—along with "'all of the [other] surrounding facts and circumstances'"—when trying to ferret out a policy's motive. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 312 (1977). The Court cannot possibly think, however, that its newfangled balancing test reflects this conventional inquiry. It has, after all, just marched up and down the hill telling us

that the same-treatment clause is not (no-no!) "'superfluous, void, or insignificant.'" *Ante*, at 226. If the clause merely instructed courts to consider a policy's effects and justifications the way it considers other circumstantial evidence of motive, it *would* be superfluous. So the Court's balancing test must mean something else. Even if the effects and justifications of policies are not enough to show intent to discriminate under ordinary Title VII principles, they could (Poof!) still show intent to discriminate for purposes of the pregnancy same-treatment clause. Deliciously incoherent.

And all of this to what end? The difference between a routine circumstantial-evidence inquiry into motive and today's grotesque effects-and-justifications inquiry into motive, it would seem, is that today's approach requires judges to concentrate on effects and justifications to the exclusion of other considerations. But Title VII *already* has a framework that allows judges to home in on a policy's effects and justifications—disparate impact. Under that framework, it is *already* unlawful for an employer to use a practice that has a disparate impact on the basis of a protected trait, unless (among other things) the employer can show that the practice "is job related . . . and consistent with business necessity." §2000e–2(k)(1)(A)(i). The Court does not explain why we need (never mind how the Act could possibly be read to contain) today's ersatz disparate-impact test, under which the disparate-impact element gives way to the significant-burden criterion and the business-necessity defense gives way to the sufficiently-strong-justification standard. Today's decision can thus serve only one purpose: allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead.

IV

JUSTICE ALITO's concurrence agrees with the Court's rejection of both conceivable readings of the same-treatment clause, but fashions a different compromise between them.

Under its approach, an employer may deny a pregnant woman a benefit granted to workers who perform similar tasks only on the basis of a "neutral business ground." *Ante*, at 241 (opinion concurring in judgment). This requirement of a "business ground" shadows the Court's requirement of a "sufficiently strong" justification, and, like it, has no footing in the terms of the same-treatment clause. As the concurrence understands the words "shall be treated the same," an employer must give pregnant workers the same accommodations (not merely accommodations on the same terms) as other workers "who are similar in their ability or inability to work." *Ante*, at 234. But the concurrence realizes that requiring the same accommodations to all who are similar in ability or inability to work—the only characteristic mentioned in the same-treatment clause—would "lead to wildly implausible results." *Ante*, at 237, n. 3. To solve this problem, the concurrence broadens the category of characteristics that the employer may take into account. It allows an employer to find dissimilarity on the basis of traits *other* than ability to work so long as there is a "neutral business reason" for considering them—though it immediately adds that cost and inconvenience are not good enough reasons. *Ante*, at 237. The need to engage in this text-free broadening in order to make the concurrence's interpretation work is as good a sign as any that its interpretation is wrong from the start.

* * *

My disagreement with the Court is fundamental. I think our task is to choose the best possible reading of the law—that is, what text and context most strongly suggest it conveys. The Court seems to think our task is to craft a policy-driven compromise between the possible readings of the law, like a congressional conference committee reconciling House and Senate versions of a bill.

Because Young has not established that UPS's accommodations policy discriminates against pregnant women rela-

tive to others of similar ability or inability, see *supra*, at 242, she has not shown a violation of the Act's same-treatment requirement. I would therefore affirm the judgment of the Court of Appeals for the Fourth Circuit.

JUSTICE KENNEDY, dissenting.

It seems to me proper, in joining JUSTICE SCALIA's dissent, to add these additional remarks. The dissent is altogether correct to point out that petitioner here cannot point to a class of her co-workers that was accommodated and that would include her but for the particular limitations imposed by her pregnancy. Many other workers with health-related restrictions were not accommodated either. And, in addition, there is no showing here of animus or hostility to pregnant women.

But as a matter of societal concern, indifference is quite another matter. There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant. They may find it difficult to continue to work, at least in their regular assignment, while still taking necessary steps to avoid risks to their health and the health of their future children. This is why the difficulties pregnant women face in the workplace are and do remain an issue of national importance.

"'Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.'" *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such "attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman's place among

paid workers." *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 724 (2009) (GINSBURG, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, see Brief for U. S. Women's Chamber of Commerce et al. as *Amici Curiae* 10–14, pregnant employees continue to be disadvantaged—and often discriminated against—in the workplace, see Brief for Law Professors et al. as *Amici Curiae* 37–38.

Recognizing the financial and dignitary harm caused by these conditions, Congress and the States have enacted laws to combat or alleviate, at least to some extent, the difficulties faced by pregnant women in the work force. Most relevant here, Congress enacted the Pregnancy Discrimination Act (PDA), 42 U. S. C. § 2000e(k), which defines discrimination on the basis of pregnancy as sex discrimination for purposes of Title VII and clarifies that pregnant employees "shall be treated the same" as nonpregnant employees who are "similar in their ability or inability to work." The PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits "practices that are not intended to discriminate but in fact have a disproportionately adverse effect." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009). Congress further enacted the parental-leave provision of the Family and Medical Leave Act of 1993, 29 U. S. C. § 2612(a)(1)(A), which requires certain employers to provide eligible employees with 12 workweeks of leave because of the birth of a child. And after the events giving rise to this litigation, Congress passed the ADA Amendments Act of 2008, 122 Stat. 3553, which expands protections for employees with temporary disabilities. As the parties note, Brief for Petitioner 37–43; Brief for Respondent 21–22; Brief for United States as *Amicus Curiae* 24–25, these amendments and their implementing regulations, 29 CFR § 1630 (2015), may require accommodations for many pregnant employees,

even though pregnancy itself is not expressly classified as a disability. Additionally, many States have enacted laws providing certain accommodations for pregnant employees. See, *e. g.*, Cal. Govt. Code Ann. § 12945 (West 2011); La. Rev. Stat. Ann. § 23:342(4) (West 2010); W. Va. Code Ann. § 5–11B–2 (Lexis Supp. 2014); see also *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987) (holding that the PDA does not pre-empt such statutes). These Acts honor and safeguard the important contributions women make to both the workplace and the American family.

Today the Court addresses only one of these legal protections: the PDA's prohibition of disparate treatment. For the reasons well stated in JUSTICE SCALIA's dissenting opinion, the Court interprets the PDA in a manner that risks "conflation of disparate impact with disparate treatment" by permitting a plaintiff to use a policy's disproportionate burden on pregnant employees as evidence of pretext. *Ante*, at 248; see *ante*, at 229–230 (opinion of the Court). In so doing, the Court injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

With these remarks, I join JUSTICE SCALIA's dissent.

Syllabus

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.* ALABAMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 13–895. Argued November 12, 2014—Decided March 25, 2015*

In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—*e. g.*, compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district's deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities' "ability . . . to elect their preferred candidates of choice" under § 5 of the Voting Rights Act of 1965, 52 U. S. C. § 10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama's new district boundaries create a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916, and the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw* v. *Hunt*, 517 U. S. 899, 902 (*Shaw II*).

In ruling against appellants, it made four critical determinations: (1) that both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants' claims must fail because race "was not the predominant motivating factor" in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was

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*Together with No. 13–1138, *Alabama Democratic Conference et al.* v. A*labama et al.*, also on appeal from the same court.

"narrowly tailored" to serve a "compelling state interest" in avoiding retrogression under § 5.

Held:

1. The District Court's analysis of the racial gerrymandering claim as referring to the State "as a whole," rather than district by district, was legally erroneous. Pp. 262–268.

(a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*, see, *e. g.*, *Shaw* v. *Reno*, 509 U. S. 630, 649 (*Shaw I*), and has described the plaintiff's evidentiary burden similarly, see *Miller*, *supra*, at 916. The Court's district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see *Bush* v. *Vera*, 517 U. S. 952, 957; *Shaw I*, *supra*, at 648. Pp. 262–263.

(b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. But a showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts. Thus, the District Court's undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 263–264.

(c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs' evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole." Pp. 264–268.

2. The District Court also erred in deciding, *sua sponte*, that the Conference lacked standing. It believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside." But the Conference's post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference's burden of establishing standing. At

the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in these circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte*, to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 268–271.

3. The District Court also did not properly calculate "predominance" in its alternative holding that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the "traditional" factors to be weighed against the use of race to determine whether race "predominates," see *Miller*, *supra*, at 916. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met. Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 271–275.

4. The District Court's final alternative holding—that "the [challenged] Districts would satisfy strict scrutiny"—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Pp. 275–279.

(a) The statute's language, 52 U. S. C. §§ 10304(b), (d), and Department of Justice Guidelines make clear that § 5 is satisfied if minority voters retain the ability to elect their preferred candidates. The history of § 5 further supports this view, as Congress adopted the language in § 5 to reject this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, and to accept the views of Justice Souter's dissent—that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances,

id., at 493, 498, 505, 509. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 275–278.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. A court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court's conclusion. Pp. 278–279.

989 F. Supp. 2d 1227, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 282. THOMAS, J., filed a dissenting opinion, *post*, p. 294.

Richard H. Pildes argued the cause for appellants in No. 13–1138. With him on the briefs were *John K. Tanner*, *Walter S. Turner*, *James H. Anderson*, *William F. Patty*, *Brannan W. Reaves*, *Paul M. Smith*, *Jessica Ring Amunson*, and *Kevin Russell*. *Eric Schnapper* argued the cause for appellants in No. 13–895. With him on the briefs were *James U. Blacksher* and *Edward Still*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* in both cases. With him on the brief were *Acting Assistant Attorney General Moran*, *Deputy Solicitor General Gershengorn*, *Rachel P. Kovner*, *Diana K. Flynn*, *Tovah R. Calderon*, *April J. Anderson*, and *Bonnie I. Robin-Vergeer*.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for appellees in both cases. With him on the brief were *Luther Strange*, Attorney General, *Megan A. Kirkpat-*

rick, Assistant Solicitor General, and *John J. Park, Jr.*, and *Dorman Walker*, Deputy Attorneys General.†

JUSTICE BREYER delivered the opinion of the Court.

The Alabama Legislative Black Caucus and the Alabama Democratic Conference appeal a three-judge Federal District Court decision rejecting their challenges to the lawfulness of Alabama's 2012 redistricting of its State House of Representatives and State Senate. The appeals focus upon the appellants' claims that new district boundaries create "racial gerrymanders" in violation of the Fourteenth Amendment's Equal Protection Clause. See, *e. g.*, *Shaw* v. *Hunt*, 517 U. S. 899, 906–908 (1996) (*Shaw II*) (Fourteenth Amendment forbids use of race as "'predominant'" district boundary-drawing "'factor'" unless boundaries are "'narrowly tailored'" to achieve a "'compelling state interest'"). We find that the District Court applied incorrect legal standards in evaluating the claims. We consequently vacate its decision and remand the cases for further proceedings.

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Brennan Center for Justice at N. Y. U. School of Law by *Wendy Weiser*; for the NAACP Legal Defense & Educational Fund, Inc., by *Christina A. Swarns*, *Ryan P. Haygood*, *Natasha M. Korgaonkar*, *Leah C. Aden*, *Samuel Spital*, and *William J. Honan*; and for North Carolina Litigants by *Anita S. Earls*, *Allison J. Riggs*, *Irving Joyner*, *Walter Dellinger*, *Anton Metlitsky*, *Edwin M. Speas, Jr.*, *John W. O'Hale*, *Caroline Mackie*, and *Adam Stein*.

Steven M. Freeman filed a brief in No. 13–1138 for the Anti-Defamation League as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Alabama House of Representatives et al. by *Christopher W. Weller* and *Marc James Ayers*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard* and *Joshua P. Thompson*; and for Dalton J. Oldham by *Jason Torchinsky*.

Jon M. Greenbaum filed a brief in both cases for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae*.

John M. Devaney, *Marc E. Elias*, and *Kevin J. Hamilton* filed a brief in No. 13–1138 for Ronald Keith Gaddie et al. as *amici curiae*.

I

The Alabama Constitution requires the legislature to reapportion its State House and Senate electoral districts following each decennial census. Ala. Const., Art. IX, §§ 199–200. In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. 2012 Ala. Acts no. 602 (House plan); *id.*, no. 603 (Senate plan) (Acts). In doing so, Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. But it placed yet greater importance on achieving two other goals. See Alabama Legislature Reapportionment Committee Guidelines in No. 12–cv–691, Doc. 30–4, pp. 3–5 (Committee Guidelines).

First, it sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population. In particular, it set as a goal creating a set of districts in which no district would deviate from the theoretical, precisely equal ideal by more than 1%—*i. e.*, a more rigorous deviation standard than our precedents have found necessary under the Constitution. See *Brown* v. *Thomson*, 462 U. S. 835, 842 (1983) (5% deviation from ideal generally permissible). No one here doubts the desirability of a State's efforts generally to come close to a one-person, one-vote ideal.

Second, it sought to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965. 79 Stat. 439, as amended, 52 U. S. C. § 10301 *et seq.* At the time of the redistricting Alabama was a covered jurisdiction under that Act. Accordingly § 5 of the Act required Alabama to demonstrate that an electoral change, such as redistricting, would not bring about retrogression in respect to racial minorities' "ability . . . to elect their preferred candidates of choice." 52 U. S. C. § 10304(b). Specifically, Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage

in existing majority-minority districts. See Appendix B, *infra*.

Compliance with these two goals posed particular difficulties with respect to many of the State's 35 majority-minority districts (8 in the Senate, 27 in the House). That is because many of these districts were (compared with the average district) underpopulated. In order for Senate District 26, for example, to meet the State's no-more-than-1% population-deviation objective, the State would have to add about 16,000 individuals to the district. And, prior to redistricting, 72.75% of District 26's population was black. Accordingly, Alabama's plan added 15,785 new individuals, and only 36 of those newly added individuals were white.

This suit, as it appears before us, focuses in large part upon Alabama's efforts to achieve these two goals. The Caucus and the Conference basically claim that the State, in adding so many new minority voters to majority-minority districts (and to others), went too far. They allege the State created a constitutionally forbidden "racial gerrymander"—a gerrymander that (*e. g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help.

After a bench trial, the Federal District Court held in favor of the State, *i. e.*, against the Caucus and the Conference, with respect to their racial gerrymandering claims as well as with respect to several other legal claims that the Caucus and the Conference had made. With respect to racial gerrymandering, the District Court recognized that electoral districting violates the Equal Protection Clause when (1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916 (1995), and (2) the use of race is not "narrowly tailored to serve a compelling state inter-

est," *Shaw II*, 517 U. S., at 902; see also *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) (*Shaw I*) (Constitution forbids "separat[ion of] voters into different districts on the basis of race" when the separation "lacks sufficient justification"); *Bush* v. *Vera*, 517 U. S. 952, 958–959, 976 (1996) (plurality opinion) (same). But, after trial the District Court held (2 to 1) that the Caucus and the Conference had failed to prove their racial gerrymandering claims. The Caucus along with the Conference (and several other plaintiffs) appealed. We noted probable jurisdiction with respect to the racial gerrymandering claims. 572 U. S. 1149 (2014).

We shall focus upon four critical District Court determinations underlying its ultimate "no violation" conclusion. They concern:

1. *The Geographical Nature of the Racial Gerrymandering Claims.* The District Court characterized the appellants' claims as falling into two categories. In the District Court's view, both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) (emphasis added), and one of the appellants (the Conference) had also argued that the State had racially gerrymandered four specific electoral districts, Senate Districts 7, 11, 22, and 26, *id.*, at 1288.
2. *Standing.* The District Court held that the Caucus had standing to argue its racial gerrymandering claim with respect to the State "as a whole." But the Conference lacked standing to make any of its racial gerrymandering claims—the claim requiring consideration of the State "as a whole," and the claims requiring consideration of four individual Senate districts. *Id.*, at 1292.
3. *Racial Predominance.* The District Court held that, in any event, the appellants' claims must fail because race "was not the predominant motivating factor" either (a) "for the Acts as a whole" or (b) with respect to "Senate Districts 7, 11, 22, or 26." *Id.*, at 1293.

4. *Narrow Tailoring/Compelling State Interest.* The District Court also held that, even were it wrong about standing and predominance, the appellants' racial gerrymandering claims must fail. That is because any predominant use of race in the drawing of electoral boundaries was "narrowly tailored" to serve a "compelling state interest," *id.*, at 1306–1307, namely, the interest in avoiding retrogression with respect to racial minorities' "ability . . . to elect their preferred candidates of choice." § 10304(b).

In our view, each of these determinations reflects an error about relevant law. And each error likely affected the District Court's conclusions—to the point where we must vacate the lower court's judgment and remand the cases to allow the appellants to reargue their racial gerrymandering claims. In light of our opinion, all parties remain free to introduce such further evidence as the District Court shall reasonably find appropriate.

II

We begin by considering the geographical nature of the racial gerrymandering claims. The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole.* See, *e. g.*, 989 F. Supp. 2d, at 1293 ("Race was not the predominant motivating factor for the Acts as a whole"); *id.*, at 1287 (construing the plaintiffs' challenge as arguing that the "Acts as a whole constitute racial gerrymanders"); *id.*, at 1292 (describing the plaintiffs' challenge as a "claim of racial gerrymandering to the Acts as a whole"); cf. *supra*, at 261 (noting four exceptions).

A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district by district. It does not apply to a State considered as an undifferentiated "whole." We have consistently described a claim of

racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*. See, *e. g.*, *Shaw I*, *supra*, at 649 (violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Vera*, *supra*, at 965 (plurality opinion) ("[Courts] must scrutinize *each challenged district* . . . " (emphasis added)). We have described the plaintiff's evidentiary burden similarly. See *Miller*, 515 U. S., at 916 (plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*" (emphasis added)).

Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally . . . subjected to [a] racial classification," *Vera*, *supra*, at 957, as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I*, *supra*, at 648. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995).

Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. See *Miller*, *supra*, at 916. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase "as a whole," considered here. Rather, the concept as used here suggests the existence of a legal unicorn, an animal that exists only in the legal imagination.

This is not a technical, linguistic point. Nor does it criticize what might seem, in effect, a slip of the pen. Rather, here the District Court's terminology mattered. That is be-

cause the District Court found that racial criteria had not predominated in the drawing of some Alabama districts. And it found that fact (the fact that race did not predominate in the drawing of some, or many, districts) sufficient to defeat what it saw as the basic claim before it, namely, a claim of racial gerrymandering with respect to the State *as an undifferentiated whole.* See, *e. g.*, 989 F. Supp. 2d, at 1294 (rejecting the plaintiffs' challenge because "[the legislature] followed no bright-line rule" with respect to every majority-minority district); *id.*, at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split).

A showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here. See *id.*, at 1329 (Thompson, J., dissenting) ("[T]he drafters[']fail[ure] to achieve their sought-after percentage in one district does not detract one iota from the fact that they did achieve it in another"). Thus, the District Court's undifferentiated statewide analysis is insufficient. And we must remand for consideration of racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges.

The State and principal dissent argue that (but for four specifically mentioned districts) there were in effect no such districts. The Caucus and the Conference, the State and principal dissent say, did not seek a district-by-district analysis. And, the State and principal dissent conclude that the Caucus and the Conference have consequently waived the right to any further consideration. Brief for Appellees 14, 31; *post,* at 286–292 (opinion of SCALIA, J.).

We do not agree. We concede that the District Court's opinion suggests that it was the Caucus and the Conference

that led the court to consider racial gerrymandering of the State "as a whole." 989 F. Supp. 2d, at 1287. At least the District Court interpreted their filings to allege only that kind of claim. *Ibid.* But our review of the record indicates that the plaintiffs did not claim only that the legislature had racially gerrymandered the State "as" an undifferentiated "whole." Rather, their evidence and their arguments embody the claim that individual majority-minority districts were racially gerrymandered. And those are the districts that we believe the District Court must reconsider.

There are 35 majority-minority districts, 27 in the House and 8 in the Senate. The District Court's opinion itself refers to evidence that the legislature's redistricting committee, in order to satisfy what it believed the Voting Rights Act required, deliberately chose additional black voters to move into underpopulated majority-minority districts, *i. e.*, a specific set of individual districts. See, *e. g.*, *id.*, at 1274 (referring to Senator Dial's testimony that the Committee "could have used," but did not use, "white population within Jefferson County to repopulate the majority-black districts" because "doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for [Justice Department] preclearance"); *id.*, at 1276 (stating that Representative Jim McClendon, also committee cochair, "testified consistently with Senator Dial"); *id.*, at 1277 (noting that the committee's expert, Randolph Hinaman, testified that "he needed to add population" to majority-black districts "without significantly lowering the percentage of the population in each district that was majority-black").

The Caucus and the Conference presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts—again, a specific set of districts—in order to prevent the percentage of minority voters in each district from declining. See, *e. g.*, Committee Guidelines 3–5; 1 Tr. 28–29, 36–37, 55, 63, 67–

68, 77, 81, 96, 115, 124, 136, 138 (testimony of Sen. Dial); Deposition of Gerald Dial in No. 12–cv–691 (May 21, 2013), Doc. 125–3, pp. 17, 39–41, 62, 100 (Dial Deposition); 3 Tr. 222 (testimony of Rep. McClendon); *id.*, at 118–119, 145–146, 164, 182–183, 186–187 (testimony of Hinaman); Deposition of Randolph Hinaman in No. 12–cv–691 (June 25, 2013), Doc. 134–4, pp. 23–24, 101 (Hinaman Deposition).

In their post-trial Proposed Findings of Fact and Conclusions of Law, the plaintiffs stated that the evidence showed a racial gerrymander with respect to the majority of the majority-minority districts; they referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence. *E. g.*, Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 194, pp. 9–10, 13–14, 30–35, 40 (Caucus Post-Trial Brief); Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 33–35, 56–61, 64–67, 69–74, 82–85, 108, 121–122 (Conference Post-Trial Brief); see also Appendix A, *infra* (organizing these citations by district).

We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines. See generally Caucus Post-Trial Brief 1, 3–7, 48–50; Conference Post-Trial Brief 2, 44–45, 105–106. And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well. See, *e. g.*, 1 Tr. 36–37, 48, 55, 70–71, 93, 111, 124 (testimony of Dial); 3 Tr. 142, 162 (testimony of Hinaman); see generally Caucus Post-Trial Brief 8–16. Such evidence is perfectly relevant. We have said that the plaintiff's burden in a racial gerrymandering case is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was

the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. Cf. *Easley* v. *Cromartie*, 532 U. S. 234, 258 (2001) (explaining the plaintiff's burden in cases, unlike these, in which the State argues that politics, not race, was its predominant motive). That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole."

We, like the principal dissent, recognize that the plaintiffs could have presented their district-specific claims more clearly, *post*, at 287–288, 290–292 (opinion of SCALIA, J.), but the dissent properly concedes that its objection would weaken had the Conference "developed such a claim in the course of discovery and trial," *post*, at 287. And that is just what happened.

In the past few pages and in Appendix A, we set forth the many record references that establish this fact. The Caucus helps to explain the complaint omissions when it tells us that the plaintiffs unearthed the factual basis for their racial gerrymandering claims when they deposed the committee's redistricting expert. See Brief for Appellants in No. 13–895, pp. 12–13. The State neither disputes this procedural history nor objects that the plaintiffs' pleadings failed to conform with the proof. Indeed, throughout, the plaintiffs litigated these claims not as if they were wholly separate entities but as if they were a team. See, *e. g.*, Caucus Post-Trial Brief 1 ("[We] support the additional claims made by the [Conference] plaintiffs"); but cf. *post*, at 283–292 (SCALIA,

J., dissenting) (treating separately Conference claims from Caucus claims). Thus we, like the dissenting judge below (who also lived with these cases through trial), conclude that the record as a whole shows that the plaintiffs brought, and their argument rested significantly upon, district-specific claims. See 989 F. Supp. 2d, at 1313 (opinion of Thompson, J.) (construing the plaintiffs as also challenging "each majority-black House and Senate District").

The principal dissent adds that the Conference waived its district-specific claims on appeal. Cf. *post*, at 288–289. But that is not so. When asked specifically about its position at oral argument, the Conference stated that it was relying on statewide evidence to prove its district-specific challenges. Tr. of Oral Arg. 15–16. Its counsel said that "the exact same policy was applied in every black-majority district," *id.*, at 15, and "[b]y statewide, we simply mean a common policy applied to every district in the State," *id.*, at 16. We accept the Conference's clarification, which is consistent with how it presented these claims below.

We consequently conclude that the District Court's analysis of racial gerrymandering of the State "as a whole" was legally erroneous. We find that the appellants did not waive their right to consideration of their claims as applied to particular districts. Accordingly, we remand the cases. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982) (remand is required when the District Court "failed to make a finding because of an erroneous view of the law"); *Rapanos* v. *United States*, 547 U. S. 715, 757 (2006) (same).

III

We next consider the District Court's holding with respect to standing. The District Court, *sua sponte*, held that the Conference lacked standing—either to bring racial gerrymandering claims with respect to the four individual districts that the court specifically considered (*i. e.*, Senate Districts 7, 11, 22, and 26) or to bring a racial gerrymandering

claim with respect to the "Acts as a whole." 989 F. Supp. 2d, at 1282.

The District Court recognized that ordinarily

> "'[a]n association has standing to bring suit on behalf of its members *when its members would [sic] have standing to sue in their own right*, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation [*sic*] in the lawsuit.'" *Id.*, at 1291 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 181 (2000); emphasis added).

It also recognized that a "member" of an association "would have standing to sue" in his or her "own right" when that member "resides in the district that he alleges was the product of a racial gerrymander." 989 F. Supp. 2d, at 1291 (citing *Hays*, 515 U. S., at 744–745). But, the District Court nonetheless denied standing because it believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside," and the Conference had "not proved that it has members who have standing to pursue any district-specific claims of racial gerrymandering." 989 F. Supp. 2d, at 1292.

The District Court conceded that Dr. Joe Reed, a representative of the Conference, testified that the Conference "has members in almost every county in Alabama." *Ibid.* But, the District Court went on to say that "the counties in Alabama are split into many districts." *Ibid.* And the "Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the [four] specific districts that it challenged." *Ibid.*

The record, however, lacks adequate support for the District Court's conclusion. Dr. Reed's testimony supports, and nothing in that record undermines, the Conference's own statement, in its post-trial brief, that it is a "statewide politi-

cal caucus founded in 1960." Conference Post-Trial Brief 3. It has the "purpose" of "endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people." *Id.*, at 3–4. These two statements (the second of which the principal dissent ignores), taken together with Dr. Reed's testimony, support an inference that the organization has members in all of the State's majority-minority districts, other things being equal, which is sufficient to meet the Conference's burden of establishing standing. That is to say, it seems highly likely that a "statewide" organization with members in "almost every county," the purpose of which is to help "blacks and other minorities and poor people," will have members in each majority-minority district. But cf. *post*, at 283–285 (SCALIA, J., dissenting).

At the very least, the commonsense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. We have found nothing in the record, nor has the State referred us to anything in the record, that suggests the contrary. Cf. App. 204–205, 208 (State arguing lack of standing, not because of inadequate member residency but because an association "lives" nowhere and that the Conference should join individual members). The most the State argued was that "[n]one of the *individual* [p]laintiffs [who brought the case with the Conference] claims to live in" Senate District 11, *id.*, at 205 (emphasis added), but the Conference would likely not have understood that argument as a request that *it* provide a membership list. In fact, the Conference might have understood the argument as an indication that the State did *not* contest its membership in every district.

To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. See *post*, at 285 (SCALIA, J., dissenting). But,

in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence. Cf. *Warth* v. *Seldin*, 422 U. S. 490, 501–502 (1975) (explaining that a court may "allow or [r]equire" a plaintiff to supplement the record to show standing and that "[i]f, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed" (emphasis added)). Moreover, we have no reason to believe that the Conference would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked. It has filed just such a list in this Court. See Affidavit of Joe L. Reed Pursuant to this Court's Rule 32.3 (Lodging of Conference affidavit listing members residing in each majority-minority district in the State); see also *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007) (accepting a lodged affidavit in similar circumstances). Thus, the District Court on remand should reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate.

IV

The District Court held in the alternative that the claims of racial gerrymandering must fail because "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. 989 F. Supp. 2d, at 1293. In our view, however, the District Court did not properly calculate "predominance." In particular, it judged race to lack "predominance" in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. See, *e. g.*, *id.*, at 1305 (the "need to bring the neighboring districts into compliance with the requirement of one person, one vote *served as the primary motivating factor* for the changes to [Senate] Dis-

trict 22" (emphasis added)); *id.*, at 1297 (the "constitutional requirement of one person, one vote trumped every other districting principle"); *id.*, at 1296 (the "record establishes that the drafters of the new districts, above all, had to correct [for] severe malapportionment . . . "); *id.*, at 1306 (the "inclusion of additional precincts [in Senate District 26] is a reasonable response to the underpopulation of the District").

In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

To understand this conclusion, recall what "predominance" is about: A plaintiff pursuing a racial gerrymandering claim must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. To do so, the "plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations." *Ibid.* (emphasis added).

Now consider the nature of those offsetting "traditional race-neutral districting principles." We have listed several, including "compactness, contiguity, . . . respect for political subdivisions or communities defined by actual shared interests," *ibid.*, incumbency protection, and political affiliation, *Vera*, 517 U. S., at 964, 968 (plurality opinion).

But we have not listed equal population objectives. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of "traditional" criteria is that equal population objectives play a different role in a State's redistricting process. That role is not a minor one. Indeed, in light of the Constitution's demands, that role may often prove "predominant" in the ordi-

nary sense of that word. But, as the United States points out, "predominance" in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature "placed" race "above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." Brief for United States as *Amicus Curiae* 19 (some emphasis added). In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the "predominance" question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, "traditional" factors when doing so.

Consequently, we agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place. *Id.*, at 12. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, "traditional" factors in the drawing of district boundaries.

Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, once the legislature's "equal population" objectives are put to the side—*i. e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.

The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See

supra, at 265–266 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries. See 3 Tr. 175–180 (testimony of Hinaman); Appendix C, *infra* (change of district's shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. See, *e. g.*, 2 Tr. 130 (testimony of Sen. Quinton Ross); 3 Tr. 179 (testimony of Hinaman). Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs' Opposition to Summary Judgment in No. 12–cv–691, Doc. 140–1, pp. 91–95. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black." 989 F. Supp. 2d, at 1306.

We recognize that the District Court also found, with respect to District 26, that "preservi[ng] the core of the existing [d]istrict," following "county lines," and following "highway lines" played an important boundary-drawing role. *Ibid.* But the first of these (core preservation) is not directly relevant to the origin of the *new* district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative redistricting guidelines. Cf. Committee Guidelines 3–5.

All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consider-

ation. Thus, on remand, the District Court should reconsider its "no predominance" conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Finally, we note that our discussion in this section is limited to correcting the District Court's misapplication of the "predominance" test for strict scrutiny discussed in *Miller*, 515 U. S., at 916. It does not express a view on the question whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny. See *Vera*, 517 U. S., at 996 (KENNEDY, J., concurring).

V

The District Court, in a yet further alternative holding, found that "[e]ven if the [State] subordinated traditional districting principles to racial considerations," the racial gerrymandering claims failed because, in any event, "the Districts would satisfy strict scrutiny." 989 F. Supp. 2d, at 1306. In the District Court's view, the "Acts are narrowly tailored to comply with Section 5" of the Voting Rights Act. *Id.*, at 1311. That provision "required the Legislature to maintain, where feasible, the existing number of majority-black districts and *not substantially reduce the relative percentages of black voters in those districts*." *Ibid.* (emphasis added). And, insofar as the State's redistricting embodied racial considerations, it did so in order to meet this § 5 requirement.

In our view, however, this alternative holding rests upon a misperception of the law. Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says. It prohibits a covered jurisdiction from adopting any change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred

candidates of choice." 52 U. S. C. § 10304(b); see also § 10304(d) (the "purpose of subsection (b) . . . is to protect the ability of such citizens to elect their preferred candidates of choice").

That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department's preclearance determinations are not based

> "on any predetermined or fixed demographic percentages. . . . Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. . . . [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Consistent with this view, the United States tells us that "Section 5" does not "requir[e] the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans." Brief for United States as *Amicus Curiae* 22. Rather, it "prohibits only those diminutions of a minority group's proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice." *Id.*, at 22–23. We agree. Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, § 5 is satisfied if minority voters retain the ability to elect their preferred candidates.

The history of § 5 further supports this view. In adopting the statutory language to which we referred above, Congress rejected this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, 480 (2003) (holding that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts), and it adopted the views of the dissent. H. R. Rep. No. 109–478, pp. 68–

69, and n. 183 (2006). While the thrust of Justice Souter's dissent was that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice—language that Congress adopted in revising § 5—his dissent also made clear that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances. *Georgia* v. *Ashcroft*, *supra*, at 493, 498, 505, 509. And while the revised language of § 5 may raise some interpretive questions—*e. g.*, its application to coalition, crossover, and influence districts—it is clear that Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive. See Persily, The Promises and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 218 (2007). Indeed, Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns. See *Miller*, *supra*, at 926.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. See Appendix B, *infra*. And the difference between that view and the more purpose-oriented view reflected in the statute's language can matter. Imagine a majority-minority district with a 70% black population. Assume also that voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters' preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is "narrowly tailored" to achieve a "compelling state interest," namely, the interest in preventing § 5 retrogression.

The circumstances of this hypothetical example, we add, are close to those characterizing Senate District 26, as set forth in the District Court's opinion and throughout the record. See, *e. g.*, 1 Tr. 131–132 (testimony of Dial); 3 Tr. 180 (testimony of Hinaman).

In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few. See *Vera*, 517 U. S., at 977 (plurality opinion). Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29 (citing *Ricci* v. *DeStefano*, 557 U. S. 557, 585 (2009)). This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." Brief for United States as *Amicus Curiae* 29. And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (emphasis added).

Here the District Court enunciated a narrow tailoring standard close to the one we have just mentioned. It said that a plan is "narrowly tailored . . . when the race-based action taken was *reasonably necessary*" to achieve a compelling interest. 989 F. Supp. 2d, at 1307 (emphasis added). And it held that preventing retrogression is a compelling interest. *Id.*, at 1306–1307. While we do not here decide whether, given *Shelby County* v. *Holder*, 570 U. S. 529 (2013), continued compliance with § 5 remains a compelling interest, we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

* * *

For these reasons, the judgment of the District Court is vacated. We note that the appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.

The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIXES

A

Majority-minority District	**Instances in Plaintiffs' Post-Trial Briefs Arguing That Traditional Race-Neutral Districting Principles Were Subordinated to Race**
HOUSE	
HD 52, 54–60	Caucus Post-Trial Brief 30; Conference Post-Trial Brief 56–57, 60, 82–83, 121–122
HD 53	Caucus Post-Trial Brief 33–35; Conference Post-Trial Brief 59–61
HD 68	Conference Post-Trial Brief 70, 84–85
HD 69	Conference Post-Trial Brief 66–67, 85
HD 70	Conference Post-Trial Brief 85
HD 71	Conference Post-Trial Brief 83–85
HD 72	Caucus Post-Trial Brief 40; Conference Post-Trial Brief 83–85
HD 76–78	Conference Post-Trial Brief 65–66
SENATE*	
SD 18–20	Conference Post-Trial Brief 56–59
SD 23–24	Caucus Post-Trial Brief 9–10, 40; Conference Post-Trial Brief 69–74
SD 33	Caucus Post-Trial Brief 13–14

* Senate District 26 excluded from this list

B

State's Use of Incorrect Retrogression Standard

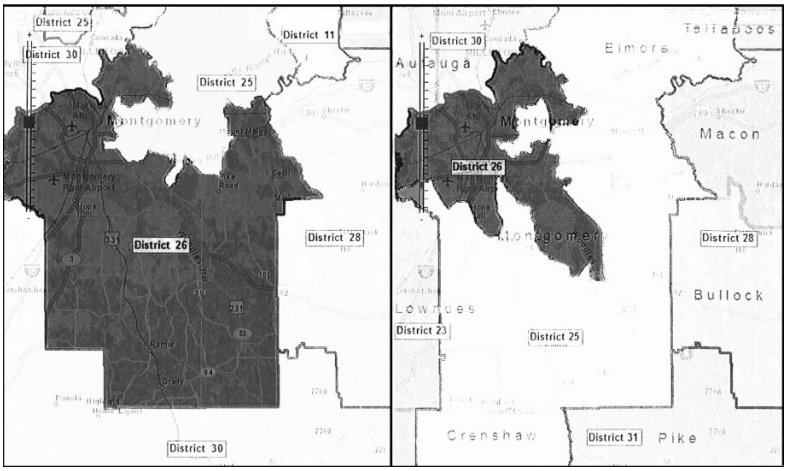
The following citations reflect instances in either the District Court opinion or in the record showing that the State believed that § 5 forbids, not just *substantial* reductions, but

any reduction in the percentage of black inhabitants of a majority-minority district.

District Court Findings	989 F. Supp. 2d, at 1307; *id.*, at 1273; *id.*, at 1247	
Evidence in the Record	Senator Gerald Dial	1 Tr. 28–29, 36–37, 55, 81, 96, 136, 138
		Dial Deposition 17, 39–41, 81, 100
	Representative Jim McClendon	3 Tr. 222
	Randolph Hinaman	3 Tr. 118–119, 145–146, 149–150, 164, 182–183, 187
		Hinaman Deposition 23–24, 101; but see *id.*, at 24–25, 101

C

2001 Districting Plan 2012 Districting Plan



JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court's destination seems fantastical, just wait until you see the journey.

Two groups of plaintiffs, the Alabama Democratic Conference and the Alabama Legislative Black Caucus, brought separate challenges to the way in which Alabama drew its state legislative districts following the 2010 census. These cases were consolidated before a three-judge District Court. Even after a full trial, the District Court lamented that "[t]he filings and arguments made by the plaintiffs on these claims were mystifying at best." 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013). Nevertheless, the District Court understood both groups of plaintiffs to argue, as relevant here, only that "the Acts as a whole constitute racial gerrymanders." *Id.*, at 1287. It also understood the Democratic Conference to argue that "Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders," *id.*, at 1288, but held that the Democratic Conference lacked standing to bring "*any* district-specific claims of racial gerrymandering," *id.*, at 1292 (emphasis added). It then found for Alabama on the merits.

The Court rightly concludes that our racial-gerrymandering jurisprudence does not allow for statewide claims. *Ante*, at 262–268. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it allows them to take a mulligan, remanding the case with orders that the District Court consider whether some (all?) of Alabama's 35 majority-minority districts result from impermissible racial gerrymandering. In doing this, the Court disregards the detailed findings and thoroughly reasoned conclusions of the District Court—in particular its determination, reached after watching the development of

the case from complaint to trial, that no appellant proved (or even pleaded) district-specific claims with respect to the majority-minority districts. Worse still, the Court ignores the Democratic Conference's express waiver of these claims before this Court. It does this on the basis of a few stray comments, cherry-picked from district-court filings that are more Rorschach brief than Brandeis brief, in which the vague outline of what could be district-specific racial-gerrymandering claims begins to take shape only with the careful, post-hoc nudging of appellate counsel.

Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law. It is therefore understandable, if not excusable, that the Court balks at denying merits review simply because appellants pursued a flawed litigation strategy. But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.

I. The Alabama Democratic Conference

The District Court concluded that the Democratic Conference lacked standing to bring district-specific claims. It did so on the basis of the Conference's failure to present any evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them. 989 F. Supp. 2d, at 1292.

A voter has standing to bring a racial-gerrymandering claim only if he votes in a gerrymandered district, or if specific evidence demonstrates that he has suffered the special harms that attend racial gerrymandering. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995). However, the Democratic Conference only claimed to have "chapters and mem-

bers in *almost* all counties in the state." Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 3–4 (Democratic Conference Post-Trial Brief) (emphasis added). Yet the Court concludes that this fact, combined with the Conference's self-description as a "'statewide political caucus'" that endorses candidates for political office, "support[s] an inference that the organization has members in all of the State's majority-minority districts, other things being equal." *Ante,* at 269–270. The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing. See *Summers* v. *Earth Island Institute*, 555 U. S. 488, 497 (2009) (rejecting a test for organizational standing that asks "whether, accepting [an] organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury").

The inference to be drawn from the Conference's statements cuts in precisely the opposite direction. What is at issue here is not just counties but voting districts within counties. If the Conference has members in *almost* every county, then there must be counties in which it does not have members; and we have no basis for concluding (or inferring) that those counties do not contain all of the majority-minority voting districts. Moreover, even in those counties in which the Conference does have members, we have no basis for concluding (or inferring) that those members vote in majority-minority districts. The Conference had plenty of opportunities, including at trial, to demonstrate that this was the case, and failed to do so. This failure lies with the Democratic Conference, and the consequences should be borne by it, not by the people of Alabama, who must now shoulder the expense of further litigation and the uncertainty that attends a resuscitated constitutional challenge to their legislative districts.

Incredibly, the Court thinks that "elementary principles of procedural fairness" *require* giving the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial. *Ante*, at 270. It observes that the Conference had no reason to believe it should provide such information because "the State did *not* contest its membership in every district," and the opinion cites an affidavit lodged *with this Court* providing a list of the Conference's members in each majority-minority district in Alabama. *Ibid.* I cannot imagine why the absence of a state challenge would matter. Whether or not there was such a challenge, it was the Conference's responsibility, as "[t]he party invoking federal jurisdiction," to establish standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992). That responsibility was enforceable, challenge or no, by the court: "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990) (citations omitted). And because standing is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, *supra*, at 561.

The Court points to *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007), as support for its decision to sandbag Alabama with the Democratic Conference's out-of-time (indeed, out-of-court) lodging in this Court. The circumstances in that case, however, are far afield. The organization of parents in that case had established organizational standing in the lower court by showing that it had members with children who would be subject to the school district's "integration tiebreaker," which was applied at ninth grade. Brief for Re-

spondents, O. T. 2006, No. 05–908, p. 16. By the time the case reached this Court, however, the youngest of these children had entered high school, and so would no longer be subject to the challenged policy. *Ibid.* Accordingly, we accepted a lodging that provided names of additional, younger children in order to show that the organization had not *lost* standing as a result of the long delay that often accompanies federal litigation. Here, by contrast, the Democratic Conference's lodging in the Supreme Court is its first attempt to show that it has members in the majority-minority districts. This is too little, too late.

But that is just the start. Even if the Democratic Conference *had standing to bring* district-specific racial-gerrymandering claims, there remains the question whether it *did* bring them. Its complaint alleged three counts: (1) Violation of § 2 of the Voting Rights Act, (2) Racial gerrymandering in violation of the Equal Protection Clause, and (3) § 1983 violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Complaint in No. 2:12–cv–1081, Doc. 1, pp. 17–18. The racial-gerrymandering count alleged that "Alabama Acts 2012-602 and 2012-603 were drawn for the purpose and effect of minimizing the opportunity of minority voters to participate effectively in the political process," and that this "racial gerrymandering by Alabama Acts 2012-602 and 2012-603 violates the rights of Plaintiffs." *Id.*, at 17. It made no reference to specific districts that were racially gerrymandered; indeed, the only particular jurisdictions mentioned *anywhere* in the complaint were Senate District 11, Senate District 22, Madison County Senate Districts, House District 73, and Jefferson and Montgomery County House Districts. None of the Senate Districts is majority-minority. Nor is House District 73. Jefferson County does, admittedly, contain 8 of the 27 majority-minority House Districts in Alabama, and Montgomery County contains another 4, making a total of 12. But they also contain 14 majority-white House Dis-

tricts between them. In light of this, it is difficult to understand the Court's statement that appellants' "evidence and . . . arguments embody the claim that individual majority-minority districts were racially gerrymandered." *Ante*, at 265.

That observation would, of course, make sense if the Democratic Conference had developed such a claim in the course of discovery and trial. But in its post-trial Proposed Findings of Fact and Conclusions of Law, the Conference hewed to its original charge of statewide racial gerrymandering—or, rather, it did so as much as it reasonably could without actually proposing that the Court find *any* racial gerrymandering, statewide or otherwise. Instead, the Conference chose only to pursue claims that Alabama violated § 2 of the Voting Rights Act under two theories. See Democratic Conference Post-Trial Brief 91–103 (alleging a violation of the results prong of Voting Rights Act § 2) and 103–124 (alleging a violation of the purpose prong of Voting Rights Act § 2).

To be sure, the Conference employed language and presented factual claims at various points in its 126-page post-trial brief that are evocative of a claim of racial gerrymandering. But in clinging to these stray comments to support its conclusion that the Conference made district-specific racial-gerrymandering claims, *ante*, at 265–266, the Court ignores the context in which these comments appear—the context of a clear Voting Rights Act § 2 claim. Voting Rights Act claims and racial-gerrymandering claims share some of the same elements. See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 514 (2006) (SCALIA, J., concurring in judgment in part and dissenting in part). Thus, allegations made in the course of arguing a § 2 claim will often be indistinguishable from allegations that would be made in support of a racial-gerrymandering claim. The appearance of such allegations in one of the Conference's briefs might support reversal if this case came to us on appeal from

the District Court's grant of a motion to dismiss. See *Johnson* v. *City of Shelby*, 574 U. S. 10, 11 (2014) (*per curiam*) (noting that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). But here the District Court held a full trial before concluding that the Conference failed to make or prove any district-specific racial-gerrymandering claims with respect to the majority-minority districts. In this posture, and on this record, I cannot agree with the Court that the Conference's district-specific evidence, clearly made in the course of arguing a § 2 theory, should be read to give rise to district-specific claims of racial gerrymandering with respect to Alabama's majority-minority districts.

The Court attempts to shift responsibility for the Democratic Conference's ill-fated statewide theory from the Conference to the District Court, implying that it was the "legally erroneous" analysis of the District Court, *ante*, at 268, rather than the arguments made by the Conference, that conjured this "legal unicorn," *ante*, at 263, so that the Conference did not forfeit the claims that the Court now attributes to it, *ante*, at 268. I suspect this will come as a great surprise to the Conference. Whatever may have been presented to the District Court, the Conference unequivocally stated in its opening brief: "Appellants challenge Alabama's race-based statewide redistricting policy, *not* the design of any one particular election district." Brief for Appellants in No. 13–1138, p. 2 (emphasis added). It drove the point home in its reply brief: "[I]f the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy*, not to the design of each particular district one-by-one." Reply Brief in No. 11–1138, p. 7. How could anything be clearer? As the Court observes, the Conference attempted to walk back this unqualified description of its case at oral argument. *Ante*, at 268. Its assertion that what it *really* meant to chal-

lenge was the policy as applied to every district (*not* every majority-minority district, mind you) is not "clarification," *ibid.*, but an entirely new argument—indeed, the same argument it expressly disclaimed in its briefing. "We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U. S. 134, 140, n. 2 (2014); we certainly should not do so when the issue is first presented at oral argument.

II. The Alabama Legislative Black Caucus

The Court does not bother to disentangle the independent claims brought by the Black Caucus from those of the Democratic Conference, but it strongly implies that both parties asserted racial-gerrymandering claims with respect to Alabama's 35 majority-minority districts. As we have described, the Democratic Conference brought no such claims; and the Black Caucus's filings provide even weaker support for the Court's conclusion.

The Black Caucus complaint contained three counts: (1) Violation of One Person, One Vote, see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); (2) Dilution and Isolation of Black Voting Strength in violation of § 2 of the Voting Rights Act; and (3) Partisan Gerrymandering. Complaint in No. 2:12–cv–691, Doc. 1, pp. 15–22. The failure to raise *any* racial-gerrymandering claim was not a mere oversight or the consequence of inartful pleading. Indeed, in its amended complaint the Black Caucus specifically cited this Court's leading racial-gerrymandering case for the proposition that "traditional or neutral districting principles may not be subordinated in a dominant fashion by *either racial or partisan interests* absent a compelling state interest for doing so." Amended Complaint in No. 2:12–cv–691, Doc. 60, p. 23 (citing *Shaw* v. *Reno*, 509 U. S. 630, 642 (1993); emphasis added). This quote appears in the first paragraph under the "Partisan Gerrymandering" heading, and claims of subordination

to *racial* interests are notably absent from the Black Caucus complaint.

Racial gerrymandering was not completely ignored, however. In a brief introductory paragraph to the amended complaint, before addressing jurisdiction and venue, the Black Caucus alleged that "Acts 2012–602 and 2012–603 are racial gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution with both the purpose and effect of minimizing black voting strength and isolating from influence in the Alabama Legislature legislators chosen by African Americans." Amended Complaint, at 3. This was the first and last mention of racial gerrymandering, and like the Democratic Conference's complaint, it focused exclusively on the districting maps as a whole rather than individual districts. Moreover, even this allegation appears primarily concerned with the use of racially motivated districting as a means of violating one person, one vote (by splitting counties), and § 2 of the Voting Rights Act (by minimizing and isolating black voters and legislators).

To the extent the Black Caucus cited particular districts in the body of its complaint, it did so only with respect to its enumerated one-person, one-vote, Voting Rights Act, and partisan-gerrymandering counts. See, *e. g.*, *id.*, at 13–14 (alleging that the "deviation restriction and disregard of the 'whole county' requirements . . . facilitated the Republican majority's efforts to gerrymander the district boundaries in Acts 2012–602 and 2012–603 for partisan purposes. By packing the majority-black House and Senate districts, the plans remove reliable Democratic voters from adjacent majority-white districts . . . "); *id.*, at 36 ("The partisan purpose of [one] gerrymander was to remove predominately black Madison County precincts to SD 1, avoiding a potential crossover district"); *id.*, at 44–45 (asserting that "splitting Jefferson County among 11 House and Senate districts" and "increasing the size of its local legislative delegation and the

number of other counties whose residents elect members" of the delegation "dilut[es] the votes of Jefferson County residents" by diminishing their ability to control county-level legislation in the state legislature). And even these claims were made with a statewide scope in mind. *Id.*, at 55 ("Viewed in their entirety, the plans in Acts 2012–602 and 2012–603 have the purpose and effect of minimizing the opportunities for black and white voters who support the Democratic Party to elect candidates of their choice").

Here again, discovery and trial failed to produce any clear claims with respect to the majority-minority districts. In a curious inversion of the Democratic Conference's practice of pleading racial gerrymandering and then effectively abandoning the claims, the Black Caucus, which failed to plead racial gerrymandering, did clearly advance the theory after the trial. See Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 2:12–cv–691, Doc. 194, pp. 48–51 (Black Caucus Post-Trial Brief). The Black Caucus asserted racial-gerrymandering claims in its post-trial brief, but they all had a clear statewide scope. It charged that Alabama "started their line drawing with the majority-black districts" so as to maximize the size of their black majorities, which "impacted the drawing of majority-white districts in nearly every part of the state." *Id.*, at 48–49. "[R]ace was the predominant factor in drafting both plans," *id.*, at 49, which "drove nearly every districting decision," "dilut[ing] the influence of black voters in the majority-white districts," *id.*, at 50.

The Black Caucus did present district-specific evidence in the course of developing its other legal theories. Although this included evidence that Alabama manipulated the racial composition of certain majority-minority districts, it also included evidence that Alabama manipulated racial distributions with respect to the districting maps as a whole, *id.*, at 6 ("Maintaining the same high black percentages had a

predominant impact on the entire plan"), and with respect to majority-white districts, *id.*, at 10–11 ("Asked why [majority-white] SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts"), and 43–44 ("Sen. Irons' quick, 'primative' [*sic*] analysis of the new [majority-white] SD 1 convinced her that it was designed to 'shed' the minority population of Sen. Sanford's [majority-white] SD 7 to SD 1" in order to "crack a minority influence district"). The Black Caucus was attacking the legislative districts from every angle. Nothing gives rise to an inference that it ever homed in on majority-minority districts—or, for that matter, any particular set of districts. Indeed, the fair reading of the Black Caucus's filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.

III. Conclusion

Frankly, I do not know what to make of appellants' arguments. They are pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything. This, the Court believes, justifies demanding that the District Court go back and squint harder, so that it may divine some new means of construing the filings. This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past. See, *e. g.*, Amended Complaint and Motion for Preliminary and Permanent Injunction in

Cromartie v. *Hunt*, No. 4:96–cv–104 (EDNC), Doc. 21, p. 9 ("Under the March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation," which were "the fruit of [earlier] racially gerrymandered plans"). Even the complaint in *Shaw*, which established a cause of action for racial gerrymandering, displayed greater lucidity than appellants', alleging that defendants "creat[ed] two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota" "totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest." Complaint and Motion for Preliminary and Permanent Injunction and for Temporary Restraining Order in *Shaw* v. *Barr*, No. 5:92–cv–202 (EDNC), Doc. 1, pp. 11–12.

The Court seems to acknowledge that appellants never focused their racial-gerrymandering claims on Alabama's majority-minority districts. While remanding to consider whether the majority-minority districts were racially gerrymandered, it admits that plaintiffs "basically claim that the State, in adding so many new minority voters to majority-minority districts (*and to others*), went too far." *Ante*, at 260 (emphasis added). It further concedes that appellants "relied heavily upon statewide evidence," and that they "also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well." *Ante*, at 266.

The only reason I see for the Court's selection of the majority-minority districts as the relevant set of districts for the District Court to consider on remand is that this was the set chosen by appellants after losing on the claim they actually presented in the District Court. By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and

repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case.

Accordingly, I dissent.

JUSTICE THOMAS, dissenting.

"[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder* v. *Hall*, 512 U. S. 874, 907 (1994) (THOMAS, J., concurring in judgment). These consolidated cases are yet another installment in the "disastrous misadventure" of this Court's voting rights jurisprudence. *Id.*, at 893. We have somehow arrived at a place where the parties agree that Alabama's legislative districts should be fine-tuned to achieve some "optimal" result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the "best" racial quota.

I join JUSTICE SCALIA's dissent. I write only to point out that, as these cases painfully illustrate, our jurisprudence in this area continues to be infected with error.

I

The Alabama Legislature faced a difficult situation in its 2010 redistricting efforts. It began with racially segregated district maps that were inherited from previous decades. The maps produced by the 2001 redistricting contained 27 majority-black House districts and 8 majority-black Senate districts—both at the time they were drawn, 989 F. Supp. 2d 1227, 1253–1254 (MD Ala. 2013), and at the time of the 2010 census, App. 103–108. Many of these majority-black districts were over 70% black when they were drawn in 2001, and even more were over 60% black. 989 F. Supp. 2d, at 1253–1254. Even after the 2010 census, the population remained above 60% black in the majority of districts. App. 103–108.

Under the 2006 amendments to § 5 of the Voting Rights Act of 1965, Alabama was also under a federal command to avoid drawing new districts that would "have the effect of diminishing the ability" of black voters "to elect their preferred candidates of choice." 52 U. S. C. § 10304(b). To comply with § 5, the legislature adopted a policy of maintaining the same percentage of black voters within each of those districts as existed in the 2001 plans. See *ante*, at 273–274. This, the districting committee thought, would preserve the ability of black voters to elect the same number of preferred candidates. 989 F. Supp. 2d, at 1307. The Department of Justice (DOJ) apparently agreed. Acting under its authority to administer § 5 of the Voting Rights Act, the DOJ precleared Alabama's plans.[1] *Id.*, at 1311.

Appellants—including the Alabama Legislative Black Caucus and the Alabama Democratic Conference—saw matters differently. They sued Alabama, and on appeal they argue that the State's redistricting plans are racially gerrymandered because many districts are highly packed with black voters. According to appellants, black voters would have more voting power if they were spread over more districts rather than concentrated in the same number of districts as in previous decades. The DOJ has entered the fray in support of appellants, arguing that the State's redistricting maps fail strict scrutiny because the State focused too heavily on a single racial characteristic—the number of black voters in majority-minority districts—which potentially resulted in impermissible packing of black voters.

[1] As I have previously explained, § 5 of the Voting Rights Act is unconstitutional. See *Shelby County* v. *Holder*, 570 U. S. 529, 557–559 (2013) (concurring opinion). And § 5 no longer applies to Alabama after the Court's decision in *Shelby County*. See *id.*, at 556–557 (majority opinion). Because appellants' claims are not properly before us, however, I express no opinion on whether compliance with § 5 was a compelling governmental purpose at the time of Alabama's 2012 redistricting, nor do I suggest that Alabama would necessarily prevail if appellants had properly raised district-specific claims.

Like the DOJ, today's majority sides with appellants, faulting Alabama for choosing the wrong percentage of blacks in the State's majority-black districts, or at least for arriving at that percentage using the wrong reasoning. In doing so, the Court—along with appellants and the DOJ—exacerbates a problem many years in the making. It seems fitting, then, to trace that history here. The practice of creating highly packed—"safe"—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin. Alabama's current legislative districts have their genesis in the "max-black" policy that the DOJ itself applied to § 5 throughout the 1990's and early 2000's. The 2006 amendments to § 5 then effectively locked in place Alabama's max-black districts that were established during the 1990's and 2000's. These three problems—a jurisprudence requiring segregated districts, the distortion created by the DOJ's max-black policy, and the ossifying effects of the 2006 amendments—are the primary culprits in these cases, not Alabama's redistricting policy. Nor does this Court have clean hands.

II

This Court created the current system of race-based redistricting by adopting expansive readings of § 2 and § 5 of the Voting Rights Act. Both § 2 and § 5 prohibit States from implementing voting laws that "den[y] or abridg[e] the right to vote on account of race or color." §§ 10304(a), 10301(a). But both provisions extend to only certain types of voting laws: any "voting qualification or prerequisite to voting, or standard, practice, or procedure." *Ibid.* As I have previously explained, the terms "'standard, practice, or procedure' . . . refer only to practices that affect minority citizens' access to the ballot," such as literacy tests. *Holder*, 512 U. S., at 914 (opinion concurring in judgment). They do not apply to "[d]istricting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted." *Ibid.* Yet this Court has adopted

far-reaching interpretations of both provisions, holding that they encompass legislative redistricting and other actions that might "dilute" the strength of minority votes. See generally *Thornburg* v. *Gingles*, 478 U. S. 30 (1986) (§2 "vote dilution" challenge to legislative districting plan); see also *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 583–587 (1969) (Harlan, J., concurring in part and dissenting in part).

The Court's interpretation of §2 and §5 have resulted in challenge after challenge to the drawing of voting districts. See, *e. g.*, *Bartlett* v. *Strickland*, 556 U. S. 1 (2009); *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399 (2006); *Georgia* v. *Ashcroft*, 539 U. S. 461 (2003); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320 (2000) (*Bossier II*); *Hunt* v. *Cromartie*, 526 U. S. 541 (1999); *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471 (1997) (*Bossier I*); *Bush* v. *Vera*, 517 U. S. 952 (1996); *Shaw* v. *Hunt*, 517 U. S. 899 (1996); *Miller* v. *Johnson*, 515 U. S. 900 (1995); *United States* v. *Hays*, 515 U. S. 737 (1995); *Holder*, *supra*; *Johnson* v. *De Grandy*, 512 U. S. 997 (1994); *Growe* v. *Emison*, 507 U. S. 25 (1993); *Shaw* v. *Reno*, 509 U. S. 630 (1993); *Voinovich* v. *Quilter*, 507 U. S. 146 (1993).

The consequences have been as predictable as they are unfortunate. In pursuing "undiluted" or maximized minority voting power, "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." *Holder*, *supra*, at 892 (THOMAS, J., concurring in judgment). Section 5, the provision at issue here, has been applied to require States that redistrict to maintain the number of pre-existing majority-minority districts, in which minority voters make up a large enough portion of the population to be able to elect their candidate of choice. See, *e. g.*, *Miller*, *supra*, at 923–927 (rejecting the DOJ's policy of requiring States to increase the number of majority-black districts because maintaining the same number of majority-black districts would not violate §5).

In order to maintain these "racially 'safe boroughs,'" States or courts must perpetually "divid[e] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands." *Holder*, 512 U. S., at 905 (opinion of THOMAS, J.) (internal quotation marks omitted). The assumptions underlying this practice of creating and maintaining "safe minority districts"—"that members of [a] racial group must think alike and that their interests are so distinct that they must be provided a separate body of representatives"—remain "repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.*, at 905–906. And, as predicted, the States' compliance efforts have "embroil[ed] the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created." *Id.*, at 905. It is this fateful system that has produced these cases.

III

A

In tandem with our flawed jurisprudence, the DOJ has played a significant role in creating Alabama's current redistricting problem. It did so by enforcing § 5 in a manner that required States, including Alabama, to create supermajority-black voting districts or face denial of preclearance.

The details of this so-called "max-black" policy were highlighted in federal court during Georgia's 1991 congressional redistricting. See *Johnson* v. *Miller*, 864 F. Supp. 1354, 1360–1361 (SD Ga. 1994). On behalf of the Black Caucus of the Georgia General Assembly, the American Civil Liberties Union (ACLU) submitted a redistricting proposal to the Georgia Legislature that became known as the "max-black plan." *Id.*, at 1360. The ACLU's map created two new "black" districts and "further maximized black voting strength by pushing the percentage of black voters within its majority-black districts as high as possible." *Id.*, at 1361 (internal quotation marks omitted).

The DOJ denied several of Georgia's proposals on the ground that they did not include enough majority-black districts. *Id.*, at 1366. The plan it finally approved was substantially similar to the ACLU's max-black proposal, *id.*, at 1364–1366, creating three majority-black districts, with total black populations of 56.63%, 62.27%, and 64.07%, *id.*, at 1366, and n. 12.[2]

Georgia was not the only State subject to the DOJ's maximization policy. North Carolina, for example, submitted a congressional redistricting plan after the 1990 census, but the DOJ rejected it because it did not create a new majority-minority district, and thus "appear[ed] to minimize minority voting strength." *Shaw* v. *Barr*, 808 F. Supp. 461, 463–464 (EDNC 1992) (quoting Letter from John R. Dunne, Assistant Attorney General of N. C., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney General of N. C., 4 (Dec. 18, 1991)). The DOJ likewise pressured Louisiana to create a new majority-black district when the State sought approval of its congressional redistricting plan following the 1990 census. See *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1190 (WD La. 1993), vacated on other grounds by *Louisiana* v. *Hays*, 512 U. S. 1230 (1994).

Although we eventually rejected the DOJ's max-black policy, see *Miller*, 512 U. S., at 924–927, much damage to the States' congressional and legislative district maps had already been done. In those States that had enacted districting plans in accordance with the DOJ's max-black policy, the prohibition on retrogression under § 5 meant that the legislatures were effectively required to maintain those max-black plans during any subsequent redistricting. That is what happened in Alabama.

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[2] The District Court found it "unclear whether DOJ's maximization policy was driven more by [the ACLU's] advocacy or DOJ's own misguided reading of the Voting Rights Act," and it concluded that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Miller*, 864 F. Supp., at 1368.

B

Alabama's 2010 redistricting plans were modeled after max-black-inspired plans that the State put in place in the 1990's under the DOJ's max-black policy. See generally *Kelley* v. *Bennett*, 96 F. Supp. 2d 1301 (MD Ala. 2000), vacated on other grounds by *Sinkfield* v. *Kelley*, 531 U. S. 28 (2000) (*per curiam*).

Following the 1990 census, the Alabama Legislature began redrawing its state legislative districts. After several proposals failed in the legislature, a group of plaintiffs sued, and the State entered into a consent decree agreeing to use the "Reed-Buskey" plan. 96 F. Supp. 2d, at 1309. The primary designer of this plan was Dr. Joe Reed, the current chairman of appellant Alabama Democratic Conference. According to Dr. Reed, the previous plan from the 1980's was not "fair" because it did not achieve the number of "black-preferred" representatives that was proportionate to the percentage of blacks in the population. *Id.*, at 1310. And because of the DOJ's max-black policy, "it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials." *Id.*, at 1310, n. 14. "Dr. Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." *Id.*, at 1310. Illustrating this strategy, Alabama's letter to the DOJ seeking preclearance of the Reed-Buskey plan "emphasize[d] the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature," *ibid.*, n. 14, and boasted that the plan had created four new majority-black districts and two additional majority-black Senate districts, *ibid.*

Dr. Reed populated these districts with a percentage of black residents that achieved an optimal middle ground—a "happy medium"—between too many and too few. *Id.*, at 1311. Twenty-three of the twenty-seven majority-black House districts were between 60% and 70% black under

Reed's plan, *ibid.*, and Senate District 26—one of the districts at issue today—was pushed from 65% to 70% black, *id.*, at 1315.[3] A District Court struck down several districts created in the Reed-Buskey plan as unconstitutionally based on race. *Id.*, at 1324. This Court reversed, however, holding that the plaintiffs lacked standing because they did not live in the gerrymandered districts. *Sinkfield*, *supra*, at 30–31.

The Reed-Buskey plan thus went into effect and provided the template for the State's next redistricting efforts in 2001. See *Montiel* v. *Davis*, 215 F. Supp. 2d 1279, 1282 (SD Ala. 2002). The 2001 maps maintained the same number of majority-black districts as the Reed-Buskey plan had created: 27 House districts and 8 Senate districts. *Ibid.* And "to maintain the same relative percentages of black voters in those districts," the legislature "redrew the districts by shifting more black voters into the majority-black districts." 989 F. Supp. 2d, at 1235. The State's letters requesting preclearance of the 2001 plans boasted that the maps maintained the same number of majority-black districts and the same (or higher) percentages of black voters within those districts, other than "slight reductions" that were "necessary to satisfy other legitimate, nondiscriminatory redistricting considerations." Letter from William H. Pryor, Alabama Attorney General, to Voting Section Chief, Civil Rights Div., Dept. of Justice 6–7 (Aug. 14, 2001) (Senate districts); Letter from William H. Pryor, Alabama Attorney General, to Voting

[3] In this litigation, Dr. Reed and the Alabama Democratic Conference argue that the percentage of black residents needed to maintain the ability to elect a black-preferred candidate is lower than it was in the 2000's because black participation has increased over the last decade. Brief for Appellants in No. 13–1138, pp. 39–40. Although appellants disclaim any argument that the State must achieve an optimal percentage of black voters in majority-black districts, *id.*, at 35, it is clear that that is what they seek: a plan that maximizes voting strength by maintaining "safe" majority-minority districts while also spreading black voters into other districts where they can influence elections, *id.*, at 17–18.

Section Chief, Civil Rights Div., Dept. of Justice 7, 9 (Sept. 4, 2001) (House districts).

Section 5 tied the State to those districts: Under this Court's § 5 precedents, States are prohibited from enacting a redistricting plan that "would lead to a retrogression in the position of racial minorities." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In other words, the State could not retrogress from the previous plan if it wished to comply with § 5.

IV

Alabama's quandary as it attempted to redraw its legislative districts after 2010 was exacerbated by the 2006 amendments to § 5. Those amendments created an inflexible definition of "retrogression" that Alabama understandably took as requiring it to maintain the same percentages of minority voters in majority-minority districts. The amendments thus provide the last piece of the puzzle that explains why the State sought to maintain the same percentages of blacks in each majority-black district.

Congress passed the 2006 amendments in response to our attempt to define "retrogression" in *Georgia* v. *Ashcroft*, 539 U. S. 461. Prior to that decision, practically any reapportionment change could "be deemed 'retrogressive' under our vote dilution jurisprudence by a court inclined to find it so." *Bossier I*, 520 U. S., at 490–491 (THOMAS, J., concurring). "[A] court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts)." *Id.*, at 491. Our § 5 jurisprudence thus "inevitably force[d] the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments courts are ill equipped to make." *Id.*, at 492.

We tried to pull the courts and the DOJ away from making these sorts of judgments in *Georgia* v. *Ashcroft*, *supra*. Insofar as § 5 applies to the drawing of voting districts, we

held that a District Court had wrongly rejected Georgia's reapportionment plan, and we adopted a retrogression standard that gave States flexibility in determining the percentage of black voters in each district. *Id.*, at 479–481. As we explained, "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." *Id.*, at 480. Alternatively, "a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Ibid.* We noted that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice," even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts. *Id.*, at 481. Thus, States would be permitted to make judgments about how best to prevent retrogression in a minority group's voting power, including assessing the range of appropriate minority population percentages within each district. *Id.*, at 480–481.

In response, Congress amended § 5 and effectively overruled *Georgia* v. *Ashcroft*. See 120 Stat. 577. The 2006 amendments added subsection (b), which provides:

> "Any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of . . . this section." 52 U. S. C. § 10304(b). See § 5, 120 Stat. 577.

Thus, any change that has the effect of "diminishing the ability" of a minority group to "elect their preferred candidate of choice" is retrogressive.

Some were rightly worried that the 2006 amendments would impose too much inflexibility on the States as they sought to comply with § 5. Richard Pildes, who argued on behalf of the Alabama Democratic Conference in these cases, testified in congressional hearings on the 2006 amendments. He explained that *Georgia* v. *Ashcroft* "recognizes room . . . for some modest flexibility in Section 5," and warned that if "Congress overturns *Georgia* v. *Ashcroft*, it will make even this limited amount of flexibility illegal." Hearing on the Continuing Need for Section 5 Pre-Clearance before the Senate Committee on the Judiciary, 109th Congress, 2d Sess., 11–12 (2006). Pildes also observed that the proposed standard of "no 'diminished ability to elect' . . . has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests." *Id.*, at 12. Although this testimony says nothing about how § 5 ought to be interpreted, it tells us that the Alabama Democratic Conference's own attorney believes that the State was subject to a "rigi[d]" and "mechanical" standard in determining the number of black voters that must be maintained in a majority-black district.

V

All of this history explains Alabama's circumstances when it attempted to redistrict after the 2010 census. The legislature began with the max-black district maps that it inherited from the days of Reed-Buskey. Using these inherited maps, combined with population data from the 2010 census, many of the State's majority-black House and Senate districts were between 60% and 70% black, and some were over 70%. 989 F. Supp. 2d, at 1287–1289. And the State was prohibited from drawing new districts that would "have the effect of diminishing the ability" of blacks "to elect their preferred candidates of choice." § 10304(b). The legislature thus adopted a policy of maintaining the same number of majority-black districts and roughly the same percentage of blacks within each of those districts. See *ante*, at 273–274.

The majority faults the State for taking this approach. I do not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help. States covered by § 5 have been whipsawed, first required to create "safe" majority-black districts, then told not to "diminis[h]" the ability to elect, and now told they have been too rigid in preventing any "diminishing" of the ability to elect. *Ante,* at 275.

Worse, the majority's solution to appellants' gerrymandering claims requires States to analyze race even *more* exhaustively, not less, by accounting for black voter registration and turnout statistics. *Ante,* at 276–278. The majority's command to analyze black voting patterns en route to adopting the "correct" racial quota does nothing to ease the conflict between our colorblind Constitution and the "consciously segregated districting system" the Court has required in the name of equality. *Holder*, 512 U. S., at 907. Although I dissent today on procedural grounds, I also continue to disagree with the Court's misguided and damaging jurisprudence.

Syllabus

GRADY *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 14–593. Decided March 30, 2015

After petitioner Grady served his sentence for a second sex offense, a state court ordered him to enroll in a satellite-based monitoring program as a recidivist sex offender. The court rejected Grady's argument that the State's monitoring program—under which he would be forced to wear tracking devices at all times—violated his Fourth Amendment right to be free from unreasonable searches and seizures. Grady renewed his challenge on appeal, relying on *United States* v. *Jones*, 565 U. S. 400, in which this Court held that police officers engaged in a Fourth Amendment search when they installed and monitored a Global Positioning System tracking device on a suspect's car. The State Court of Appeals distinguished *Jones* on the ground that it was decided in the context of a defendant's motion to suppress evidence, rather than in a civil proceeding about monitoring. The State Supreme Court summarily dismissed Grady's appeal and denied his petition for discretionary review.

Held: The state courts' determination that a system of nonconsensual satellite-based monitoring does not entail a Fourth Amendment search is inconsistent with this Court's precedents. See *Jones*, 565 U. S., at 404, 406, n. 3; *Florida* v. *Jardines*, 569 U. S. 1, 5–6. Under those precedents—which hold that the government conducts a search when it physically intrudes on a constitutionally protected area in order to obtain information—a State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements. In concluding otherwise, the State Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is civil in nature. But "the Fourth Amendment's protection extends beyond the sphere of criminal investigations," *Ontario* v. *Quon*, 560 U. S. 746, 755, and the government's purpose in collecting information does not control whether the method of collection constitutes a search. The State's monitoring program is plainly designed to obtain information, and since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search. Because the state courts did not view the monitoring program as a search, they did not decide whether it is reasonable. That determination, which de-

pends on the totality of the circumstances, will not be made by this Court in the first instance.

Certiorari granted; 367 N. C. 523, 762 S. E. 2d 460, vacated and remanded.

PER CURIAM.

Petitioner Torrey Dale Grady was convicted in North Carolina trial courts of a second degree sexual offense in 1997 and of taking indecent liberties with a child in 2006. After serving his sentence for the latter crime, Grady was ordered to appear in New Hanover County Superior Court for a hearing to determine whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender. See N. C. Gen. Stat. Ann. §§ 14–208.40(a)(1), 14–208.40B (2013). Grady did not dispute that his prior convictions rendered him a recidivist under the relevant North Carolina statutes. He argued, however, that the monitoring program—under which he would be forced to wear tracking devices at all times—would violate his Fourth Amendment right to be free from unreasonable searches and seizures. Unpersuaded, the trial court ordered Grady to enroll in the program and be monitored for the rest of his life. Record in No. COA13–958 (N. C. App.), pp. 3–4, 18–22.

Grady renewed his Fourth Amendment challenge on appeal, relying on this Court's decision in *United States* v. *Jones*, 565 U. S. 400 (2012). In that case, this Court held that police officers had engaged in a "search" within the meaning of the Fourth Amendment when they installed and monitored a Global Positioning System (GPS) tracking device on a suspect's car. The North Carolina Court of Appeals rejected Grady's argument, concluding that it was foreclosed by one of its earlier decisions. App. to Pet. for Cert. 5a–7a. In that decision, coincidentally named *State* v. *Jones*, the court had said:

> "Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing

> an ankle bracelet to an individual must constitute a search of the individual as well. We disagree. The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States* v.] *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence. We conclude, therefore, that the specific holding in [*United States* v.] *Jones* does not control in the case *sub judice*." 231 N. C. App. 123, 127, 750 S. E. 2d 883, 886 (2013).

The court in Grady's case held itself bound by this reasoning and accordingly rejected his Fourth Amendment challenge. App. to Pet. for Cert. 6a–7a. The North Carolina Supreme Court in turn summarily dismissed Grady's appeal and denied his petition for discretionary review. 367 N. C. 523, 762 S. E. 2d 460 (2014). Grady now asks us to reverse these decisions.*

The only explanation provided below for the rejection of Grady's challenge is the quoted passage from *State* v. *Jones*. And the only theory we discern in that passage is that the State's system of nonconsensual SBM does not entail a search within the meaning of the Fourth Amendment. That theory is inconsistent with this Court's precedents.

In *United States* v. *Jones*, we held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 565 U. S., at 404 (footnote omitted). We stressed the importance of the fact that the Government had "physically occupied private property for the purpose of obtaining information." *Ibid.* Under such circumstances, it

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*Grady aims his petition at the decisions of both North Carolina appellate courts. See Pet. for Cert. 1. Because we treat the North Carolina Supreme Court's dismissal of an appeal for lack of a substantial constitutional question as a decision on the merits, it is that court's judgment, rather than the judgment of the Court of Appeals, that is subject to our review under 28 U. S. C. § 1257(a). See *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 138–139 (1986).

was not necessary to inquire about the target's expectation of privacy in his vehicle's movements in order to determine if a Fourth Amendment search had occurred. "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Id.*, at 406–407, n. 3.

We reaffirmed this principle in *Florida* v. *Jardines*, 569 U. S. 1, 5–6 (2013), where we held that having a drug-sniffing dog nose around a suspect's front porch was a search, because police had "gathered . . . information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner." See also *id.*, at 11 (a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas"). In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.

In concluding otherwise, the North Carolina Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is civil in nature. See *Jones*, 231 N. C. App., at 127, 750 S. E. 2d, at 886 ("the instant case . . . involves a civil SBM proceeding"). "It is well settled," however, "that the Fourth Amendment's protection extends beyond the sphere of criminal investigations," *Ontario* v. *Quon*, 560 U. S. 746, 755 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967) (housing inspections are "administrative searches" that must comply with the Fourth Amendment).

In its brief in opposition to certiorari, the State faults Grady for failing to introduce "evidence about the State's implementation of the SBM program or what information, if

any, it currently obtains through the monitoring process." Brief in Opposition 11. Without evidence that it is acting to obtain information, the State argues, "there is no basis upon which this Court can determine whether North Carolina conducts a 'search' of an offender enrolled in its SBM program." *Ibid.* (citing *Jones*, 565 U. S., at 408, n. 5 (noting that a government intrusion is not a search unless "done to obtain information")). In other words, the State argues that we cannot be sure its program for satellite-based *monitoring* of sex offenders collects any information. If the very name of the program does not suffice to rebut this contention, the text of the statute surely does:

> "The satellite-based monitoring program shall use a system that provides all of the following:
>
> "(1) Time-correlated and continuous tracking of the geographic location of the subject . . . .
>
> "(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements." N. C. Gen. Stat. Ann. § 14–208.40(c).

The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.

That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. See, *e. g.*, *Samson* v. *California*, 547 U. S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995) (random drug testing of student athletes was reasonable). The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

The petition for certiorari is granted, the judgment of the Supreme Court of North Carolina is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

WOODS, WARDEN *v.* DONALD

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

No. 14–618. Decided March 30, 2015

Respondent Donald's counsel in his state-court trial for felony murder and armed robbery briefly left the courtroom during testimony concerning Donald's codefendants, having indicated that this particular testimony did not apply to his client. Donald was convicted. The Michigan Court of Appeals rejected Donald's claim that he was entitled to a new trial because his attorney's absence denied him his Sixth Amendment right to effective assistance of counsel, and the State Supreme Court denied review. A Federal District Court, however, granted him habeas relief. The Sixth Circuit affirmed, holding that the State Court of Appeals' decision was both contrary to, and involved an unreasonable application of, this Court's decision in *United States* v. *Cronic*, 466 U. S. 648.

Held: The Sixth Circuit should not have affirmed the *Cronic*-based grant of habeas relief in this case. Under the exacting standard of the Antiterrorism and Effective Death Penalty Act of 1996, the State Court of Appeals' decision was not contrary to any clearly established holding of this Court. This Court has never addressed whether *Cronic*'s rule—that courts may presume that a defendant has suffered unconstitutional prejudice if he "is denied counsel at a critical stage of his trial," 466 U. S., at 659—applies to testimony regarding codefendants' actions. The Sixth Circuit's conclusion that a government witness's testimony "is similar to the trial events that th[is] Court has deemed to be critical stages," *Donald* v. *Rapelje*, 580 Fed. Appx. 277, 284, is doubly wrong. First, if the circumstances of a case are only "similar to" this Court's precedents, then the state court's decision is not "contrary to" the holdings in those cases. See, *e. g.*, *Carey* v. *Musladin*, 549 U. S. 70, 76–77, and n. 2. Second, the Sixth Circuit framed the issue at too high a level of generality, see, *e. g.*, *Lopez* v. *Smith*, 574 U. S. 1, for the relevant testimony was not merely a government witness's testimony but was prosecution testimony *about other defendants*. Nor was the state court's decision an unreasonable application of this Court's cases. Within the contours of *Cronic*, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case.

Certiorari granted; 580 Fed. Appx. 277, reversed and remanded.

PER CURIAM.

Federal courts may grant habeas corpus relief if the underlying state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U. S. C. § 2254(d)(1). Here, the Sixth Circuit held that respondent Cory Donald's attorney provided *per se* ineffective assistance of counsel under *United States* v. *Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. Because no decision from this Court clearly establishes that Donald is entitled to relief under *Cronic*, we reverse.

I

After a day of drinking and smoking marijuana, Cory Donald and four others—Seante Liggins, Rashad Moore, Dewayne Saine, and Fawzi Zaya—decided to rob a drug dealer named Mohammed Makki. Donald, Moore, and Liggins drove to Makki's home in Dearborn, Michigan, wearing black skull caps and coats. Moore and Donald entered the house, while Liggins waited in the car.

Michael McGinnis, one of Makki's drug runners, was in the house at the time. When Donald and Moore came through the door, McGinnis raised his hands and dropped facedown to the floor. He heard a scuffle in the kitchen and two gunshots as someone said, "'[L]et it go.'" *Donald* v. *Rapelje*, 580 Fed. Appx. 277, 279 (CA6 2014). After that, McGinnis felt a gun on the back of his head while someone rifled through his pockets saying, "'[W]hat you got, what you got?'" *Donald* v. *Rapelje*, 2012 WL 6047130, *3 (ED Mich., Dec. 5, 2012). He also heard one of the two men whisper to the other, "'I got shot, I got shot.'" 580 Fed. Appx., at 279. After Moore and Donald left, McGinnis found Makki slumped against the refrigerator dying.

About seven minutes after they entered the house, Moore and Donald returned, guns in hand, to Liggins' car. Donald told the others that he had stolen $320 and that Moore had

accidentally shot him during the crime. That night, Donald checked into a hospital for a gunshot wound to his foot. Police arrested him about three weeks later.

The State charged Donald with one count of first-degree felony murder and two counts of armed robbery. Liggins and Zaya pleaded guilty, and Donald was tried with Moore and Saine. His defense theory was that he was present at the scene of the crime but he did not participate. At trial, the government sought to admit a chart chronicling phone calls from the day of the crime among Moore, Saine, and Zaya. Moore and Saine's attorneys objected, but Donald's attorney declined, saying: "'I don't have a dog in this race. It does not affect me at all.'" *Id.*, at 280. The court admitted the exhibit and took a short recess.

When the trial resumed, Donald's counsel was not in the courtroom. At first, the judge indicated that he would wait for the attorney. But he then decided to proceed because Donald's counsel had already indicated that the exhibit and testimony did not apply to his client. About 10 minutes later, the lawyer returned. The judge informed him that "'up until that point we only were discussing the telephone chart,'" to which the attorney replied, "'[Y]es, your Honor, and as I had indicated on the record, I had no dog in the race and no interest in that.'" *Ibid.*

The jury found Donald guilty on all three counts. He was sentenced to life imprisonment for the felony-murder count and to concurrent prison terms of 10½ to 20 years for each of the armed robbery counts. On appeal, Donald argued that he was entitled to a new trial because his attorney's absence during the phone call testimony denied him his Sixth Amendment right to effective assistance of counsel. The Michigan Court of Appeals rejected his claim, and the Michigan Supreme Court denied review.

The United States District Court for the Eastern District of Michigan granted federal habeas relief, and the Sixth Circuit affirmed. The Sixth Circuit held that the Michi-

gan Court of Appeals' decision was both contrary to and involved an unreasonable application of this Court's decision in *Cronic*. In the normal course, defendants claiming ineffective assistance of counsel must satisfy the familiar framework of *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984), which requires a showing that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." And when reviewing an ineffective-assistance-of-counsel claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689.

In *Cronic*, however, we held that courts may presume that a defendant has suffered unconstitutional prejudice if he "is denied counsel at a critical stage of his trial." 466 U. S., at 659. And in *Bell* v. *Cone*, 535 U. S. 685, 696 (2002), we characterized a "critical stage" as one that "held significant consequences for the accused." According to the Sixth Circuit, these statements should have compelled the Michigan court to hold that the phone call testimony was a "critical stage" and that counsel's absence constituted *per se* ineffective assistance. Without identifying any decision from this Court directly in point, the Sixth Circuit concluded that the relevant testimony in this case was "similar to" our cases applying *Cronic*. 580 Fed. Appx., at 284.

II

A

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from this Court, or was "based on an unreasonable determination of the facts." 28 U. S. C. § 2254(d). Donald does not argue that the state-court decision in his

case was factually erroneous. Instead, he argues that the decision was both contrary to and involved an unreasonable application of this Court's ineffective-assistance-of-counsel cases.

AEDPA's standard is intentionally "'"difficult to meet."'" *White* v. *Woodall*, 572 U. S. 415, 419 (2014) (quoting *Metrish* v. *Lancaster*, 569 U. S. 351, 358 (2013)). We have explained that "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White*, 572 U. S., at 419 (some internal quotation marks omitted). "And an 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Ibid.* (same). To satisfy this high bar, a habeas petitioner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

Adherence to these principles serves important interests of federalism and comity. AEDPA's requirements reflect a "presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*). When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong. Federal habeas review thus exists as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington*, *supra*, at 102–103 (internal quotation marks omitted). This is especially true for claims of ineffective assistance of counsel, where AEDPA review must be "'"doubly deferential"'" in order to afford "both the state court and the defense attor-

ney the benefit of the doubt." *Burt* v. *Titlow*, 571 U. S. 12, 15 (2013) (quoting *Cullen* v. *Pinholster*, 563 U. S. 170, 190 (2011)).

B

The Sixth Circuit should not have affirmed the *Cronic*-based grant of habeas relief in this case. The Michigan Court of Appeals' decision was not contrary to any clearly established holding of this Court. We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions. In *Cronic* itself, we rejected the defendant's claim that his counsel's lack of experience and short time for preparation warranted a presumption of prejudice, not a claim based on counsel's absence. See 466 U. S., at 663–666. When announcing the rule in *Cronic*, we cited earlier cases finding prejudice where "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.*, at 659, n. 25. But none of those cases dealt with circumstances like those present here. And *Bell* did not involve the absence of counsel; instead, we declined to presume prejudice where a capital defendant's counsel "failed to 'mount some case for life' after the prosecution introduced evidence in the sentencing hearing and gave a closing statement." 535 U. S., at 696.

Because none of our cases confront "the specific question presented by this case," the state court's decision could not be "contrary to" any holding from this Court. *Lopez* v. *Smith*, 574 U. S. 1, 6 (2014) (*per curiam*). The most that the Sixth Circuit could muster was that "[t]he testimony of a government witness is similar to the trial events that th[is] Court has deemed to be critical stages." 580 Fed. Appx., at 284. But that conclusion is doubly wrong. First, if the circumstances of a case are only "similar to" our precedents, then the state court's decision is not "contrary to" the holdings in those cases. See, *e. g.*, *Carey* v. *Musladin*, 549

U. S. 70, 76–77, and n. 2 (2006). Second, the Sixth Circuit framed the issue at too high a level of generality. See, *e. g.*, *Lopez*, *supra*, at 6. The relevant testimony was not merely "testimony of a government witness"; it was prosecution testimony *about other defendants*. To be sure, the Sixth Circuit considered the testimony relevant to Donald because he was being prosecuted on an aiding-and-abetting theory for felony murder. But Donald's position was that he had nothing to do with the planning among his codefendants. And none of our holdings address counsel's absence during testimony that is irrelevant within the defendant's own theory of the case.

Nor was the state court's decision an unreasonable application of our cases. The Sixth Circuit stated "that a critical stage of trial is a 'step of a criminal proceeding . . . that h[olds] significant consequences for the accused.'" 580 Fed. Appx., at 284 (quoting *Bell*, *supra*, at 696). And it held that the Michigan Court of Appeals' decision was "objectively unreasonable" because the phone call evidence might have indirectly inculpated Donald in the eyes of the jury. But that holding is not correct. Just last Term we warned the Sixth Circuit that "where the '"precise contours"' of [a] right remain '"unclear,"' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims." *White*, *supra*, at 424 (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003), in turn quoting *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (KENNEDY, J., concurring in part and in judgment)). Within the contours of *Cronic*, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case.

Cronic applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U. S., at 658. The Michigan Court of Appeals' refusal to apply it to these circum-

stances was not the "extreme malfunction" required for federal habeas relief. *Harrington*, 562 U. S., at 102.

III

Because we consider this case only in the narrow context of federal habeas review, we "expres[s] no view on the merits of the underlying Sixth Amendment principle." *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*). All that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that *Cronic* applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

ARMSTRONG ET AL. *v.* EXCEPTIONAL CHILD CENTER, INC., ET AL.

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

No. 14–15. Argued January 20, 2015—Decided March 31, 2015

Providers of "habilitation services" under Idaho's Medicaid plan are reimbursed by the State's Department of Health and Welfare. Section 30(A) of the Medicaid Act requires Idaho's plan to "assure that payments are consistent with efficiency, economy, and quality of care" while "safeguard-[ing] against unnecessary utilization of . . . care and services." 42 U. S. C. § 1396a(a)(30)(A). Respondents, providers of habilitation services, sued petitioners, Idaho Health and Welfare Department officials, claiming that Idaho reimbursed them at rates lower than § 30(A) permits, and seeking to enjoin petitioners to increase these rates. The District Court entered summary judgment for the providers. The Ninth Circuit affirmed, concluding that the Supremacy Clause gave the providers an implied right of action, and that they could sue under this implied right of action to seek an injunction requiring Idaho to comply with § 30(A).

Held: The judgment is reversed.

567 Fed. Appx. 496, reversed.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part IV, concluding that the Supremacy Clause does not confer a private right of action, and that Medicaid providers cannot sue for an injunction requiring compliance with § 30(A). Pp. 324–331.

(a) The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210. But it is not the "'source of any federal rights,'" *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107, and certainly does not create a cause of action. Nothing in the Clause's text suggests otherwise, and nothing suggests it was ever understood as conferring a private right of action. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers. Art. I, § 8; *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. It is unlikely that the Constitution gave Congress broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. Pp. 324–326.

(b) Reading the Supremacy Clause not to confer a private right of action is consistent with this Court's preemption jurisprudence. The ability to sue to enjoin unconstitutional actions by state and federal

Syllabus

officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. This Court has never held nor suggested that this judge-made remedy, in its application to state officers, rests upon an implied right of action contained in the Supremacy Clause. Pp. 326–327.

(c) Respondents' suit cannot proceed in equity. The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e. g., Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 74. Here, the express provision of a single remedy for a State's failure to comply with Medicaid's requirements—the withholding of Medicaid funds by the Secretary of Health and Human Services, 42 U. S. C. § 1396c—and the sheer complexity associated with enforcing § 30(A) combine to establish Congress's "intent to foreclose" equitable relief, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 647. Pp. 327–331.

SCALIA, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined, and an opinion with respect to Part IV, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 333. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, GINSBURG, and KAGAN, JJ., joined, *post*, p. 336.

Carl J. Withroe, Deputy Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *Lawrence G. Wasden*, Attorney General, *Brian Kane*, Assistant Chief Deputy Attorney General, and *Steven L. Olsen* and *Peg M. Dougherty*, Deputy Attorneys General.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Allon Kedem*, *Mark B. Stern*, *Alisa B. Klein*, and *Jeffrey E. Sandberg*.

James M. Piotrowski argued the cause for respondents. With him on the brief were *Stephen P. Berzon* and *Stacey M. Leyton*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, and *Jonathan F. Mitchell*, Solicitor General, and by the Attorneys General for their respective States as follows:

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

We consider whether Medicaid providers can sue to enforce § 30(A) of the Medicaid Act. 81 Stat. 911 (codified as amended at 42 U. S. C. § 1396a(a)(30)(A)).

Luther Strange of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Joseph A. Foster* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery* of Tennessee, *Sean Reyes* of Utah, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; for the California Health and Human Services Agency by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Kathleen A. Kenealy*, Chief Assistant Attorney General, *Julie Weng-Gutierrez*, Senior Assistant Attorney General, *Gregory D. Brown*, Deputy Solicitor General, *Susan M. Carson*, Supervising Deputy Attorney General, and *Joshua N. Sondheimer*, Deputy Attorney General; and for the National Governors Association et al. by *Michael W. McConnell*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of People with Disabilities et al. by *Elizabeth B. McCallum* and *Samuel R. Bagenstos*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Omar C. Jadwat*, *Jon Greenbaum*, *Sherrilyn Ifill*, *Janai S. Nelson*, *Christina A. Swarns*, *Jin Hee Lee*, and *Nina Perales*; for the American Hospital Association et al. by *Dominic F. Perella*; for the American Medical Association et al. by *Stuart H. Singer*, *Carl E. Goldfarb*, *Andrew L. Adler*, and *Benjamin D. Geffen*; for the American Network of Community Options and Resources et al. by *Joel M. Hamme*; for the Chamber of Commerce of the United States of America by *Carter G. Phillips*, *Peter D. Keisler*, *Quin M. Sorenson*, *Lowell J. Schiller*, *Kate Comerford Todd*, and *Tyler R. Green*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Douglas T. Kendall*, *David H. Gans*, and *Brianne J. Gorod*; for Former HHS Officials by *Stephen I. Vladeck* and *Matthew M. Hoffman*; for the Medicaid Defense Fund by *Lynn S. Carman*; for Members of Congress by *Paul M. Smith* and *Matthew S. Hellman*; and for the National Health Law Program et al. by *Jane Perkins* and *Kelly Bagby*.

I

Medicaid is a federal program that subsidizes the States' provision of medical services to "families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." § 1396–1. Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions.

In order to qualify for Medicaid funding, the State of Idaho adopted, and the Federal Government approved, a Medicaid "plan," § 1396a(a), which Idaho administers through its Department of Health and Welfare. Idaho's plan includes "habilitation services"—in-home care for individuals who, "but for the provision of such services . . . would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan," § 1396n(c) and (c)(1). Providers of these services are reimbursed by the Department of Health and Welfare.

Section 30(A) of the Medicaid Act requires Idaho's plan to:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . ." 42 U. S. C. § 1396a(a)(30)(A).

Respondents are providers of habilitation services to persons covered by Idaho's Medicaid plan. They sued petitioners—

two officials in Idaho's Department of Health and Welfare—in the United States District Court for the District of Idaho, claiming that Idaho violates § 30(A) by reimbursing providers of habilitation services at rates lower than § 30(A) permits. They asked the court to enjoin petitioners to increase these rates.

The District Court entered summary judgment for the providers, holding that Idaho had not set rates in a manner consistent with § 30(A). *Inclusion, Inc.* v. *Armstrong*, 835 F. Supp. 2d 960 (2011). The Ninth Circuit affirmed. 567 Fed. Appx. 496 (2014). It said that the providers had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Id.*, at 497 (citing *Independent Living Center of Southern Cal.* v. *Shewry*, 543 F. 3d 1050, 1065 (CA9 2008)). We granted certiorari. 573 U. S. 991 (2014).

II

The Supremacy Clause, Art. VI, cl. 2, reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210 (1824). It is equally apparent that the Supremacy Clause is not the "'source of any federal rights,'" *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107 (1989) (quoting *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 613

(1979)), and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

Hamilton wrote that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government." The Federalist No. 33, p. 207 (J. Cooke ed. 1961). And Story described the Clause as "a positive affirmance of that, which is necessarily implied." 3 Commentaries on the Constitution of the United States § 1831, p. 693 (1833). These descriptions would have been grossly inapt if the Clause were understood to give affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States. And had it been understood to provide such significant private rights against the States, one would expect to find that mentioned in the preratification historical record, which contained ample discussion of the Supremacy Clause by both supporters and opponents of ratification. See C. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 25 (2004); The Federalist No. 44, at 306 (J. Madison). We are aware of no such mention, and respondents have not provided any. Its conspicuous absence militates strongly against their position.

Additionally, it is important to read the Supremacy Clause in the context of the Constitution as a whole. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to "make all Laws which shall be necessary and proper for carrying [them] into Execution." Art. I, § 8. We have said that this confers upon the Legislature "that discretion, with respect to the means by which the powers [the Constitution] confers are to be carried into execution, which will enable that body to perform the high duties assigned to it," *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). It is unlikely that the Constitution gave Congress such broad discretion with re-

gard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits. See, *e. g.*, *Pennsylvania* v. *Nelson*, 350 U. S. 497, 499, 509 (1956). Similarly, a court may not hold a civil defendant liable under state law for conduct federal law requires. See, *e. g.*, *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472, 486–487 (2013). And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted. *Ex parte Young*, 209 U. S. 123, 155–156 (1908).

Respondents contend that our preemption jurisprudence—specifically, the fact that we have regularly considered whether to enjoin the enforcement of state laws that are alleged to violate federal law—demonstrates that the Supremacy Clause creates a cause of action for its violation. They are incorrect. It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. See, *e. g.*, *Osborn* v. *Bank of United*

States, 9 Wheat. 738, 838–839, 844 (1824); *Ex parte Young*, *supra*, at 150–151 (citing *Davis* v. *Gray*, 16 Wall. 203, 220 (1873)). But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110 (1902); see generally L. Jaffe, Judicial Control of Administrative Action 152–196 (1965). Thus, the Supremacy Clause need not be (and in light of our textual analysis above, cannot be) the explanation. What our cases demonstrate is that, "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Carroll* v. *Safford*, 3 How. 441, 463 (1845).

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L. Q. Rev. 345 (1956). It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause. That is because, as even the dissent implicitly acknowledges, *post*, at 339 (opinion of SOTOMAYOR, J.), it does not. The Ninth Circuit erred in holding otherwise.

III

A

We turn next to respondents' contention that, quite apart from any cause of action conferred by the Supremacy Clause, this suit can proceed against Idaho in equity.

The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e. g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 74 (1996). "'Courts of equity can no more disregard statutory and constitutional requirements and provi-

sions than can courts of law.'" *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893); brackets omitted). In our view the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement. See *Douglas* v. *Independent Living Center of Southern Cal., Inc.*, 565 U. S. 606, 619–620 (2012) (ROBERTS, C. J., dissenting).

Two aspects of § 30(A) establish Congress's "intent to foreclose" equitable relief. *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 647 (2002). First, the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's "breach" of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services. 42 U. S. C. § 1396c. As we have elsewhere explained, the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U. S. 275, 290 (2001).

The provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief. See *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 256, n. 3 (2011). But it does so when combined with the judicially unadministrable nature of § 30(A)'s text. It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are "consistent with efficiency, economy, and quality of care," all the while "safeguard[ing] against unnecessary utilization of . . . care and services." Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency deci-

sionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 292 (2002) (BREYER, J., concurring in judgment). The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.

B

The dissent agrees with us that the Supremacy Clause does not provide an implied right of action, and that Congress may displace the equitable relief that is traditionally available to enforce federal law. It disagrees only with our conclusion that such displacement has occurred here.

The dissent insists that, "because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it *affirmatively* manifests a contrary intent." *Post*, at 340 (emphasis added). But a "long-established practice" does not justify a rule that denies statutory text its fairest reading. Section 30(A), fairly read in the context of the Medicaid Act, "display[s] a[n] intent to foreclose" the availability of equitable relief. *Verizon*, *supra*, at 647. We have no warrant to revise Congress's scheme simply because it did not "affirmatively" preclude the availability of a judge-made action at equity. See *Seminole Tribe*, *supra*, at 75 (inferring, in the absence of an "affirmative" statement by Congress, that equitable relief was unavailable).

Equally unavailing is the dissent's reliance on § 30(A)'s history. Section 30(A) was amended, on December 19, 1989, to include what the dissent calls the "equal access mandate," *post*, at 344—the requirement that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that

such care and services are available to the general population in the geographic area." § 6402(a), 103 Stat. 2260. There existed at the time another provision, known as the "Boren Amendment," that likewise imposed broad requirements on state Medicaid plans. 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V). Lower courts had interpreted the Boren Amendment to be privately enforceable under § 1983. From this, the dissent infers that, when Congress amended § 30(A), it could not "have failed to anticipate" that § 30(A)'s broad language—or at least that of the equal access mandate—would be interpreted as enforceable in a private action. Thus, concludes the dissent, Congress's failure to *expressly* preclude the private enforcement of § 30(A) suggests it intended *not to* preclude private enforcement. *Post,* at 345.

This argument appears to rely on the prior-construction canon; the rule that, when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute" is presumed to incorporate that interpretation. *Bragdon* v. *Abbott,* 524 U. S. 624, 645 (1998). But that canon has no application here. The language of the two provisions is nowhere near identical; and even if it had been, the question whether the Boren Amendment permitted private actions was far from "settled." When Congress amended § 30(A) in 1989, this Court had already granted certiorari to decide, but had not yet decided, whether the Boren Amendment could be enforced through a § 1983 suit. See *Baliles* v. *Virginia Hospital Assn.*, 493 U. S. 808 (Oct. 2, 1989) (granting certiorari). Our decision permitting a § 1983 action did not issue until June 14, 1990—almost six months after the amendment to § 30(A). *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498.*

*Respondents do not claim that *Wilder* establishes precedent for a private cause of action in this case. They do not assert a § 1983 action, since our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified. See *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 283 (2002) (expressly "reject[ing] the notion," implicit in *Wilder*, "that our

The existence of a granted petition for certiorari demonstrates quite clearly that the question whether the Boren Amendment could be privately enforced was *un*settled at the time of § 30(A)'s 1989 amendment—so that if Congress was aware of the parallel (which is highly doubtful) the course that awareness would have prompted (if any) would not have been legislative silence but rather express specification of the availability of private enforcement (if that was what Congress intended).

Finally, the dissent speaks as though we leave these plaintiffs with no resort. That is not the case. Their relief must be sought initially through the Secretary rather than through the courts. The dissent's complaint that the sanction available to the Secretary (the cut-off of funding) is too massive to be a realistic source of relief seems to us mistaken. We doubt that the Secretary's notice to a State that its compensation scheme is inadequate will be ignored.

IV

The last possible source of a cause of action for respondents is the Medicaid Act itself. They do not claim that, and rightly so. Section 30(A) lacks the sort of rights-creating language needed to imply a private right of action. *Sandoval*, *supra*, at 286–287. It is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid. The Act says that the "Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," the subsection that includes § 30(A). 42 U. S. C. § 1396a(b). We have held that such language "reveals no congressional intent to create a private right of action." *Sandoval*, *supra* at 289; see also *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 772 (1981). And again, the explicitly conferred means of en-

cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983").

forcing compliance with § 30(A) by the Secretary's withholding funding, § 1396c, suggests that other means of enforcement are precluded, *Sandoval*, *supra*, at 290.

Spending Clause legislation like Medicaid "is much in the nature of a contract." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). The notion that respondents have a right to sue derives, perhaps, from the fact that they are beneficiaries of the federal-state Medicaid agreement, and that intended beneficiaries, in modern times at least, can sue to enforce the obligations of private contracting parties. See 13 R. Lord, Williston on Contracts §§ 37:12–37.13, pp. 123–135 (4th ed. 2013). We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves. See *Pharmaceutical Research and Mfrs. of America* v. *Walsh*, 538 U. S. 644, 683 (2003) (THOMAS, J., concurring in judgment). More fundamentally, however, the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government, *Astra USA, Inc.* v. *Santa Clara County*, 563 U. S. 110, 117–118 (2011); see Williston, *supra*, at §§ 37:35–37:36, at 256–271; 9 J. Murray, Corbin on Contracts § 45.6, p. 92 (rev. ed. 2007)—much less to contracts between two governments. Our precedents establish that a private right of action under federal law is not created by mere implication, but must be "unambiguously conferred," *Gonzaga*, 536 U. S., at 283. Nothing in the Medicaid Act suggests that Congress meant to change that for the commitments made under § 30(A).

* * *

The judgment of the Ninth Circuit Court of Appeals is reversed.

It is so ordered.

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

I join Parts I, II, and III of the Court's opinion.

Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause "cause of action." Rather, I would ask whether "federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Ante*, at 326; *post*, at 339 (SOTOMAYOR, J., dissenting). I believe the answer to this question is no.

That answer does not follow from the application of a simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not. "[T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer" courts "more than general guidance." *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 291 (2002) (BREYER, J., concurring in judgment). Rather, I believe that several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing this particular action for injunctive relief.

For one thing, as the majority points out, § 30(A) of the Medicaid Act, 42 U. S. C. § 1396a(a)(30)(A), sets forth a federal mandate that is broad and nonspecific. See *ante*, at 328. But, more than that, § 30(A) applies its broad standards to the setting of rates. The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges. More than a century ago, Congress created the Interstate Commerce Commission, the first great federal regulatory ratesetting agency, and endowed it with authority to set "reasonable" railroad rates. Ch. 104, 24 Stat. 379 (1887). It did so in part because judicial efforts to maintain reasonable rate levels had proved inadequate. See I. Sharfman, Railway Regulation: An Analysis of the Underlying Problems in Railway Economics From the Standpoint of Government Regulation 43–44 (1915).

Reading § 30(A) underscores the complexity and nonjudicial nature of the ratesetting task. That provision requires State Medicaid plans to "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to assure "care and services" equivalent to that "available to the general population in the geographic area." § 1396a(a)(30)(A). The methods that a state agency, such as Idaho's Department of Health and Welfare, uses to make this kind of determination may involve subsidiary determinations of, for example, the actual cost of providing quality services, including personnel and total operating expenses; changes in public expectations with respect to delivery of services; inflation; a comparison of rates paid in neighboring States for comparable services; and a comparison of any rates paid for comparable services in other public or private capacities. See App. to Reply to Brief in Opposition 16; Idaho Code Ann. § 56–118 (2012).

At the same time, § 30(A) applies broadly, covering reimbursements provided to approximately 1.36 million doctors, serving over 69 million patients across the Nation. See Dept. of Health and Human Servs., Office of Inspector General, Access to Care: Provider Availability in Medicaid Managed Care 1, 5 (Dec. 2014). And States engage in time-consuming efforts to obtain public input on proposed plan amendments. See, *e. g.*, Kansas Medicaid: Design and Implementation of a Public Input and Stakeholder Consult Process (Sept. 16, 2011) (prepared by Deloitte Consulting, LLP) (describing public input on Kansas' proposed Medicaid amendments).

I recognize that federal courts have long become accustomed to reviewing for reasonableness or constitutionality the ratesetting determinations made by agencies. See 5 U. S. C. § 706; *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602–606 (1944). But this is not such an action. Instead, the lower courts here, relying on the ratesetting standard articulated in *Orthopaedic Hospital* v. *Belshe*, 103 F. 3d 1491 (CA9 1997), required the State to set rates that "approximate the

cost of quality care provided efficiently and economically." *Id.*, at 1496. See *Inclusion, Inc.* v. *Armstrong*, 835 F. Supp. 2d 960, 963–964 (Idaho 2011), aff'd, 567 Fed. Appx. 496 (CA9 2014). To find in the law a basis for courts to engage in such direct ratesetting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decision-making. The consequence, I fear, would be increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance, and coherence for their success. I do not believe Congress intended to allow a statute-based injunctive action that poses such risks (and that has the other features I mention).

I recognize that courts might in particular instances be able to resolve rate-related requests for injunctive relief quite easily. But I see no easy way to separate in advance the potentially simple sheep from the more harmful rate-making goats. In any event, this case, I fear, belongs in the latter category. See *Belshe*, *supra*, at 1496. Compare Brief for Respondents 2, n. 1 (claiming that respondents seek only to enforce federally approved methodology), with Brief for United States as *Amicus Curiae* 5, n. 2 (the relevant methodology has not been approved). See also Idaho Code Ann. § 56–118 (describing in general terms what appears to be a complex ratesetting methodology, while leaving unclear the extent to which Idaho is bound to use, rather than merely consider, actual provider costs).

For another thing, like the majority, I would ask why, in the complex ratesetting area, other forms of relief are inadequate. If the Secretary of Health and Human Services concludes that a State is failing to follow legally required federal rules, the Secretary can withhold federal funds. See *ante*, at 328 (citing 42 U. S. C. § 1396c). If withholding funds does not work, the federal agency may be able to sue a State to compel compliance with federal rules. See Tr. of Oral Arg.

23, 52 (Solicitor General and respondents acknowledging that the Federal Government might be able to sue a State to enjoin it from paying less than what § 30(A) requires). Cf., *e. g.*, *Arizona* v. *United States*, 567 U. S. 387 (2012) (allowing similar action in another context).

Moreover, why could respondents not ask the federal agency to interpret its rules to respondents' satisfaction, to modify those rules, to promulgate new rules or to enforce old ones? See 5 U. S. C. § 553(e). Normally, when such requests are denied, an injured party can seek judicial review of the agency's refusal on the grounds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §§ 702, 706(2)(A). And an injured party can ask the court to "compel agency action unlawfully withheld or unreasonably delayed." §§ 702, 706(1). See also Tr. of Oral Arg. 15–16 (arguing that providers can bring an action under the Administrative Procedure Act (APA) whenever a waiver program is renewed or can seek new agency rulemaking); *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 230, n. 4, 231 (1986) (APA challenge to the Secretary of Commerce's failure to act).

I recognize that the law may give the federal agency broad discretionary authority to decide when and how to exercise or to enforce statutes and rules. See *Massachusetts* v. *EPA*, 549 U. S. 497, 527 (2007). As a result, it may be difficult for respondents to prevail on an APA claim unless it stems from an agency's particularly egregious failure to act. But, if that is so, it is because Congress decided to vest broad discretion in the agency to interpret and to enforce § 30(A). I see no reason for this Court to circumvent that congressional determination by allowing this action to proceed.

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

Suits in federal court to restrain state officials from executing laws that assertedly conflict with the Constitution or

with a federal statute are not novel. To the contrary, this Court has adjudicated such requests for equitable relief since the early days of the Republic. Nevertheless, today the Court holds that Congress has foreclosed private parties from invoking the equitable powers of the federal courts to require States to comply with §30(A) of the Medicaid Act, 42 U. S. C. §1396a(a)(30)(A). It does so without pointing to the sort of detailed remedial scheme we have previously deemed necessary to establish congressional intent to preclude resort to equity. Instead, the Court relies on Congress' provision for agency enforcement of §30(A)—an enforcement mechanism of the sort we have already definitively determined *not* to foreclose private actions—and on the mere fact that §30(A) contains relatively broad language. As I cannot agree that these statutory provisions demonstrate the requisite congressional intent to restrict the equitable authority of the federal courts, I respectfully dissent.

I

A

That parties may call upon the federal courts to enjoin unconstitutional government action is not subject to serious dispute. Perhaps the most famous exposition of this principle is our decision in *Ex parte Young*, 209 U. S. 123 (1908), from which the doctrine derives its usual name. There, we held that the shareholders of a railroad could seek an injunction preventing the Minnesota attorney general from enforcing a state law setting maximum railroad rates because the Eleventh Amendment did not provide the officials with immunity from such an action and the federal court had the "power" in equity to "grant a temporary injunction." *Id.*, at 148. This Court had earlier recognized similar equitable authority in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), in which a federal court issued an injunction prohibiting an Ohio official from executing a state law taxing the

Bank of the United States. *Id.*, at 838–839. We affirmed in relevant part, concluding that the case was "cognizable in a Court of equity," and holding it to be "proper" to grant equitable relief insofar as the state tax was "repugnant" to the federal law creating the national bank. *Id.*, at 839, 859. More recently, we confirmed the vitality of this doctrine in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). There, we found no support for the argument that a challenge to "'governmental action under the Appointments Clause or separation-of-powers principles'" should be treated "differently than every other constitutional claim" for which "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Id.*, at 491, n. 2.

A suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within this doctrine. A claim that a state law contravenes a federal statute is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause," *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 271–272 (1977), and the application of preempted state law is therefore "unconstitutional," *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 388 (2000); accord, *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819) (that States have "no power" to enact laws interfering with "the operations of the constitutional laws enacted by Congress" is the "unavoidable consequence of that supremacy which the constitution has declared"; such a state law "is unconstitutional and void"). We have thus long entertained suits in which a party seeks prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action. See, *e. g.*, *Foster* v. *Love*, 522 U. S. 67 (1997) (state election law that permitted the winner of a state primary to be deemed the winner of election to Congress held preempted by federal statute setting date of con-

gressional elections); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983) (state law preempted in part by the federal Employee Retirement Income Security Act of 1974); *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U. S. 351 (1967) (city ordinance imposing licensing requirements on motor carrier transporting railroad passengers held preempted by federal Interstate Commerce Act); *Campbell* v. *Hussey*, 368 U. S. 297 (1961) (state law requiring labeling of certain strains of tobacco held preempted by the federal Tobacco Inspection Act); *Railway Co.* v. *McShane*, 22 Wall. 444 (1875) (state taxation of land possessed by railroad company held invalid under federal Act of July 2, 1864). Indeed, for this reason, we have characterized "the availability of prospective relief of the sort awarded in *Ex parte Young*" as giving "life to the Supremacy Clause." *Green* v. *Mansour*, 474 U. S. 64, 68 (1985).

Thus, even though the Court is correct that it is somewhat misleading to speak of "an implied right of action contained in the Supremacy Clause," *ante*, at 327, that does not mean that parties may not enforce the Supremacy Clause by bringing suit to enjoin preempted state action. As the Court also recognizes, we "have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Ante*, at 326.

B

Most important for purposes of this case is not the mere existence of this equitable authority, but the fact that it is exceedingly well established—supported, as the Court puts it, by a "long history." *Ante*, at 327. Congress may, if it so chooses, either expressly or implicitly preclude *Ex parte Young* enforcement actions with respect to a particular statute or category of lawsuit. See, *e. g.*, 28 U. S. C. § 1341 (prohibiting federal judicial restraints on the collection of state taxes); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 75–76 (1996) (comprehensive alternative remedial scheme can

establish Congress' intent to foreclose *Ex parte Young* actions). But because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it affirmatively manifests a contrary intent. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946).

In this respect, equitable preemption actions differ from suits brought by plaintiffs invoking 42 U. S. C. § 1983 or an implied right of action to enforce a federal statute. Suits for "redress designed to halt or prevent the constitutional violation rather than the award of money damages" seek "traditional forms of relief." *United States* v. *Stanley*, 483 U. S. 669, 683 (1987). By contrast, a plaintiff invoking § 1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties. Rather than simply pointing to background equitable principles authorizing the action that Congress presumably has not overridden, such a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies. See *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 290 (2002); *Alexander* v. *Sandoval*, 532 U. S. 275, 286 (2001); see also *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 114 (1989) (KENNEDY, J., dissenting) (Because a preemption claim does not seek to enforce a statutory right, "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system"). For these reasons, the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through § 1983, are not transferable to the *Ex parte Young* context.

II

In concluding that Congress has "implicitly preclude[d] private enforcement of § 30(A)," *ante*, at 328, the Court ignores this critical distinction and threatens the vitality of our *Ex parte Young* jurisprudence. The Court identifies only a single prior decision—*Seminole Tribe*—in which we have ever discerned such congressional intent to foreclose equitable enforcement of a statutory mandate. *Ante*, at 327. Even the most cursory review of that decision reveals how far afield it is from this case.

In *Seminole Tribe*, the plaintiff Indian Tribe had invoked *Ex parte Young* in seeking to compel the State of Florida to "negotiate in good faith with [the] tribe toward the formation of a compact" governing certain gaming activities, as required by a provision of the Indian Gaming Regulatory Act, 25 U. S. C. § 2710(d)(3). 517 U. S., at 47. We rejected this effort, observing that "Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)." *Id.*, at 73–74. That latter provision allowed a tribe to sue for violations of the duty to negotiate 180 days after requesting such negotiations, but specifically limited the remedy that a court could grant to "an order directing the State and the Indian tribe to conclude a compact within 60 days," and provided that the only sanction for the violation of such an order would be to require the parties to "submit a proposed compact to a mediator." *Id.*, at 74; §§ 2710(d)(7)(B)(i), (iii), (iv). The statute further directed that if the State should fail to abide by the mediator's selected compact, the sole remedy would be for the Secretary of the Interior, in consultation with the tribe, to prescribe regulations governing gaming. See *id.*, at 74–75; § 2710(d)(7)(B)(vii). We concluded that Congress must have intended this procedural route to be the exclusive means of enforcing § 2710(d)(3). As we explained: "If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an

Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." *Id.*, at 75.

What is the equivalent "carefully crafted and intricate remedial scheme" for enforcement of § 30(A)? The Court relies on two aspects of the Medicaid Act, but, whether considered separately or in combination, neither suffices.

First, the Court cites 42 U. S. C. § 1396c, which authorizes the Secretary of Health and Human Services (HHS) to withhold federal Medicaid payments to a State in whole or in part if the Secretary determines that the State has failed to comply with the obligations set out in § 1396a, including § 30(A). See *ante*, at 328–329. But in striking contrast to the remedial provision set out in the Indian Gaming Regulatory Act, § 1396c provides no specific procedure that parties actually affected by a State's violation of its statutory obligations may invoke in lieu of *Ex parte Young*—leaving them without any other avenue for seeking relief from the State. Nor will § 1396c always provide a particularly effective means for redressing a State's violations: If the State has violated § 30(A) by refusing to reimburse medical providers at a level "sufficient to enlist enough providers so that care and services are available" to Medicaid beneficiaries to the same extent as they are available to "the general population," agency action resulting in a reduced flow of federal funds to that State will often be self-defeating. § 1396a(a)(30)(A); see Brief for Former HHS Officials as *Amici Curiae* 18 (noting that HHS is often reluctant to initiate compliance actions because a "state's non-compliance creates a damned-if-you-do, damned-if-you-don't scenario where the withholding of state funds will lead to depriving the poor of essential medical assistance"). Far from rendering § 1396c "superfluous," then, *Ex parte Young* actions would seem to be an anticipated and possibly necessary supplement to this limited agency-enforcement mechanism. *Seminole Tribe*, 517 U. S., at 75. Indeed, presumably for these reasons, we recently rejected

the very contention the Court now accepts, holding that "[t]he fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds . . . does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 256, n. 3 (2011) (internal quotation marks omitted).

Section 1396c also parallels other provisions scattered throughout the Social Security Act that likewise authorize the withholding of federal funds to States that fail to fulfill their obligations. See, *e. g.*, §§ 609(a), 1204, 1354. Yet we have consistently authorized judicial enforcement of the Act. See *Maine* v. *Thiboutot*, 448 U. S. 1, 6 (1980) (collecting cases). *Rosado* v. *Wyman*, 397 U. S. 397 (1970), provides a fitting illustration. There, we considered a provision of the Social Security Act mandating that, in calculating benefits for participants in the Aid to Families with Dependent Children Program, States make adjustments "'to reflect fully changes in living costs.'" *Id.*, at 412 (quoting § 602(a)(23) (1964 ed., Supp. IV)). We expressed no hesitation in concluding that federal courts could require compliance with this obligation, explaining: "It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Id.*, at 422–423. We so held notwithstanding the existence of an enforcement provision permitting a federal agency to "make a total or partial cutoff of federal funds." See *id.*, at 406, n. 8 (citing § 1316).

Second, perhaps attempting to reconcile its treatment of § 1396c (2012 ed.) with this longstanding precedent, the Court focuses on the particular language of § 30(A), contending that this provision, at least, is so "judicially unadminis-

trable" that Congress must have intended to preclude its enforcement in private suits. *Ante*, at 328. Admittedly, the standard set out in § 30(A) is fairly broad, requiring that a state Medicaid plan:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." § 1396a(a)(30)(A).

But mere breadth of statutory language does not require the Court to give up all hope of judicial enforcement—or, more important, to infer that Congress must have done so.

In fact, the contention that § 30(A)'s language was intended to foreclose private enforcement actions entirely is difficult to square with the provision's history. The specific equal access mandate invoked by the plaintiffs in this case—that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"—was added to § 30(A) in 1989. 103 Stat. 2260. At that time, multiple Federal Courts of Appeals had held that the so-called Boren Amendment to the Medicaid Act was enforceable pursuant to § 1983—as we soon thereafter concluded it was. See *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 504–505, 524 (1990). The Boren Amendment employed language quite similar to that used in § 30(A), requiring that a state plan:

> "provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under

> the plan through the use of rates . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality." § 1396a(a)(13)(A) (1982 ed., Supp. V).

It is hard to believe that the Congress that enacted the operative version of § 30(A) could have failed to anticipate that it might be similarly enforceable. Even if, as the Court observes, the question whether the Boren Amendment was enforceable under § 1983 was "unsettled at the time," *ante*, at 331 (emphasis deleted), surely Congress would have spoken with far more clarity had it actually intended to preclude private enforcement of § 30(A) through not just § 1983 but also *Ex parte Young*.

Of course, the broad scope of § 30(A)'s language is not irrelevant. But rather than compelling the conclusion that the provision is wholly unenforceable by private parties, its breadth counsels in favor of interpreting § 30(A) to provide substantial leeway to States, so that only in rare and extreme circumstances could a State actually be held to violate its mandate. The provision's scope may also often require a court to rely on HHS, which is "comparatively expert in the statute's subject matter." *Douglas* v. *Independent Living Center of Southern Cal., Inc.*, 565 U. S. 604, 614 (2012). When the agency has made a determination with respect to what legal standard should apply, or the validity of a State's procedures for implementing its Medicaid plan, that determination should be accorded the appropriate deference. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). And if faced with a question that pre-

sents a special demand for agency expertise, a court might call for the views of the agency, or refer the question to the agency under the doctrine of primary jurisdiction. See *Rosado*, 397 U. S., at 406–407; *Pharmaceutical Research and Mfrs. of America* v. *Walsh*, 538 U. S. 644, 673 (2003) (BREYER, J., concurring in part and concurring in judgment). Finally, because the authority invoked for enforcing § 30(A) is equitable in nature, a plaintiff is not entitled to relief as of right, but only in the sound discretion of the court. See *Amoco Production Co.* v. *Gambell*, 480 U. S. 531, 542 (1987). Given the courts' ability to both respect States' legitimate choices and defer to the federal agency when necessary, I see no basis for presuming that Congress believed the Judiciary to be completely incapable of enforcing § 30(A).*

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*That is not to say that the Court of Appeals in this case necessarily applied § 30(A) correctly. Indeed, there are good reasons to think the court construed § 30(A) to impose an overly stringent obligation on the States. While the Ninth Circuit has understood § 30(A) to compel States to "rely on responsible cost studies," and to reimburse for services at rates that "approximate the cost of quality care provided efficiently and economically," *Orthopaedic Hospital* v. *Belshe*, 103 F. 3d 1491, 1496 (1997), other courts have read § 30(A) to require only that rates be high enough to ensure that services are *available* to Medicaid participants. See *Pennsylvania Pharmacists Assn.* v. *Houstoun*, 283 F. 3d 531, 538 (CA3 2002); *Evergreen Presbyterian Ministries, Inc.* v. *Hood*, 235 F. 3d 908, 928–929 (CA5 2000); *Methodist Hospitals, Inc.* v. *Sullivan*, 91 F. 3d 1026, 1030 (CA7 1996). This Court declined to grant certiorari to address whether the Ninth Circuit's reading of § 30(A) is correct. See 573 U. S. 991 (2014). But JUSTICE BREYER, in his concurrence, appears to mistake that question about the merits of the Ninth Circuit's standard for the question this Court actually granted certiorari to address—that is, whether § 30(A) is judicially enforceable at all. See *ante*, at 334–335 (opinion concurring in part and concurring in judgment). To answer that question, one need only recognize, as JUSTICE BREYER does, that "federal courts have long become accustomed to reviewing for reasonableness or constitutionality the ratesetting determinations made by agencies." *Ante*, at 334. A private party who invokes the jurisdiction of the federal courts in order to enjoin a state agency's implementation of rates that are so unreasonably low as to violate § 30(A) seeks a determination of exactly this sort.

* * *

In sum, far from identifying a "carefully crafted . . . remedial scheme" demonstrating that Congress intended to foreclose *Ex parte Young* enforcement of § 30(A), *Seminole Tribe*, 517 U. S., at 73–74, the Court points only to two provisions. The first is § 1396c, an agency-enforcement provision that, given our precedent, cannot preclude private actions. The second is § 30(A) itself, which, while perhaps broad, cannot be understood to manifest congressional intent to preclude judicial involvement.

The Court's error today has very real consequences. Previously, a State that set reimbursement rates so low that providers were unwilling to furnish a covered service for those who need it could be compelled by those affected to respect the obligation imposed by § 30(A). Now, it must suffice that a federal agency, with many programs to oversee, has authority to address such violations through the drastic and often counterproductive measure of withholding the funds that pay for such services. Because a faithful application of our precedents would have led to a contrary result, I respectfully dissent.

Syllabus

RODRIGUEZ *v.* UNITED STATES

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

No. 13–9972. Argued January 21, 2015—Decided April 21, 2015

Officer Struble, a K–9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, *inter alia*, checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge recommended denial of the motion. He found no reasonable suspicion supporting detention once Struble issued the written warning. Under Eighth Circuit precedent, however, he concluded that prolonging the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was for that reason permissible. The District Court then denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed. Noting that the seven or eight minute delay was an acceptable "*de minimis* intrusion on Rodriguez's personal liberty," the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

Held:

1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under *Terry* v. *Ohio*, 392 U. S. 1, than an arrest, see, *e. g.*, *Arizona* v. *Johnson*, 555 U. S. 323, 330. Its tolerable duration is determined by the seizure's "mission," which is to address the traffic violation that warranted the stop, *Illinois* v. *Caballes*, 543 U. S. 405, 407, and attend to related safety concerns.

Syllabus

Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, *Johnson*, 555 U. S., at 327–328 (questioning); *Caballes*, 543 U. S., at 406, 408 (dog sniff), but a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket, *id.*, at 407.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Delaware* v. *Prouse*, 440 U. S. 648, 658–659. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In concluding that the *de minimis* intrusion here could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on *Pennsylvania* v. *Mimms*, 434 U. S. 106. The Court reasoned in *Mimms* that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis*" additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, *id.*, at 110–111. The officer safety interest recognized in *Mimms*, however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore gains no support from *Mimms*.

The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop "prolonged beyond" the time in fact needed for the officer to complete his traffic-based inquiries is "unlawful," *Caballes*, 543 U. S., at 407. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 354–357.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. Pp. 357–358.

741 F. 3d 905, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KEN-

NEDY, J., filed a dissenting opinion, *post*, p. 358. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which KENNEDY, J., joined as to all but Part III, *post*, p. 358. ALITO, J., filed a dissenting opinion, *post*, p. 370.

Shannon P. O'Connor argued the cause for petitioner. With him on the briefs were *David R. Stickman*, *Jennifer L. Gilg*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup.*

Ginger D. Anders argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *Christopher J. Smith.**

JUSTICE GINSBURG delivered the opinion of the Court.

In *Illinois* v. *Caballes*, 543 U. S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to com-

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**Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Mark B. Weinberg* filed a brief for the United States Justice Foundation et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E. Shapiro* and *Brett E. Legner*, Deputy Solicitors General, and *Eldad Z. Malamuth* and *Michael M. Glick*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Russell A. Suzuki* of Hawaii, *Bill Schuette* of Michigan, *Gary K. King* of New Mexico, *Marty J. Jackley* of South Dakota, *Sean D. Reyes* of Utah, *William Sorrell* of Vermont, *Robert W. Ferguson* of Washington, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming.

plete th[e] mission" of issuing a ticket for the violation. *Id.*, at 407. The Court so recognized in *Caballes*, and we adhere to the line drawn in that decision.

I

Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road. Nebraska law prohibits driving on highway shoulders, see Neb. Rev. Stat. § 60–6,142 (2010), and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] . . . took care of all the business." App. 70.

Nevertheless, Struble did not consider Rodriguez "free to leave." *Id.*, at 69–70. Although justification for the traffic stop was "out of the way," *id.*, at 70, Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U. S. C. §§ 841(a)(1) and (b)(1). He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. App. 100 (apart from "information given by the dog," "Officer Struble had [no]thing other than a rather

large hunch"). He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible.

The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." *Id.*, at 114 (quoting *United States* v. *Alexander*, 448 F. 3d 1014, 1016 (CA8 2006)). The court thus agreed with the Magistrate Judge that the "7 to 10 minutes" added to the stop by the dog sniff "was not of constitutional significance." App. 114. Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison.

The Eighth Circuit affirmed. The "seven- or eight-minute delay" in this case, the opinion noted, resembled delays that the court had previously ranked as permissible. 741 F. 3d 905, 907 (2014). The Court of Appeals thus ruled that the delay here constituted an acceptable "*de minimis* intrusion on Rodriguez's personal liberty." *Id.*, at 908. Given that ruling, the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. 573 U. S. 991 (2014). Compare, *e. g.*, *United States* v. *Morgan*, 270 F. 3d 625, 632 (CA8 2001) (postcompletion delay of "well under ten minutes" permissible), with, *e. g.*, *State* v. *Baker*, 2010 UT 18, ¶13, 229 P. 3d 650, 658 (2010) ("[W]ithout additional reason-

able suspicion, the officer must allow the seized person to depart once the purpose of the stop has concluded.").

II

A seizure for a traffic violation justifies a police investigation of that violation. "[A] relatively brief encounter," a routine traffic stop is "more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." *Knowles* v. *Iowa*, 525 U. S. 113, 117 (1998) (quoting *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984), in turn citing *Terry* v. *Ohio*, 392 U. S. 1 (1968)). See also *Arizona* v. *Johnson*, 555 U. S. 323, 330 (2009). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, *Caballes*, 543 U. S., at 407, and attend to related safety concerns, *infra*, at 356–357. See also *United States* v. *Sharpe*, 470 U. S. 675, 685 (1985); *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification."). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." *Ibid.* See also *Caballes*, 543 U. S., at 407. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe*, 470 U. S., at 686 (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation").

Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. *Johnson*, 555 U. S., at 327–328 (questioning); *Caballes*, 543 U. S., at 406, 408 (dog sniff). In *Caballes*, however, we cautioned that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a

warning ticket. 543 U. S., at 407. And we repeated that admonition in *Johnson*: The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." 555 U. S., at 333. See also *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] . . . no additional Fourth Amendment justification . . . was required"). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to JUSTICE ALITO's suggestion, *post*, at 372, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see *post*, at 370 (ALITO, J., dissenting) (premising opinion on the dissent's own finding of "reasonable suspicion," although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).

Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Caballes*, 543 U. S., at 408. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. See *Delaware* v. *Prouse*, 440 U. S. 648, 658–660 (1979). See also 4 W. LaFave, Search and Seizure § 9.3(c), pp. 507–517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse*, 440 U. S., at 658–659; LaFave, Search and Seizure § 9.3(c), at 516 (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis* v. *Edmond*, 531 U. S. 32, 40–41 (2000). See also *Florida* v. *Jardines*, 569 U. S. 1, 9–10 (2013). Candidly, the Govern-

ment acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. See Tr. of Oral Arg. 33. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In advancing its *de minimis* rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (*per curiam*). See *United States* v. *$404,905.00 in U. S. Currency*, 182 F. 3d 643, 649 (CA8 1999). In *Mimms*, we reasoned that the government's "legitimate and weighty" interest in officer safety outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. 434 U. S., at 110–111. See also *Maryland* v. *Wilson*, 519 U. S. 408, 413–415 (1997) (passengers may be required to exit vehicle stopped for traffic violation). The Eighth Circuit, echoed in JUSTICE THOMAS's dissent, believed that the imposition here similarly could be offset by the Government's "strong interest in interdicting the flow of illegal drugs along the nation's highways." *$404,905.00 in U. S. Currency*, 182 F. 3d, at 649; see *post*, at 366.

Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," *Johnson*, 555 U. S., at 330 (internal quotation marks omitted), so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. Cf. *United States* v. *Holt*, 264 F. 3d 1215, 1221–1222 (CA10 2001) (en banc) (recognizing officer safety justification for criminal record and outstanding warrant checks), abrogated on other grounds as recognized in *United States* v. *Stewart*, 473 F. 3d 1265, 1269 (CA10 2007). On-scene investigation into other crimes, however, detours from that mission. See *supra*, at 355 and this page. So too do safety precautions taken in order to facilitate such detours. But cf. *post*, at 371–372 (ALITO, J., dissenting).

Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. Brief for United States 36–39. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. See also *post,* at 360–362 (THOMAS, J., dissenting) (embracing the Government's argument). The reasonableness of a seizure, however, depends on what the police in fact do. See *Knowles*, 525 U. S., at 115–117. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." Tr. of Oral Arg. 49. How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." *Caballes*, 543 U. S., at 407. As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." *Ibid.* The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as JUSTICE ALITO supposes, *post,* at 370–372, but whether conducting the sniff "prolongs"—*i. e.*, adds time to—"the stop," *supra,* at 355.

III

The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, see App. 100, and the District Court

adopted the Magistrate Judge's findings, see *id.*, at 112–113. The Court of Appeals, however, did not review that determination. But see *post*, at 359, 367–369 (THOMAS, J., dissenting) (resolving the issue, never mind that the Court of Appeals left it unaddressed); *post*, at 370 (ALITO, J., dissenting) (upbraiding the Court for addressing the sole issue decided by the Court of Appeals and characterizing the Court's answer as "unnecessary" because the Court, instead, should have decided an issue the Court of Appeals did not decide). The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, dissenting.

My join in JUSTICE THOMAS' dissenting opinion does not extend to Part III. Although the issue discussed in that Part was argued here, the Court of Appeals has not addressed that aspect of the case in any detail. In my view the better course would be to allow that court to do so in the first instance.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, and with whom JUSTICE KENNEDY joins as to all but Part III, dissenting.

Ten years ago, we explained that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Illinois* v. *Caballes*, 543 U. S. 405, 408 (2005). The

only question here is whether an officer executed a stop in a reasonable manner when he waited to conduct a dog sniff until after he had given the driver a written warning and a backup unit had arrived, bringing the overall duration of the stop to 29 minutes. Because the stop was reasonably executed, no Fourth Amendment violation occurred. The Court's holding to the contrary cannot be reconciled with our decision in *Caballes* or a number of common police practices. It was also unnecessary, as the officer possessed reasonable suspicion to continue to hold the driver to conduct the dog sniff. I respectfully dissent.

I

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U. S. Const., Amdt. 4. As the text indicates, and as we have repeatedly confirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). We have defined reasonableness "in objective terms by examining the totality of the circumstances," *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996), and by considering "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Atwater* v. *Lago Vista*, 532 U. S. 318, 326 (2001) (internal quotation marks omitted). When traditional protections have not provided a definitive answer, our precedents have "analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia* v. *Moore*, 553 U. S. 164, 171 (2008) (internal quotation marks omitted).

Although a traffic stop "constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]," such a sei-

zure is constitutionally "reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren* v. *United States*, 517 U. S. 806, 809–810 (1996). But "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Caballes*, *supra,* at 407.

Because Rodriguez does not dispute that Officer Struble had probable cause to stop him, the only question is whether the stop was otherwise executed in a reasonable manner. See Brief for Appellant in No. 13–1176 (CA8), p. 4, n. 2. I easily conclude that it was. Approximately 29 minutes passed from the time Officer Struble stopped Rodriguez until his narcotics-detection dog alerted to the presence of drugs. That amount of time is hardly out of the ordinary for a traffic stop by a single officer of a vehicle containing multiple occupants even when no dog sniff is involved. See, *e. g.*, *United States* v. *Ellis*, 497 F. 3d 606 (CA6 2007) (22 minutes); *United States* v. *Barragan*, 379 F. 3d 524 (CA8 2004) (approximately 30 minutes). During that time, Officer Struble conducted the ordinary activities of a traffic stop—he approached the vehicle, questioned Rodriguez about the observed violation, asked Pollman about their travel plans, ran serial warrant checks on Rodriguez and Pollman, and issued a written warning to Rodriguez. And when he decided to conduct a dog sniff, he took the precaution of calling for backup out of concern for his safety. See 741 F. 3d 905, 907 (CA8 2014); see also *Pennsylvania* v. *Mimms*, 434 U. S. 106, 110 (1977) (*per curiam*) (officer safety is a "legitimate and weighty" concern relevant to reasonableness).

As *Caballes* makes clear, the fact that Officer Struble waited until after he gave Rodriguez the warning to conduct the dog sniff does not alter this analysis. Because "the use of a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests," 543 U. S., at 409, "conducting a dog sniff would not change the character of a

traffic stop that is lawful at its inception and otherwise executed in a reasonable manner," *id.*, at 408. The stop here was "lawful at its inception and otherwise executed in a reasonable manner." *Ibid.* As in *Caballes*, "conducting a dog sniff [did] not change the character of [the] traffic stop," *ibid.*, and thus no Fourth Amendment violation occurred.

II

Rather than adhere to the reasonableness requirement that we have repeatedly characterized as the "touchstone of the Fourth Amendment," *Brigham City*, *supra*, at 403, the majority constructed a test of its own that is inconsistent with our precedents.

A

The majority's rule requires a traffic stop to "en[d] when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Ante*, at 354. "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission" and he may hold the individual no longer. *Ante*, at 357 (internal quotation marks and alterations omitted). The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop: If a driver is stopped by a particularly efficient officer, then he will be entitled to be released from the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. Similarly, if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology.

I "cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren*, 517 U. S., at 815 (citations omitted). We have repeatedly explained that the rea-

sonableness inquiry must not hinge on the characteristics of the individual officer conducting the seizure. We have held, for example, that an officer's state of mind "does not invalidate [an] action taken as long as the circumstances, viewed objectively, justify that action." *Id.*, at 813 (internal quotation marks omitted). We have spurned theories that would make the Fourth Amendment "change with local law enforcement practices." *Moore*, 553 U. S., at 172. And we have rejected a rule that would require the offense establishing probable cause to be "closely related to" the offense identified by the arresting officer, as such a rule would make "the constitutionality of an arrest . . . vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists." *Devenpeck* v. *Alford*, 543 U. S. 146, 154 (2004) (internal quotation marks and citation omitted). In *Devenpeck*, a unanimous Court explained: "An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection." *Ibid.*

The majority's logic would produce similarly arbitrary results. Under its reasoning, a traffic stop made by a rookie could be executed in a reasonable manner, whereas the same traffic stop made by a knowledgeable, veteran officer *in precisely the same circumstances* might not, if in fact his knowledge and experience made him capable of completing the stop faster. We have long rejected interpretations of the Fourth Amendment that would produce such haphazard results, and I see no reason to depart from our consistent practice today.

B

As if that were not enough, the majority also limits the duration of the stop to the time it takes the officer to com-

plete a narrow category of "traffic-based inquiries." *Ante*, at 357. According to the majority, these inquiries include those that "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Ante*, at 355. Inquiries directed to "detecting evidence of ordinary criminal wrongdoing" are not traffic-related inquiries and thus cannot count toward the overall duration of the stop. *Ibid.* (internal quotation marks and alteration omitted).

The combination of that definition of traffic-related inquiries with the majority's officer-specific durational limit produces a result demonstrably at odds with our decision in *Caballes*. *Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff. We explained that no Fourth Amendment violation had occurred in *Caballes*, where the "duration of the stop . . . was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," but suggested a different result might attend a case "involving a dog sniff that occurred during an *unreasonably* prolonged traffic stop." 543 U. S., at 407–408 (emphasis added). The dividing line was whether the overall duration of the stop exceeded "the time reasonably required to complete th[e] mission," *id.*, at 407, not, as the majority suggests, whether the duration of the stop "in fact" exceeded the time necessary to complete the traffic-related inquiries, *ante*, at 357.

The majority's approach draws an artificial line between dog sniffs and other common police practices. The lower courts have routinely confirmed that warrant checks are a constitutionally permissible part of a traffic stop, see, *e. g.*, *United States* v. *Simmons*, 172 F. 3d 775, 778 (CA11 1999); *United States* v. *Mendez*, 118 F. 3d 1426, 1429 (CA10 1997); *United States* v. *Shabazz*, 993 F. 2d 431, 437 (CA5 1993), and the majority confirms that it finds no fault in these measures, *ante*, at 355. Yet its reasoning suggests the opposite. Such warrant checks look more like they are directed to "detecting

evidence of ordinary criminal wrongdoing" than to "ensuring that vehicles on the road are operated safely and responsibly." *Ibid.* (internal quotation marks and alteration omitted). Perhaps one could argue that the existence of an outstanding warrant might make a driver less likely to operate his vehicle safely and responsibly on the road, but the same could be said about a driver in possession of contraband. A driver confronted by the police in either case might try to flee or become violent toward the officer. But under the majority's analysis, a dog sniff, which is directed at uncovering that problem, is not treated as a traffic-based inquiry. Warrant checks, arguably, should fare no better. The majority suggests that a warrant check is an ordinary inquiry incident to a traffic stop because it can be used "'to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.'" *Ibid.* (quoting 4 W. LaFave, Search and Seizure § 9.3(c), p. 516 (5th ed. 2012)). But as the very treatise on which the majority relies notes, such checks are a "manifest[ation of] the 'war on drugs' motivation so often underlying [routine traffic] stops," and thus are very much like the dog sniff in this case. *Id.*, at 507–508.

Investigative questioning rests on the same basis as the dog sniff. "Asking questions is an essential part of police investigations." *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 185 (2004). And the lower courts have routinely upheld such questioning during routine traffic stops. See, *e. g., United States* v. *Rivera*, 570 F. 3d 1009, 1013 (CA8 2009); *United States* v. *Childs*, 277 F. 3d 947, 953–954 (CA7 2002). The majority's reasoning appears to allow officers to engage in *some* questioning aimed at detecting evidence of ordinary criminal wrongdoing. *Ante*, at 354. But it is hard to see how such inquiries fall within the "seizure's 'mission' [of] address[ing] the traffic violation that warranted the stop," or "attend[ing] to related safety concerns." *Ibid.* Its reasoning appears to come down to the principle that dogs are different.

C

On a more fundamental level, the majority's inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion. Probable cause is *the* "traditional justification" for the seizure of a person. *Whren*, 517 U. S., at 817 (emphasis deleted); see also *Dunaway* v. *New York*, 442 U. S. 200, 207–208 (1979). This Court created an exception to that rule in *Terry* v. *Ohio*, 392 U. S. 1 (1968), permitting "police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause," *Michigan* v. *Summers*, 452 U. S. 692, 698 (1981). Reasonable suspicion is the justification for such seizures. *Prado Navarette* v. *California*, 572 U. S. 393, 397 (2014).

Traffic stops can be initiated based on probable cause or reasonable suspicion. Although the Court has commented that a routine traffic stop is "more analogous to a so-called '*Terry* stop' than to a formal arrest," it has rejected the notion "that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer* v. *McCarty*, 468 U. S. 420, 439, and n. 29 (1984) (citation omitted).

Although all traffic stops must be executed reasonably, our precedents make clear that traffic stops justified by reasonable suspicion are subject to additional limitations that those justified by probable cause are not. A traffic stop based on reasonable suspicion, like all *Terry* stops, must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Hiibel*, 542 U. S., at 185 (internal quotation marks omitted). It also "cannot continue for an excessive period of time or resemble a traditional arrest." *Id.*, at 185–186 (citation omitted). By contrast, a stop based on probable cause affords an officer considerably more leeway. In such seizures, an officer may engage in a warrantless arrest of the driver, *Atwater*, 532 U. S., at 354, a warrantless search incident to arrest of the driver, *Riley* v. *California*, 573 U. S.

373, 382 (2014), and a warrantless search incident to arrest of the vehicle if it is reasonable to believe evidence relevant to the crime of arrest might be found there, *Arizona* v. *Gant*, 556 U. S. 332, 335 (2009).

The majority casually tosses this distinction aside. It asserts that the traffic stop in this case, which was undisputedly initiated on the basis of probable cause, can last no longer than is in fact necessary to effectuate the mission of the stop. *Ante*, at 357. And, it assumes that the mission of the stop was merely to write a traffic ticket, rather than to consider making a custodial arrest. *Ante*, at 354. In support of that durational requirement, it relies primarily on cases involving *Terry* stops. See *ante*, at 354–356 (citing *Arizona* v. *Johnson*, 555 U. S. 323 (2009) (analyzing "stop and frisk" of *passenger* in a vehicle temporarily seized for a traffic violation); *United States* v. *Sharpe*, 470 U. S. 675 (1985) (analyzing seizure of individuals based on suspicion of marijuana trafficking); *Florida* v. *Royer*, 460 U. S. 491 (1983) (plurality opinion) (analyzing seizure of man walking through airport on suspicion of narcotics activity)).

The *only* case involving a traffic stop based on probable cause that the majority cites for its rule is *Caballes*. But, that decision provides no support for today's restructuring of our Fourth Amendment jurisprudence. In *Caballes*, the Court made clear that, in the context of a traffic stop supported by probable cause, "a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." 543 U. S., at 408. To be sure, *the dissent* in *Caballes* would have "appl[ied] *Terry*'s reasonable-relation test . . . to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes." *Id.*, at 420 (opinion of GINSBURG, J.). But even it conceded that the *Caballes* majority had "implicitly [rejected] the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search." *Id.*, at 421.

By strictly limiting the tasks that define the durational scope of the traffic stop, the majority accomplishes today what the *Caballes* dissent could not: strictly limiting the scope of an officer's activities during a traffic stop justified by probable cause. In doing so, it renders the difference between probable cause and reasonable suspicion virtually meaningless in this context. That shift is supported neither by the Fourth Amendment nor by our precedents interpreting it. And, it results in a constitutional framework that lacks predictability. Had Officer Struble arrested, handcuffed, and taken Rodriguez to the police station for his traffic violation, he would have complied with the Fourth Amendment. See *Atwater*, *supra*, at 354–355. But because he made Rodriguez wait for seven or eight extra minutes, he evidently committed a constitutional violation. Such a view of the Fourth Amendment makes little sense.

III

Today's revision of our Fourth Amendment jurisprudence was also entirely unnecessary. Rodriguez suffered no Fourth Amendment violation here for an entirely independent reason: Officer Struble had reasonable suspicion to continue to hold him for investigative purposes. Our precedents make clear that the Fourth Amendment permits an officer to conduct an investigative traffic stop when that officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Prado Navarette*, 572 U. S., at 396 (internal quotation marks omitted). Reasonable suspicion is determined by looking at "the whole picture," *id.*, at 397, taking into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Ornelas* v. *United States*, 517 U. S. 690, 695 (1996) (internal quotation marks omitted).

Officer Struble testified that he first became suspicious that Rodriguez was engaged in criminal activity for a num-

ber of reasons. When he approached the vehicle, he smelled an "overwhelming odor of air freshener coming from the vehicle," which is, in his experience, "a common attempt to conceal an odor that [people] don't want . . . to be smelled by the police." App. 20–21. He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was "more nervous than your typical passenger" who "do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation." *Id.*, at 34.

Officer Struble's interactions with the vehicle's occupants only increased his suspicions. When he asked Rodriguez why he had driven onto the shoulder, Rodriguez claimed that he swerved to avoid a pothole. But that story could not be squared with Officer Struble's observation of the vehicle slowly driving off the road before being jerked back onto it. And when Officer Struble asked Pollman where they were coming from and where they were going, Pollman told him they were traveling from Omaha, Nebraska, back to Norfolk, Nebraska, after looking at a vehicle they were considering purchasing. Pollman told the officer that he had neither seen pictures of the vehicle nor confirmed title before the trip. As Officer Struble explained, it "seemed suspicious" to him "to drive . . . approximately two hours . . . late at night to see a vehicle sight unseen to possibly buy it," *id.*, at 26, and to go from Norfolk to Omaha to look at it because "[u]sually people leave Omaha to go get vehicles, not the other way around" due to higher Omaha taxes, *id.*, at 65.

These facts, taken together, easily meet our standard for reasonable suspicion. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion," *Illinois* v. *Wardlow*, 528 U. S. 119, 124 (2000), and both vehicle occupants were engaged in such conduct. The officer also recog-

nized heavy use of air freshener, which, in his experience, indicated the presence of contraband in the vehicle. "[C]ommonsense judgments and inferences about human behavior" further support the officer's conclusion that Pollman's story about their trip was likely a cover story for illegal activity. *Id.*, at 125. Taking into account all the relevant facts, Officer Struble possessed reasonable suspicion of criminal activity to conduct the dog sniff.

Rodriguez contends that reasonable suspicion cannot exist because each of the actions giving rise to the officer's suspicions could be entirely innocent, but our cases easily dispose of that argument. Acts that, by themselves, might be innocent can, when taken together, give rise to reasonable suspicion. *United States* v. *Arvizu*, 534 U. S. 266, 274–275 (2002). *Terry* is a classic example, as it involved two individuals repeatedly walking back and forth, looking into a store window, and conferring with one another as well as with a third man. 392 U. S., at 6. The Court reasoned that this "series of acts, each of them perhaps innocent in itself, . . . together warranted further investigation," *id.*, at 22, and it has reiterated that analysis in a number of cases, see, *e. g.*, *Arvizu*, *supra*, at 277; *United States* v. *Sokolow*, 490 U. S. 1, 9–10 (1989). This one is no different.

* * *

I would conclude that the police did not violate the Fourth Amendment here. Officer Struble possessed probable cause to stop Rodriguez for driving on the shoulder, and he executed the subsequent stop in a reasonable manner. Our decision in *Caballes* requires no more. The majority's holding to the contrary is irreconcilable with *Caballes* and a number of other routine police practices, distorts the distinction between traffic stops justified by probable cause and those justified by reasonable suspicion, and abandons reasonableness as the touchstone of the Fourth Amendment. I respectfully dissent.

JUSTICE ALITO, dissenting.

This is an unnecessary,[1] impractical, and arbitrary decision. It addresses a purely hypothetical question: whether the traffic stop in this case *would be* unreasonable if the police officer, prior to leading a drug-sniffing dog around the exterior of petitioner's car, did not already have reasonable suspicion that the car contained drugs. In fact, however, the police officer *did have* reasonable suspicion, and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue.

The relevant facts are not in dispute. Officer Struble, who made the stop, was the only witness at the suppression hearing, and his testimony about what happened was not challenged. Defense counsel argued that the facts recounted by Officer Struble were insufficient to establish reasonable suspicion, but defense counsel did not dispute those facts or attack the officer's credibility. Similarly, the Magistrate Judge who conducted the hearing did not question the officer's credibility. And as JUSTICE THOMAS's opinion shows, the facts recounted by Officer Struble "easily meet our standard for reasonable suspicion." *Ante*, at 368 (dissenting opinion); see also, *e. g.*, *United States* v. *Carpenter*, 462 F. 3d 981, 986–987 (CA8 2006) (finding reasonable suspicion for a dog sniff based on implausible travel plans and nervous conduct); *United States* v. *Ludwig*, 641 F. 3d 1243, 1248–1250 (CA10 2011) (finding reasonable suspicion for a dog sniff where, among other things, the officer smelled "strong masking odors," the defendant's "account of his travel was suspect," and the defendant "was exceptionally nervous throughout his encounter").

Not only does the Court reach out to decide a question not really presented by the facts in this case, but the Court's answer to that question is arbitrary. The Court refuses to address the real Fourth Amendment question: whether the

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[1] See Brief in Opposition 11–14.

stop was unreasonably prolonged. Instead, the Court latches onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks.

This holding is not only arbitrary; it is perverse since Officer Struble chose that sequence for the purpose of protecting his own safety and possibly the safety of others. See App. 71–72. Without prolonging the stop, Officer Struble could have conducted the dog sniff while one of the tasks that the Court regards as properly part of the traffic stop was still in progress, but that sequence would have entailed unnecessary risk. At approximately 12:19 a.m., after collecting Pollman's driver's license, Officer Struble did two things. He called in the information needed to do a records check on Pollman (a step that the Court recognizes was properly part of the traffic stop), and he requested that another officer report to the scene. Officer Struble had decided to perform a dog sniff but did not want to do that without another officer present. When occupants of a vehicle who know that their vehicle contains a large amount of illegal drugs see that a drug-sniffing dog has alerted for the presence of drugs, they will almost certainly realize that the police will then proceed to search the vehicle, discover the drugs, and make arrests. Thus, it is reasonable for an officer to believe that an alert will increase the risk that the occupants of the vehicle will attempt to flee or perhaps even attack the officer. See, *e. g.*, *United States* v. *Dawdy*, 46 F. 3d 1427, 1429 (CA8 1995) (recounting scuffle between officer and defendant after drugs were discovered).

In this case, Officer Struble was concerned that he was outnumbered at the scene, and he therefore called for backup and waited for the arrival of another officer before conducting the sniff. As a result, the sniff was not completed until

seven or eight minutes after he delivered the warning. But Officer Struble could have proceeded with the dog sniff while he was waiting for the results of the records check on Pollman and before the arrival of the second officer. The drug-sniffing dog was present in Officer Struble's car. If he had chosen that riskier sequence of events, the dog sniff would have been completed before the point in time when, according to the Court's analysis, the authority to detain for the traffic stop ended. Thus, an action that would have been lawful had the officer made the *unreasonable* decision to risk his life became unlawful when the officer made the *reasonable* decision to wait a few minutes for backup. Officer Struble's error—apparently—was following prudent procedures motivated by legitimate safety concerns. The Court's holding therefore makes no practical sense. And nothing in the Fourth Amendment, which speaks of *reasonableness*, compels this arbitrary line.

The rule that the Court adopts will do little good going forward.[2] It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement. (I would love to be the proverbial fly on the wall when police instructors teach this rule to officers who make traffic stops.)

For these reasons and those set out in JUSTICE THOMAS's opinion, I respectfully dissent.

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[2] It is important to note that the Court's decision does not affect procedures routinely carried out during traffic stops, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Ante*, at 355. And the Court reaffirms that police "may conduct certain unrelated checks during an otherwise lawful traffic stop." *Ibid.* Thus, it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants out of their car during a valid stop. See *Arizona* v. *Johnson*, 555 U. S. 323, 333 (2009); *Maryland* v. *Wilson*, 519 U. S. 408, 414–415 (1997); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 111 (1977) (*per curiam*).

Syllabus

ONEOK, INC., ET AL. *v.* LEARJET, INC., ET AL.

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

No. 13–271. Argued January 12, 2015—Decided April 21, 2015

Respondents, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines, sued petitioner interstate pipelines, claiming that the pipelines had engaged in behavior that violated state antitrust laws. In particular, respondents alleged that petitioners reported false information to the natural-gas indices on which respondents' natural-gas contracts were based. The indices affected not only retail natural-gas prices, but also wholesale natural-gas prices.

After removing the cases to federal court, the petitioner pipelines sought summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law claims. That Act gives the Federal Energy Regulatory Commission (FERC) the authority to determine whether rates charged by natural-gas companies or practices affecting such rates are unreasonable. 15 U. S. C. § 717d(a). But it also limits FERC's jurisdiction to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies engaged in such transportation or sale. § 717(b). The Act leaves regulation of other portions of the industry—such as retail sales—to the States. *Ibid.*

The District Court granted petitioners' motion for summary judgment, reasoning that because petitioners' challenged practices directly affected wholesale as well as retail prices, they were pre-empted by the Act. The Ninth Circuit reversed. While acknowledging that the pipelines' index manipulation increased wholesale prices as well as retail prices, it held that the state-law claims were not pre-empted because they were aimed at obtaining damages only for excessively high retail prices.

Held: Respondents' state-law antitrust claims are not within the field of matters pre-empted by the Natural Gas Act. Pp. 384–391.

(a) The Act "was drawn with meticulous regard for the continued exercise of state power." *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517–518. Where, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption

can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court's precedents. Those precedents emphasize the importance of considering the target at which the state-law claims aim. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84; *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493. Here, respondents' claims are aimed at practices affecting retail prices, a matter "firmly on the States' side of [the] dividing line." *Id.*, at 514.

Schneidewind v. *ANR Pipeline Co.*, 485 U. S. 293, is not to the contrary. That opinion explains that the Act does not pre-empt "traditional" state regulation, such as blue sky laws. *Id.*, at 308, n. 11. Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. The broad applicability of state antitrust laws supports a finding of no pre-emption here.

So, too, does the fact that States have long provided "common-law and statutory remedies against monopolies and unfair business practices," *California* v. *ARC America Corp.*, 490 U. S. 93, 101. As noted earlier, the Act circumscribes FERC's powers and preserves traditional areas of state authority. § 717(b). Pp. 384–388.

(b) Neither *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, nor *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621, supports petitioners' position. *Mississippi Power* is best read as a conflict pre-emption case, not a field pre-emption case. In any event, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust suits are not. *Louisiana Power* is also a conflict pre-emption case, and thus does not significantly help petitioners' field pre-emption argument. Pp. 388–390.

(c) Because the parties have not argued conflict pre-emption, questions involving conflicts between state antitrust proceedings and the federal ratesetting process are left for the lower courts to resolve in the first instance. P. 390.

(d) While petitioners and the Government argue that this Court should defer to FERC's determination that field pre-emption bars respondents' claims, they fail to point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Thus, this Court need not consider what legal effect such a determination might have. P. 390.

715 F. 3d 716, affirmed.

Syllabus

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined as to all but Part I–A. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 391. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 392.

Neal K. Katyal argued the cause for petitioners. With him on the briefs were *Dominic F. Perella* and *Sean Marotta*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, and *Robert H. Solomon*.

Jeffrey L. Fisher argued the cause for respondents. With him on the brief for respondents Learjet, Inc., et al. were *Jennifer Gille Bacon*, *William E. Quirk*, *Gregory M. Bentz*, *Brian Wolfman*, *Donald D. Barry*, *Eric I. Unrein*, *Gary D. McCallister*, *Thomas J. H. Brill*, and *Melvin Goldstein*. *Robert L. Gegios*, *Ryan M. Billings*, *Stephen D. R. Taylor*, *Melinda A. Bialzik*, and *Amy Irene Washburn* filed a brief for the Wisconsin respondents.

Stephen R. McAllister, Solicitor General of Kansas, argued the cause for the State of Kansas et al. as *amici curiae* urging affirmance. With him on the brief were *Derek Schmidt*, Attorney General, *Jeffrey A. Chanay*, Chief Deputy Attorney General, and the Attorneys General for their respective States as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *George Jepsen* of Connecticut, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Janet T. Mills* of Maine, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Michael DeWine* of Ohio, *Peter F. Kilmartin* of Rhode Island, *Herbert*

H. Slatery III of Tennessee, *Robert W. Ferguson* of Washington, and *J. B. Van Hollen* of Wisconsin.*

JUSTICE BREYER delivered the opinion of the Court.

In this case, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines sued the pipelines, claiming that they engaged in behavior that violated state antitrust laws. The pipelines' behavior affected *both* federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices. The question is whether the federal Natural Gas Act pre-empts these lawsuits. We have said that, in passing the Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 305 (1988). Nevertheless, for the reasons given below, we conclude that the Act does not pre-empt the state-law antitrust suits at issue here.

I

A

The Supremacy Clause provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Congress may consequently pre-empt, *i. e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt

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*Briefs of *amici curiae* urging reversal were filed for the Interstate Natural Gas Association of America et al. by *Thomas C. Goldstein* and *Kevin K. Russell*; for Noble Americas Energy Solutions et al. by *Sean D. Jordan*; and for the Washington Legal Foundation by *Cory L. Andrews*.

Richard M. Brunell and *Albert A. Foer* filed a brief for the American Antitrust Institute as *amicus curiae* urging affirmance.

a state law, rule, or other state action. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 64 (2002).

It may do so either through "field" pre-emption or "conflict" pre-emption. As to the former, Congress may have intended "to foreclose any state regulation in the *area*," irrespective of whether state law is consistent or inconsistent with "federal standards." *Arizona* v. *United States*, 567 U. S. 387, 401 (2012) (emphasis added). In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts.

By contrast, conflict pre-emption exists where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California* v. *ARC America Corp.*, 490 U. S. 93, 100, 101 (1989). In either situation, federal law must prevail.

No one here claims that any relevant federal statute expressly pre-empts state antitrust lawsuits. Nor have the parties argued at any length that these state suits conflict with federal law. Rather, the interstate pipeline companies (petitioners here) argue that Congress implicitly "'occupied *the field of matters* relating to wholesale sales and transportation of natural gas in interstate commerce.'" Brief for Petitioners 18 (quoting *Schneidewind*, *supra*, at 305 (emphasis added)). And they contend that the state antitrust claims advanced by their direct-sales customers (respondents here) fall within that field. The United States, supporting the pipelines, argues similarly. See Brief for United States as *Amicus Curiae* 15. Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question.

B

1

Federal regulation of the natural-gas industry began at a time when the industry was divided into three segments.

See 1 Regulation of the Natural Gas Industry § 1.01 (W. Mogel ed. 2008) (hereinafter Mogel); *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 283 (1997). First, natural-gas producers sunk wells in large oil and gas fields (such as the Permian Basin in Texas and New Mexico). They gathered the gas, brought it to transportation points, and left it to interstate gas pipelines to transport the gas to distant markets. Second, interstate pipelines shipped the gas from the field to cities and towns across the Nation. Third, local gas distributors bought the gas from the interstate pipelines and resold it to business and residential customers within their localities.

Originally, the States regulated all three segments of the industry. See 1 Mogel § 1.03. But in the early 20th century, this Court held that the Commerce Clause forbids the States to regulate the second part of the business—*i. e.*, the interstate shipment and sale of gas to local distributors for resale. See, *e. g.*, *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 89–90 (1927); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 307–308 (1924). These holdings left a regulatory gap. Congress enacted the Natural Gas Act, 52 Stat. 821, to fill it. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682–684, and n. 13 (1954) (citing H. R. Rep. No. 709, 75th Cong., 1st Sess., 1–2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 1–2 (1937)).

The Act, in § 5(a), gives ratesetting authority to the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission (FPC)). That authority allows FERC to determine whether "any rate, charge, or classification . . . collected by any natural-gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of* [*FERC*]," or "any rule, regulation, practice, or contract affecting *such* rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." 15 U. S. C. § 717d(a) (emphasis added). As the italicized words make clear, § 5(a) limits the scope of FERC's authority

to activities "in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission*." *Ibid.* (emphasis added). And the Act, in § 1(b), limits FERC's "jurisdiction" to (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale." § 717(b). The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States. See *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493, 507 (1989) (Section 1(b) of the Act "expressly" provides that "States retain jurisdiction over *intrastate* transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas' ").

To simplify our discussion, we shall describe the firms that engage in interstate transportation as "jurisdictional sellers" or "interstate pipelines" (though various brokers and others may also fall within the Act's jurisdictional scope). Similarly, we shall refer to the sales over which FERC has jurisdiction as "jurisdictional sales" or "wholesale sales."

2

Until the 1970's, natural-gas regulation roughly tracked the industry model we described above. Interstate pipelines would typically buy gas from field producers and resell it to local distribution companies for resale. See *Tracy*, *supra*, at 283. FERC (or FPC), acting under the authority of the Natural Gas Act, would set interstate pipeline wholesale rates using classical "cost-of-service" ratemaking methods. See *Public Serv. Comm'n of N. Y.* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319, 328 (1983). That is, FERC would determine a pipeline's revenue requirement by calculating the costs of providing its services, including operating and maintenance expenses, depreciation expenses, taxes, and a reasonable profit. See FERC, Cost-of-Service Rates Man-

ual 6 (June 1999). FERC would then set wholesale rates at a level designed to meet the pipeline's revenue requirement.

Deregulation of the natural-gas industry, however, brought about changes in FERC's approach. In the 1950's, this Court had held that the Natural Gas Act required regulation of prices at the interstate pipelines' *buying* end—*i. e.*, the prices at which field producers sold natural gas to interstate pipelines. *Phillips Petroleum Co.*, *supra*, at 682, 685. By the 1970's, many in Congress thought that such efforts to regulate field prices had jeopardized natural-gas supplies in an industry already dependent "on the caprice of nature." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 630 (1944) (opinion of Jackson, J.); see *id.*, at 629 (recognizing that "the wealth of Midas and the wit of man cannot produce . . . a natural gas field"). Hoping to avoid future shortages, Congress enacted forms of field price deregulation designed to rely upon competition, rather than regulation, to keep field prices low. See, *e. g.*, Natural Gas Policy Act of 1978, 92 Stat. 3409, codified in part at 15 U. S. C. § 3301 *et seq.* (phasing out regulation of wellhead prices charged by producers of natural gas); Natural Gas Wellhead Decontrol Act of 1989, 103 Stat. 157 (removing price controls on wellhead sales as of January 1993).

FERC promulgated new regulations designed to further this process of deregulation. See, *e. g.*, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (1985) (allowing "open access" to pipelines so that consumers could pay to ship their own gas). Most important here, FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory ratesetting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level. Order No. 636, issued in 1992, allowed FERC to issue blanket certificates that permitted jurisdictional sellers (typically interstate pipelines) to charge market-based rates for gas, provided that FERC had first determined that the sellers lacked mar-

ket power. See 57 Fed. Reg. 57957–57958 (1992); *id.*, at 13270.

After the issuance of this order, FERC's oversight of the natural-gas market largely consisted of (1) ex ante examinations of jurisdictional sellers' market power, and (2) the availability of a complaint process under § 717d(a). See Brief for United States as *Amicus Curiae* 4. The new system also led many large gas consumers—such as industrial and commercial users—to buy their own gas directly from gas producers, and to arrange (and often pay separately) for transportation from the field to the place of consumption. See *Tracy*, 519 U. S., at 284. Insofar as interstate pipelines sold gas to such consumers, they sold it for direct consumption rather than resale.

3

The free-market system for setting interstate pipeline rates turned out to be less than perfect. Interstate pipelines, distributing companies, and many of the customers who bought directly from the pipelines found that they had to rely on privately published price indices to determine appropriate prices for their natural-gas contracts. These indices listed the prices at which natural gas was being sold in different (presumably competitive) markets across the country. The information on which these indices were based was voluntarily reported by natural-gas traders.

In 2003, FERC found that the indices were inaccurate, in part because much of the information that natural-gas traders reported had been false. See FERC, Final Report on Price Manipulation in Western Markets (Mar. 2003), App. 88–89. FERC found that false reporting had involved "inflating the volume of trades, omitting trades, and adjusting the price of trades." *Id.*, at 88. That is, sometimes those who reported information simply fabricated it. Other times, the information reported reflected "wash trades," *i. e.*, "*prearranged* pair[s] of trades of the same good between the same parties, involving no economic risk and no net change in ben-

eficial ownership." *Id.*, at 215. FERC concluded that these "efforts to manipulate price indices compiled by trade publications" had helped raise "to extraordinary levels" the prices of both jurisdictional sales (that is, interstate pipeline sales for resale) and nonjurisdictional direct sales to ultimate consumers. *Id.*, at 86, 85.

After issuing its final report on price manipulation in western markets, FERC issued a Code of Conduct. That code amended all blanket certificates to prohibit jurisdictional sellers "from engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." 68 Fed. Reg. 66324 (2003). The code also required jurisdictional companies, when they provided information to natural-gas index publishers, to "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.*, at 66337. At the same time, FERC issued a policy statement setting forth "minimum standards for creation and publication of any energy price index" and "for reporting transaction data to index developers." *Price Discovery in Natural Gas and Elec. Markets*, 104 FERC ¶61,121, pp. 61,407, 61,408 (2003). Finally, FERC, after finding that certain jurisdictional sellers had "engaged in wash trading . . . that resulted in the manipulation of [natural-gas] prices," terminated those sellers' blanket marketing certificates. *Enron Power Marketing, Inc.*, 103 FERC ¶61,343, p. 62,303 (2003).

Congress also took steps to address these problems. In particular, it passed the Energy Policy Act of 2005, 119 Stat. 594, which gives FERC the authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" by "any entity . . . in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of" FERC, 15 U. S. C. § 717c–1.

C

We now turn to the cases before us. Respondents, as we have said, bought large quantities of natural gas directly from interstate pipelines for their own consumption. They believe that they overpaid in these transactions due to the interstate pipelines' manipulation of the natural-gas indices. Based on this belief, they filed state-law antitrust suits against petitioners in state and federal courts. See App. 244–246 (alleging violations of Wis. Stat. §§ 133.03, 133.14, 133.18); see also App. 430–433 (same); *id.*, at 519–521 (same); *id.*, at 362–364 (alleging violations of Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50–101 *et seq.*); App. 417–419 (alleging violations of Missouri Antitrust Law, Mo. Rev. Stat. §§ 416.011–416.161). The pipelines removed all the state cases to federal court, where they were consolidated and sent for pretrial proceedings to the Federal District Court for the District of Nevada. See 28 U. S. C. § 1407.

The pipelines then moved for summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law antitrust claims. The District Court granted their motion. It concluded that the pipelines were "jurisdictional sellers," *i. e.*, "natural gas companies engaged in" the "transportation of natural gas in interstate commerce." Order in No. 03–cv–1431 (D Nev., July 18, 2011), pp. 4, 11. And it held that respondents' claims, which were "aimed at" these sellers' "alleged practices of false price reporting, wash trades, and anticompetitive collusive behavior" were pre-empted because "such practices" not only affected nonjurisdictional direct-sale prices but also "directly affect[ed]" jurisdictional (*i. e.*, wholesale) rates. *Id.*, at 36–37.

The Ninth Circuit reversed. It emphasized that the price manipulation of which respondents complained affected not only jurisdictional (*i. e.*, wholesale) sales but also nonjurisdictional (*i. e.*, retail) sales. The court construed the Natural Gas Act's pre-emptive scope narrowly in light of Congress' intent—manifested in § 1(b) of the Act—to preserve

for the States the authority to regulate nonjurisdictional sales. And it held that the Act did not pre-empt state-law claims aimed at obtaining damages for excessively high *retail* natural-gas prices stemming from interstate pipelines' price manipulation, even if the manipulation raised *wholesale* rates as well. See *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F. 3d 716, 729–736 (2013).

The pipelines sought certiorari. They asked us to resolve confusion in the lower courts as to whether the Natural Gas Act pre-empts retail customers' state antitrust law challenges to practices that also affect wholesale rates. Compare *id.*, at 729–736, with *Leggett* v. *Duke Energy Corp.*, 308 S. W. 3d 843 (Tenn. 2010). We granted the petition.

II

Petitioners, supported by the United States, argue that their customers' state antitrust lawsuits are within the field that the Natural Gas Act pre-empts. See Brief for Petitioners 18 (citing *Schneidewind*, 485 U. S., at 305); Brief for United States as *Amicus Curiae* 13 (same). They point out that respondents' antitrust claims target anticompetitive activities that affected wholesale (as well as retail) rates. See Brief for Petitioners 2. They add that the Natural Gas Act expressly grants FERC authority to keep wholesale rates at reasonable levels. See *ibid.* (citing 15 U. S. C. §§ 717(b), 717d(a)). In exercising this authority, FERC has prohibited the very kind of anticompetitive conduct that the state actions attack. See Part I–B–3, *supra.* And, petitioners contend, letting these actions proceed will permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC might reach or has already reached. Accordingly, petitioners argue, respondents' state-law antitrust suits fall within the pre-empted field.

A

Petitioners' arguments are forceful, but we cannot accept their conclusion. As we have repeatedly stressed, the Natu-

ral Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517–518 (1947); see also *Northwest Central*, 489 U. S., at 511 (the "legislative history of the [Act] is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions' " (quoting 81 Cong. Rec. 6721 (1937))). Accordingly, where (as here) a state law can be applied to nonjurisdictional as well as jurisdictional sales, we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents. See *Panhandle Eastern*, *supra*, at 516–518; *Interstate Natural Gas Co.* v. *FPC*, 331 U. S. 682, 689–693 (1947).

Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted. For example, in *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84 (1963), the Court said that it had "consistently recognized" that the "significant distinction" for purposes of pre-emption in the natural-gas context is the distinction between "measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at" subjects left to the States to regulate. *Id.*, at 94 (emphasis added). And, in *Northwest Central*, the Court found that the Natural Gas Act did not pre-empt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, *i. e.*, jurisdictional sales. 489 U. S., at 514. In reaching this conclusion, the Court explained that the state regulation aimed primarily at "protect[ing] producers' . . . rights—a matter firmly on the States' side of that dividing line." *Ibid.* The Court contrasted this state regulation with the state orders at issue in *Northern Natural*, which " 'invalidly invade[d] the federal

agency's exclusive domain' precisely because" they were "'unmistakably and unambiguously *directed at purchasers*.'" *Id.*, at 513 (quoting *Northern Natural*, *supra*, at 92; emphasis added). Here, too, the lawsuits are directed at practices affecting *retail* rates—which are "firmly on the States' side of that dividing line."

Petitioners argue that *Schneidewind* constitutes contrary authority. In that case, the Court found pre-empted a state law that required public utilities, such as interstate pipelines crossing the State, to obtain state approval before issuing long-term securities. 485 U. S., at 306–309. But the Court there thought that the State's securities regulation was aimed directly at interstate pipelines. It wrote that the state law was designed to keep "a natural gas company from raising its equity levels above a certain point" in order to keep the company's revenue requirement low, thereby ensuring lower *wholesale* rates. *Id.*, at 307–308. Indeed, the Court expressly said that the state law was pre-empted because it was "*directed at* . . . the control of rates and facilities of natural gas companies," "precisely the things over which FERC has comprehensive authority." *Id.*, at 308 (emphasis added).

The dissent rejects the notion that the proper test for purposes of pre-emption in the natural-gas context is whether the challenged measures are "aimed directly at interstate purchasers and wholesales for resale" or not. *Northern Natural*, *supra*, at 94. It argues that this approach is "unprecedented," and that the Court's focus should be on "*what* the State seeks to regulate . . . , not *why* the State seeks to regulate it." *Post*, at 397 (opinion of SCALIA, J.). But the "target" to which our cases refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. To repeat the point we made above, no one could claim that FERC's regu-

lation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Indeed, although the dissent argues that *Schneidewind* created a definitive test for pre-emption in the natural-gas context that turns on whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act," *post*, at 394 (quoting 485 U. S., at 310, n. 13), *Schneidewind* could not mean this statement as an absolute test. It goes on to explain that the Natural Gas Act does not pre-empt "traditional" state regulation, such as state blue sky laws (which, of course, raise wholesale—as well as retail—investment costs). *Id.*, at 308, n. 11.

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. See *ibid.* They are far broader in their application than, for example, the regulations at issue in *Northern Natural*, which applied only to entities buying gas from fields within the State. See 372 U. S., at 85–86, n. 1; contra, *post*, at 396 (stating that *Northern Natural* concerned "background market conditions"). This broad applicability of state antitrust law supports a finding of no pre-emption here.

Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. See Brief for Petitioners 18; *post*, at 397–398. But that Platonic ideal does not describe the natural-gas regulatory world. Suppose FERC, when setting wholesale rates in the former cost-of-service ratemaking days, had denied cost recovery for pipelines' failure to recycle. Would that fact deny States the power to enact and apply recycling laws? These state laws might well raise pipelines' operating costs, and thus the costs of wholesale natural-gas transportation. But in *Northwest Central* we said that "[t]o find field pre-emption of [state] regulation merely because purchasers' costs and hence rates might be

affected would be largely to nullify . . . § 1(b)." 489 U. S., at 514.

The dissent barely mentions the limitations on FERC's powers in § 1(b), but the enumeration of FERC's powers in § 5(a) is circumscribed by a reference back to the limitations in § 1(b). See *post*, at 392–394. As we explained above, see Part I–B–1, *supra*, those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern*, 332 U. S., at 517–518. Contra, *post*, at 399. States have a "long history of" providing "common-law and statutory remedies against monopolies and unfair business practices." *ARC America*, 490 U. S., at 101; see also *Watson* v. *Buck*, 313 U. S. 387, 404 (1941) (noting the States' "long-recognized power to regulate combinations in restraint of trade"). Respondents' state-law antitrust suits relied on this well-established state power.

B

Petitioners point to two other cases that they believe support their position. The first is *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354 (1988). There, the Court held that the Federal Power Act—which gives FERC the authority to determine whether rates charged by public utilities in electric energy sales are "just and reasonable," 16 U. S. C. § 824d(a)—pre-empted a state inquiry into the reasonableness of FERC-approved prices for the sale of nuclear power to wholesalers of electricity (which led to higher retail electricity rates). 487 U. S., at 373–377. Petitioners argue that this case shows that state regulation of similar sales here—*i. e.*, by a pipeline to a direct consumer—must also be pre-empted. See Reply Brief 11–12. *Mississippi Power*, however, is best read as a conflict pre-emption case, not a field pre-emption case. See 487 U. S., at 377 ("[A]

state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity'" (quoting *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 318–319 (1981))).

Regardless, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust lawsuits are not. Mississippi's inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to "regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." 487 U. S., at 374. By contrast, respondents' state antitrust lawsuits do not seek to challenge the reasonableness of any rates expressly approved by FERC. Rather, they seek to challenge the background marketplace conditions that affected both jurisdictional and nonjurisdictional rates.

Petitioners additionally point to *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621 (1972). In that case, the Court held that federal law gave FPC the authority to allocate natural gas during shortages by ordering interstate pipelines to curtail gas deliveries to all customers, *including retail customers.* This latter fact, the pipelines argue, shows that FERC has authority to regulate index manipulation insofar as that manipulation affects *retail* (as well as wholesale) sales. Brief for Petitioners 26. Accordingly, they contend that state laws that aim at this same subject are pre-empted.

This argument, however, makes too much of too little. The Court's finding of pre-emption in *Louisiana Power* rested on its belief that the state laws in question *conflicted* with federal law. The Court concluded that "FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale," 406 U. S., at 631, because otherwise there would be "unavoidable conflict between" state regulation of direct sales and the "uniform fed-

eral regulation" that the Natural Gas Act foresees, *id.*, at 633–635. Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not. Because petitioners have not argued this case as a conflict pre-emption case, *Louisiana Power* does not offer them significant help.

C

To the extent any conflicts arise between state antitrust law proceedings and the federal ratesetting process, the doctrine of conflict pre-emption should prove sufficient to address them. But as we have noted, see Part I–A, *supra*, the parties have not argued conflict pre-emption. See also, *e. g.*, Tr. of Oral Arg. 24 (Solicitor General agrees that he has not "analyzed this [case] under a conflict preemption regime"). We consequently leave conflict pre-emption questions for the lower courts to resolve in the first instance.

D

We note that petitioners and the Solicitor General have argued that we should defer to FERC's determination that field pre-emption bars respondents' claims. See Brief for Petitioners 22 (citing *Arlington* v. *FCC*, 569 U. S. 290, 301–305 (2013); Brief for United States as *Amicus Curiae* 32 (same). But they have not pointed to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Rather, they point only to the fact that FERC has promulgated detailed rules governing manipulation of price indices. Because there is no determination by FERC that its regulation pre-empts the field into which respondents' state-law antitrust suits fall, we need not consider what legal effect such a determination might have. And we conclude that the detailed federal regulations here do not offset the other considerations that weigh against a finding of pre-emption in this context.

* * *

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

It is so ordered.

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

I agree with much of the majority's application of our precedents governing pre-emption under the Natural Gas Act. I write separately to reiterate my view that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth* v. *Levine*, 555 U. S. 555, 583 (2009) (THOMAS, J., concurring in judgment). The Supremacy Clause of our Constitution "gives 'supreme' status only to those [federal laws] that are 'made in Pursuance' " of it. *Id.*, at 585 (quoting Art. VI, cl. 2). And to be "made in Pursuance" of the Constitution, a law must fall within one of Congress' enumerated powers and be promulgated in accordance with the lawmaking procedures set forth in that document. 555 U. S., at 585–586. "The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Id.*, at 586.

In light of this constitutional requirement, I have doubts about the legitimacy of this Court's precedents concerning the pre-emptive scope of the Natural Gas Act, see, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84, 91–92 (1963) (defining the pre-empted field in light of the "objective[s]" of the Act). Neither party, however, has asked us to overrule these longstanding precedents or "to overcome the presumption of *stare decisis* that attaches to" them. *Kurns* v. *Railroad Friction Products Corp.*, 565 U. S. 625, 633 (2012). And even under these precedents, the challenged state antitrust laws fall outside the

pre-empted field. Because the Court today avoids extending its earlier questionable precedents, I concur in its judgment and join all but Part I–A of its opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Natural Gas Act divides responsibility over trade in natural gas between federal and state regulators. The Act and our cases interpreting it draw a firm line between national and local authority over this trade: If the Federal Government may regulate a subject, the States may not. Today the Court smudges this line. It holds that States may use their antitrust laws to regulate practices already regulated by the Federal Energy Regulatory Commission whenever "other considerations . . . weigh against a finding of pre-emption." *Ante*, at 390. The Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice.

I

Trade in natural gas consists of three parts. A drilling company collects gas from the earth; a pipeline company then carries the gas to its destination and sells it at wholesale to a local distributor; and the local distributor sells the gas at retail to industries and households. See *ante*, at 377–378. The Natural Gas Act empowers the Commission to regulate the middle of this three-leg journey—interstate transportation and wholesale sales. 15 U. S. C. § 717 *et seq.* But it does not empower the Commission to regulate the opening and closing phases—production at one end, retail sales at the other—thus leaving those matters to the States. § 717(b). (Like the Court, I will for simplicity's sake call the sales controlled by the Commission wholesale sales, and the companies controlled by the Commission pipelines. See *ante*, at 379.)

Over 70 years ago, the Court concluded that the Act confers "exclusive jurisdiction upon the federal regulatory

agency." *Public Util. Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 469 (1943). The Court thought it "clear" that the Act contemplates "a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere," "without any confusion of functions." *Id.*, at 467. The Court drew this inference from the law's purpose and legislative history, though it could just as easily have relied on the law's terms and structure. The Act grants the Commission a wide range of powers over wholesale sales and transportation, but qualifies only some of these powers with reservations of state authority over the same subject. See § 717g(a) (concurrent authority over recordkeeping); § 717h(a) (concurrent authority over depreciation and amortization rates). Congress's decision to include express reservations of state power alongside these grants of authority, but to omit them alongside other grants of authority, suggests that the other grants are exclusive. Right or wrong, in any event, our inference of exclusivity is now settled beyond debate.

United Fuel rejected a State's regulation of wholesale rates. *Id.*, at 468. But our later holdings establish that the Act makes exclusive the Commission's powers in general, not just its rate-setting power in particular. We have again and again set aside state laws—even those that do not purport to fix wholesale rates—for regulating a matter already subject to regulation by the Commission. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84, 89 (1963) (state regulation of pipelines' gas purchases preempted because it "invade[s] the exclusive jurisdiction which the Natural Gas Act has conferred upon the [Commission]"); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 185 (1983) (state law prohibiting producers from passing on production taxes preempted because it "trespasse[s] upon FERC's authority"); *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 309 (1988) (state securities regulation directly af-

fecting wholesale rates and gas transportation facilities preempted because it regulates "matters that Congress intended FERC to regulate"). The test for preemption in this setting, the Court has confirmed, "'is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Id.*, at 310, n. 13.

Straightforward application of these precedents would make short work of the case at hand. The Natural Gas Act empowers the Commission to regulate "practice[s] . . . affecting [wholesale] rate[s]." § 717d. Nothing in the Act suggests that the States share power to regulate these practices. The Commission has reasonably determined that this power allows it to regulate the behavior involved in this case, pipelines' use of sham trades and false reports to manipulate gas price indices. Because the Commission's exclusive authority extends to the conduct challenged here, state antitrust regulation of that conduct is preempted.

II

The Court agrees that the Commission may regulate index manipulation, but upholds state antitrust regulation of this practice anyway on account of "other considerations that weigh against a finding of pre-emption in this context." *Ante*, at 390. That is an unprecedented decision. The Court does not identify a single case—not one—in which we have sustained state regulation of behavior already regulated by the Commission. The Court's justifications for its novel approach do not persuade.

A

The Court begins by considering "the *target* at which the state law *aims*." *Ante*, at 385. It reasons that because this case involves a practice that affects both wholesale and retail rates, the Act tolerates state regulation that takes aim at the practice's retail-stage effects. *Ante*, at 386.

This analysis misunderstands how the Natural Gas Act divides responsibilities between national and local regulators. The Act does not give the Commission the power to aim at

particular effects; it gives it the power to regulate particular activities. When the Commission regulates those activities, it may consider their effects on *all* parts of the gas trade, not just on wholesale sales. It may, for example, set wholesale rates with the aim of encouraging producers to conserve gas supplies—even though production is a state-regulated activity. See *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 602–603 (1945); *id.*, at 609–610 (Jackson, J., concurring). Or it may regulate wholesale sales with an eye toward blunting the sales' anticompetitive effects in the retail market—even though retail prices are controlled by the States. See *FPC* v. *Conway Corp.*, 426 U. S. 271, 276–280 (1976). The Court's ad hoc partition of authority over index manipulation—leaving it to the Commission to control the practice's consequences for wholesale sales, but allowing the States to target its consequences for retail sales—thus clashes with the design of the Act.

To justify its fixation on aims, the Court stresses that this case involves regulation of "background marketplace conditions" rather than regulation of wholesale rates or sales themselves. *Ante*, at 389. But the Natural Gas Act empowers the Commission to regulate wholesale rates *and* "background" practices affecting such rates. It grants both powers in the same clause: "Whenever the Commission . . . find[s] that a [wholesale] rate, charge, or classification . . . [or] any rule, regulation, *practice*, or contract affecting such rate, charge, or classification is unjust [or] unreasonable, . . . the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, *practice*, or contract to be thereafter observed." § 717d(a) (emphasis added). Nothing in this provision, and for that matter nothing in the Act, suggests that federal authority over practices is a second-class power, somehow less exclusive than the authority over rates.

The Court persists that the background conditions in this case affect *both* wholesale and retail sales. *Ante*, at 389. This observation adds atmosphere, but nothing more. The

Court concedes that index manipulation's dual effect does not weaken the Commission's power to regulate it. *Ante*, at 384–385. So too should the Court have seen that this simultaneous effect does not strengthen the claims of the States. It is not at all unusual for an activity controlled by the Commission to have effects in the States' field; production, wholesale, and retail are after all interdependent stages of a single trade. We have never suggested that the rules of field preemption change in such situations. For example, producers' ability to pass production taxes on to pipelines no doubt affects both producers and pipelines. Yet we had no trouble concluding that a state law restricting producers' ability to pass these taxes impermissibly attempted to manage "a matter within the sphere of FERC's regulatory authority." *Exxon*, *supra*, at 185–186.

The Court's approach makes a snarl of our precedents. In *Northern Natural*, the Court held that the Act preempts state regulations requiring pipelines to buy gas ratably from gas wells. 372 U. S., at 90. The regulations in that case shared each of the principal features emphasized by the Court today. They governed background market conditions, not wholesale prices. *Id.*, at 90–91. The background conditions in question, pipelines' purchases from gas wells, affected both the federal field of wholesale sales and the state field of gas production. *Id.*, at 92–93. And the regulations took aim at the purchases' effects on production; they sought to promote conservation of natural resources by limiting how much gas pipelines could take from each well. *Id.*, at 93. No matter; the Court still concluded that the regulations "invade[d] the federal agency's exclusive domain." *Id.*, at 92. The factors that made no difference in *Northern Natural* should make no difference today.

Contrast *Northern Natural* with *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493 (1989), which involved state regulations that restricted the times when producers could take gas from wells. On

this occasion the Court upheld the regulations—not because the law aimed at the objective of gas conservation, but because the State pursued this end by regulating "'the physical ac[t] of drawing gas from the earth.'" *Id.*, at 510. Our precedents demand, in other words, that the Court focus in the present case upon *what* the State seeks to regulate (a pipeline practice that is subject to regulation by the Commission), not *why* the State seeks to regulate it (to curb the practice's effects on retail rates).

Trying to turn liabilities into assets, the Court brandishes statements from *Northern Natural* and *Northwest Central* that (in its view) discuss where state law was "aimed" or "directed." *Ante*, at 385, 386. But read in context, these statements refer to the entity or activity that the state law regulates, not to which of the activity's effects the law seeks to control by regulating it. See, *e. g.*, *Northern Natural*, *supra*, at 94 ("[O]ur cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales . . . , and those aimed at producers and production"); *Northwest Central*, *supra*, at 512 ("[This regulation] is directed to the behavior of gas producers"). The lawsuits at hand target pipelines (entities regulated by the Commission) for their manipulation of indices (behavior regulated by the Commission). That should have sufficed to establish preemption.

B

The Court also tallies several features of state antitrust law that, it believes, weigh against preemption. *Ante*, at 387–388. Once again the Court seems to have forgotten its precedents. We have said before that "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction'" over the gas trade. *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953, 966 (1986) (quoting *FPC* v. *Southern Cal. Edison Co.*, 376 U. S. 205, 215–216 (1964)). Our decisions have therefore "'squarely rejected'"

the theory, endorsed by the Court today, that the boundary between national and local authority turns on "'a case-by-case analysis of the impact of state regulation upon the national interest.'" *Ibid.*

State antitrust law, the Court begins, applies to "all businesses in the marketplace" rather than just "natural-gas companies in particular." *Ante*, at 387. So what? No principle of our natural-gas preemption jurisprudence distinguishes particularized state laws from state laws of general applicability. We have never suggested, for example, that a State may use general price-gouging laws to fix wholesale rates, or general laws about unfair trade practices to control wholesale contracts, or general common-carrier laws to administer interstate pipelines. The Court in any event could not have chosen a worse setting in which to attempt a distinction between general and particular laws. Like their federal counterpart, state antitrust laws tend to use the rule of reason to judge the lawfulness of challenged practices. Legal Aspects of Buying and Selling § 10:12 (P. Zeidman ed. 2014–2015). This amorphous standard requires the reviewing court to consider "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997). Far from authorizing across-the-board application of a uniform requirement, therefore, the Court's decision will invite state antitrust courts to engage in targeted regulation of the natural-gas industry.

The Court also stresses the "'long history'" of state antitrust regulation. *Ante*, at 388. Again, quite beside the point. States have long regulated public utilities, yet the Natural Gas Act precludes them from using that established power to fix gas wholesale prices. *United Fuel*, 317 U. S., at 468. States also have long enacted laws to conserve natural resources, yet the Act precludes them from deploying that power to control purchases made by gas pipelines. *North-*

ern Natural, 372 U. S., at 93–94. The Court's invocation of the pedigree of state antitrust law rests on air.

One need not launch this unbounded inquiry into the features of state law in order to preserve the States' authority to apply "tax laws," "disclosure laws," and "blue sky laws" to natural-gas companies, *ante*, at 386, 387. One need only stand by the principle that if the Commission has authority over a subject, the States lack authority over that subject. The Commission's authority to regulate gas pipelines "in the public interest," § 717a, is a power to address matters that are traditionally the concern of utility regulators, not "a broad license to promote the general public welfare," *NAACP* v. *FPC*, 425 U. S. 662, 669 (1976). We have explained that the Commission does not, for example, have power to superintend "employment discrimination" or "unfair labor practices." *Id.*, at 670–671. So the Act does not preempt state employment discrimination or labor laws. But the Commission does have power to consider, say, "conservation, environmental, and *antitrust* questions." *Id.*, at 670, n. 6 (emphasis added). So the Act does preempt state antitrust laws.

C

At bottom, the Court's decision turns on its perception that the Natural Gas Act "'was drawn with meticulous regard for the continued exercise of state power.'" *Ante*, at 385. No doubt the Act protects state authority in a variety of ways. It gives the Commission authority over only some parts of the gas trade. § 717(b). It establishes procedures under which the Commission may consult, collaborate, or share information with States. § 717p. It even provides that the Commission may regulate practices affecting wholesale rates "upon its own motion *or upon complaint of any State*." § 717d(a) (emphasis added). It should have gone without saying, however, that no law pursues its purposes at all costs. Nothing in the Act and nothing in our cases suggests that Congress protected state power in the way imag-

ined by today's decision: by licensing state sorties into the Commission's domain whenever judges conclude that an incursion would not be too disruptive.

The Court's preoccupation with the purpose of preserving state authority is all the more inexpiable because that is not the Act's only purpose. The Act also has competing purposes, the most important of which is promoting "uniformity of regulation." *Northern Natural*, *supra*, at 91–92. The Court's decision impairs *that* objective. Before today, interstate pipelines knew that their practices relating to price indices had to comply with one set of regulations promulgated by the Commission. From now on, however, pipelines will have to ensure that their behavior conforms to the discordant regulations of 50 States—or more accurately, to the discordant verdicts of untold state antitrust juries. The Court's reassurance that pipelines may still invoke conflict preemption, see *ante*, at 390, provides little comfort on this front. Conflict preemption will resolve only discrepancies between state and federal regulations, not the discrepancies among differing state regulations to which today's opinion subjects the industry.

* * *

"The Natural Gas Act was designed . . . to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949) (footnote omitted). Today, however, the Court allows the States to encroach. Worse still, it leaves pipelines guessing about when States will be allowed to encroach again. May States aim at retail rates under laws that share none of the features of antitrust law advertised today? Under laws that share only some of those features? May States apply their antitrust laws to pipelines *without* aiming at retail rates? But that is just the start. Who knows what other "considerations that weigh against a finding of pre-emption" remain

to be unearthed in future cases? The Court's all-things-considered test does not make for a stable background against which to carry on the natural-gas trade.

I would stand by the more principled and more workable line traced by our precedents. The Commission may regulate the practices alleged in this case; the States therefore may not. I respectfully dissent.

Syllabus

UNITED STATES *v.* KWAI FUN WONG

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

No. 13–1074. Argued December 10, 2014—Decided April 22, 2015*

The Federal Tort Claims Act (FTCA) provides that a tort claim against the United States "shall be forever barred" unless the claimant meets two deadlines. First, a claim must be presented to the appropriate federal agency for administrative review "within two years after [the] claim accrues." 28 U. S. C. § 2401(b). Second, if the agency denies the claim, the claimant may file suit in federal court "within six months" of the agency's denial. *Ibid.*

Kwai Fun Wong and Marlene June, respondents in Nos. 13–1074 and 13–1075, respectively, each missed one of those deadlines. Wong failed to file her FTCA claim in federal court within six months, but argued that that was only because the District Court had not permitted her to file that claim until after the period expired. June failed to present her FTCA claim to a federal agency within two years, but argued that her untimely filing should be excused because the Government had, in her view, concealed facts vital to her claim. In each case, the District Court dismissed the FTCA claim for failure to satisfy § 2401(b)'s time bars, holding that, despite any justification for delay, those time bars are jurisdictional and not subject to equitable tolling. The Ninth Circuit reversed in both cases, concluding that § 2401(b)'s time bars may be equitably tolled.

Held: Section 2401(b)'s time limits are subject to equitable tolling. Pp. 407–421.

(a) *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, provides the framework for deciding the applicability of equitable tolling to statutes of limitations on suits against the Government. There, the Court adopted a "rebuttable presumption" that such time bars may be equitably tolled. *Id.*, at 95. *Irwin*'s presumption may, of course, be rebutted. One way to do so—pursued by the Government here—is to demonstrate that the statute of limitations at issue is jurisdictional; if so, the statute cannot be equitably tolled. But this Court will not conclude that a time bar is jurisdictional unless Congress provides a "clear statement" to that effect. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S.

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*Together with No. 13–1075, *United States* v. *June, Conservator*, also on certiorari to the same court.

145, 153. And in applying that clear statement rule, this Court has said that most time bars, even if mandatory and emphatic, are nonjurisdictional. See *ibid.* Congress thus must do something special to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it. Pp. 407–410.

(b) Congress did no such thing in enacting § 2401(b). The text of that provision speaks only to a claim's timeliness; it does not refer to the jurisdiction of the district courts or address those courts' authority to hear untimely suits. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515. Instead, it "reads like an ordinary, run-of-the-mill statute of limitations." *Holland* v. *Florida*, 560 U. S. 631, 647. Statutory context confirms that reading. Congress's separation of a filing deadline from a jurisdictional grant often indicates that the deadline is not jurisdictional, and here the FTCA's jurisdictional grant appears not in § 2401(b) but in another section of Title 28, § 1346(b)(1). That jurisdictional grant is not expressly conditioned on compliance with § 2401(b)'s limitations periods. Finally, assuming it could provide the clear statement that this Court's cases require, § 2401(b)'s legislative history does not clearly demonstrate that Congress intended the provision to impose a jurisdictional bar. Pp. 410–412.

(c) The Government's two principal arguments for treating § 2401(b) as jurisdictional are unpersuasive and foreclosed by this Court's precedents. Pp. 412–420.

(1) The Government first points out that § 2401(b) includes the same "shall be forever barred" language as the statute of limitations governing Tucker Act claims, which this Court has held to be jurisdictional. See, *e. g.*, *Kendall* v. *United States*, 107 U. S. 123, 125–126. But that phrase was a commonplace in statutes of limitations enacted around the time of the FTCA, and it does not carry talismanic jurisdictional significance. Indeed, this Court has construed the same language to be subject to tolling in the Clayton Act's statute of limitations. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 559. And in two decisions addressing the Tucker Act's statute of limitations, the Court has dismissed the idea that that language is jurisdictionally significant. See *Irwin*, 498 U. S., at 95; *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 137, 139. The "shall be forever barred" phrase is thus nothing more than an ordinary way to set a statutory deadline. Pp. 412–417.

(2) The Government next argues that § 2401(b) is jurisdictional because it is a condition on the FTCA's waiver of sovereign immunity. But that argument is foreclosed by *Irwin*, which considered an identical objection but concluded that even time limits that condition a waiver of immunity may be equitably tolled. See 498 U. S., at 95–96. The

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Government's invocation of sovereign immunity principles is also peculiarly inapt here. Unlike other waivers of sovereign immunity, the FTCA treats the Government much like a private party, and the Court has accordingly declined to construe the Act narrowly merely because it waives the Government's immunity from suit. There is no reason to do differently here. Pp. 417–420.

No. 13–1074, 732 F. 3d 1030, and No. 13–1075, 550 Fed. Appx. 505, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 421.

Roman Martinez argued the cause for the United States in No. 13–1074. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, and *Anne Murphy*. *Elizabeth Prelogar* argued the cause for the United States in No. 13–1075. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mr. Martinez*, *Mr. Stern*, and *Ms. Murphy*.

Eric Schanpper argued the cause for respondent in No. 13–1074. With him on the brief was *Tom Steenson*. *E. Joshua Rosenkranz* argued the cause for respondent in No. 13–1075. With him on the brief were *Robert M. Loeb*, *Brian D. Ginsberg*, *John P. Leader*, and *Stanley G. Feldman*.†

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†Briefs of *amici curiae* urging affirmance in both cases were filed for the American Association for Justice by *Jeffrey R. White* and *Lisa Blue Baron*; and for the Clinic for Legal Assistance to Servicemembers and Veterans by *James C. Martin* and *Colin E. Wrabley*.

Joshua D. N. Hess filed a brief for Paralyzed Veterans of America et al. as *amici curiae* urging affirmance in No. 13–1074.

Briefs of *amici curiae* urging affirmance were filed in No. 13–1075 for the Arizona Association for Justice/Arizona Trial Lawyers Association by *David L. Abney*; for the National Center for Law and Economic Justice

JUSTICE KAGAN delivered the opinion of the Court.

The Federal Tort Claims Act (FTCA or Act) provides that a tort claim against the United States "shall be forever barred" unless it is presented to the "appropriate Federal agency within two years after such claim accrues" and then brought to federal court "within six months" after the agency acts on the claim. 28 U. S. C. § 2401(b). In each of the two cases we resolve here, the claimant missed one of those deadlines, but requested equitable tolling on the ground that she had a good reason for filing late. The Government responded that § 2401(b)'s time limits are not subject to tolling because they are jurisdictional restrictions. Today, we reject the Government's argument and conclude that courts may toll both of the FTCA's limitations periods.

I

In the first case, respondent Kwai Fun Wong asserts that the Immigration and Naturalization Service (INS) falsely imprisoned her for five days in 1999. As the FTCA requires, Wong first presented that claim to the INS within two years of the alleged unlawful action. See § 2401(b); § 2675(a). The INS denied the administrative complaint on December 3, 2001. Under the Act, that gave Wong six months, until June 3, 2002, to bring her tort claim in federal court. See § 2401(b).

Several months prior to the INS's decision, Wong had filed suit in Federal District Court asserting various *non*-FTCA claims against the Government arising out of the same alleged misconduct. Anticipating the INS's ruling, Wong moved in mid-November 2001 to amend the complaint in that suit by adding her tort claim. On April 5, 2002, a Magistrate Judge recommended granting Wong leave to amend.

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et al. by *Edward P. Krugman* and *Susan Buckley*; and for the Southeastern Legal Foundation by *Shannon Lee Goessling*, *Steffen N. Johnson*, and *Linda T. Coberly*.

But the District Court did not finally adopt that proposal until June 25—three weeks *after* the FTCA's 6-month deadline.

The Government moved to dismiss the tort claim on the ground that it was filed late. The District Court at first rejected the motion. It recognized that Wong had managed to add her FTCA claim only after § 2401(b)'s 6-month time period had expired. But the court equitably tolled that period for all the time between the Magistrate Judge's recommendation and its own order allowing amendment, thus bringing Wong's FTCA claim within the statutory deadline. Several years later, the Government moved for reconsideration of that ruling based on an intervening Ninth Circuit decision. This time, the District Court dismissed Wong's claim, reasoning that § 2401(b)'s 6-month time bar was jurisdictional and therefore not subject to equitable tolling. On appeal, the Ninth Circuit agreed to hear the case en banc to address an intra-circuit conflict on the issue. The en banc court held that the 6-month limit is not jurisdictional and that equitable tolling is available. *Kwai Fun Wong* v. *Beebe*, 732 F. 3d 1030 (2013). It then confirmed the District Court's prior ruling that the circumstances here justify tolling because Wong "exercis[ed] due diligence" in attempting to amend her complaint before the statutory deadline. *Id.*, at 1052.

The second case before us arises from a deadly highway accident. Andrew Booth was killed in 2005 when a car in which he was riding crossed through a cable median barrier and crashed into oncoming traffic. The following year, respondent Marlene June, acting on behalf of Booth's young son, filed a wrongful death action alleging that the State of Arizona and its contractor had negligently constructed and maintained the median barrier. Years into that state-court litigation, June contends, she discovered that the Federal Highway Administration (FHWA) had approved installation of the barrier knowing it had not been properly crash tested.

Relying on that new information, June presented a tort claim to the FHWA in 2010, more than five years after the accident. The FHWA denied the claim, and June promptly filed this action in Federal District Court. The court dismissed the suit because June had failed to submit her claim to the FHWA within two years of the collision. The FTCA's 2-year bar, the court ruled, is jurisdictional and therefore not subject to equitable tolling; accordingly, the court did not consider June's contention that tolling was proper because the Government had concealed its failure to require crash testing. On appeal, the Ninth Circuit reversed in light of its recent decision in *Wong*, thus holding that § 2401(b)'s 2-year deadline, like its 6-month counterpart, is not jurisdictional and may be tolled. 550 Fed. Appx. 505 (2013).

We granted certiorari in both cases, 573 U. S. 945 (2014), to resolve a circuit split about whether courts may equitably toll § 2401(b)'s two time limits. Compare, *e. g.*, *In re FEMA Trailer Formaldehyde Prods. Liability Litigation*, 646 F. 3d 185, 190–191 (CA5 2011) (*per curiam*) (tolling not available), with *Arteaga* v. *United States*, 711 F. 3d 828, 832–833 (CA7 2013) (tolling allowed).[1] We now affirm the Court of Appeals' rulings.

II

Irwin v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990), sets out the framework for deciding "the applicability of equitable tolling in suits against the Government." In *Irwin*, we recognized that time bars in suits between *private* parties are presumptively subject to equitable tolling. See *id.*, at 95–96. That means a court usually may pause the

[1] Although we did not consolidate these cases, we address them together because everyone agrees that the core arguments for and against equitable tolling apply equally to both of § 2401(b)'s deadlines. See, *e. g.*, Brief for United States in *June* 15 ("Nothing in the text or relevant legislative history . . . suggests that the respective time bars should be interpreted differently with respect to whether they are jurisdictional or subject to equitable tolling").

running of a limitations statute in private litigation when a party "has pursued his rights diligently but some extraordinary circumstance" prevents him from meeting a deadline. *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10 (2014). We held in *Irwin* that "the same rebuttable presumption of equitable tolling" should also apply to suits brought against the United States under a statute waiving sovereign immunity. 498 U. S., at 95–96. Our old "ad hoc," law-by-law approach to determining the availability of tolling in those suits, we reasoned, had produced inconsistency and "unpredictability" without the offsetting virtue of enhanced "fidelity to the intent of Congress." *Id.*, at 95. Adopting the "general rule" used in private litigation, we stated, would "amount[ ] to little, if any, broadening" of a statutory waiver of immunity. *Ibid.* Accordingly, we thought such a presumption "likely to be a realistic assessment of legislative intent as well as a practically useful" rule of interpretation. *Ibid.*

A rebuttable presumption, of course, may be rebutted, so *Irwin* does not end the matter. When enacting a time bar for a suit against the Government (as for one against a private party), Congress may reverse the usual rule if it chooses. See *id.*, at 96. The Government may therefore attempt to establish, through evidence relating to a particular statute of limitations, that Congress opted to forbid equitable tolling.

One way to meet that burden—and the way the Government pursues here—is to show that Congress made the time bar at issue jurisdictional.[2] When that is so, a litigant's fail-

[2] The Government notes, and we agree, that Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations. See Brief for United States in *Wong* 20; *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153–158 (2013) (finding a nonjurisdictional time limit not amenable to tolling). And the Government contends in passing that even if §2401(b) is nonjurisdictional, it prohibits equitable tolling. See Brief for United States in *Wong* 20. But the Government makes no independent arguments in support of that position; instead, it relies (and even then implicitly) on the same indicia of congressional intent that, in its view,

ure to comply with the bar deprives a court of all authority to hear a case. Hence, a court must enforce the limitation even if the other party has waived any timeliness objection. See *Gonzalez* v. *Thaler*, 565 U. S. 134, 141 (2012). And, more crucially here, a court must do so even if equitable considerations would support extending the prescribed time period. See *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133–134 (2008).[3]

Given those harsh consequences, the Government must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515 (2006)); see *Gonzalez*, 565 U. S., at 141–142. "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'" *Auburn Regional*, 568 U. S., at 153 (quoting *Arbaugh*, 546 U. S., at 516). That does not mean "Congress must incant magic words." *Auburn Regional*,

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show that § 2401(b)'s time limits are jurisdictional. See *infra*, at 412–413, 417. In addressing the Government's predominant, jurisdictional claim, we therefore also deal with its subsidiary one.

[3] The dissent takes issue with the sequence in which we decide the jurisdictional question, contending that we must do so prior to mentioning *Irwin*'s presumption. See *post*, at 430–432 (opinion of ALITO, J.). We do not understand the point—or more precisely, why the dissent thinks the ordering matters. When Congress makes a time bar in a suit against the Government jurisdictional, one could say (as the dissent does) that *Irwin* does not apply, or one could say (as we do) that *Irwin*'s presumption is conclusively rebutted. The bottom line is the same: Tolling is not available. We frame the inquiry as we do in part because that is how the Government presented the issue. See Brief for United States in *Wong* 19 ("One way to show that [*Irwin*'s presumption is rebutted] is to establish that the statutory time limit is a 'jurisdictional' restriction"). And we think that choice makes especially good sense in these cases because various aspects of *Irwin*'s reasoning are central to considering the parties' positions on whether § 2401(b) is jurisdictional. See *infra*, at 415–420.

568 U. S., at 153. But traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.

And in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. See, *e. g.*, *id.*, at 154–155 (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson* v. *Shinseki*, 562 U. S. 428, 435 (2011); see *Auburn Regional*, 568 U. S., at 154; *Scarborough* v. *Principi*, 541 U. S. 401, 413 (2004). That is so, contrary to the dissent's suggestion, see *post,* at 423, 430, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be, *Henderson*, 562 U. S., at 439 (quoting *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 81 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

In enacting the FTCA, Congress did nothing of that kind. It provided no clear statement indicating that § 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar.

Most important, § 2401(b)'s text speaks only to a claim's timeliness, not to a court's power. It states that "[a] tort claim against the United States shall be forever barred unless it is presented [to the agency] within two years . . . or unless action is begun within six months" of the agency's denial of the claim. That is mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred. See *infra*,

at 414, n. 7 (citing many similarly worded limitations statutes). The language is mandatory—"shall" be barred—but (as just noted) that is true of most such statutes, and we have consistently found it of no consequence. See, *e. g.*, *Gonzalez*, 565 U. S., at 146. Too, the language might be viewed as emphatic—"forever" barred—but (again) we have often held that not to matter. See, *e. g.*, *Henderson*, 562 U. S., at 439; *Union Pacific*, 558 U. S., at 81. What matters instead is that § 2401(b) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U. S., at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982)). It does not define a federal court's jurisdiction over tort claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers. Section 2401(b), in short, "reads like an ordinary, run-of-the-mill statute of limitations," spelling out a litigant's filing obligations without restricting a court's authority. *Holland* v. *Florida*, 560 U. S. 631, 647 (2010).[4]

Statutory context confirms that reading. This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. See *Henderson*, 562 U. S., at 439–440; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 164–165 (2010); *Arbaugh*, 546 U. S., at 515; *Zipes*, 455 U. S., at 393–394. So too here. Whereas § 2401(b) houses the FTCA's

[4] The dissent argues that nonjurisdictional time limits typically mention claimants, whereas § 2401(b) does not. See *post*, at 429. But none of our precedents have either said or suggested that such a difference matters—that, for example, a statute barring a "tort claim" is jurisdictional, but one barring a "person's tort claim" is not. See, *e. g.*, *Zipes*, 455 U. S., at 394, and n. 10 (concluding that a time limit did "not speak in jurisdictional terms" even though it did not refer to a claimant). Rather, in case after case, we have emphasized another distinction—that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers. See *Auburn Regional*, 568 U. S., at 154; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 160–161 (2010); *Arbaugh*, 546 U. S., at 515.

time limitations, a different section of Title 28 confers power on federal district courts to hear FTCA claims. See § 1346(b)(1) ("district courts . . . shall have exclusive jurisdiction" over tort claims against the United States). Nothing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions. Treating § 2401(b)'s time bars as jurisdictional would thus disregard the structural divide built into the statute.

Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here. The report accompanying the FTCA did not discuss whether § 2401(b)'s time limits are jurisdictional. See S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946). And in amending § 2401(b) four times after its enactment, Congress declined again (four times over) to say anything specific about whether the statute of limitations imposes a jurisdictional bar. Congress thus failed to provide anything like the clear statement this Court has demanded before deeming a statute of limitations to curtail a court's power.

And so we wind up back where we started, with *Irwin*'s "general rule" that equitable tolling is available in suits against the Government. 498 U. S., at 95. The justification the Government offers for departing from that principle fails: Section 2401(b) is not a jurisdictional requirement. The time limits in the FTCA are just time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds.

III

The Government balks at that straightforward analysis, claiming that it overlooks two reasons for thinking § 2401(b) jurisdictional. But neither of those reasons is persuasive. Indeed, our precedents in this area foreclose them both.

A

The Government principally contends that § 2401(b) is jurisdictional because it includes the same language as the

statute of limitations governing contract (and some other non-tort) suits brought against the United States under the Tucker Act. See § 2501.[5] That statute long provided that such suits "shall be forever barred" if not filed within six years. Act of Mar. 3, 1863, § 10, 12 Stat. 767; see Act of Mar. 3, 1911, § 156, 36 Stat. 1139.[6] And this Court repeatedly held that 6-year limit to be jurisdictional and thus not subject to equitable tolling. See *Kendall* v. *United States*, 107 U. S. 123, 125–126 (1883); *Finn* v. *United States*, 123 U. S. 227, 232 (1887); *Soriano* v. *United States*, 352 U. S. 270, 273–274 (1957). When Congress drafted the FTCA's time bar, it used the same "shall be forever barred" language (though selecting a shorter limitations period). "In these circumstances," the Government maintains, "the only reasonable conclusion is that Congress intended the FTCA's identically worded time limit to be a jurisdictional bar." Brief for United States in *Wong* 21–22. According to the Government, Congress wanted the FTCA to serve as "a tort-law analogue to the Tucker Act" and incorporated the words "shall be forever barred" to similarly preclude equitable tolling. Reply Brief in *Wong* 4. (The dissent relies heavily on the same argument. See *post*, at 423–428.)

But the Government takes too much from Congress's use in § 2401(b) of an utterly unremarkable phrase. The "shall be forever barred" formulation was a commonplace in federal limitations statutes for many decades surrounding Con-

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[5] The Tucker Act of 1887, ch. 359, 24 Stat. 505, enlarged the Court of Claims' jurisdiction over contract and other non-tort actions against the Government. The statute of limitations applying to such suits pre-dated the Tucker Act by more than two decades.

[6] During a recodification occurring in 1948 (two years after passage of the FTCA), Congress omitted the word "forever" from the Tucker Act's statute of limitations; since then, it has provided simply that untimely claims "shall be barred." 28 U. S. C. § 2501; see § 2501, 62 Stat. 976. No party contends that change makes any difference to the resolution of these cases.

gress's enactment of the FTCA.[7] And neither this Court nor any other has accorded those words talismanic power to render time bars jurisdictional. To the contrary, we have construed the very same "shall be forever barred" language in 15 U. S. C. § 15b, the Clayton Act's statute of limitations, to be subject to tolling; nothing in that provision, we found, "restrict[s] the power of the federal courts" to extend a limitations period when circumstances warrant. *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 559 (1974); see *Hardin* v. *City Title & Escrow Co.*, 797 F. 2d 1037, 1040 (CADC 1986) (calling § 15(b) "a good example of a non-jurisdictional time limitation" based on its text and separation from the Clayton Act's jurisdictional provisions).[8] As the Government itself has previously acknowledged, refer-

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[7] See, *e. g.*, § 6 of the Portal-to-Portal Act of 1947, 61 Stat. 87, 29 U. S. C. § 255 (1952 ed.); § 3 of the Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U. S. C. § 1223 (1958 ed.); § 111(b) of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 725, 15 U. S. C. § 1400(b) (1970 ed.); § 7(e) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 605, 29 U. S. C. § 626(e) (1970 ed.); § 6(c) of the Agricultural Fair Practices Act of 1967, 82 Stat. 95, 7 U. S. C. § 2305(c) (1970 ed.); § 613(b) of the National Manufactured Housing Construction and Safety Standards Act of 1974, 88 Stat. 707, 42 U. S. C. § 5412(b) (1976 ed.).

[8] Even before this Court's decision in *American Pipe*, Courts of Appeals had unanimously construed the Clayton Act's statute of limitations to allow equitable tolling. See *General Elec. Co.* v. *San Antonio*, 334 F. 2d 480, 484–485 (CA5 1964) (joining six other Circuits in reaching that conclusion). Similarly, every Court of Appeals to have considered the issue has found that § 6 of the Portal-to-Portal Act, which contains the same "shall be forever barred" phrase, permits hearing late claims. See, *e. g.*, *Hodgson* v. *Humphries*, 454 F. 2d 1279, 1283–1284 (CA10 1972); *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (CA6 1975); *Partlow* v. *Jewish Orphans' Home of Southern Cal., Inc.*, 645 F. 2d 757, 760–761 (CA9 1981), abrogated on other grounds by *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165 (1989). And so too Courts of Appeals unanimously found that the ADEA's longtime (though not current) time bar containing that language was subject to tolling. See, *e. g.*, *Vance* v. *Whirlpool Corp.*, 707 F. 2d 483, 489 (CA4 1983); *Callowhill* v. *Allen-Sherman-Hoff Co.*, 832 F. 2d 269, 273–274 (CA3 1987).

ring to the "shall be forever barred" locution: "[T]hat type of language has more to do with the legal rhetoric at the time the statute was passed" than with anything else, and should not "make[ ] a difference" to the jurisdictional analysis. Tr. of Oral Arg. in *Irwin*, O. T. 1990, No. 89–5867, p. 30. Or, put just a bit differently: Congress's inclusion of a phrase endemic to limitations statutes of that era, at least some of which allow tolling, cannot provide the requisite clear statement that a time bar curtails a court's authority.

Indeed, in two decisions directly addressing the Tucker Act's statute of limitations, this Court dismissed the idea that the language the Government relies on here has jurisdictional significance. Twice we described the words in that provision as not meaningfully different from those in a nonjurisdictional statute of limitations. And twice we made clear that the jurisdictional status of the Tucker Act's time bar has precious little to do with its phrasing.

We first did so in *Irwin*. Using our newly minted presumption, see *supra*, at 407–408, we decided there that the limitations period governing Title VII suits against the Government, 42 U. S. C. § 2000e–16(c) (1988 ed.), allowed equitable tolling. In reaching that conclusion, we compared § 2000e–16(c)'s text (then stating that an employee "may file a civil action" within 30 days of an agency's denial of her claim) with the language of the Tucker Act's time bar. We noted that we had formerly held the Tucker Act's limitations statute to "jurisdictionally bar[ ]" late claims, and we acknowledged the possibility of justifying that different treatment by characterizing its "language [as] more stringent than" § 2000e–16(c)'s. *Irwin*, 498 U. S., at 94–95. But we rejected that reasoning, instead finding that the two formulations were materially alike. "[W]e are not persuaded," we stated, "that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.*, at 95. Leaving for another day the question of what *did* account for the jurisdictional status

of the Tucker Act's time bar, the Court thus ruled out reliance on its language. In other words, on the core question the Government raises here—whether the phrase "shall be forever barred," as used in both the Tucker Act and the FTCA, manifests a congressional decision to preclude tolling—*Irwin* said no.

More recently, *John R. Sand* reaffirmed that conclusion, even as it refused to overturn our century-old view that the Tucker Act's time bar is jurisdictional. No less than three times, *John R. Sand* approvingly repeated *Irwin*'s statement that the textual differences between the Tucker Act's time bar and § 2000e–16(c) were insignificant—*i. e.*, that the language of the two provisions could not explain why the former was jurisdictional and the latter not. See 552 U. S., at 137, 139 (calling the provisions "linguistically similar," "similar . . . in language," and "similarly worded"). But if that were so, *John R. Sand* asked, why not hold that the Tucker Act's time limit, like § 2000e–16(c), is nonjurisdictional? The answer came down to two words: *stare decisis*. The Tucker Act's bar was different because it had been the subject of "a definitive earlier interpretation." *Id.*, at 138; see *id.*, at 137; *supra*, at 413. And for that reason alone, *John R. Sand* left in place our prior construction of the Tucker Act's time limit. See 552 U. S., at 139 (observing, in Justice Brandeis's words, that "it is more important that" the rule "be settled than that it be settled right" (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting opinion))). What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from this Court's prior rulings, not from Congress's choice of wording.

The Government thus cannot show that the phrase "shall be forever barred" in § 2401(b) plainly signifies a jurisdictional statute, as our decisions require. See *supra*, at 409–410. Unlike in *John R. Sand*, here *stare decisis* plays no role: We have not previously considered whether § 2401(b) restricts a court's authority. What we have done is to say, again and

again, that the core language in that provision has no jurisdictional significance. It is materially indistinguishable from the language in one nonjurisdictional time bar (*i. e.*, § 2000e–16(c)). See *Irwin*, 498 U. S., at 95; *John R. Sand*, 552 U. S., at 137, 139. And it is identical to the language in another (*i. e.*, 15 U. S. C. § 15b). See *American Pipe*, 414 U. S., at 559. Yes, we have held that the Tucker Act's time bar, which includes those same words, constrains a court's power to hear late claims. But as we explained in *Irwin*, that is not because the phrase itself "manifest[s] a . . . congressional intent with respect to the availability of equitable tolling." 498 U. S., at 95. The words on which the Government pins its hopes are just the words of a limitations statute of a particular era. And nothing else supports the Government's claim that Congress, when enacting the FTCA, wanted to incorporate this Court's view of the Tucker Act's time bar—much less that Congress expressed that purported intent with the needed clear statement.

B

The Government next contends that at the time of the FTCA's enactment, Congress thought that *every* limitations statute applying to suits against the United States, however framed or worded, cut off a court's jurisdiction over untimely claims. On that view, the particular language of those statutes makes no difference. All that matters is that such time limits function as conditions on the Government's waiver of sovereign immunity. In that era—indeed, up until *Irwin* was decided—those conditions were generally supposed to be "strictly observed." *Soriano*, 352 U. S., at 276. That meant, the Government urges, that all time limits on actions against the United States "carr[ied] jurisdictional consequences." Brief for United States in *Wong* 34. Accordingly, the Government concludes, Congress "would have expected courts to apply [§ 2401(b)] as a jurisdictional requirement—just as conditions on waivers of sovereign immunity had always been applied." *Id.*, at 32.

Irwin, however, forecloses that argument. After all, *Irwin* also considered a pre-*Irwin* time bar attached to a waiver of sovereign immunity. The Government argued there—anticipating its claim here—that because § 2000e–16(c)'s statute of limitations conditioned such a waiver, it must be jurisdictional and not subject to equitable tolling. See Brief for Respondents 6, 10, 14, 19, and Tr. of Oral Arg. 31–37, in *Irwin*, O. T. 1990, No. 89–5867. But *Irwin* disagreed, applying the opposite presumption to a time limit passed two decades earlier. See 498 U. S., at 94–96; *supra*, at 407–408. Justice White protested, much as the Government does now, that at the time of § 2000e–16(c)'s enactment, limitations statutes for suits against the Government were "strictly observed" and not amenable to tolling. 498 U. S., at 97 (opinion concurring in part and concurring in judgment) (quoting *Soriano*, 352 U. S., at 276); see 498 U. S., at 99, n. 2. How could an earlier Congress, Justice White asked, have "had in mind the Court's present departure from that long-standing rule"? *Ibid.*; see *post*, at 428–429 (asking a variant of the same question). But the *Irwin* Court was undeterred. The Court noted that it had not applied the former rule so consistently as Justice White suggested. See 498 U. S., at 94. And the Court doubted that the former approach so well reflected congressional intent: On the contrary, because equitable tolling "amounts to little, if any, broadening of the congressional waiver," we thought that a rule generally *allowing* tolling is the more "realistic assessment of legislative intent." *Id.*, at 95; see *supra*, at 408. For those reasons, the Court declined to count time bars as jurisdictional merely because they condition waivers of immunity—even if Congress enacted the deadline when the Court interpreted limitations statutes differently.

In the years since, this Court has repeatedly followed *Irwin*'s lead. We have applied *Irwin* to pre-*Irwin* statutes, just as we have to statutes that followed in that decision's wake. See *Scarborough*, 541 U. S., at 420–422; *Franconia*

Associates v. *United States*, 536 U. S. 129, 145 (2002). To be sure, *Irwin*'s presumption is rebuttable. But the rebuttal cannot rely on what *Irwin* itself deemed irrelevant—that Congress passed the statute in an earlier era, when this Court often attached jurisdictional consequence to conditions on waivers of sovereign immunity. Rather, the rebuttal must identify something distinctive about the time limit at issue, whether enacted then or later—a reason for thinking Congress wanted *that* limitations statute (not all statutes passed in an earlier day) to curtail a court's jurisdiction. On the Government's contrary view, *Irwin* would effectively become only a prospective decision. Nothing could be less consonant with *Irwin*'s ambition to adopt a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U. S., at 95.

And the Government's claim is peculiarly inapt as applied to § 2401(b) because all that is special about the FTCA cuts *in favor of* allowing equitable tolling. As compared to other waivers of immunity (prominently including the Tucker Act), the FTCA treats the United States more like a commoner than like the Crown. The FTCA's jurisdictional provision states that courts may hear suits "under circumstances where the United States, if a private person, would be liable to the claimant." 28 U. S. C. § 1346(b). And when defining substantive liability for torts, the Act reiterates that the United States is accountable "in the same manner and to the same extent as a private individual." § 2674. In keeping with those provisions, this Court has often rejected the Government's calls to cabin the FTCA on the ground that it waives sovereign immunity—and indeed, the Court did so in the years immediately after the Act's passage, even as it was construing *other* waivers of immunity narrowly. See, *e. g.*, *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 65 (1955); *Rayonier Inc.* v. *United States*, 352 U. S. 315, 319–320 (1957). There is no reason to do differently here. As

Irwin recognized, treating the Government like a private person means (among other things) permitting equitable tolling. See 498 U. S., at 95–96. So in stressing the Government's equivalence to a private party, the FTCA goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims.

IV

Our precedents make this a clear-cut case. *Irwin* requires an affirmative indication from Congress that it intends to preclude equitable tolling in a suit against the Government. See 498 U. S., at 95–96. Congress can provide that signal by making a statute of limitations jurisdictional. But that requires its own plain statement; otherwise, we treat a time bar as a mere claims-processing rule. See *Auburn Regional*, 568 U. S., at 153–154. Congress has supplied no such statement here. As this Court has repeatedly stated, nothing about § 2401(b)'s core language is special; "shall be forever barred" is an ordinary (albeit old-fashioned) way of setting a deadline, which does not preclude tolling when circumstances warrant. See *Irwin*, 498 U. S., at 95–96; *John R. Sand*, 552 U. S., at 137, 139; *American Pipe*, 414 U. S., at 558–559. And it makes no difference that a time bar conditions a waiver of sovereign immunity, even if Congress enacted the measure when different interpretive conventions applied; that is the very point of this Court's decision to treat time bars in suits against the Government, whenever passed, the same as in litigation between private parties. See *Irwin*, 498 U. S., at 95–96; *Scarborough*, 541 U. S., at 420–422; *Franconia*, 536 U. S., at 145. Accordingly, we hold that the FTCA's time bars are nonjurisdictional and subject to equitable tolling.

We affirm the judgments of the U. S. Court of Appeals for the Ninth Circuit and remand the cases for further proceedings consistent with this opinion. On remand in *June*, it is

for the District Court to decide whether, on the facts of her case, June is entitled to equitable tolling.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Our task in these cases is to interpret and enforce a federal statute that specifies the limits of the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA). The FTCA waives the immunity of the United States for certain tort claims but provides that any "tort claim against the United States shall be forever barred unless" it is filed with the appropriate agency "within two years after such claim accrues" and in federal court "within six months after" the agency's final decision. 28 U. S. C. § 2401(b). The statutory text, its historical roots, and more than a century of precedents show that this absolute bar is not subject to equitable tolling. I would enforce the statute as Congress intended and reverse.

I

The FTCA is a waiver of sovereign immunity and must be understood in that context. In the 19th and early 20th centuries, Congress was reluctant to allow individual tort claims against the United States. Instead, it granted relief to individuals through private laws enacted solely for those individuals' benefit. These waivers of sovereign immunity were surgical and sporadic, but "notoriously clumsy," and by 1946 Congress thought it better to adopt a "simplified" approach. *Dalehite* v. *United States*, 346 U. S. 15, 24–25 (1953). The FTCA thus waived sovereign immunity for tort claims against the Government and set out a procedure for adjudicating those claims.

This waiver of sovereign immunity was no trivial matter. Long before the FTCA, Congress authorized suits against the Government for contract and property claims under the Tucker Act and a number of predecessor statutes, but the

Tucker Act excluded tort claims from its waiver of sovereign immunity. The concern was obvious: As opposed to the more predictable nature of contractual and property claims, tort-based harms are sometimes unperceived and open-ended. Even frivolous claims require the Federal Government to expend administrative and litigation costs, which ultimately fall upon society at large. For every dollar spent to defend against or to satisfy a tort claim against the United States, the Government must either raise taxes or shift funds originally allocated to different public programs.

To reduce these risks, Congress placed strict limits on the FTCA's waiver of sovereign immunity. The statute "exempts from [its] waiver certain categories of claims," *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 218 (2008), and includes a broad exemption for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U. S. C. § 2680(h); see also §§ 2680(a)–(n). In addition, in order to limit the scope and unpredictability of the Government's potential liability, the Act exempts from the waiver of sovereign immunity certain types of recovery, such as prejudgment interest and punitive damages. See § 2674.

Most relevant here, the FTCA "condition[s]" its waiver of sovereign immunity on strict filing deadlines. *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979). As enacted in 1946, the Act granted district courts exclusive jurisdiction over tort claims against the Government, "[s]ubject to the [other] provisions of" the Act. FTCA, ch. 753, § 410(a), 60 Stat. 843–844. One of those provisions stated that "[e]very claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued . . . it is presented in writing to the [relevant] Federal agency . . . or . . . an action is begun" in federal court. § 420, *id.*, at 845. The current version provides in full as follows:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U. S. C. §2401(b).

II

The question presented in these two cases is whether the FTCA's filing deadlines are subject to equitable tolling. We must therefore decide (1) whether the deadlines are "jurisdictional" in nature, so that courts are without power to adjudicate claims filed outside their strict limits and (2) if they are not jurisdictional, whether the statute nonetheless prohibits equitable tolling. Both of these inquiries require close attention to the text, context, and history of the Act. And both lead to the conclusion that the FTCA allows no equitable tolling.

A

The FTCA's filing deadlines are jurisdictional. The statute's plain text prohibits adjudication of untimely claims. Once the Act's filing deadlines have run, all untimely claims "shall be forever barred." *Ibid.* These words are not qualified or aspirational. They are absolute. If not filed with the agency within two years, or with a federal court within six months, a claim "shall be" "barred" "forever." "Shall be forever barred" is not generally understood to mean "should be allowed sometimes." The statute brooks no exceptions. And because the filing deadlines restrict the FTCA's waiver of sovereign immunity, they impose a limit on the courts' jurisdiction that "we should not take it upon ourselves to extend." *Kubrick*, *supra*, at 117–118.

For over 130 years, we have understood these terms as jurisdictional. When crafting the FTCA's limitations provi-

sion, Congress did not write on a clean slate. Rather, it borrowed language from limitations provisions in the Tucker Act and its predecessor statutes. The 1911 version of the Tucker Act included language that was nearly identical to that in the 1946 version of the FTCA: "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues." § 156, 36 Stat. 1139. That statutory language came, in turn, from the 1863 predecessor to the Tucker Act. See § 10, 12 Stat. 767.

As early as 1883, we interpreted these precise terms to impose a "jurisdiction[al]" requirement that the "court may not disregard." *Kendall* v. *United States*, 107 U. S. 123, 125. We emphasized that, when waiving sovereign immunity, Congress "may restrict the jurisdiction of the [courts] to certain classes of demands." *Ibid.* And we held that "[t]he express words of the statute leave no room for contention." *Ibid.* The Court thus had no "authority to engraft" an equitable tolling provision where Congress had so clearly constrained the Judiciary's authority. *Ibid.*

Over the ensuing decades, we repeatedly reaffirmed our interpretation of the phrase. In *Finn* v. *United States*, 123 U. S. 227, 232 (1887), we held that the Government could not waive the jurisdictional time bar and thus that the "duty of the court" was "to dismiss the petition" when a plaintiff raised an untimely claim. We reached the same conclusion in *De Arnaud* v. *United States*, 151 U. S. 483, 495–496 (1894). We reaffirmed the rule in *United States* v. *New York*, 160 U. S. 598, 616–619 (1896), while holding that there *was* jurisdiction where the plaintiff presented its claim before the statutory deadline. And in *Munro* v. *United States*, 303 U. S. 36, 38, n. 1, 41 (1938), we held that a District Court lacked jurisdiction to resolve untimely claims, even if the Government waived any objection, under a different statute that incorporated the Tucker Act's time limits. All the

while, the lower courts similarly enforced the deadline as "a jurisdictional requirement, compliance with which is necessary to enable suit to be maintained against the sovereign." *Compagnie Generale Transatlantique* v. *United States*, 51 F. 2d 1053, 1056 (CA2 1931). Thus, by 1946, the phrase "shall be forever barred" was well understood to deprive federal courts of jurisdiction over untimely claims.[1]

The FTCA's statutory terms must be understood in this context. When Congress crafted the FTCA as a tort-based analogue to the Tucker Act, it consciously borrowed the well-known wording of the Tucker Act's filing deadline. Then, as now, it was settled that "[i]n adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); see also *Shapiro* v. *United States*, 335 U. S. 1, 16 (1948); *Sekhar* v. *United States*, 570 U. S. 729, 733 (2013) ("'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it'" (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947))).

Indeed, Congress considered departing from the Tucker Act's prohibition on equitable tolling, but decided against it. Proposals to include an equitable tolling provision were "included in nine of the thirty-one bills prior to the enactment of the FTCA," but "the Act passed by the 1946 Congress did not provide for any equitable tolling of the limitations

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[1] At times in the past we have too loosely conferred the "jurisdictional" label. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998). But our use of the term in this context was conscious, as we recognized in *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 134 (2008) ("Justice Harlan, writing for the Court, said the statute was 'jurisdiction[al],' . . . and that '*it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not*'" (quoting *Kendall* v. *United States*, 107 U. S. 123, 125 (1883))). And it was correct.

periods." Colella & Bain, Revisiting Equitable Tolling and the Federal Tort Claims Act, 31 Seton Hall L. Rev. 174, 195–196 (2000). Instead, it was understood that individuals with claims outside those deadlines could turn to Congress for relief through private bills, as they did before the FTCA's enactment. See *id.*, at 195.[2]

The evidence of statutory meaning does not end there. We reaffirmed the phase's jurisdictional nature in the decades following the FTCA's enactment. In *Soriano* v. *United States*, 352 U. S. 270 (1957), we rejected a request to allow equitable tolling under the Tucker Act. Confirming the connection between the Tucker Act and the FTCA, we noted that "statutes permitting suits for tax refunds, *tort actions*, alien property litigation, patent cases, and other claims against the Government would be affected" if the Court allowed equitable tolling under the Tucker Act. *Id.*, at 275 (emphasis added). And in *Kubrick*, 444 U. S., at 117–118, we cited *Soriano*'s warning while emphasizing that the FTCA's time limits are a condition of the Act's waiver of sovereign immunity.

The lower courts also quickly recognized the statutes' common heritage and enforced § 2401(b) as a jurisdictional requirement. In *Anderegg* v. *United States*, 171 F. 2d 127, 128 (1948) (*per curiam*), the Fourth Circuit cited *Finn* and *Munro* while holding that the FTCA's filing deadline is a jurisdictional limit that the Government cannot waive. The

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[2] Congress has occasionally modified the FTCA's limitations provision. Initially, the Act required plaintiffs to file suit within one year of a claim's accrual, or if the claim was for less than $1,000 to present the claim to the appropriate agency within one year of accrual. § 420, 60 Stat. 845. In 1949, to relieve the hardship of the 1-year deadline, Congress enlarged the filing deadline to two years. Act of Apr. 25, ch. 92, § 1, 63 Stat. 62. Then, in 1966, it made the filing of an administrative claim with the appropriate agency a prerequisite to filing suit, and it shortened the litigation filing deadline to six months from the agency's denial of the claim. Act of July 18, §§ 2(a), 7, 80 Stat. 306, 307. But Congress has never suggested that the deadlines could be excused or enlarged by the courts.

Fifth Circuit, in *Simon* v. *United States*, 244 F. 2d 703, 705, n. 4 (1957), held that the FTCA's deadline is a jurisdictional condition on the Act's waiver of sovereign immunity and cited *Carpenter* v. *United States*, 56 F. 2d 828, 829 (CA2 1932), a Tucker Act case, to support its holding. And in *Humphreys* v. *United States*, 272 F. 2d 411 (1959), the Ninth Circuit similarly relied on Tucker Act precedents to hold that "the District Court has no jurisdiction over [an untimely FTCA] action," because no waiver of sovereign immunity exists once the filing deadline "has run." *Id.*, at 412 (citing *Edwards* v. *United States*, 163 F. 2d 268, 269 (CA9 1947), in turn citing *Finn* and *Munro*). When Congress amended the FTCA in 1966, it readopted the "forever barred" language against the backdrop of *Soriano* and the lower courts' interpretation of the phrase. We must therefore assume that Congress meant to keep the universally recognized meaning of those words. See, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 593–594 (2004).

That meaning, of course, cannot change over time. But even if there were any doubt, we recently reaffirmed our view in *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130 (2008). We explained that, unlike run-of-the-mill statutes of limitations, jurisdictional time limits "seek . . . to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id.*, at 133 (citations omitted). Recounting our decisions in *Kendall*, *Finn*, *De Arnaud*, *New York*, and *Soriano*, we "reiterated" our understanding of the "absolute nature of the court of claims limitations statute." 552 U. S., at 135. And we rejected an invitation to abandon that interpretation, noting that Congress has long accepted our interpretation of the statute. *Id.*, at 139.

The same must be said of the FTCA. As we have often explained, "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement

as 'jurisdictional,' we will presume that Congress intended to follow that course." *Henderson* v. *Shinseki*, 562 U. S. 428, 436 (2011) (citation and some internal quotation marks omitted); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 168 (2010); *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 82 (2009). Every single decision from this Court interpreting the Tucker Act's "similar requirement" has treated it as jurisdictional. And there is strong historical evidence that Congress "intended to follow that course." That should be the end of the matter: Section 2401(b)'s filing deadlines are jurisdictional limits that are not subject to equitable tolling.

B

Even if the FTCA's filing deadlines are not jurisdictional, they still prohibit equitable tolling. To be sure, in recent years, we have grown reluctant to affix the "jurisdictional" label. See, *e. g.*, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510 (2006); *Henderson*, *supra*, at 434–436. "But calling a rule nonjurisdictional does not mean that it is not mandatory." *Gonzalez* v. *Thaler*, 565 U. S. 134, 146 (2012). Where Congress imposes an inflexible claims processing rule, it is our duty to enforce the law and prohibit equitable tolling, whether it is jurisdictional or not.

Here, Congress' intent is clear. The words of the statute leave no doubt that untimely claims are never allowed: They are "*forever* barred." This is no weak-kneed command. The history underlying the text only bolsters its apparent meaning, and our repeated reaffirmation of the phrase's meaning should remove any doubt. Congress never meant for equitable tolling to be available under the FTCA.

The only factor pointing in the opposite direction is our suggestion in *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990), that we would thenceforth apply a rebuttable presumption in favor of equitable tolling in suits against the Government. But it is beyond me how *Irwin*'s judge-made presumption announced in 1990 can trump the obvious meaning of a statute enacted many decades earlier.

Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 718 (1979) (Rehnquist, J., concurring). In any event, *Irwin*'s rebuttable presumption is overcome in these cases. For well over a century, we have recognized the inflexible nature of the Tucker Act's provision. Since its adoption, we have recognized that the FTCA's language bears the same meaning as its Tucker Act companion. See *Soriano*, 352 U. S., at 275; *Kubrick*, *supra*, at 118. And in *John R. Sand & Gravel*, we held that our "definitive earlier interpretation of the" Tucker Act is a "sufficient rebuttal" to *Irwin*'s presumption. 552 U. S., at 138. There is no principled way to distinguish these cases. Section 2401(b) allows no equitable tolling.

III

The Court's contrary conclusion is wrong at every step. In its view, § 2401(b)'s statutory text is "mundane" language that "'reads like an ordinary, run-of-the-mill statute of limitations.'" *Ante*, at 411. But "ordinary" nonjurisdictional time limits are typically directed at claimants. The deadline in *Henderson*, for example, required that "*a person* adversely affected by [a Board of Veterans' Appeals] decision shall file a notice of appeal . . . within 120 days after" the decision. 38 U. S. C. § 7266(a) (emphasis added); 562 U. S., at 438. The "run-of-the-mill" limitations provision in *Holland* v. *Florida*, 560 U. S. 631, 647 (2010), likewise applied to the "person" responsible for filing: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus *by a person* in custody pursuant to the judgment of a State court." 28 U. S. C. § 2244(d)(1) (emphasis added); 560 U. S., at 635. And the provision at issue in *Irwin* was similar, if not an even weaker command. It provided that "'[w]ithin thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an *employee or applicant* for employment . . . *may file* a civil action.'" 498 U. S., at 94 (quoting 42 U. S. C. § 2000e–16(c) (1998 ed.); emphasis added).

Section 2401(b), by contrast, never mentions the claimant, and it is phrased in emphatically absolute terms. It says unequivocally that untimely tort claims against the United States "shall be forever barred." Although it does not use the word "jurisdiction," it speaks at least as much to the courts (who are "forever barred" from considering untimely claims) as it does to claimants (who are "forever barred" from bringing stale claims). More important, though, the words in § 2401(b) have a well-known meaning that *ipse dixit* labels cannot overcome.[3]

The majority tells us this "old 'ad hoc,' law-by-law approach"—also known as *statutory interpretation*—has been replaced with a broad presumption in favor of equitable tolling and a judicial preference against jurisdictional labels. *Ante*, at 408. I dispute the premise. But in any event, as I explained above, and as six Members of the current Court held in *John R. Sand & Gravel*, the overwhelming evidence of congressional intent here easily overtakes *Irwin*'s rebuttable presumption. Even if we would rather not call § 2401(b)'s deadlines "jurisdictional," with all that label entails, we must nonetheless recognize that Congress never meant to allow equitable tolling.

The majority avoids this latter point by declining to give it any separate attention. See *ante*, at 408, n. 2. But we cannot conflate the two questions because, though the relevant evidence is the same, the analysis is different. In particular, the majority is wrong to rely on *Irwin* when assessing the jurisdictional question, which is the only question it really

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[3] The majority relies on the fact that we have allowed equitable tolling under "forever barred" language in the Clayton Act. See *ante*, at 414. But there is no evidence that Congress meant to import *that* statute's terms into the FTCA. Nor does the Clayton Act involve the waiver of sovereign immunity for money damages against the Government. The Tucker Act, by contrast, was clearly the blueprint for the FTCA's time bar, it *did* involve a waiver of sovereign immunity, and our cases have uniformly held that its language is *not* subject to equitable tolling.

decides. We do not indulge *Irwin*'s presumption when determining whether a requirement is jurisdictional. Instead, we typically invoke *Irwin* only *after* finding that a requirement is not jurisdictional, to decide whether Congress nonetheless intended to prohibit equitable tolling. In *Henderson*, for instance, we never mentioned *Irwin* because the parties did not ask us to address whether the rule was "subject to equitable tolling if it [was] not jurisdictional." 562 U. S., at 442, n. 4. Likewise, in *Bowles* v. *Russell*, 551 U. S. 205 (2007), we held that the deadline for filing a notice of appeal is jurisdictional, without a word about *Irwin*.[4] In *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153–155, 158–161 (2013), we considered *Irwin* only after deciding that a deadline was not jurisdictional. And in *Holland*, we held that the Antiterrorism and Effective Death Penalty Act of 1996's time limits are not jurisdictional, without relying on *Irwin*, and then stated that "[w]e have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" 560 U. S., at 645–646 (quoting *Irwin*, *supra*, at 95–96; emphasis deleted); cf. *Young* v. *United States*, 535 U. S. 43, 49–50 (2002) (invoking *Irwin* after concluding that a limitations period was not a "substantive" component of the Bankruptcy Code).[5] This error matters because the majority's jurisdictional analysis literally begins and ends with *Irwin*, see *ante*, at 407–408, 420, and thus relies on a presumption that should have no bearing on the question. Without that presumption, the majority could

[4] Even the dissent in *Bowles* recognized *Irwin*'s irrelevance: It cited the decision only when discussing equitable exceptions to *nonjurisdictional* statutes of limitations. 551 U. S., at 219 (opinion of Souter, J.).

[5] We considered *Irwin* in *John R. Sand & Gravel* while holding that 28 U. S. C. § 2501's time limits are jurisdictional. But we did so only to *reject* the suggestion that *Irwin* compelled a contrary result. So there, too, *Irwin*'s presumption did not influence the jurisdictional question. Nor did it influence the outcome in *Irwin* itself, where we held that equitable tolling was not available. See 498 U. S., at 96.

not so readily ignore the unmistakable evidence that §2401(b)'s limits are jurisdictional.

* * *

For these reasons, I would hold that §2401(b) does not allow equitable tolling, and I therefore respectfully dissent.

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WILLIAMS-YULEE *v.* FLORIDA BAR

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 13–1499. Argued January 20, 2015—Decided April 29, 2015

Florida is one of 39 States where voters elect judges at the polls. To promote public confidence in the integrity of the judiciary, the Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct, which provides that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons" to raise money for election campaigns.

Petitioner Lanell Williams-Yulee (Yulee) mailed and posted online a letter soliciting financial contributions to her campaign for judicial office. The Florida Bar disciplined her for violating a Florida Bar Rule requiring candidates to comply with Canon 7C(1), but Yulee contended that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. The Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailored to serve the State's compelling interest.

Held: The judgment is affirmed.

138 So. 3d 379, affirmed.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II, concluding that the First Amendment permits Canon 7C(1)'s ban on the personal solicitation of campaign funds by judicial candidates. Pp. 444–457.

(a) Florida's interest in preserving public confidence in the integrity of its judiciary is compelling. The State may conclude that judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. Simply put, the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors. This Court's precedents have recognized the "vital state interest" in safeguarding "'public confidence in the fairness and integrity of the nation's elected judges,'" *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 889. Unlike the legislature or the executive, the judiciary "has no influence over either the sword or the purse," Federalist No. 78, p. 465 (A. Hamilton), so its authority depends in large measure on the public's willingness to respect and follow its decisions. Public perception of judicial integrity is accordingly "'a state interest of the highest order.'" 556 U. S., at 889.

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A State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, because a judge's role differs from that of a politician. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 783. Unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors. As in *White*, therefore, precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States allowing personal solicitation serve with fairness and honor, but in the eyes of the public, a judicial candidate's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey* v. *Ohio*, 273 U. S. 510, 532. That risk is especially pronounced where most donors are lawyers and litigants who may appear before the judge they are supporting. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. Pp. 445–448.

(b) Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of viewpoint or means of solicitation. And unlike some laws that have been found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. When the judicial candidate himself asks for money, the stakes are higher for all involved. A judicial candidate asking for money places his name and reputation behind the request, and the solicited individual knows that the same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no. However sim-

ilar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public.

Permitting a judicial candidate to write thank you notes to campaign donors likewise does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. The State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U. S. 380, 400. The State should not be punished for leaving open more, rather than fewer, avenues of expression, especially when there is no indication of a pretextual motive for the selective restriction of speech. Pp. 448–452.

(c) Canon 7C(1) is also not overinclusive. By any measure, it restricts a narrow slice of speech. It leaves judicial candidates free to discuss any issue with any person at any time; to write letters, give speeches, and put up billboards; to contact potential supporters in person, on the phone, or online; and to promote their campaigns through the media. Though they cannot ask for money, they can direct their campaign committees to do so.

Yulee concedes that Canon 7C(1) is valid in numerous applications, but she contends that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. This argument misperceives the breadth of the compelling interest underlying Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money. Canon 7C(1) must be narrowly tailored, not "perfectly tailored." *Burson* v. *Freeman*, 504 U. S. 191, 209. The First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Yulee errs in contending that Florida can accomplish its compelling interest through recusal rules and campaign contribution limits. A

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rule requiring recusal in every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions, and a flood of postelection recusal motions could exacerbate the very appearance problem the State is trying to solve. As for contribution limits, Florida already applies them to judicial elections, and this Court has never held that adopting such limits precludes a State from pursuing its compelling interests through additional means.

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years, but it is not the Court's place to resolve that enduring debate. The Court's limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity. Pp. 452–457.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part II. BREYER, SOTOMAYOR, and KAGAN, JJ., joined that opinion in full, and GINSBURG, J., joined except as to Part II. BREYER, J., filed a concurring opinion, *post*, p. 457. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined as to Part II, *post*, p. 457. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 462. KENNEDY, J., *post*, p. 474, and ALITO, J., *post*, p. 479, filed dissenting opinions.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Charles A. Rothfeld*, *Michael B. Kimberly*, *Paul W. Hughes*, *Ernest J. Myers*, *Lee W. Marcus*, and *Eugene R. Fidell*.

Barry Richard argued the cause for respondent. With him on the brief was *M. Hope Keating*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Robert Corn-Revere*, *Peter Karanjia*, *Ronald G. London*, *Micah J. Ratner*, *Steven R. Shapiro*, and *Nancy G. Abudu*; for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler*; for Cameron A. Blau by *Christopher Wiest*; and for Randolph Wolfson et al. by *James Bopp, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert*

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

Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to

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L. Ellman, Solicitor General, and *Paula S. Bickett*, Chief Counsel, Civil Appeals, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Jim Hood* of Mississippi, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenbaum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Marty J. Jackley* of South Dakota, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the American Bar Association by *William C. Hubbard*, *Joshua G. Vincent*, *Steven M. Puiszis*, *Matthew R. Henderson*, and *Adam R. Vaught*; for the Brennan Center for Justice at NYU School of Law et al. by *Randolph S. Sherman*, *Robert M. Grass*, *Wendy Weiser*, *Matthew Menendez*, *Elizabeth Kennedy*, *Brenda Wright*, *Hayley Gorenberg*, and *J. Gerald Hebert*; for the Carter Center by *Boris Bershteyn* and *Martha F. Davis*; for the Conference of Chief Justices by *Igor Timofeyev*, *George T. Patton, Jr.*, and *Karl J. Sandstrom*; for Free Speech for People et al. by *Ronald A. Fein*; for Professors of Law, Economics, and Political Science by *Jessica Ring Amunson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, *Seth P. Waxman*, *Catherine M. A. Carroll*, *Donald J. Simon*, and *Fred Wertheimer*; for State and Local Judicial Reform Groups by *Paul Titus*, *Nancy Winkelman*, *Roger A. Cooper*, and *Peter Fox*; for Jed Shugerman by *Donald B. Ayer*; for Major B. Harding et al. by *Daniel L. Wallach*; for Norman Dorsen et al. by *Burt Neuborne* and *Mr. Dorsen*, both *pro se*; and for Thomas R. Phillips et al. by *Scott E. Gant*.

treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money. We affirm the judgment of the Florida Supreme Court.

I

A

When Florida entered the Union in 1845, its Constitution provided for trial and appellate judges to be elected by the General Assembly. Florida soon followed more than a dozen of its sister States in transferring authority to elect judges to the voting public. See J. Shugerman, The People's Courts: Pursuing Judicial Independence in America 103–122 (2012). The experiment did not last long in the Sunshine State. The war came, and Florida's 1868 Constitution returned judicial selection to the political branches. Over time, however, the people reclaimed the power to elect the state bench: Supreme Court justices in 1885 and trial court judges in 1942. See Little, An Overview of the Historical Development of the Judicial Article of the Florida Constitution, 19 Stetson L. Rev. 1, 40 (1989).

In the early 1970s, four Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution again. Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee—a process known as "merit selection." Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection. Fla. Const., Art. V, §10; Hawkins, Perspective on Judicial Merit Retention in Florida, 64 Fla. L. Rev. 1421, 1423–1428 (2012).

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. 281

So. 2d 21 (1973). In its present form, the first sentence of Canon 1 reads, "An independent and honorable judiciary is indispensable to justice in our society." Code of Judicial Conduct for the State of Florida 6 (2014). Canon 1 instructs judges to observe "high standards of conduct" so that "the integrity and independence of the judiciary may be preserved." *Ibid.* Canon 2 directs that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*, at 7. Other provisions prohibit judges from lending the prestige of their offices to private interests, engaging in certain business transactions, and personally participating in soliciting funds for nonprofit organizations. Canons 2B, 5C(3)(b)(i), 5D; *id.*, at 7, 23, 24.

Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

> "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." *Id.*, at 38.

Florida statutes impose additional restrictions on campaign fundraising in judicial elections. Contributors may not donate more than $1,000 per election to a trial court candidate or more than $3,000 per retention election to a Supreme Court justice. Fla. Stat. § 106.08(1)(a) (2014). Campaign committee treasurers must file periodic reports

disclosing the names of contributors and the amount of each contribution. § 106.07.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors. An Aid To Understanding Canon 7, pp. 51–58 (2014).

Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1). Brief for American Bar Association as *Amicus Curiae* 4.

B

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the County Court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." App. to Pet. for Cert. 31a. The letter then stated:

> "An early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support." *Id.*, at 32a.

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee's bid for the bench did not unfold as she had hoped. She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. As relevant here, the Bar charged her with violating Rule 4–8.2(b) of the Rules Regulating the Florida Bar. That Rule requires judicial candidates to comply with applicable provisions of Florida's Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election.* The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding ($1,860). App. to Pet. for Cert. 19a–25a.

The Florida Supreme Court adopted the referee's recommendations. 138 So. 3d 379 (2014). The court explained that Canon 7C(1) "clearly restricts a judicial candidate's speech" and therefore must be "narrowly tailored to serve a compelling state interest." *Id.*, at 384. The court held that the Canon satisfies that demanding inquiry. First, the court reasoned, prohibiting judicial candidates from personally soliciting funds furthers Florida's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." *Ibid.* (internal quotation marks omitted; alteration in original). In the court's view, "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impar-

*Yulee also contended that she had not violated Canon 7C(1), which applies to "a judicial office that is filled by public election between competing candidates," because the incumbent judge had not declared his campaign for reelection at the time she sent her solicitation letter. She has since abandoned that argument.

tiality." *Id.*, at 385. Second, the court concluded that Canon 7C(1) is narrowly tailored to serve that compelling interest because it "'insulate[s] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" *Id.*, at 387 (quoting *Simes* v. *Arkansas Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 588, 247 S. W. 3d 876, 883 (2007)).

The Florida Supreme Court acknowledged that some Federal Courts of Appeals—"whose judges have lifetime appointments and thus do not have to engage in fundraising"—had invalidated restrictions similar to Canon 7C(1). 138 So. 3d, at 386, n. 3. But the court found it persuasive that every State Supreme Court that had considered similar fundraising provisions—along with several Federal Courts of Appeals—had upheld the laws against First Amendment challenges. *Id.*, at 386. Florida's chief justice and one associate justice dissented. *Id.*, at 389. We granted certiorari. 573 U. S. 990 (2014).

II

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. *Stromberg* v. *California*, 283 U. S. 359, 368 (1931). The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest. See *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 798 (1988); *id.*, at 810 (Rehnquist, C. J., dissenting). As we have explained, noncommercial solicitation "is characteristically intertwined with informative

and perhaps persuasive speech." *Id.*, at 796 (majority opinion) (quoting *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 632 (1980)). Applying a lesser standard of scrutiny to such speech would threaten "the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 161 (1939).

The principles underlying these charitable solicitation cases apply with even greater force here. Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her "message out to the public." App. to Pet. for Cert. 32a. As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. See *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989). Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 774 (2002).

Although the Florida Supreme Court upheld Canon 7C(1) under strict scrutiny, the Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be "closely drawn" to match a "sufficiently important interest." *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). The "closely drawn" standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor's "freedom of political association." *Id.*, at 24–25. Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. And the Florida Bar can hardly dispute that the Canon infringes Yulee's freedom to discuss candidates and public issues—namely, herself and her qualifica-

tions to be a judge. The Bar's call to import the "closely drawn" test from the contribution limit context into a case about solicitation therefore has little avail.

As several of the Bar's *amici* note, we applied the "closely drawn" test to solicitation restrictions in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 136 (2003), overruled in part by *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010). But the Court in that case determined that the solicitation restrictions operated primarily to prevent circumvention of the contribution limits, which were the subject of the "closely drawn" test in the first place. 540 U. S., at 138–139. *McConnell* offers no help to the Bar here, because Florida did not adopt Canon 7C(1) as an anticircumvention measure.

In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that "it is the rare case" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion). But those cases do arise. See *ibid.*; *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 25–39 (2010); *McConnell*, 540 U. S., at 314 (opinion of KENNEDY, J.); cf. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' "). Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." 138 So. 3d, at 385. The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 395 (2d ed. 1914). The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will," 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908), and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich," 28 U. S. C. § 453. Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 889 (2009) (internal quotation marks omitted). The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to re-

spect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). It follows that public perception of judicial integrity is "a state interest of the highest order." *Caperton*, 556 U. S., at 889 (quoting *White*, 536 U. S., at 793 (KENNEDY, J., concurring)).

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. *Post*, at 462–463 (opinion of SCALIA, J.). We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize "new categories of unprotected speech." *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791 (2011); see *post*, at 462. But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. 536 U. S., at 783; *id.*, at 805 (GINSBURG, J., dissenting). Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such "responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185, 227 (2014) (plurality opinion). The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his support-

ers, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience." Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). As in *White*, therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *White*, 536 U. S., at 790 (O'Connor, J., concurring). In the eyes of the public, a judge's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting. See A. Bannon, E. Velasco, L. Casey, & L. Reagan, The New Politics of Judicial Elections: 2011–12, p. 15 (2013).

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. As the Supreme Court of Oregon explained, "the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary."

In re Fadeley, 310 Ore. 548, 565, 802 P. 2d 31, 41 (1990). Moreover, personal solicitation by a judicial candidate "inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes*, 368 Ark., at 585, 247 S. W. 3d, at 882. Potential litigants then fear that "the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." *Ibid.* A State's decision to elect its judges does not require it to tolerate these risks. The Florida Bar's interest is compelling.

B

Yulee acknowledges the State's compelling interest in judicial integrity. She argues, however, that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position. In particular, she notes that Canon 7C(1) allows a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation. Yulee also points out that Florida permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U. S., at 802. In a textbook illustration of that principle, we invalidated a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 543–547 (1993).

Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy. *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 104–105 (1979).

Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 387 (1992) (internal quotation marks omitted). A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests. *Burson*, 504 U. S., at 207; see *McConnell*, 540 U. S., at 207–208; *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 511–512 (1981) (plurality opinion); *Buckley*, 424 U. S., at 105.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. See *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52–53 (1994). Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of under-

mining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U. S. 380, 400 (1991). They belie the principal dissent's suggestion that Canon 7C(1) reflects general "hostility toward judicial campaigning" and has "nothing to do with the appearances created by judges' asking for money." *Post*, at 472. Nothing?

The principal dissent also suggests that Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans. *Post*, at 470–471. But Florida law treats a personal "gift" or "loan" as a campaign contribution if the donor makes it "for the purpose of influencing the results of an election," Fla. Stat. § 106.011(5)(a), and Florida's Judicial Qualifications Commission has determined that a judicial candidate violates Canon 7C(1) by personally soliciting such a loan. See *In re Turner*, 76 So. 3d 898, 901–902 (Fla. 2011). In any event, Florida can ban personal solicitation of campaign funds by judicial candidates without making them obey a comprehensive code to leading an ethical life. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way.* See *Florida Star* v. *B. J. F.*, 491 U. S. 524, 540 (1989). The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. *Post*, at 470–471. Even under strict scrutiny, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson*, 504 U. S., at 207 (State's regulation of political solicitation around a polling place, but not charitable or

commercial solicitation, was not fatally underinclusive under strict scrutiny).

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

C

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000).

By any measure, Canon 7C(1) restricts a narrow slice of speech. A reader of JUSTICE KENNEDY's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. *Post*, at 475–476. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so. Whatever else may be said of the Canon, it is surely not

a "wildly disproportionate restriction upon speech." *Post*, at 462 (SCALIA, J., dissenting).

Indeed, Yulee concedes—and the principal dissent seems to agree, *post*, at 468—that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. Reply Brief 18. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." *Ibid.* She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. Tr. of Oral Arg. 7; cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (permitting State to ban in person solicitation of clients by lawyers). But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the pub-

lic impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." *Burson*, 504 U. S., at 209. The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. See *id.*, at 210. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who "sit as their judges." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991).

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every

case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of post-election recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. *Caperton*, 556 U. S., at 891 (ROBERTS, C. J., dissenting). Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. Fla. Stat. § 106.08(1)(a). A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. Even if Florida decreased its contribution limit, the appearance that judges who personally solicit funds might improperly favor their campaign donors would remain. Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means. And in any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way. The principal dissent faults us for not answering a slew of broader questions, such as whether Florida

may cap a judicial candidate's spending or ban independent expenditures by corporations. *Post*, at 469. Yulee has not asked these questions, and for good reason—they are far afield from the narrow regulation actually at issue in this case.

We likewise have no cause to consider whether the citizens of States that elect their judges have decided anything about the "oracular sanctity of judges" or whether judges are due "a hearty helping of humble pie." *Post*, at 472–473. The principal dissent could be right that the decision to adopt judicial elections "probably springs," at least in part, from a desire to make judges more accountable to the public, *post*, at 472, although the history on this matter is more complicated. See Shugerman, The People's Courts, at 5 (arguing that States adopted judicial elections to increase judicial independence). In any event, it is a long way from general notions of judicial accountability to the principal dissent's view, which evokes nothing so much as Delacroix's painting of Liberty leading a determined band of *citoyens*, this time against a robed aristocracy scurrying to shore up the ramparts of the judicial castle through disingenuous ethical rules. We claim no similar insight into the People's passions, hazard no assertions about ulterior motives of those who promulgated Canon 7C(1), and firmly reject the charge of a deceptive "pose of neutrality" on the part of those who uphold it. *Post*, at 472.

* * *

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 465. Jefferson thought that making judges "dependent on none but themselves" ran counter to the principle of "a government founded on the public will." 12 The Works of Thomas Jef-

ferson 5 (P. Ford ed. 1905). The federal courts reflect the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining "the public's respect . . . and a reserve of public goodwill, without becoming subservient to public opinion." Rehnquist, Judicial Independence, 38 U. Rich. L. Rev. 579, 596 (2004).

It is not our place to resolve this enduring debate. Our limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.

The judgment of the Florida Supreme Court is

Affirmed.

JUSTICE BREYER, concurring.

As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. See, *e. g.*, *United States* v. *Alvarez*, 567 U. S. 709, 730–731 (2012) (opinion concurring in judgment); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (concurring opinion). On that understanding, I join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins as to Part II, concurring in part and concurring in the judgment.

I

I join the Court's opinion save for Part II. As explained in my dissenting opinion in *Republican Party of Minnesota* v. *White*, 536 U. S. 765, 803 (2002), I would not apply exacting

scrutiny to a State's endeavor sensibly to "differentiate elections for political offices . . . , from elections designed to select those whose office it is to administer justice without respect to persons," *id.*, at 805.

II

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. "Judges," the Court rightly recognizes, "are not politicians," *ante,* at 437, so "States may regulate judicial elections differently than they regulate political elections," *ante,* at 446. And because "the role of judges differs from the role of politicians," *ibid.*, this Court's "precedents applying the First Amendment to political elections [should] have little bearing" on elections to judicial office, *ante,* at 447.

The Court's recent campaign-finance decisions, trained on political actors, should not hold sway for judicial elections. In *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), the Court invalidated a campaign-finance restriction designed to check the outsized influence of moneyed interests in politics. Addressing the Government's asserted interest in preventing "influence over or access to elected officials," *id.*, at 359, the Court observed that "[f]avoritism and influence" are inevitable "in *representative* politics," *ibid.* (quoting *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 297 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part); emphasis added). A plurality of the Court responded similarly in *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185 (2014), when it addressed the prospect that wealthy donors would have ready access to, and could therefore influence, elected policymakers. "[A] central feature of democracy," the plurality maintained, is "that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.*, at 192.

For reasons spelled out in the dissenting opinions in *Citizens United* and *McCutcheon*, I would have upheld the legislation there at issue. But even if one agrees with those judgments, they are geared to elections for representative posts, and should have "little bearing" on judicial elections. *Ante*, at 447. "Favoritism," *i. e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain. See *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). Unlike politicians, judges are not "expected to be responsive to [the] concerns" of constituents. *McCutcheon*, 572 U. S., at 192 (plurality opinion). Instead, "it is the business of judges to be indifferent to popularity." *Chisom* v. *Roemer*, 501 U. S. 380, 401, n. 29 (1991) (internal quotation marks omitted).

States may therefore impose different campaign-finance rules for judicial elections than for political elections. Experience illustrates why States may wish to do so. When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in campaigns for judicial office will yield similar returns. Elected judges understand this dynamic. As Ohio Supreme Court Justice Paul Pfeifer put it: "Whether they succeed or not," campaign contributors "mean to be buying a vote." Liptak & Roberts, Campaign Cash Mirrors a High Court's Rulings, N. Y. Times, Oct. 1, 2006, pp. A1, A22 (internal quotation marks omitted).

In recent years, moreover, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not toe a party line or are alleged to be out of step with public opinion. Following the Iowa Supreme Court's 2009 invalidation of the State's same-sex marriage ban, for example, national

organizations poured money into a successful campaign to remove three justices from that court. J. Shugerman, The People's Courts: Pursuing Judicial Independence in America 3 (2012). Attack advertisements funded by issue or politically driven organizations portrayed the justices as political actors; they lambasted the Iowa Supreme Court for "usurp[ing] the will of voters." A. Skaggs, M. da Silva, L. Casey, & C. Hall, The New Politics of Judicial Elections 2009–10, p. 9 (C. Hall ed. 2011) (internal quotation marks omitted).

Similarly portraying judges as belonging to another political branch, huge amounts have been spent on advertisements opposing retention of judges because they rendered unpopular decisions in favor of criminal defendants. D. Goldberg, S. Samis, E. Bender, & R. Weiss, The New Politics of Judicial Elections 2004, pp. 5, 10–11 (J. Rutledge ed. 2005) (hereinafter Goldberg). In North Carolina, for example, in 2014, a political action committee aired "a widely condemned TV spot accusing [North Carolina Supreme Court Justice Robin] Hudson of being 'soft' on child-molesters." Oliphant, When Judges Go Courting, National Journal Magazine, Oct. 18, 2014, p. 28. And in West Virginia, as described in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 873 (2009), coal executive Don Blankenship lavishly funded a political action committee called "And For The Sake Of The Kids." That group bought advertisements accusing Justice Warren McGraw of freeing a "child rapist" and allowing that "rapist" to "work as a janitor at a West Virginia school." Goldberg 4; see A. Bannon, E. Velasco, L. Casey, & L. Reagan, The New Politics of Judicial Elections 2011–12, p. 22 (L. Kinney and P. Hardin eds. 2013) (reporting that in 2011 and 2012, interest-oriented groups were 22 times more likely to purchase an "attack" advertisement than were judicial candidates themselves).

Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial inde-

pendence. Numerous studies report that the money pressure groups spend on judicial elections "can affect judicial decision-making across a broad range of cases." Brief for Professors of Law, Economics, and Political Science as *Amici Curiae* 14 (hereinafter Professors' Brief), see *id.*, at 5–17; J. Shepherd & M. Kang, Skewed Justice 1 (2014), available at http://skewedjustice.org (All Internet materials as visited Apr. 24, 2015, and included in Clerk of Court's case file) (finding that a recent "explosion in spending on television attack advertisements . . . has made courts less likely to rule in favor of defendants in criminal appeals").

How does the electorate perceive outsized spending on judicial elections? Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges' campaigns have at least "some influence" on judicial decisionmaking. See Professors' Brief 23 (citing polls). Disquieting as well, in response to a recent poll, 87% of voters stated that advertisements purchased by interest groups during judicial elections can have either "some" or "a great deal of influence" on an elected "judge's later decisions." Justice at Stake/Brennan Center National Poll 3, Question 9 (Oct. 22–24, 2013) (conducted by 20/20 Insight LLC), available at http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf.

"A State's decision to elect its judges does not require it to tolerate these risks." *Ante*, at 448. What may be true of happy families, L. Tolstoy, Anna Karenina 1 (R. Pevear and L. Volokhonsky transls. 2000) ("All happy families are alike"), or of roses, G. Stein, Sacred Emily, in Geography and Plays 178, 187 (1922) (reprint 1968) ("Rose is a rose is a rose is a rose"), does not hold true in elections of every kind. States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the

unique setting of an elected judiciary." *White*, 536 U. S., at 821 (GINSBURG, J., dissenting).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

An ethics canon adopted by the Florida Supreme Court bans a candidate in a judicial election from asking anyone, under any circumstances, for a contribution to his campaign. Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech. Intent upon upholding the Canon, however, the Court flattens one settled First Amendment principle after another.

I

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. One need not equate judges with politicians to see that this principle does not grow weaker merely because the censored speech is a judicial candidate's request for a campaign contribution. Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011). No such tradition looms here. Georgia became the first State to elect its judges in 1812, and judicial elections had spread to a large majority of the States by the time of the Civil War. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785 (2002). Yet there appears to have been no regulation of judicial candidates' speech throughout the 19th and early 20th centuries. *Ibid.* The American Bar Association first proposed ethics rules concerning speech of judicial candidates in 1924, but these rules did not achieve widespread adoption until after the Second World War. *Id.*, at 786.

Rules against soliciting campaign contributions arrived more recently still. The ABA first proposed a canon advis-

ing against it in 1972, and a canon prohibiting it only in 1990. See Brief for American Bar Association as *Amicus Curiae* 2–4. Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. See *id.*, at 4. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

One likewise need not equate judges with politicians to see that the electoral setting calls for all the more vigilance in ensuring observance of the First Amendment. When a candidate asks someone for a campaign contribution, he tends (as the principal opinion acknowledges) also to talk about his qualifications for office and his views on public issues. *Ante*, at 443 (plurality opinion). This expression lies at the heart of what the First Amendment is meant to protect. In addition, banning candidates from asking for money personally "favors some candidates over others—incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey* v. *Wolnitzek*, 614 F. 3d 189, 204 (CA6 2010). This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.

Because Canon 7C(1) restricts fully protected speech on the basis of content, it presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny—that is to say, only if it shows that the Canon is narrowly tailored to serve a compelling interest. I do not for a moment question the Court's conclusion that States have different compelling interests when regulating judicial elections than when regulating political ones. Unlike a legislator, a judge must be impartial—without bias for or against any party or attorney who comes before him. I accept for the

sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not. But Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment. This case should have been just that straightforward.

II

The Court concludes that Florida may prohibit personal solicitations by judicial candidates as a means of preserving "public confidence in the integrity of the judiciary." *Ante*, at 444. It purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny.

A

The first sign that mischief is afoot comes when the Court describes Florida's compelling interest. The State must first identify its objective with precision before one can tell whether that interest is compelling and whether the speech restriction narrowly targets it. In *White*, for example, the Court did not allow a State to invoke hazy concerns about judicial impartiality in justification of an ethics rule against judicial candidates' announcing their positions on legal issues. 536 U. S., at 775. The Court instead separately analyzed the State's concerns about judges' bias against parties, preconceptions on legal issues, and openmindedness, and ex-

plained why each concern (and each for a different reason) did not suffice to sustain the rule. *Id.*, at 775–780.

In stark contrast to *White*, the Court today relies on Florida's invocation of an ill-defined interest in "public confidence in judicial integrity." The Court at first suggests that "judicial integrity" involves the "ability to administer justice without fear or favor." *Ante*, at 445. As its opinion unfolds, however, today's concept of judicial integrity turns out to be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." 12 The Works of Thomas Jefferson 137 (P. Ford ed. 1905). When the Court explains how solicitation undermines confidence in judicial integrity, integrity starts to sound like saintliness. It involves independence from any "'*possible* temptation'" that "'*might* lead'" the judge, "even unknowingly," to favor one party. *Ante*, at 447 (emphasis added). When the Court turns to distinguishing in-person solicitation from solicitation by proxy, the any-possible-temptation standard no longer helps and thus drops out. The critical factors instead become the "pressure" a listener feels during a solicitation and the "appearance that the candidate will remember who says yes, and who says no." *Ante*, at 450. But when it comes time to explain Florida's decision to allow candidates to write thank-you notes, the "appearance that the candidate . . . remember[s] who says yes" gets nary a mention. *Ibid.* And when the Court confronts Florida's decision to prohibit mass-mailed solicitations, concern about pressure fades away. *Ante*, at 453. More outrageous still, the Court at times molds the interest in the perception that judges have integrity into an interest in the perception that judges do not solicit—for example when it says, "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern." *Ante*, at 454. This is not strict scrutiny; it is sleight of hand.

B

The Court's twistifications have not come to an end; indeed, they are just beginning. In order to uphold Canon 7C(1) under strict scrutiny, Florida must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective. The State "bears the risk of uncertainty," so "ambiguous proof will not suffice." *Entertainment Merchants*, 564 U. S., at 799–800. In an arresting illustration, this Court held that a law punishing lies about winning military decorations like the Congressional Medal of Honor failed exacting scrutiny, because the Government could not satisfy its "heavy burden" of proving that "the public's general perception of military awards is diluted by false claims." *United States* v. *Alvarez*, 567 U. S. 709, 726 (2012) (plurality opinion).

Now that we have a case about the public's perception of judicial honor rather than its perception of military honors, the Justices of this Court change the rules. The Court announces, on the basis of its "intuiti[on]," that allowing personal solicitations will make litigants worry that "'judges' decisions may be motivated by the desire to repay campaign contributions.'" *Ante*, at 445, 447. But this case is not about whether Yulee has the right to receive campaign contributions. It is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive. Florida bears the burden of showing that banning *requests* for lawful contributions will improve public confidence in judges—not just a little bit, but significantly, because "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Entertainment Merchants*, *supra*, at 804, n. 9.

Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does common

sense make this happy forecast obvious. The concept of judicial integrity "dates back at least eight centuries," *ante*, at 445, and judicial elections in America date back more than two centuries, *supra*, at 462—but rules against personal solicitations date back only to 1972, *supra*, at 462–463. The peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions than elsewhere. And in any event, if candidates' appeals for money are "'characteristically intertwined'" with discussion of qualifications and views on public issues, *ante*, at 442 (plurality opinion), how can the Court be so sure that the public will regard them as improprieties rather than as legitimate instances of campaigning? In the final analysis, Florida comes nowhere near making the convincing demonstration required by our cases that the speech restriction in this case substantially advances its objective.

C

But suppose we play along with the premise that prohibiting solicitations will significantly improve the public reputation of judges. Even then, Florida must show that the ban restricts no more speech than necessary to achieve the objective. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989).

Canon 7C(1) falls miles short of satisfying this requirement. The Court seems to accept Florida's claim that solicitations erode public confidence by creating the perception that judges are selling justice to lawyers and litigants. *Ante*, at 445. Yet the Canon prohibits candidates from asking for money from *anybody*—even from someone who is neither lawyer nor litigant, even from someone who (because of recusal rules) cannot possibly appear before the candidate as lawyer or litigant. Yulee thus may not call up an old friend, a

cousin, or even her parents to ask for a donation to her campaign. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

No less important, Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular—mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary. Consider online solicitations. They avoid "'the spectacle of lawyers or potential litigants directly handing over money to judicial candidates,'" *ante*, at 447. People who come across online solicitations do not feel "pressure" to comply with the request, *ante*, at 450. Nor does the candidate's signature on the online solicitation suggest "that the candidate will remember who says yes, and who says no," *ibid.* Yet Canon 7C(1) prohibits these and similar solicitations anyway. This tailoring is as narrow as the Court's scrutiny is strict.

Perhaps sensing the fragility of the initial claim that *all* solicitations threaten public confidence in judges, the Court argues that "the lines Yulee asks [it] to draw are unworkable." *Ante*, at 453. That is a difficulty of the Court's own imagination. In reality, the Court could have chosen from a whole spectrum of workable rules. It could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate's court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online). The Supreme Court of Florida has made similar accommoda-

tions in other settings. It allows sitting judges to solicit memberships in civic organizations if (among other things) the solicitee is not "likely ever to appear before the court on which the judge serves." Code of Judicial Conduct for the State of Florida 27 (2014) (Judicial Conduct Code). And it allows sitting judges to accept gifts if (among other things) "the donor is not a party or other person . . . whose interests have come or are likely to come before the judge." *Id.*, at 24. It is not too much to ask that the State show election speech similar consideration.

The Court's accusation of unworkability also suffers from a bit of a pot-kettle problem. Consider the many real-world questions left open by today's decision. Does the First Amendment permit restricting a candidate's appearing at an event where somebody *else* asks for campaign funds on his behalf? See Florida Judicial Ethics Advisory Committee Opinion No. 2012–14 (JEAC Op.). Does it permit prohibiting the candidate's *family* from making personal solicitations? See *ibid.* Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate's name does not appear next to the request? See JEAC Op. No. 2008–11. More broadly, could Florida ban thank-you notes to donors? Cap a candidate's campaign spending? Restrict independent spending by people other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by "judicial integrity"? For the Court to wring its hands about workability under these circumstances is more than one should have to bear.

D

Even if Florida could show that banning all personal appeals for campaign funds is necessary to protect public confidence in judicial integrity, the Court must overpower one

last sentinel of free speech before it can uphold Canon 7C(1). Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. Applying this principle, we invalidated a law that prohibited picketing dwellings but made an exception for picketing about labor issues; the State could not show that labor picketing harmed its asserted interest in residential privacy any less than other kinds of picketing. *Carey* v. *Brown*, 447 U. S. 455, 464–465 (1980). In another case, we set aside a ban on showing movies containing nudity in drive-in theaters, because the government did not demonstrate that movies with nude scenes would distract passing drivers any more than, say, movies with violent scenes. *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 214–215 (1975).

The Court's decision disregards these principles. The Court tells us that "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary." *Ante*, at 454. But Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. The part of the Canon challenged here prohibits personal pleas for "campaign funds," and the Canon elsewhere prohibits personal appeals to attorneys for "publicly stated support." Judicial Conduct Code 38. So although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not. Could anyone say with a straight face that it

looks *worse* for a candidate to say "please give my campaign $25" than to say "please give *me* $25"? *

Fumbling around for a fig-leaf, the Court says that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Ante*, at 449. This analysis elides the distinction between selectivity on the basis of content and selectivity on other grounds. Because the First Amendment does not prohibit underinclusiveness as such, lawmakers may target a problem only at certain times or in certain places. Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages. Explaining this distinction, we have said that the First Amendment would allow banning obscenity "only in certain media or markets" but would preclude banning "only that obscenity which includes offensive political messages." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 387–388 (1992) (emphasis deleted). This case involves selectivity on the basis of content. The Florida Supreme Court has decided to eliminate the appearances associated with "personal appeals for money," *ante*, at 453, when the appeals seek money for a campaign but not when the appeals seek money for other purposes. That distinction violates the First Amendment. See *Erznoznik*, *supra*, at 215.

Even on the Court's own terms, Canon 7C(1) cannot stand. The Court concedes that "underinclusiveness can raise 'doubts about whether the government is in fact pursuing

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*Neither Florida nor the Court identifies any other ethics rule that would prevent candidates like Yulee from asking for favors unrelated to elections, and I know of none. The Supreme Court of Florida has adopted various rules restricting *sitting judges*' solicitation and acceptance of favors, but these rules do not bind challengers like Yulee. See, *e. g.*, Canon 4D(2)(a), Judicial Conduct Code 18–19 ("A judge as [a member or officer of an organization] . . . shall not personally or directly participate in the solicitation of funds . . . "); Canon 5D(5), *id.*, at 24 ("A judge shall not accept . . . a gift, bequest, favor or loan . . . "); JEAC Op. No. 2010–14 ("[J]udicial candidates are only governed by Canon 7, and not by the remainder of the Code of Judicial Conduct").

the interest it invokes.'" *Ante*, at 448. Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections—preferring instead a system in which (surprise!) a committee of lawyers proposes candidates from among whom the Governor must make his selection. See *White*, 536 U. S., at 787.

The Court tries to strike a pose of neutrality between appointment and election of judges, but no one should be deceived. A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them. When a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges, their immunity from the (shudder!) indignity of begging for funds, and their exemption from those shadows of impropriety that fall over the proletarian public officials who must run for office. A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers—and (it must be said) from just a deep-down feeling that members of the Third Branch will

profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People. (It should not be thought that I myself harbor such irreverent and revolutionary feelings; but I think it likely—and year by year more likely—that those who favor the election of judges do so.) In any case, hostility to campaigning by judges entitles the people of Florida to amend their Constitution to replace judicial elections with the selection of judges by lawyers' committees; it does not entitle the Florida Supreme Court to adopt, or this Court to endorse, a rule of judicial conduct that abridges candidates' speech in the judicial elections that the Florida Constitution prescribes.

* * *

This Court has not been shy to enforce the First Amendment in recent Terms—even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals. See *United States* v. *Stevens*, 559 U. S. 460 (2010); *Entertainment Merchants*, 564 U. S. 786; *Alvarez*, 567 U. S. 709. Who would have thought that the same Court would today exert such heroic efforts to save so plain an abridgement of the freedom of speech? It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

I respectfully dissent.

JUSTICE KENNEDY, dissenting.

The dissenting opinion by JUSTICE SCALIA gives a full and complete explanation of the reasons why the Court's opinion contradicts settled First Amendment principles. This separate dissent is written to underscore the irony in the Court's having concluded that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue. It is written to underscore, too, the irony in the Court's having weakened the rigors of the First Amendment in a case concerning elections, a paradigmatic forum for speech and a process intended to protect freedom in so many other manifestations.

First Amendment protections are both personal and structural. Free speech begins with the right of each person to think and then to express his or her own ideas. Protecting this personal sphere of intellect and conscience, in turn, creates structural safeguards for many of the processes that define a free society. The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech. See *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971) (the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office"). As James Madison observed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. [A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter to William T. Barry (Aug. 4, 1822), in J. Madison, Writings 790 (J. Rakove ed. 1999). The Court's decision in this case imperils the content neutrality essential both for individual speech and the election process.

With all due respect for the Court, it seems fair and necessary to say its decision rests on two premises, neither one correct. One premise is that in certain elections—here an

election to choose the best qualified judge—the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other elections. In my respectful view neither premise can justify the speech restriction at issue here. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal. See *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002).

While any number of troubling consequences will follow from the Court's ruling, a simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. For the very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By

cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced.

Elections are a paradigmatic forum for speech. Though present day campaign rhetoric all too often might thwart or obscure deliberative discourse, the idea of elections is that voters can engage in, or at least consider, a principled debate. That debate can be a means to find consensus for a civic course that is prudent and wise. This pertains both to issues and to the choice of elected officials. The First Amendment seeks to make the idea of discussion, open debate, and consensus building a reality. But the Court decides otherwise. The Court locks the First Amendment out.

Whether an election is the best way to choose a judge is itself the subject of fair debate. But once the people of a State choose to have elections, the First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate. See *ibid.* One advantage of judicial elections is the opportunity offered for the public to become more knowledgeable about their courts and their law. This might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds. Yet now that teaching process is hindered by state censorship. By allowing the State's speech restriction, the Court undermines the educational process that free speech in elections should facilitate.

It is not within our Nation's First Amendment tradition to abridge speech simply because the government believes a question is too difficult or too profound for voters. If the State is concerned about unethical campaign practices, it need not revert to the assumption that voters themselves are insensitive to ethics. Judicial elections were created to enable citizens to decide for themselves which judges are

best qualified and which are most likely to "stand by the constitution of the State against the encroachment of power." Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York 672 (1846). The Court should not now presume citizens are unequipped for that task when it comes to judging for themselves who should judge them.

If there is concern about principled, decent, and thoughtful discourse in election campaigns, the First Amendment provides the answer. That answer is more speech. See, *e. g.*, *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) (when the government objects to speech, "the remedy to be applied is more speech, not enforced silence"). For example, candidates might themselves agree to appoint members of a panel charged with periodic evaluation of campaign statements, candor, and fairness. Those evaluations could be made public. And any number of private organizations or voter groups seeking to evaluate campaign rhetoric could do the same. See *White*, *supra*, at 795 (KENNEDY, J. concurring).

Modern communication technologies afford voters and candidates an unparalleled opportunity to engage in the campaign and election process. These technologies may encourage a discourse that is principled and informed. The Internet, in particular, has increased in a dramatic way the rapidity and pervasiveness with which ideas may spread. Whether as a result of disclosure laws or a candidate's voluntary decision to make the campaign transparent, the Internet can reveal almost at once how a candidate sought funds; who the donors were; and what amounts they gave. Indeed, disclosure requirements offer a powerful, speech-enhancing method of deterring corruption—one that does not impose limits on how and when people can speak. See *Doe* v. *Reed*, 561 U. S. 186, 199 (2010) ("Public disclosure also promotes transparency and accountability in the electoral

process to an extent other measures cannot"). Based on disclosures the voters can decide, among other matters, whether the public is well served by an elected judiciary; how each candidate defines appropriate campaign conduct (which may speak volumes about his or her judicial demeanor); and what persons and groups support or oppose a particular candidate. See *Buckley* v. *Valeo*, 424 U. S. 1, 67 (1976) (*per curiam*). With detailed information about a candidate's practices in soliciting funds, voters may be better informed in choosing those judges who are prepared to do justice "without fear or favor." 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908). The speech the Court now holds foreclosed might itself have been instructive in this regard, and it could have been open to the electorate's scrutiny. Judicial elections, no less than other elections, presuppose faith in democracy. Judicial elections are no exception to the premise that elections can teach.

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. As JUSTICE SCALIA well explains, the state law at issue fails strict scrutiny for any number of reasons. The candidate who is not wealthy or well connected cannot ask even a close friend or relative for a bit of financial help, despite the lack of any increased risk of partiality and despite the fact that disclosure laws might be enacted to make the solicitation and support public. This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by JUSTICE SCALIA, it is necessary for me to file this respectful dissent.

Justice Alito, dissenting.

I largely agree with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy. The Florida rule before us regulates speech that is part of the process of selecting those who wield the power of the State. Such speech lies at the heart of the protection provided by the First Amendment. The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny. This means that it must be narrowly tailored to further a compelling state interest. Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest.

Indeed, this rule is about as narrowly tailored as a burlap bag. It applies to all solicitations made in the name of a candidate for judicial office—including, as was the case here, a mass mailing. It even applies to an ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.

When petitioner sent out a form letter requesting campaign contributions, she was well within her First Amendment rights. The Florida Supreme Court violated the Constitution when it imposed a financial penalty and stained her record with a finding that she had engaged in unethical conduct. I would reverse the judgment of the Florida Supreme Court.

Syllabus

MACH MINING, LLC *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

No. 13–1019. Argued January 13, 2015—Decided April 29, 2015

Before suing an employer for employment discrimination under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC or Commission) must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U. S. C. § 2000e–5(b). Once the Commission determines that conciliation has failed, it may file suit in federal court. § 2000e–5(f)(1). However, "[n]othing said or done during" conciliation may be "used as evidence in a subsequent proceeding without written consent of the persons concerned." § 2000e–5(b).

After investigating a sex discrimination charge against petitioner Mach Mining, LLC, respondent EEOC determined that reasonable cause existed to believe that the company had engaged in unlawful hiring practices. The Commission sent a letter inviting Mach Mining and the complainant to participate in informal conciliation proceedings and notifying them that a representative would be contacting them to begin the process. About a year later, the Commission sent Mach Mining another letter stating that it had determined that conciliation efforts had been unsuccessful. The Commission then sued Mach Mining in federal court. In its answer, Mach Mining alleged that the Commission had not attempted to conciliate in good faith. The Commission countered that its conciliation efforts were not subject to judicial review and that, regardless, the two letters it sent to Mach Mining provided adequate proof that it had fulfilled its statutory duty. The District Court agreed that it could review the adequacy of the Commission's efforts, but granted the Commission leave to immediately appeal. The Seventh Circuit reversed, holding that the Commission's statutory conciliation obligation was unreviewable.

Held:

1. Courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation. This Court has recognized a "strong presumption" that Congress means to allow judicial review of administrative action. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670. That presumption is rebuttable when a statute's language or structure demonstrates that Congress intended an

agency to police itself. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351. But nothing rebuts that presumption here.

By its choice of language, Congress imposed a mandatory duty on the EEOC to attempt conciliation and made that duty a precondition to filing a lawsuit. Such compulsory prerequisites are routinely enforced by courts in Title VII litigation. And though Congress gave the EEOC wide latitude to choose which "informal methods" to use, it did not deprive courts of judicially manageable criteria by which to review the conciliation process. By its terms, the statutory obligation to attempt conciliation necessarily entails communication between the parties concerning the alleged unlawful employment practice. The statute therefore requires the EEOC to notify the employer of the claim and give the employer an opportunity to discuss the matter. In enforcing that statutory condition, a court applies a manageable standard. Pp. 486–489.

2. The appropriate scope of judicial review of the EEOC's conciliation activities is narrow, enforcing only the EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance. This limited review respects the expansive discretion that Title VII gives the EEOC while still ensuring that it follows the law.

The Government's suggestion that review be limited to checking the facial validity of its two letters to Mach Mining falls short of Title VII's demands. That standard would merely accept the EEOC's word that it followed the law, whereas the aim of judicial review is to verify that the EEOC actually tried to conciliate a discrimination charge. Citing the standard set out in the National Labor Relations Act, Mach Mining proposes review for whether the EEOC engaged in good-faith negotiation, laying out a number of specific requirements to implement that standard. But the NLRA's process-based approach provides a poor analogy for Title VII, which ultimately cares about substantive outcomes and eschews any reciprocal duty to negotiate in good faith. Mach Mining's proposed code of conduct also conflicts with the wide latitude Congress gave the Commission to decide how to conduct and when to end conciliation efforts. And because information obtained during conciliation would be necessary evidence in a good-faith determination proceeding, Mach Mining's brand of review would violate Title VII's confidentiality protections.

The proper scope of review thus matches the terms of Title VII's conciliation provision. In order to comply with that provision, the EEOC must inform the employer about the specific discrimination allegation. Such notice must describe what the employer has done and which employees (or class of employees) have suffered. And the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. A

sworn affidavit from the EEOC stating that it has performed these obligations should suffice to show that it has met the conciliation requirement. Should the employer present concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to resolve that limited dispute. Should it find for the employer, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. Pp. 489–495.

738 F. 3d 171, vacated and remanded.

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

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *R. Lance Witcher* and *David L. Schenberg.*

Nicole A. Saharsky argued the cause for respondent. With her on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Gershengorn*, *P. David Lopez*, *Carolyn L. Wheeler*, and *Gail S. Coleman.**

JUSTICE KAGAN delivered the opinion of the Court.

Before suing an employer for discrimination, the Equal Employment Opportunity Commission (EEOC or Commission) must try to remedy unlawful workplace practices

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*Briefs of *amici curiae* urging reversal were filed for the American Insurance Association by *Gerald L. Maatman, Jr.*, and *Rebecca S. Bjork*; for the Equal Employment Advisory Council et al. by *Rae T. Vann*; and for the Retail Litigation Center, Inc., et al. by *Eric S. Dreiband*, *Shay Dvoretzky*, *Deborah White*, *Karen R. Harned*, *Elizabeth Milito*, *Kate Comerford Todd*, *Warren Postman*, *Prasad Sharma*, and *Richard Pianka.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, and *Rose A. Daly-Rooney* and *Chris Carlsen*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, and *Robert W. Ferguson* of Washington; for the Impact Fund et al. by *Jocelyn D. Larkin*, *Robert L. Schug*, *Meredith Johnson*, and *Michael L. Foreman*; and for Women's Rights Organizations et al. by *Jeremy Heisler*, *Deborah K. Marcuse*, *Andrew C. Melzer*, *Jenifer Rajkumar*, *Michelle Caiola*, and *Christina Brandt-Young.*

through informal methods of conciliation. This case requires us to decide whether and how courts may review those efforts. We hold that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit. But we find that the scope of that review is narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case.

I

Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 42 U. S. C. § 2000e *et seq.*, sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination. The process generally starts when "a person claiming to be aggrieved" files a charge of an unlawful workplace practice with the EEOC. § 2000e–5(b). At that point, the EEOC notifies the employer of the complaint and undertakes an investigation. See *ibid.* If the Commission finds no "reasonable cause" to think that the allegation has merit, it dismisses the charge and notifies the parties. *Ibid.* The complainant may then pursue her own lawsuit if she chooses. See § 2000e–5(f)(1).

If, on the other hand, the Commission finds reasonable cause, it must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). To ensure candor in those discussions, the statute limits the disclosure and use of the participants' statements: "Nothing said or done during and as a part of such informal endeavors" may be publicized by the Commission or "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* The statute leaves to the EEOC the ultimate decision whether to accept a settlement or instead to bring a lawsuit. So long as "the Commission has been unable to secure from the respondent a conciliation

agreement acceptable to the Commission" itself, the EEOC may sue the employer. § 2000e–5(f)(1).

This case began when a woman filed a charge with the EEOC claiming that petitioner Mach Mining, LLC, had refused to hire her as a coal miner because of her sex. The Commission investigated the allegation and found reasonable cause to believe that Mach Mining had discriminated against the complainant, along with a class of women who had similarly applied for mining jobs. See App. 15. In a letter announcing that determination, the EEOC invited both the company and the complainant to participate in "informal methods" of dispute resolution, promising that a Commission representative would soon "contact [them] to begin the conciliation process." *Id.*, at 16. The record does not disclose what happened next. But about a year later, the Commission sent Mach Mining a second letter, stating that "such conciliation efforts as are required by law have occurred and have been unsuccessful" and that any further efforts would be "futile." *Id.*, at 18–19.

The EEOC then sued Mach Mining in federal district court alleging sex discrimination in hiring. The Commission's complaint maintained that "[a]ll conditions precedent to the institution of this lawsuit"—including an attempt to end the challenged practice through conciliation—"ha[d] been fulfilled." *Id.*, at 22. In its answer, Mach Mining contested that statement, asserting that the EEOC had failed to "conciliat[e] in good faith" prior to filing suit. *Id.*, at 30.

The Commission subsequently moved for summary judgment on that issue, contending that its "conciliation efforts are not subject to judicial review." Motion for Summary Judgment in No. 3:11–cv–00879 (SD Ill.), p. 1. At most, the Commission argued, the court could inspect the EEOC's two letters to Mach Mining to confirm that the EEOC had met its duty to attempt conciliation. See *id.*, at 11, 19. Mach Mining responded by urging the court to consider the overall "reasonable[ness]" of the EEOC's efforts, based on evidence the company would present about the conciliation process.

Memorandum in Opposition to Motion for Partial Summary Judgment in No. 3:11–cv–00879 (SD Ill.), p. 20. The trial court agreed with Mach Mining that it should review whether the Commission had made "a sincere and reasonable effort to negotiate." Civ. No. 11–879 (SD Ill., Jan. 28, 2013), App. to Pet. for Cert. 40a, 2013 WL 319337, *5 (internal quotation marks omitted). At the EEOC's request, the court then authorized an immediate appeal of its ruling. See Civ. No. 11–879 (SD Ill., May 20, 2013), App. to Pet. for Cert. 52a–55a, 2013 WL 2177770, *5–*6; 28 U. S. C. § 1292(b).

The Court of Appeals for the Seventh Circuit reversed, holding that "the statutory directive to attempt conciliation" is "not subject to judicial review." 738 F. 3d 171, 177 (2013). According to the court, that provision entrusts conciliation "solely to the EEOC's expert judgment" and thus provides no "workable standard" of review for courts to apply. *Id.*, at 174, 177. The Seventh Circuit further reasoned that judicial review of the conciliation process would "undermine enforcement of Title VII" by "protract[ing] and complicat[ing]" discrimination suits. *Id.*, at 178–179 (quoting *Doe* v. *Oberweis Dairy*, 456 F. 3d 704, 710 (CA7 2006)). In its concluding paragraph, however, the court indicated that it had in fact subjected the EEOC's activities to a smidgen of review: Because the Commission "pled on the face of its complaint that it ha[d] complied with all" prerequisites to suit and because its two letters to Mach Mining were "facially sufficient" to show that conciliation had occurred, the court stated, "our review of [that process] is satisfied." 738 F. 3d, at 184.

Other Courts of Appeals have held that Title VII allows judicial review of the EEOC's conciliation efforts, but without agreeing on what that review entails.[1] We granted certiorari, 573 U. S. 944 (2014), to address whether and to what

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[1] See, *e. g.*, *EEOC* v. *Asplundh Tree Expert Co.*, 340 F. 3d 1256, 1259 (CA11 2003) (holding that the EEOC must, among other things, "respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC* v. *Keco Industries, Inc.*, 748 F. 2d 1097, 1102 (CA6 1984) (holding that the EEOC must "make a good faith effort to conciliate").

extent such an attempt to conciliate is subject to judicial consideration.

II

Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986). That presumption is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. See *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351 (1984). But the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review" of the agency's compliance with a legislative mandate. *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975).

Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit. See Brief for Respondent 20. That obligation is a key component of the statutory scheme. In pursuing the goal of "bring[ing] employment discrimination to an end," Congress chose "[c]ooperation and voluntary compliance" as its "preferred means." *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 228 (1982) (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974)). Accordingly, the statute provides, as earlier noted, that the Commission "shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b); see *supra*, at 483. That language is mandatory, not precatory. Cf. *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 109 (2002) (noting that the word "shall" admits of no discretion). And the duty it imposes serves as a necessary precondition to filing a lawsuit. Only if the Commission is "unable to secure" an acceptable conciliation agreement—that

is, only if its attempt to conciliate has failed—may a claim against the employer go forward. § 2000e–5(f)(1).

Courts routinely enforce such compulsory prerequisites to suit in Title VII litigation (and in many other contexts besides). An employee, for example, may bring a Title VII claim only if she has first filed a timely charge with the EEOC—and a court will usually dismiss a complaint for failure to do so. See, *e. g.*, *id.*, at 104–105, 114–115. Similarly, an employee must obtain a right-to-sue letter before bringing suit—and a court will typically insist on satisfaction of that condition. See, *e. g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973); see also, *e. g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 26 (1989) (upholding dismissal of an environmental suit for failure to comply with a notice provision serving as a "condition precedent"); *United States* v. *Zucca*, 351 U. S. 91 (1956) (affirming dismissal of a denaturalization suit because of the Government's failure to comply with a mandatory prerequisite). That ordinary part of Title VII litigation—see a prerequisite to suit, enforce a prerequisite to suit—supports judicial review of the EEOC's compliance with the law's conciliation provision.

The Government, reiterating the Seventh Circuit's view, contests that conclusion, arguing that Title VII provides "no standards by which to judge" the EEOC's performance of its statutory duty. Brief for Respondent 17. The Government highlights the broad leeway the statute gives the EEOC to decide how to engage in, and when to give up on, conciliation. In granting that discretion, the Government contends, Congress deprived courts of any "judicially manageable" criteria with which to review the EEOC's efforts. *Id.*, at 36 (quoting *Heckler* v. *Chaney*, 470 U. S. 821, 830 (1985)). And in that way Congress "demonstrate[d] [its] intention to preclude judicial review." Brief for Respondent 39.

But in thus denying that Title VII creates a "reviewable prerequisite to suit," the Government takes its observation about discretion too far. *Id.*, at 37 (quoting 738 F. 3d, at

175). Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review. See *infra*, at 492. But no, Congress has not left *everything* to the Commission. Consider if the EEOC declined to make any attempt to conciliate a claim—if, after finding reasonable cause to support a charge, the EEOC took the employer straight to court. In such a case, Title VII would offer a perfectly serviceable standard for judicial review: Without any "endeavor" at all, the EEOC would have failed to satisfy a necessary condition of litigation.

Still more, the statute provides certain concrete standards pertaining to what that endeavor must entail. Again, think of how the statute describes the obligatory attempt: "to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). Those specified methods necessarily involve communication between parties, including the exchange of information and views. As one dictionary variously defines the terms, they involve "consultation or discussion," an attempt to "reconcile" different positions, and a "means of argument, reasoning, or entreaty." American Heritage Dictionary 385, 382, 1318 (5th ed. 2011). That communication, moreover, concerns a particular thing: the "alleged unlawful employment practice." So the EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. See also *infra*, at 494. If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation. And in insisting that the Commission do so, as the statutory language directs, a court applies a manageable standard.

Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need

not doubt the EEOC's trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action. See *supra*, at 486. Nothing overcomes that presumption with respect to the EEOC's duty to attempt conciliation of employment discrimination claims.

III

That conclusion raises a second dispute between the parties: What is the proper scope of judicial review of the EEOC's conciliation activities? The Government (once having accepted the necessity for some review) proposes that courts rely solely on facial examination of certain EEOC documents. Mach Mining argues for far more intrusive review, in part analogizing to the way judges superintend bargaining between employers and unions. We accept neither suggestion, because we think neither consistent with the choices Congress made in enacting Title VII. The appropriate scope of review enforces the statute's requirements as just described—in brief, that the EEOC afford the employer a chance to discuss and rectify a specified discriminatory practice—but goes no further. See *supra*, at 488; *infra*, at 494. Such limited review respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the Commission follows the law.

The Government argues for the most minimalist form of review imaginable. Echoing the final paragraph of the decision below, the Government observes that the EEOC, in line with its standard practice, wrote two letters to Mach Mining. See *supra*, at 484, 485. The first, after announcing the Commission's finding of reasonable cause, informed the company that "[a] representative of this office will be in contact with each party in the near future to begin the conciliation proc-

ess." App. 16. The second, sent about a year later, stated that the legally mandated conciliation attempt had "occurred" and failed. *Id.*, at 18. According to the Government, those "bookend" letters are all a court ever needs for review, because they "establish" that the EEOC met its obligation to attempt conciliation. Brief for Respondent 21.

But review of that kind falls short of what Title VII demands because the EEOC's bookend letters fail to prove what the Government claims. Contrary to its intimation, those letters do not themselves fulfill the conciliation condition: The first declares only that the process will start soon, and the second only that it has concluded. The two letters, to be sure, may provide indirect evidence that conciliation efforts happened in the interim; the later one expressly represents as much. But suppose an employer contests that statement. Let us say the employer files an affidavit alleging that although the EEOC promised to make contact, it in fact did not. In that circumstance, to treat the letters as sufficient—to take them at face value, as the Government wants—is simply to accept the EEOC's say-so that it complied with the law. And as earlier explained, the point of judicial review is instead to *verify* the EEOC's say-so—that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge. See *supra*, at 488–489. For that, a court needs more than the two bookend letters the Government proffers.

Mach Mining, for its part, would have a court do a deep dive into the conciliation process. Citing the standard set out in the National Labor Relations Act (NLRA), Mach Mining wants a court to consider whether the EEOC has "negotiate[d] in good faith" over a discrimination claim. Brief for Petitioner 37; see 29 U. S. C. § 158(d) (imposing a duty on employers and unions to bargain "in good faith with respect to . . . terms and conditions of employment"). That good-faith obligation, Mach Mining maintains, here incorporates a number of specific requirements. In every case, the EEOC

must let the employer know the "minimum . . . it would take to resolve" the claim—that is, the smallest remedial award the EEOC would accept. Tr. of Oral Arg. 63. The Commission must also lay out "the factual and legal basis for" all its positions, including the calculations underlying any monetary request. Brief for Petitioner 39. And the Commission must refrain from making "take-it-or-leave-it" offers; rather, the EEOC has to go back and forth with the employer, considering and addressing its various counteroffers and giving it sufficient time at each turn "to review and respond." *Id.*, at 40. The function of judicial review, Mach Mining concludes, is to compel the Commission to abide by these rules.

To begin, however, we reject any analogy between the NLRA and Title VII. The NLRA is about process and process alone. It creates a sphere of bargaining—in which both sides have a mutual obligation to deal fairly—without expressing any preference as to the substantive agreements the parties should reach. See §§ 151, 158(d). By contrast, Title VII ultimately cares about substantive results, while eschewing any reciprocal duties of good-faith negotiation. Its conciliation provision explicitly serves a substantive mission: to "eliminate" unlawful discrimination from the workplace. 42 U. S. C. § 2000e–5(b). In discussing a claim with an employer, the EEOC must always insist upon legal compliance; and the employer, for its part, has no duty at all to confer or exchange proposals, but only to refrain from any discrimination. Those differences make judicial review of the NLRA's duty of good-faith bargaining a poor model for review of Title VII's conciliation requirement. In addressing labor disputes, courts have devised a detailed body of rules to police good-faith dealing divorced from outcomes—and so to protect the NLRA's core procedural apparatus. But those kinds of rules do not properly apply to a law that treats the conciliation process not as an end in itself, but only as a tool to redress workplace discrimination.

More concretely, Mach Mining's proposed code of conduct conflicts with the latitude Title VII gives the Commission to pursue voluntary compliance with the law's commands. Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only "endeavor" to conciliate a claim, without having to devote a set amount of time or resources to that project. § 2000e–5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever "informal" means of "conference, conciliation, and persuasion" it deems appropriate. *Ibid.* And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable *to the Commission*." § 2000e–5(f)(1) (emphasis added). All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining's bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as Mach Mining urges and many courts have done, see n. 1, *supra*—is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Mach Mining's brand of review would also flout Title VII's protection of the confidentiality of conciliation efforts. The statute, recall, provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the written consent of the persons concerned"—both the employer and the complainant. § 2000e–5(b); see *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S.

590, 598, and n. 13 (1981). But the judicial inquiry Mach Mining proposes would *necessitate* the disclosure and use of such information in a later Title VII suit: How else could a court address an allegation that the EEOC failed to comply with all the negotiating rules Mach Mining espouses?[2] The proof is in this very case: The District Court held that it could not strike from the record descriptions of the conciliation process because they spoke to whether the EEOC had made a "sincere and reasonable effort to negotiate." App. to Pet. for Cert. 40a (internal quotation marks omitted); see *supra*, at 485. The court thus failed to give effect to the law's non-disclosure provision. And in so doing, the court undermined the conciliation process itself, because confidentiality promotes candor in discussions and thereby enhances the prospects for agreement. As this Court has explained, "[t]he maximum results from the voluntary approach will be achieved if" the parties know that statements they make cannot come back to haunt them in litigation. *Associated Dry Goods Corp.*, 449 U. S., at 599, n. 16 (quoting 110 Cong.

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[2] Mach Mining tries to show that broad judicial review is compatible with Title VII's non-disclosure provision, but fails to do so. The company first contends that the statutory bar is limited to "using what was said or done in a conciliation as evidence *going to the merits of the claims*." Brief for Petitioner 27 (emphasis added). But to make that argument, Mach Mining must add many words to the text (those shown here in italics). The actual language refers to "evidence in a subsequent proceeding," without carving out evidence relating to non-merits issues. 42 U. S. C. § 2000e–5(b). And in any case, under Mach Mining's own view of Title VII, compliance with the conciliation mandate *is* a merits issue, because it is a necessary "element of the [EEOC's] claim, which the [EEOC] must plead and prove." Brief for Petitioner 9; see *id.*, at 31. Mach Mining therefore presents a back-up argument: "[T]he confidentiality limitation should be deemed waived" when the employer puts conciliation at issue. *Id.*, at 30. But again, to effect a waiver Title VII requires "the written consent of the persons concerned," which includes not just the employer but the complainant too. § 2000e–5(b); see *supra*, at 492. And the *employer's* decision to contest the EEOC's conciliation efforts cannot waive, by "deem[ing]" or otherwise, the *employee's* statutory rights.

Rec. 8193 (1964) (remarks of Sen. Dirksen)). And conversely, the minimum results will be achieved if a party can hope to use accounts of those discussions to derail or delay a meritorious claim.

By contrast with these flawed proposals, the proper scope of judicial review matches the terms of Title VII's conciliation provision, as we earlier described them. See *supra*, at 488–489. The statute demands, once again, that the EEOC communicate in some way (through "conference, conciliation, and persuasion") about an "alleged unlawful employment practice" in an "endeavor" to achieve an employer's voluntary compliance. § 2000e–5(b). That means the EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of "reasonable cause." *Ibid.* Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute. At the same time, that relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. And such review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i. e.*, statements made or positions taken) during those discussions.

A sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement. Cf. *United States* v. *Clarke*, 573 U. S. 248, 254 (2014) ("[A]bsent contrary evidence, the [agency] can

satisfy [the relevant] standard by submitting a simple affidavit from" the agency representative involved). If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to decide that limited dispute. Cf. *id.*, at 254–255. Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. See § 2000e–5(f)(1) (authorizing a stay of a Title VII action for that purpose).

IV

Judicial review of administrative action is the norm in our legal system, and nothing in Title VII withdraws the courts' authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims. But the scope of that review is narrow, reflecting the abundant discretion the law gives the EEOC to decide the kind and extent of discussions appropriate in a given case. In addressing a claim like Mach Mining's, courts may not impinge on that latitude and on the Commission's concomitant responsibility to eliminate unlawful workplace discrimination.

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

It is so ordered.

Syllabus

BULLARD *v.* BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK

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

No. 14–116. Argued April 1, 2015—Decided May 4, 2015

After filing for Chapter 13 bankruptcy, petitioner Bullard submitted a proposed repayment plan to the Bankruptcy Court. Respondent Blue Hills Bank, Bullard's mortgage lender, objected to the plan's treatment of its claim. The Bankruptcy Court sustained the Bank's objection and declined to confirm the plan. Bullard appealed to the First Circuit Bankruptcy Appellate Panel (BAP). The BAP concluded that the Bankruptcy Court's denial of confirmation was not a final, appealable order, see 28 U. S. C. § 158(a)(1), but heard the appeal under a provision permitting interlocutory appeals "with leave of the court," § 158(a)(3), and agreed with the Bankruptcy Court that Bullard's proposed plan was not allowed. Bullard appealed to the First Circuit, but it dismissed for lack of jurisdiction. It concluded that its jurisdiction depended on the finality of the BAP's order, which in turn depended on the finality of the Bankruptcy Court's order. And it found that the Bankruptcy Court's order denying confirmation was not final so long as Bullard remained free to propose another plan.

Held: A bankruptcy court's order denying confirmation of a debtor's proposed repayment plan is not a final order that the debtor can immediately appeal. Pp. 501–509.

(a) Congress has long treated orders in bankruptcy cases as immediately appealable "if they finally dispose of discrete disputes within the larger case," *Howard Delivery Service, Inc.* v. *Zurich American Ins. Co.*, 547 U. S. 651, 657, n. 3. This approach is reflected in the current statute, which provides that bankruptcy appeals as of right may be taken not only from final judgments in cases but from "final judgments, orders, and decrees . . . in cases and proceedings." 28 U. S. C. § 158(a). Bullard argues that a bankruptcy court conducts a separate proceeding each time it reviews a proposed plan, and therefore a court's order either confirming or denying a plan terminates the proceeding and is final and immediately appealable. But the relevant proceeding is the entire process of attempting to arrive at an approved plan that would allow the bankruptcy case to move forward. Only plan confirmation, or case dismissal, alters the status quo and fixes the parties' rights and obliga-

tions; denial of confirmation with leave to amend changes little and can hardly be described as final. Additional considerations—that the statute defining core bankruptcy proceedings lists "confirmations of plans," § 157(b)(2)(L), but omits any reference to denials; that immediate appeals from denials would result in delays and inefficiencies that requirements of finality are designed to constrain; and that a debtor's inability to immediately appeal a denial encourages the debtor to work with creditors and the trustee to develop a confirmable plan—bolster the conclusion that the relevant proceeding is the entire process culminating in confirmation or dismissal. Pp. 501–505.

(b) The Solicitor General suggests that because bankruptcy disputes are generally classified as either "adversary proceedings" or "contested matters," and because an order denying confirmation and an order granting confirmation both resolve a contested matter, both should be considered final. This argument simply assumes that confirmation is appealable because it resolves a contested matter, and that therefore anything else that resolves the contested matter must also be appealable. But one could just as easily contend that confirmation is appealable because it resolves the entire plan consideration process, while denial is not because it does not. Any asymmetry in denying the debtor an immediate appeal from a denial while allowing a creditor an immediate appeal from a confirmation simply reflects the fact that confirmation allows the bankruptcy to go forward and alters the legal relationships among the parties, while denial lacks such significant consequences. Nor is it clear that the asymmetry will always advantage creditors. Finally, Bullard contends that unless denial orders are final, a debtor will be required to choose between two untenable options: either accept dismissal of the case and then appeal, or propose an amended but unwanted plan and appeal its confirmation. These options will often be unsatisfying, but our litigation system has long accepted that certain burdensome rulings will be "only imperfectly reparable" by the appellate process. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 872. That prospect is made tolerable by the Court's confidence that bankruptcy courts rule correctly most of the time and by the existence of several mechanisms for interlocutory review, *e. g.*, §§ 158(a)(3), (d)(2), which "serve as useful safety valves for promptly correcting serious errors" and resolving legal questions important enough to be addressed immediately. *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 111. Pp. 505–509.

752 F. 3d 483, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

James A. Feldman argued the cause for petitioner. With him on the briefs were *Stephanos Bibas*, *Nancy Bregstein Gordon*, *David G. Baker*, and *Haneen Kutub.*

Zachary D. Tripp argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, *Ramona D. Elliott*, and *P. Matthew Sutko.*

Douglas Hallward-Driemeier argued the cause for respondent. With him on the brief were *Jonathan R. Ference-Burke*, *D. Ross Martin*, *Andrew E. Goloboy,* and *Ronald W. Dunbar*, *Jr.**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Chapter 13 of the Bankruptcy Code affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property. To proceed under Chapter 13, a debtor must propose a plan to use future income to repay a portion (or in the rare case all) of his debts over the next three to five years. If the bankruptcy court confirms the plan and the debtor successfully carries it out, he receives a discharge of his debts according to the plan.

The bankruptcy court may, however, decline to confirm a proposed repayment plan because it is inconsistent with the Code. Although the debtor is usually given an opportunity to submit a revised plan, he may be convinced that the original plan complied with the Code and that the bankruptcy court was wrong to deny confirmation. The question presented is whether such an order denying confirmation is a

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*Briefs of *amici curiae* urging reversal were filed for Bank of America, N. A., by *Danielle Spinelli*, *Craig Goldblatt*, *Allison Hester-Haddad*, and *Matthew Guarnieri*; for the National Association of Consumer Bankruptcy Attorneys et al. by *Tara Twomey* and *Scott L. Nelson*; and for G. Eric Brunstad, Jr., by *Mr. Brunstad*, *pro se*, and *Kate M. O'Keeffe.*

"final" order that the debtor can immediately appeal. We hold that it is not.

I

In December 2010, Louis Bullard filed a petition for Chapter 13 bankruptcy in Federal Bankruptcy Court in Massachusetts. A week later he filed a proposed repayment plan listing the various claims he anticipated creditors would file and the monthly amounts he planned to pay on each claim over the five-year life of his plan. See 11 U. S. C. §§ 1321, 1322. Chief among Bullard's debts was the roughly $346,000 he owed to Blue Hills Bank, which held a mortgage on a multifamily house Bullard owned. Bullard's plan indicated that the mortgage was significantly "underwater": that is, the house was worth substantially less than the amount Bullard owed the Bank.

Before submitting his plan for court approval, Bullard amended it three times over the course of a year to more accurately reflect the value of the house, the terms of the mortgage, the amounts of creditors' claims, and his proposed payments. See § 1323 (allowing preconfirmation modification). Bullard's third amended plan—the one at issue here—proposed a "hybrid" treatment of his debt to the Bank. He proposed splitting the debt into a secured claim in the amount of the house's then-current value (which he estimated at $245,000), and an unsecured claim for the remainder (roughly $101,000). Under the plan, Bullard would continue making his regular mortgage payments toward the secured claim, which he would eventually repay in full, long after the conclusion of his bankruptcy case. He would treat the unsecured claim, however, the same as any other unsecured debt, paying only as much on it as his income would allow over the course of his five-year plan. At the end of this period the remaining balance on the unsecured portion of the loan would be discharged. In total, Bullard's plan called for him to pay only about $5,000 of the $101,000 unsecured claim.

The Bank (no surprise) objected to the plan and, after a hearing, the Bankruptcy Court declined to confirm it. *In re Bullard*, 475 B. R. 304 (Bkrtcy. Ct. Mass. 2012). The court concluded that Chapter 13 did not allow Bullard to split the Bank's claim as he proposed unless he paid the secured portion in full during the plan period. *Id.*, at 314. The court acknowledged, however, that other Bankruptcy Courts in the First Circuit had approved such arrangements. *Id.*, at 309. The Bankruptcy Court ordered Bullard to submit a new plan within 30 days. *Id.*, at 314.

Bullard appealed to the Bankruptcy Appellate Panel (BAP) of the First Circuit. The BAP first addressed its jurisdiction under the bankruptcy appeals statute, noting that a party can immediately appeal only "final" orders of a bankruptcy court. *In re Bullard*, 494 B. R. 92, 95 (2013) (citing 28 U. S. C. § 158(a)(1)). The BAP concluded that the order denying plan confirmation was not final because Bullard was "free to propose an alternate plan." 494 B. R., at 95. The BAP nonetheless exercised its discretion to hear the appeal under a provision that allows interlocutory appeals "with leave of the court." § 158(a)(3). The BAP granted such leave because the confirmation dispute involved a "controlling question of law . . . as to which there is substantial ground for difference of opinion," and "an immediate appeal [would] materially advance the ultimate termination of the litigation." 494 B. R., at 95, and n. 5. On the merits, the BAP agreed with the Bankruptcy Court that Bullard's proposed treatment of the Bank's claim was not allowed. *Id.*, at 96–101.

Bullard sought review in the Court of Appeals for the First Circuit, but that court dismissed his appeal for lack of jurisdiction. *In re Bullard*, 752 F. 3d 483 (2014). The First Circuit noted that because the BAP had not certified the appeal under § 158(d)(2), the only possible source of Court of Appeals jurisdiction was § 158(d)(1), which allowed appeal of only a final order of the BAP. *Id.*, at 485, and n. 3. And

under First Circuit precedent "an order of the BAP cannot be final unless the underlying bankruptcy court order is final." *Id.*, at 485. The Court of Appeals accordingly examined whether a bankruptcy court's denial of plan confirmation is a final order, a question that it recognized had divided the Circuits. Adopting the majority view, the First Circuit concluded that an order denying confirmation is not final so long as the debtor remains free to propose another plan. *Id.*, at 486–490.

We granted certiorari. 574 U. S. 1058 (2014).

II

In ordinary civil litigation, a case in federal district court culminates in a "final decisio[n]," 28 U. S. C. § 1291, a ruling "by which a district court disassociates itself from a case," *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995). A party can typically appeal as of right only from that final decision. This rule reflects the conclusion that "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981)).

The rules are different in bankruptcy. A bankruptcy case involves "an aggregation of individual controversies," many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor. 1 Collier on Bankruptcy ¶5.08[1][b], p. 5–42 (16th ed. 2014). Accordingly, "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case." *Howard Delivery Service, Inc.* v. *Zurich American Ins. Co.*, 547 U. S. 651, 657, n. 3 (2006) (internal quotation marks and emphasis omitted). The current bankruptcy appeals statute reflects this approach: It authorizes appeals as of right not only from final

judgments in cases but from "final judgments, orders, and decrees . . . in cases and proceedings." § 158(a).

The present dispute is about how to define the immediately appealable "proceeding" in the context of the consideration of Chapter 13 plans. Bullard argues for a plan-by-plan approach. Each time the bankruptcy court reviews a proposed plan, he says, it conducts a separate proceeding. On this view, an order denying confirmation and an order granting confirmation both terminate that proceeding, and both are therefore final and appealable.

In the Bank's view Bullard is slicing the case too thin. The relevant "proceeding," it argues, is the entire process of considering plans, which terminates only when a plan is confirmed or—if the debtor fails to offer any confirmable plan—when the case is dismissed. An order denying confirmation is not final, so long as it leaves the debtor free to propose another plan.

We agree with the Bank: The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties. When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. 11 U. S. C. § 1327(a). Confirmation has preclusive effect, foreclosing relitigation of "any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." 8 Collier ¶1327.02[1][c], at 1327–6; see also *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U. S. 260, 275 (2010) (finding a confirmation order "enforceable and binding" on a creditor notwithstanding legal error when the creditor "had notice of the error and failed to object or timely appeal"). Subject to certain exceptions, confirmation "vests all of the property of the [bankruptcy] estate in the debtor," and renders that property "free and clear of any claim or interest of any creditor provided for by the plan."

§§ 1327(b), (c). Confirmation also triggers the Chapter 13 trustee's duty to distribute to creditors those funds already received from the debtor. § 1326(a)(2).

When confirmation is denied *and the case is dismissed as a result*, the consequences are similarly significant. Dismissal of course dooms the possibility of a discharge and the other benefits available to a debtor under Chapter 13. Dismissal lifts the automatic stay entered at the start of bankruptcy, exposing the debtor to creditors' legal actions and collection efforts. § 362(c)(2). And it can limit the availability of an automatic stay in a subsequent bankruptcy case. § 362(c)(3).

Denial of confirmation with leave to amend, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled. The trustee continues to collect funds from the debtor in anticipation of a different plan's eventual confirmation. The possibility of discharge lives on. "Final" does not describe this state of affairs. An order denying confirmation does rule out the specific arrangement of relief embodied in a particular plan. But that alone does not make the denial final any more than, say, a car buyer's declining to pay the sticker price is viewed as a "final" purchasing decision by either the buyer or seller. "It ain't over till it's over."

Several additional considerations bolster our conclusion that the relevant "proceeding" is the entire process culminating in confirmation or dismissal. First is a textual clue. Among the list of "core proceedings" statutorily entrusted to bankruptcy judges are "confirmations of plans." 28 U. S. C. § 157(b)(2)(L). Although this item hardly clinches the matter for the Bank—the provision's purpose is not to explain appealability—it does cut in the Bank's favor. The presence of the phrase "confirmations of plans," combined with the absence of any reference to denials, suggests that Congress viewed the larger confirmation process as the "proceeding," not the ruling on each specific plan.

In Bullard's view the debtor can appeal the denial of the first plan he submits to the bankruptcy court. If the court of appeals affirms the denial, the debtor can then revise the plan. If the new plan is also denied confirmation, another appeal can ensue. And so on. As Bullard's case shows, each climb up the appellate ladder and slide down the chute can take more than a year. Avoiding such delays and inefficiencies is precisely the reason for a rule of finality. It does not make much sense to define the pertinent proceeding so narrowly that the requirement of finality would do little work as a meaningful constraint on the availability of appellate review.

Bullard responds that concerns about frequent piecemeal appeals are misplaced in this context. Debtors do not typically have the money or incentives to take appeals over small beer issues. They will only appeal the relatively rare denials based on significant legal rulings—precisely the cases that should proceed promptly to the courts of appeals. Brief for Petitioner 43–46.

Bullard's assurance notwithstanding, debtors may often view, in good faith or bad, the prospect of appeals as important leverage in dealing with creditors. An appeal extends the automatic stay that comes with bankruptcy, which can cost creditors money and allow a debtor to retain property he might lose if the Chapter 13 proceeding turns out not to be viable. These concerns are heightened if the same rule applies in Chapter 11, as the parties assume. Chapter 11 debtors, often business entities, are more likely to have the resources to appeal and may do so on narrow issues. See Tr. of Oral Arg. 51. But even if Bullard is correct that such appeals will be rare, that does not much support his broader point that an appeal of right should be allowed in every case. It is odd, after all, to argue in favor of allowing more appeals by emphasizing that almost nobody will take them.

We think that in the ordinary case treating only confirmation or dismissal as final will not unfairly burden a debtor.

He retains the valuable exclusive right to propose plans, which he can modify freely. 11 U. S. C. §§ 1321, 1323. The knowledge that he will have no guaranteed appeal from a denial should encourage the debtor to work with creditors and the trustee to develop a confirmable plan as promptly as possible. And expedition is always an important consideration in bankruptcy.

III

Bullard and the Solicitor General present several arguments for treating each plan denial as final, but we are not persuaded.

The Solicitor General notes that disputes in bankruptcy are generally classified as either "adversary proceedings," essentially full civil lawsuits carried out under the umbrella of the bankruptcy case, or "contested matters," an undefined catchall for other issues the parties dispute. See Fed. Rule Bkrtcy. Proc. 7001 (listing ten adversary proceedings); Rule 9014 (addressing "contested matter[s] not otherwise governed by these rules"). An objection to a plan initiates a contested matter. See Rule 3015(f). Everyone agrees that an order resolving that matter by overruling the objection and confirming the plan is final. As the Solicitor General sees it, an order denying confirmation would also resolve that contested matter, so such an order should also be considered final. Brief for United States as *Amicus Curiae* 19–22.

The scope of the Solicitor General's argument is unclear. At points his brief appears to argue that an order resolving *any* contested matter is final and immediately appealable. That version of the argument has the virtue of resting on a general principle—but the vice of being implausible. As a leading treatise notes, the list of contested matters is "endless" and covers all sorts of minor disagreements. 10 Collier ¶9014.01, at 9014–3. The concept of finality cannot stretch to cover, for example, an order resolving a disputed request for an extension of time.

At other points, the Solicitor General appears to argue that because one possible resolution of this particular contested matter (confirmation) is final, the other (denial) must be as well. But this argument begs the question. It simply assumes that confirmation is appealable because it resolves a contested matter, and that therefore anything else that resolves the contested matter must also be appealable. But one can just as easily contend that confirmation is appealable because it resolves the entire plan consideration process, and that therefore the entire process is the "proceeding." A decision that does not resolve the entire plan consideration process—denial—is therefore not appealable.

Perhaps the Solicitor General's suggestion is that a separately appealable "proceeding" must coincide precisely with a particular "adversary proceeding" or "contested matter" under the Bankruptcy Rules. He does not, however, provide any support for such a suggestion. More broadly, it is of course quite common for the finality of a decision to depend on which way the decision goes. An order granting a motion for summary judgment is final; an order denying such a motion is not.

Bullard and the Solicitor General also contend that our rule creates an unfair asymmetry: If the bankruptcy court sustains an objection and denies confirmation, the debtor (always the plan proponent in Chapter 13) must go back to the drafting table and try again; but if the bankruptcy court overrules an objection and grants confirmation, a creditor can appeal without delay. But any asymmetry in this regard simply reflects the fact that confirmation allows the bankruptcy to go forward and alters the legal relationships among the parties, while denial does not have such significant consequences.

Moreover, it is not clear that this asymmetry will always advantage creditors. Consider a creditor who strongly supports a proposed plan because it treats him well. If the bankruptcy court sustains an objection from another credi-

tor—perhaps because the plan treats the first creditor too well—the first creditor might have as keen an interest in a prompt appeal as the debtor. And yet, under the rule we adopt, that creditor too would have to await further developments.

Bullard also raises a more practical objection. If denial orders are not final, he says, there will be no effective means of obtaining appellate review of the denied proposal. The debtor's only two options would be to seek or accept dismissal of his case and then appeal, or to propose an amended plan and appeal its confirmation.

The first option is not realistic, Bullard contends, because dismissal means the end of the automatic stay against creditors' collection efforts. Without the stay, the debtor might lose the very property at issue in the rejected plan. Even if a bankruptcy court agrees to maintain the stay pending appeal, the debtor is still risking his entire bankruptcy case on the appeal.

The second option is no better, says Bullard. An acceptable, confirmable alternative may not exist. Even if one does, its confirmation might have immediate and irreversible effects—such as the sale or transfer of property—and a court is unlikely to stay its execution. Moreover, it simply wastes time and money to place the debtor in the position of seeking approval of a plan he does not want.

All good points. We do not doubt that in many cases these options may be, as the court below put it, "unappealing." 752 F. 3d, at 487. But our litigation system has long accepted that certain burdensome rulings will be "only imperfectly reparable" by the appellate process. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 872 (1994). This prospect is made tolerable in part by our confidence that bankruptcy courts, like trial courts in ordinary litigation, rule correctly most of the time. And even when they slip, many of their errors—wrongly concluding, say, that a debtor should pay unsecured creditors $400 a month rather

than $300—will not be of a sort that justifies the costs entailed by a system of universal immediate appeals.

Sometimes, of course, a question will be important enough that it should be addressed immediately. Bullard's case could well fit the bill: The confirmability of his hybrid plan presented a pure question of law that had divided bankruptcy courts in the First Circuit and would make a substantial financial difference to the parties. But there are several mechanisms for interlocutory review to address such cases. First, a district court or BAP can (as the BAP did in this case) grant leave to hear such an appeal. 28 U. S. C. § 158(a)(3). A debtor who appeals to the district court and loses there can seek certification to the court of appeals under the general interlocutory appeals statute, § 1292(b). See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249 (1992).

Another interlocutory mechanism is provided in § 158(d)(2). That provision allows a bankruptcy court, district court, BAP, or the parties acting jointly to certify a bankruptcy court's order to the court of appeals, which then has discretion to hear the matter. Unlike § 1292(b), which permits certification only when three enumerated factors suggesting importance are all present, § 158(d)(2) permits certification when any one of several such factors exists, a distinction that allows a broader range of interlocutory decisions to make their way to the courts of appeals. While discretionary review mechanisms such as these "do not provide relief in every case, they serve as useful safety valves for promptly correcting serious errors" and addressing important legal questions. *Mohawk Industries*, 558 U. S., at 111 (internal quotation marks and brackets omitted).

Bullard maintains that interlocutory appeals are ineffective because lower courts have been too reticent in granting them. But Bullard did, after all, obtain one layer of interlocutory review when the BAP granted him leave to appeal under § 158(a)(3). He also sought certification to the Court of Appeals under § 158(d)(2), but the BAP denied his request

for reasons that are not entirely clear. See App. to Pet. for Cert. 17a. The fact that Bullard was not able to obtain further merits review in the First Circuit in this particular instance does not undermine our expectation that lower courts will certify and accept interlocutory appeals from plan denials in appropriate cases.

* * *

Because the Court of Appeals correctly held that the order denying confirmation was not final, its judgment is

Affirmed.

Syllabus

HARRIS *v.* VIEGELAHN, CHAPTER 13 TRUSTEE

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

No. 14–400. Argued April 1, 2015—Decided May 18, 2015

Individual debtors may seek discharge of their financial obligations under either Chapter 7 or Chapter 13 of the Bankruptcy Code. In a Chapter 7 proceeding, the debtor's assets are transferred to a bankruptcy estate. 11 U. S. C. § 541(a)(1). The estate's assets are then promptly liquidated, § 704(a)(1), and distributed to creditors, § 726. A Chapter 7 estate, however, does not include the wages a debtor earns or the assets he acquires *after* the bankruptcy filing. § 541(a)(1). Chapter 13, a wholly voluntary alternative to Chapter 7, permits the debtor to retain assets during bankruptcy subject to a court-approved plan for payment of his debts. Payments under a Chapter 13 plan are usually made from a debtor's "future income." § 1322(a)(1). The Chapter 13 estate, unlike a Chapter 7 estate, therefore includes both the debtor's property at the time of his bankruptcy petition, and any assets he acquires after filing. § 1306(a). Because many debtors fail to complete a Chapter 13 plan successfully, Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 "at any time." § 1307(a). Conversion does not commence a new bankruptcy case, but it does terminate the service of the Chapter 13 trustee. § 348(e).

Petitioner Harris, indebted to multiple creditors and $3,700 behind on his home mortgage payments to Chase Manhattan, filed a Chapter 13 bankruptcy petition. His court-confirmed plan provided that he would resume making monthly mortgage payments to Chase, and that $530 per month would be withheld from his postpetition wages and remitted to the Chapter 13 trustee, respondent Viegelahn. Trustee Viegelahn would make monthly payments to Chase to pay down Harris' mortgage arrears, and distribute remaining funds to Harris' other creditors. When Harris again fell behind on his mortgage payments, Chase foreclosed on his home. Following the foreclosure, Viegelahn continued to receive $530 per month from Harris' wages, but stopped making the payments earmarked for Chase. As a result, funds formerly reserved for Chase accumulated in Viegelahn's possession. Approximately a year after the foreclosure, Harris converted his case to Chapter 7. Ten days after this conversion, Viegelahn distributed $5,519.22 in Harris' withheld wages mainly to Harris' creditors. Asserting that Viegelahn lacked authority to disburse his postpetition wages to creditors postcon-

version, Harris sought an order from the Bankruptcy Court directing refund of the accumulated wages Viegelahn paid to his creditors. The Bankruptcy Court granted Harris' motion, and the District Court affirmed. The Fifth Circuit reversed, concluding that a former Chapter 13 trustee must distribute a debtor's accumulated postpetition wages to his creditors.

Held: A debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee. Pp. 516–522.

(a) Absent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. Because postpetition wages do not fit that bill, undistributed wages collected by a Chapter 13 trustee ordinarily do not become part of a converted Chapter 7 estate. Pp. 516–517.

(b) By excluding postpetition wages from the converted Chapter 7 estate (absent a bad-faith conversion), § 348(f) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. Pp. 518–519.

(c) This conclusion is reinforced by § 348(e), which "terminates the service of [the Chapter 13] trustee" upon conversion. One service provided by a Chapter 13 trustee is disbursing "payments to creditors." § 1326(c). The moment a case is converted from Chapter 13 to Chapter 7, a Chapter 13 trustee is stripped of authority to provide that "service." P. 519.

(d) Section 1327(a), which provides that a confirmed Chapter 13 plan "bind[s] the debtor and each creditor," and § 1326(a)(2), which instructs a trustee to distribute "payment[s] in accordance with the plan," ceased to apply once the case was converted to Chapter 7. § 103(i). Sections 1327(a) and 1326(a)(2), therefore, offer no support for Viegelahn's assertion that the Bankruptcy Code *requires* a terminated Chapter 13 trustee to distribute to creditors postpetition wages remaining in the trustee's possession. Continuing to distribute funds to creditors pursuant to a defunct Chapter 13 plan, moreover, is not one of the trustee's postconversion responsibilities specified by the Federal Rules of Bankruptcy Procedure. Pp. 519–521.

(e) Because Chapter 13 is a voluntary alternative to Chapter 7, a debtor's postconversion receipt of a fraction of the wages he earned and would have kept had he filed under Chapter 7 in the first place does not provide the debtor with a "windfall." A trustee who distributes payments regularly may have little or no accumulated wages to return,

while a trustee who distributes payments infrequently may have a sizable refund to make. But creditors may gain protection against the risk of excess accumulations in the hands of trustees by seeking to have a Chapter 13 plan include a schedule for regular disbursement of collected funds. Pp. 521–522.

757 F. 3d 468, reversed and remanded.

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

Matthew M. Madden argued the cause for petitioner. With him on the briefs were *Mark T. Stancil*, *Alan E. Untereiner*, *Eric A. White*, *J. Todd Malaise*, and *Steven G. Cennamo*.

Craig Goldblatt argued the cause for respondent. With him on the brief were *Mary Kathryn Viegelahn*, *pro se*, *Danielle Spinelli*, *Kelly P. Dunbar*, *Isley M. Gostin*, and *Vanessa DeLeon Guerrero*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the disposition of wages earned by a debtor *after* he petitions for bankruptcy. The treatment of postpetition wages generally depends on whether the debtor is proceeding under Chapter 13 of the Bankruptcy Code (in which the debtor retains assets, often his home, during bankruptcy subject to a court-approved plan for the payment of his debts) or Chapter 7 (in which the debtor's assets are immediately liquidated and the proceeds distributed to creditors). In a Chapter 13 proceeding, postpetition wages are "[p]roperty of the estate," 11 U. S. C. § 1306(a), and may be collected by the Chapter 13 trustee for distribution to credi-

*Briefs of *amici curiae* urging reversal were filed for the National Association of Consumer Bankruptcy Attorneys by *Martin V. Totaro* and *Tara Twomey*; and for G. Eric Brunstad, Jr., by *Mr. Brunstad*, *pro se*, and *Kate M. O'Keeffe*.

Briefs of *amici curiae* urging affirmance were filed for the American Financial Services Association et al. by *Tyler P. Brown* and *Justin F. Paget*; and for the National Association of Chapter Thirteen Trustees by *Henry E. Hildebrand III*.

tors, § 1322(a)(1). In a Chapter 7 proceeding, those earnings are not estate property; instead, they belong to the debtor. See § 541(a)(1). The Code permits the debtor to convert a Chapter 13 proceeding to one under Chapter 7 "at any time," § 1307(a); upon such conversion, the service of the Chapter 13 trustee terminates, § 348(e).

When a debtor initially filing under Chapter 13 exercises his right to convert to Chapter 7, who is entitled to postpetition wages still in the hands of the Chapter 13 trustee? Not the Chapter 7 estate when the conversion is in good faith, all agree. May the trustee distribute the accumulated wage payments to creditors as the Chapter 13 plan required, or must she remit them to the debtor? That is the question this case presents. We hold that, under the governing provisions of the Bankruptcy Code, a debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee.

I

A

The Bankruptcy Code provides diverse courses overburdened debtors may pursue to gain discharge of their financial obligations, and thereby a "fresh start." *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U. S. 279, 286 (1991)). Two roads individual debtors may take are relevant here: Chapter 7 and Chapter 13 bankruptcy proceedings.

Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets. When a debtor files a Chapter 7 petition, his assets, with specified exemptions, are immediately transferred to a bankruptcy estate. § 541(a)(1). A Chapter 7 trustee is then charged with selling the property in the estate, § 704(a)(1), and distributing the proceeds to the debtor's creditors, § 726. Crucially, however, a Chapter 7 estate does not include the wages a debtor earns or the assets he ac-

quires *after* the bankruptcy filing. § 541(a)(1). Thus, while a Chapter 7 debtor must forfeit virtually all his prepetition property, he is able to make a "fresh start" by shielding from creditors his postpetition earnings and acquisitions.

Chapter 13 works differently. A wholly voluntary alternative to Chapter 7, Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to five-year period. §§ 1306(b), 1322, 1327(b). Payments under a Chapter 13 plan are usually made from a debtor's "future earnings or other future income." § 1322(a)(1); see 8 Collier on Bankruptcy ¶1322.02[1] (A. Resnick & H. Sommer eds., 16th ed. 2014). Accordingly, the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing. § 1306(a). A Chapter 13 trustee is often charged with collecting a portion of a debtor's wages through payroll deduction, and with distributing the withheld wages to creditors.

Proceedings under Chapter 13 can benefit debtors and creditors alike. Debtors are allowed to retain their assets, commonly their home or car. And creditors, entitled to a Chapter 13 debtor's "disposable" postpetition income, § 1325(b)(1), usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation.

Many debtors, however, fail to complete a Chapter 13 plan successfully. See Porter, The Pretend Solution: An Empirical Study of Bankruptcy Outcomes, 90 Texas L. Rev. 103, 107–111 (2011) (only one in three cases filed under Chapter 13 ends in discharge). Recognizing that reality, Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 "at any time." § 1307(a). To effectuate a conversion, a debtor need only file a notice with the bankruptcy court. Fed. Rule Bkrtcy. Proc. 1017(f)(3). No motion or court order is needed to render the conversion effective. See *ibid.*

Conversion from Chapter 13 to Chapter 7 does not commence a new bankruptcy case. The existing case continues along another track, Chapter 7 instead of Chapter 13, without "effect[ing] a change in the date of the filing of the petition." § 348(a). Conversion, however, immediately "terminates the service" of the Chapter 13 trustee, replacing her with a Chapter 7 trustee. § 348(e).

B

In February 2010, petitioner Charles Harris III filed a Chapter 13 bankruptcy petition. At the time of filing, Harris was indebted to multiple creditors, and had fallen $3,700 behind on payments to Chase Manhattan, his home mortgage lender.

Harris' court-confirmed Chapter 13 plan provided that he would immediately resume making monthly mortgage payments to Chase. The plan further provided that $530 per month would be withheld from Harris' postpetition wages and remitted to the Chapter 13 trustee, respondent Mary Viegelahn. Viegelahn, in turn, would distribute $352 per month to Chase to pay down Harris' outstanding mortgage debt. She would also distribute $75.34 per month to Harris' only other secured lender, a consumer-electronics store. Once those secured creditors were paid in full, Viegelahn was to begin distributing funds to Harris' unsecured creditors.

Implementation of the plan was short lived. Harris again fell behind on his mortgage payments, and in November 2010, Chase received permission from the Bankruptcy Court to foreclose on Harris' home. Following the foreclosure, Viegelahn continued to receive $530 per month from Harris' wages, but stopped making the payments earmarked for Chase. As a result, funds formerly reserved for Chase accumulated in Viegelahn's possession.

On November 22, 2011, Harris exercised his statutory right to convert his Chapter 13 case to one under Chapter 7. By that time, Harris' postpetition wages accumulated

by Viegelahn amounted to $5,519.22. On December 1, 2011—ten days after Harris' conversion—Viegelahn disposed of those funds by giving $1,200 to Harris' counsel, paying herself a $267.79 fee, and distributing the remaining money to the consumer-electronics store and six of Harris' unsecured creditors.

Asserting that Viegelahn lacked authority to disburse funds to creditors once the case was converted to Chapter 7, Harris moved the Bankruptcy Court for an order directing refund of the accumulated wages Viegelahn had given to his creditors. The Bankruptcy Court granted Harris' motion, and the District Court affirmed.

The Fifth Circuit reversed. *In re Harris*, 757 F. 3d 468 (2014). Finding "little guidance in the Bankruptcy Code," *id.*, at 478, the Fifth Circuit concluded that "considerations of equity and policy" rendered "the creditors' claim to the undistributed funds . . . superior to that of the debtor," *id.*, at 478, 481. Notwithstanding a Chapter 13 debtor's conversion to Chapter 7, the Fifth Circuit held, a former Chapter 13 trustee must distribute a debtor's accumulated postpetition wages to his creditors.

The Fifth Circuit acknowledged that its decision conflicted with the Third Circuit's decision in *In re Michael*, 699 F. 3d 305 (2012), which held that a debtor's undistributed postpetition wages "are to be returned to the debtor at the time of conversion [from Chapter 13 to Chapter 7]." *Id.*, at 307. We granted certiorari to resolve this conflict, 574 U. S. 1058 (2014), and now reverse the Fifth Circuit's judgment.

II

A

Prior to the Bankruptcy Reform Act of 1994, courts divided three ways on the disposition of a debtor's undistributed postpetition wages following conversion of a proceeding from Chapter 13 to Chapter 7. Some courts concluded that undistributed postpetition wages reverted to the debtor.

E. g., *In re Boggs*, 137 B. R. 408, 411 (Bkrtcy. Ct. WD Wash. 1992). Others ordered a debtor's undistributed postpetition earnings disbursed to creditors pursuant to the terms of the confirmed (albeit terminated) Chapter 13 plan. *E. g.*, *In re Waugh*, 82 B. R. 394, 400 (Bkrtcy. Ct. WD Pa. 1988). Still other courts, including several Courts of Appeals, held that, upon conversion, all postpetition earnings and acquisitions became part of the new Chapter 7 estate, thus augmenting the property available for liquidation and distribution to creditors. *E. g.*, *In re Calder*, 973 F. 2d 862, 865–866 (CA10 1992); *In re Lybrook*, 951 F. 2d 136, 137 (CA7 1991).

Congress addressed the matter in 1994 by adding § 348(f) to the Bankruptcy Code. Rejecting the rulings of several Courts of Appeals, § 348(f)(1)(A) provides that in a case converted from Chapter 13, a debtor's postpetition earnings and acquisitions do not become part of the new Chapter 7 estate:

> "[P]roperty of the [Chapter 7] estate in the converted case shall consist of property of the estate, as of the date of filing of the [initial Chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

In § 348(f)(2), Congress added an exception for debtors who convert in bad faith:

> "If the debtor converts a case [initially filed] under chapter 13 . . . in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of the conversion."

Section 348(f), all agree, makes one thing clear: A debtor's postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion. Absent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. Postpetition wages, by definition, do not fit that bill.

B

With this background, we turn to the question presented: What happens to postpetition wages held by a Chapter 13 trustee at the time the case is converted to Chapter 7? Does the Code require return of the funds to the debtor, or does it require their distribution to creditors? We conclude that postpetition wages must be returned to the debtor.

By excluding postpetition wages from the converted Chapter 7 estate, § 348(f)(1)(A) removes those earnings from the pool of assets that may be liquidated and distributed to creditors. Allowing a terminated Chapter 13 trustee to disburse the very same earnings to the very same creditors is incompatible with that statutory design. We resist attributing to Congress, after explicitly exempting from Chapter 7's liquidation-and-distribution process a debtor's postpetition wages, a plan to place those wages in creditors' hands another way.

Section 348(f)(2)'s exception for bad-faith conversions is instructive in this regard. If a debtor converts in bad faith—for example, by concealing assets in "unfair manipulation of the bankruptcy system," *In re Siegfried*, 219 B. R. 581, 586 (Bkrtcy. Ct. Colo. 1998)—the converted Chapter 7 estate "consist[s] of the property of the [Chapter 13] estate *as of the date of conversion*." § 348(f)(2) (emphasis added). Section 348(f)(2) thus penalizes bad-faith debtors by making their postpetition wages available for liquidation and distribution to creditors. Conversely, when the conversion to Chapter 7 is made in *good* faith, no penalty is exacted. Shielding a Chapter 7 debtor's postpetition earnings from creditors enables the "honest but unfortunate debtor" to make the "fresh start" the Bankruptcy Code aims to facilitate. *Marrama*, 549 U. S., at 367 (internal quotation marks omitted). Bad-faith conversions apart, we find nothing in the Code denying debtors funds that would have been theirs had the case proceeded under Chapter 7 from the start. In sum, § 348(f) does not say, expressly: On conversion, accumu-

lated wages go to the debtor. But that is the most sensible reading of what Congress did provide.

Section 348(e) also informs our ruling that undistributed postpetition wages must be returned to the debtor. That section provides: "Conversion [from Chapter 13 to Chapter 7] terminates the service of [the Chapter 13] trustee." A core service provided by a Chapter 13 trustee is the disbursement of "payments *to creditors*." § 1326(c) (emphasis added). The moment a case is converted from Chapter 13 to Chapter 7, however, the Chapter 13 trustee is stripped of authority to provide that "service." § 348(e).

Section 348(e), of course, does not require a terminated trustee to hold accumulated funds in perpetuity; she must (as we hold today) return undistributed postpetition wages to the debtor. Returning funds to a debtor, however, is not a Chapter 13 trustee service as is making "paymen[t] to creditors." § 1326(c). In this case, illustratively, Chapter 13 trustee Viegelahn continued to act in that capacity after her tenure ended. Eight days after the case was converted to Chapter 7, she filed with the Bankruptcy Court a document titled "Trustee's Recommendations Concerning Claims," recommending distribution of the funds originally earmarked for Chase to the remaining secured creditor and six of the 13 unsecured creditors. No. 10–50655 (Bkrtcy. Ct. WD Tex., Nov. 30, 2011), Doc. 34. She then acted on that recommendation. She thus provided a Chapter 13 trustee "service," although barred from doing so by § 348(e). Returning undistributed wages to the debtor, in contrast, renders no Chapter 13-authorized "service."

C

Viegelahn cites two Chapter 13 provisions in support of her argument that the Bankruptcy Code *requires* a terminated Chapter 13 trustee "to distribute undisbursed funds to creditors." Brief for Respondent 21. The first, § 1327(a), provides that a confirmed Chapter 13 plan "bind[s] the debtor and each creditor." The second, § 1326(a)(2), instructs a

trustee to distribute "payment[s] in accordance with the plan," and that, Viegelahn observes, is just what she did. But the cited provisions had no force here, for they ceased to apply once the case was converted to Chapter 7.

When a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway. § 103(i) ("Chapter 13 . . . applies only in a case under [that] chapter."). Harris having converted the case, the Chapter 13 plan was no longer "bind[ing]." § 1327(a). And Viegelahn, by then the *former* Chapter 13 trustee, lacked authority to distribute "payment[s] in accordance with the plan." § 1326(a)(2); see § 348(e).

Nor can we credit the suggestion that a confirmed Chapter 13 plan gives creditors a vested right to funds held by a trustee. "[N]o provision in the Bankruptcy Code classifies any property, including post-petition wages, as belonging to creditors." *Michael*, 699 F. 3d, at 312–313.

Viegelahn alternatively urges that a terminated Chapter 13 trustee's "duty" to distribute funds to creditors is a facet of the trustee's obligation to "wind up" the affairs of the Chapter 13 estate following conversion. Brief for Respondent 25 (internal quotation marks omitted). The Federal Rules of Bankruptcy Procedure, however, specify what a terminated Chapter 13 trustee must do postconversion: (1) She must turn over records and assets to the Chapter 7 trustee, Rule 1019(4); and (2) she must file a report with the United States bankruptcy trustee, Rule 1019(5)(B)(ii). Continuing to distribute funds to creditors pursuant to the defunct Chapter 13 plan is not an authorized "wind-up" task.

Finally, Viegelahn homes in on a particular feature of this case. Section 1327(b) states that "[e]xcept as otherwise provided in the [Chapter 13] plan . . . the confirmation of a plan vests all of the property of the estate in the debtor." Harris' plan "otherwise provided": It stated that "[u]pon confirmation of the plan, all property of the estate shall not vest

in the Debto[r], but shall remain as property *of the estate*." App. 31 (emphasis added). That plan language does not change the outcome here. Harris' wages may have been "property of the estate" while his case proceeded under Chapter 13, but estate property does not become property of creditors until it is distributed to them. See *Michael*, 699 F. 3d, at 313. Moreover, the order confirming Harris' plan provided that upon conversion to Chapter 7, "[s]uch property as may revest in the debtor shall so revest." App. 48. Pursuant to that provision, property formerly in the Chapter 13 estate that did not become part of the Chapter 7 estate revested in Harris; here, Harris' postpetition wages so revested.

D

The Fifth Circuit expressed concern that debtors would receive a "windfall" if they could reclaim accumulated wages from a terminated Chapter 13 trustee. 757 F. 3d, at 478–481. As explained, however, see *supra*, at 513–514, Chapter 13 is a voluntary proceeding in which debtors endeavor to discharge their obligations using postpetition earnings that are off limits to creditors in a Chapter 7 proceeding. We do not regard as a "windfall" a debtor's receipt of a fraction of the wages he earned and would have kept had he filed under Chapter 7 in the first place.

We acknowledge the "fortuit[y]," as the Fifth Circuit called it, that a "debtor's chance of having funds returned" is "dependent on the trustee's speed in distributing the payments" to creditors. 757 F. 3d, at 479, and n. 10. A trustee who distributes payments regularly may have little or no accumulated wages to return. When a trustee distributes payments infrequently, on the other hand, a debtor who converts to Chapter 7 may be entitled to a sizable refund. These outcomes, however, follow directly from Congress' decisions to shield postpetition wages from creditors in a converted Chapter 7 case, § 348(f)(1)(A), and to give Chapter 13 debtors a right to convert to Chapter 7 "at any time,"

§ 1307(a). Moreover, creditors may gain protection against the risk of excess accumulations in the hands of Chapter 13 trustees by seeking to include in a Chapter 13 plan a schedule for regular disbursement of funds the trustee collects.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

TIBBLE ET AL. *v.* EDISON INTERNATIONAL ET AL.

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

No. 13–550. Argued February 24, 2015—Decided May 18, 2015

In 2007, petitioners, beneficiaries of the Edison 401(k) Savings Plan (Plan), sued Plan fiduciaries, respondents Edison International and others, to recover damages for alleged losses suffered by the Plan from alleged breaches of respondents' fiduciary duties. As relevant here, petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. Because the Employee Retirement Income Security Act of 1974 (ERISA) requires a breach of fiduciary duty complaint to be filed no more than six years after "the date of the last action which constituted a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation," 29 U. S. C. § 1113, the District Court held that petitioners' complaint as to the 1999 funds was untimely because they were included in the Plan more than six years before the complaint was filed, and the circumstances had not changed enough within the 6-year statutory period to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class funds. The Ninth Circuit affirmed, concluding that petitioners had not established a change in circumstances that might trigger an obligation to conduct a full due-diligence review of the 1999 funds within the 6-year statutory period.

Held: The Ninth Circuit erred by applying § 1113's statutory bar to a breach of fiduciary duty claim based on the initial selection of the investments without considering the contours of the alleged breach of fiduciary duty. ERISA's fiduciary duty is "derived from the common law of trusts," *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570, which provides that a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments. So long as a plaintiff's claim alleging breach of the continuing duty of prudence occurred within six

Syllabus

years of suit, the claim is timely. This Court expresses no view on the scope of respondents' fiduciary duty in this case, *e. g.*, whether a review of the contested mutual funds is required, and, if so, just what kind of review. A fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. § 1104(a)(1). The case is remanded for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the relevant 6-year statutory period under § 1113, recognizing the importance of analogous trust law. Pp. 527–531.

729 F. 3d 1110, vacated and remanded.

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

David C. Frederick argued the cause for petitioners. With him on the briefs were *Jerome J. Schlichter*, *Michael A. Wolff*, and *Brendan J. Crimmins*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, *M. Patricia Smith*, and *Nathaniel I. Spiller*.

Jonathan D. Hacker argued the cause for respondents. With him on the brief were *Walter Dellinger*, *Brian D. Boyle*, *Meaghan VerGow*, *Anna-Rose Mathieson*, and *Sergey Trakhtenberg*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP by *Jay E. Sushelsky*; for Cambridge Fiduciary Services by *Brian Glasser*; for Law Professors by *Lynn L. Sarko*; and for the Pension Rights Center by *Karen L. Handorf*, *Michelle C. Yau*, and *Karen W. Ferguson*.

Briefs of *amici curiae* urging affirmance were filed for DRI—The Voice of the Defense Bar by *Scott Burnett Smith*, *Mary Ann Couch*, *John Parker Sweeney*, and *Edmund S. Sauer*; for the ESOP Association by *Brian D. Netter* and *Nancy G. Ross*; for the National Association of Manufacturers et al. by *Mark A. Perry*, *William J. Kilberg*, *Jason Mendro*, *Paul Blankenstein*, *Kate Comerford Todd*, and *Annette Guarisco Fildes*; and for the Securities Industry and Financial Markets Association by *Abigail K. Hemani*, *James O. Fleckner*, *Alison V. Douglass*, *William M. Jay*, and *Kevin Carroll*.

JUSTICE BREYER delivered the opinion of the Court.

Under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829 *et seq.*, as amended, a breach of fiduciary duty complaint is timely if filed no more than six years after "the date of the last action which constituted a part of the breach or violation" or "in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U. S. C. § 1113. The question before us concerns application of this provision to the timeliness of a fiduciary duty complaint. It requires us to consider whether a fiduciary's allegedly imprudent retention of an investment is an "action" or "omission" that triggers the running of the 6-year limitations period.

In 2007, several individual beneficiaries of the Edison 401(k) Savings Plan (Plan) filed a lawsuit on behalf of the Plan and all similarly situated beneficiaries (collectively, petitioners) against Edison International and others (collectively, respondents). Petitioners sought to recover damages for alleged losses suffered by the Plan, in addition to injunctive and other equitable relief based on alleged breaches of respondents' fiduciary duties.

The Plan is a defined-contribution plan, meaning that participants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses. Expenses, such as management or administrative fees, can sometimes significantly reduce the value of an account in a defined-contribution plan.

As relevant here, petitioners argued that respondents violated their fiduciary duties with respect to three mutual funds added to the Plan in 1999 and three mutual funds added to the Plan in 2002. Petitioners argued that respondents acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially

identical lower priced institutional-class mutual funds were available (the lower price reflects lower administrative costs). Specifically, petitioners claimed that a large institutional investor with billions of dollars, like the Plan, can obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor. Petitioners asked, how could respondents have acted prudently in offering the six higher priced retail-class mutual funds when respondents could have offered them effectively the same six mutual funds at the lower price offered to institutional investors like the Plan?

As to the three funds added to the Plan in 2002, the District Court agreed. It wrote that respondents had "not offered any credible explanation" for offering retail-class, *i. e.*, higher priced mutual funds that "cost the Plan participants wholly unnecessary [administrative] fees," and it concluded that, with respect to those mutual funds, respondents had failed to exercise "the care, skill, prudence and diligence under the circumstances" that ERISA demands of fiduciaries. No. CV 07–5359 (CD Cal., July 8, 2010), App. to Pet. for Cert. 65, 130, 142, 109.

As to the three funds added to the Plan in 1999, however, the District Court held that petitioners' claims were untimely because, unlike the other contested mutual funds, these mutual funds were included in the Plan more than six years before the complaint was filed in 2007. 639 F. Supp. 2d 1074, 1119–1120 (CD Cal. 2009). As a result, the 6-year statutory period had run.

The District Court allowed petitioners to argue that, despite the 1999 selection of the three mutual funds, their complaint was nevertheless timely because these funds underwent significant changes *within* the 6-year statutory period that should have prompted respondents to undertake a full due-diligence review and convert the higher priced retail-class mutual funds to lower priced institutional-class mutual funds. App. to Pet. for Cert. 142–150.

The District Court concluded, however, that petitioners had not met their burden of showing that a prudent fiduciary would have undertaken a full due-diligence review of these funds as a result of the alleged changed circumstances. According to the District Court, the circumstances had not changed enough to place respondents under an obligation to review the mutual funds and to convert them to lower priced institutional-class mutual funds. *Ibid.*

The Ninth Circuit affirmed the District Court as to the six mutual funds. 729 F. 3d 1110 (2013). With respect to the three mutual funds added in 1999, the Ninth Circuit held that petitioners' claims were untimely because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6-year statutory period. Petitioners filed a petition for certiorari asking us to review this latter holding. We agreed to do so.

Section 1113 reads, in relevant part, that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility, duty, or obligation" after the earlier of "six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." Both clauses of that provision require only a "breach or violation" to start the 6-year period. Petitioners contend that respondents breached the duty of prudence by offering higher priced retail-class mutual funds when the same investments were available as lower priced institutional-class mutual funds.

The Ninth Circuit, without considering the role of the fiduciary's duty of prudence under trust law, rejected petitioners' claims as untimely under § 1113 on the basis that respondents had selected the three mutual funds more than six years before petitioners brought this action. The Ninth Circuit correctly asked whether the "last action which constituted a part of the breach or violation" of respondents'

duty of prudence occurred *within* the relevant 6-year period. It focused, however, upon the act of "designating an investment for inclusion" to start the 6-year period. 729 F. 3d, at 1119. The Ninth Circuit stated that "[c]haracterizing the mere continued offering of a plan option, without more, as a subsequent breach would render" the statute meaningless and could even expose present fiduciaries to liability for decisions made decades ago. *Id.*, at 1120. But the Ninth Circuit jumped from this observation to the conclusion that *only* a significant change in circumstances could engender a new breach of a fiduciary duty, stating that the District Court was "entirely correct" to have entertained the "possibility" that "significant changes" occurring "within the limitations period" might require "'a full due diligence review of the funds,'" equivalent to the diligence review that respondents conduct when adding new funds to the Plan. *Ibid.*

We believe the Ninth Circuit erred by applying a statutory bar to a claim of a "breach or violation" of a fiduciary duty without considering the nature of the fiduciary duty. The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances. Of course, after the Ninth Circuit considers trust-law principles, it is possible that it will conclude that respondents did indeed conduct the sort of review that a prudent fiduciary would have conducted absent a significant change in circumstances.

An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. § 1104(a)(1); see also *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U. S. 409 (2014). We have often noted that an ERISA fiduciary's duty is "derived from the common law of trusts." *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985). In determining the contours of an ERISA

fiduciary's duty, courts often must look to the law of trusts. We are aware of no reason why the Ninth Circuit should not do so here.

Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset. The Bogert treatise states that "[t]he trustee cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely." A. Hess, G. Bogert, & G. Bogert, Law of Trusts and Trustees § 684, pp. 145–146 (3d ed. 2009) (Bogert 3d). Rather, the trustee must "systematic[ally] conside[r] all the investments of the trust at regular intervals" to ensure that they are appropriate. *Id.*, § 684, at 147–148; see also *In re Stark's Estate*, 15 N. Y. S. 729, 731 (Surr. Ct. 1891) (stating that a trustee must "exercis[e] a reasonable degree of diligence in looking after the security after the investment had been made"); *Johns* v. *Herbert*, 2 App. D. C. 485, 499 (1894) (holding trustee liable for failure to discharge his "duty to watch the investment with reasonable care and diligence"). The Restatement (Third) of Trusts states the following:

> "[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." § 90, Comment *b*, p. 295 (2007).

The Uniform Prudent Investor Act confirms that "[m]anaging embraces monitoring" and that a trustee has "continuing responsibility for oversight of the suitability of the investments already made." § 2, Comment, 7B U. L. A. 21 (1995) (internal quotation marks omitted). Scott on Trusts implies as much by stating that, "[w]hen the trust estate includes

assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time." 4 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 19.3.1, p. 1439 (5th ed. 2007). Bogert says the same. Bogert 3d § 685, at 156–157 (explaining that if an investment is determined to be imprudent, the trustee "must dispose of it within a reasonable time"); see, *e. g.*, *State Street Trust Co.* v. *DeKalb*, 259 Mass. 578, 583, 157 N. E. 334, 336 (1927) (trustee was required to take action to "protect the rights of the beneficiaries" when the value of trust assets declined).

In short, under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones. A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones. In such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely. The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty.

The parties now agree that the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law. Brief for Petitioners 24 ("Trust law imposes a duty to examine the prudence of existing investments periodically and to remove imprudent investments"); Brief for Respondents 3 ("All agree that a fiduciary has an ongoing duty to monitor trust investments to ensure that they remain prudent"); Brief for United States as *Amicus Curiae* 7 ("The duty of prudence under ERISA, as under trust law, requires plan fiduciaries with investment responsibility to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time"). The parties disagree, however, with respect to the scope of that responsibility. Did it require a review of the contested mutual funds here, and if so,

just what kind of review did it require? A fiduciary must discharge his responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. § 1104(a)(1). We express no view on the scope of respondents' fiduciary duty in this case. We remand for the Ninth Circuit to consider petitioners' claims that respondents breached their duties within the relevant 6-year period under § 1113, recognizing the importance of analogous trust law.

A final point: Respondents argue that petitioners did not raise the claim below that respondents committed new breaches of the duty of prudence by failing to monitor their investments and remove imprudent ones absent a significant change in circumstances. We leave any questions of forfeiture for the Ninth Circuit on remand. The Ninth Circuit's judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

COLEMAN, AKA COLEMAN-BEY *v.* TOLLEFSON ET AL.

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

No. 13–1333. Argued February 23, 2015—Decided May 18, 2015*

Ordinarily, a federal litigant who is too poor to pay court fees may proceed *in forma pauperis*. This means that the litigant may commence a civil action without prepaying fees or paying certain expenses. See 28 U. S. C. § 1915(a). But a special "three strikes" provision prevents a court from affording *in forma pauperis* status to a prisoner who "has, on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." § 1915(g).

Petitioner Coleman, a state prisoner, filed three federal lawsuits that were dismissed on grounds enumerated in § 1915(g). While the third dismissal was pending on appeal, he filed four additional federal lawsuits, moving to proceed *in forma pauperis* in each. The District Court refused to permit him to proceed *in forma pauperis* in any of those lawsuits, holding that a prior dismissal is a strike under § 1915(g) even if it is pending on appeal. The Sixth Circuit agreed with the District Court.

Held: A prior dismissal on one of § 1915(g)'s statutorily enumerated grounds counts as a strike, even if the dismissal is the subject of an ongoing appeal. Pp. 537–541.

(a) Coleman suggests that a dismissal should count as a strike only once appellate review is complete. But the word "dismissed" does not normally include subsequent appellate activity. See, *e. g.*, *Heintz* v. *Jenkins*, 514 U. S. 291, 294. And § 1915 itself describes dismissal as an action taken by a single court, not as a sequence of events involving multiple courts. See § 1915(e). Coleman further contends that the phrase "prior occasions" creates ambiguity. But nothing about that phrase transforms a dismissal into a dismissal-plus-appellate-review. In the context of § 1915(g), a "prior occasion" merely means a previous

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*Together with *Coleman, aka Coleman-Bey* v. *Bowerman et al.*; *Coleman, aka Coleman-Bey* v. *Dykehouse et al.*; and *Coleman, aka Coleman-Bey* v. *Vroman et al.*, also on certiorari to the same court (see this Court's Rule 12.4).

instance in which a "prisoner has . . . brought an action or appeal . . . that was dismissed on" statutorily enumerated grounds.

A literal reading of the "three strikes" provision is consistent with the statute's treatment of the trial and appellate states of litigation as distinct. See §§ 1915(a)(2), (a)(3), (b)(1), (e)(2), (g). It is also supported by the way in which the law ordinarily treats trial court judgments, *i. e.*, a judgment normally takes effect despite a pending appeal, see Fed. Rule Civ. Proc. 62; Fed. Rule App. Proc. 8(a), and its preclusive effect is generally immediate, notwithstanding any appeal, see *Clay* v. *United States*, 537 U. S. 522, 527.

Finally, the statute's purpose favors this Court's interpretation. The "three strikes" provision was "designed to filter out the bad claims and facilitate consideration of the good," *Jones* v. *Bock*, 549 U. S. 199, 204. To refuse to count a prior dismissal because of a pending appeal would produce a leaky filter, because a prisoner could file many new lawsuits before reaching the end of the often lengthy appellate process. By contrast, the Court perceives no great risk that an erroneous trial court dismissal might wrongly deprive a prisoner of *in forma pauperis* status in a subsequent lawsuit. Pp. 537–540.

(b) Coleman also argues that if the dismissal of a third complaint counts as a third strike, a litigant will lose the ability to appeal *in forma pauperis* from that strike itself. He believes this is a result that Congress could not possibly have intended. Because Coleman is not appealing from a third-strike trial court dismissal here, the Court declines to address that question. Pp. 540–541.

733 F. 3d 175, affirmed.

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

Kannon K. Shanmugam argued the cause for petitioner. With him on the brief were *Allison B. Jones* and *Julia H. Pudlin*.

Aaron D. Lindstrom, Solicitor General of Michigan, argued the cause for respondents. With him on the brief were *Bill Schuette*, Attorney General, and *Kevin R. Himebaugh*, Assistant Attorney General.

Allon Kedem argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney*

General Branda, *Deputy Solicitor General Gershengorn*, *Barbara L. Herwig*, and *Lowell V. Sturgill, Jr.*†

JUSTICE BREYER delivered the opinion of the Court.

Ordinarily, a federal litigant who is too poor to pay court fees may proceed *in forma pauperis*. This means that the litigant may commence a civil action without prepaying fees or paying certain expenses. See 28 U. S. C. § 1915. But a special "three strikes" provision prevents a court from affording *in forma pauperis* status where the litigant is a prisoner and he or she "has, on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." § 1915(g).

Prior to this litigation, a Federal District Court had dismissed on those grounds three actions brought by a state prisoner. While the third dismissal was pending on appeal, the prisoner sought to bring several additional actions in the federal courts. The question before us is whether the prisoner may litigate his new actions *in forma pauperis*. Where an appeals court has not yet decided whether a prior dismissal is legally proper, should courts count, or should they ignore, that dismissal when calculating how many qualifying dismissals the litigant has suffered?

We conclude that the courts must count the dismissal even though it remains pending on appeal. The litigant here has accumulated three prior dismissals on statutorily enumerated grounds. Consequently, a court may not afford him *in forma pauperis* status with respect to his additional civil actions.

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†Briefs of *amici curiae* urging reversal were filed for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *Brianne J. Gorod*; for the National Association of Criminal Defense Lawyers by *Catherine M. A. Carroll* and *David M. Porter*; and for Thirty-three Professors by *Matthew A. Fitzgerald*.

I

A

Congress first enacted an *in forma pauperis* statute in 1892. See Act of July 20, ch. 209, 27 Stat. 252. Congress recognized that "no citizen sh[ould] be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 342 (1948) (internal quotation marks omitted). It therefore permitted a citizen to "commence and prosecute to conclusion any such . . . action without being required to prepay fees or costs, or give security therefor before or after bringing suit." § 1, 27 Stat. 252. The current statute permits an individual to litigate a federal action *in forma pauperis* if the individual files an affidavit stating, among other things, that he or she is unable to prepay fees "or give security therefor." 28 U. S. C. § 1915(a)(1).

Even in 1892, "Congress recognized . . . that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke* v. *Williams*, 490 U. S. 319, 324 (1989). And as the years passed, Congress came to see that prisoner suits in particular represented a disproportionate share of federal filings. *Jones* v. *Bock*, 549 U. S. 199, 202–203 (2007). It responded by "enact[ing] a variety of reforms designed to filter out the bad claims [filed by prisoners] and facilitate consideration of the good." *Id.*, at 204. Among those reforms was the "three strikes" rule here at issue. The rule, which applies to *in forma pauperis* status, reads in its entirety as follows:

> "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding [*in forma pauperis*] if the prisoner has, on 3 or more prior occa-

> sions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." § 1915(g).

B

The petitioner, André Lee Coleman, is incarcerated at the Baraga Correctional Facility in Michigan. By 2010, three federal lawsuits filed by Coleman during his incarceration had been dismissed as frivolous (or on other grounds enumerated in § 1915(g)). Nonetheless, when Coleman filed four new federal lawsuits between April 2010 and January 2011, he moved to proceed *in forma pauperis* in each. He denied that his third dismissed lawsuit counted as a strike under § 1915(g). That is because he had appealed the dismissal, and the appeals court had not yet ruled. Thus, in Coleman's view, he had fewer than three qualifying dismissals, and was eligible for *in forma pauperis* status under the statute.

The District Court rejected Coleman's argument. It held that "a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action." No. 10–cv–337 (WD Mich., Apr. 12, 2011), App. to Pet. for Cert. 21a, 24a. It thus refused to permit Coleman to proceed *in forma pauperis* in any of his four suits.

On appeal, a divided panel of the Sixth Circuit agreed with the District Court. 733 F. 3d 175 (2013). It resolved the four cases using slightly different procedures. In one of the four cases, the Sixth Circuit affirmed the District Court's judgment. In the remaining three cases, it denied Coleman's request to proceed *in forma pauperis* on appeal. It subsequently dismissed the three cases for want of prosecution after Coleman failed to pay the appellate filing fees.

In contrast to the Sixth Circuit, the vast majority of the other Courts of Appeals have held that a prior dismissal on

a statutorily enumerated ground does not count as a strike while an appeal of that dismissal remains pending. See *Henslee* v. *Keller*, 681 F. 3d 538, 541 (CA4 2012) (listing, and joining, courts that have adopted the majority view). In light of the division of opinion among the Circuits, we granted Coleman's petition for certiorari.

II

A

In our view, the Sixth Circuit majority correctly applied § 1915(g). A prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal. That, after all, is what the statute literally says. The "three strikes" provision applies where a prisoner "has, on 3 or more prior occasions . . . brought an action or appeal . . . *that was dismissed* on" certain grounds. § 1915(g) (emphasis added). Coleman believes that we should read the statute as if it referred to an "affirmed dismissal," as if it considered a trial court dismissal to be provisional, or as if it meant that a dismissal falls within the statute's scope only when the litigant has no further chance to secure a reversal. But the statute itself says none of these things.

Instead, the statute refers to whether an action or appeal "was dismissed." § 1915(g). The linguistic term "dismiss," taken alone, does not normally include subsequent appellate activity. See, *e. g.*, *Heintz* v. *Jenkins*, 514 U. S. 291, 294 (1995) ("[T]he District Court dismissed [the] lawsuit for failure to state a claim. . . . However, the Court of Appeals for the Seventh Circuit reversed the District Court's judgment"); *Gray* v. *Netherland*, 518 U. S. 152, 158 (1996) ("The Suffolk Circuit Court dismissed petitioner's state petition for a writ of habeas corpus. The Virginia Supreme Court affirmed the dismissal"). Indeed, § 1915 itself describes dismissal as an action taken by a single court, not as a sequence of events involving multiple courts. See § 1915(e)(2) ("*[T]he*

court shall dismiss the case at any time if *the court* determines that—(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be granted" (emphasis added)).

Coleman insists that § 1915(g) is not so clear. Even if the term "dismissed" is unambiguous, contends Coleman, the phrase "prior occasions" creates ambiguity. Coleman observes that the phrase "'may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal.'" Brief for Petitioner 17 (quoting *Henslee*, *supra*, at 542). Coleman believes that a "prior occasion" in the context of § 1915(g) may therefore include both a dismissal on an enumerated ground and any subsequent appeal.

We find it difficult to agree. Linguistically speaking, we see nothing about the phrase "prior occasions" that would transform a dismissal into a dismissal-plus-appellate-review. An "occasion" is "a particular occurrence," a "happening," or an "incident." Webster's Third New International Dictionary 1560 (3d ed. 1993). And the statute provides the content of that occurrence, happening, or incident: It is an instance in which a "prisoner has . . . brought an action or appeal in a court of the United States that was dismissed on" statutorily enumerated grounds. § 1915(g). Under the plain language of the statute, when Coleman filed the suits at issue here, he had already experienced three such "prior occasions."

Our literal reading of the phrases "prior occasions" and "was dismissed" is consistent with the statute's discussion of actions and appeals. The *in forma pauperis* statute repeatedly treats the trial and appellate stages of litigation as distinct. See §§ 1915(a)(2), (a)(3), (b)(1), (e)(2), (g). Related provisions reflect a congressional focus upon trial court dismissal as an important separate element of the statutory scheme. See § 1915A (requiring a district court to screen

certain prisoner complaints "as soon as practicable" and to dismiss any portion of the complaint that "is frivolous, malicious, or fails to state a claim upon which relief may be granted"); 42 U. S. C. § 1997e(c)(1) (similar). We have found nothing in these provisions indicating that Congress considered a trial court dismissal and an appellate court decision as if they were a single entity—or that Congress intended the former to take effect only when affirmed by the latter.

Our literal reading of the "three strikes" provision also is supported by the way in which the law ordinarily treats trial court judgments. Unless a court issues a stay, a trial court's judgment (say, dismissing a case) normally takes effect despite a pending appeal. See Fed. Rule Civ. Proc. 62; Fed. Rule App. Proc. 8(a). And a judgment's preclusive effect is generally immediate, notwithstanding any appeal. See *Clay* v. *United States*, 537 U. S. 522, 527 (2003) ("Typically, a federal judgment becomes final for . . . claim preclusion purposes when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment"). The ordinary rules of civil procedure thus provide additional support for our interpretation of the statute. See *Jones*, 549 U. S., at 211–216 (applying the ordinary rules of civil procedure where the procedural requirements for prison litigation do not call for an alternative).

Finally, the statute's purpose favors our interpretation. The "three strikes" provision was "designed to filter out the bad claims and facilitate consideration of the good." *Id.*, at 204. To refuse to count a prior dismissal because of a pending appeal would produce a leaky filter. Appeals take time. During that time, a prisoner could file many lawsuits, including additional lawsuits that are frivolous, malicious, or fail to state a claim upon which relief may be granted. Indeed, Coleman filed these four cases after he suffered his third qualifying dismissal, in October 2009, and before the affirmance of that order, in March 2011.

We recognize that our interpretation of the statute may create a different risk: An erroneous trial court dismissal might wrongly deprive a prisoner of *in forma pauperis* status with respect to lawsuits filed after a dismissal but before its reversal on appeal. But that risk does not seem great. For one thing, the Solicitor General informs us that he has been able to identify only two instances in which a Court of Appeals has reversed a District Court's issuance of a third strike. Brief for United States as *Amicus Curiae* 22, n. 5. For another, where a court of appeals reverses a third strike, in some instances the prisoner will be able to refile his or her lawsuit after the reversal, seeking *in forma pauperis* status at that time. Further, if the statute of limitations governing that lawsuit has run out before the court of appeals reverses the third strike, the Solicitor General assures us that prisoners will find relief in Federal Rule of Civil Procedure 60(b). According to the Solicitor General, a prisoner may move to reopen his or her interim lawsuits (reinstating the cases as of the dates originally filed) and may then seek *in forma pauperis* status anew. In any event, we believe our interpretation of the statute hews more closely to its meaning and objective than does Coleman's alternative.

B

Coleman makes an additional argument. He poses a hypothetical: What if this litigation had involved an attempt to appeal from the trial court's dismissal of his third complaint instead of an attempt to file several additional complaints? If the dismissal were counted as his third strike, Coleman asserts, he would lose the ability to appeal *in forma pauperis* from that strike itself. He believes that this result, which potentially could deprive him of appellate review, would be unfair. He further believes that it would be such a departure from the federal courts' normal appellate practice that Congress could not possibly have intended it.

The Solicitor General, while subscribing to our interpretation of the statute, supports Coleman on this point. The Solicitor General says that we can and should read the statute to afford a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal—even if it does not allow a prisoner to file a *fourth* case during that time. He believes that the statute, in referring to dismissals "on 3 or more *prior* occasions," 28 U. S. C. § 1915(g) (emphasis added), means that a trial court dismissal qualifies as a strike only if it occurred in a prior, *different*, lawsuit.

We need not, and do not, now decide whether the Solicitor General's interpretation (or some other interpretation with the same result) is correct. That is because Coleman is not here appealing from a third-strike trial court dismissal. He is appealing from the denial of *in forma pauperis* status with respect to several separate suits filed after the trial court dismissed his earlier third-strike suit. With respect to those suits, the earlier dismissals certainly took place on "prior occasions." If and when the situation that Coleman hypothesizes does arise, the courts can consider the problem in context.

* * *

For the reasons stated, we hold that a prisoner who has accumulated three prior qualifying dismissals under § 1915(g) may not file an additional suit *in forma pauperis* while his appeal of one such dismissal is pending. The judgments of the Court of Appeals are

Affirmed.

Syllabus

COMPTROLLER OF THE TREASURY OF MARYLAND *v.* WYNNE ET UX.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 13–485. Argued November 12, 2014—Decided May 18, 2015

Maryland's personal income tax on state residents consists of a "state" income tax, Md. Tax-Gen. Code Ann. § 10–105(a), and a "county" income tax, §§ 10–103, 10–106. Residents who pay income tax to another jurisdiction for income earned in that other jurisdiction are allowed a credit against the "state" tax but not the "county" tax. § 10–703. Nonresidents who earn income from sources within Maryland must pay the "state" income tax, §§ 10–105(d), 10–210, and nonresidents not subject to the county tax must pay a "special nonresident tax" in lieu of the "county" tax, § 10–106.1.

Respondents, Maryland residents, earned pass-through income from a Subchapter S corporation that earned income in several States. Respondents claimed an income tax credit on their 2006 Maryland income tax return for taxes paid to other States. The Maryland State Comptroller of the Treasury, petitioner here, allowed respondents a credit against their "state" income tax but not against their "county" income tax and assessed a tax deficiency. That decision was affirmed by the Hearings and Appeals Section of the Comptroller's Office and by the Maryland Tax Court, but the Circuit Court for Howard County reversed on the ground that Maryland's tax system violated the Commerce Clause of the Federal Constitution. The Court of Appeals of Maryland affirmed and held that the tax unconstitutionally discriminated against interstate commerce.

Held: Maryland's personal income tax scheme violates the dormant Commerce Clause. Pp. 548–571.

(a) The Commerce Clause, which grants Congress power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, also has "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 179, which precludes States from "discriminat[ing] between transactions on the basis of some interstate element," *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 332, n. 12. Thus, *inter alia*, a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642, or "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to

local business, or by subjecting interstate commerce to the burden of 'multiple taxation,'" *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458. Pp. 548–550.

(b) The result in this case is all but dictated by this Court's dormant Commerce Clause cases, particularly *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311, *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 439, and *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 662, which all invalidated state tax schemes that might lead to double taxation of out-of-state income and that discriminated in favor of intrastate over interstate economic activity. Pp. 550–551.

(c) This conclusion is not affected by the fact that these three cases involved a tax on gross receipts rather than net income, and a tax on corporations rather than individuals. This Court's decisions have previously rejected the formal distinction between gross receipts and net income taxes. And there is no reason the dormant Commerce Clause should treat individuals less favorably than corporations; in addition, the taxes invalidated in *J. D. Adams* and *Gwin, White* applied to the income of both individuals and corporations. Nor does the right of the individual to vote in political elections justify disparate treatment of corporate and personal income. Thus the Court has previously entertained and even sustained dormant Commerce Clause challenges by individual residents of the State that imposed the alleged burden on interstate commerce. See *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 336; *Granholm* v. *Heald*, 544 U. S. 460, 469. Pp. 551–556.

(d) Maryland's tax scheme is not immune from dormant Commerce Clause scrutiny simply because Maryland has the jurisdictional power under the Due Process Clause to impose the tax. "[W]hile a state may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 305. Pp. 556–558.

(e) Maryland's income tax scheme discriminates against interstate commerce. The "internal consistency" test, which helps courts identify tax schemes that discriminate against interstate commerce, assumes that every State has the same tax structure. Maryland's income tax scheme fails the internal consistency test because if every State adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce. Maryland's tax scheme is inherently discriminatory and operates as a tariff, which is fatal because tariffs are "[t]he paradigmatic example of a law discriminating against interstate commerce." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 193. Petitioner emphasizes that by offering residents who earn income in interstate commerce a credit against the "state" portion of

Syllabus

the income tax, Maryland actually receives less tax revenue from residents who earn income from interstate commerce rather than intrastate commerce, but this argument is a red herring. The critical point is that the total tax burden on interstate commerce is higher. Pp. 561–569.

431 Md. 147, 64 A. 3d 453, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined as to Parts I and II, *post*, p. 571. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined except as to the first paragraph, *post*, p. 578. GINSBURG, J., filed a dissenting opinion, in which SCALIA and KAGAN, JJ., joined, *post*, p. 581.

William F. Brockman, Acting Solicitor General of Maryland, argued the cause for petitioner. With him on the briefs were *Douglas F. Gansler*, Attorney General, *Steven M. Sullivan*, Chief of Litigation, *Julia Doyle Bernhardt*, Deputy Chief of Litigation, *Brian L. Oliner*, Assistant Attorney General, and *H. Bartow Farr III*.

Eric J. Feigin argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Acting Assistant Attorney General Ashford*, *Deputy Solicitor General Stewart*, *Johnathan S. Cohen*, and *Damon W. Taaffe*.

Dominic F. Perella argued the cause for respondents. With him on the brief were *Neal Kumar Katyal*, *Frederick Liu*, and *Sean Marotta*.*

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*Briefs of *amici curiae* urging reversal were filed for the International Municipal Lawyers Association et al. by *Paul D. Clement*, *Zachary D. Tripp*, *John C. Neiman, Jr.*, *Lisa Soronen*, and *Charles W. Thompson, Jr.*; and for the Multistate Tax Commission by *Joe Huddleston*, *Helen Hecht*, and *Sheldon Laskin*.

Briefs of *amici curiae* urging affirmance were filed for American Association of Attorney-Certified Public Accountants, Inc., by *David S. DeJong*, *C. Murray Saylor, Jr.*, *James H. Sutton, Jr.*, and *Sydney S. Traum*; for the American Legislative Exchange Council by *Seth L. Cooper*; for the Chamber of Commerce of the United States of America by *Jeffrey A. Lamken*, *Kathryn Comerford Todd*, and *Warren Postman*; for the Council

JUSTICE ALITO delivered the opinion of the Court.

This case involves the constitutionality of an unusual feature of Maryland's personal income tax scheme. Like many other States, Maryland taxes the income its residents earn both within and outside the State, as well as the income that nonresidents earn from sources within Maryland. But unlike most other States, Maryland does not offer its residents a full credit against the income taxes that they pay to other States. The effect of this scheme is that some of the income earned by Maryland residents outside the State is taxed twice. Maryland's scheme creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity.

We have long held that States cannot subject corporate income to tax schemes similar to Maryland's, and we see no reason why income earned by individuals should be treated less favorably. Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause. We therefore affirm the decision of Maryland's highest court and hold that this feature of the State's tax scheme violates the Federal Constitution.

I

Maryland, like most States, raises revenue in part by levying a personal income tax. The income tax that Maryland

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on State Taxation by *Karl Frieden*, *Frederick Nicely*, and *Douglas Lindholm*; for the Maryland Chamber of Commerce by *Jerome B. Libin*, *Jeffrey A. Friedman*, and *Walter Hellerstein*; for the National Association of Publicly Traded Partnerships by *Timothy P. O'Toole* and *Alan I. Horowitz*; for the National Federation of Independent Business Small Business Legal Center et al. by *Steven G. Bradbury, Steven A. Engel*, *Michael J. Rufkahr*, *Karen R. Harned*, *Elizabeth Milito*, and *Devala Janardan*; for Tax Economists by *David W. T. Daniels*; for the Tax Executives Institute, Inc., by *Daniel B. DeJong*, *W. Patrick Evans*, and *Eli J. Dicker*; and for the Tax Foundation by *Joseph D. Henchman*.

A brief of *amici curiae* was filed for Michael S. Knoll et al. by *H. David Rosenbloom*, and *Mr. Knoll* and *Ruth Mason*, both *pro se*.

imposes upon its own residents has two parts: a "state" income tax, which is set at a graduated rate, Md. Tax-Gen. Code Ann. § 10–105(a) (Supp. 2014), and a so-called "county" income tax, which is set at a rate that varies by county but is capped at 3.2%, §§ 10–103, 10–106 (2010). Despite the names that Maryland has assigned to these taxes, both are State taxes, and both are collected by the State's Comptroller of the Treasury. *Frey* v. *Comptroller of Treasury*, 422 Md. 111, 125, 141–142, 29 A. 3d 475, 483, 492 (2011). Of course, some Maryland residents earn income in other States, and some of those States also tax this income. If Maryland residents pay income tax to another jurisdiction for income earned there, Maryland allows them a credit against the "state" tax but not the "county" tax. § 10–703; 431 Md. 147, 156–157, 64 A. 3d 453, 458 (2013) (case below). As a result, part of the income that a Maryland resident earns outside the State may be taxed twice.

Maryland also taxes the income of nonresidents. This tax has two parts. First, nonresidents must pay the "state" income tax on all the income that they earn from sources within Maryland. §§ 10–105(d) (Supp. 2014), 10–210 (2010). Second, nonresidents not subject to the county tax must pay a "special nonresident tax" in lieu of the "county" tax. § 10–106.1; *Frey*, *supra*, at 125–126, 29 A. 3d, at 483. The "special nonresident tax" is levied on income earned from sources within Maryland, and its rate is "equal to the lowest county income tax rate set by any Maryland county." § 10–106.1. Maryland does not tax the income that nonresidents earn from sources outside Maryland. See § 10–210.

Respondents Brian and Karen Wynne are Maryland residents. In 2006, the relevant tax year, Brian Wynne owned stock in Maxim Healthcare Services, Inc., a Subchapter S corporation.[1] That year, Maxim earned income in States

[1] Under federal law, S corporations permit shareholders "to elect a 'pass-through' taxation system under which income is subjected to only one level of taxation. The corporation's profits pass through directly to its

other than Maryland, and it filed state income tax returns in 39 States. The Wynnes earned income passed through to them from Maxim. On their 2006 Maryland tax return, the Wynnes claimed an income tax credit for income taxes paid to other States.

Petitioner, the Maryland State Comptroller of the Treasury, denied this claim and assessed a tax deficiency. In accordance with Maryland law, the Comptroller allowed the Wynnes a credit against their Maryland "state" income tax but not against their "county" income tax. The Hearings and Appeals Section of the Comptroller's Office slightly modified the assessment but otherwise affirmed. The Maryland Tax Court also affirmed, but the Circuit Court for Howard County reversed on the ground that Maryland's tax system violated the Commerce Clause.

The Court of Appeals of Maryland affirmed. 431 Md. 147, 64 A. 3d 453. That court evaluated the tax under the four-part test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), which asks whether a "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*, at 279. The Court of Appeals held that the tax failed both the fair apportionment and nondiscrimination parts of the *Complete Auto* test. With respect to fair appor-

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shareholders on a pro rata basis and are reported on the shareholders' individual tax returns." *Gitlitz* v. *Commissioner*, 531 U. S. 206, 209 (2001) (citation omitted). Maryland affords similar pass-through treatment to the income of an S corporation. 431 Md. 147, 158, 64 A. 3d 453, 459 (2013). By contrast, C corporations—organized under Subchapter C rather than S of Chapter 1 of the Internal Revenue Code—must pay their own taxes because they are considered to be separate tax entities from their shareholders. 14A W. Fletcher, Cyclopedia of the Law of Corporations §§ 6971, 6973 (rev. ed. 2008 and Cum. Supp. 2014–2015). Because of limitations on the number and type of shareholders they may have, S corporations tend to be smaller, more closely held corporations. *Id.*, §§ 7025.50, 7026.

tionment, the court first held that the tax failed the "internal consistency" test because if every State adopted Maryland's tax scheme, interstate commerce would be taxed at a higher rate than intrastate commerce. It then held that the tax failed the "external consistency" test because it created a risk of multiple taxation. With respect to nondiscrimination, the court held that the tax discriminated against interstate commerce because it denied residents a credit on income taxes paid to other States and so taxed income earned interstate at a rate higher than income earned intrastate. The court thus concluded that Maryland's tax scheme was unconstitutional insofar as it denied the Wynnes a credit against the "county" tax for income taxes they paid to other States. Two judges dissented and argued that the tax did not violate the Commerce Clause. The Court of Appeals later issued a brief clarification that "[a] state may avoid discrimination against interstate commerce by providing a tax credit, or some other method of apportionment, to avoid discriminating against interstate commerce in violation of the dormant Commerce Clause." 431 Md., at 189, 64 A. 3d, at 478.

We granted certiorari. 572 U. S. 1134 (2014).

II

A

The Commerce Clause grants Congress power to "regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. These "few simple words . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). Although the Clause is framed as a positive grant of power to Congress, "we have consistently

held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 179 (1995).

This interpretation of the Commerce Clause has been disputed. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 609–620 (1997) (THOMAS, J., dissenting); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 259–265 (1987) (SCALIA, J., concurring in part and dissenting in part); *License Cases*, 5 How. 504, 578–579 (1847) (Taney, C. J.). But it also has deep roots. See, *e. g.*, *Case of the State Freight Tax*, 15 Wall. 232, 279–280 (1873); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–319 (1852); *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824) (Marshall, C. J.). By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce. *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 330–331 (1996); *Hughes*, *supra*, at 325; *Welton* v. *Missouri*, 91 U. S. 275, 280 (1876); see also The Federalist Nos. 7, 11 (A. Hamilton), and 42 (J. Madison).

Under our precedents, the dormant Commerce Clause precludes States from "discriminat[ing] between transactions on the basis of some interstate element." *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 332, n. 12 (1977). This means, among other things, that a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642 (1984). "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the

burden of 'multiple taxation.'" *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959) (citations omitted).

B

Our existing dormant Commerce Clause cases all but dictate the result reached in this case by Maryland's highest court. Three cases involving the taxation of the income of domestic corporations are particularly instructive.

In *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), Indiana taxed the income of every Indiana resident (including individuals) and the income that every nonresident derived from sources within Indiana. *Id.*, at 308. The State levied the tax on income earned by the plaintiff Indiana corporation on sales made out of the State. *Id.*, at 309. Holding that this scheme violated the dormant Commerce Clause, we explained that the "vice of the statute" was that it taxed, "without apportionment, receipts derived from activities in interstate commerce." *Id.*, at 311. If these receipts were also taxed by the States in which the sales occurred, we warned, interstate commerce would be subjected "to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *Ibid.*

The next year, in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), we reached a similar result. In that case, the State of Washington taxed all the income of persons doing business in the State. *Id.*, at 435. Washington levied that tax on income that the plaintiff Washington corporation earned in shipping fruit from Washington to other States and foreign countries. *Id.*, at 436–437. This tax, we wrote, "discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Id.*, at 439.

In the third of these cases involving the taxation of a domestic corporation, *Central Greyhound Lines, Inc.* v. *Mealey*,

334 U. S. 653 (1948), New York sought to tax the portion of a domiciliary bus company's gross receipts that were derived from services provided in neighboring States. *Id.*, at 660; see also *id.*, at 665 (Murphy, J., dissenting) (stating that the plaintiff was a New York corporation). Noting that these other States might also attempt to tax this portion of the company's gross receipts, the Court held that the New York scheme violated the dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce. *Id.*, at 662 (majority opinion).

In all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity. As we will explain, see Part II–F, *infra*, Maryland's tax scheme is unconstitutional for similar reasons.

C

The principal dissent distinguishes these cases on the sole ground that they involved a tax on gross receipts rather than net income. We see no reason why the distinction between gross receipts and net income should matter, particularly in light of the admonition that we must consider "not the formal language of the tax statute but rather its practical effect." *Complete Auto*, 430 U. S., at 279. The principal dissent claims, see *post*, at 592 (opinion of GINSBURG, J.), that "[t]he Court, *historically*, has taken the position that the difference between taxes on net income and taxes on gross receipts from interstate commerce warrants different results," 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 10:1, p. 251 (2003) (hereinafter Trost) (emphasis added). But this historical point is irrelevant. As the principal dissent seems to acknowledge, our cases rejected this formal distinction some time ago. And the distinction between gross receipts and net income taxes was not the basis for our decisions in *J. D. Adams*, *Gwin*, *White*, and *Central*

Greyhound, which turned instead on the threat of multiple taxation.

The discarded distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible "direct and immediate burden" on interstate commerce, whereas a tax on net income is merely an "indirect and incidental" burden. *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328–329 (1918); see also *Shaffer* v. *Carter*, 252 U. S. 37, 57 (1920). This arid distinction between direct and indirect burdens allowed "very little coherent, trustworthy guidance as to tax validity." 2 Trost § 9:1, at 212. And so, beginning with Justice Stone's seminal opinion in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and continuing through cases like *J. D. Adams* and *Gwin, White*, the direct-indirect burdens test was replaced with a more practical approach that looked to the economic impact of the tax. These cases worked "a substantial judicial reinterpretation of the power of the States to levy taxes on gross income from interstate commerce." 1 Trost § 2:20, at 175.

After a temporary reversion to our earlier formalism, see *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), "the gross receipts judicial pendulum has swung in a wide arc, recently reaching the place where taxation of gross receipts from interstate commerce is placed on an equal footing with receipts from local business, in *Complete Auto Transit Inc. v. Brady*," 2 Trost § 9:1, at 212. And we have now squarely rejected the argument that the Commerce Clause distinguishes between taxes on net and gross income. See *Jefferson Lines*, 514 U. S., at 190 (explaining that the Court in *Central Greyhound* "understood the gross receipts tax to be simply a variety of tax on income"); *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 280 (1978) (rejecting a suggestion that the Commerce Clause distinguishes between gross receipts

taxes and net income taxes); *id.*, at 281 (Brennan, J., dissenting) ("I agree with the Court that, for purposes of constitutional review, there is no distinction between a corporate income tax and a gross-receipts tax"); *Complete Auto*, *supra*, at 280 (upholding a gross receipts tax and rejecting the notion that the Commerce Clause places "a blanket prohibition against any state taxation imposed directly on an interstate transaction").[2]

For its part, petitioner distinguishes *J. D. Adams*, *Gwin*, *White*, and *Central Greyhound* on the ground that they concerned the taxation of corporations, not individuals. But it is hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations. See *Camps Newfound*, 520 U. S., at 574 ("A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce" (emphasis added)). In addition, the distinction between individuals and corporations cannot stand because the taxes invalidated in *J. D. Adams* and *Gwin, White* applied to the income of both individuals and corporations. See Ind. Stat. Ann., ch. 26, § 64–2602 (Burns 1933) (tax in *J. D. Adams*); 1935 Wash. Sess. Laws ch. 180, Tit. II, § 4(e), pp. 710–711 (tax in *Gwin*, *White*).

Attempting to explain why the dormant Commerce Clause should provide less protection for natural persons than for corporations, petitioner and the Solicitor General argue that

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[2] The principal dissent mischaracterizes the import of the Court's statement in *Moorman* that a gross receipts tax is "'more burdensome'" than a net income tax. *Post*, at 593. This was a statement about the relative economic impact of the taxes (a gross receipts tax applies regardless of whether the corporation makes a profit). It was not, as Justice Brennan confirmed in dissent, a suggestion that net income taxes are subject to lesser constitutional scrutiny than gross receipts taxes. Indeed, we noted in *Moorman* that "the actual burden on interstate commerce would have been the same had Iowa imposed a plainly valid gross-receipts tax instead of the challenged [net] income tax." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 280–281 (1978).

States should have a free hand to tax their residents' out-of-state income because States provide their residents with many services. As the Solicitor General puts it, individuals "reap the benefits of local roads, local police and fire protection, local public schools, [and] local health and welfare benefits." Brief for United States as *Amicus Curiae* 30.

This argument fails because corporations also benefit heavily from state and local services. Trucks hauling a corporation's supplies and goods, and vehicles transporting its employees, use local roads. Corporations call upon local police and fire departments to protect their facilities. Corporations rely on local schools to educate prospective employees, and the availability of good schools and other government services are features that may aid a corporation in attracting and retaining employees. Thus, disparate treatment of corporate and personal income cannot be justified based on the state services enjoyed by these two groups of taxpayers.

The sole remaining attribute that, in the view of petitioner, distinguishes a corporation from an individual for present purposes is the right of the individual to vote. The principal dissent also emphasizes that residents can vote to change Maryland's discriminatory tax law. *Post*, at 583–584. The argument is that this Court need not be concerned about state laws that burden the interstate activities of individuals because those individuals can lobby and vote against legislators who support such measures. But if a State's tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State. This Court has thus entertained and even sustained dormant Commerce Clause challenges by individual residents of the State that imposed the alleged burden on interstate commerce, *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 336 (2008); *Granholm* v. *Heald*, 544 U. S. 460, 469 (2005), and we have also sustained such a challenge to a tax whose burden was borne by in-

state consumers, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 272 (1984).[3]

The principal dissent and JUSTICE SCALIA respond to these holdings by relying on dictum in *Goldberg* v. *Sweet*, 488 U. S. 252, 266 (1989), that it is not the purpose of the dormant Commerce Clause "'to protect state residents from their own state taxes.'" *Post*, at 584 (GINSBURG, J., dissenting); *post*, at 576 (SCALIA, J., dissenting). But we repudiated that dictum in *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186 (1994), where we stated that "[s]tate taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." *Id.*, at 203. And, of course, the dictum must bow to the holdings of our many cases entertaining Commerce Clause challenges brought by residents. We find the dissents' reliance on *Goldberg*'s dictum particularly inappropriate since they do not find themselves similarly bound by the rule of that case, which applied the internal consistency test to determine whether the tax at issue violated the dormant Commerce Clause. 488 U. S., at 261.

In addition, the notion that the victims of such discrimination have a complete remedy at the polls is fanciful. It is likely that only a distinct minority of a State's residents earns income out of State. Schemes that discriminate against income earned in other States may be attractive to legislators and a majority of their constituents for precisely this reason. It is even more farfetched to suggest that natural persons with out-of-state income are better able to influence state lawmakers than large corporations headquartered

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[3] Similarly, we have sustained dormant Commerce Clause challenges by corporate residents of the State that imposed the burden on interstate commerce. See, *e. g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 567 (1997); *Fulton Corp.* v. *Faulkner*, 516 U. S. 325, 328 (1996); *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 654 (1948); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 435 (1939); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 308 (1938).

in the State. In short, petitioner's argument would leave no security where the majority of voters prefer protectionism at the expense of the few who earn income interstate.

It would be particularly incongruous in the present case to disregard our prior decisions regarding the taxation of corporate income because the income at issue here is a type of corporate income, namely, the income of a Subchapter S corporation. Only small businesses may incorporate under Subchapter S, and thus acceptance of petitioner's submission would provide greater protection for income earned by large Subchapter C corporations than small businesses incorporated under Subchapter S.

D

In attempting to justify Maryland's unusual tax scheme, the principal dissent argues that the Commerce Clause imposes no limit on Maryland's ability to tax the income of its residents, no matter where that income is earned. It argues that Maryland has the sovereign power to tax all of the income of its residents, wherever earned, and it therefore reasons that the dormant Commerce Clause cannot constrain Maryland's ability to expose its residents (and nonresidents) to the threat of double taxation.

This argument confuses what a State may do without violating the Due Process Clause of the Fourteenth Amendment with what it may do without violating the Commerce Clause. The Due Process Clause allows a State to tax "*all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 462–463 (1995). But "while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 305 (1992) (rejecting a due process challenge to a tax before sustaining a Commerce Clause challenge to that tax).

Our decision in *Camps Newfound* illustrates the point. There, we held that the Commerce Clause prohibited Maine

from granting more favorable tax treatment to charities that operated principally for the benefit of Maine residents. 520 U. S., at 580–583. Because the plaintiff charity in that case was a Maine nonprofit corporation, there is no question that Maine had the raw jurisdictional power to tax the charity. See *Chickasaw Nation*, *supra*, at 462–463. Nonetheless, the tax failed scrutiny under the Commerce Clause. *Camps Newfound*, *supra*, at 580–581. Similarly, Maryland's raw power to tax its residents' out-of-state income does not insulate its tax scheme from scrutiny under the dormant Commerce Clause.

Although the principal dissent claims the mantle of precedent, it is unable to identify a single case that endorses its essential premise, namely, that the Commerce Clause places no constraint on a State's power to tax the income of its residents wherever earned. This is unsurprising. As cases like *Quill Corp.* and *Camps Newfound* recognize, the fact that a State has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause. See also, *e. g.*, *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298 (1994) (separately addressing due process and Commerce Clause challenges to a tax); *Moorman*, 437 U. S. 267 (same); *Standard Pressed Steel Co.* v. *Department of Revenue of Wash.*, 419 U. S. 560 (1975) (same); *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U. S. 276 (1932) (separately addressing due process and equal protection challenges to a tax); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920) (separately addressing due process and privileges-and-immunities challenges to a tax).

One good reason why we have never accepted the principal dissent's logic is that it would lead to plainly untenable results. Imagine that Maryland taxed the income that its residents earned in other States but exempted income earned out of State from any business that primarily served Maryland residents. Such a tax would violate the dormant Commerce Clause, see *Camps Newfound*, *supra*, and it cannot be saved by the principal dissent's admonition that Maryland

has the power to tax all the income of its residents. There is no principled difference between that hypothetical Commerce Clause challenge and this one.

The principal dissent, if accepted, would work a sea change in our Commerce Clause jurisprudence. Legion are the cases in which we have considered and even upheld dormant Commerce Clause challenges brought by residents to taxes that the State had the jurisdictional power to impose. See, *e. g.*, *Davis*, 553 U. S. 328; *Camps Newfound*, *supra*; *Fulton Corp.*, 516 U. S. 325; *Bacchus Imports*, 468 U. S. 263; *Central Greyhound*, 334 U. S. 653; *Gwin, White*, 305 U. S. 434; *J. D. Adams*, 304 U. S. 307. If the principal dissent were to prevail, all of these cases would be thrown into doubt. After all, in those cases, as here, the State's decision to tax in a way that allegedly discriminates against interstate commerce could be justified by the argument that a State may tax its residents without any Commerce Clause constraints.

E

While the principal dissent claims that we are departing from principles that have been accepted for "a century" and have been "repeatedly acknowledged by this Court," see *post*, at 581, 582, 599, when it comes to providing supporting authority for this assertion, it cites exactly two Commerce Clause decisions that are supposedly inconsistent with our decision today. One is a summary affirmance, *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946), and neither actually supports the principal dissent's argument.

In the first of these cases, *Shaffer* v. *Carter*, 252 U. S. 37, a resident of Illinois who earned income from oil in Oklahoma unsuccessfully argued that his Oklahoma income tax assessment violated several provisions of the Federal Constitution. His main argument was based on due process, but he also raised a dormant Commerce Clause challenge. Although the principal dissent relies on *Shaffer* for the proposition that a State may tax the income of its residents wherever

earned, *Shaffer* did not reject the Commerce Clause challenge on that basis.

The dormant Commerce Clause challenge in *Shaffer* was nothing like the Wynnes' challenge here. The taxpayer in *Shaffer* argued that "[i]f the tax is considered an excise tax on business, rather than an income tax proper," it unconstitutionally burdened interstate commerce. Brief for Appellant, O. T. 1919, No. 531, p. 166. The taxpayer did not argue that this burden occurred because he was subject to double taxation; instead, he argued that the tax was an impermissible direct "tax on interstate business." *Ibid.* That argument was based on the notion that States may not impose a tax "directly" on interstate commerce. See *supra*, at 552–553. After assuming that the taxpayer's business was engaged in interstate commerce, we held that "it is sufficient to say that the tax is imposed not upon the gross receipts, . . . but only upon the net proceeds, and is plainly sustainable, even if it includes net gains from interstate commerce. [*United States Glue Co.* v. *Town of Oak Creek*], 247 U. S. 321." *Shaffer*, *supra*, at 57.

Shaffer thus did not adjudicate anything like the double taxation argument that was accepted in later cases and is before us today. And the principal dissent's suggestion that *Shaffer* allows States to levy discriminatory net income taxes is refuted by a case decided that same day. In *Travis*, a Connecticut corporation challenged New York's net income tax, which allowed residents, but not nonresidents, certain tax exemptions. The Court first rejected the taxpayer's due process argument as "settled by our decision in *Shaffer*." 252 U. S., at 75. But that due process inquiry was not the end of the matter: The Court then separately considered—and sustained—the argument that the net income tax's disparate treatment of residents and nonresidents violated the Privileges and Immunities Clause. *Id.*, at 79–80.

The second case on which the principal dissent relies, *West Publishing*, is a summary affirmance and thus has "consider-

ably less precedential value than an opinion on the merits." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 180–181 (1979). A summary affirmance "'is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.'" *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) (*per curiam*) (quoting *Fusari* v. *Steinberg*, 419 U. S. 379, 392 (1975) (Burger, C. J., concurring)). The principal dissent's reliance on the state-court decision below in that case is particularly inappropriate because "a summary affirmance is an affirmance of the judgment only," and "the rationale of the affirmance may not be gleaned solely from the opinion below." 432 U. S., at 176.

Moreover, we do not disagree with the result of *West Publishing*. The tax in that case was levied only on "'the net income of every corporation derived *from sources within this State*,'" and thus was an internally consistent and nondiscriminatory tax scheme. See *West Publishing Co.* v. *McColgan*, 27 Cal. 2d 705, 707, n., 166 P. 2d 861, 862, n. (1946) (emphasis added). Moreover, even if we did disagree with the result, the citation in our summary affirmance to *United States Glue Co.* suggests that our decision was based on the since-discarded distinction between net income and gross receipts taxes. *West Publishing* did not—indeed, it could not—repudiate the double taxation cases upon which we rely.

The principal dissent also finds it significant that, when States first enacted modern income taxes in the early 1900's, some States had tax schemes similar to Maryland's. This practice, however, was by no means universal. A great many States—such as Alabama, Colorado, Georgia, Kentucky, and Maryland—had early income tax schemes that allowed their residents a credit against taxes paid to other States. See Ala. Code, Tit. 51, ch. 17, § 390 (1940); Colo. Stat. Ann., ch. 84A, § 38 (Cum. Supp. 1951); Ga. Code Ann. § 92–3111 (1974); Carroll's Ky. Stat. Ann., ch. 108, Art. XX, § 4281b–15 (Baldwin rev. 1936); Md. Ann. Code, Art. 81, ch.

277, § 231 (1939). Other States also adopted internally consistent tax schemes. For example, Massachusetts and Utah taxed only the income of residents, not nonresidents. See Mass. Gen. Laws, ch. 62 (1932); Utah Rev. Stat. § 80–14–1 *et seq.* (1933).

In any event, it is hardly surprising that these early state ventures into the taxation of income included some protectionist regimes that favored the local economy over interstate commerce. What is much more significant is that over the next century, as our Commerce Clause jurisprudence developed, the States have almost entirely abandoned that approach, perhaps in recognition of their doubtful constitutionality. Today, the near-universal state practice is to provide credits against personal income taxes for such taxes paid to other States. See 2 J. Hellerstein & W. Hellerstein, State Taxation ¶20.10, pp. 20–163 to 20–164 (3d ed. 2003).[4]

F

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As previously noted, the tax schemes held to be unconstitutional in *J. D. Adams*, *Gwin*, *White*, and *Central Greyhound* had the potential to result in the discriminatory double taxation of income earned out of State and created a powerful incentive to engage in intrastate rather than interstate economic activity. Although we did not use the term in those cases, we held that those schemes could be cured by taxes that satisfy what we have subsequently labeled the

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[4] There is no merit to petitioner's argument that Maryland is free to adopt any tax scheme that is not actually intended to discriminate against interstate commerce. Reply Brief 7. The Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect. See, *e. g.*, *Associated Industries of Mo.* v. *Lohman*, 511 U. S. 641, 653 (1994); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 626–627 (1978); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 352–353 (1977).

"internal consistency" test. See *Jefferson Lines*, 514 U. S., at 185 (citing *Gwin, White* as a case requiring internal consistency); see also 1 Trost § 2:19, at 122–123, and n. 160 (explaining that the internal consistency test has its origins in *Western Live Stock*, *J. D. Adams*, and *Gwin, White*). This test, which helps courts identify tax schemes that discriminate against interstate commerce, "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." 514 U. S., at 185. See also, *e. g.*, *Tyler Pipe*, 483 U. S., at 246–248; *Armco*, 467 U. S., at 644–645; *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169 (1983).

By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. See *Armco*, *supra*, at 645–646; *Moorman*, 437 U. S., at 277, n. 12; Brief for Tax Economists as *Amici Curiae* 23–24 (hereinafter Brief for Tax Economists); Brief for Michael S. Knoll & Ruth Mason as *Amici Curiae* 18–23 (hereinafter Brief for Knoll & Mason). The first category of taxes is typically unconstitutional; the second is not.[5] See *Armco*, *supra*, at 644–646; *Moorman*, *supra*, at 277, and

[5] Our cases have held that tax schemes may be invalid under the dormant Commerce Clause even absent a showing of actual double taxation. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 444 (1980); *Gwin, White*, 305 U. S., at 439. We note, however, that petitioner does not dispute that respondents have been subject to actual multiple taxation in this case.

n. 12. Tax schemes that fail the internal consistency test will fall into the first category, not the second: "[A]ny cross-border tax disadvantage that remains after application of the [test] cannot be due to tax disparities"[6] but is instead attributable to the taxing State's discriminatory policies alone.

Neither petitioner nor the principal dissent questions the economic bona fides of the internal consistency test. And despite its professed adherence to precedent, the principal dissent ignores the numerous cases in which we have applied the internal consistency test in the past. The internal consistency test was formally introduced more than three decades ago, see *Container Corp.*, *supra*, and it has been invoked in no fewer than seven cases, invalidating the tax in three of those cases. See *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429 (2005);[7] *Jeffer-*

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[6] Mason, Made in America for European Tax: The Internal Consistency Test, 49 Boston College L. Rev. 1277, 1310 (2008).

[7] The principal dissent and JUSTICE SCALIA inaccurately state that the Court in *American Trucking* "conceded that a trucking tax 'fail[ed] the "internal consistency" test,' but upheld the tax anyway." *Post*, at 575 (SCALIA, J., dissenting); see also *post*, at 594 (GINSBURG, J., dissenting). The Court did not say that the tax in question "failed the 'internal consistency test.'" The Court wrote that this is what *petitioner argued*. See *American Trucking*, 545 U. S., at 437. And the Court did not concede that this was true. The tax in that case was a flat tax on any truck that made point-to-point deliveries in Michigan. The tax therefore fell on all trucks that made solely intrastate deliveries and some that made interstate deliveries, namely, those that also made some intrastate deliveries. What the Court "concede[d]" was that "if all States [adopted a similar tax], an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, *were it to 'top off' its business by carrying local loads in many (or even all) other States*." *Id.*, at 438 (emphasis added). But that was not the same as a concession that the tax violated the internal consistency test. The internal consistency test asks whether the adoption of a rule by all States "would place interstate commerce at a disadvantage as compared with commerce intrastate." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 185 (1995). Whether the Michigan trucking tax had such an effect depended on an empirical showing that petitioners failed to make, namely, that the chal-

son Lines, Inc., *supra*; *Goldberg*, 488 U. S. 252; *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987); *Tyler Pipe*, *supra*; *Armco*, *supra*; *Container Corp.*, *supra*.

2

Maryland's income tax scheme fails the internal consistency test.[8] A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents

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lenged tax imposed a heavier burden on interstate truckers in general than it did on intrastate truckers. Under the Michigan tax, some interstate truckers, *i. e.*, those who used Michigan roads solely for trips that started and ended outside the State, did not pay this tax even though they benefited from the use of the State's roads; they were thus treated more favorably than truckers who did not leave the State. Other truckers who made interstate trips, *i. e.*, those who made some intrastate trips, were treated less favorably. As the United States explained in its brief, "[n]either record evidence nor abstract logic makes clear whether the overall effect of such a system would be to increase or to reduce existing financial disincentives to interstate travel." Brief for United States in *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, O. T. 2004, No. 03–1230, p. 26.

[8] In order to apply the internal consistency test in this case, we must evaluate the Maryland income tax scheme as a whole. That scheme taxes three separate categories of income: (1) the "county tax" on income that Maryland residents earn in Maryland; (2) the "county tax" on income that Maryland residents earn in other States; and (3) the "special nonresident tax" on income that nonresidents earn in Maryland. For Commerce Clause purposes, it is immaterial that Maryland assigns different labels (*i. e.*, "county tax" and "special nonresident tax") to these taxes. In applying the dormant Commerce Clause, they must be considered as one. Cf. *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 102–103 (1994) (independent taxes on intrastate and interstate commerce are "compensatory" if they are rough equivalents imposed upon substantially similar events). If state labels controlled, a State would always be free to tax domestic, inbound, and outbound income at discriminatory rates simply by attaching different labels.

earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Critically—and this dispels a central argument made by petitioner and the principal dissent—the Maryland scheme's discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States. Instead, the internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff. See Brief for Tax Economists 4, 9; Brief for Knoll & Mason 2. This identity between Maryland's tax and a tariff is fatal because tariffs are "[t]he paradigmatic example of a law discriminating against interstate commerce." *West Lynn*, 512 U. S., at 193. Indeed, when asked about the foregoing analysis made by *amici* Tax Economists and Knoll & Mason, counsel for Maryland responded, "I don't dispute the mathematics. They lose me when they switch from tariffs to income taxes." Tr. of Oral Arg. 9. But Maryland has offered no reason why our analysis should change because we deal with an income tax rather than a formal tariff, and we see none. After all, "tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means." *West Lynn*, *supra*, at 193.

None of our dissenting colleagues dispute this economic analysis. The principal dissent focuses instead on a supposed "oddity" with our analysis: The principal dissent can envision other tax schemes that result in double taxation but

do not violate the internal consistency test. This would happen, the principal dissent points out, if State A taxed only based on residence and State B taxed only based on source. *Post*, at 596–597 (opinion of GINSBURG, J.); see also *post*, at 577 (opinion of SCALIA, J.). Our prior decisions have already considered and rejected this precise argument—and for good reason. For example, in *Armco*, we struck down an internally inconsistent tax that posed a risk of double taxation even though we recognized that there might be other permissible arrangements that would result in double taxation. Such schemes would be constitutional, we explained, because "such a result would not arise from impermissible discrimination against interstate commerce." 467 U. S., at 645. The principal dissent's protest that our distinction is "entirely circular," *post*, at 597, n. 10, misunderstands the critical distinction, recognized in cases like *Armco*, between discriminatory tax schemes and double taxation that results only from the interaction of two different but nondiscriminatory tax schemes. See also *Moorman*, 437 U. S., at 277, n. 12 (distinguishing "the potential consequences of the use of different formulas by the two States," which is not prohibited by the Commerce Clause, from discrimination that "inhere[s] in either State's formula," which is prohibited).

Petitioner and the Solicitor General argue that Maryland's tax is neutral, not discriminatory, because the same tax applies to all three categories of income. Specifically, they point out that the same tax is levied on (1) residents who earn income in State, (2) residents who earn income out of State, and (3) nonresidents who earn income in State. But the fact that the tax might have "'the advantage of appearing nondiscriminatory' does not save it from invalidation." *Tyler Pipe*, 483 U. S., at 248 (quoting *General Motors Corp.* v. *Washington*, 377 U. S. 436, 460 (1964) (Goldberg, J., dissenting)). See also *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S., at 281 (dormant Commerce Clause applies to state taxes even when they "do not allocate tax

burdens between insiders and outsiders in a manner that is facially discriminatory"); *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986) (a state law may discriminate against interstate commerce "'either on its face or in practical effect'" (quoting *Hughes*, 441 U. S., at 336)). In this case, the internal consistency test and economic analysis—indeed, petitioner's own concession—confirm that the tax scheme operates as a tariff and discriminates against interstate commerce, and so the scheme is invalid.

Petitioner and the principal dissent, *post*, at 586, also note that by offering residents who earn income in interstate commerce a credit against the "state" portion of the income tax, Maryland actually receives less tax revenue from residents who earn income from interstate commerce rather than intrastate commerce. This argument is a red herring. The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer. See *Armco*, *supra*, at 642–645. Maryland's tax unconstitutionally discriminates against interstate commerce, and it is thus invalid regardless of how much a particular taxpayer must pay to the taxing State.

Once again, a simple hypothetical illustrates the point. Assume that State A imposes a 5% tax on the income that its residents earn in State but a 10% tax on income they earn in other jurisdictions. Assume also that State A happens to grant a credit against income taxes paid to other States. Such a scheme discriminates against interstate commerce because it taxes income earned interstate at a higher rate than income earned intrastate. This is so despite the fact that, in certain circumstances, a resident of State A who earns income interstate may pay less tax to State A than a neighbor who earns income intrastate. For example, if Bob lives in State A but earns his income in State B, which has a 6% income tax rate, Bob would pay a total tax of 10% on his income, though 6% would go to State B and (because of

the credit) only 4% would go to State A. Bob would thus pay less to State A than his neighbor, April, who lives in State A and earns all of her income there, because April would pay a 5% tax to State A. But Bob's tax burden to State A is irrelevant; his total tax burden is what matters.

The principal dissent is left with two arguments against the internal consistency test. These arguments are inconsistent with each other and with our precedents.

First, the principal dissent claims that the analysis outlined above requires a State taxing based on residence to "recede" to a State taxing based on source. *Post*, at 582. We establish no such rule of priority. To be sure, Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States. See *Tyler Pipe*, *supra*, at 245–246, and n. 13. If it did, Maryland's tax scheme would survive the internal consistency test and would not be inherently discriminatory. Tweak our first hypothetical, *supra*, at 564–565, and assume that all States impose a 1.25% tax on all three categories of income but also allow a credit against income taxes that residents pay to other jurisdictions. In that circumstance, April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax. Specifically, April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State B, because State A would give him a credit against the tax he paid to State B).

But while Maryland could cure the problem with its current system by granting a credit for taxes paid to other States, we do not foreclose the possibility that it could comply with the Commerce Clause in some other way. See Brief for Tax Economists 32; Brief for Knoll & Mason 28–30. Of course, we do not decide the constitutionality of a hypothetical tax scheme that Maryland might adopt because such a scheme is not before us. That Maryland's existing tax unconstitutionally discriminates against interstate commerce is enough to decide this case.

Second, the principal dissent finds a "deep flaw" with the possibility that "Maryland could eliminate the inconsistency [with its tax scheme] by terminating the special nonresident tax—a measure that would not help the Wynnes at all." *Post*, at 596. This second objection refutes the first. By positing that Maryland could remedy the unconstitutionality of its tax scheme by eliminating the special nonresident tax, the principal dissent accepts that Maryland's desire to tax based on residence need not "recede" to another State's desire to tax based on source.

Moreover, the principal dissent's supposed flaw is simply a truism about every case under the dormant Commerce Clause (not to mention the Equal Protection Clause): Whenever government impermissibly treats like cases differently, it can cure the violation by either "leveling up" or "leveling down." Whenever a State impermissibly taxes interstate commerce at a higher rate than intrastate commerce, that infirmity could be cured by lowering the higher rate, raising the lower rate, or a combination of the two. For this reason, we have concluded that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 39–40 (1990). See also *Associated Industries of Mo.* v. *Lohman*, 511 U. S. 641, 656 (1994); *Fulton Corp.*, 516 U. S., at 346–347. If every claim that suffers from this "flaw" cannot succeed, no dormant Commerce Clause or equal protection claim could ever succeed.

G

Justice Scalia would uphold the constitutionality of the Maryland tax scheme because the dormant Commerce Clause, in his words, is "a judicial fraud." *Post*, at 572. That was not the view of the Court in *Gibbons* v. *Ogden*, 9 Wheat., at 209, where Chief Justice Marshall wrote that there was "great force" in the argument that the Commerce Clause by itself limits the power of the States to enact laws regulating

interstate commerce. Since that time, this supposedly fraudulent doctrine has been applied in dozens of our opinions, joined by dozens of Justices. Perhaps for this reason, petitioner in this case, while challenging the interpretation and application of that doctrine by the court below, did not ask us to reconsider the doctrine's validity.

JUSTICE SCALIA does not dispute the fact that state tariffs were among the principal problems that led to the adoption of the Constitution. See *post*, at 573. Nor does he dispute the fact that the Maryland tax scheme is tantamount to a tariff on work done out of State. He argues, however, that the Constitution addresses the problem of state tariffs by prohibiting States from imposing "'Imposts or Duties on Imports or Exports.'" *Ibid.* (quoting Art. I, § 10, cl. 2). But he does not explain why, under his interpretation of the Constitution, the Import-Export Clause would not lead to the same result that we reach under the dormant Commerce Clause. Our cases have noted the close relationship between the two provisions. See, *e. g.*, *State Tonnage Tax Cases*, 12 Wall. 204, 214 (1871).

JUSTICE THOMAS also refuses to accept the dormant Commerce Clause doctrine, and he suggests that the Constitution was ratified on the understanding that it would not prevent a State from doing what Maryland has done here. He notes that some States imposed income taxes at the time of the adoption of the Constitution, and he observes that "[t]here is no indication that those early state income tax schemes provided credits for income taxes paid elsewhere." *Post*, at 579 (dissenting opinion). "It seems highly implausible," he writes, "that those who ratified the Commerce Clause understood it to conflict with the income tax laws of their States and nonetheless adopted it without a word of concern." *Post*, at 579–580. This argument is plainly unsound.

First, because of the difficulty of interstate travel, the number of individuals who earned income out of State in 1787 was surely very small. (We are unaware of records

showing, for example, that it was common in 1787 for workers to commute to Manhattan from New Jersey by rowboat or from Connecticut by stagecoach.)

Second, JUSTICE THOMAS has not shown that the small number of individuals who earned income out of State were taxed twice on that income. A number of founding-era income tax schemes appear to have taxed only the income of residents, not nonresidents. For example, in his report to Congress on direct taxes, Oliver Wolcott, Jr., Secretary of Treasury, describes Delaware's income tax as being imposed only on "the inhabitants of this State," and he makes no mention of the taxation of nonresidents' income. Report to 4th Cong., 2d Sess. (1796), concerning Direct Taxes, in 1 American State Papers, Finance 429 (1832). JUSTICE THOMAS likewise understands that the Massachusetts and Delaware income taxes were imposed only on residents. *Post*, at 579, n. These tax schemes, of course, pass the internal consistency test. Moreover, the difficulty of administering an income tax on nonresidents would have diminished the likelihood of double taxation. See R. Blakey, State Income Taxation 1 (1930).

Third, even if some persons were taxed twice, it is unlikely that this was a matter of such common knowledge that it must have been known by the delegates to the state ratifying conventions who voted to adopt the Constitution.

* * *

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, dissenting.

The Court holds unconstitutional Maryland's refusal to give its residents full credits against income taxes paid to other States. It does this by invoking the negative Com-

merce Clause, a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon interstate commerce. I join the principal dissent, which demonstrates the incompatibility of this decision with our prior negative Commerce Clause cases. *Post*, at 582–593 (opinion of GINSBURG, J.). Incompatibility, however, is not the test for me—though what is incompatible with our cases *a fortiori* fails my test as well, as discussed briefly in Part III below. The principal purpose of my writing separately is to point out how wrong our negative Commerce Clause jurisprudence is in the first place, and how well today's decision illustrates its error.

I

The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause. Unlike the negative Commerce Clause adopted by the judges, the real Commerce Clause adopted by the People merely empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. The Clause says nothing about prohibiting state laws that burden commerce. Much less does it say anything about authorizing judges to set aside state laws *they believe* burden commerce. The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce. See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421–427 (1946). How could congressional consent lift a constitutional prohibition? See *License Cases*, 5 How. 504, 580 (1847) (opinion of Taney, C. J.).

The Court's efforts to justify this judicial economic veto come to naught. The Court claims that the doctrine "has deep roots." *Ante*, at 549. So it does, like many weeds.

But age alone does not make up for brazen invention. And the doctrine in any event is not quite as old as the Court makes it seem. The idea that the Commerce Clause of its own force limits state power "finds no expression" in discussions surrounding the Constitution's ratification. F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 13 (1937). For years after the adoption of the Constitution, States continually made regulations that burdened interstate commerce (like pilotage laws and quarantine laws) without provoking any doubts about their constitutionality. *License Cases*, *supra*, at 580–581. This Court's earliest allusions to a negative Commerce Clause came only in dicta—ambiguous dicta, at that—and were vigorously contested at the time. See, *e. g.*, *id.*, at 581–582. Our first clear *holding* setting aside a state law under the negative Commerce Clause came after the Civil War, more than 80 years after the Constitution's adoption. *Case of the State Freight Tax*, 15 Wall. 232 (1873). Since then, we have tended to revamp the doctrine every couple of decades upon finding existing decisions unworkable or unsatisfactory. See *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 309 (1992). The negative Commerce Clause applied today has little in common with the negative Commerce Clause of the 19th century, except perhaps for incoherence.

The Court adds that "tariffs and other laws that burdened interstate commerce" were among "the chief evils that led to the adoption of the Constitution." *Ante*, at 549. This line of reasoning forgets that interpretation requires heeding more than the Constitution's purposes; it requires heeding the means the Constitution uses to achieve those purposes. The Constitution addresses the evils of local impediments to commerce by prohibiting States from imposing certain especially burdensome taxes—"Imposts or Duties on Imports or Exports" and "Dut[ies] of Tonnage"—without congressional consent. Art. I, § 10, cls. 2–3. It also addresses these evils by giving Congress a commerce power under which *it* may

prohibit other burdensome taxes and laws. As the Constitution's text shows, however, it does not address these evils by empowering the *judiciary* to set aside state taxes and laws that *it* deems too burdensome. By arrogating this power anyway, our negative Commerce Clause cases have disrupted the balance the Constitution strikes between the goal of protecting commerce and competing goals like preserving local autonomy and promoting democratic responsibility.

II

The failings of negative Commerce Clause doctrine go beyond its lack of a constitutional foundation, as today's decision well illustrates.

1. One glaring defect of the negative Commerce Clause is its lack of governing principle. Neither the Constitution nor our legal traditions offer guidance about how to separate improper state interference with commerce from permissible state taxation or regulation of commerce. So we must make the rules up as we go along. That is how we ended up with the bestiary of ad hoc tests and ad hoc exceptions that we apply nowadays, including the substantial nexus test, the fair apportionment test, and the fair relation test, *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977), the interest-on-state-bonds exception, *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 353–356 (2008), and the sales-taxes-on-mail-orders exception, *Quill Corp.*, *supra*, at 314–319.

The internal consistency rule invoked by the Court nicely showcases our ad hocery. Under this rule, a tax violates the Constitution if its hypothetical adoption by all States would interfere with interstate commerce. *Ante*, at 562–563. How did this exercise in counterfactuals find its way into our basic charter? The test, it is true, bears some resemblance to Kant's first formulation of the categorical imperative: "Act only according to that maxim whereby you can at the same time will that it should become a universal law" without contradiction. Grounding for the Metaphysics of Morals 30 (J.

Ellington transl. 3d ed. 1993). It bears no resemblance, however, to anything in the text or structure of the Constitution. Nor can one discern an obligation of internal consistency from our legal traditions, which show that States have been imposing internally inconsistent taxes for quite a while—until recently with our approval. See, *e. g.*, *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964) (upholding internally inconsistent business activities tax); *Hinson* v. *Lott*, 8 Wall. 148 (1869) (upholding internally inconsistent liquor tax). No, the only justification for the test seems to be that this Court disapproves of "'cross-border tax disadvantage[s]'" when created by internally inconsistent taxes, but is willing to tolerate them when created by "the interaction of . . . internally consistent schemes." *Ante*, at 562, 563. "Whatever it is we are expounding in this area, it is not a Constitution." *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 203 (1990) (SCALIA, J., concurring in judgment).

2. Another conspicuous feature of the negative Commerce Clause is its instability. Because no principle anchors our development of this doctrine—and because the line between wise regulation and burdensome interference changes from age to economic age—one can never tell when the Court will make up a new rule or throw away an old one. "Change is almost [the doctrine's] natural state, as it is the natural state of legislation in a constantly changing national economy." *Ibid.*

Today's decision continues in this proud tradition. Consider a few ways in which it contradicts earlier decisions:

- In an earlier case, the Court conceded that a trucking tax "fail[ed] the 'internal consistency' test," but upheld the tax anyway. *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429, 437 (2005). Now, the Court proclaims that an income tax "fails the internal consistency test," and for that reason strikes it down. *Ante*, at 564.

- In an earlier case, the Court concluded that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes" and that residents could "complain about and change the tax through the [State's] political process." *Goldberg* v. *Sweet*, 488 U. S. 252, 266 (1989). Now, the Court concludes that the negative Commerce Clause operates "regardless of whether the plaintiff is a resident . . . or nonresident" and that "the notion that [residents] have a complete remedy at the polls is fanciful." *Ante*, at 554, 555.
- In an earlier case, the Court said that "[t]he difference in effect between a tax measured by gross receipts and one measured by net income . . . is manifest and substantial." *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328 (1918). Now, the Court says that the "formal distinction" between taxes on net and gross income "should [not] matter." *Ante*, at 551.
- In an earlier case, the Court upheld a tax despite its economic similarity to the gross-receipts tax struck down in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948). *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 190–191 (1995). The Court explained that "economic equivalence alone has . . . not been (and should not be) the touchstone of Commerce Clause jurisprudence." *Id.*, at 196–197, n. 7. Now, the Court strikes down a tax in part because of its economic similarity to the gross-receipts tax struck down in *Central Greyhound*. *Ante*, at 550–551. The Court explains that "we must consider 'not the formal language of the tax statute but rather its practical effect.'" *Ante*, at 551.

So much for internal consistency.

3. A final defect of our Synthetic Commerce Clause cases is their incompatibility with the judicial role. The doctrine

does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments. That is a task for legislators, not judges.

Today's enterprise of eliminating double taxation puts this problem prominently on display. The one sure way to eliminate all double taxation is to prescribe uniform national tax rules—for example, to allow taxation of income only where earned. But a program of prescribing a national tax code plainly exceeds the judicial competence. (It may even exceed the legislative competence to come up with a uniform code that accounts for the many political and economic differences among the States.) As an alternative, we could consider whether a State's taxes in practice overlap too much with the taxes of other States. But any such approach would drive us "to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of power." *McCulloch* v. *Maryland*, 4 Wheat. 316, 430 (1819). The Court today chooses a third approach, prohibiting States from imposing internally inconsistent taxes. *Ante*, at 562–563. But that rule avoids double taxation only in the hypothetical world where all States adopt the same internally consistent tax, not in the real world where different States might adopt different internally consistent taxes. For example, if Maryland imposes its income tax on people who live in Maryland regardless of where they work (one internally consistent scheme), while Virginia imposes its income tax on people who work in Virginia regardless of where they live (another internally consistent scheme), Marylanders who work in Virginia *still* face double taxation. *Post*, at 596–597. Then again, it is only fitting that the Imaginary Commerce Clause would lead to imaginary benefits.

III

For reasons of *stare decisis*, I will vote to set aside a tax under the negative Commerce Clause if (but only if) it discriminates on its face against interstate commerce or cannot be distinguished from a tax this Court has already held unconstitutional. *American Trucking Assns.*, 545 U. S., at 439 (SCALIA, J., concurring in judgment). The income tax before us does not discriminate on its face against interstate commerce; a resident pays no less to Maryland when he works in Maryland than when he works elsewhere. Neither is the tax before us indistinguishable from one that we have previously held unconstitutional. To the contrary, as the principal dissent establishes, our prior cases validate this tax.

* * *

Maryland's refusal to give residents full tax credits against income taxes paid to other States has its disadvantages. It threatens double taxation and encourages residents to work in Maryland. But Maryland's law also has its advantages. It allows the State to collect equal revenue from taxpayers with equal incomes, avoids the administrative burdens of verifying tax payments to other States, and ensures that every resident pays the State at least some income tax. Nothing in the Constitution precludes Maryland from deciding that the benefits of its tax scheme are worth the costs.

I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins except as to the first paragraph, dissenting.

"I continue to adhere to my view that the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute." *McBurney* v. *Young*, 569 U. S. 221, 237 (2013) (THOMAS, J., concurring) (internal quotation marks and alteration omitted); accord, *e. g.*, *Camps*

Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U. S. 564, 610–612 (1997) (THOMAS, J., dissenting). For that reason, I would uphold Maryland's tax scheme.

In reaching the contrary conclusion, the Court proves just how far our negative Commerce Clause jurisprudence has departed from the actual Commerce Clause. According to the majority, a state income tax that fails to provide residents with "a full credit against the income taxes that they pay to other States" violates the Commerce Clause. *Ante*, at 545. That news would have come as a surprise to those who penned and ratified the Constitution. As this Court observed some time ago, "Income taxes . . . were imposed by several of the States at or shortly after the adoption of the Federal Constitution." *Shaffer* v. *Carter*, 252 U. S. 37, 51 (1920).* There is no indication that those early state income tax schemes provided credits for income taxes paid elsewhere. Thus, under the majority's reasoning, all of those state laws would have contravened the newly ratified Commerce Clause.

It seems highly implausible that those who ratified the Commerce Clause understood it to conflict with the income tax laws of their States and nonetheless adopted it without

*See, *e. g.*, 1777–1778 Mass. Acts ch. 13, § 2, p. 756 (taxing "the amount of [inhabitants'] income from any profession, faculty, handicraft, trade or employment; and also on the amount of all incomes and profits gained by trading by sea and on shore"); 1781 Pa. Laws ch. 961, § 12, p. 390 (providing that "[a]ll offices and posts of profit, trades, occupations and professions (that of ministers of the gospel of all denominations and schoolmasters only excepted), shall be rated at the discretion of the township, ward or district assessors . . . having due regard of the profits arising from them"); see also Report of Oliver Wolcott, Jr., Secretary of the Treasury, to 4th Cong., 2d Sess., concerning Direct Taxes (1796), in 1 American State Papers, Finance 414, 423 (1832) (describing Connecticut's income tax as assessing, as relevant, "the estimated gains or profits arising from any, and all, lucrative professions, trades, and occupations"); *id.*, at 429 (noting that, in Delaware, "[t]axes have been hitherto collected on the estimated annual income of the inhabitants of this State, without reference to specific objects").

a word of concern. That silence is particularly deafening given the importance of such taxes for raising revenues at the time. See Kinsman, The Income Tax in the Commonwealths of the United States 7, in 4 Publications of the American Economic Assn. (1903) (noting, for example, that "Connecticut from her earliest history had followed the plan of taxing incomes rather than property" and that "[t]he total assessed value of [taxable] incomes in Connecticut in the year 1795 was a little over $300,000" (internal quotation marks omitted)).

In other areas of constitutional analysis, we would have considered these laws to be powerful evidence of the original understanding of the Constitution. We have, for example, relied on the practices of the First Congress to guide our interpretation of provisions defining congressional power. See, *e. g.*, *Golan* v. *Holder*, 565 U. S. 302, 320–321 (2012) (Copyright Clause); *McCulloch* v. *Maryland*, 4 Wheat. 316, 401–402 (1819) (Necessary and Proper Clause). We have likewise treated "actions taken by the First Congress a[s] presumptively consistent with the Bill of Rights," *Town of Greece* v. *Galloway*, 572 U. S. 565, 602 (2014) (ALITO, J., concurring). See, *e. g.*, *id.*, at 575–577 (majority opinion); *Carroll* v. *United States*, 267 U. S. 132, 150–152 (1925). And we have looked to founding-era state laws to guide our understanding of the Constitution's meaning. See, *e. g.*, *District of Columbia* v. *Heller*, 554 U. S. 570, 600–602 (2008) (Second Amendment); *Atwater* v. *Lago Vista*, 532 U. S. 318, 337–340 (2001) (Fourth Amendment); *Roth* v. *United States*, 354 U. S. 476, 482–483 (1957) (First Amendment); *Kilbourn* v. *Thompson*, 103 U. S. 168, 202–203 (1881) (Speech and Debate Clause); see also *Calder* v. *Bull*, 3 Dall. 386, 396–397 (1798) (opinion of Paterson, J.) (*Ex Post Facto* Clause).

Even if one assumed that the negative Commerce Clause existed, I see no reason why it would be subject to a different mode of constitutional interpretation. The majority quibbles that I fail to "sho[w] that the small number of individuals

who earned income out of State were taxed twice on that income," *ante*, at 571, but given the deference we owe to the duly enacted laws of a State—particularly those concerning the paradigmatically sovereign activity of taxation—the burden of proof falls on those who would wield the Federal Constitution to foreclose that exercise of sovereign power.

I am doubtful that the majority's application of one of our many negative Commerce Clause tests is correct under our precedents, see *ante*, at 575–576 (SCALIA, J., dissenting); *post*, at 590–593 (GINSBURG, J., dissenting), but I am certain that the majority's result is incorrect under our Constitution. As was well said in another area of constitutional law: "[I]f there is any inconsistency between [our] tests and the historic practice . . . , the inconsistency calls into question the validity of the test, not the historic practice." *Town of Greece*, *supra*, at 603 (ALITO, J., concurring).

I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE SCALIA and JUSTICE KAGAN join, dissenting.

Today's decision veers from a principle of interstate and international taxation repeatedly acknowledged by this Court: A nation or State "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 462–463 (1995). In accord with this principle, the Court has regularly rejected claims that taxes on a resident's out-of-state income violate the Due Process Clause for lack of a sufficient "connection" to the taxing State. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 306 (1992) (internal quotation marks omitted); see, *e. g.*, *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U. S. 276, 281 (1932). But under dormant Commerce Clause jurisprudence, the Court decides, a State is not really empowered to tax a resident's income from whatever source derived. In taxing personal income, the Court holds, source-based authority, *i. e.*, authority to tax commerce con-

ducted within a State's territory, boxes in the taxing authority of a taxpayer's domicile.

As I see it, nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary State or the source State, must recede simply because both have lawful tax regimes reaching the same income. See *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 277, n. 12 (1978) (finding no "discriminat[ion] against interstate commerce" where alleged taxation disparities were "the consequence of the combined effect" of two otherwise lawful income tax schemes). True, Maryland elected to deny a credit for income taxes paid to other States in computing a resident's county tax liability. It is equally true, however, that the other States that taxed the Wynnes' income elected not to offer them a credit for their Maryland county income taxes. In this situation, the Constitution does not prefer one lawful basis for state taxation of a person's income over the other. Nor does it require one State, in this case Maryland, to limit its residence-based taxation, should the State also choose to exercise, to the full extent, its source-based authority. States often offer their residents credits for income taxes paid to other States, as Maryland does for state income tax purposes. States do so, however, as a matter of tax "policy," *Chickasaw Nation*, 515 U. S., at 463, n. 12 (internal quotation marks omitted), not because the Constitution compels that course.

I

For at least a century, "domicile" has been recognized as a secure ground for taxation of residents' worldwide income. *Lawrence*, 286 U. S., at 279. "Enjoyment of the privileges of residence within [a] state, and the attendant right to invoke the protection of its laws," this Court has explained, "are inseparable from the responsibility for sharing the costs of government." *Ibid.* "A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy

its benefits." *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313 (1937).

More is given to the residents of a State than to those who reside elsewhere, therefore more may be demanded of them. With this Court's approbation, States have long favored their residents over nonresidents in the provision of local services. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 442 (1980) (such favoritism does not violate the Commerce Clause). See also *Martinez* v. *Bynum*, 461 U. S. 321 (1983) (upholding residency requirements for free primary and secondary schooling). The cost of services residents enjoy is substantial. According to the State's Comptroller, for example, in 2012 Maryland and its local governments spent over $11 billion to fund public schools, $4 billion for state health programs, and $1.1 billion for the State's food supplemental program—all programs available to residents only. Brief for Petitioner 20–23. See also Brief for United States as *Amicus Curiae* 18 (Howard County—where the Wynnes lived in 2006—budgeted more than $903 million for education in fiscal year 2014). Excluding nonresidents from these services, this Court has observed, is rational for it is residents "who fund the state treasury and whom the State was created to serve." *Reeves*, 447 U. S., at 442. A taxpayer's home State, then, can hardly be faulted for making support of local government activities an obligation of every resident, regardless of any obligations residents may have to *other* States.[1]

Residents, moreover, possess political means, not shared by outsiders, to ensure that the power to tax their income is

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[1] The Court offers no response to this reason for permitting a State to tax its residents' worldwide income, other than to urge that Commerce Clause doctrine ought not favor corporations over individuals. See *ante*, at 553–554. I scarcely disagree with that proposition (nor does this opinion suggest otherwise). But I fail to see how it answers, or is even relevant to, my observation that affording residents greater benefits entitles a State to require that they bear a greater tax burden.

not abused. "It is not," this Court has observed, "a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg* v. *Sweet*, 488 U. S. 252, 266 (1989). The reason is evident. Residents are "insider[s] who presumably [are] able to complain about and change the tax through the [State's] political process." *Ibid.* Nonresidents, by contrast, are not similarly positioned to "effec[t] legislative change." *Ibid.* As Chief Justice Marshall, developer of the Court's Commerce Clause jurisprudence, reasoned: "In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." *McCulloch* v. *Maryland*, 4 Wheat. 316, 428 (1819). The "people of a State" can thus "res[t] confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against . . . abuse" of the "right of taxing themselves and their property." *Ibid.*[2]

I hardly maintain, as the majority insistently asserts I do, that "the Commerce Clause places no constraint on a State's power to tax" its residents. *Ante*, at 557. See also *ante*, at 555–558. This Court has not shied away from striking down or closely scrutinizing state efforts to tax residents at a higher rate for out-of-state activities than for in-state activities (or to exempt from taxation only in-state activities). See, *e. g.*, *Department of Revenue of Ky.* v. *Davis*, 553 U. S.

[2] The majority dismisses what we said in *Goldberg* v. *Sweet*, 488 U. S. 252 (1989), as "dictum" allegedly "repudiated" by the Court in *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 203 (1994). *Ante*, at 555. That is doubly wrong. In *Goldberg*, we distinguished the tax struck down in *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987) (*ATA I*), noting, in particular, that the tax in *ATA I* fell on "out-of-state[rs]" whereas the tax in *Goldberg* fell on "the insider who presumably is able to complain about and change the tax through the Illinois political process." 488 U. S., at 266. Essential to our holding, this rationale cannot be written off as "dictum." As for *West Lynn Creamery*, far from "repudiat-[ing]" *Goldberg*, the Court *cited Goldberg* and *reaffirmed* its political safeguards rationale, as explained below. See *infra*, at 585.

328, 336 (2008); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564 (1997); *Fulton Corp.* v. *Faulkner*, 516 U. S. 325 (1996); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 272 (1984). See also *ante*, at 554–555, and n. 3, 558 (mistakenly charging that under my analysis "all of these cases would be thrown into doubt"). "[P]olitical processes" are ill equipped to guard against such facially discriminatory taxes because the effect of a tax of this sort is to "mollif[y]" some of the "in-state interests [that] would otherwise lobby against" it. *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 200 (1994). By contrast, the Court has generally upheld "evenhanded tax[es] . . . in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *Ibid.* (citing, *inter alia*, *Goldberg*, 488 U. S., at 266). That justification applies with full force to the "evenhanded tax" challenged here, which taxes residents' income at the same rate whether earned in State or out of State.[3]

These rationales for a State taxing its residents' worldwide income are not diminished by another State's independent interest in "requiring contributions from [nonresidents] who realize current pecuniary benefits under the protection of the [State's] government." *Shaffer* v. *Carter*, 252 U. S. 37, 51 (1920). A taxpayer living in one State and working in another gains protection and benefits from both—and so

[3] Given the pedigree of this rationale, applying it here would hardly "work a sea change in our Commerce Clause jurisprudence." *Ante*, at 558. See *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U. S. 330, 345, n. 7 (2007); *Goldberg*, 488 U. S., at 266; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981); *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 444, n. 18 (1978); *South Carolina Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 187 (1938). Nor would applying the rationale to a net income tax cast "doubt" on the Court's gross receipts precedents, *ante*, at 558, given the Court's longstanding practice of evaluating income and gross receipt taxes differently, see *infra*, at 592–593.

can be called upon to share in the costs of both States' governments.

States deciding whether to tax residents' entire worldwide income must choose between legitimate but competing tax policy objectives. A State might prioritize obtaining equal contributions from those who benefit from the State's protection in roughly similar ways. Or a State might prioritize ensuring that its taxpayers are not subject to double taxation. A State cannot, however, accomplish both objectives at once.

To illustrate, consider the Wynnes. Under the tax scheme in place in 2006, other Howard County residents who earned their income in State but who otherwise had the same tax profile as the Wynnes (*e. g.*, $2.67 million in taxable net income) owed the same amount of taxes *to Maryland* as the Wynnes. See App. to Pet. for Cert. A–56. The scheme thus ensured that all residents with similar access to the State's protection and benefits and similar ability to pay made equal contributions to the State to defray the costs of those benefits. Maryland could not achieve that objective, however, without exposing the Wynnes to a risk of double taxation. Conversely, the Court prioritizes reducing the risk that the Wynnes' income will be taxed twice by two different States. But that choice comes at a cost: The Wynnes enjoyed equal access to the State's services but will have paid $25,000 less to cover the costs of those services than similarly situated neighbors who earned their income entirely within the State. See Pet. for Cert. 15.

States confront the same tradeoff when deciding whether to tax nonresidents' entire in-state income. A State can require all residents and nonresidents who work within the State under its protection to contribute equally to the cost of that protection. Or the State can seek to avoid exposing its workers to any risk of double taxation. But it cannot achieve both objectives.

For at least a century, responsibility for striking the right balance between these two policy objectives has belonged to the States (and Congress), not this Court. Some States have chosen the same balance the Court embraces today. See *ante*, at 560–561. But since almost the dawn of the modern era of state income taxation, other States have taken the same approach as Maryland does now, taxing residents' entire income, wherever earned, while at the same time taxing nonresidents' entire in-state income. And recognizing that "[p]rotection, benefit, and power over [a taxpayer's income] are not confined to either" the State of residence or the State in which income is earned, this Court has long afforded States that flexibility. *Curry* v. *McCanless*, 307 U. S. 357, 368 (1939). This history of States imposing and this Court upholding income tax schemes materially identical to the one the Court confronts here should be the beginning and end of this case.

The modern era of state income taxation dates from a Wisconsin tax enacted in 1911. See 1911 Wis. Laws ch. 658; R. Blakey, State Income Taxation 1 (1930). From close to the start of this modern era, States have taxed residents and nonresidents in ways materially indistinguishable from the way Maryland does now. In 1915, for example, Oklahoma began taxing residents' "entire net income . . . arising or accruing from *all* sources," while at the same time taxing nonresidents' "entire net income from [sources] in th[e] State." 1915 Okla. Sess. Laws ch. 164, § 1, pp. 232–233 (emphasis added). Like Maryland today, Oklahoma provided no credit to either residents or nonresidents for taxes paid elsewhere. See *id.*, ch. 164, § 1 *et seq.*, at 232–237. In 1917, neighboring Missouri adopted a similar scheme: Residents owed taxes on their "entire net income . . . from *all* sources" and nonresidents owed taxes on their "entire net income . . . from all sources within th[e] state." 1917 Mo. Laws § 1(a), pp. 524–525 (emphasis added). Missouri too provided nei-

ther residents nor nonresidents a credit for taxes paid to other jurisdictions. See *id.*, § 1 *et seq.*, at 524–538. Thus, much like Maryland today, these early income tax adopters simultaneously taxed residents on *all* income, wherever earned, and nonresidents on *all* income earned within the State.[4]

Almost immediately, this Court began issuing what became a long series of decisions, repeatedly upholding States' authority to tax both residents' worldwide income and nonresidents' in-state income. *E. g.*, *Maguire* v. *Trefry*, 253 U. S. 12, 17 (1920) (resident income tax); *Shaffer*, 252 U. S., at 52–53, 57 (nonresident income tax). See also *State Tax Comm'n of Utah* v. *Aldrich*, 316 U. S. 174, 178 (1942); *Curry*, 307 U. S., at 368; *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19, 23 (1938); *Graves*, 300 U. S., at 313; *Lawrence*, 286 U. S., at 281. By the end of the 20th century, it was "a well-established principle of interstate and international taxation" that "sovereigns have authority to tax all income of their residents, including income earned outside their borders," *Chickasaw Nation*, 515 U. S., at 462, 463, n. 12, and that sovereigns generally may also tax nonresidents on "income earned within the [sovereign's] jurisdiction," *id.*, at 463, n. 11.

Far from suggesting that States must choose between taxing residents or nonresidents, this Court specifically affirmed that the exact same "income may be taxed [simultaneously]

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[4] Unlike Maryland's county income tax, these early 20th-century income taxes allowed a deduction for taxes paid to other jurisdictions. Compare App. 18 with 1917 Mo. Laws § 5, pp. 526–527, and 1915 Okla. Sess. Laws § 6, p. 234. The Wynnes have not argued and the majority does not suggest, however, that Maryland could fully cure the asserted defects in its tax "scheme" simply by providing a deduction, in lieu of a tax credit. And I doubt that such a deduction would give the Wynnes much satisfaction: Deducting taxes paid to other States from the Wynnes' $2.67 million taxable net income would reduce their Maryland tax burden by a small fraction of the $25,000 tax credit the majority awards them. See Pet. for Cert. 15; App. to Pet. for Cert. A–56.

both by the state where it is earned *and* by the state of the recipient's domicile." *Curry*, 307 U. S., at 368 (emphasis added). See also *Aldrich*, 316 U. S., at 176–178, 181 (rejecting "a rule of immunity from taxation by more than one state," including with respect to income taxation (internal quotation marks omitted)). In *Lawrence*, for example, this Court dealt with a Mississippi tax "scheme" with the same structure Maryland has today: Mississippi taxed residents on all income, wherever earned, and nonresidents on income earned within the State, without providing either set of taxpayers a credit for taxes paid elsewhere. See 286 U. S., at 278–279; Miss. Code Ann. § 5033(a), (b)(9) (1930). *Lawrence* upheld a Mississippi tax on net income earned by one of its residents on the construction of public highways in Tennessee. See 286 U. S., at 279–281. The Court did so fully aware that both Mississippi and Tennessee were effectively imposing "an income tax upon the same occupation." Reply Brief in *Lawrence* v. *State Tax Comm'n of Miss.*, O. T. 1931, No. 580, p. 32. See also *Curry*, 307 U. S., at 363, n. 1, 368 (discussing *Lawrence*).

Likewise, in *Guaranty Trust*, both New York and Virginia had taxed income of a New York trust that had been distributed to a Virginia resident. 305 U. S., at 21–22. The resident sought to block Virginia's tax in order to avoid "double taxation" of the "identical income." *Id.*, at 22. Rejecting that challenge, the Court once again reiterated that "two States" may simultaneously tax the "same income." *Ibid.*

The majority deems these cases irrelevant because they involved challenges brought under the Due Process Clause, not the Commerce Clause. See *ante*, at 556–558. These cases are significant, however, not because the constraints imposed by the two Clauses are identical. Obviously, they are not. See *Quill Corp.*, 504 U. S., at 305. What the sheer volume and consistency of this precedent confirms, rather, is the degree to which this Court has—until now—endorsed the "well-established principle of interstate and international

taxation" that a State may tax its residents' worldwide income, without restriction arising from the source-based taxes imposed by other States and regardless of whether the State also chooses to impose source-based taxes of its own. *Chickasaw Nation*, 515 U. S., at 462.[5]

In any event, it is incorrect that support for this principle is limited to the Court's Due Process Clause cases. In *Shaffer*, for example, this Court rejected *both* a Due Process Clause challenge *and* a dormant Commerce Clause challenge to an income tax "scheme" (the Oklahoma statute described above) with the very features the majority latches onto today: Oklahoma taxed residents on all worldwide income and nonresidents on all in-state income, without providing a credit for taxes paid elsewhere to either residents or nonresidents. 252 U. S., at 52–53 (Due Process Clause challenge); *id.*, at 57 (dormant Commerce Clause challenge). See also *supra*, at 587. The specific tax challenged in *Shaffer*—a tax on a nonresident's in-state income—exposed taxpayers to the same risk of double taxation as the Maryland tax challenged in this case. The majority labors mightily to distinguish *Shaffer*, but it does not dispute the one thing that ought to give it pause: Today's decision overrules *Shaffer*'s dormant Commerce Clause holding. See *ante*, at 558–559. I would not discard our precedents so lightly. Just as the tax in *Shaffer* encountered no constitutional shoals, so Maryland's scheme should survive the Court's inspection.

This Court's decision in *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946), reinforces that conclusion. In *West Publishing*, the Court summarily affirmed a decision of the

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[5] Upholding Maryland's facially neutral tax hardly means, as the majority contends, *ante*, at 556, that the dormant Commerce Clause places no limits on States' authority to tax residents' worldwide income. There are, for example, no well-established principles of interstate and international taxation permitting the kind of facially discriminatory tax the majority "[i]magine[s]" a State enacting. *Ante*, at 557. Nor are the political processes noted above an adequate safeguard against such a tax. See *supra*, at 583–585.

California Supreme Court that denied a dormant Commerce Clause challenge based on the principles today's majority disrespects:

> "[T]here [is no] merit to the contention that [California's tax] discriminates against interstate commerce on the ground that it subjects part of plaintiff's income to double taxation, given the taxability of plaintiff's entire net income in the state of its domicile. Taxation in one state is not an immunization against taxation in other states. Taxation by states in which a corporation carries on business activities is justified by the advantages that attend the pursuit of such activities. Income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit and power over the subject matter are not confined to either state." 27 Cal. 2d 705, 710–711, 166 P. 2d 861, 864 (1946) (citations and internal quotation marks omitted).

In treating the matter summarily, the Court rejected an argument strikingly similar to the one the majority now embraces: that California's tax violated the dormant Commerce Clause because it subjected "interstate commerce . . . to the risk of a double tax burden." Brief for Appellant Opposing Motion to Dismiss or Affirm in *West Publishing Co.* v. *McColgan*, O. T. 1945, No. 1255, pp. 20–21 (quoting *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311 (1938)).

The long history just recounted counsels in favor of respecting States' authority to tax without discount its residents' worldwide income. As Justice Holmes stated over a century ago, in regard to a "mode of taxation . . . of long standing, . . . the fact that the system has been in force for a very long time is of itself a strong reason . . . for leaving any improvement that may be desired to the legislature." *Paddell* v. *City of New York*, 211 U. S. 446, 448 (1908). Only recently, this Court followed that sound advice in resisting a dormant Commerce Clause challenge to a taxing practice

with a pedigree as enduring as the practice in this case. See *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 356–357 (2008) (quoting *Paddell*, 211 U. S., at 448). Surely that advice merits application here, where the challenged tax draws support from both historical practice and numerous decisions of this Court.

The majority rejects Justice Holmes' counsel, observing that most States, over time, have chosen not to exercise plenary authority to tax residents' worldwide income. See *ante*, at 560–561. The Court, however, learns the wrong lesson from the "independent *policy* decision[s]" States have made. *Chickasaw*, 515 U. S., at 463, n. 12 (emphasis added; internal quotation marks omitted). This history demonstrates not that States "doub[t]" their "constitutiona[l]" authority to tax residents' income, wherever earned, as the majority speculates, *ante*, at 561, but that the very political processes the Court disregards as "fanciful," *ante*, at 555, have in fact worked to produce policies the Court ranks as responsible—all the more reason to resist this Court's heavy-handed supervision.

The Court also attempts to deflect the force of this history and precedent by relying on a "trilogy" of decisions it finds "particularly instructive." *Ante*, at 550 (citing *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939); *J. D. Adams Mfg.*, 304 U. S. 307). As the majority acknowledges, however, those three decisions involved gross receipts taxes, not income taxes. *Ante*, at 551–553. True, this Court has recently pointed to similarities between these two forms of taxation. See *ante*, at 552–553. But it is an indulgence in wishful thinking to say that this Court has previously "rejected the argument that the Commerce Clause distinguishes between" these taxes. *Ante*, at 552. For decades—including the years when the majority's "trilogy" was decided—the Court has routinely maintained that "the difference between taxes on net income and taxes on gross receipts from interstate commerce warrants different results" under the Com-

merce Clause. 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 10:1, p. 251 (2003).

In *Shaffer*, for example, the Court rejected the taxpayer's dormant Commerce Clause challenge *because* "the tax [was] imposed not upon gross receipts . . . but only upon the net proceeds." 252 U. S., at 57. Just three years before deciding *J. D. Adams*, the Court emphasized "manifest and substantial" differences between the two types of taxes, calling the burden imposed by a gross receipts tax "direct and immediate," in contrast to the "indirect and incidental" burden imposed by an income tax. *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 558 (1935) (quoting *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328 (1918)). And the *Gwin, White* opinion observed that invalidating the gross receipts tax at issue "left to the states wide scope for taxation of those engaged in interstate commerce, extending to . . . *net income derived from it*." 305 U. S., at 441 (emphasis added).

The majority asserts that this Court "rejected" this distinction in *Moorman Mfg.* See *ante*, at 552. That decision in fact described gross receipts taxes as "more burdensome" than income taxes—twice. 437 U. S., at 280, 281. In particular, *Moorman* upheld a state income tax because an earlier decision had upheld a similar but "inherently more burdensome" gross receipts tax. *Id.*, at 281. To say that the constitutionality of an income tax follows *a fortiori* from the constitutionality of a similar but "more burdensome" gross receipts tax is to *affirm*, not reject, a distinction between the two.

The Justices participating in the Court's "trilogy," in short, would scarcely expect to see the three decisions invoked to invalidate a tax on net income.

II

Abandoning principles and precedent sustaining simultaneous residence- and source-based income taxation, the Court offers two reasons for striking down Maryland's

county income tax: (1) The tax creates a risk of double taxation, *ante*, at 551, 561; and (2) the Court deems Maryland's income tax "scheme" "inherently discriminatory"—by which the Court means, the scheme fails the so-called "internal consistency" test, *ante*, at 564. The first objection is overwhelmed by the history, recounted above, of States imposing and this Court upholding income taxes that carried a similar risk of double taxation. See *supra*, at 586–592. The Court's reliance on the internal consistency test is no more compelling.

This Court has not rigidly required States to maintain internally consistent tax regimes. Before today, for two decades, the Court has not insisted that a tax under review pass the internal consistency test, see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 185 (1995), and has not struck down a state tax for failing the test in nearly 30 years, see *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 284–287 (1987) (*ATA I*); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 247–248 (1987). Moreover, the Court has rejected challenges to taxes that flunk the test. The Oklahoma tax "scheme" upheld under the dormant Commerce Clause in *Shaffer*, for example, is materially indistinguishable from—therefore as internally inconsistent as—Maryland's scheme. 252 U. S., at 57. And more recently, in *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, the Court upheld a "conceded[ly]" internally inconsistent state tax. 545 U. S. 429, 438 (2005) (*ATA II*). The Court did so, satisfied that there was a sufficiently close connection between the tax at issue and the local conduct that triggered the tax. See *ibid.*[6]

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[6] The majority reads *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429 (2005) (*ATA II*), in a way so implausible, it must resort to quoting from an *amicus* brief, rather than from the Court's opinion. According to the majority, this Court did *not* think the challenged tax failed the internal consistency test in *ATA II*, it held only that the challengers had failed to make the necessary "empirical show-

The logic of *ATA II*, counsel for the Wynnes appeared to recognize, see Tr. of Oral Arg. 46–47, would permit a State to impose a head tax—*i. e.*, a flat charge imposed on every resident in the State—even if that tax were part of an internally inconsistent tax scheme. Such a tax would rest on purely local conduct: the taxpayer's residence in the taxing State. And the taxes paid would defray costs closely connected to that local conduct—the services used by the taxpayer while living in the State.

I see no reason why the Constitution requires us to disarm States from using a progressive tax, rather than a flat toll, to cover the costs of local services all residents enjoy. A head tax and a residence-based income tax differ, do they not, only in that the latter is measured by each taxpayer's ability to pay. Like the head tax, however, a residence-based income tax is triggered by the purely local conduct of residing in the State. And also like the head tax, a residence-based income tax covers costs closely connected to that residence: It finances services used by those living in the State. If a head tax qualifies for *ATA II*'s reprieve from internal consistency, then so too must a residence-based income tax.

The majority asserts that because Maryland's tax scheme is internally inconsistent, it "operates as a tariff," making it "'patently unconstitutional.'" *Ante*, at 565. This is a curious claim. The defining characteristic of a tariff is that it

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ing." See *ante*, at 563, n. 7. It is true that the United States made that argument. See Brief for United States as *Amicus Curiae* in *ATA II*, O. T. 2004, No. 03–1230, p. 26. But one searches the U. S. Reports in vain for any indication that the Court adopted it. Which is hardly surprising, for one would scarcely think that a test turning on "*hypothetically*" assessing a tax's "structure," *ante*, at 562 (emphasis added), would require empirical data. What the Court in fact said in *ATA II*, is that the tax's internal inconsistency would be *excused* because any multiple taxation resulting from every State adopting the challenged tax would be caused by interstate firms' choosing to "engag[e] in *local* business in all those States." 545 U. S., at 438.

taxes interstate activity at a higher rate than it taxes the same activity conducted within the State. See *West Lynn Creamery*, 512 U. S., at 193. Maryland's resident income tax does the exact opposite: It taxes the income of its residents at precisely the same rate, whether the income is earned in State or out of State.[7]

There is, moreover, a deep flaw in the Court's chosen test. The Court characterizes internal consistency as a "cure," *ante*, at 561–562, 568–569, but the test is scarcely that, at least for the double taxation the Court believes to justify its intervention. According to the Court, Maryland's tax "scheme" is internally inconsistent because Maryland simultaneously imposes two taxes: the county income tax and the special nonresident tax. See *ante*, at 551, 564–565, and n. 8. But only one of these taxes—the county income tax—actually falls on the Wynnes. Because it is the interaction between these two taxes that renders Maryland's tax scheme internally inconsistent, Maryland could eliminate the inconsistency by terminating the special nonresident tax—a measure that would not help the Wynnes at all.[8] Maryland could, in other words, bring itself into compliance with the test at the heart of the Court's analysis without removing the double tax burden the test is purportedly designed to "cure."

To illustrate this oddity, consider the Court's "simple example" of April (who lives and works in State A) and Bob (who lives in State A, but works in State B). *Ante*, at 564, 568. Both States fail the internal consistency test because they impose (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. According to the Court, these

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[7] The majority faults the dissents for not "disput[ing]" its "economic analysis," but beyond citation to a pair of *amicus* briefs, its opinion offers no analysis to dispute. *Ante*, at 565.

[8] Or Maryland could provide nonresidents a credit for taxes paid to other jurisdictions on Maryland source income. Cf. *ante*, at 568–569.

tax schemes are troubling because "Bob will pay more income tax than April solely because he earns income interstate." *Ante*, at 565.

Each State, however, need not pursue the same approach to make their tax schemes internally consistent.[9] See *ante*, at 568. State A might choose to tax residents' worldwide income only, which it could do by eliminating the third tax (on nonresidents' in-state income). State B might instead choose exclusively to tax income earned within the State by deleting the second tax (on residents' out-of-state income). Each State's tax scheme would then be internally consistent. But the tax burden on April and Bob would remain unchanged: Just as under the original schemes, April would have to pay a 1.25% tax only once, to State A, and Bob would have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income. The Court's "cure," in other words, is no match for the perceived disease.[10]

The Court asserts that this flaw is just a "truism" of every discrimination case, whether brought under the dormant

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[9] I do not "clai[m]" as the Court groundlessly suggests, that the Court's analysis "establish[es] . . . [a] rule of priority" between residence- and source-based taxation. *Ante*, at 568. My objection, rather, is that the Court treats source-based authority as "box[ing] in" a State's discrete authority to tax on the basis of residence. *Supra*, at 582. There is no "inconsisten[cy]" in my analysis, and the majority plainly errs in insisting that there is. *Ante*, at 568.

[10] Attempting to preserve the test's qualification as a "cure," the Court redefines the illness as not just double taxation but double taxation caused by an "inherently discriminat[ory]" tax "scheme." *Ante*, at 562. Relying on such a distinction to justify the test is entirely circular, however, as the Court defines "inherent discrimination" in this case as internal inconsistency. In any event, given the concern that purportedly drives the Court's analysis, it is mystifying why the Court sees "virtue" in striking down only one of the two schemes under which Bob is taxed twice. *Ibid.* Whatever disincentive the original scheme creates for Bob (or the Wynnes) to work in interstate commerce is created just as much by the revised scheme that the Court finds satisfactory.

Commerce Clause or the Equal Protection Clause. *Ante,* at 569. That is simply incorrect. As the Court acknowledges, a government that impermissibly "treats like cases differently" (*i. e.*, discriminates) can ordinarily cure the violation either by "leveling up" or "leveling down." *Ibid.* (internal quotation marks omitted). Consider another April and Bob example. If Bob must pay a 10% tax and April must pay a 5% tax, that discrimination can be eliminated either by requiring both to pay the 10% tax ("leveling up") *or* by requiring both to pay the 5% tax ("leveling down"). True, "leveling up" leaves Bob's tax bill unchanged. "Leveling up" nonetheless benefits Bob because it eliminates the unfairness of being treated differently. And if, as is often true in dormant Commerce Clause cases, April and Bob compete in the same market, then "leveling up" provides the concrete benefit of placing a new burden on Bob's competitors.

The majority's rule does not work this way. As just explained, Maryland can "cure" what the majority deems discrimination without lowering the Wynnes' taxes *or* increasing the tax burden on any of the Wynnes' neighbors—by terminating the special nonresident tax. See *supra,* at 596–597. The State can, in other words, satisfy the majority not by lowering Bob's taxes or by raising April's taxes, but by eliminating the taxes imposed on yet a third taxpayer (say, Cathy). The Court's internal consistency test thus scarcely resembles "ordinary" antidiscrimination law. Whatever virtue the internal consistency test has in other contexts, this shortcoming makes it a poor excuse for jettisoning taxation principles as entrenched as those here.

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This case is, at bottom, about policy choices: Should States prioritize ensuring that all who live or work within the State shoulder their fair share of the costs of government? Or must States prioritize avoidance of double taxation? As I have demonstrated, *supra,* at 596–597 and this page, achiev-

ing even the latter goal is beyond this Court's competence. Resolving the competing tax policy considerations this case implicates is something the Court is even less well equipped to do. For a century, we have recognized that state legislatures and the Congress are constitutionally assigned and institutionally better equipped to balance such issues. I would reverse, so that we may leave that task where it belongs.

Syllabus

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. *v.* SHEEHAN

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

No. 13–1412. Argued March 23, 2015—Decided May 18, 2015

Respondent Sheehan lived in a group home for individuals with mental illness. After Sheehan began acting erratically and threatened to kill her social worker, the City and County of San Francisco (San Francisco) dispatched police officers Reynolds and Holder to help escort Sheehan to a facility for temporary evaluation and treatment. When the officers first entered Sheehan's room, she grabbed a knife and threatened to kill them. They retreated and closed the door. Concerned about what Sheehan might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. Sheehan, knife in hand, again confronted them. After pepper spray proved ineffective, the officers shot Sheehan multiple times. Sheehan later sued petitioner San Francisco for, among other things, violating Title II of the Americans with Disabilities Act of 1990 (ADA) by arresting her without accommodating her disability. See 42 U. S. C. § 12132. She also sued petitioners Reynolds and Holder in their personal capacities under 42 U. S. C. § 1983, claiming that they violated her Fourth Amendment rights. The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, and also that Reynolds and Holder did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco should have accommodated Sheehan. The court also held that Reynolds and Holder are not entitled to qualified immunity because it is clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and has threatened anyone who enters.

Held:

1. The question whether § 12132 "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody," Pet. for Cert. i, is dismissed as improvidently granted. Certiorari was granted on the understanding that San Francisco would argue that Title II of the ADA

does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco merely argues that Sheehan was not "qualified" for an accommodation, § 12132, because she "pose[d] a direct threat to the health or safety of others," which threat could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services," 28 CFR §§ 35.139(a), 35.104. This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, is reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers. Pp. 608–610.

2. Reynolds and Holder are entitled to qualified immunity from liability for the injuries suffered by Sheehan. Public officials are immune from suit under 42 U. S. C. § 1983 unless they have "violated a statutory or constitutional right that was '" 'clearly established'" ' at the time of the challenged conduct," *Plumhoff* v. *Rickard*, 572 U. S. 765, 778, an exacting standard that "gives government officials breathing room to make reasonable but mistaken judgments," *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 743. The officers did not violate the Fourth Amendment when they opened Sheehan's door the first time, and there is no doubt that they could have opened her door the second time without violating her rights had Sheehan not been disabled. Their use of force was also reasonable. The only question therefore is whether they violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempt to accommodate her disability. Because any such Fourth Amendment right, even assuming it exists, was not clearly established, Reynolds and Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted. Pp. 610–617.

Certiorari dismissed in part; 743 F. 3d 1211, reversed in part and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which KAGAN, J., joined, *post*, p. 618. BREYER, J., took no part in the consideration or decision of the case.

Christine Van Aken argued the cause for petitioners. With her on the briefs were *Dennis J. Herrera* and *Peter J. Keith*.

Deputy Solicitor General Gershengorn argued the cause for the United States as *amicus curiae* urging vacatur in part and reversal in part. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorneys General Branda* and *Gupta*, *Elizabeth B. Prelogar*, *Barbara L. Herwig*, *Sharon M. McGowan*, *Dana Kaersvang*, and *Holly A. Thomas*.

Leonard J. Feldman argued the cause for respondent. With him on the brief were *Ben Nisenbaum*, *Jill D. Bowman*, and *Hunter O. Ferguson*.*

JUSTICE ALITO delivered the opinion of the Court.

We granted certiorari to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent. After reviewing the parties' submissions, we dismiss the first question as improvidently granted. We decide the second question and hold that the officers are entitled to qualified immunity because they did not violate any clearly established Fourth Amendment rights.

I

Petitioners are the City and County of San Francisco, California (San Francisco), and two police officers, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Respond-

*Briefs of *amici curiae* urging reversal were filed for the International Municipal Lawyers Association et al. by *Sarah M. Shalf* and *Charles W. Thompson, Jr.*; and for the National League of Cities et al. by *Danny Chou*, *Greta S. Hansen*, *Melissa* R. *Kiniyalocts*, and *Daniel G. Lloyd*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Claudia Center*, *Matthew Coles*, *Steven R. Shapiro*, and *Alan L. Schlosser*; for the American Psychiatric Association et al. by *Aaron M. Panner*, *David W. Ogden*, *Daniel S. Volchok*, and *Ira A. Burnim*; for the National Police Accountability Project by *Julia Sherwin* and *Michael J. Haddad*; for the Policy Council on Law Enforcement and the Mentally Ill by *William Harry Ehlies II* and *Anita S. Earls*; and for Eugene De Boise, Sr., by *John Burton* and *W. Bevis Schock*.

ent is Teresa Sheehan, a woman who suffers from a schizoaffective disorder. Because this case arises in a summary judgment posture, we view the facts in the light most favorable to Sheehan, the nonmoving party. See, *e. g.*, *Plumhoff* v. *Rickard*, 572 U. S. 765, 768–769 (2014).

In August 2008, Sheehan lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the counseling staff in the building, attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. See 743 F. 3d 1211, 1218 (CA9 2014); App. 23–24.

Hodge knocked on Sheehan's door but received no answer. He then used a key to enter her room and found Sheehan on her bed. Initially, she would not respond to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and Sheehan slammed the door shut behind him. See 743 F. 3d, at 1218.

Sheehan, Hodge realized, required "some sort of intervention," App. 96, but he also knew that he would need help. Hodge took steps to clear the building of other people and completed an application to have Sheehan detained for temporary evaluation and treatment. See Cal. Welf. & Inst. Code Ann. §5150 (West 2015 Cum. Supp.) (authorizing temporary detention of someone who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled"). On that application, Hodge checked off boxes indicating that Sheehan was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself. 743 F. 3d, at 1218. He telephoned the police and asked for help to take Sheehan to a secure facility.

Officer Holder responded to police dispatch and headed toward the group home. When she arrived, Holder reviewed the temporary-detention application and spoke with Hodge. Holder then sought assistance from Sergeant Reynolds, a more experienced officer. After Reynolds arrived and was brought up to speed, Hodge spoke with a nurse at the psychiatric emergency services unit at San Francisco General Hospital who said that the hospital would be able to admit Sheehan.

Accompanied by Hodge, the officers went to Sheehan's room, knocked on her door, announced who they were, and told Sheehan that "we want to help you." App. 36. When Sheehan did not answer, the officers used Hodge's key to enter the room. Sheehan reacted violently. She grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of "I am going to kill you. I don't need help. Get out." *Ibid.* See also *id.*, at 284 ("[Q.] Did you tell them I'll kill you if you don't get out of here? A. Yes"). The officers—who did not have their weapons drawn—"retreated and Sheehan closed the door, leaving Sheehan in her room and the officers and Hodge in the hallway." 743 F. 3d, at 1219. The officers called for backup and sent Hodge downstairs to let in reinforcements when they arrived.

The officers were concerned that the door to Sheehan's room was closed. They worried that Sheehan, out of their sight, might gather more weapons—Reynolds had already observed other knives in her room, see App. 228—or even try to flee through the back window, *id.*, at 227. Because Sheehan's room was on the second floor, she likely would have needed a ladder to escape. Fire escapes, however, are common in San Francisco, and the officers did not know whether Sheehan's room had such an escape. (Neither officer asked Hodge about a fire escape, but if they had, it seems he "probably" would have said there was one, *id.*, at 117). With the door closed, all that Reynolds and Holder knew for

sure was that Sheehan was unstable, she had just threatened to kill three people, and she had a weapon.[1]

Reynolds and Holder had to make a decision. They could wait for backup—indeed, they already heard sirens. Or they could quickly reenter the room and try to subdue Sheehan before more time elapsed. Because Reynolds believed that the situation "required [their] immediate attention," *id.*, at 235, the officers chose reentry. In making that decision, they did not pause to consider whether Sheehan's disability should be accommodated. See 743 F. 3d, at 1219. The officers obviously knew that Sheehan was unwell, but in Reynolds' words, that was "a secondary issue" given that they were "faced with a violent woman who had already threatened to kill her social worker" and "two uniformed police officers." App. 235.

The officers ultimately decided that Holder—the larger officer—should push the door open while Reynolds used pepper spray on Sheehan. With pistols drawn, the officers moved in. When Sheehan, knife in hand, saw them, she again yelled for them to leave. She may also have again said that she was going to kill them. Sheehan is "not sure" if she threatened death a second time, *id.*, at 284, but "concedes that it was her intent to resist arrest and to use the knife," 743 F. 3d, at 1220. In any event, Reynolds began pepper-spraying Sheehan in the face, but Sheehan would not

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[1] The officers also may have feared that another person was with Sheehan. Reynolds testified that the officers had not been "able to do a complete assessment of the entire room." App. 38. Sheehan, by contrast, testified during a deposition that the officers "could see . . . that no one else was in the room." *Id.*, at 279. Before the Ninth Circuit, Sheehan conceded that some of her deposition testimony "smacks of irrationality that begs the question whether any of it is credible." Brief for Appellant in No. 11–16401 (CA9), p. 41; see also Reply Brief in No. 11–16401, p. 17 (explaining that "the inherent inconsistencies in her testimony cast suspicion over all of it"). We need not decide whether there is a genuine dispute of fact here because the officers' other, independent concerns make this point immaterial.

drop the knife. When Sheehan was only a few feet away, Holder shot her twice, but she did not collapse. Reynolds then fired multiple shots.[2] After Sheehan finally fell, a third officer (who had just arrived) kicked the knife out of her hand. Sheehan survived.

Some time later, San Francisco prosecuted Sheehan for assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats. The jury acquitted Sheehan of making threats but was unable to reach a verdict on the assault counts, and prosecutors decided not to retry her.

Sheehan then brought suit, alleging, among other things, that San Francisco violated the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. § 12101 *et seq.*, by subduing her in a manner that did not reasonably accommodate her disability. She also sued Reynolds and Holder in their personal capacities under Rev. Stat. § 1979, 42 U. S. C. § 1983, for violating her Fourth Amendment rights. In support of her claims, she offered testimony from a former deputy police chief, Lou Reiter, who contended that Reynolds and Holder fell short of their training by not using practices designed to minimize the risk of violence when dealing with the mentally ill.

The District Court granted summary judgment for petitioners. Relying on *Hainze* v. *Richards*, 207 F. 3d 795 (CA5 2000), the court held that officers making an arrest are not required "to first determine whether their actions would comply with the ADA before protecting themselves and others." App. to Pet. for Cert. 80. The court also held that the officers did not violate the Fourth Amendment. The court wrote that the officers "had no way of knowing whether [Sheehan] might escape through a back window or fire escape, whether she might hurt herself, or whether there

[2] There is a dispute regarding whether Sheehan was on the ground for the last shot. This dispute is not material: "Even if Sheehan was on the ground, she was certainly not subdued." 743 F. 3d 1211, 1230 (CA9 2014).

was anyone else in her room whom she might hurt." *Id.*, at 71. In addition, the court observed that Holder did not begin shooting until it was necessary for her to do so in order "to protect herself" and that "Reynolds used deadly force only after she found that pepper spray was not enough force to contain the situation." *Id.*, at 75, 76–77.

On appeal, the Ninth Circuit vacated in part. Relevant here, the panel held that because the ADA covers public "services, programs, or activities," § 12132, the ADA's accommodation requirement should be read "to encompass 'anything a public entity does,'" 743 F. 3d, at 1232. The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," *ibid.*, but concluded that it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation rather than precipitating a deadly confrontation," *id.*, at 1233.

As to Reynolds and Holder, the panel held that their initial entry into Sheehan's room was lawful and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop Sheehan's advance. Nonetheless, the panel also held that a jury could find that the officers "provoked" Sheehan by needlessly forcing that second confrontation. *Id.*, at 1216, 1229. The panel further found that it was clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *Id.*, at 1229. Dissenting in part, Judge Graber would have held that the officers were entitled to qualified immunity.

San Francisco and the officers petitioned for a writ of certiorari and asked us to review two questions. We granted the petition. 574 U. S. 1021 (2014).

II

Title II of the ADA commands that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. § 12132. The first question on which we granted review asks whether this provision "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that "'Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.'" Brief for Appellees in No. 11–16401 (CA9), p. 36 (quoting *Hainze*, *supra*, at 801; emphasis added); see also Brief for Appellees in No. 11–16401, at 37 (similar).

As San Francisco explained in its reply brief at the certiorari stage, resolving its "question presented" "does not require a fact-intensive 'reasonable accommodation' inquiry," since "the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA." Reply to Brief in Opposition 3.

Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below. In its brief in this Court, San Francisco focuses on the statutory phrase "qualified individual," § 12132, and a regulation declaring that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health

or safety of others," 28 CFR § 35.139(a) (2014). Another regulation defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." § 35.104. Putting these authorities together, San Francisco argues that "a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA," Brief for Petitioners 17. Contending that Sheehan clearly posed a "direct threat," San Francisco concludes that she was therefore not "qualified" for an accommodation.

Though, to be sure, this "qualified" argument does appear in San Francisco's certiorari petition, San Francisco never hinted at it in the Ninth Circuit. The Court does not ordinarily decide questions that were not passed on below. More than that, San Francisco's new argument effectively concedes that the relevant provision of the ADA, 42 U. S. C. § 12132, *may* "requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. This is so because there may be circumstances in which any "significant risk" presented by "an armed, violent, and mentally ill suspect" can be "eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."

The argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested. The relevant provision provides that a public entity may not "exclud[e]" a qualified individual with a disability from "participat[ing] in," and may not "den[y]" that individual the "benefits of[,] the services, programs, or activities of a public entity." § 12132. This language would apply to an arrest if an arrest is an "activity" in which the arrestee "participat[es]" or from which the arrestee may "benefi[t]."

This same provision also commands that "no qualified individual with a disability shall be . . . subjected to discrimination by any [public] entity." *Ibid.* This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes "discrimination." *Ibid.*

Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing and an adversary presentation. But San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that § 12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.

Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II, see, *e. g.*, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 208 (1998), and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees, see Tr. of Oral Arg. 10–12, 22. But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.

Because certiorari jurisdiction exists to clarify the law, its exercise "is not a matter of right, but of judicial discretion." This Court's Rule 10. Exercising that discretion, we dismiss the first question presented as improvidently granted. See, *e. g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 360, n. 1 (2001) (partial dismissal); *Parker* v. *Dugger*, 498 U. S. 308, 323 (1991) (same).

III

The second question presented is whether Reynolds and Holder can be held personally liable for the injuries that

Sheehan suffered. We conclude they are entitled to qualified immunity.[3]

Public officials are immune from suit under 42 U. S. C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff*, 572 U. S., at 778 (internal quotation marks omitted). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," *id.*, at 778–779, meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate," *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 741 (2011). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.' " *Id.*, at 743.

In this case, although we disagree with the Ninth Circuit's ultimate conclusion on the question of qualified immunity, we

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[3] Not satisfied with dismissing question 1, which concerns *San Francisco's* liability, our dissenting colleagues would further punish San Francisco by dismissing question 2 as well. See *post*, at 620 (opinion of SCALIA, J.) (arguing that deciding the second question would "reward" San Francisco and "spar[e it] the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners"). But question 2 concerns the *liability of the individual officers.* Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution. Moreover, when we granted the petition, we determined that both questions independently merited review. Because of the importance of qualified immunity "to society as a whole," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982), the Court often corrects lower courts when they wrongly subject individual officers to liability. See, *e. g., Carroll* v. *Carman*, 574 U. S. 13 (2014) (*per curiam*); *Wood* v. *Moss*, 572 U. S. 774 (2014); *Plumhoff* v. *Rickard*, 572 U. S. 765 (2014); *Stanton* v. *Sims*, 571 U. S. 3 (2013) (*per curiam*); *Reichle* v. *Howards*, 566 U. S. 658 (2012).

agree with its analysis in many respects. For instance, there is no doubt that the officers did not violate any federal right when they opened Sheehan's door the first time. See 743 F. 3d, at 1216, 1223. Reynolds and Holder knocked on the door, announced that they were police officers, and informed Sheehan that they wanted to help her. When Sheehan did not come to the door, they entered her room. This was not unconstitutional. "[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). See also *Kentucky* v. *King*, 563 U. S. 452, 460 (2011).

Nor is there any doubt that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights. For one thing, "because the two entries were part of a single, continuous search or seizure, the officers [were] not required to justify the continuing emergency with respect to the second entry." 743 F. 3d, at 1224 (following *Michigan* v. *Tyler*, 436 U. S. 499, 511 (1978)). In addition, Reynolds and Holder knew that Sheehan had a weapon and had threatened to use it to kill three people. They also knew that delay could make the situation more dangerous. The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298–299 (1967). This is true even when, judged with the benefit of hindsight, the officers may have made "some mistakes." *Heien* v. *North Carolina*, 574 U. S. 54, 61 (2014). The Constitution is not blind to "the fact that police officers are often forced to make split-second judgments." *Plumhoff*, *supra*, at 775.

We also agree with the Ninth Circuit that after the officers opened Sheehan's door the second time, their use of force was reasonable. Reynolds tried to subdue Sheehan with pepper

spray, but Sheehan kept coming at the officers until she was "only a few feet from a cornered Officer Holder." 743 F. 3d, at 1229. At this point, the use of potentially deadly force was justified. See *Scott* v. *Harris*, 550 U. S. 372, 384 (2007). Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds. See *Plumhoff*, *supra*, at 777.

The real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson* v. *Callahan*, 555 U. S. 223, 242 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id.*, at 239. Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not.

To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham* v. *Connor*, 490 U. S. 386 (1989), but *Graham* holds only that the "'objective reasonableness'" test applies to excessive-force claims under the Fourth Amendment. See *id.*, at 388. That is far too general a proposition to control this case. "We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *al-Kidd*, *supra*, at 742 (citation omitted); cf. *Lopez* v. *Smith*, 574 U. S. 1, 6 (2014) (*per curiam*). Qualified immunity is no immunity at all if "clearly established" law can simply be defined as the right to be free from unreasonable searches and seizures.

Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham*, *supra*, at 388–389, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter.

Moving beyond *Graham*, the Ninth Circuit also turned to two of its own cases. But even if "a controlling circuit precedent could constitute clearly established federal law in these circumstances," *Carroll* v. *Carman*, 574 U. S. 13, 17 (2014) (*per curiam*), it does not do so here.

The Ninth Circuit first pointed to *Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue "an emotionally disturbed" person who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id.*, at 1275. The officer there, moreover, "observed Deorle at close proximity for about five to ten minutes before shooting him" in the face. See *id.*, at 1281. Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law breaking, and out of sight.

The Ninth Circuit also leaned on *Alexander* v. *City and County of San Francisco*, 29 F. 3d 1355 (CA9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home "for the primary purpose of arresting him" even though they lacked an arrest warrant. *Id.*, at 1361. Quade, in response, fired a handgun; police officers "shot back, and Quade died from gunshot wounds shortly thereafter." *Id.*, at 1358. The

panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no "exigent circumstances" excusing their entrance. *Id.*, at 1361.

Alexander too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. See 743 F. 3d, at 1235 (opinion concurring in part and dissenting in part) (citing *Billington* v. *Smith*, 292 F. 3d 1177 (CA9 2002)). Under Ninth Circuit law,[4] an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. See *id.*, at 1189–1190. Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot "establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id.*, at 1190. Courts must not judge officers with "the '20/20 vision of hindsight.'" *Ibid.* (quoting *Graham*, *supra*, at 396).

When *Graham*, *Deorle*, and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irratio-

[4] Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere. See *Livermore* v. *Lubelan*, 476 F. 3d 397, 406–407 (CA6 2007); see also, *e. g.*, *Hector* v. *Watt*, 235 F. 3d 154, 160 (CA3 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause"). Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated.

nally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F. 3d, at 1229. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here.* No matter how carefully a reasonable officer read *Graham*, *Deorle*, and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity. See, *e. g.*, *Plumhoff*, 572 U. S., at 779.

Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. According to Reiter, San Francisco trains its officers when dealing with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect" the suspect's "comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication." Brief for Respondent 7. Likewise, San Francisco's policy is "'to use hostage negotiators'" when dealing with "'a suspect [who] resists arrest by barricading himself.'" *Id.*, at 8 (quoting San Francisco Police Department General Order 8.02, § II(B) (Aug. 3, 1994), online at http://www.sf-police.org (as visited May 14, 2015, and available in Clerk of Court's case file)).

Even if an officer acts contrary to her training, however (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless."

Billington, *supra*, at 1189. Cf. *Saucier* v. *Katz*, 533 U. S. 194, 216, n. 6 (2001) (GINSBURG, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting *Roy* v. *Inhabitants of Lewiston*, 42 F. 3d 691, 695 (CA1 1994))). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

Finally, to the extent that a "robust 'consensus of cases of persuasive authority'" could itself clearly establish the federal right respondent alleges, *al-Kidd*, 563 U. S., at 742, no such consensus exists here. If anything, the opposite may be true. See, *e. g.*, *Bates* v. *Chesterfield County*, 216 F. 3d 367, 372 (CA4 2000) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public"); *Sanders* v. *Minneapolis*, 474 F. 3d 523, 527 (CA8 2007) (following *Bates*, *supra*); *Menuel* v. *Atlanta*, 25 F. 3d 990 (CA11 1994) (upholding use of deadly force to try to apprehend a mentally ill man who had a knife and was hiding behind a door).

In sum, we hold that qualified immunity applies because these officers had no "'fair and clear warning' of what the Constitution requires." *al-Kidd*, *supra*, at 746 (KENNEDY, J., concurring). Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness.

* * *

For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE SCALIA, with whom JUSTICE KAGAN joins, concurring in part and dissenting in part.

The first question presented (QP) in the petition for certiorari was "Whether Title II of the Americans with Disabilities Act [(ADA)] requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. The petition assured us (quite accurately), and devoted a section of its argument to the point, that "The Circuits Are In Conflict On This Question." *Id.*, at 18. And petitioners faulted the Ninth Circuit for "holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances," a conclusion that was "in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits." *Ibid.* Petitioners had expressly advocated for the Fifth and Sixth Circuits' position in the Court of Appeals. See Appellees' Answering Brief in No. 11–16401 (CA9), pp. 35–37 ("[T]he ADA does not apply to police officers' responses to violent individuals who happen to be mentally ill, where officers have not yet brought the violent situation under control").

Imagine our surprise, then, when the petitioners' principal brief, reply brief, and oral argument had nary a word to say about that subject. Instead, petitioners bluntly announced in their principal brief that they "do not assert that the actions of individual police officers [in arresting violent and armed disabled persons] are never subject to scrutiny under Title II," and proclaimed that "[t]he only ADA issue here is *what* Title II requires of individual officers who are facing an armed and dangerous suspect." Brief for Petitioners 34 (emphasis added). In other words, the issue is not (as the petition had asserted) *whether* Title II applies to arrests of violent, mentally ill individuals, but rather *how* it applies

under the circumstances of this case, where the plaintiff threatened officers with a weapon. We were thus deprived of the opportunity to consider, and settle, a controverted question of law that has divided the Circuits, and were invited instead to decide an ADA question that has relevance only if we assume the Ninth Circuit correctly resolved the antecedent, unargued question on which we granted certiorari. The Court is correct to dismiss the first QP as improvidently granted.

Why, one might ask, would a petitioner take a position on a Circuit split that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside uninvited? The answer is simple. Petitioners included that issue to induce us to grant certiorari. As the Court rightly observes, there are numerous reasons why we would not have agreed to hear petitioners' first QP if their petition for certiorari presented it in the same form that it was argued on the merits. See *ante*, at 608–610. But it is also true that there was little chance that we would have taken this case to decide only the second, fact-bound QP—that is, whether the individual petitioners are entitled to qualified immunity on respondent's Fourth Amendment claim.

This Court's Rule 10, entitled "Considerations Governing Review on Certiorari," says that certiorari will be granted "only for compelling reasons," which include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. The Rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The second QP implicates, at most, the latter. It is unlikely that we would have granted certiorari on that question alone.

But (and here is what lies beneath the present case) when we do grant certiorari on a question for which there is a

"compelling reason" for our review, we often also grant certiorari on attendant questions that are not independently "certworthy," but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration. In other words, by promising argument on the Circuit conflict that their first question presented, petitioners got us to grant certiorari not only on the first question but also on the second.

I would not reward such bait-and-switch tactics by proceeding to decide the independently "uncertworthy" second question. And make no mistake about it: Today's judgment is a reward. It gives the individual petitioners all that they seek, and spares San Francisco the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners.* I would not encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge that once they find a toehold on this Court's docket, we will consider whatever workaday arguments they choose to present in their merits briefs.

There is no injustice in my vote to dismiss both questions as improvidently granted. To be sure, *ex post*—after the Court has improvidently decided the uncertworthy question—it appears that refusal to reverse the judgment below would have left a wrong unrighted. *Ex ante*, however—before we considered and deliberated upon the second QP but after petitioners' principal brief made clear that they would not address the Circuit conflict presented by the first QP—we had no more assurance that this question was decided incorrectly than we do for the thousands of other uncertworthy questions we refuse to hear each Term. *Many* of them have undoubtedly been decided wrongly, but we are not, and

*San Francisco will still be subject to liability under the ADA if the trial court determines that the facts demanded accommodation. The Court of Appeals vacated the District Court's judgment that the ADA was inapplicable to police arrests of violent and armed disabled persons, and remanded for the accommodation determination.

for well over a century have not been, a court of error correction. The fair course—the just course—is to treat this nownakedly uncertworthy question the way we treat all others: by declining to decide it. In fact, there is in this case an even greater reason to decline: to avoid being snookered, and to deter future snookering.

Because I agree with the Court that "certiorari jurisdiction exists to clarify the *law*," *ante*, at 610 (emphasis added), I would dismiss both questions presented as improvidently granted.

Syllabus

HENDERSON *v.* UNITED STATES

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

No. 13–1487. Argued February 24, 2015—Decided May 18, 2015

After being charged with the felony offense of distributing marijuana, petitioner Tony Henderson was required as a condition of his bail to turn over firearms that he lawfully owned. Henderson ultimately pleaded guilty, and, as a felon, was prohibited under 18 U. S. C. § 922(g) from possessing his (or any other) firearms. Henderson therefore asked the Federal Bureau of Investigation, which had custody of his firearms, to transfer them to his friend. But the agency refused to do so. Henderson then filed a motion in Federal District Court seeking to transfer his firearms, but the court denied the motion on the ground that Henderson's requested transfer would give him constructive possession of the firearms in violation of § 922(g). The Eleventh Circuit affirmed.

Held: A court-ordered transfer of a felon's lawfully owned firearms from Government custody to a third party is not barred by § 922(g) if the court is satisfied that the recipient will not give the felon control over the firearms, so that he could either use them or direct their use. Federal courts have equitable authority to order law enforcement to return property obtained during the course of a criminal proceeding to its rightful owner. Section 922(g), however, bars a court from ordering guns returned to a felon-owner like Henderson, because that would place the owner in violation of the law. And because § 922(g) bans constructive as well as actual possession, it also prevents a court from ordering the transfer of a felon's guns to someone willing to give the felon access to them or to accede to the felon's instructions about their future use.

The Government goes further, arguing that § 922(g) prevents *all* transfers to a third party, no matter how independent of the felon's influence, unless that recipient is a licensed firearms dealer or other third party who will sell the guns on the open market. But that view conflates possession, which § 922(g) prohibits, with an owner's right merely to alienate his property, which it does not. After all, the Government's reading of § 922(g) would prohibit a felon from disposing of his firearms even when he would lack any control over and thus not possess them before, during, or after the disposition. That reading would also extend § 922(g)'s scope far beyond its purpose; preventing a felon like Henderson from disposing of his firearms, even in ways that

guarantee he never uses them again, does nothing to advance the statute's goal of keeping firearms away from felons. Finally, the Government's insistence that a felon cannot select a third-party recipient over whom he exercises no influence fits poorly with its concession that a felon may select a firearms dealer or third party to sell his guns. The Government's reading of § 922(g) is thus overbroad.

Accordingly, a court may approve the transfer of a felon's guns consistently with § 922(g) if, but only if, the recipient will not grant the felon control over those weapons. One way to ensure that result is to order that the guns be turned over to a firearms dealer, himself independent of the felon's control, for subsequent sale on the open market. But that is not the only option; a court, with proper assurances from the recipient, may also grant a felon's request to transfer his guns to a person who expects to maintain custody of them. Either way, once a court is satisfied that the transferee will not allow the felon to exert any influence over the firearms, the court has equitable power to accommodate the felon's transfer request. Pp. 625–631.

555 Fed. Appx. 851, vacated and remanded.

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

Daniel R. Ortiz argued the cause for petitioner. With him on the briefs were *Toby J. Heytens*, *John P. Elwood*, *Mark T. Stancil*, and *David T. Goldberg.*

Ann O'Connell argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *Vijay Shanker.**

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*Briefs of *amici curiae* urging reversal were filed for Commonwealth Second Amendment, Inc., et al. by *David D. Jensen*; for the CRPA Foundation et al. by *C. D. Michel*, *Clinton B. Monfort*, and *Anna M. Barvir*; for Gun Owners of America, Inc., et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, and *John S. Miles*; for the Institute for Justice by *David G. Post* and *Scott Bullock*; for the National Association of Criminal Defense Lawyers by *Stephen P. Halbrook* and *Jonathan D. Hacker*; and for the National Rifle Association of America, Inc., by *James M. Baranowski*.

Sean A. Lev, *Gregory G. Rapawy*, and *Jonathan E. Lowy* filed a brief for the Brady Center to Prevent Gun Violence as *amicus curiae* urging affirmance.

JUSTICE KAGAN delivered the opinion of the Court.

Government agencies sometimes come into possession of firearms lawfully owned by individuals facing serious criminal charges. If convicted, such a person cannot recover his guns because a federal statute, 18 U. S. C. § 922(g), prohibits any felon from possessing firearms. In this case, we consider what § 922(g) allows a court to do when a felon instead seeks the transfer of his guns to either a firearms dealer (for future sale on the open market) or some other third party. We hold that § 922(g) does not bar such a transfer unless it would allow the felon to later control the guns, so that he could either use them or direct their use.

I

The Federal Government charged petitioner Tony Henderson, then a U. S. Border Patrol agent, with the felony offense of distributing marijuana. See 21 U. S. C. §§ 841(a)(1), (b)(1)(D). A Magistrate Judge required that Henderson surrender all his firearms as a condition of his release on bail. Henderson complied, and the Federal Bureau of Investigation (FBI) took custody of the guns. Soon afterward, Henderson pleaded guilty to the distribution charge; as a result of that conviction, § 922(g) prevents him from legally repossessing his firearms.

Following his release from prison, Henderson asked the FBI to transfer the guns to Robert Rosier, a friend who had agreed to purchase them for an unspecified price. The FBI denied the request. In a letter to Henderson, it explained that "the release of the firearms to [Rosier] would place you in violation of [§ 922(g)], as it would amount to constructive possession" of the guns. App. 121.

Henderson then returned to the court that had handled his criminal case to seek release of his firearms. Invoking the court's equitable powers, Henderson asked for an order directing the FBI to transfer the guns either to his wife or to Rosier. The District Court denied the motion, concluding

(as the FBI had) that Henderson could not "transfer the firearms or receive money from their sale" without "constructive[ly] possessi[ng]" them in violation of § 922(g). No. 3:06–cr–211 (MD Fla., Aug. 8, 2012), App. to Pet. for Cert. 5a–6a, 12a. The Court of Appeals for the Eleventh Circuit affirmed on the same ground, reasoning that granting Henderson's motion would amount to giving a felon "constructive possession" of his firearms. 555 Fed. Appx. 851, 853 (2014) (*per curiam*).[1]

We granted certiorari, 574 U. S. 958 (2014), to resolve a circuit split over whether, as the courts below held, § 922(g) categorically prohibits a court from approving a convicted felon's request to transfer his firearms to another person.[2] We now vacate the decision below.

II

A federal court has equitable authority, even after a criminal proceeding has ended, to order a law enforcement agency to turn over property it has obtained during the case to the

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[1] The Court of Appeals added that Henderson's "equitable argument rings hollow" because a convicted felon has "unclean hands to demand return [or transfer] of his firearms." 555 Fed. Appx., at 854. That view is wrong, as all parties now agree. See Brief for Petitioner 35–39; Brief for United States 31, n. 8; Tr. of Oral Arg. 33, 42. The unclean hands doctrine proscribes equitable relief when, but only when, an individual's misconduct has "immediate and necessary relation to the equity that he seeks." *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245 (1933). The doctrine might apply, for example, if a felon requests the return or transfer of property used in furtherance of his offense. See, *e. g.*, *United States* v. *Kaczynski*, 551 F. 3d 1120, 1129–1130 (CA9 2009) (holding that the Unabomber had unclean hands to request the return of bomb-making materials). But Henderson's felony conviction had nothing to do with his firearms, so the unclean hands rule has no role to play here.

[2] Compare 555 Fed. Appx. 851, 853–854 (CA11 2014) (*per curiam*) (case below) (holding that § 922(g) bars any transfer); *United States* v. *Felici*, 208 F. 3d 667, 670 (CA8 2000) (same), with *United States* v. *Zaleski*, 686 F. 3d 90, 92–94 (CA2 2012) (holding that § 922(g) permits some transfers); *United States* v. *Miller*, 588 F. 3d 418, 419–420 (CA7 2009) (same).

rightful owner or his designee. See, *e. g.*, *United States* v. *Martinez*, 241 F. 3d 1329, 1330–1331 (CA11 2001) (citing numerous appellate decisions to that effect); Tr. of Oral Arg. 41 (Solicitor General agreeing). Congress, however, may cabin that power in various ways. As relevant here, § 922(g) makes it unlawful for any person convicted of a felony to "possess in or affecting commerce[ ] any firearm or ammunition." That provision prevents a court from instructing an agency to return guns in its custody to a felon-owner like Henderson, because that would place him in violation of the law. The question here is how § 922(g) affects a court's authority to instead direct the transfer of such firearms to a third party.

Section 922(g) proscribes possession alone, but covers possession in every form. By its terms, § 922(g) does not prohibit a felon from *owning* firearms. Rather, it interferes with a single incident of ownership—one of the proverbial sticks in the bundle of property rights—by preventing the felon from knowingly *possessing* his (or another person's) guns. But that stick is a thick one, encompassing what the criminal law recognizes as "actual" and "constructive" possession alike. 2A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 39.12, p. 55 (6th ed. 2009) (hereinafter O'Malley); see *National Safe Deposit Co.* v. *Stead*, 232 U. S. 58, 67 (1914) (noting that in "legal terminology" the word "possession" is "interchangeably used to describe" both the actual and the constructive kinds). Actual possession exists when a person has direct physical control over a thing. See Black's Law Dictionary 1047 (5th ed. 1979) (hereinafter Black's); 2A O'Malley § 39.12, at 55. Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object. See Black's 1047; 2A O'Malley § 39.12, at 55. Section 922(g) thus prevents a felon not only from holding his firearms himself but also from maintaining control over those guns in the hands of others.

That means, as all parties agree, that § 922(g) prevents a court from ordering the sale or other transfer of a felon's guns to someone willing to give the felon access to them or to accede to the felon's instructions about their future use. See Brief for United States 23; Reply Brief 12. In such a case, the felon would have control over the guns, even while another person kept physical custody. The idea of constructive possession is designed to preclude just that result, "allow[ing] the law to reach beyond puppets to puppeteers." *United States* v. *Al-Rekabi*, 454 F. 3d 1113, 1118 (CA10 2006). A felon cannot evade the strictures of § 922(g) by arranging a sham transfer that leaves him in effective control of his guns. And because that is so, a court may no more approve such a transfer than order the return of the firearms to the felon himself.

The Government argues that § 922(g) prohibits still more—that it bars a felon, except in one circumstance, from transferring his firearms to another person, no matter how independent of the felon's influence. According to the Government, a felon "exercises his right to control" his firearms, and thus violates § 922(g)'s broad ban on possession, merely by "select[ing] the[ir] first recipient," because that choice "determine[s] who [will] (and who [will] not) next have access to the firearms." Brief for United States 24. And that remains so even if a felon never retakes physical custody of the guns and needs a court order to approve and effectuate the proposed transfer. The felon (so says the Government) still exerts enough sway over the guns' disposition to "have constructive possession" of them. *Id.*, at 25. The only time that is not true, the Government claims, is when a felon asks the court to transfer the guns to a licensed dealer or other party who will sell the guns for him on the open market. See *id.*, at 20–22; Tr. of Oral Arg. 18–21. Because the felon then does not control the firearms' final destination, the Government avers, he does not constructively possess them and a court may approve the transfer. See *ibid.*

But the Government's theory wrongly conflates the right to possess a gun with another incident of ownership, which § 922(g) does not affect: the right merely to sell or otherwise dispose of that item. Cf. *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979) (distinguishing between entitlements to possess and sell property). Consider the scenario that the Government claims would violate § 922(g). The felon has nothing to do with his guns before, during, or after the transaction in question, except to nominate their recipient. Prior to the transfer, the guns sit in an evidence vault, under the sole custody of law enforcement officers. Assuming the court approves the proposed recipient, FBI agents handle the firearms' physical conveyance, without the felon's participation. Afterward, the purchaser or other custodian denies the felon any access to or influence over the guns; the recipient alone decides where to store them, when to loan them out, how to use them, and so on. In short, the arrangement serves only to divest the felon of his firearms—and even that much depends on a court's approving the designee's fitness and ordering the transfer to go forward. Such a felon exercises not a possessory interest (whether directly or through another), but instead a naked right of alienation—the capacity to sell or transfer his guns, unaccompanied by any control over them.[3]

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[3] The Government calls our attention to several cases in which courts have found constructive possession of firearms based on evidence that a felon negotiated and arranged a sale of guns while using a third party to make the physical handoff to the buyer. See, *e. g.*, *United States* v. *Nungaray*, 697 F. 3d 1114, 1116–1119 (CA9 2012); *United States* v. *Virciglio*, 441 F. 2d 1295, 1297–1298 (CA5 1971). But the facts in the cited cases bear no similarity to those here. In each, the defendant-felon controlled the guns' movement both before and during the transaction at issue (and even was present at the delivery site). As the Government explains, the felon could "make a gun appear" at the time and place of his choosing and decide what would happen to it once it got there. Tr. of Oral Arg. 27. Indeed, he could have chosen to take the firearms for himself or direct them to

The Government's view of what counts as "possession" would also extend § 922(g)'s scope far beyond its purpose. Congress enacted that ban to keep firearms away from felons like Henderson, for fear that they would use those guns irresponsibly. See *Small* v. *United States*, 544 U. S. 385, 393 (2005). Yet on the Government's construction, § 922(g) would prevent Henderson from disposing of his firearms even in ways that guarantee he never uses them again, solely because he played a part in selecting their transferee. He could not, for example, place those guns in a secure trust for distribution to his children after his death. He could not sell them to someone halfway around the world. He could not even donate them to a law enforcement agency. See Tr. of Oral Arg. 22. Results of that kind would do nothing to advance § 922(g)'s purpose.

Finally, the Government's expansive idea of constructive possession fits poorly with its concession that a felon in Henderson's position may select a firearms dealer or other third party to sell his guns and give him the proceeds. After all, the felon chooses the guns' "first recipient" in that case too, deciding who "next ha[s] access to the firearms." Brief for United States 24; see *supra*, at 627. If (as the Government argues) that is all it takes to exercise control over and thus constructively possess an item, then (contrary to the Government's view) the felon would violate § 922(g) merely by selecting a dealer to sell his guns. To be sure, that person will predictably convey the firearms to someone whom the

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someone under his influence. The felon's management of the sale thus exemplified, and served as evidence of, his broader command over the guns' location and use—the very hallmark of possession. But as just explained, that kind of control is absent when a felon can do no more than nominate an independent recipient for firearms in a federal agency's custody. The decisions the Government invokes thus have no bearing on this case; nor does our decision here, which addresses only § 922(g)'s application to court-supervised transfers of guns, prevent the Government from bringing charges under § 922(g) in cases resembling those cited.

felon does not know and cannot control: That is why the Government, as a practical matter, has no worries about the transfer. See Tr. of Oral Arg. 19–21. But that fact merely demonstrates how the Government's view of § 922(g) errs in its focus in a case like this one. What matters here is *not* whether a felon plays a role in deciding where his firearms should go next: That test would logically prohibit a transfer even when the chosen recipient will later sell the guns to someone else. What matters instead is whether the felon will have the ability to use or direct the use of his firearms after the transfer. That is what gives the felon constructive possession.

Accordingly, a court facing a motion like Henderson's may approve the transfer of guns consistently with § 922(g) if, but only if, that disposition prevents the felon from later exercising control over those weapons, so that he could either use them or tell someone else how to do so. One way to ensure that result, as the Government notes, is to order that the guns be turned over to a firearms dealer, himself independent of the felon's control, for subsequent sale on the open market. See, *e. g.*, *United States* v. *Zaleski*, 686 F. 3d 90, 92–94 (CA2 2012). Indeed, we can see no reason, absent exceptional circumstances, to disapprove a felon's motion for such a sale, whether or not he has picked the vendor. That option, however, is not the only one available under § 922(g). A court may also grant a felon's request to transfer his guns to a person who expects to maintain custody of them, so long as the recipient will not allow the felon to exert any influence over their use. In considering such a motion, the court may properly seek certain assurances: for example, it may ask the proposed transferee to promise to keep the guns away from the felon, and to acknowledge that allowing him to use them would aid and abet a § 922(g) violation. See *id.*, at 94; *United States* v. *Miller*, 588 F. 3d 418, 420 (CA7 2009). Even such a pledge, of course, might fail to provide an adequate safeguard, and a court should then disapprove the transfer.

See, *e. g.*, *State* v. *Fadness*, 363 Mont. 322, 341–342, 268 P. 3d 17, 30 (2012) (upholding a trial court's finding that the assurances given by a felon's parents were not credible). But when a court is satisfied that a felon will not retain control over his guns, § 922(g) does not apply, and the court has equitable power to accommodate the felon's request.

Neither of the courts below assessed Henderson's motion for a transfer of his firearms in accord with these principles. We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

COMMIL USA, LLC *v.* CISCO SYSTEMS, INC.

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

No. 13–896. Argued March 31, 2015—Decided May 26, 2015

Petitioner Commil USA, LLC, holder of a patent for a method of implementing short-range wireless networks, filed suit, claiming that respondent Cisco Systems, Inc., a maker and seller of wireless networking equipment, had directly infringed Commil's patent in its networking equipment and had induced others to infringe the patent by selling the infringing equipment for them to use. After two trials, Cisco was found liable for both direct and induced infringement. With regard to inducement, Cisco had raised the defense that it had a good-faith belief that Commil's patent was invalid, but the District Court found Cisco's supporting evidence inadmissible. The Federal Circuit affirmed the District Court's judgment in part, vacated in part, and remanded, holding, as relevant here, that the trial court erred in excluding Cisco's evidence of its good-faith belief that Commil's patent was invalid.

Held: A defendant's belief regarding patent validity is not a defense to an induced infringement claim. Pp. 638–647.

(a) While this case centers on inducement liability, 35 U. S. C. § 271(b), which attaches only if the defendant knew of the patent and that "the induced acts constitute patent infringement," *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 766, the discussion here also refers to direct infringement, § 271(a), a strict-liability offense in which a defendant's mental state is irrelevant, and contributory infringement, § 271(c), which, like inducement liability, requires knowledge of the patent in suit and knowledge of patent infringement, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 488 (*Aro II*). Pp. 638–639.

(b) In *Global-Tech*, this Court held that "induced infringement . . . requires knowledge that the induced acts constitute patent infringement," 563 U. S., at 766, relying on the reasoning of *Aro II*, a contributory infringement case, because the mental state imposed in each instance is similar. Contrary to the claim of Commil and the Government as *amicus*, it was not only knowledge of the existence of respondent's patent that led the Court to affirm the liability finding in *Global-Tech*, but also the fact that petitioner's actions demonstrated that it knew it would be causing customers to infringe respondent's patent. 563 U. S., at 771. Qualifying or limiting that holding could make a person, or entity, liable for induced or contributory infringement even though he

did not know the acts were infringing. *Global-Tech* requires more, namely proof the defendant knew the acts were infringing. And that opinion was clear in rejecting any lesser mental state as the standard. *Id.*, at 769–770. Pp. 640–642.

(c) Because induced infringement and validity are separate issues and have separate defenses under the Act, belief regarding validity cannot negate § 271(b)'s scienter requirement of "actively induce[d] infringement," *i. e.*, the intent to "bring about the desired result" of infringement, 563 U. S., at 760. When infringement is the issue, the patent's validity is not the question to be confronted. See *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U. S. 83. Otherwise, the long held presumption that a patent is valid, § 282(a), would be undermined, permitting circumvention of the high bar—the clear and convincing standard—that defendants must surmount to rebut the presumption. See *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 102–104. To be sure, if a patent is shown to be invalid, there is no patent to be infringed. But the orderly administration of the patent system requires courts to interpret and implement the statutory framework to determine the procedures and sequences that the parties must follow to prove the act of wrongful inducement and any related issues of patent validity.

There are practical reasons not to create a defense of belief in invalidity for induced infringement. Accused inducers who believe a patent is invalid have other, proper ways to obtain a ruling to that effect, including, *e. g.*, seeking *ex parte* reexamination of the patent by the Patent and Trademark Office, something Cisco did here. Creating such a defense could also have negative consequences, including, *e. g.*, rendering litigation more burdensome for all involved. Pp. 642–646.

(d) District courts have the authority and responsibility to ensure that frivolous cases—brought by companies using patents as a sword to go after defendants for money—are dissuaded, though no issue of frivolity has been raised here. Safeguards—including, *e. g.*, sanctioning attorneys for bringing such suits, see Fed. Rule Civ. Proc. 11—combined with the avenues that accused inducers have to obtain rulings on the validity of patents, militate in favor of maintaining the separation between infringement and validity expressed in the Patent Act. Pp. 646–647.

720 F. 3d 1361, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined as to Parts II–B and III. SCALIA, J., filed a dissenting opinion, in

which ROBERTS, C. J., joined, *post*, p. 647. BREYER, J., took no part in the consideration or decision of the case.

Mark S. Werbner argued the cause for petitioner. With him on the briefs were *Richard A. Sayles*, *Mark D. Strachan*, *Darren P. Nicholson*, *Leslie V. Payne*, *Nathan J. Davis*, and *Miranda Y. Jones*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* urging vacatur and remand. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Thomas Pulham*, and *Thomas W. Krause*.

Seth P. Waxman argued the cause for respondent. With him on the brief were *William F. Lee*, *Mark C. Fleming*, *Felicia H. Ellsworth*, *Jeffrey E. Ostrow*, *Harrison J. Frahn IV*, *Patrick E. King*, and *Henry B. Gutman*.*

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*Briefs of *amici curiae* urging reversal were filed for Abbvie Inc. by *J. Michael Jakes*, *William B. Raich*, and *Jason W. Melvin*; for the Biotechnology Industry Organization by *Mark P. Walters* and *Lawrence D. Graham*; for Gilead Sciences, Inc., by *Jonathan E. Singer* and *Craig E. Countryman*; and for the Pharmaceutical Research and Manufacturers of America by *Carter G. Phillips*, *Jeffrey P. Kushan*, *Ryan C. Morris*, *James M. Spears*, *David E. Korn*, and *Melissa B. Kimmel*.

Briefs of *amici curiae* urging affirmance were filed for Askeladden L. L. C. by *Kevin J. Culligan* and *John P. Hanish*; for the Computer & Communications Industry Association by *Jonathan Band* and *Matthew Levy*; for the Electronic Frontier Foundation by *Vera Ranieri*, *Daniel K. Nazer*, and *Michael Barclay*; for EMC Corp. et al. by *Thomas G. Hungar*, *Matthew D. McGill*, *Paul T. Dacier*, and *Thomas A. Brown*; for the Generic Pharmaceutical Association by *William A. Rakoczy* and *Deanne M. Mazzochi*; for Public Knowledge et al. by *Charles Duan*, *Phillip R. Malone*, and *Krista Cox*; for Sixteen Intellectual Property Law Professors by *Timothy R. Holbrook*, *pro se*, and *Sarah M. Shalf*; and for Saurabh Vishnubhakat by *Mr. Vishnubhakat*, *pro se*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *John T. Johnson*; for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Philip S. Johnson*, and *Kevin H. Rhodes*; and for the MUSC Foundation for Research Development by *Peter J. Corcoran III* and *Samuel F. Baxter*.

JUSTICE KENNEDY delivered the opinion of the Court.†

A patent holder, and the holder's lawful licensees, can recover for monetary injury when their exclusive rights are violated by others' wrongful conduct. One form of patent injury occurs if unauthorized persons or entities copy, use, or otherwise infringe upon the patented invention. Another form of injury to the patent holder or his licensees can occur when the actor induces others to infringe the patent. In the instant case, both forms of injury—direct infringement and wrongful inducement of others to commit infringement—were alleged. After two trials, the defendant was found liable for both types of injury. The dispute now before the Court concerns the inducement aspect of the case.

I

The patent holder who commenced this action is the petitioner here, Commil USA, LLC. The technical details of Commil's patent are not at issue. So it suffices to say, with much oversimplification, that the patent is for a method of implementing short-range wireless networks. Suppose an extensive business headquarters or a resort or a college campus wants a single, central wireless system (sometimes called a Wi-Fi network). In order to cover the large space, the system needs multiple base stations so a user can move around the area and still stay connected. Commil's patent relates to a method of providing faster and more reliable communications between devices and base stations. The particular claims of Commil's patent are discussed in the opinion of the United States Court of Appeals for the Federal Circuit. 720 F. 3d 1361, 1364–1365, 1372 (2013).

Commil brought this action against Cisco Systems, Inc., which makes and sells wireless networking equipment. In 2007, Commil sued Cisco in the United States District Court for the Eastern District of Texas. Cisco is the respondent

†JUSTICE THOMAS joins Parts II–B and III of this opinion.

here. Commil alleged that Cisco had infringed Commil's patent by making and using networking equipment. In addition Commil alleged that Cisco had induced others to infringe the patent by selling the infringing equipment for them to use, in contravention of Commil's exclusive patent rights.

At the first trial, the jury concluded that Commil's patent was valid and that Cisco had directly infringed. The jury awarded Commil $3.7 million in damages. As to induced infringement, the jury found Cisco not liable. Commil filed a motion for a new trial on induced infringement and damages, which the District Court granted because of certain inappropriate comments Cisco's counsel had made during the first trial.

A month before the second trial, Cisco went to the United States Patent and Trademark Office and asked it to reexamine the validity of Commil's patent. The Office granted the request; but, undoubtedly to Cisco's disappointment, it confirmed the validity of Commil's patent. App. 159, 162.

Back in the District Court, the second trial proceeded, limited to the issues of inducement and damages on that issue and direct infringement. As a defense to the claim of inducement, Cisco argued it had a good-faith belief that Commil's patent was invalid. It sought to introduce evidence to support that assertion. The District Court, however, ruled that Cisco's proffered evidence of its good-faith belief in the patent's invalidity was inadmissible. While the District Court's order does not provide the reason for the ruling, it seems the court excluded this evidence on the assumption that belief in invalidity is not a defense to a plaintiff's claim that the defendant induced others to infringe.

At the close of trial, and over Cisco's objection, the District Court instructed the jury that it could find inducement if "Cisco actually intended to cause the acts that constitute . . . direct infringement and that Cisco knew or should have known that its actions would induce actual infringement."

Id., at 21. The jury returned a verdict for Commil on induced infringement and awarded $63.7 million in damages.

After the verdict, but before judgment, this Court issued its decision in *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754 (2011). That case, as will be discussed in more detail, held that, in an action for induced infringement, it is necessary for the plaintiff to show that the alleged inducer knew of the patent in question and knew the induced acts were infringing. *Id.*, at 766. Relying on that case, Cisco again urged that the jury instruction was incorrect because it did not state knowledge as the governing standard for inducement liability. The District Court denied Cisco's motion and entered judgment in Commil's favor.

Cisco appealed to the United States Court of Appeals for the Federal Circuit. The Court of Appeals affirmed in part, vacated in part, and remanded for further proceedings. The court concluded it was error for the District Court to have instructed the jury that Cisco could be liable for induced infringement if it "'knew or should have known'" that its customers infringed. 720 F. 3d, at 1366. The panel held that "induced infringement 'requires knowledge that the induced acts constitute patent infringement.'" *Ibid.* (quoting *Global-Tech*, *supra*, at 766. By stating that Cisco could be found liable if it "'knew or should have known that its actions would induce actual infringement,'" the Court of Appeals explained, the District Court had allowed "the jury to find [Cisco] liable based on mere negligence where knowledge is required." 720 F. 3d, at 1366. That ruling, which requires a new trial on the inducement claim with a corrected instruction on knowledge, is not in question here.

What is at issue is the second holding of the Court of Appeals, addressing Cisco's contention that the trial court committed further error in excluding Cisco's evidence that it had a good-faith belief that Commil's patent was invalid. Beginning with the observation that it is "axiomatic that one cannot infringe an invalid patent," the Court of Appeals rea-

soned that "evidence of an accused inducer's good-faith belief of invalidity may negate the requisite intent for induced infringement." *Id.*, at 1368. The court saw "no principled distinction between a good-faith belief of invalidity and a good-faith belief of non-infringement for the purpose of whether a defendant possessed the specific intent to induce infringement of a patent." *Ibid.*

Judge Newman dissented on that point. In Judge Newman's view a defendant's good-faith belief in a patent's invalidity is not a defense to induced infringement. She reasoned that "whether there is infringement in fact does not depend on the belief of the accused infringer that it might succeed in invalidating the patent." *Id.*, at 1374 (opinion concurring in part and dissenting in part). Both parties filed petitions for rehearing en banc, which were denied. 737 F. 3d 699, 700 (2013). Five judges, however, would have granted rehearing en banc to consider the question whether a good-faith belief in invalidity is a defense to induced infringement. *Ibid.* (Reyna, J., dissenting from denial of rehearing en banc).

This Court granted certiorari to decide that question. 574 U. S. 1045 (2014).

II

Although the precise issue to be addressed concerns a claim of improper inducement to infringe, the discussion to follow refers as well to direct infringement and contributory infringement, so it is instructive at the outset to set forth the statutory provisions pertaining to these three forms of liability. These three relevant provisions are found in § 271 of the Patent Act. 35 U. S. C. § 271.

Subsection (a) governs direct infringement and provides:

> "Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."

Under this form of liability, a defendant's mental state is irrelevant. Direct infringement is a strict-liability offense. *Global-Tech*, 563 U. S., at 761, n. 2.

Subsection (b) governs induced infringement:

> "Whoever actively induces infringement of a patent shall be liable as an infringer."

In contrast to direct infringement, liability for inducing infringement attaches only if the defendant knew of the patent and that "the induced acts constitute patent infringement." *Id.*, at 766. In Commil and the Government's view, not only is knowledge or belief in the patent's validity irrelevant, they further argue the party charged with inducing infringement need not know that the acts it induced would infringe. On this latter point, they are incorrect, as will be explained below.

Subsection (c) deals with contributory infringement:

> "Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 488 (1964) (*Aro II*).

This case asks a question of first impression: whether knowledge of, or belief in, a patent's validity is required for induced infringement under § 271(b).

A

Before turning to the question presented, it is necessary to reaffirm what the Court held in *Global-Tech*. Commil and the Government (which supports Commil in this case) argue that *Global-Tech* should be read as holding that only knowledge of the patent is required for induced infringement. That, as will be explained, would contravene *Global-Tech*'s explicit holding that liability for induced infringement can only attach if the defendant knew of the patent and knew as well that "the induced acts constitute patent infringement." 563 U. S., at 766.

In *Global-Tech*, the plaintiff, SEB, had invented and patented a deep fryer. A few years later, Sunbeam asked Pentalpha to supply deep fryers for Sunbeam to sell. To make the deep fryer, Pentalpha bought an SEB fryer and copied all but the cosmetic features. Pentalpha then sold the fryers to Sunbeam, which in turn sold them to customers. SEB sued Pentalpha for induced infringement, arguing Pentalpha had induced Sunbeam and others to sell the infringing fryers in violation of SEB's patent rights. In defense, Pentalpha argued it did not know the deep fryer it copied was patented and therefore could not be liable for inducing anyone to infringe SEB's patent. The question presented to this Court was "whether a party who 'actively induces infringement of a patent' under 35 U. S. C. § 271(b) must know that the induced acts constitute patent infringement." *Id.*, at 757.

After noting the language of § 271(b) and the case law prior to passage of the Patent Act did not resolve the question, the *Global-Tech* Court turned to *Aro II*, a case about contributory infringement. The *Global-Tech* Court deemed that rules concerning contributory infringement were relevant to induced infringement, because the mental state imposed in each instance is similar. Before the Patent Act, inducing infringement was not a separate theory of indirect liability but was evidence of contributory infringement. 563

U. S., at 761–762. Thus, in many respects, it is proper to find common ground in the two theories of liability.

Aro II concluded that to be liable for contributory infringement, a defendant must know the acts were infringing. 377 U. S., at 488. In *Global-Tech*, the Court said this reasoning was applicable, explaining as follows:

> "Based on this premise, it follows that the same knowledge is needed for induced infringement under § 271(b). As noted, the two provisions have a common origin in the pre-1952 understanding of contributory infringement, and the language of the two provisions creates the same difficult interpretive choice. It would thus be strange to hold that knowledge of the relevant patent is needed under § 271(c) but not under § 271(b).
>
> "Accordingly, we now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement." 563 U. S., at 765–766.

In support of Commil, the Government argues against the clear language of *Global-Tech*. According to the Government, all *Global-Tech* requires is knowledge of the patent: "The Court did not definitively resolve whether Section 271(b) additionally requires knowledge of the infringing nature of the induced acts." Brief for United States as *Amicus Curiae* 9. See also Brief for Petitioner 17. Together, Commil and the Government claim the "factual circumstances" of *Global-Tech* "did not require" the Court to decide whether knowledge of infringement is required for inducement liability. Brief for United States as *Amicus Curiae* 12. See also Brief for Petitioner 23–24. But in the Court's *Global-Tech* decision, its description of the factual circumstances suggests otherwise. The Court concluded there was enough evidence to support a finding that Pentalpha knew "the infringing nature of the sales it encouraged Sunbeam to make." 563 U. S., at 770. It was not only knowledge of the existence of SEB's patent that led the Court to affirm

the liability finding but also the fact that Pentalpha copied "all but the cosmetic features of SEB's fryer," demonstrating Pentalpha knew it would be causing customers to infringe SEB's patent. *Id.*, at 771.

Accepting the Government and Commil's argument would require this Court to depart from its prior holding. See *id.*, at 766. See also *id.*, at 772 (KENNEDY, J., dissenting) ("The Court is correct, in my view, to conclude that . . . to induce infringement a defendant must know the acts constitute patent infringement" (internal quotation marks omitted)). And the *Global-Tech* rationale is sound. Qualifying or limiting its holding, as the Government and Commil seek to do, would lead to the conclusion, both in inducement and contributory infringement cases, that a person, or entity, could be liable even though he did not know the acts were infringing. In other words, even if the defendant reads the patent's claims differently from the plaintiff, and that reading is reasonable, he would still be liable because he knew the acts might infringe. *Global-Tech* requires more. It requires proof the defendant knew the acts were infringing. And the Court's opinion was clear in rejecting any lesser mental state as the standard. *Id.*, at 769–770.

B

The question the Court confronts today concerns whether a defendant's belief regarding patent validity is a defense to a claim of induced infringement. It is not. The scienter element for induced infringement concerns infringement; that is a different issue than validity. Section 271(b) requires that the defendant "actively induce[d] infringement." That language requires intent to "bring about the desired result," which is infringement. *Id.*, at 760. And because infringement and validity are separate issues under the Act, belief regarding validity cannot negate the scienter required under § 271(b).

When infringement is the issue, the validity of the patent is not the question to be confronted. In *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 508 U. S. 83 (1993), the Court explained, "A party seeking a declaratory judgment of invalidity presents a claim independent of the patentee's charge of infringement." *Id.*, at 96. It further held noninfringement and invalidity were "alternative grounds" for dismissing the suit. *Id.*, at 98. And in *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980), the Court explained that an accused infringer "may prevail either by successfully attacking the validity of the patent or by successfully defending the charge of infringement." *Id.*, at 334. These explanations are in accord with the long-accepted truth—perhaps the axiom—that infringement and invalidity are separate matters under patent law. See *Pandrol USA, LP* v. *Airboss R. Prods., Inc.*, 320 F. 3d 1354, 1365 (CA Fed. 2003).

Indeed, the issues of infringement and validity appear in separate parts of the Patent Act. Part III of the Act deals with "Patents and Protection of Patent Rights," including the right to be free from infringement. §§ 251–329. Part II, entitled "Patentability of Inventions and Grants of Patents," defines what constitutes a valid patent. §§ 100–212. Further, noninfringement and invalidity are listed as two separate defenses, see §§ 282(b)(1), (2), and defendants are free to raise either or both of them. See *Cardinal*, *supra*, at 98. Were this Court to interpret § 271(b) as permitting a defense of belief in invalidity, it would conflate the issues of infringement and validity.

Allowing this new defense would also undermine a presumption that is a "common core of thought and truth" reflected in this Court's precedents for a century. *Radio Corp. of America* v. *Radio Engineering Laboratories, Inc.*, 293 U. S. 1, 8 (1934). Under the Patent Act, and the case law before its passage, a patent is "presumed valid." § 282(a); *id.*, at 8. That presumption takes away any need for a plaintiff to prove his patent is valid to bring a claim. But if belief

in invalidity were a defense to induced infringement, the force of that presumption would be lessened to a drastic degree, for a defendant could prevail if he proved he reasonably believed the patent was invalid. That would circumvent the high bar Congress is presumed to have chosen: the clear and convincing standard. See *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 102–104 (2011). Defendants must meet that standard to rebut the presumption of validity. *Ibid.*

To say that an invalid patent cannot be infringed, or that someone cannot be induced to infringe an invalid patent, is in one sense a simple truth, both as a matter of logic and semantics. See *M. Swift & Sons, Inc.* v. *W. H. Coe Mfg. Co.*, 102 F. 2d 391, 396 (CA1 1939). But the questions courts must address when interpreting and implementing the statutory framework require a determination of the procedures and sequences that the parties must follow to prove the act of wrongful inducement and any related issues of patent validity. "Validity and infringement are distinct issues, bearing different burdens, different presumptions, and different evidence." 720 F. 3d, at 1374 (opinion of Newman, J.). To be sure, if at the end of the day, an act that would have been an infringement or an inducement to infringe pertains to a patent that is shown to be invalid, there is no patent to be infringed. But the allocation of the burden to persuade on these questions, and the timing for the presentations of the relevant arguments, are concerns of central relevance to the orderly administration of the patent system.

Invalidity is an affirmative defense that "can preclude enforcement of a patent against otherwise infringing conduct." 6A Chisum on Patents § 19.01, p. 19–5 (2015). An accused infringer can, of course, attempt to prove that the patent in suit is invalid; if the patent is indeed invalid, and shown to be so under proper procedures, there is no liability. See *i4i*, *supra*, at 105–106. That is because invalidity is not a defense to infringement, it is a defense to liability. And be-

cause of that fact, a belief as to invalidity cannot negate the scienter required for induced infringement.

There are also practical reasons not to create a defense based on a good-faith belief in invalidity. First and foremost, accused inducers who believe a patent is invalid have various proper ways to obtain a ruling to that effect. They can file a declaratory judgment action asking a federal court to declare the patent invalid. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 137 (2007). They can seek *inter partes* review at the Patent Trial and Appeal Board and receive a decision as to validity within 12 to 18 months. See § 316. Or they can, as Cisco did here, seek *ex parte* reexamination of the patent by the Patent and Trademark Office. § 302. And, of course, any accused infringer who believes the patent in suit is invalid may raise the affirmative defense of invalidity. § 282(b)(2). If the defendant is successful, he will be immune from liability.

Creating a defense of belief in invalidity, furthermore, would have negative consequences. It can render litigation more burdensome for everyone involved. Every accused inducer would have an incentive to put forth a theory of invalidity and could likely come up with myriad arguments. See Sloan, Think It Is Invalid? A New Defense To Negate Intent for Induced Infringement, 23 Fed. Cir. B. J. 613, 618 (2013). And since "it is often more difficult to determine whether a patent is valid than whether it has been infringed," *Cardinal*, *supra*, at 99, accused inducers would likely find it easier to prevail on a defense regarding the belief of invalidity than noninfringement. In addition the need to respond to the defense will increase discovery costs and multiply the issues the jury must resolve. Indeed, the jury would be put to the difficult task of separating the defendant's belief regarding validity from the actual issue of validity.

As a final note, "[o]ur law is . . . no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her

conduct violated the law." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U. S. 573, 582–583 (2010). Tortious interference with a contract provides an apt example. While the invalidity of a contract is a defense to tortious interference, belief in validity is irrelevant. Restatement (Second) of Torts § 766, Comment *i* (1979). See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 110 (5th ed. 1984). In a similar way, a trespass "can be committed despite the actor's mistaken belief that she has a legal right to enter the property." *Jerman*, *supra*, at 583 (citing Restatement (Second) of Torts § 164, and Comment *e* (1963–1964)). And of course, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U. S. 192, 199 (1991). In the usual case, "I thought it was legal" is no defense. That concept mirrors this Court's holding that belief in invalidity will not negate the scienter required under § 271(b).

III

The Court is well aware that an "industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 396 (2006) (KENNEDY, J., concurring). Some companies may use patents as a sword to go after defendants for money, even when their claims are frivolous. This tactic is often pursued through demand letters, which "may be sent very broadly and without prior investigation, may assert vague claims of infringement, and may be designed to obtain payments that are based more on the costs of defending litigation than on the merit of the patent claims." L. Greisman, Prepared Statement of the Federal Trade Commission on Discussion Draft of Patent Demand Letter Legislation before the Subcommittee on Commerce, Manufacturing, and Trade of the House Committee on Energy and Commerce 2

(2014). This behavior can impose a "harmful tax on innovation." *Ibid.*

No issue of frivolity has been raised by the parties in this case, nor does it arise on the facts presented to this Court. Nonetheless, it is still necessary and proper to stress that district courts have the authority and responsibility to ensure frivolous cases are dissuaded. If frivolous cases are filed in federal court, it is within the power of the court to sanction attorneys for bringing such suits. Fed. Rule Civ. Proc. 11. It is also within the district court's discretion to award attorney's fees to prevailing parties in "exceptional cases." 35 U. S. C. § 285; see also *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 554–555 (2014). These safeguards, combined with the avenues that accused inducers have to obtain rulings on the validity of patents, militate in favor of maintaining the separation expressed throughout the Patent Act between infringement and validity. This dichotomy means that belief in invalidity is no defense to a claim of induced infringement.

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

It is so ordered.

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

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the Court's rejection of the main argument advanced by Commil and the United States, that induced infringement under 35 U. S. C. § 271(b) does not "requir[e] knowledge of the infringing nature of the induced acts." Brief for United States as *Amicus Curiae* 9; see also Brief for Petitioner 15–44. I disagree, however, with the Court's

holding that good-faith belief in a patent's invalidity is not a defense to induced infringement.

Infringing a patent means invading a patentee's exclusive right to practice his claimed invention. *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24, 40 (1923) (quoting 3 W. Robinson, Law of Patents § 937, pp. 122–123 (1890)). Only valid patents confer this right to exclusivity—invalid patents do not. *FTC* v. *Actavis, Inc.*, 570 U. S. 136, 147 (2013). It follows, as night the day, that only valid patents can be infringed. To talk of infringing an invalid patent is to talk nonsense.

Induced infringement, we have said, "requires knowledge that the induced acts constitute patent infringement." *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 766 (2011). Because only valid patents can be infringed, anyone with a good-faith belief in a patent's *in*validity necessarily believes the patent *cannot* be infringed. And it is impossible for anyone who believes that a patent cannot be infringed to induce actions that he *knows* will infringe it. A good-faith belief that a patent is invalid is therefore a defense to induced infringement of that patent.

The Court makes four arguments in support of the contrary position. None seems to me persuasive. First, it notes that the Patent Act treats infringement and validity as distinct issues. *Ante*, at 643. That is true. It is also irrelevant. Saying that infringement cannot exist without a valid patent does not "conflate the issues of infringement and validity," *ibid.*, any more than saying that water cannot exist without oxygen "conflates" water and oxygen. Recognizing that infringement requires validity is entirely consistent with the "long-accepted truth . . . that infringement and invalidity are separate matters under patent law." *Ibid.*

The Court next insists that permitting the defense at issue would undermine the statutory presumption of validity. *Ante*, at 643–644. It would do no such thing. By reason of the statutory presumption of validity, § 282(a), patents can

be held invalid only by "clear and convincing evidence." *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 95 (2011). This presumption is not weakened by treating a good-faith belief in invalidity as a defense to induced infringement. An alleged inducer who succeeds in this defense does not thereby call a patent's validity into question. He merely avoids liability for a third party's infringement of a *valid* patent, in no way undermining that patent's presumed validity.

Next, the Court says that "invalidity is not a defense to infringement, it is a defense to liability." *Ante*, at 644. That is an assertion, not an argument. Again, to infringe a patent is to invade the patentee's right of exclusivity. An invalid patent confers no such right. How is it possible to interfere with rights that do not exist? The Court has no answer.

That brings me to the Court's weakest argument: that there are "practical reasons not to *create* a defense based on a good-faith belief in invalidity." *Ante*, at 645 (emphasis added); see also *ibid.* ("*Creating* a defense of belief in invalidity, furthermore, would have negative consequences" (emphasis added)). Ours is not a common-law court. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938). We do not, or at least should not, *create* defenses to statutory liability—and that is not what this dissent purports to do. Our task is to interpret the Patent Act, and to decide whether *it* makes a good-faith belief in a patent's invalidity a defense to induced infringement. Since, as we said in *Global-Tech*, *supra*, the Act makes knowledge of infringement a requirement for induced-infringement liability; and since there can be no infringement (and hence no knowledge of infringement) of an invalid patent; good-faith belief in invalidity is a defense. I may add, however, that if the desirability of the rule we adopt were a proper consideration, it is by no means clear that the Court's holding, which increases the *in terrorem* power of patent trolls, is preferable. The Court seemingly acknowledges that consequence in Part III of its opinion.

For the foregoing reasons, I respectfully dissent.

Syllabus

KELLOGG BROWN & ROOT SERVICES, INC., ET AL. *v.* UNITED STATES EX REL. CARTER

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

No. 12–1497. Argued January 13, 2015—Decided May 26, 2015

Private parties may file civil *qui tam* actions to enforce the False Claims Act (FCA), which prohibits making "a false or fraudulent claim for payment or approval," 31 U. S. C. § 3729(a)(1), "to . . . the United States," § 3729(b)(2)(A)(i). A *qui tam* action must generally be brought within six years of a violation, § 3731(b), but the Wartime Suspension of Limitations Act (WSLA) suspends "the running of any statute of limitations applicable to any offense" involving fraud against the Federal Government. 18 U. S. C. § 3287. Separately, the FCA's "first-to-file bar" precludes a *qui tam* suit "based on the facts underlying [a] pending action," § 3730(b)(5).

In 2005, respondent worked for one of the petitioners, providing logistical services to the United States military in Iraq. He subsequently filed a *qui tam* complaint (*Carter I*), alleging that petitioners, who are defense contractors and related entities, had fraudulently billed the Government for water purification services that were not performed or not performed properly. In 2010, shortly before trial, the Government informed the parties that an earlier filed *qui tam* suit (*Thorpe*) had similar claims, leading the District Court to dismiss *Carter I* without prejudice under the first-to-file bar. While respondent's appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the court dismissed it under the first-to-file rule because *Carter I*'s appeal was pending. Respondent then dismissed that appeal, and in June 2011, more than six years after the alleged fraud, filed the instant complaint (*Carter III*). The District Court dismissed this complaint with prejudice under the first-to-file rule because of a pending Maryland suit. Further, because the WSLA applies only to criminal charges, the court reasoned, all but one of respondent's civil actions were untimely. Reversing, the Fourth Circuit concluded that the WSLA applied to civil claims and that the first-to-file bar ceases to apply once a related action is dismissed. Since any pending suits had by then been dismissed, the court held, respondent had the right to refile his case. It thus remanded *Carter III* with instructions to dismiss without prejudice.

Syllabus

Held:

1. As shown by the WSLA's text, structure, and history, the Act applies only to criminal offenses, not to civil claims like those in this case. Pp. 656–662.

(a) The 1921 and 1942 versions of the WSLA were enacted to address war-related fraud during, respectively, the First and Second World Wars. Both extended the statute of limitations for fraud offenses "now indictable under any existing statutes." Since only crimes are "indictable," these provisions quite clearly were limited to criminal charges. In 1944, Congress made the WSLA prospectively applicable to future wartime frauds rather than merely applicable to past frauds as earlier versions had been. In doing so, it deleted the phrase "now indictable under any statute," so that the WSLA now applied to "any offense against the laws of the United States." Congress made additional changes in 1948 and codified the WSLA in Title 18 U. S. C. Pp. 656–658.

(b) Section 3287's text supports limiting the WSLA to criminal charges. The term "offense" is most commonly used to refer to crimes, especially given the WSLA's location in Title 18, titled "Crimes and Criminal Procedure," where no provision appears to employ "offense" to denote a civil violation rather than a civil penalty attached to a criminal offense. And when Title 18 was enacted in 1948, its very first provision classified all offenses as crimes. In similar circumstances, this Court has regarded a provision's placement as relevant in determining whether its content is civil or criminal. *Kansas* v. *Hendricks*, 521 U. S. 346, 361. The WSLA's history provides further support for this reading. The term "offenses" in the 1921 and 1942 statutes, the parties agree, applied only to crimes. And it is improbable that the 1944 Act's removal of the phrase "now indictable under any statute" had the effect of sweeping in civil claims, a fundamental change in scope not typically accomplished with so subtle a move. The more plausible explanation is that Congress removed that phrase in order to change the WSLA from a retroactive measure designed to deal exclusively with past fraud into a permanent measure applicable to future fraud as well. If there were any ambiguity in the WSLA's use of the term "offense," that ambiguity should be resolved in favor of a narrower definition. See *Bridges* v. *United States*, 346 U. S. 209, 216. Pp. 658–662.

2. The FCA's first-to-file bar keeps new claims out of court only while related claims are still alive, not in perpetuity. Thus, dismissal with prejudice was not called for in this case. This reading of § 3730(b)(5) is in accordance with the ordinary dictionary meaning of the term "pend-

ing." Contrary to petitioners' reading, the term "pending" cannot be seen as a sort of "short-hand" for first-filed, which is neither a lengthy nor a complex term. Petitioners' reading would also bar even a suit dismissed for a reason having nothing to do with the merits, such as *Thorpe*, which was dismissed for failure to prosecute. Pp. 662–664.

710 F. 3d 171, reversed in part, affirmed in part, and remanded.

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

John P. Elwood argued the cause for petitioners. With him on the briefs were *Craig D. Margolis*, *Jeremy C. Marwell*, and *John M. Faust*.

David S. Stone argued the cause for respondent. With him on the brief were *Robert A. Magnanini*, *Amy Walker Wagner*, *Jason C. Spiro*, *Thomas M. Dunlap*, and *David Ludwig*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Nicole A. Saharsky*, *Michael S. Raab*, and *Jeffrey E. Sandberg*.*

JUSTICE ALITO delivered the opinion of the Court.

Wars have often provided "exceptional opportunities" for fraud on the United States Government. See *United States* v. *Smith*, 342 U. S. 225, 228 (1952). "The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Jonathan S. Franklin*, *Mark Emery*, *Rachel Brand*, and *Melissa B. Kimmel*; for the National Defense Industrial Association et al. by *Douglas W. Baruch*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for Verizon by *Seth P. Waxman* and *Brian M. Boynton*.

Briefs of *amici curiae* urging affirmance were filed for the National Whistleblower Center by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; and for the Taxpayers Against Fraud Education Fund by *Joseph E. B. White*.

War defense contracts." S. Rep. No. 99–345, p. 8 (1986). Predecessors of the Wartime Suspension of Limitations Act were enacted to address similar problems that arose during the First and Second World Wars. See *Smith*, *supra*, at 228–229.

In this case, we must decide two questions regarding those laws: first, whether the Wartime Suspension of Limitations Act applies only to criminal charges or also to civil claims; second, whether the False Claims Act's first-to-file bar keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity.

I

A

The False Claims Act (FCA) imposes liability on any person who "knowingly presents . . . a false or fraudulent claim for payment or approval," 31 U. S. C. § 3729(a)(1)(A), "to an officer, employee, or agent of the United States," § 3729(b)(2)(A)(i). The FCA may be enforced not just through litigation brought by the Government itself, but also through civil *qui tam* actions that are filed by private parties, called relators, "in the name of the Government." § 3730(b).

In a *qui tam* suit under the FCA, the relator files a complaint under seal and serves the United States with a copy of the complaint and a disclosure of all material evidence. § 3730(b)(2). After reviewing these materials, the United States may "proceed with the action, in which case the action shall be conducted by the Government," or it may "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." § 3730(b)(4). Regardless of the option that the United States selects, it retains the right at any time to dismiss the action entirely, § 3730(c)(2)(A), or to settle the case, § 3730(c)(2)(B).

The FCA imposes two restrictions on *qui tam* suits that are relevant here. One, the "first-to-file" bar, precludes a *qui tam* suit "based on the facts underlying [a] pending action." § 3730(b)(5). The other, the FCA's statute of limitations provision, states that a *qui tam* action must be brought within six years of a violation or within three years of the date by which the United States should have known about a violation. In no circumstances, however, may a suit be brought more than 10 years after the date of a violation. § 3731(b).

B

The Wartime Suspension of Limitations Act (WSLA) suspends the statute of limitations for "any offense" involving fraud against the Federal Government. 18 U. S. C. § 3287. Before 2008, this provision was activated only "[w]hen the United States [was] at war." *Ibid.* (2006 ed.). In 2008, however, this provision was made to apply as well whenever Congress has enacted "a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U. S. C. 1544(b))." *Ibid.* (2012 ed.).

II

Petitioners are defense contractors and related entities that provided logistical services to the United States military during the armed conflict in Iraq. From January to April 2005, respondent worked in Iraq for one of the petitioners as a water purification operator. He subsequently filed a *qui tam* complaint against petitioners (*Carter I*), alleging that they had fraudulently billed the Government for water purification services that were not performed or not performed properly. The Government declined to intervene.

In 2010, shortly before trial, the Government informed the parties about an earlier filed *qui tam* lawsuit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05–cv–08924 (CD Cal., filed Dec. 23, 2005), that arguably contained similar claims.

This initiated a remarkable sequence of dismissals and filings.

The District Court held that respondent's suit was related to *Thorpe* and thus dismissed his case without prejudice under the first-to-file bar. Respondent appealed, and while his appeal was pending, *Thorpe* was dismissed for failure to prosecute. Respondent quickly filed a new complaint (*Carter II*), but the District Court dismissed this second complaint under the first-to-file rule because respondent's own earlier case was still pending on appeal. Respondent then voluntarily dismissed this appeal, and in June 2011, more than six years after the alleged fraud, he filed yet another complaint (*Carter III*), and it is this complaint that is now at issue.

Petitioners sought dismissal of this third complaint under the first-to-file rule, pointing to two allegedly related cases, one in Maryland and one in Texas, that had been filed in the interim between the filing of *Carter I* and *Carter III*. This time, the court dismissed respondent's complaint with prejudice. The court held that the latest complaint was barred under the first-to-file rule because the Maryland suit was already pending when that complaint was filed. The court also ruled that the WSLA applies only to criminal charges and thus did not suspend the time for filing respondent's civil claims. As a result, the court concluded, all but one of those claims were untimely because they were filed more than six years after the alleged wrongdoing.

The Fourth Circuit reversed, rejecting the District Court's analysis of both the WSLA and first-to-file issues. *United States ex rel. Carter* v. *Halliburton Co.*, 710 F. 3d 171 (2013). Concluding that the WSLA applies to civil claims based on fraud committed during the conflict in Iraq,[1] the Court of

[1] The Court of Appeals held that the Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1498, note following 50 U. S. C. § 1541, p. 312, was sufficient to satisfy the "at war" requirement in the pre-2008 version of the WSLA. The Court of Appeals consequently

Appeals held that respondent's claims had been filed on time. The Court of Appeals also held that the first-to-file bar ceases to apply once a related action is dismissed. Since the Maryland and Texas cases had been dismissed by the time of the Fourth Circuit's decision, the court held that respondent had the right to refile his case. The Court of Appeals thus remanded *Carter III* with instructions to dismiss without prejudice.

After this was done, respondent filed *Carter IV*, but the District Court dismissed *Carter IV* on the ground that the petition for a writ of certiorari in *Carter III* (the case now before us) was still pending.

We granted that petition, 573 U. S. 957 (2014), and we now reverse in part and affirm in part.

III

The text, structure, and history of the WSLA show that the Act applies only to criminal offenses.

A

The WSLA's roots extend back to the time after the end of World War I. Concerned about war-related frauds, Congress in 1921 enacted a statute that extended the statute of limitations for such offenses. The new law provided as follows: "[I]n offenses involving the defrauding or attempts to defraud the United States or any agency thereof . . . and *now indictable under any existing statutes*, the period of limitation shall be six years." Act of Nov. 17, 1921, ch. 124, 42 Stat. 220 (emphasis added). Since only crimes are "indictable," this provision quite clearly was limited to the filing of criminal charges.

In 1942, after the United States entered World War II, Congress enacted a similar suspension statute. This law, like its

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found it unnecessary to decide whether the pre- or post-2008 version of the WSLA governed respondent's claims.

predecessor, applied to fraud "offenses . . . now indictable under any existing statutes," but this time the law suspended "any" "existing statute of limitations" until the fixed date of June 30, 1945. Act of Aug. 24, 1942, ch. 555, 56 Stat. 747–748.

As that date approached, Congress decided to adopt a suspension statute which would remain in force for the duration of the war. Congress amended the 1942 WSLA in three important ways. First, Congress deleted the phrase "now indictable under any statute," so that the WSLA was made to apply simply to "any offense against the laws of the United States." 58 Stat. 667. Second, although previous versions of the WSLA were of definite duration, Congress now suspended the limitations period for the open-ended timeframe of "three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." *Ibid.* Third, Congress expanded the statute's coverage beyond offenses "involving defrauding or attempts to defraud the United States" to include other offenses pertaining to Government contracts and the handling and disposal of Government property. *Ibid.*, and § 28, 58 Stat. 781.

Congress made more changes in 1948. From then until 2008, the WSLA's relevant language was as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." Act of June 25, 1948, § 3287, 62 Stat. 828.

In addition, Congress codified the WSLA in Title 18 of the United States Code, titled "Crimes and Criminal Procedure."

Finally, in 2008, Congress once again amended the WSLA, this time in two relevant ways. First, as noted, Congress

changed the Act's triggering event, providing that tolling is available not only "[w]hen the United States is at war," but also when Congress has enacted a specific authorization for the use of military force. Second, Congress extended the suspension period from three to five years. § 855, 122 Stat. 4545.[2]

B

With this background in mind, we turn to the question whether the WSLA applies to civil claims as well as criminal charges. We hold that the Act applies only to the latter.

We begin with the WSLA's text. The WSLA suspends "the running of any statute of limitations applicable to any *offense* . . . involving fraud or attempted fraud against the United States or any agency thereof." 18 U. S. C. § 3287 (emphasis added). The term "offense" is most commonly used to refer to crimes. At the time of both the 1948 and 2008 amendments to the Act, the primary definition of "offense" in Black's Law Dictionary referred to crime. Black's Law Dictionary 1110 (8th ed. 2004) (Black's) ("A violation of the law; a crime, often a minor one. See CRIME"); *id.*, at 1232 (4th ed. 1951) ("A crime or misdemeanor; a breach of the criminal laws"); *id.*, at 1282 (3d ed. 1933) (same). The 1942 edition of Webster's similarly states that "offense" "has no technical legal meaning; but it is sometimes used specifically for an indictable crime . . . and sometimes for a misdemeanor or wrong punishable only by fine or penalty." Webster's New International Dictionary 1690 (2d ed.). See also Webster's Third New International Dictionary 1566 (1976) (Webster's Third) ("an infraction of law: CRIME, MISDEMEANOR"); American Heritage Dictionary 1255 (3d ed. 1992) ("A transgression of law; a crime").

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[2] The claims giving rise to the present suit originated in 2005, but respondent filed the operative complaint in 2011. Resolution of the questions before us in this case does not require us to decide which of these two versions of the WSLA applies to respondent's claims.

It is true that the term "offense" is sometimes used more broadly. For instance, the 1948 edition of Ballentine's Law Dictionary cautions: "The words 'crime' and 'offense' are not necessarily synonymous. All crimes are offenses, but some offenses are not crimes." Ballentine's Law Dictionary 900.

But while the term "offense" is sometimes used in this way, that is not how the word is used in Title 18. Although the term appears hundreds of times in Title 18, neither respondent nor the Solicitor General, appearing as an *amicus* in support of respondent, has been able to find a single provision of that title in which "offense" is employed to denote a civil violation. The Solicitor General cites eight provisions,[3] but not one actually labels a civil wrong as an "offense." Instead, they all simply attach civil penalties to criminal offenses—as the Deputy Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 28–29.

Not only is this pattern of usage telling, but when Title 18 was enacted in 1948, the very first provision, what was then 18 U. S. C. § 1, classified all offenses as crimes. That provision read in pertinent part as follows:

> "§ 1. Offenses classified.
>
> "Notwithstanding any Act of Congress to the contrary:
>
> "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> "(2) Any other offense is a misdemeanor." 62 Stat. 684 (repealed Oct. 12, 1984).

The Solicitor General correctly points out that regulatory provisions outside Title 18 sometimes use the term "offense" to describe a civil violation, see Brief for United States as *Amicus Curiae* 10 (United States Brief), but it is significant that Congress chose to place the WSLA in Title 18. Although we have cautioned against "plac[ing] too much significance on the location of a statute in the United States

[3] 18 U. S. C. §§ 38, 248, 670, 1033(a), 1964, 2292(a), 2339B, 2339C.

Code," *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 376 (2004), we have in similar circumstances regarded the placement of a provision as relevant in determining whether its content is civil or criminal in nature, see *Kansas* v. *Hendricks*, 521 U. S. 346, 361 (1997). It is also revealing that Congress has used clearer and more specific language when it has wanted to toll the statutes of limitations for civil suits as well as crimes. Only two months after enacting the WSLA, Congress passed a tolling statute for "violations of the antitrust laws . . . now indictable *or subject to civil proceedings*." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added). Congress obviously could have included a similar "civil proceedings" clause in the WSLA, but it did not do so.

The WSLA's history provides what is perhaps the strongest support for the conclusion that it applies only to criminal charges. The parties do not dispute that the term "offenses" in the 1921 and 1942 suspension statutes applied only to crimes, Brief for Petitioners 23; Brief for Respondent 24–25, and after 1942, the WSLA continued to use that same term. The retention of the same term in the later laws suggests that no fundamental alteration was intended.

Respondent and the Government latch onto the 1944 Act's removal of the phrase "now indictable under any statute" and argue that this deletion had the effect of sweeping in civil claims, but this argument is most improbable. Simply deleting the phrase "now indictable under the statute," while leaving the operative term "offense" unchanged would have been an obscure way of substantially expanding the WSLA's reach. Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move. Converting the WSLA from a provision that suspended the statute of limitations for criminal prosecutions into one that also suspended the time for commencing a civil action would have been a big step. If Congress had meant to make such a change, we would expect it to have used language that made this important modification clear to litigants and courts.

Respondent's and the Government's interpretation of the significance of the deletion of the phrase "now indictable" ignores a more plausible explanation, namely, Congress' decision to make the WSLA applicable, not just to offenses committed in the past during or in the aftermath of particular wars, but also to future offenses committed during future wars. When the phrase "now indictable" first appeared in the 1921 Act, it meant that the statute of limitations was suspended for only those crimes that had already been committed when the Act took effect. This made sense because the 1921 Act was a temporary measure enacted to deal with problems resulting from the First World War. The 1942 Act simply "readopt[ed] the [same] World War I policy" to deal with claims during World War II. *Bridges* v. *United States*, 346 U. S. 209, 219 (1953).

The 1944 amendments, however, changed the WSLA from a retroactive measure designed to deal exclusively with past fraud into a measure applicable to future fraud as well. In order to complete this transformation, it was necessary to remove the phrase "now indictable," which, as noted, limited the applicability of the suspension to offenses committed in the past. Thus, the removal of the "now indictable" provision was more plausibly driven by Congress' intent to apply the WSLA prospectively, not by any desire to expand the WSLA's reach to civil suits. For all these reasons, we think it clear that the term "offense" in the WSLA applies solely to crimes.

But even if there were some ambiguity in the WSLA's use of that term, our cases instruct us to resolve that ambiguity in favor of the narrower definition. We have said that the WSLA should be "narrowly construed" and "'interpreted in favor of repose.'" *Id.*, at 216 (quoting *United States* v. *Scharton*, 285 U. S. 518, 521–522 (1932)). Applying that principle here means that the term "offense" must be construed to refer only to crimes. Because this case involves civil claims, the WSLA does not suspend the applicable stat-

ute of limitations under either the 1948 or the 2008 version of the statute.[4]

IV

Petitioners acknowledge that respondent has raised other arguments that, if successful, could render at least one claim timely on remand. We therefore consider whether respondent's claims must be dismissed with prejudice under the first-to-file rule. We conclude that dismissal with prejudice was not called for.

The first-to-file bar provides that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action." 31 U. S. C. § 3730(b)(5) (emphasis added). The term "pending" means "[r]emaining undecided; awaiting decision." Black's 1314 (10th ed. 2014). See also Webster's Third 1669 (1976) (defining "pending" to mean "not yet decided: in continuance: in suspense"). If the reference to a "pending" action in the FCA is interpreted in this way, an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed. We see no reason not to interpret the term "pending" in the FCA in accordance with its ordinary meaning.

Petitioners argue that Congress used the term "pending" in a very different—and very peculiar—way. In the FCA, according to petitioners, the term "pending" "is 'used as a short-hand for the first-filed action.' " Brief for Petitioners 44. Thus, as petitioners see things, the first-filed action remains "pending" even after it has been dismissed, and it forever bars any subsequent related action.

This interpretation does not comport with any known usage of the term "pending." Under this interpretation,

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[4] This holding obviates any need to determine which version of the WSLA applies or whether the term "war" in the 1948 Act applies only when Congress has formally declared war.

Marbury v. *Madison*, 1 Cranch 137 (1803), is still "pending." So is the trial of Socrates.

Petitioners say that Congress used the term "pending" in the FCA as a sort of "short-hand," but a shorthand phrase or term is employed to provide a succinct way of expressing a concept that would otherwise require a lengthy or complex formulation. Here, we are told that "pending" is shorthand for "first-filed," a term that is neither lengthy nor complex. And if Congress had wanted to adopt the rule that petitioners favor, the task could have been accomplished in other equally economical ways—for example, by replacing "pending," with "earlier" or "prior."

Not only does petitioners' argument push the term "pending" far beyond the breaking point, but it would lead to strange results that Congress is unlikely to have wanted. Under petitioners' interpretation, a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits. Here, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule, was dismissed for failure to prosecute. Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?

Petitioners contend that interpreting "pending" to mean pending would produce practical problems, and there is some merit to their arguments. In particular, as petitioners note, if the first-to-file bar is lifted once the first-filed action ends, defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims. See Brief for Petitioners 56–57. Respondent and the United States argue that the doctrine of claim preclusion may protect defendants if the first-filed action is decided on the merits, *id.*, at 60–61; United States Brief 30, but that issue is not before us in this

case. The FCA's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine. We hold that a *qui tam* suit under the FCA ceases to be "pending" once it is dismissed. We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

WELLNESS INTERNATIONAL NETWORK, LTD., ET AL. *v.* SHARIF

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

No. 13–935. Argued January 14, 2015—Decided May 26, 2015

Respondent Richard Sharif tried to discharge a debt he owed petitioners, Wellness International Network, Ltd., and its owners (collectively, Wellness), in his Chapter 7 bankruptcy. Wellness sought, *inter alia*, a declaratory judgment from the Bankruptcy Court, contending that a trust Sharif claimed to administer was in fact Sharif's alter ego, and that its assets were his personal property and part of his bankruptcy estate. The Bankruptcy Court eventually entered a default judgment against Sharif. While Sharif's appeal was pending in District Court, but before briefing concluded, this Court held that Article III forbids bankruptcy courts to enter a final judgment on claims that seek only to "augment" the bankruptcy estate and would otherwise "exis[t] without regard to any bankruptcy proceeding." *Stern* v. *Marshall*, 564 U. S. 462, 492, 499. After briefing closed, Sharif sought permission to file a supplemental brief raising a *Stern* objection. The District Court denied the motion, finding it untimely, and affirmed the Bankruptcy Court's judgment. As relevant here, the Seventh Circuit determined that Sharif's *Stern* objection could not be waived because it implicated structural interests and reversed on the alter-ego claim, holding that the Bankruptcy Court lacked constitutional authority to enter final judgment on that claim.

Held:

1. Article III permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent. Pp. 674–683.

(a) The foundational case supporting the adjudication of legal disputes by non-Article III judges with the consent of the parties is *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833. There, the Court held that the right to adjudication before an Article III court is "personal" and therefore "subject to waiver." *Id.*, at 848. The Court also recognized that if Article III's structural interests as "'an inseparable element of the constitutional system of checks and balances'" are implicated, "the parties cannot by consent cure the constitutional difficulty." *Id.*, at 850–851. The importance of consent was reiterated in two later cases involving the Federal Magistrates Act's assignment of non-Article III magistrate judges to supervise *voir dire* in felony trials. In *Gomez* v. *United States*, 490 U. S. 858, the Court held that a

magistrate judge was not permitted to select a jury without the defendant's consent, *id.*, at 864. But in *Peretz* v. *United States*, 501 U. S. 923, the Court stated that "the defendant's consent significantly changes the constitutional analysis," *id.*, at 932. Because an Article III court retained supervisory authority over the process, the Court found "no structural protections . . . implicated" and upheld the Magistrate Judge's action. *Id.*, at 937. Pp. 674–678.

(b) The question whether allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threate[n] the institutional integrity of the Judicial Branch," *Schor*, 478 U. S., at 851, must be decided "with an eye to the practical effect that the" practice "will have on the constitutionally assigned role of the federal judiciary," *ibid.* For several reasons, this practice does not usurp the constitutional prerogatives of Article III courts. Bankruptcy judges are appointed and may be removed by Article III judges, see 28 U. S. C. §§ 152(a)(1), (e); "serve as judicial officers of the United States district court," § 152(a)(1); and collectively "constitute a unit of the district court" for the district in which they serve, § 151. Bankruptcy courts hear matters solely on a district court's reference, § 157(a), and possess no free-floating authority to decide claims traditionally heard by Article III courts, see *Schor*, 478 U. S., at 854, 856. "[T]he decision to invoke" the bankruptcy court's authority "is left entirely to the parties," *id.*, at 855, and "the power of the federal judiciary to take jurisdiction" remains in place, *ibid.* Finally, there is no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary. See, *e. g.*, *Peretz*, 501 U. S., at 937. Pp. 678–681.

(c) *Stern* does not compel a different result. It turned on the fact that the litigant "did not truly consent to" resolution of the claim against it in a non-Article III forum, 564 U. S., at 493, and thus, does not govern the question whether litigants may validly consent to adjudication by a bankruptcy court. Moreover, expanding *Stern* to hold that a litigant may not waive the right to an Article III court through consent would be inconsistent with that opinion's own description of its holding as "a 'narrow' one" that did "not change all that much" about the division of labor between district and bankruptcy courts. *Id.*, at 502. Pp. 681–683.

2. Consent to adjudication by a bankruptcy court need not be express, but must be knowing and voluntary. Neither the Constitution nor the relevant statute—which requires "the consent of all parties to the proceeding" to hear a *Stern* claim, § 157(c)(2)—mandates express consent. Such a requirement would be in great tension with this Court's holding that substantially similar language in § 636(c)—which authorizes magistrate judges to conduct proceedings "[u]pon consent of the parties"—

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permits waiver based on "actions rather than words," *Roell* v. *Withrow*, 538 U. S. 580, 589. *Roell*'s implied consent standard supplies the appropriate rule for bankruptcy court adjudications and makes clear that a litigant's consent—whether express or implied—must be knowing and voluntary. Pp. 683–685.

3. The Seventh Circuit should decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent and whether Sharif forfeited his *Stern* argument below. Pp. 685–686.

727 F. 3d 751, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 686. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, J., joined, and in which THOMAS, J., joined as to Part I, *post*, p. 687. THOMAS, J., filed a dissenting opinion, *post*, p. 706.

Catherine Steege argued the cause for petitioners. With her on the briefs were *Barry Levenstam*, *Melissa M. Hinds*, *Landon Raiford*, *Matthew S. Hellman*, *Michael J. Lang*, and *John A. E. Pottow*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, and *Jeffrey Clair*.

Jonathan D. Hacker argued the cause for respondent. With him on the brief were *Peter Friedman*, *Ben H. Logan*, and *Anton Metlitsky*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *William C. Hubbard*, *Donald L. Gaffney*, and *Kurt F. Gwynne*; for the American College of Bankruptcy by *Craig Goldblatt*, *Danielle Spinelli*, and *Isley M. Gostin*; for the National Association of Bankruptcy Trustees by *William C. Heuer*; and for G. Eric Brunstad, Jr., by *Mr. Brunstad*, *pro se*, and *Kate M. O'Keeffe*.

Andrew M. LeBlanc, *Atara Miller*, and *Robert L. Lindholm* filed a brief for *TOUSA* Defendants as *amici curiae* urging affirmance.

Paul Steven Singerman and *Arthur J. Spector* filed a brief for the Business Law Section of the Florida Bar as *amicus curiae*.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Article III, § 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress has in turn established 94 District Courts and 13 Courts of Appeals, composed of judges who enjoy the protections of Article III: life tenure and pay that cannot be diminished. Because these protections help to ensure the integrity and independence of the Judiciary, "we have long recognized that, in general, Congress may not withdraw from" the Article III courts "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011) (internal quotation marks omitted).

Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. The number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships.[1] And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.[2]

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[1] Congress has authorized 179 circuit judgeships and 677 district judgeships, a total of 856. United States Courts, Status of Article III Judgeships, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/status-article-iii-judgeships.aspx (all Internet materials as visited May 22, 2015, and available in Clerk of Court's case file). The number of authorized magistrate and bankruptcy judgeships currently stands at 883: 534 full-time magistrate judgeships and 349 bankruptcy judgeships. United States Courts, Appointments of Magistrate Judges, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/appointments-magistrate-judges.aspx; United States Courts, Status of Bankruptcy Judgeships, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/status-bankruptcy-judgeships.aspx.

[2] Between October 1, 2013, and September 30, 2014, for example, litigants filed 963,739 cases in bankruptcy courts—more than double the total

Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982) (plurality opinion), and more recently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication. This case presents the question whether Article III allows bankruptcy judges to adjudicate such claims with the parties' consent. We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.

I

A

Before 1978, district courts typically delegated bankruptcy proceedings to "referees." *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 31 (2014). Under the Bankruptcy Act of 1898, bankruptcy referees had "[s]ummary jurisdiction" over "claims involving 'property in the actual or constructive possession of the bankruptcy court' "—that is, over the apportionment of the bankruptcy estate among creditors. *Ibid.* (alteration omitted). They could preside over other proceedings—matters implicating the court's "plenary jurisdiction"—by consent. *Id.*, at 32; see also *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263, 266–267 (1932).

In 1978, Congress enacted the Bankruptcy Reform Act, which repealed the 1898 Act and gave the newly created bankruptcy courts power "much broader than that exercised under the former referee system." *Northern Pipeline*, 458 U. S., at 54. The Act "[e]liminat[ed] the distinction between 'summary' and 'plenary' jurisdiction" and enabled bank-

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number filed in district and circuit courts. United States Courts, Judicial Caseload Indicators, http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx.

ruptcy courts to decide "all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11.'" *Ibid.* (emphasis deleted). Congress thus vested bankruptcy judges with most of the "'powers of a court of equity, law, and admiralty,'" *id.*, at 55, without affording them the benefits of Article III. This Court therefore held parts of the system unconstitutional in *Northern Pipeline*.

Congress responded by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984. Under that Act, district courts have original jurisdiction over bankruptcy cases and related proceedings. 28 U. S. C. §§ 1334(a), (b). But "[e]ach district court may provide that any or all" bankruptcy cases and related proceedings "shall be referred to the bankruptcy judges for the district." § 157(a). Bankruptcy judges are "judicial officers of the United States district court," appointed to 14-year terms by the courts of appeals, and subject to removal for cause. §§ 152(a)(1), (e). "The district court may withdraw" a reference to the bankruptcy court "on its own motion or on timely motion of any party, for cause shown." § 157(d).

When a district court refers a case to a bankruptcy judge, that judge's statutory authority depends on whether Congress has classified the matter as a "[c]ore proceedin[g]" or a "[n]on-core proceedin[g]," §§ 157(b)(2), (4)—much as the authority of bankruptcy referees, before the 1978 Act, depended on whether the proceeding was "summary" or "plenary." Congress identified as "[c]ore" a nonexclusive list of 16 types of proceedings, § 157(b)(2), in which it thought bankruptcy courts could constitutionally enter judgment.[3] Congress gave bankruptcy courts the power to "hear and determine" core proceedings and to "enter appropriate orders and judgments," subject to appellate review by the district court.

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[3] Congress appears to have drawn the term "core" from *Northern Pipeline*'s description of "the restructuring of debtor-creditor relations" as "the core of the federal bankruptcy power." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 71 (1982).

§ 157(b)(1); see § 158. But it gave bankruptcy courts more limited authority in non-core proceedings: They may "hear and determine" such proceedings, and "enter appropriate orders and judgments," only "with the consent of all the parties to the proceeding." § 157(c)(2). Absent consent, bankruptcy courts in non-core proceedings may only "submit proposed findings of fact and conclusions of law," which the district courts review *de novo*. § 157(c)(1).

B

Petitioner Wellness International Network is a manufacturer of health and nutrition products.[4] Wellness and respondent Sharif entered into a contract under which Sharif would distribute Wellness' products. The relationship quickly soured, and in 2005, Sharif sued Wellness in the United States District Court for the Northern District of Texas. Sharif repeatedly ignored Wellness' discovery requests and other litigation obligations, resulting in an entry of default judgment for Wellness. The District Court eventually sanctioned Sharif by awarding Wellness over $650,000 in attorney's fees. This case arises from Wellness' long-running—and so far unsuccessful—efforts to collect on that judgment.

In February 2009, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois. The bankruptcy petition listed Wellness as a creditor. Wellness requested documents concerning Sharif's assets, which Sharif did not provide. Wellness later obtained a loan application Sharif had filed in 2002, listing more than $5 million in assets. When confronted, Sharif informed Wellness and the Chapter 7 trustee that he had lied on the loan application. The listed assets, Sharif claimed, were actually owned by the Soad Wattar Living Trust (Trust), an entity Sharif said he administered on behalf of his mother, and for the benefit of his sister.

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[4] Individual petitioners Ralph and Cathy Oats are Wellness' founders. This opinion refers to all petitioners collectively as "Wellness."

Wellness pressed Sharif for information on the Trust, but Sharif again failed to respond.

Wellness filed a five-count adversary complaint against Sharif in the Bankruptcy Court. See App. 5–22. Counts I–IV of the complaint objected to the discharge of Sharif's debts because, among other reasons, Sharif had concealed property by claiming that it was owned by the Trust. Count V of the complaint sought a declaratory judgment that the Trust was Sharif's alter ego and that its assets should therefore be treated as part of Sharif's bankruptcy estate. *Id.*, at 21. In his answer, Sharif admitted that the adversary proceeding was a "core proceeding" under 28 U. S. C. § 157(b)—*i. e.*, a proceeding in which the Bankruptcy Court could enter final judgment subject to appeal. See §§ 157(b)(1), (2)(J); App. 24. Indeed, Sharif requested judgment in his favor on all counts of Wellness' complaint and urged the Bankruptcy Court to "find that the Soad Wattar Living Trust is not property of the [bankruptcy] estate." *Id.*, at 44.

A familiar pattern of discovery evasion ensued. Wellness responded by filing a motion for sanctions, or, in the alternative, to compel discovery. Granting the motion to compel, the Bankruptcy Court warned Sharif that if he did not respond to Wellness' discovery requests a default judgment would be entered against him. Sharif eventually complied with some discovery obligations but did not produce any documents related to the Trust.

In July 2010, the Bankruptcy Court issued a ruling finding that Sharif had violated the court's discovery order. See App. to Pet. for Cert. 92a–120a. It accordingly denied Sharif's request to discharge his debts and entered a default judgment against him in the adversary proceeding. And it declared, as requested by count V of Wellness' complaint, that the assets supposedly held by the Trust were in fact property of Sharif's bankruptcy estate because Sharif "treats [the Trust's] assets as his own property." *Id.*, at 119a.

Sharif appealed to the District Court. Six weeks before Sharif filed his opening brief in the District Court, this Court decided *Stern*. In *Stern*, the Court held that Article III prevents bankruptcy courts from entering final judgment on claims that seek only to "augment" the bankruptcy estate and would otherwise "exis[t] without regard to any bankruptcy proceeding." 564 U. S., at 492, 499. Sharif did not cite *Stern* in his opening brief. Rather, after the close of briefing, Sharif moved for leave to file a supplemental brief, arguing that in light of *In re Ortiz*, 665 F. 3d 906 (CA7 2011)—a recently issued decision interpreting *Stern*—"the bankruptcy court's order should only be treated as a report and recommendation." App. 145. The District Court denied Sharif's motion for supplemental briefing as untimely and affirmed the Bankruptcy Court's judgment.

The Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. 727 F. 3d 751 (2013). The Seventh Circuit acknowledged that ordinarily Sharif's *Stern* objection would "not [be] preserved because he waited too long to assert it." 727 F. 3d, at 767.[5] But the court determined that the ordinary rule did not apply because Sharif's argument concerned "the allocation of authority between bankruptcy courts and district courts" under Article III, and thus "implicate[d] structural interests." *Id.*, at 771. Based on those separation-of-powers considerations, the court held that "a litigant may not waive" a *Stern* objection. 727 F. 3d, at 773. Turning to the merits of Sharif's contentions, the Seventh Circuit agreed with the Bankruptcy Court's resolution of counts I–IV of Wellness' adversary complaint. It further concluded, however, that count V of the complaint alleged a so-called "*Stern* claim," that is, "a claim designated

[5] Although the Seventh Circuit referred to Sharif's failure to raise his *Stern* argument in a timely manner as a waiver, that court has since clarified that its decision rested on forfeiture. See *Peterson* v. *Somers Dublin Ltd.*, 729 F. 3d 741, 747 (2013) ("The issue in *Wellness International Network* was forfeiture rather than waiver").

for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." *Executive Benefits*, 573 U. S., at 30–31. The Seventh Circuit therefore ruled that the Bankruptcy Court lacked constitutional authority to enter final judgment on count V.[6]

We granted certiorari, 573 U. S. 957 (2014), and now reverse the judgment of the Seventh Circuit.[7]

II

Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts.

A

Adjudication by consent is nothing new. Indeed, "[d]uring the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." Brubaker, The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications, 32 Bkrtcy. L. Letter No. 12, p. 6 (Dec. 2012); see, *e. g.*,

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[6] The Seventh Circuit concluded its opinion by considering the remedy for the Bankruptcy Court's purportedly unconstitutional issuance of a final judgment. The court determined that if count V of Wellness' complaint raised a core claim, the only statutorily authorized remedy would be for the District Court to withdraw the reference to the Bankruptcy Court and set a new discovery schedule. The Seventh Circuit's reasoning on this point was rejected by our decision last Term in *Executive Benefits*, which held that district courts may treat *Stern* claims like non-core claims and thus are not required to restart proceedings entirely when a bankruptcy court improperly enters final judgment.

[7] Because the Court concludes that the Bankruptcy Court could validly enter judgment on Wellness' claim with the parties' consent, this opinion does not address, and expresses no view on, Wellness' alternative contention that the Seventh Circuit erred in concluding the claim in count V of its complaint was a *Stern* claim.

Thornton v. *Carson*, 7 Cranch 596, 597 (1813) (affirming damages awards in two actions that "were referred, by consent under a rule of Court to arbitrators"); *Heckers* v. *Fowler*, 2 Wall. 123, 131 (1865) (observing that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law" and "is now universally regarded . . . as the proper foundation of judgment"); *Newcomb* v. *Wood*, 97 U. S. 581, 583 (1878) (recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it").

The foundational case in the modern era is *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). The Commodity Futures Trading Commission (CFTC), which Congress had authorized to hear customer complaints against commodities brokers, issued a regulation allowing itself to hear state-law counterclaims as well. William Schor filed a complaint with the CFTC against his broker, and the broker, which had previously filed claims against Schor in federal court, refiled them as counterclaims in the CFTC proceeding. The CFTC ruled against Schor on the counterclaims. This Court upheld that ruling against both statutory and constitutional challenges.

On the constitutional question (the one relevant here) the Court began by holding that Schor had "waived any right he may have possessed to the full trial of [the broker's] counterclaim before an Article III court." *Id.*, at 849. The Court then explained why this waiver legitimated the CFTC's exercise of authority: "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights"—such as the right to a jury—"that dictate the procedures by which civil and criminal matters must be tried." *Id.*, at 848–849.

The Court went on to state that a litigant's waiver of his "personal right" to an Article III court is not always dispositive because Article III "not only preserves to litigants their

interest in an impartial and independent federal adjudication of claims . . . , but also serves as 'an inseparable element of the constitutional system of checks and balances.' . . . To the extent that this structural principle is implicated in a given case"—but only to that extent—"the parties cannot by consent cure the constitutional difficulty . . . ." *Id.*, at 850–851.

Leaning heavily on the importance of Schor's consent, the Court found no structural concern implicated by the CFTC's adjudication of the counterclaims against him. While "Congress gave the CFTC the authority to adjudicate such matters," the Court wrote,

> "the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Id.*, at 855.

The option for parties to submit their disputes to a non-Article III adjudicator was at most a "*de minimis*" infringement on the prerogative of the federal courts. *Id.*, at 856.

A few years after *Schor*, the Court decided a pair of cases—*Gomez* v. *United States*, 490 U. S. 858 (1989), and *Peretz* v. *United States*, 501 U. S. 923 (1991)—that reiterated the importance of consent to the constitutional analysis. Both cases concerned whether the Federal Magistrates Act authorized magistrate judges to preside over jury selection in a felony trial;[8] the difference was that Peretz consented to the practice while Gomez did not. That difference was dispositive.

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[8] In relevant part, the Act provides that district courts may assign magistrate judges certain enumerated duties as well as "such additional duties as are not inconsistent with the Constitution and the laws of the United States." 28 U. S. C. § 636(b)(3).

In *Gomez*, the Court interpreted the statute as not allowing magistrate judges to supervise *voir dire* without consent, emphasizing the constitutional concerns that might otherwise arise. See 490 U. S., at 864. In *Peretz*, the Court upheld the Magistrate Judge's action, stating that "the defendant's consent significantly changes the constitutional analysis." 501 U. S., at 932. The Court concluded that allowing a magistrate judge to supervise jury selection—with consent—does not violate Article III, explaining that "litigants may waive their personal right to have an Article III judge preside over a civil trial," *id.*, at 936 (citing *Schor*, 478 U. S., at 848), and that "[t]he most basic rights of criminal defendants are similarly subject to waiver," 501 U. S., at 936. And "[e]ven assuming that a litigant may not waive structural protections provided by Article III," the Court found "no such structural protections . . . implicated by" a magistrate judge's supervision of *voir dire*:

> "Magistrates are appointed and subject to removal by Article III judges. The 'ultimate decision' whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties. The decision whether to empanel the jury whose selection a magistrate has supervised also remains entirely with the district court. Because 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger that use of the magistrate involves a 'congressional attemp[t] "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts.'" *Id.*, at 937 (citations omitted; alteration in original).[9]

[9] Discounting the relevance of *Gomez* and *Peretz*, the principal dissent emphasizes that neither case concerned the entry of final judgment by a non-Article III actor. See *post*, at 701–702 (opinion of ROBERTS, C. J.). Here again, the principal dissent's insistence on formalism leads it astray. As we explained in *Peretz*, the "responsibility and importance [of] presiding over *voir dire* at a felony trial" is equivalent to the "supervision of entire civil and misdemeanor trials," 501 U. S., at 933, tasks in which mag-

The lesson of *Schor*, *Peretz*, and the history that preceded them is plain: The entitlement to an Article III adjudicator is "a personal right" and thus ordinarily "subject to waiver," *Schor*, 478 U. S., at 848. Article III also serves a structural purpose, "barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts and thereby prevent[ing] 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Id.*, at 850 (citations omitted). But allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.

B

The question here, then, is whether allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threate[n] the institutional integrity of the Judicial Branch." *Schor*, 478 U. S., at 851. And that question must be decided not by "formalistic and unbending rules," but "with an eye to the practical effect that the" practice "will have on the constitutionally assigned role of the federal judiciary." *Ibid.*; see *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 587 (1985) ("[P]ractical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III"). The Court must weigh

> "the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of

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istrate judges may "order the entry of judgment" with the parties' consent, § 636(c)(1).

Article III." *Schor*, 478 U. S., at 851 (internal quotation marks omitted).

Applying these factors, we conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts. Bankruptcy judges, like magistrate judges, "are appointed and subject to removal by Article III judges," *Peretz*, 501 U. S., at 937; see 28 U. S. C. §§ 152(a)(1), (e). They "serve as judicial officers of the United States district court," § 152(a)(1), and collectively "constitute a unit of the district court" for that district, § 151. Just as "[t]he 'ultimate decision' whether to invoke [a] magistrate [judge]'s assistance is made by the district court," *Peretz*, 501 U. S., at 937, bankruptcy courts hear matters solely on a district court's reference, § 157(a), which the district court may withdraw *sua sponte* or at the request of a party, § 157(d). "[S]eparation of powers concerns are diminished" when, as here, "the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction" remains in place. *Schor*, 478 U. S., at 855.

Furthermore, like the CFTC in *Schor*, bankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to "a narrow class of common law claims as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function." *Id.*, at 854. "In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*." *Id.*, at 856.

Finally, there is no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary. As in *Peretz*, "[b]ecause 'the entire process takes place under the district court's total control and jurisdiction,' there is no danger that use of the [bankruptcy court] involves a 'congressional attemp[t] "to transfer jurisdiction [to non-Article III tribunals]

for the purpose of emasculating" constitutional courts.'" 501 U. S., at 937 (citation omitted); see also *Schor*, 478 U. S., at 855 (allowing CFTC's adjudication of counterclaims because of "the degree of judicial control saved to the federal courts, as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation" (citation omitted)); *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F. 2d 537, 544 (CA9 1984) (en banc) (Kennedy, J.) (magistrate judges may adjudicate civil cases by consent because the Federal Magistrates Act "invests the Article III judiciary with extensive administrative control over the management, composition, and operation of the magistrate system").[10]

Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of dis-

[10] The principal dissent accuses us of making Sharif's consent "'dispositive' in curing [a] structural separation of powers violation," contrary to the holding of *Schor*. *Post*, at 703. That argument misapprehends both *Schor* and the nature of our analysis. What *Schor* forbids is using consent to excuse an actual violation of Article III. See 478 U. S., at 850–851 ("*To the extent* that th[e] structural principle [protected by Article III] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty . . . " (emphasis added)). But *Schor* confirms that consent remains highly relevant when determining, as we do here, whether a particular adjudication in fact raises constitutional concerns. See *id.*, at 855 ("[S]eparation of powers concerns are diminished" when "the decision to invoke [a non-Article III] forum is left entirely to the parties"). Thus, we do not rely on Sharif's consent to "cur[e]" a violation of Article III. His consent shows, in part, why no such violation has occurred. Cf. Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 Ind. L. J. 291, 303 (1990) ("[C]onsent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence"); Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 992 (1988) (When the parties consent, "there is substantial assurance that the agency is not generally behaving arbitrarily or otherwise offending separation-of-powers values. Judicial integrity is not at risk").

trict judgeships. Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.

C

Our recent decision in *Stern*, on which Sharif and the principal dissent rely heavily, does not compel a different result. That is because *Stern*—like its predecessor, *Northern Pipeline*—turned on the fact that the litigant "did not truly consent to" resolution of the claim against it in a non-Article III forum. 564 U. S., at 493.

To understand *Stern*, it is necessary to first understand *Northern Pipeline*. There, the Court considered whether bankruptcy judges "could 'constitutionally be vested with jurisdiction to decide [a] state-law contract claim' against an entity that was not otherwise part of the bankruptcy proceedings." 564 U. S., at 485. In answering that question in the negative, both the plurality and then-Justice Rehnquist, concurring in the judgment, noted that the entity in question did not consent to the bankruptcy court's adjudication of the claim. See 458 U. S., at 80, n. 31 (plurality opinion); *id.*, at 91 (opinion of Rehnquist, J.). The Court confirmed in two later cases that *Northern Pipeline* turned on the lack of consent. See *Schor*, 478 U. S., at 849 ("[I]n *Northern Pipeline*, . . . the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication"); *Thomas*, 473 U. S., at 584.

Stern presented the same scenario. The majority cited the dissent's observation that *Northern Pipeline* "establish[ed] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent* of the litigants, and subject

only to ordinary appellate review," 564 U. S., at 494 (emphasis added; internal quotation marks omitted). To which the majority responded, "Just so: Substitute 'tort' for 'contract,' and that statement directly covers this case." *Ibid.*; see also *id.*, at 493 (defendant litigated in the Bankruptcy Court because he "had nowhere else to go" to pursue his claim). Because *Stern* was premised on nonconsent to adjudication by the Bankruptcy Court, the "constitutional bar" it announced, see *post*, at 700 (ROBERTS, C. J., dissenting), simply does not govern the question whether litigants may validly consent to adjudication by a bankruptcy court.

An expansive reading of *Stern*, moreover, would be inconsistent with the opinion's own description of its holding. The Court in *Stern* took pains to note that the question before it was "a 'narrow' one," and that its answer did "not change all that much" about the division of labor between district courts and bankruptcy courts. 564 U. S., at 502; see also *id.*, at 503 (stating that Congress had exceeded the limitations of Article III "in one isolated respect"). That could not have been a fair characterization of the decision if it meant that bankruptcy judges could no longer exercise their longstanding authority to resolve claims submitted to them by consent. Interpreting *Stern* to bar consensual adjudications by bankruptcy courts would "meaningfully chang[e] the division of labor" in our judicial system, contra, *id.*, at 502.[11]

In sum, the cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily

[11] In advancing its restrictive view of *Stern*, the principal dissent ignores the sweeping jurisprudential implications of its position. If, as the principal dissent suggests, consent is irrelevant to the Article III analysis, it is difficult to see how *Schor* and *Peretz* were not wrongly decided. But those decisions obviously remain good law. It is the principal dissent's position that breaks with our precedents. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases").

before a non-Article III court. The Court has never done what Sharif and the principal dissent would have us do—hold that a litigant who has the right to an Article III court may not waive that right through his consent.

D

The principal dissent warns darkly of the consequences of today's decision. See *post*, at 703–705. To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court. The response to these ominous predictions is the same now as it was when Justice Brennan, dissenting in *Schor*, first made them nearly 30 years ago:

> "This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. But this case obviously bears no resemblance to such a scenario . . . ." 478 U. S., at 855 (citations omitted).

Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise.

III

Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express. We disagree.

Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U. S. C. § 157, mandate express consent; it states only that a bankruptcy court must obtain "the con-

sent"—consent *simpliciter*—"of all parties to the proceeding" before hearing and determining a non-core claim. § 157(c)(2). And a requirement of express consent would be in great tension with our decision in *Roell* v. *Withrow*, 538 U. S. 580 (2003). That case concerned the interpretation of § 636(c), which authorizes magistrate judges to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," with "the consent of the parties."[12] The specific question in *Roell* was whether, as a statutory matter, the "consent" required by § 636(c) had to be express. The dissent argued that "[r]eading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also" avoids constitutional concerns by "ensur[ing] that the parties knowingly and voluntarily waive their right to an Article III judge." 538 U. S., at 595 (opinion of THOMAS, J.). But the majority—thus placed on notice of the constitutional concern—was untroubled by it, opining that "the Article III right is substantially honored" by permitting waiver based on "actions rather than words." *Id.*, at 589, 590.

The implied consent standard articulated in *Roell* supplies the appropriate rule for adjudications by bankruptcy courts under § 157. Applied in the bankruptcy context, that stand-

[12] Consistent with our precedents, the Courts of Appeals have unanimously upheld the constitutionality of § 636(c). See *Sinclair* v. *Wainwright*, 814 F. 2d 1516, 1519 (CA11 1987); *Bell & Beckwith* v. *United States*, 766 F. 2d 910, 912 (CA6 1985); *Gairola* v. *Virginia Dept. of Gen. Servs.*, 753 F. 2d 1281, 1285 (CA4 1985); *D. L. Auld Co.* v. *Chroma Graphics Corp.*, 753 F. 2d 1029, 1032 (CA Fed. 1985); *United States* v. *Dobey*, 751 F. 2d 1140, 1143 (CA10 1985); *Fields* v. *Washington Metropolitan Area Transit Auth.*, 743 F. 2d 890, 893 (CADC 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F. 2d 1037, 1045 (CA7 1984); *Lehman Bros. Kuhn Loeb Inc.* v. *Clark Oil & Refining Corp.*, 739 F. 2d 1313, 1316 (CA8 1984) (en banc); *Puryear* v. *Ede's Ltd.*, 731 F. 2d 1153, 1154 (CA5 1984); *Goldstein* v. *Kelleher*, 728 F. 2d 32, 36 (CA1 1984); *Collins* v. *Foreman*, 729 F. 2d 108, 115–116 (CA2 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F. 2d 537, 540 (CA9 1984) (en banc) (Kennedy, J.); *Wharton-Thomas* v. *United States*, 721 F. 2d 922, 929–930 (CA3 1983).

ard possesses the same pragmatic virtues—increasing judicial efficiency and checking gamesmanship—that motivated our adoption of it for consent-based adjudications by magistrate judges. See *id.*, at 590. It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* makes clear that the key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator. *Ibid.*; see also *id.*, at 588, n. 5 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent").[13]

IV

It would be possible to resolve this case by determining whether Sharif in fact consented to the Bankruptcy Court's adjudication of count V of Wellness' adversary complaint. But reaching that determination would require a deeply fact-bound analysis of the procedural history unique to this protracted litigation. Our resolution of the consent question—unlike the antecedent constitutional question—would provide little guidance to litigants or the lower courts. Thus, consistent with our role as "a court of review, not of first view," *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572

[13] Even though the Constitution does not require that consent be express, it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue. Statutes or judicial rules may require express consent where the Constitution does not. Indeed, the Federal Rules of Bankruptcy Procedure already require that pleadings in adversary proceedings before a bankruptcy court "contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." Fed. Rule Bkrtcy. Proc. 7008 (opening pleadings); see Rule 7012 (responsive pleadings). The Bankruptcy Court and the parties followed that procedure in this case. See App. 6, 24; *supra*, at 672.

U. S. 898, 913 (2014) (internal quotation marks omitted), we leave it to the Seventh Circuit to decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below.

* * *

The Court holds that Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent. The judgment of the United States Court of Appeals for the Seventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I join the opinion of the Court insofar as it holds that a bankruptcy judge's resolution of a "*Stern* claim"* with the consent of the parties does not violate Article III of the Constitution. The Court faithfully applies *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). No one believes that an arbitrator exercises "[t]he judicial Power of the United States," Art. III, § 1, in an ordinary, run-of-the mill arbitration. And whatever differences there may be between an arbitrator's "decision" and a bankruptcy court's "judgment," those differences would seem to fall within the Court's previous rejection of "formalistic and unbending rules." *Schor*, *supra*, at 851. Whatever one thinks of *Schor*, it is still the law of this Court, and the parties do not ask us to revisit it.

Unlike the Court, however, I would not decide whether consent may be implied. While the Bankruptcy Act just

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*See *Stern* v. *Marshall*, 564 U. S. 462 (2011). A "*Stern* claim" is a claim that is "core" under the statute but yet "prohibited from proceeding in that way as a constitutional matter." *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 31 (2014).

speaks of "consent," 28 U. S. C. § 157(c)(2), the Federal Rules of Bankruptcy Procedure provide that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties," Rule 7012(b). When this Rule was promulgated, no one was thinking about a *Stern* claim. But now, assuming that Rule 7012(b) represents a permissible interpretation of § 157, the question arises whether a *Stern* claim should be treated as a non-core or core claim for purposes of the bankruptcy rules. See *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 36–37 (2014) (holding that, for reasons of severability, a bankruptcy court should treat a *Stern* claim as a non-core claim).

There is no need to decide that question here. In this case, respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below. *Stern* vindicates Article III, but that does not mean that *Stern* arguments are exempt from ordinary principles of appellate procedure. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, *ante*, at 150.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, and with whom JUSTICE THOMAS joins as to Part I, dissenting.

The Bankruptcy Court in this case granted judgment to Wellness on its claim that Sharif's bankruptcy estate contained assets he purportedly held in a trust. Provided that no third party asserted a substantial adverse claim to those assets, the Bankruptcy Court's adjudication "stems from the bankruptcy itself" rather than from "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Stern* v. *Marshall*, 564 U. S. 462, 499, 484 (2011) (internal quotation marks omitted). Article III poses no barrier to such a decision. That is enough to resolve this case.

Unfortunately, the Court brushes aside this narrow basis for decision and proceeds to the serious constitutional ques-

tion whether private parties may consent to an Article III violation. In my view, they cannot. By reserving the judicial power to judges with life tenure and salary protection, Article III constitutes "an inseparable element of the constitutional system of checks and balances"—a structural safeguard that must "be jealously guarded." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 58, 60 (1982) (plurality opinion).

Today the Court lets down its guard. Despite our precedent directing that "parties cannot by consent cure" an Article III violation implicating the structural separation of powers, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 850–851 (1986), the majority authorizes litigants to do just that. The Court justifies its decision largely on pragmatic grounds. I would not yield so fully to functionalism. The Framers adopted the formal protections of Article III for good reasons, and "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U. S. 919, 944 (1983).

The impact of today's decision may seem limited, but the Court's acceptance of an Article III violation is not likely to go unnoticed. The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret. I respectfully dissent.

I

The Court granted certiorari on two questions in this case. The first is whether the Bankruptcy Court's entry of final judgment on Wellness's claim violated Article III based on *Stern*. The second is whether an Article III violation of the kind recognized in *Stern* can be cured by consent. Because the first question can be resolved on narrower grounds, I would answer it alone.

A

The Framers of the Constitution "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995). Under British rule, the King "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence ¶11. Between the Revolution and the Constitutional Convention, state legislatures routinely interfered with judgments of the courts. This history created the "sense of a sharp necessity to separate the legislative from the judicial power." *Plaut*, 514 U. S., at 221; see *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 116–119 (2015) (THOMAS, J., concurring in judgment). The result was Article III, which established a Judiciary "truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton).

Article III vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The judges of those courts are entitled to hold their offices "during good Behaviour" and to receive compensation "which shall not be diminished" during their tenure. *Ibid.* The judicial power extends "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties" and to other enumerated matters. Art. III, § 2. Taken together, these provisions define the constitutional birthright of Article III judges: to "render dispositive judgments" in cases or controversies within the bounds of federal jurisdiction. *Plaut*, 514 U. S., at 219 (internal quotation marks omitted).

With narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III. Those narrow exceptions permit Congress to establish non-Article III courts to exercise general jurisdiction in the ter-

ritories and the District of Columbia, to serve as military tribunals, and to adjudicate disputes over "public rights" such as veterans' benefits. *Northern Pipeline*, 458 U. S., at 64–70 (plurality opinion).

Our precedents have also recognized an exception to the requirements of Article III for certain bankruptcy proceedings. When the Framers gathered to draft the Constitution, English statutes had long empowered nonjudicial bankruptcy "commissioners" to collect a debtor's property, resolve claims by creditors, order the distribution of assets in the estate, and ultimately discharge the debts. See 2 W. Blackstone, Commentaries *471–*488. This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article III courts adjudications involving "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Northern Pipeline*, 458 U. S., at 71 (plurality opinion).

Although Congress may assign some bankruptcy proceedings to non-Article III courts, there are limits on that power. In *Northern Pipeline*, the Court invalidated statutory provisions that permitted a bankruptcy court to enter final judgment on a creditor's state law claim for breach of contract. Because that claim arose not from the bankruptcy but from independent common law sources, a majority of the Court determined that Article III required an adjudicator with life tenure and salary protection. See *id.*, at 84; *id.*, at 90–91 (Rehnquist, J., concurring in judgment).

Congress responded to *Northern Pipeline* by allowing bankruptcy courts to render final judgments only in "core" bankruptcy proceedings. 28 U. S. C. § 157(b). Those judgments may be appealed to district courts and reviewed under deferential standards. § 158(a). In non-core proceedings, bankruptcy judges may submit proposed findings of fact and conclusions of law, which the district court must review *de novo* before entering final judgment. § 157(c)(1).

In *Stern*, we faced the question whether a bankruptcy court could enter final judgment on an action defined by Congress as a "core" proceeding—an estate's counterclaim against a creditor based on state tort law. § 157(b)(2)(C). We said no. Because the tort claim neither "stem[med] from the bankruptcy itself" nor would "necessarily be resolved in the claims allowance process," it fell outside the recognized exceptions to Article III. 564 U. S., at 499. Like the contract claim in *Northern Pipeline*, the tort claim in *Stern* involved "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." 564 U. S., at 484 (quoting *Northern Pipeline*, 458 U. S., at 90 (Rehnquist, J., concurring in judgment)). Congress had no power under the Constitution to assign the resolution of such a claim to a judge who lacked the structural protections of Article III.

B

The question here is whether the claim Wellness submitted to the Bankruptcy Court is a "*Stern* claim" that requires final adjudication by an Article III court. See *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 35 (2014) (assuming without deciding that a fraudulent conveyance action is a "*Stern* claim"). As the Court recounts, Wellness alleged that Sharif had concealed about $5 million of assets by claiming that they were owned by a trust. Wellness sought a declaratory judgment that the trust was in fact Sharif's alter ego and that its assets should accordingly be part of his bankruptcy estate. The Bankruptcy Court granted final judgment (based on Sharif's default) to Wellness, declaring that the trust assets were part of Sharif's estate because he had treated them as his own property. *Ante*, at 672.

In my view, Article III likely poses no barrier to the Bankruptcy Court's resolution of Wellness's claim. At its most basic level, bankruptcy is "an adjudication of interests claimed in a *res*." *Katchen* v. *Landy*, 382 U. S. 323, 329 (1966) (internal quotation marks omitted). Wellness asked

the Bankruptcy Court to declare that assets held by Sharif are part of that res. Defining what constitutes the estate is the necessary starting point of every bankruptcy; a court cannot divide up the estate without first knowing what's in it. See 11 U. S. C. §541(a). As the Solicitor General explains, "Identifying the property of the estate is therefore inescapably central to the restructuring of the debtor-creditor relationship." Brief for United States as *Amicus Curiae* 14.

Identifying property that constitutes the estate has long been a central feature of bankruptcy adjudication. English bankruptcy commissioners had authority not only to collect property in the debtor's possession, but also to "cause any house or tenement of the bankrupt to be broken open," in order to uncover and seize property the debtor had concealed. 2 Blackstone, Commentaries, at *485. America's first bankruptcy statute, enacted by Congress in 1800, similarly gave commissioners "power to take into their possession, all the estate, real and personal, of every nature and description to which the [debtor] may be entitled, either in law or equity, in any manner whatsoever." §5, 2 Stat. 23. That is peculiarly a bankruptcy power.

The Bankruptcy Act of 1898 provides further support for Wellness's position. Under that Act, bankruptcy referees had authority to exercise "summary" jurisdiction over certain claims, while other claims could only be adjudicated in "plenary" proceedings before an Article III district court. See *Arkison*, 573 U. S., at 31–32. This Court interpreted the 1898 Act to permit bankruptcy referees to exercise summary jurisdiction to determine whether property in the actual or constructive possession of a debtor should come within the estate, at least when no third party asserted more than a "merely colorable" claim to the property. *Mueller* v. *Nugent*, 184 U. S. 1, 15 (1902). In the legal parlance of the times, a "merely colorable" claim was one that existed "in appearance only, and not in reality." Black's Law Diction-

ary 223 (1891). So a bankruptcy referee could exercise summary jurisdiction over property in the debtor's possession as long as no third party asserted a "substantial adverse" claim. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 431–433 (1924).

Here, Sharif does not contest that he held legal title to the assets in the trust. Assuming that no third party asserted a substantial adverse claim to those assets—an inquiry for the Bankruptcy Court on remand—Wellness's alter ego claim fits comfortably into the category of cases that bankruptcy referees could have decided by themselves under the 1898 Act.

In *Mueller*, for example, this Court held that a bankruptcy referee could exercise summary jurisdiction over property in the possession of a third party acting as the debtor's agent. 184 U. S., at 14–17; see Black's Law Dictionary 302 (10th ed. 2014) (example of a merely "colorable" claim is "one made by a person holding property as an agent or bailee of the bankrupt"). Similarly, this Court held that a bankruptcy referee could exercise summary jurisdiction over a creditor's claim that the debtor had concealed assets under the veil of a corporate entity that was "nothing but a sham and a cloak." *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, 216–217 (1941) (internal quotation marks omitted), rev'g 114 F. 2d 49, 52 (CA9 1940) (describing creditor's claim that corporation was debtor's "alter ego"). As the Court explained in *Sampsell*, the "legal existence of the affiliated corporation" did not automatically require a plenary proceeding, because "[m]ere legal paraphernalia will not suffice to transform into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket." 313 U. S., at 218. Just as the bankruptcy referee in that case had authority to decide whether assets allegedly concealed behind the corporate veil belonged to the bankruptcy estate, the Bankruptcy Court

here had authority to decide whether the assets allegedly concealed in the trust belonged to Sharif's estate.

Sharif contends that Wellness's alter ego claim is more like an allegation of a fraudulent conveyance, which this Court has implied must be adjudicated by an Article III court. See *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 56 (1989); *Arkison*, 573 U. S., at 35. Although both actions aim to remedy a debtor's deception, they differ in a critical respect. A fraudulent conveyance claim seeks assets in the hands of a third party, while an alter ego claim targets only the debtor's "second self." Webster's New International Dictionary 76 (2d ed. 1954). That distinction is significant given bankruptcy's historic domain over property within the actual or constructive "possession [of] the bankrupt at the time of the filing of the petition." *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481 (1940). Through a fraudulent conveyance, a dishonest debtor *relinquishes* possession of assets before filing for bankruptcy. Reclaiming those assets for the estate requires depriving third parties of property within their otherwise lawful possession and control, an action that "quintessentially" required a suit at common law. *Granfinanciera*, 492 U. S., at 56. By contrast, a debtor's possession of property provided "an adequate basis" for a bankruptcy referee to adjudicate a dispute over title in a summary proceeding. *Thompson*, 309 U. S., at 482; see *Mueller*, 184 U. S., at 15–16 (distinguishing claim to property in possession of debtor's agent from fraudulent conveyance claim in determining that bankruptcy referee could exercise summary jurisdiction).

In sum, unlike the fraudulent conveyance claim in *Granfinanciera*, Wellness's alter ego claim alleges that assets within Sharif's actual or constructive possession belong to his estate. And unlike the breach of contract and tort claims at issue in *Northern Pipeline* and *Stern*, Wellness's claim stems not from any independent source of law but "from the bankruptcy itself." *Stern*, 564 U. S. 499. Pro-

vided that no third party asserted a substantial adverse claim to the trust assets, Wellness's claim therefore falls within the narrow historical exception that permits a non-Article III adjudicator in certain bankruptcy proceedings. I would reverse the contrary holding by the Court of Appeals and end our inquiry there, rather than deciding a broader question that may not be necessary to the disposition of this case.

II

The Court "expresses no view" on whether Wellness's claim was a *Stern* claim. *Ante*, at 674, n. 7. Instead, the Court concludes that the Bankruptcy Court had constitutional authority to enter final judgment on Wellness's claim either way. The majority rests its decision on Sharif's purported consent to the Bankruptcy Court's adjudication. But Sharif has no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III. His consent therefore cannot cure a constitutional violation.

A

"[I]f there is a principle in our Constitution . . . more sacred than another," James Madison said on the floor of the First Congress, "it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581 (1789). A strong word, "sacred." Madison was the principal drafter of the Constitution, and he knew what he was talking about. By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability. See *Bond* v. *United States*, 564 U. S. 211, 222–223 (2011), *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 497–501 (2010) (*PCAOB*); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

Preserving the separation of powers is one of this Court's most weighty responsibilities. In performing that duty, we have not hesitated to enforce the Constitution's mandate "that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U. S. 748, 757 (1996). We have accordingly invalidated executive actions that encroach upon the power of the Legislature, see *NLRB* v. *Noel Canning*, 573 U. S. 513 (2014); *Youngstown*, 343 U. S. 579; legislative actions that invade the province of the Executive, see *PCAOB*, 561 U. S. 477; *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Chadha*, 462 U. S. 919; *Myers* v. *United States*, 272 U. S. 52 (1926); and actions by either branch that trench upon the territory of the Judiciary, see *Stern*, 564 U. S. 462; *Plaut*, 514 U. S. 211; *United States* v. *Will*, 449 U. S. 200 (1980); *United States* v. *Klein*, 13 Wall. 128 (1872); *Hayburn's Case*, 2 Dall. 409 (1792).

In these and other cases, we have emphasized that the values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole. See *Bowsher*, 478 U. S., at 722. A branch's consent to a diminution of its constitutional powers therefore does not mitigate the harm or cure the wrong. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring). When the Executive and the Legislature agreed to bypass the Article I, § 7, requirements of bicameralism and presentment by creating a Presidential line-item veto—a very pragmatic proposal—the Court held that the arrangement violated the Constitution notwithstanding the voluntary participation of both branches. *Id.*, at 421 (majority opinion). Likewise, the Court struck down a one-House "legislative veto" that violated Article I, § 7, even though Presidents and Congresses had agreed to include similar provisions in hundreds of laws for more than 50 years. *Chadha*, 462 U. S., at 944–945.

In neither of these cases did the branches' willing embrace of a separation of powers violation weaken the Court's scrutiny. To the contrary, the branches' "enthusiasm" for the offending arrangements "'sharpened rather than blunted' our review." *Noel Canning*, 573 U. S., at 572 (SCALIA, J., concurring in judgment) (quoting *Chadha*, 462 U. S., at 944). In short, because the structural provisions of the Constitution protect liberty and not just government entities, "the separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'" *PCAOB*, 561 U. S., at 497 (quoting *New York* v. *United States*, 505 U. S. 144, 182 (1992)).

B

If a branch of the Federal Government may not consent to a violation of the separation of powers, surely a private litigant may not do so. Just as a branch of Government may not consent away the individual liberty interest protected by the separation of powers, so too an individual may not consent away the institutional interest protected by the separation of powers. To be sure, a private litigant may consensually relinquish *individual* constitutional rights. A federal criminal defendant, for example, may knowingly and voluntarily waive his Sixth Amendment right to a jury trial by pleading guilty to a charged offense. See *Brady* v. *United States*, 397 U. S. 742, 748 (1970). But that same defendant may not agree to stand trial on federal charges before a state court, a foreign court, or a moot court, because those courts have no constitutional authority to exercise judicial power over his case, and he has no power to confer it. A "lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties." *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934).

As the majority recognizes, the Court's most extensive discussion of litigant consent in a separation of powers case occurred in *Commodity Futures Trading Comm'n* v. *Schor*,

478 U. S. 833 (1986). There the Court held that Article III confers both a "personal right" that can be waived through consent and a structural component that "safeguards the role of the Judicial Branch in our tripartite system." *Id.*, at 848, 850. "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." *Id.*, at 850–851. Thus, when "Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.*, at 851.

Schor's holding that a private litigant can consent to an Article III violation that affects only his "personal right" has been vigorously contested. See *id.*, at 867 (Brennan, J., dissenting) ("Because the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required"); *Granfinanciera*, 492 U. S., at 70 (SCALIA, J., concurring in part and concurring in judgment). But whatever the merits of that position, nobody disputes that *Schor* forbids a litigant from consenting to a constitutional violation when the structural component of Article III "is implicated." 478 U. S., at 850–851. Thus, the key inquiry in this case—as the majority puts it—is "whether allowing bankruptcy courts to decide *Stern* claims by consent would 'impermissibly threaten the institutional integrity of the Judicial Branch.'" *Ante*, at 678 (quoting *Schor*, 478 U. S., at 851; alteration omitted).

One need not search far to find the answer. In *Stern*, this Court applied the analysis from *Schor* to bankruptcy courts and concluded that they lack Article III authority to enter final judgments on matters now known as *Stern* claims. The Court noted that bankruptcy courts, unlike the administrative agency in *Schor*, were endowed by Congress with

"substantive jurisdiction reaching any area of the *corpus juris*," power to render final judgments enforceable without any action by Article III courts, and authority to adjudicate counterclaims entirely independent of the bankruptcy itself. 564 U. S., at 491–495. The Court concluded that allowing Congress to bestow such authority on non-Article III courts would "compromise the integrity of the system of separated powers and the role of the Judiciary in that system." *Id.*, at 503. If there was any room for doubt about the basis for its holding, the Court dispelled it by asking a question: "Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy?" *Id.*, at 502. "The short but emphatic answer is yes." *Ibid.*

In other words, allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threaten the institutional integrity of the Judicial Branch." *Ante*, at 678 (internal quotation marks and alteration omitted). It is little wonder that the Court of Appeals felt itself bound by *Stern* and *Schor* to hold that Sharif's consent could not cure the *Stern* violation. 727 F. 3d 751, 771 (CA7 2013). Other Courts of Appeals have adopted the same reading. See *In re BP RE, L. P.*, 735 F. 3d 279, 287 (CA5 2013); *Waldman* v. *Stone*, 698 F. 3d 910, 917–918 (CA6 2012).

The majority attempts to avoid this conclusion through an imaginative reconstruction of *Stern*. As the majority sees it, *Stern* "turned on the fact that the litigant 'did not truly consent to' resolution of the claim" against him in the Bankruptcy Court. *Ante*, at 681 (quoting 564 U. S., at 493). That is not a proper reading of the decision. The constitutional analysis in *Stern*, spanning 22 pages, contained exactly one affirmative reference to the lack of consent. See *ibid.* That reference came amid a long list of factors distinguishing the proceeding in *Stern* from the proceedings in *Schor* and other "public rights" cases. 564 U. S., at 493–495. *Stern*'s subsequent sentences made clear that the notions of consent relied

upon by the Court in *Schor* did not apply in bankruptcy because "creditors lack an alternative forum to the bankruptcy court in which to pursue their claims." 564 U. S., at 493 (quoting *Granfinanciera*, 492 U. S., at 59, n. 14). Put simply, the litigant in *Stern* did not consent because he *could not* consent given the nature of bankruptcy.

There was an opinion in *Stern* that turned heavily on consent: the dissent. 564 U. S., at 516–517 (opinion of BREYER, J.). The *Stern* majority responded to the dissent with a counterfactual: *Even if* consent were relevant to the analysis, that factor would not change the result because the litigant did not truly consent. *Id.*, at 493. Moreover, *Stern* held that "it does not matter who" authorizes a bankruptcy judge to render final judgments on *Stern* claims, because the "constitutional bar remains." *Id.*, at 501. That holding is incompatible with the majority's conclusion today that two litigants can authorize a bankruptcy judge to render final judgments on *Stern* claims, despite the constitutional bar that remains.

The majority also relies heavily on the supervision and control that Article III courts exercise over bankruptcy courts. *Ante*, at 679–681. As the majority notes, court of appeals judges appoint bankruptcy judges, and bankruptcy judges receive cases only on referral from district courts (although every district court in the country has adopted a standing rule automatically referring all bankruptcy filings to bankruptcy judges, see 1 Collier on Bankruptcy ¶3.02[1], p. 3–26 (16th ed. 2014)). The problem is that Congress has also given bankruptcy courts authority to enter final judgments subject only to deferential appellate review, and Article III precludes those judgments when they involve *Stern* claims. The fact that Article III judges played a role in the Article III violation does not remedy the constitutional harm. We have already explained why.

It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks

authority to exercise those functions. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936). Such delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 61–62 (2015) (ALITO, J., concurring); *id.*, at 67–68 (THOMAS, J., concurring in judgment); *Mistretta* v. *United States*, 488 U. S. 361, 417–422 (1989) (SCALIA, J., dissenting). Article III judges have no constitutional authority to delegate the judicial power—the power to "render dispositive judgments"—to non-Article III judges, no matter how closely they control or supervise their work. *Plaut*, 514 U. S., at 219 (internal quotation marks omitted).

In any event, the majority's arguments about supervision and control are not new. They were considered and rejected in *Stern*. See 564 U. S., at 501 ("it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments"); see also *Northern Pipeline*, 458 U. S., at 84–86 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment). The majority points to no differences between the bankruptcy proceeding in *Stern* and the bankruptcy proceeding here, except for Sharif's purported consent. The majority thus treats consent as "dispositive" in curing the structural separation of powers violation—precisely what *Schor* said consent could not do. 478 U. S., at 851.

C

Eager to change the subject from *Stern*, the majority devotes considerable attention to defending the authority of magistrate judges, who may conduct certain proceedings with the consent of the parties under 28 U. S. C. § 636. No one here challenges the constitutionality of magistrate judges or disputes that they, like bankruptcy judges, may issue reports and recommendations that are reviewed *de*

novo by Article III judges. The cases about magistrate judges cited by the majority therefore have little bearing on this case, because none of them involved a constitutional challenge to the entry of final judgment by a non-Article III actor. See *Roell* v. *Withrow*, 538 U. S. 580 (2003) (statutory challenge only); *Peretz* v. *United States*, 501 U. S. 923 (1991) (challenge to a magistrate judge's conduct of *voir dire* in a felony trial); *Gomez* v. *United States*, 490 U. S. 858 (1989) (same).

The majority also points to 19th-century cases in which courts referred disputes to non-Article III referees, masters, or arbitrators. *Ante*, at 674–675. In those cases, however, it was the Article III court that ultimately entered final judgment. *E. g.*, *Thornton* v. *Carson*, 7 Cranch 596, 600 (1813) ("the Court was right in entering the judgment for the sums awarded"). Article III courts do refer matters to non-Article III actors for assistance from time to time. This Court does so regularly in original jurisdiction cases. See, *e. g.*, *Kansas* v. *Nebraska*, 574 U. S. 445, 449 (2015). But under the Constitution, the "ultimate responsibility for deciding" the case must remain with the Article III court. *Id.*, at 453 (quoting *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984)).

The concurrence's comparison of bankruptcy judges to arbitrators is similarly inapt. *Ante*, at 686 (opinion of ALITO, J.). Arbitration is "a matter of contract" by which parties agree to resolve their disputes in a private forum. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67 (2010). Such an arrangement does not implicate Article III any more than does an agreement between two business partners to submit a difference of opinion to a mutually trusted friend. Arbitration agreements, like most private contracts, can be enforced in court. And Congress, pursuant to its Commerce Clause power, has authorized district courts to enter judgments enforcing arbitration awards under certain circumstances. See 9 U. S. C. § 9. But this ordinary scheme of contract enforcement creates no constitutional concern. As the concur-

rence acknowledges, only Article III judges—not arbitrators—may enter final judgments enforcing arbitration awards. *Ante*, at 686.

The discussion of magistrate judges, masters, arbitrators, and the like fits with the majority's focus on the supposedly dire consequences that would follow a decision that parties cannot consent to the final adjudication of *Stern* claims in bankruptcy courts. Of course, it "goes without saying" that practical considerations of efficiency and convenience cannot trump the structural protections of the Constitution. *Stern*, 564 U. S., at 501; see *Perez*, 575 U. S., at 130 (THOMAS, J., concurring in judgment) ("Even in the face of a perceived necessity, the Constitution protects us from ourselves."). And I find it hard to believe that the Framers in Philadelphia, who took great care to ensure that the Judiciary was "truly distinct" from the Legislature, would have been comforted to know that Congress's incursion here could "only be termed *de minimis*." *Ante*, at 679 (quoting *Schor*, 478 U. S., at 856).

In any event, the majority overstates the consequences of enforcing the requirements of Article III in this case. As explained in Part I, Wellness's claim may not be a *Stern* claim, in which case the bankruptcy statute would apply precisely as Congress wrote it. Even if Wellness's claim were a *Stern* claim, the District Court would not need to start from scratch. As this Court held in *Arkison*, the District Court could treat the bankruptcy judge's decision as a recommendation and enter judgment after performing *de novo* review. 573 U. S., at 31.

In *Stern*, the Court cautioned that Congress "may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." 564 U. S., at 502–503. The majority sees no reason to fret, however, so long as two private parties consent. *Ante*, at 680, n. 10. But such parties are unlikely to carefully weigh the long-term structural independence of the Article III Judiciary against their own

short-term priorities. Perhaps the majority's acquiescence in this diminution of constitutional authority will escape notice. Far more likely, however, it will amount to the kind of "blueprint for extensive expansion of the legislative power" that we have resisted in the past. *PCAOB*, 561 U. S., at 500 (quoting *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 277 (1991)).

The encroachment at issue here may seem benign enough. Bankruptcy judges are devoted professionals who strive to be fair to all sides, and litigants can be trusted to protect their own interests when deciding whether to consent. But the fact remains that Congress controls the salary and tenure of bankruptcy judges, and the Legislature's present solicitude provides no guarantee of its future restraint. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 534 (1962) (plurality opinion). Once Congress knows that it can assign federal claims to judges outside Article III with the parties' consent, nothing would limit its exercise of that power to bankruptcy. Congress may consider it advantageous to allow claims to be heard before judges subject to greater legislative control in any number of areas of federal concern. As for the requirement of consent, Congress can find ways to "encourage" consent, say by requiring it as a condition of federal benefits. That has worked to expand Congress's power before. See, *e. g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 686 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take"); *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987) (same).

Legislative designs of this kind would not displace the Article III Judiciary overnight. But steady erosion of Article III authority, no less than a brazen usurpation, violates the constitutional separation of powers. In a Federal Government of limited powers, one branch's loss is another branch's

gain, see *PCAOB*, 561 U. S., at 500, so whether a branch aims to "arrogate power to itself" or to "impair another in the performance of its constitutional duties," the Constitution forbids the transgression all the same. *Loving*, 517 U. S., at 757. As we have cautioned, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture." *Stern*, 564 U. S., at 503 (internal quotation marks omitted).

The Framers understood this danger. They warned that the Legislature would inevitably seek to draw greater power into its "impetuous vortex," The Federalist No. 48, at 309 (J. Madison), and that "power over a man's subsistence amounts to a power over his will," *id.*, No. 79, at 472 (A. Hamilton) (emphasis deleted). In response, the Framers adopted the structural protections of Article III, "establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U. S., at 239. As this Court once put it, invoking Frost, "Good fences make good neighbors." *Id.*, at 240.

Ultimately, however, the structural protections of Article III are only as strong as this Court's will to enforce them. In Madison's words, the "great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51, at 321–322. The Court today declines to resist encroachment by the Legislature. Instead it holds that a single federal judge, for reasons adequate to him, may assign away our hard-won constitutional birthright so long as two private parties agree. I hope I will be wrong about the consequences of this decision for the independence of the Judicial Branch. But for now, another literary passage comes to mind: It profits the Court nothing to give its soul for the whole world . . . but to avoid *Stern* claims?

I respectfully dissent.

JUSTICE THOMAS, dissenting.

Like THE CHIEF JUSTICE, I would have remanded this case to the lower courts to determine, under the proper standard, whether Wellness' alter-ego claim is a *Stern* claim. See *Stern* v. *Marshall*, 564 U. S. 462 (2011). I write separately to highlight a few questions touching on the consent issue that merit closer attention than either the Court or THE CHIEF JUSTICE gives them.

I agree with THE CHIEF JUSTICE that individuals cannot consent to violations of the Constitution, but this principle has nothing to do with whose interest the violated provision protects. Anytime the Federal Government acts in a manner inconsistent with the separation of powers, it acts in excess of its constitutional authority. That authority is carefully defined by the Constitution, and, except through Article V's amendment process, that document does not permit individuals to bestow additional power upon the Government.

The majority today authorizes non-Article III courts to adjudicate, with consent, claims that we have held to require an exercise of the judicial power based on its assessment that few "structural interests" are implicated by consent to the adjudication of *Stern* claims. See *ante*, at 673, 678. That reasoning is flawed. It matters not whether *we* think the particular violation threatens the structure of our Government. Our duty is to enforce the Constitution as written, not as revised by private consent, innocuous or otherwise. Worse, amidst the tempest over whether "structural interests" are implicated when an individual consents to adjudication of *Stern* claims by a non-Article III court, both the majority and THE CHIEF JUSTICE fail to grapple with the antecedent question: whether a violation of the Constitution has actually occurred. That question is a difficult one, and the majority makes a grave mistake by skipping over it in its quest to answer the question whether consent can authorize a constitutional violation. Because I would resolve this case on nar-

rower grounds, I need not decide that question here. I nevertheless write separately to highlight the complexity of the issues the majority simply brushes past.

I

A

"The principle, that [the Federal Government] can exercise only the powers granted to it, . . . is now universally admitted." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). A corollary to this principle is that each branch of the Government is limited to the exercise of those powers granted to it. Every violation of the separation of powers thus involves an exercise of power in excess of the Constitution. And because the only authorities capable of granting power are the Constitution itself, and the people acting through the amendment process, individual consent cannot authorize the Government to exceed constitutional boundaries.

This does not mean, however, that consent is invariably irrelevant to the constitutional inquiry. Although it may not authorize a constitutional violation, consent may prevent one from occurring in the first place. This concept is perhaps best understood with the example on which the majority and THE CHIEF JUSTICE both rely: the right to a jury trial. *Ante*, at 675 (majority opinion); *ante*, at 697 (ROBERTS, C. J., dissenting).[1] Although the Government incurably contravenes the Constitution when it acts in *violation* of the jury

[1] There is some dispute whether the guarantee of a jury trial protects an individual right, a structural right, or both, raising serious questions about how it should be treated under *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). My view, which does not turn on such taxonomies, leaves no doubt: It is a "fundamental reservation of power in our constitutional structure," *Blakely* v. *Washington*, 542 U. S. 296, 306 (2004), meaning its *violation* may not be authorized by the consent of the individual.

trial right, our precedents permit the Government to convict a criminal defendant without a jury trial when he waives that right. See *Brady* v. *United States*, 397 U. S. 742, 748 (1970). The defendant's waiver is thus a form of consent that lifts a limitation on government action by satisfying its terms—that is, the right is exercised and honored, not disregarded. See *Patton* v. *United States*, 281 U. S. 276, 296–298 (1930), abrogated on other grounds by *Williams* v. *Florida*, 399 U. S. 78 (1970). Provided the Government otherwise acts within its powers, there is no constitutional violation.

B

Consent to the adjudication of *Stern* claims by bankruptcy courts is a far more complex matter than waiver of a jury trial. Two potential violations of the separation of powers occur whenever bankruptcy courts adjudicate *Stern* claims. First, the bankruptcy courts purport to exercise power that the Constitution vests exclusively in the Judiciary, even though they are not Article III courts because bankruptcy judges do not enjoy the tenure and salary protections required by Article III. See Art. III, § 1. Second, the bankruptcy courts act pursuant to statutory authorization that is itself invalid. For even when acting pursuant to an enumerated power, such as the bankruptcy power, Congress exceeds its authority when it purports to authorize a person or entity to perform a function that requires the exercise of a power vested elsewhere by the Constitution. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001).

Rather than attempt to grapple with these problems, the majority seizes on some statements from *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986), to resolve the difficult constitutional issue before us. See *ante*, at 675–678. But to the extent *Schor* suggests that individual consent could authorize non-Article III courts to exercise the judicial power, 478 U. S., at 850–851, it was wrongly decided and should be abandoned. Consent to adjudication by non-

Article III judges may waive whatever individual right to impartial adjudication Article III implies, thereby lifting that affirmative barrier on Government action. But non-Article III courts must still act within the bounds of their constitutional authority. That is, they must act through a power properly delegated to the Federal Government and not vested by the Constitution in a different governmental actor. Because the judicial power is vested exclusively in Article III courts, non-Article III courts may not exercise it.

Schor's justification for authorizing such a transgression was that it judged the "practical effect [the allocation would] have on the constitutionally assigned role of the federal judiciary" not to be too great. *Id.*, at 851. But we "can[not] preserve a system of separation of powers on the basis of such intuitive judgments regarding 'practical effects.'" *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 70 (1989) (SCALIA, J., concurring in part and concurring in judgment). Put more starkly, "[t]o uphold" a violation of the Constitution because one perceives "the infraction assailed [a]s unimportant when compared with similar but more serious infractions which might be conceived . . . is not to interpret that instrument, but to disregard it." *Patton*, *supra*, at 292. Our Constitution is not a matter of convenience, to be invoked when we feel uncomfortable with some Government action and cast aside when we do not. See *Perez* v. *Mortgage Bankers Assn.*, *ante*, at 115–116 (THOMAS, J., concurring in judgment).

II

Properly understood, then, the answer to the consent question in this case depends on whether bankruptcy courts act within the bounds of their constitutional authority when they adjudicate *Stern* claims with the consent of the parties. In order to answer that question, we must consider what form of governmental power that type of adjudication requires and whether bankruptcy courts are qualified to exer-

cise that power. *Department of Transportation* v. *Association of American Railroads*, *ante*, at 88 (THOMAS, J., concurring in judgment).

Many Government functions "may be performed by two or more branches without either exceeding its enumerated powers under the Constitution." *Association of American Railroads*, *ante*, at 69. Certain core functions, however, demand the exercise of legislative, executive, or judicial power, and their allocation is controlled by the Vesting Clauses contained in the first three articles of the Constitution. *Ibid.* We have already held that adjudicating *Stern* claims, at least *without* consent of the parties, requires an exercise of the judicial power vested exclusively in Article III courts. *Stern*, 564 U. S., at 493–494. The difficult question presented by this case, which the Court glosses over, is whether the parties' consent somehow transforms the nature of the power exercised.

A

As the concepts were understood at the time of the founding, the legislative, executive, and judicial powers played different roles in the resolution of cases and controversies. In this context, the judicial power is the power "to determine all differences according to the established law"; the legislative power is the power to make that "established law"; and the executive power is the power "to back and support the sentence, and to give it due execution." J. Locke, Second Treatise of Civil Government §§ 124–126, pp. 62–63 (J. Gough ed. 1947); see also *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825).

It should be immediately apparent that consent does not transform the adjudication of *Stern* claims into a function that requires the exercise of legislative or executive power. Parties by their consent do not transform the function of adjudicating controversies into the functions of creating rules or enforcing judgments.

The more difficult question is whether consent somehow eliminates the need for an exercise of the judicial power.

Our precedents reveal that the resolution of certain cases or controversies requires the exercise of that power, but that others "may or may not" be brought "within the cognizance of [Article III courts], as [Congress] deem[s] proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). The distinction generally has to do with the types of rights at issue. Disposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not. From that core of the judicial power, we have identified two narrow historical exceptions. Those exceptions, along with the treatment of cases or controversies not falling within that core, provide useful guidance for understanding whether bankruptcy courts' adjudication of *Stern* claims with the consent of the parties requires the exercise of Article III judicial power.

1

Under our precedents, the three categories of cases that may be adjudicated by Article III courts but that do not demand the exercise of the judicial power are those arising in the territories, those arising in the Armed Forces, and those involving public rights disputes. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 63–67 (1982) (plurality opinion).

The first two represent unique historical exceptions that tell us little about the overall scope of the judicial power. From an early date, this Court has long upheld laws authorizing the adjudication of cases arising in the territories in non-Article III "territorial courts" on the ground that such courts exercise power "conferred by Congress, in the execution of those general powers which [Congress] possesses over the territories of the United States." *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828) (*Canter*).[2] And

[2] Chief Justice Marshall's explanation in *Canter* has come under attack on the ground that it fails to clarify the precise constitutional status of the power exercised by the territorial courts. Lawson, Territorial Govern-

the Court has upheld laws authorizing the adjudication of cases arising in the Armed Forces in non-Article III courts-martial, inferring from a constellation of constitutional provisions that Congress has the power to provide for the adjudication of disputes among the Armed Forces it creates and that Article III extends only to *civilian* judicial power. *Dynes* v. *Hoover*, 20 How. 65, 78–79 (1858). Whatever their historical validity, these precedents exempt cases arising in the territories and in the land and naval forces from Article III because of other provisions of the Constitution, not because of the definition of judicial power in Article III itself. See Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 576 (2007) (noting that both exceptions enjoy "special textual rationales that d[o] not spill over into other areas").

The third category consists of so-called "public rights" cases. Unlike the other two categories, which reflect carve-outs from the core of the judicial power, this category describes cases outside of that core and therefore has more to tell us about the scope of the judicial power.

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ments and the Limits of Formalism, 78 Cal. L. Rev. 853, 892 (1990) (criticizing it as "fatuous" dictum). On the one hand, some early evidence suggests that the courts were thought to be dealing primarily with local matters that lie *beyond* federal judicial cognizance. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 706–711 (2004). Yet *Canter* involved a controversy indisputably *capable* of adjudication by Article III courts, because it both arose in admiralty and fell within the Supreme Court's appellate jurisdiction. Pfander, *supra*, at 713–714, n. 314. The best explanation for this apparent tension is that territorial courts adjudicate matters that Congress may or may not assign to Article III courts, as it wishes. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 575–576 (2007). To recognize Congress' discretion requires no distortion of the meaning of judicial power because Chief Justice Marshall's reasoning has nothing to do with the intrinsic qualities of the adjudication itself—*e. g.*, whether it involves "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789," *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011) (internal quotation marks omitted).

The distinction between disputes involving "public rights" and those involving "private rights" is longstanding, but the contours of the "public rights" doctrine have been the source of much confusion and controversy. See generally *Granfinanciera*, 492 U. S., at 66–70 (opinion of SCALIA, J.) (tracing the evolution of the doctrine). Our cases attribute the doctrine to this Court's mid-19th-century decision, *Murray's Lessee*, *supra*. In that case, the Court observed that there are certain cases addressing "*public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284 (emphasis added).

Historically, "*public* rights" were understood as "rights belonging to the people at large," as distinguished from "the *private* unalienable rights of each individual." *Lansing* v. *Smith*, 4 Wend. 9, 21 (N. Y. 1829) (Walworth, C.). This distinction is significant to our understanding of Article III, for while the legislative and executive branches may dispose of public rights at will—including through non-Article III adjudications—an exercise of the judicial power is required "when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual." Nelson, *supra*, at 569; see *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, *ante*, at 171 (THOMAS, J., dissenting).

The distinction was well known at the time of the founding. In the tradition of John Locke, William Blackstone in his Commentaries identified the private rights to life, liberty, and property as the three "absolute" rights—so called because they "appertain[ed] and belong[ed] to particular men . . . merely as individuals," not "to them as members of society [or] standing in various relations to each other"—that is, not dependent upon the will of the government. 1 W. Blackstone, Commentaries on the Laws of England 119

(1765) (Commentaries); see also Nelson, *supra*, at 567.[3] Public rights, by contrast, belonged to "the whole community, considered as a community, in its social aggregate capacity." 4 Commentaries 5 (1769); see also Nelson, *supra*, at 567. As the modern doctrine of the separation of powers emerged, "the courts became identified with the enforcement of private right, and administrative agencies with the execution of public policy." Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 413 (1958).

The Founders carried this idea forward into the Vesting Clauses of our Constitution. Those Clauses were understood to play a role in ensuring that the federal courts alone could act to deprive individuals of private rights because the power to act conclusively against those rights was the core of the judicial power. As one early treatise explained, the judiciary is "that department of the government to whom the protection of the rights of the individual is by the constitution especially confided." 1 St. George Tucker, Blackstone's Commentaries, App. 357 (1803). If "public rights" were not thought to fall within the core of the judicial power, then that could explain why Congress would be able to perform or authorize non-Article III adjudications of public rights without transgressing Article III's Vesting Clause.

Nineteenth-century American jurisprudence confirms that an exercise of the judicial power was thought to be necessary for the disposition of private, but not public, rights.[4] See

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[3] The protection of private rights in the Anglo-American tradition goes back to at least Magna Carta. The original 1215 charter is replete with restrictions on the King's ability to proceed against private rights, including most notably the provision that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, . . . except by the lawful judgment of his peers and by the law of the land." A. Howard, Magna Carta: Text and Commentary 43 (1964).

[4] Contemporary state-court decisions provide even more explication of the distinction between public and private rights, and many expressly tie the distinction to the separation of powers. See, *e. g.*, *Newland* v. *Marsh*, 19 Ill. 376, 383 (1857) ("The legislative power . . . cannot directly reach the

B&B Hardware, *ante,* at 171–172. The treatment of land patents illustrates the point well: Although Congress could authorize executive agencies to dispose of *public* rights in land—often by means of adjudicating a claimant's qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke a patent. See generally Nelson, 107 Colum. L. Rev., at 577–578 (discussing land patents). That differential treatment reflected the fact that, once "legal title passed out of the United States," the patent "[u]ndoubtedly" constituted "a vested right" and consequently could "only be divested according to law." *Johnson* v. *Towsley,* 13 Wall. 72, 84–85 (1871). By contrast, a party who sought to protect only a "public right" in the land had no such vested right and could not invoke the intervention of Article III courts. See *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647 (1882) ("It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it"); see also *Bagnell* v. *Broderick*, 13 Pet. 436, 450 (1839) (refusing to examine the propriety of a land patent on the ground that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States").

Over time, the line between public and private rights has blurred, along with the Court's treatment of the judicial power. See *B&B Hardware*, *ante*, at 168–170, 171–172. The source of the confusion may be *Murray's Lessee*—the

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property or vested rights of the citizen, by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so, would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislat[ure]"); see also *Gaines* v. *Gaines*, 48 Ky. 295, 301 (1848) (describing the judiciary as "the tribunal appointed by the Constitution and the law, for the ascertainment of private rights and the redress of private wrongs"); *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 98, 109, 5 N. E. 228, 232 (1886) ("[P]ower to hear and determine rights of property and of person between private parties is judicial, and can only be conferred on the courts"); see generally T. Cooley, Constitutional Limitations 175 (1868) (explaining that only the judicial power was thought capable of disposing of private rights).

putative source of the public rights doctrine itself. Dictum in the case muddles the distinction between private and public rights, and the decision is perhaps better read as an expression of the principle of sovereign immunity. *Granfinanciera*, 492 U. S., at 68–69 (opinion of SCALIA, J.).[5] Some cases appear to have done just that, thus reading *Murray's Lessee* to apply only in disputes arising between the Government and others. See, *e. g.*, *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932).

Another strain of cases has confused the distinction between private and public rights, with some cases treating public rights as the equivalent of private rights entitled to full judicial review, *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108 (1902), and others treating what appear to be private rights as public rights on which executive action could be conclusive, see, *e. g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404 (1940); see also *B&B Hardware*, *ante*, at 172 (observing that *Sunshine Anthracite* may reflect a unique historical exception for tax cases). Cf. *Northern Pipeline*, 458 U. S., at 84–85 (plurality opinion) (discussing other cases that appear to reflect the historical distinction between private rights and rights created by Congress). Perhaps this confusion explains why the Court has more recently expanded the concept of public rights to include any right "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency

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[5] Another potential explanation is that *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), recognized yet another special exception to Article III's allocation of judicial power, applicable whenever the Government exercises its power of taxation. Nelson, 107 Colum. L. Rev., at 588–589; see also *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, *ante*, at 172 (THOMAS, J., dissenting) (discussing other decisions that appear to rest on this exception). To the extent that *Murray's Lessee* purported to recognize such an exception, however, it did so only in dictum after noting that the statute provided a mechanism for judicial review of the accounting decision on which the distress warrant was based. 18 How., at 280–281.

resolution with limited involvement by the Article III judiciary." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 593–594 (1985). A return to the historical understanding of "public rights," however, would lead to the conclusion that the inalienable core of the judicial power vested by Article III in the federal courts is the power to adjudicate *private* rights disputes.

2

Although Congress did not enact a permanent federal bankruptcy law until the late 19th century, it has assigned the adjudication of certain bankruptcy disputes to non-Article III actors since as early as 1800. Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L. J. 567, 608 (1998) (describing the bankruptcy powers vested by Congress in non-Article III judges). Modern bankruptcy courts, however, adjudicate a far broader array of disputes than their earliest historical counterparts. And this Court has remained carefully noncommittal about the source of their authority to do so. See *Northern Pipeline*, 458 U. S., at 71 (plurality opinion).

Applying the historical categories of cases discussed above, one can understand why. Bankruptcy courts clearly do not qualify as territorial courts or courts-martial, but they are not an easy fit in the "public rights" category, either. No doubt certain aspects of bankruptcy involve rights lying outside the core of the judicial power. The most obvious of these is the right to discharge, which a party may obtain if he satisfies certain statutory criteria. *Ibid.* Discharge is not itself a private right, but, together with the claims allowance process that precedes it, it can act conclusively on the core private rights of the debtor's creditors. We have nevertheless implicitly recognized that the claims allowance process may proceed in a bankruptcy court, as can any matter that would necessarily be resolved by that process, even one that affects core private rights. *Stern*, 564 U. S., at 495–

497. For this reason, bankruptcy courts and their predecessors more likely enjoy a unique, textually based exception, much like territorial courts and courts-martial do. See *id.*, at 504–505 (SCALIA, J., concurring). That is, Article I's Bankruptcy Clause serves to carve cases and controversies traditionally subject to resolution by bankruptcy commissioners out of Article III, giving Congress the discretion, within those historical boundaries, to provide for their resolution outside of Article III courts.

3

Because *Stern* claims by definition fall outside of the historical boundaries of the bankruptcy carveout, they are subject to Article III. This means that, if their adjudication requires the exercise of the judicial power, then only Article III courts may perform it.

Although *Stern* claims indisputably involve private rights, the "public rights" doctrine suggests a way in which party consent may transform the function of adjudicating *Stern* claims into one that does not require the exercise of the judicial power. The premise of the "public rights" doctrine, as described above, is not that public rights affirmatively require adjudication by some other governmental power, but that the Government has a freer hand when private rights are not at issue. Accordingly, this premise may not require the presence of a public right at all, but may apply equally to any situation in which private rights are not asserted.

Party consent, in turn, may have the effect of lifting that "private rights" bar, much in the way that waiver lifts the bar imposed by the right to a jury trial. Individuals may dispose of their own private rights freely, without judicial intervention. A party who consents to adjudication of a *Stern* claim by a bankruptcy court is merely making a conditional surrender of whatever private right he has on the line, contingent on some future event—namely, that the bankruptcy court rules against him. Indeed, it is on this logic

that the law has long encouraged and permitted private settlement of disputes, including through the action of an arbitrator not vested with the judicial power. See *ante*, at 686 (ALITO, J., concurring in part and concurring in judgment); T. Cooley, Constitutional Limitations 399 (1868). Perhaps for this reason, decisions discussing the relationship between private rights and the judicial power have emphasized the "*involuntary* divestiture" of a private right. *Newland* v. *Marsh*, 19 Ill. 376, 382–383 (1857) (emphasis added).

But all of this does not necessarily mean that the majority has wound up in the right place by the wrong path. Even if consent could lift the private rights barrier to nonjudicial Government action, it would not necessarily follow that consent removes the *Stern* adjudication from the core of the judicial power. There may be other aspects of the adjudication that demand the exercise of the judicial power, such as entry of a final judgment enforceable without any further action by an Article III court. We have recognized that judgments entered by Article III courts bear unique qualities that spring from the exercise of the judicial power, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218–219 (1995), and it may be that the entry of a final judgment bearing these qualities—irrespective of the subject matter of the dispute—is a quintessential judicial function, see *ante*, at 702–703 (ROBERTS, C. J., dissenting). See generally *Northern Pipeline*, *supra*, at 85–86, and n. 38 (plurality opinion) (distinguishing the agency orders at issue in *Crowell* from bankruptcy court orders on this ground). As Thomas Cooley explained in his influential treatise, "If the judges should sit to hear . . . controversies [beyond their cognizance], they would not sit as a court; at the most they would be arbitrators only, and their . . . decision could not be binding as a judgment, but only as an award." Cooley, *supra*, at 399.[6]

[6] Numerous 19th-century State Supreme Courts held unconstitutional laws authorizing individuals to consent to have their cases heard by an individual not qualified as a judge under provisions of State Constitutions

Ultimately, this case implicates difficult questions about the nature of bankruptcy procedure, judicial power, and remedies. In particular, if we were to determine that current practice accords bankruptcy court judgments a feature that demands the exercise of the judicial power, would that mean that all bankruptcy judgments resolving *Stern* claims are void, or only that courts may not give effect to that single feature that triggers Article III? The parties have briefed none of these issues, so I do not resolve them. But the number and magnitude of these important questions—questions implicated by thousands of bankruptcy and magistrate judge decisions each year—merit closer attention than the majority has given them.

B

Even assuming we were to decide that adjudication of *Stern* claims with the consent of the parties does not require the exercise of the judicial power, that decision would not end the constitutional inquiry. As instrumentalities of the

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similar to Article III, §1. See, *e. g.*, *Winchester* v. *Ayres*, 4 Iowa 104 (1853); *Haverly Invincible Mining Co.* v. *Howcutt*, 6 Colo. 574, 575–576 (1883); *Ex parte Alabama State Bar Assn.*, 92 Ala. 113, 8 So. 768 (1891); see also Cooley, Constitutional Limitations, at 399. Acknowledging the similarity between the practices under review and the legitimate practice of private arbitration, many of these decisions premised their finding of unconstitutionality on the issuance of a judgment or other writ that only judges may issue. See, *e. g.*, *Bishop* v. *Nelson*, 83 Ill. 601 (1876) (*per curiam*) ("This was not an arbitration . . . but it was an attempt to confer upon [Mr. Wood] the power of a judge, to decide the pending case, and he did decide it, the court carrying out his decision by entering the judgment he had reached, and not [its] own judgment"); *Van Slyke* v. *Trempealeau Cty. Farmers' Mut. Fire Ins. Co.*, 39 Wis. 390, 393 (1876) ("We cannot look into the bill of exceptions or consider the order denying a new trial, because both are unofficial and devoid of judicial authority"); see also *id.*, at 395–396 (tracing this rule back to English understandings of judicial power). These decisions treat the rule as a corollary to the rule that parties may not, by consent, confer jurisdiction. See, *e. g.*, *Higby* v. *Ayres*, 14 Kan. 331, 334 (1875); *Hoagland* v. *Creed*, 81 Ill. 506, 507–508 (1876); see also Cooley, *supra*, at 399.

Federal Government, the bankruptcy courts must act pursuant to some constitutional grant of authority. Even if the functions bankruptcy courts perform do not require an exercise of legislative, executive, or judicial power, we would need to identify the source of Congress' authority to establish them and to authorize them to act.

The historical carveouts for territorial courts and courts-martial might provide some guidance. The Court has anchored Congress' authority to create territorial courts in "the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *Canter*, 1 Pet., at 546. And it has anchored Congress' authority to create courts-martial in Congress' Article I powers concerning the Army and Navy, understood alongside the Fifth Amendment's exception of "'cases arising in the land or naval forces,'" from the grand jury requirement, and Article II's requirement that the President serve as Commander in Chief. *Dynes*, 20 How., at 78–79.

Although our cases examining the constitutionality of statutes allocating the power to the bankruptcy courts have not considered the source of Congress' authority to establish them, the obvious textual basis is the fourth clause of Article I, § 8, which empowers Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[7] But as with the other two historical carveouts,

[7] In *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), the plurality rejected the argument that "Congress' constitutional authority to establish 'uniform Laws on the subject of Bankruptcies throughout the United States' carries with it an inherent power to establish legislative courts capable of adjudicating 'bankruptcy-related controversies.'" *Id.*, at 72 (citation omitted). In that context, however, it was considering whether Article III imposes limits on Congress' bankruptcy power, *id.*, at 73, which is a distinct question from whether Congress has the power to establish bankruptcy courts as an antecedent matter, leaving aside any Article III limitations.

Congress' power to establish tribunals within that grant is informed by historical understandings of the bankruptcy power.[8] We have suggested that, under this historical understanding, Congress has the power to establish bankruptcy courts that exercise jurisdiction akin to that of bankruptcy commissioners in England, subject to review traditionally had in England. *Ante*, at 690 (ROBERTS, C. J., dissenting). Although *Stern* claims, by definition, lie outside those historical boundaries, a historical practice of allowing broader adjudication by bankruptcy commissioners acting with the consent of the parties could alter the analysis. The parties once again do not brief these questions, but they merit closer attention by this Court.

* * *

Whether parties may consent to bankruptcy court adjudication of *Stern* claims is a difficult constitutional question. It turns on issues that are not adequately considered by the Court or briefed by the parties. And it cannot—and should not—be resolved through a cursory reading of *Schor*, which itself is hardly a model of careful constitutional interpretation. For these reasons, I would resolve the case on the narrow grounds set forth in Part I of THE CHIEF JUSTICE's opinion. I respectfully dissent.

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[8] I would be wary of concluding that every grant of lawmaking authority to Congress includes the power to establish "legislative courts" as part of its legislative scheme. Some have suggested that Congress' authority to establish tribunals pursuant to substantive grants of authority is informed and limited by its Article I power to "constitute Tribunals inferior to the supreme Court." U. S. Const., Art. I, §8, cl. 9. See Pfander, 118 Harv. L. Rev., at 671–697.

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ELONIS *v.* UNITED STATES

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

No. 13–983. Argued December 1, 2014—Decided June 1, 2015

After his wife left him, petitioner Anthony Douglas Elonis, under the pseudonym "Tone Dougie," used the social networking Web site Facebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement. These posts were often interspersed with disclaimers that the lyrics were "fictitious" and not intended to depict real persons, and with statements that Elonis was exercising his First Amendment rights. Many who knew him saw his posts as threatening, however, including his boss, who fired him for threatening co-workers, and his wife, who sought and was granted a state court protection-from-abuse order against him.

When Elonis's former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring Elonis's Facebook activity and eventually arrested him. He was charged with five counts of violating 18 U. S. C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." At trial, Elonis requested a jury instruction that the Government was required to prove that he intended to communicate a "true threat." Instead, the District Court told the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

Held: The Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under Section 875(c). Pp. 732–742.

(a) Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, and the parties can show no indication of a particular mental state requirement in the statute's text. Elonis claims that the word "threat," by definition, conveys the intent to inflict harm. But common definitions of "threat" speak to what the statement conveys—not to the author's mental state. The Government argues that the express "intent to extort" requirements in

neighboring Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). The most that can be concluded from such a comparison, however, is that Congress did not mean to confine Section 875(c) to crimes of extortion, not that it meant to exclude a mental state requirement. Pp. 732–734.

(b) The Court does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Morissette* v. *United States*, 342 U. S. 246, 250. This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.*, at 252. The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U. S. 250, 251. Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70. This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples* v. *United States*, 511 U. S. 600, 608, n. 3. Federal criminal statutes that are silent on the required mental state should be read to include "only that *mens rea* which is necessary to separate" wrongful from innocent conduct. *Carter* v. *United States*, 530 U. S. 255, 269. In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Ibid.* Pp. 734–737.

(c) The "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S., at 72. In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," *id.*, at 73, is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a threat. Elonis's conviction was premised solely on how his posts would be viewed by a reasonable person, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of "awareness of some wrongdoing," *Staples*, 511 U. S., at 606–607. This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers* v. *United States*, 422 U. S. 35, 47 (Marshall, J., concurring). And the Government fails to show that the instructions in this case required more than a mental state of negligence. *Hamling* v. *United States*, 418 U. S. 87, distinguished. Section

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875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declines to address whether a mental state of recklessness would also suffice. Given the disposition here, it is unnecessary to consider any First Amendment issues. Pp. 737–742.

730 F. 3d 321, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part, *post*, p. 742. THOMAS, J., filed a dissenting opinion, *post*, p. 750.

John P. Elwood argued the cause for petitioner. With him on the briefs were *Ronald H. Levine*, *Abraham J. Rein*, and *Daniel R. Ortiz*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Eric J. Feigin*, and *Sangita K. Rao*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *David A. Schulz*, and *Joan E. Bertin*; for the Center for Individual Rights by *Michael E. Rosman*; for the Marion B. Brechner First Amendment Project et al. by *Clay Calvert*; for the People for Ethical Treatment of Animals, Inc. (PETA), et al. by *Brian J. Murray* and *Thomas Brejcha*; for the Reporters Committee for Freedom of Press et al. by *Bruce D. Brown*, *Gregg P. Leslie*, *Richard A. Bernstein*, *Kevin M. Goldberg*, *Marcia Hofmann*, *Mickey H. Osterreicher*, *Kurt Wimmer*, and *Barbara L. Camens*; for The Rutherford Institute by *John W. Whitehead*; for the Student Press Law Center et al. by *Sean D. Jordan*; and for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler* and *Robert D. Richards*.

Briefs of *amici curiae* urging affirmance were filed for the State of Wisconsin et al. by *J. B. Van Hollen*, Attorney General of Wisconsin, and *Thomas C. Bellavia*, Assistant Attorney General, by *Kay Chopard Cohen*, and by the Attorneys General for their respective jurisdictions as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *Irvin B. Nathan* of the District of Columbia, *Leonardo M. Rapadas* of Guam, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Jack Conway* of Kentucky, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan,

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U. S. C. § 875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

I

A

Anthony Douglas Elonis was an active user of the social networking Web site Facebook. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook "friends" who are notified when new content is posted. In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children. Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music. App. 204, 226. Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "online persona." *Id.*, at 249, 265. The lyrics Elonis posted as

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Jim Hood of Mississippi, *Gary K. King* of New Mexico, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Sean D. Reyes* of Utah, and *Robert F. Ferguson* of Washington; for the Anti-Defamation League by *Christopher Wolf, Steve M. Freeman*, and *Frederick M. Lawrence*; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; for the Domestic Violence Legal Empowerment and Appeals Project et al. by *David B. Salmons*, *Jonathan M. Albano*, and *Joan S. Meier*; for the National Center for Victims of Crime by *Rebecca Roe*; and for the National Network to End Domestic Violence et al. by *Helen Gerostathos Guyton* and *Timothy J. Slattery.*

"Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." *Id.*, at 331, 329. Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic." *Id.*, at 329; see also *id.*, at 205 (testifying that it "helps me to deal with the pain").

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, "I wish." *Id.*, at 340. Elonis was not Facebook friends with the co-worker and did not "tag" her, a Facebook feature that would have alerted her to the posting. *Id.*, at 175; Brief for Petitioner 6, 9. But the chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him. App. 114–116; Brief for Petitioner 9.

In response, Elonis posted a new entry on his Facebook page:

> "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f***in' scary?" App. 332.

This post became the basis for Count One of Elonis's subsequent indictment, threatening park patrons and employees.

Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. *Id.*, at 164–165,

207. In the actual sketch, called "It's Illegal to Say . . . ," a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

> "Hi, I'm Tone Elonis.
> Did you know that it's illegal for me to say I want to kill my wife? . . .
> It's one of the only sentences that I'm not allowed to say. . . .
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. . . .
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
> But not illegal to say with a mortar launcher.
> Because that's its own sentence. . . .
> I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room. . . .
> Yet even more illegal to show an illustrated diagram.
> [diagram of the house]. . . . " *Id.*, at 333.

The details about the home were accurate. *Id.*, at 154. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" *Id.*, at 333.

After viewing some of Elonis's posts, his wife felt "extremely afraid for [her] life." *Id.*, at 156. A state court

granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). *Id.*, at 148–150. Elonis referred to the order in another post on his "Tone Dougie" page, also included in Count Two of the indictment:

> "Fold up your [protection-from-abuse order] and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> that was improperly granted in the first place
> Me thinks the Judge needs an education
> on true threat jurisprudence
> And prison time'll add zeros to my settlement . . .
> And if worse comes to worse
> I've got enough explosives
> to take care of the State Police and the Sheriff's Department." *Id.*, at 334.

At the bottom of this post was a link to the Wikipedia article on "Freedom of speech." *Ibid.* Elonis's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

That same month, interspersed with posts about a movie Elonis liked and observations on a comedian's social commentary, *id.*, at 356–358, Elonis posted an entry that gave rise to Count Four of his indictment:

> "That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius
> to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a Kindergarten class
> The only question is . . . which one?" *Id.*, at 335.

Meanwhile, park security had informed both local police and the Federal Bureau of Investigation about Elonis's posts,

and FBI Agent Denise Stevens had created a Facebook account to monitor his online activity. *Id.*, at 49–51, 125. After the post about a school shooting, Agent Stevens and her partner visited Elonis at his house. *Id.*, at 65–66. Following their visit, during which Elonis was polite but uncooperative, Elonis posted another entry on his Facebook page, called "Little Agent Lady," which led to Count Five:

> "You know your s***'s ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent lady stood so close
> Took all the strength I had not to turn the b**** ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
> [laughter]
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all goin'
> [BOOM!]
> Are all the pieces comin' together?
> S***, I'm just a crazy sociopath
> that gets off playin' you stupid f***s like a fiddle
> And if y'all didn't hear, I'm gonna be famous
> Cause I'm just an aspiring rapper who likes the attention
> who happens to be under investigation for terrorism
> cause y'all think I'm ready to turn the Valley into Fallujah
> But I ain't gonna tell you which bridge is gonna fall

into which river or road
And if you really believe this s***
I'll have some bridge rubble to sell you tomorrow
[BOOM!][BOOM!][BOOM!]" *Id.*, at 336.

B

A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U. S. C. § 875(c). App. 14–17. In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis "intentionally made the communication, not that he intended to make a threat." App. to Pet. for Cert. 51a. At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife. App. 225. In Elonis's view, he had posted "nothing . . . that hasn't been said already." *Id.*, at 205. The Government presented as witnesses Elonis's wife and coworkers, all of whom said they felt afraid and viewed Elonis's posts as serious threats. See, *e. g.*, *id.*, at 153, 158.

Elonis requested a jury instruction that "the government must prove that he intended to communicate a true threat." *Id.*, at 21. See also *id.*, at 267–269, 303. The District Court denied that request. The jury instructions instead informed the jury that

> "A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." *Id.*, at 301.

The Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—"it doesn't matter what he thinks." *Id.*, at 286. A jury convicted Elonis on four of the five counts against him, acquitting only on the charge of threatening park patrons and employees. *Id.*, at 309. Elonis was sentenced to three years, eight months' imprisonment and three years' supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his posts to be threats. The Court of Appeals disagreed, holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat. 730 F. 3d 321, 332 (CA3 2013).

We granted certiorari. 573 U. S. 916 (2014).

II

A

An individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 U. S. C. § 875(c). This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word "threat" itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of "threat" or "threaten" conveys the notion of an intent to inflict harm. Brief for Petitioner 23. See *United States* v. *Jeffries*, 692 F. 3d 473, 483 (CA6 2012) (Sutton, J., *dubitante*). *E. g.*, 11 Oxford English Dictionary 353

(1933) ("to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's New International Dictionary 2633 (2d ed. 1954) ("*Law,* specif., an expression of an intention to inflict loss or harm on another by illegal means"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another").

These definitions, however, speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says "I'm going to kill you" is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and (d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an "intent to extort." See 18 U. S. C. § 875(b) (proscribing threats to injure or kidnap made "with intent to extort"); § 875(d) (proscribing threats to property or reputation made "with intent to extort"). According to the Government, the express "intent to extort" requirements in Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Government takes this *expressio unius est exclusio alterius* canon too far. The fact that Congress excluded the requirement of an "intent to extort" from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state

in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

In sum, neither Elonis nor the Government has identified any indication of a particular mental state requirement in the text of Section 875(c).

B

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette* v. *United States*, 342 U. S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id.*, at 252. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*, at 250. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252; 1 W. LaFave, Substantive Criminal Law § 5.1, pp. 332–333 (2d ed. 2003). Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U. S. 250, 251 (1922). We therefore generally "interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994).

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The famil-

iar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," *Staples* v. *United States*, 511 U. S. 600, 608, n. 3 (1994), even if he does not know that those facts give rise to a crime.

Morissette, for example, involved an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned. During his trial for "knowingly convert[ing]" property of the United States, the judge instructed the jury that the only question was whether the defendant had knowingly taken the property without authorization. 342 U. S., at 248–249. This Court reversed the defendant's conviction, ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights in them. He could not be found liable "if he truly believed [the casings] to be abandoned." *Id.*, at 271; see *id.*, at 276.

By the same token, in *Liparota* v. *United States*, we considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U. S. 419, 420 (1985). The Government's argument, similar to its position in this case, was that a defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.*, at 423. But this Court rejected that interpretation of the statute, because it would have criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.*, at 426. For example, the statute made it illegal to use food stamps at a store that charged higher prices to food stamp customers. Without a mental state requirement in the statute, an individual who unwittingly paid higher prices would be guilty under the Government's interpretation. *Ibid.* The Court noted that Congress *could* have intended to cover such a "broad range of conduct," but

declined "to adopt such a sweeping interpretation" in the absence of a clear indication that Congress intended that result. *Id.*, at 427. The Court instead construed the statute to require knowledge of the facts that made the use of the food stamps unauthorized. *Id.*, at 425.

To take another example, in *Posters 'N' Things, Ltd.* v. *United States*, this Court interpreted a federal statute prohibiting the sale of drug paraphernalia. 511 U. S. 513 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant's state of mind. *Id.*, at 517–522. But, we held, an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs." *Id.*, at 524. Such a showing was necessary to establish the defendant's culpable state of mind.

And again, in *X-Citement Video*, we considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct. 513 U. S., at 68. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. *Id.*, at 68–69. We held instead that a defendant must also know that those depicted were minors, because that was "the crucial element separating legal innocence from wrongful conduct." *Id.*, at 73. See also *Staples*, 511 U. S., at 619 (defendant must know that his weapon had automatic firing capability to be convicted of possession of such a weapon).

When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U. S. 255, 269 (2000) (quoting *X-Citement Video*, 513 U. S., at 72). In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard. For example, in *Carter*, we considered whether a conviction

under 18 U. S. C. § 2113(a), for taking "by force and violence" items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 U. S., at 261. We held that once the Government proves the defendant forcibly took the money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of . . . 'otherwise innocent' " conduct. *Id.*, at 269–270. In other instances, however, requiring only that the defendant act knowingly "would fail to protect the innocent actor." *Id.*, at 269. A statute similar to Section 2113(a) that did not require a forcible taking or the intent to steal "would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his." *Ibid.* In such a case, the Court explained, the statute "would need to be read to require . . . that the defendant take the money with 'intent to steal or purloin.' " *Ibid.*

C

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S., at 72 (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. *Id.*, at 73. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil

liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U. S., at 606–607 (quoting *United States* v. *Dotterweich*, 320 U. S. 277, 281 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F. 3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers* v. *United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U. S. 246). See 1 C. Torcia, Wharton's Criminal Law § 27, pp. 171–172 (15th ed. 1993); *Cochran* v. *United States*, 157 U. S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter. App. 286.

The Government is at pains to characterize its position as something other than a negligence standard, emphasizing that its approach would require proof that a defendant "comprehended [the] contents and context" of the communication. Brief for United States 29. The Government gives two examples of individuals who, in its view, would lack this necessary mental state—a "foreigner, ignorant of the English language," who would not know the meaning of the words at issue, or an individual mailing a sealed envelope without knowing its contents. *Ibid.* But the fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. ALI, Model Penal Code § 2.02(2)(d) (1985). See *id.*, Comment 4, at 241; 1 LaFave, Substantive Criminal Law § 5.4, at 372–373. Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual

defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

In support of its position the Government relies most heavily on *Hamling* v. *United States*, 418 U. S. 87 (1974). In that case, the Court rejected the argument that individuals could be convicted of mailing obscene material only if they knew the "legal status of the materials" distributed. *Id.*, at 121. Absolving a defendant of liability because he lacked the knowledge that the materials were legally obscene "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.*, at 123. It was instead enough for liability that "a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Ibid.*

This holding does not help the Government. In fact, the Court in *Hamling* approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a "vital element of scienter" so that "not innocent but *calculated purveyance* of filth . . . is exorcised." *Id.*, at 122 (quoting *Mishkin* v. *New York*, 383 U. S. 502, 510 (1966); internal quotation marks omitted). In this case, "calculated purveyance" of a threat would require that Elonis know the threatening nature of his communication. Put simply, the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the *character* of what was sent, not simply its contents and context.

Contrary to the dissent's suggestion, see *post*, at 753, 758 (opinion of THOMAS, J.), nothing in *Rosen* v. *United States*, 161 U. S. 29 (1896), undermines this reading. The defendant's contention in *Rosen* was that his indictment for mailing obscene material was invalid because it did not allege that

he was aware of the contents of the mailing. *Id.*, at 31–33. That is not at issue here; there is no dispute that Elonis knew the words he communicated. The defendant also argued that he could not be convicted of mailing obscene material if he did not know that the material "could be properly or justly characterized as obscene." *Id.*, at 41. The Court correctly rejected this "ignorance of the law" defense; no such contention is at issue here. See *supra*, at 735.

* * *

In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and Congress left it intact here: Under Section 875(c), "wrongdoing must be conscious to be criminal." *Morissette*, 342 U. S., at 252.

There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. See Tr. of Oral Arg. 25, 56. In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. See *id.*, at 8–9. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it. See *Department of Treasury, IRS* v. *FLRA*, 494 U. S. 922, 933 (1990) (this Court is "poorly situated" to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in "only the most cursory fashion at oral argument"). Given our disposition, it is not necessary to consider any First Amendment issues.

Both JUSTICE ALITO and JUSTICE THOMAS complain about our not deciding whether recklessness suffices for liability under Section 875(c). *Post*, at 742–743 (ALITO, J., concurring in part and dissenting in part); *post*, at 750–751 (opinion of THOMAS, J.). JUSTICE ALITO contends that each party "argued" this issue, *post*, at 743, but they did not address it at all until oral argument, and even then only briefly. See Tr. of Oral Arg. 8, 38–39.

JUSTICE ALITO also suggests that we have not clarified confusion in the lower courts. That is wrong. Our holding makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals. Pet. for Cert. 17. There was and is no circuit conflict over the question JUSTICE ALITO and JUSTICE THOMAS would have us decide—whether recklessness suffices for liability under Section 875(c). No Court of Appeals has even addressed that question. We think that is more than sufficient "justification," *post*, at 743 (opinion of ALITO, J.), for us to decline to be the first appellate tribunal to do so.

Such prudence is nothing new. See *United States* v. *Bailey*, 444 U. S. 394, 407 (1980) (declining to decide whether mental state of recklessness or negligence could suffice for criminal liability under 18 U. S. C. § 751, even though a "court may someday confront a case" presenting issue); *Ginsberg* v. *New York*, 390 U. S. 629, 644–645 (1968) (rejecting defendant's challenge to obscenity law "makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution' "); *Smith* v. *California*, 361 U. S. 147, 154 (1959) (overturning conviction because lower court did not require any mental element under statute, but noting that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution"); cf. *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 103–104 (1981) (finding a lower court's order impermissible under the First Amend-

ment but not deciding "what standards are mandated by the First Amendment in this kind of case").

We may be "capable of deciding the recklessness issue," *post*, at 743 (opinion of ALITO, J.), but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in part and dissenting in part.

In *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), the Court famously proclaimed: "It is emphatically the province and duty of the judicial department to say what the law is." Today, the Court announces: It is emphatically the prerogative of this Court to say only what the law is not.

The Court's disposition of this case is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for conviction under 18 U. S. C. § 875(c), an important criminal statute. This case squarely presents that issue, but the Court provides only a partial answer. The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary. Did the jury need to find that Elonis had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.

This will have regrettable consequences. While this Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard. If purpose or knowledge is needed and a district court instructs the jury that recklessness suffices, a defendant may be wrongly con-

victed. On the other hand, if recklessness is enough, and the jury is told that conviction requires proof of more, a guilty defendant may go free. We granted review in this case to resolve a disagreement among the Circuits. But the Court has compounded—not clarified—the confusion.

There is no justification for the Court's refusal to provide an answer. The Court says that "[n]either Elonis nor the Government has briefed or argued" the question whether recklessness is sufficient. *Ante*, at 740. But in fact both parties addressed that issue. Elonis argued that recklessness is not enough, and the Government argued that it more than suffices. If the Court thinks that we cannot decide the recklessness question without additional help from the parties, we can order further briefing and argument. In my view, however, we are capable of deciding the recklessness issue, and we should resolve that question now.

I

Section 875(c) provides in relevant part:

> "Whoever transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

Thus, conviction under this provision requires proof that: (1) the defendant transmitted something, (2) the thing transmitted was a threat to injure the person of another, and (3) the transmission was in interstate or foreign commerce.

At issue in this case is the *mens rea* required with respect to the second element—that the thing transmitted was a threat to injure the person of another. This Court has not defined the meaning of the term "threat" in § 875(c), but in construing the same term in a related statute, the Court distinguished a "true 'threat'" from facetious or hyperbolic remarks. *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*). In my view, the term "threat" in § 875(c) can fairly

be defined as a statement that is reasonably interpreted as "an expression of an intention to inflict evil, injury, or damage on another." Webster's Third New International Dictionary 2382 (1976). Conviction under § 875(c) demands proof that the defendant's transmission was in fact a threat, *i. e.*, that it is reasonable to interpret the transmission as an expression of an intent to harm another. In addition, it must be shown that the defendant was at least reckless as to whether the transmission met that requirement.

Why is recklessness enough? My analysis of the *mens rea* issue follows the same track as the Court's, as far as it goes. I agree with the Court that we should presume that criminal statutes require some sort of *mens rea* for conviction. See *ante*, at 734–737. To be sure, this presumption marks a departure from the way in which we generally interpret statutes. We "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U. S. 23, 29 (1997). But this step is justified by a well-established pattern in our criminal laws. "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence)." 1 W. LaFave, Substantive Criminal Law § 5.5, p. 381 (2003). Based on these "background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime." *Staples* v. *United States*, 511 U. S. 600, 605–606 (1994).

For a similar reason, I agree with the Court that we should presume that an offense like that created by § 875(c) requires more than negligence with respect to a critical element like the one at issue here. See *ante*, at 737–740. As the Court states, "[w]hen interpreting federal criminal statutes that

are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Ante*, at 736 (quoting *Carter* v. *United States*, 530 U. S. 255, 269 (2000)). Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.

Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant "should [have] be[en] aware of a substantial and unjustifiable risk," ALI, Model Penal Code § 2.02(2)(d), p. 226 (1985), while recklessness exists "when a person disregards a risk of harm of which he is aware," *Farmer* v. *Brennan*, 511 U. S. 825, 837 (1994); Model Penal Code § 2.02(2)(c). And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.

There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable. See, *e. g.*, *Farmer*, *supra*, at 835–836 (deliberate indifference to an inmate's harm); *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964) (criminal libel); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964) (civil libel). Indeed, this Court has held that "reckless disregard for human life" may justify the death penalty. *Tison* v. *Arizona*, 481 U. S. 137, 157 (1987). Someone who acts recklessly with re-

spect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.

Accordingly, I would hold that a defendant may be convicted under § 875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat. Nothing in the Court's noncommittal opinion prevents lower courts from adopting that standard.

II

There remains the question whether interpreting § 875(c) to require no more than recklessness with respect to the element at issue here would violate the First Amendment. Elonis contends that it would. I would reject that argument.

It is settled that the Constitution does not protect true threats. See *Virginia* v. *Black*, 538 U. S. 343, 359–360 (2003); *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992); *Watts*, 394 U. S., at 707–708. And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.

Elonis argues that the First Amendment protects a threat if the person making the statement does not actually intend to cause harm. In his view, if a threat is made for a "'therapeutic'" purpose, "to 'deal with the pain' . . . of a wrenching event," or for "cathartic" reasons, the threat is protected. Brief for Petitioner 52–53. But whether or not the person making a threat intends to cause harm, the damage is the same. And the fact that making a threat may have a thera-

peutic or cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them.

Elonis also claims his threats were constitutionally protected works of art. Words like his, he contends, are shielded by the First Amendment because they are similar to words uttered by rappers and singers in public performances and recordings. To make this point, his brief includes a lengthy excerpt from the lyrics of a rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake. If this celebrity can utter such words, Elonis pleads, amateurs like him should be able to post similar things on social media. But context matters. "Taken in context," lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. *Watts*, *supra*, at 708. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.

The facts of this case illustrate the point. Imagine the effect on Elonis's estranged wife when she read this: "'If I only knew then what I know now . . . I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder.'" 730 F. 3d 321, 324 (CA3 2013). Or this: "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts." *Ibid.* Or this: "Fold up your [protection from abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?" *Id.*, at 325.

There was evidence that Elonis made sure his wife saw his posts. And she testified that they made her feel "'extremely afraid'" and "'like [she] was being stalked.'" *Ibid.* Considering the context, who could blame her? Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. See Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 4–16. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.

It can be argued that § 875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e. g.*, statements that may be literally threatening but are plainly not meant to be taken seriously. We have sometimes cautioned that it is necessary to "exten[d] a measure of strategic protection" to otherwise unprotected false statements of fact in order to ensure enough "'breathing space'" for protected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. See *New York Times*, 376 U. S., at 279–280 (civil liability); *Garrison*, 379 U. S., at 74–75 (criminal liability). Requiring proof of recklessness is similarly sufficient here.

III

Finally, because the jury instructions in this case did not require proof of recklessness, I would vacate the judgment below and remand for the Court of Appeals to decide in the first instance whether Elonis's conviction could be upheld under a recklessness standard.

We do not lightly overturn criminal convictions, even where it appears that the district court might have erred. To benefit from a favorable ruling on appeal, a defendant

must have actually asked for the legal rule the appellate court adopts. Rule 30(d) of the Federal Rules of Criminal Procedure requires a defendant to "inform the court of the specific objection and the grounds for the objection." An objection cannot be vague or open-ended. It must *specifically* identify the alleged error. And failure to lodge a sufficient objection "precludes appellate review," except for plain error. Rule 30(d); see also 2A C. Wright & P. Henning, Federal Practice and Procedure § 484, pp. 433–435 (4th ed. 2009).

At trial, Elonis objected to the District Court's instruction, but he did not argue for recklessness. Instead, he proposed instructions that would have required proof that he acted purposefully or with knowledge that his statements would be received as threats. See App. 19–21. He advanced the same position on appeal and in this Court. See Brief for Petitioner 29 ("Section 875(c) requires proof that the defendant *intended* the charged statement to be a 'threat' " (emphasis in original)); Corrected Brief of Appellant in No. 12–3798 (CA3), p. 14 ("[A] 'true threat' has been uttered only if the speaker acted with *subjective intent to threaten*" (same)). And at oral argument before this Court, he expressly disclaimed any agreement with a recklessness standard—which the Third Circuit remains free to adopt. Tr. of Oral Arg. 8 ("[W]e would say that recklessness is not enough"). I would therefore remand for the Third Circuit to determine if Elonis's failure (indeed, *refusal*) to argue for recklessness prevents reversal of his conviction.

The Third Circuit should also have the opportunity to consider whether the conviction can be upheld on harmless-error grounds. "We have often applied harmless-error analysis to cases involving improper instructions." *Neder* v. *United States*, 527 U. S. 1, 9 (1999); see also, *e. g.*, *Pope* v. *Illinois*, 481 U. S. 497, 503–504 (1987) (remanding for harmless-error analysis after holding that jury instruction misstated obscenity standard). And the Third Circuit has previously upheld

convictions where erroneous jury instructions proved harmless. See, *e. g.*, *United States* v. *Saybolt*, 577 F. 3d 195, 206–207 (2009). It should be given the chance to address that possibility here.

JUSTICE THOMAS, dissenting.

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. § 875(c). Save two, every Circuit to have considered the issue—11 in total—has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction. Adopting the minority position, Elonis urges us to hold that § 875(c) and the First Amendment require proof of an intent to threaten. The Government in turn advocates a general-intent approach.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for § 875(c). All they know after today's decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough. See *ante*, at 740–742.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. This uncertainty could have been avoided had we simply adhered to the background rule of the common law favoring general intent. Although I am sympathetic to my colleagues' policy concerns about the risks associated with threat prosecutions, the answer to such fears is not to discard

our traditional approach to state-of-mind requirements in criminal law. Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by Elonis were "true threats" unprotected by the First Amendment, I would affirm the judgment below.

I

A

Enacted in 1939, § 875(c) provides, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Because § 875(c) criminalizes speech, the First Amendment requires that the term "threat" be limited to a narrow class of historically unprotected communications called "true threats." To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely "political hyperbole"; "vehement, caustic, and sometimes unpleasantly sharp attacks"; or "vituperative, abusive, and inexact" statements. *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). It also cannot be determined solely by the reaction of the recipient, but must instead be "determined by the interpretation of a *reasonable* recipient familiar with the context of the communication," *United States* v. *Darby*, 37 F. 3d 1059, 1066 (CA4 1994) (emphasis added), lest historically protected speech be suppressed at the will of an eggshell observer, cf. *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise" (internal quotation marks omitted)). There is thus no dispute that, at a minimum, § 875(c) requires an objective showing: The communication must be one that "a reasonable observer would construe as a true threat to another." *United States* v. *Jeffries*, 692

F. 3d 473, 478 (CA6 2012). And there is no dispute that the posts at issue here meet that objective standard.

The only dispute in this case is about the state of mind necessary to convict Elonis for making those posts. On its face, § 875(c) does not demand any particular mental state. As the Court correctly explains, the word "threat" does not itself contain a *mens rea* requirement. See *ante*, at 732–734. But because we read criminal statutes "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime." *Staples* v. *United States*, 511 U. S. 600, 605–606 (1994) (citation omitted). Absent such indicia, we ordinarily apply the "presumption in favor of scienter" to require only "proof of *general intent*—that is, that the defendant [must] posses[s] knowledge with respect to the *actus reus* of the crime." *Carter* v. *United States*, 530 U. S. 255, 268 (2000).

Under this "conventional *mens rea* element," "the defendant [must] know the facts that make his conduct illegal," *Staples*, *supra*, at 605, but he need not know *that* those facts make his conduct illegal. It has long been settled that "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan* v. *United States*, 524 U. S. 184, 192 (1998) (internal quotation marks omitted). For instance, in *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513 (1994), the Court addressed a conviction for selling drug paraphernalia under a statute forbidding anyone to "'make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia,'" *id.*, at 516 (quoting 21 U. S. C. § 857(a)(1) (1988 ed.)). In applying the presumption in favor of scienter, the Court concluded that "although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are 'drug para-

phernalia' within the meaning of the statute." 511 U. S., at 524.

Our default rule in favor of general intent applies with full force to criminal statutes addressing speech. Well over 100 years ago, this Court considered a conviction under a federal obscenity statute that punished anyone "'who shall knowingly deposit, or cause to be deposited, for mailing or delivery,'" any "'obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character.'" *Rosen* v. *United States*, 161 U. S. 29, 30 (1896) (quoting Rev. Stat. § 3893). In that case, as here, the defendant argued that, even if "he may have had . . . actual knowledge or notice of [the paper's] contents" when he put it in the mail, he could not "be convicted of the offence . . . unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious." 161 U. S., at 41. The Court rejected that theory, concluding that if the material was actually obscene and "deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." *Ibid.* As the Court explained, "Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of [the paper's] contents, assumed the responsibility of putting it in the mails of the United States," because "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of . . . what must be deemed obscene, lewd, and lascivious." *Id.*, at 41–42.

This Court reaffirmed *Rosen*'s holding in *Hamling* v. *United States*, 418 U. S. 87 (1974), when it considered a challenge to convictions under the successor federal statute, see *id.*, at 98, n. 8 (citing 18 U. S. C. § 1461 (1970 ed.)). Relying on *Rosen*, the Court rejected the argument that the statute required "proof both of knowledge of the contents of the ma-

terial and awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). In approving the jury instruction that the defendants' "belief as to the obscenity or non-obscenity of the material is irrelevant," the Court declined to hold "that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes." *Id.*, at 120–121 (internal quotation marks omitted). To rule otherwise, the Court observed, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.*, at 123.

Decades before § 875(c)'s enactment, courts took the same approach to the first federal threat statute, which prohibited threats against the President. In 1917, Congress enacted a law punishing anyone

> "who knowingly and willfully deposits or causes to be deposited for conveyance in the mail . . . any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President." Act of Feb. 14, 1917, ch. 64, 39 Stat. 919.

Courts applying this statute shortly after its enactment appeared to require proof of only general intent. In *Ragansky* v. *United States*, 253 F. 643 (CA7 1918), for instance, a Court of Appeals held that "[a] threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him," and "is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution," *id.*, at 645. The court consequently rejected the defendant's argument that he could not be convicted when his language "[c]oncededly . . . constituted such a threat" but was meant only "as a joke." *Id.*, at 644. Likewise, in *United States* v. *Stobo*, 251 F. 689

(Del. 1918), a District Court rejected the defendant's objection that there was no allegation "of any facts . . . indicating any intention . . . on the part of the defendant . . . to menace the President of the United States," *id.*, at 693 (internal quotation marks omitted). As it explained, the defendant "is punishable under the act whether he uses the words lightly or with a set purpose to kill," as "[t]he effect upon the minds of the hearers, who cannot read his inward thoughts, is precisely the same." *Ibid.* At a minimum, there is no historical practice requiring more than general intent when a statute regulates speech.

B

Applying ordinary rules of statutory construction, I would read § 875(c) to require proof of general intent. To "know the facts that make his conduct illegal" under § 875(c), see *Staples*, 511 U. S., at 605, a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. Knowing that the communication contains a "threat"—a serious expression of an intention to engage in unlawful physical violence—does not, however, require knowing that a jury will conclude that the communication contains a threat as a matter of law. Instead, like one who mails an "obscene" publication and is prosecuted under the federal obscenity statute, a defendant prosecuted under § 875(c) must know only the words used in that communication, along with their ordinary meaning in context.

General intent divides those who know the facts constituting the *actus reus* of this crime from those who do not. For example, someone who transmits a threat who does not know English—or who knows English, but perhaps does not know a threatening idiom—lacks the general intent required under § 875(c). See *Ragansky*, *supra*, at 645 ("[A] foreigner, ignorant of the English language, repeating [threatening] words without knowledge of their meaning, may not knowingly have made a threat"). Likewise, the hapless mailman who

delivers a threatening letter, ignorant of its contents, should not fear prosecution. A defendant like Elonis, however, who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," App. 205, acted with the general intent required under § 875(c), even if he did not know that a jury would conclude that his communication constituted a "threat" as a matter of law.

Demanding evidence only of general intent also corresponds to § 875(c)'s statutory backdrop. As previously discussed, before the enactment of § 875(c), courts had read the Presidential threats statute to require proof only of general intent. Given Congress' presumptive awareness of this application of the Presidential threats statute—not to mention this Court's similar approach in the obscenity context, see *Rosen*, 161 U. S., at 41–42—it is difficult to conclude that the Congress that enacted § 875(c) in 1939 understood it to contain an implicit mental-state requirement apart from general intent. There is certainly no textual evidence to support this conclusion. If anything, the text supports the opposite inference, as § 875(c), unlike the Presidential threats statute, contains no reference to knowledge or willfulness. Nothing in the statute suggests that Congress departed from the "conventional *mens rea* element" of general intent, *Staples*, *supra*, at 605; I would not impose a higher mental-state requirement here.

C

The majority refuses to apply these ordinary background principles. Instead, it casts my application of general intent as a negligence standard disfavored in the criminal law. *Ante*, at 737–740. But that characterization misses the mark. Requiring general intent in this context is not the same as requiring mere negligence. Like the mental-state requirements adopted in many of the cases cited by the Court, general intent under § 875(c) prevents a defendant from being convicted on the basis of any *fact* beyond his awareness. See, *e. g.*, *United States* v. *X-Citement Video, Inc.*, 513 U. S.

64, 73 (1994) (knowledge of age of persons depicted in explicit materials); *Staples*, *supra*, at 614–615 (knowledge of firing capability of weapon); *Morissette* v. *United States*, 342 U. S. 246, 270–271 (1952) (knowledge that property belonged to another). In other words, the defendant must *know*—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the *actus reus* of the offense.

But general intent requires *no* mental state (not even a negligent one) concerning the "fact" that certain words meet the *legal* definition of a threat. That approach is particularly appropriate where, as here, that legal status is determined by a jury's application of the legal standard of a "threat" to the contents of a communication. And convicting a defendant despite his ignorance of the legal—or objective—status of his conduct does not mean that he is being punished for negligent conduct. By way of example, a defendant who is convicted of murder despite claiming that he acted in self-defense has not been penalized under a negligence standard merely because he does not know that the jury will reject his argument that his "belief in the necessity of using force to prevent harm to himself [was] a reasonable one." See 2 W. LaFave, Substantive Criminal Law § 10.4(c), p. 147 (2d ed. 2003).

The Court apparently does not believe that our traditional approach to the federal obscenity statute involved a negligence standard. It asserts that *Hamling* "approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a 'vital element of scienter' so that 'not innocent but *calculated purveyance* of filth . . . is exorcised.' " *Ante*, at 739 (quoting *Hamling*, 418 U. S., at 122, in turn quoting *Mishkin* v. *New York*, 383 U. S. 502, 510 (1966)). According to the Court, the mental state approved in *Hamling* thus "turns on whether a defendant knew the *character* of what was sent, not simply its contents and context." *Ante*, at 739. It is unclear what the Court

means by its distinction between "character" and "contents and context." "Character" cannot mean *legal* obscenity, as *Hamling* rejected the argument that a defendant must have "awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). Moreover, this discussion was not part of *Hamling*'s holding, which was primarily a reaffirmation of *Rosen*. See 418 U. S., at 120–121; see also *Posters 'N' Things*, 511 U. S., at 524–525 (characterizing *Hamling* as holding that a "statute prohibiting mailing of obscene materials does not require proof that [the] defendant knew the materials at issue met the legal definition of 'obscenity' ").

The majority's treatment of *Rosen* is even less persuasive. To shore up its position, it asserts that the critical portion of *Rosen* rejected an "'ignorance of the law' defense," and claims that "no such contention is at issue here." *Ante*, at 740. But the thrust of Elonis' challenge is that a § 875(c) conviction cannot stand if the defendant's subjective belief of what constitutes a "threat" differs from that of a reasonable jury. That is akin to the argument the defendant made—and lost—in *Rosen*. That defendant insisted that he could not be convicted for mailing the paper "unless he knew or believed that such paper could be properly or justly characterized as obscene." 161 U. S., at 41. The Court, however, held that the Government did not need to show that the defendant "regard[ed] the paper as one that the statute forbade to be carried in the mails," because the obscene character of the material did not "depend upon the opinion or belief of the person who . . . assumed the responsibility of putting it in the mails." *Ibid.* The majority's muddying of the waters cannot obscure the fact that today's decision is irreconcilable with *Rosen* and *Hamling*.

D

The majority today at least refrains from requiring an intent to threaten for § 875(c) convictions, as Elonis asks us to do. Elonis contends that proof of a defendant's intent to put

the recipient of a threat in fear is necessary for conviction, but that element cannot be found within the statutory text. "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face," including elements similar to the one Elonis proposes. *Bates* v. *United States*, 522 U. S. 23, 29 (1997) (declining to read an "intent to defraud" element into a criminal statute). As the majority correctly explains, nothing in the text of § 875(c) itself requires proof of an intent to threaten. See *ante*, at 732–734. The absence of such a requirement is significant, as Congress knows how to require a heightened *mens rea* in the context of threat offenses. See § 875(b) (providing for the punishment of "[w]hoever, with intent to extort . . . , transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another"); see also § 119 (providing for the punishment of "[w]hoever knowingly makes restricted personal information about [certain officials] . . . publicly available . . . with the intent to threaten").

Elonis nonetheless suggests that an intent-to-threaten element is necessary in order to avoid the risk of punishing innocent conduct. But there is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high school student who sends a letter to his principal stating that he will massacre his classmates with a machinegun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct. But see *ante*, at 729, 740 (concluding that Elonis' conviction under § 875(c) for discussing a plan to "'initiate the most heinous school shooting ever imagined'" against "'a Kindergarten class'" cannot stand without proof of some unspecified heightened mental state).

Elonis also insists that we read an intent-to-threaten element into § 875(c) in light of the First Amendment. But our practice of construing statutes "to avoid constitutional ques-

tions . . . is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U. S. 52, 59–60 (1997) (internal quotation marks omitted), and ordinary background principles of criminal law do not support rewriting § 875(c) to include an intent-to-threaten requirement. We have not altered our traditional approach to *mens rea* for other constitutional provisions. See, *e. g.*, *Dean* v. *United States*, 556 U. S. 568, 572–574 (2009) (refusing to read an intent-to-discharge-the-firearm element into a mandatory minimum provision concerning the discharge of a firearm during a particular crime). The First Amendment should be treated no differently.

II

In light of my conclusion that Elonis was properly convicted under the requirements of § 875(c), I must address his argument that his threatening posts were nevertheless protected by the First Amendment.

A

Elonis does not contend that threats are constitutionally protected speech, nor could he: "From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas," true threats being one of them. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382–383 (1992); see *id.*, at 388. Instead, Elonis claims that only *intentional* threats fall within this particular historical exception.

If it were clear that intentional threats alone have been punished in our Nation since 1791, I would be inclined to agree. But that is not the case. Although the Federal Government apparently did not get into the business of regulating threats until 1917, the States have been doing so since the late 18th and early 19th centuries. See, *e. g.*, 1795 N. J. Laws p. 108; Ill. Rev. Code of Laws, Crim. Code § 108 (1827) (1827 Ill. Crim. Code); 1832 Fla. Laws pp. 68–69. And that practice continued even after the States amended their con-

stitutions to include speech protections similar to those in the First Amendment. See, *e. g.*, Fla. Const., Art. I, § 5 (1838); Ill. Const., Art. VIII, § 22 (1818); Mich. Const., Art. I, § 7 (1835); N. J. Const., Art. I, § 5 (1844); J. Hood, Index of Colonial and State Laws of New Jersey 1203, 1235, 1257, 1265 (1905); 1 Ill. Stat., ch. 30, div. 9, § 31 (3d ed. 1873). State practice thus provides at least some evidence of the original meaning of the phrase "freedom of speech" in the First Amendment. See *Roth* v. *United States*, 354 U. S. 476, 481–483 (1957) (engaging in a similar inquiry with respect to obscenity).

Shortly after the founding, several States and Territories enacted laws making it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded," *e. g.*, 1795 N. J. Laws § 57, at 108; see also, *e. g.*, 1816 Ga. Laws p. 178; 1816 Mich. Territory Laws p. 128; 1827 Ill. Crim. Code § 108; 1832 Fla. Laws, at 68–69. These laws appear to be the closest early analogue to § 875(c), as they penalize transmitting a communication containing a threat without proof of a demand to extort something from the victim. Threat provisions explicitly requiring proof of a specific "intent to extort" appeared alongside these laws, see, *e. g.*, 1795 N. J. Laws § 57, at 108, but those provisions are simply the predecessors to § 875(b) and § 875(d), which likewise expressly contain an intent-to-extort requirement.

The laws without that extortion requirement were copies of a 1754 English threat statute subject to only a general-intent requirement. The statute made it a capital offense to "knowingly send any Letter without any Name subscribed thereto, or signed with a fictitious Name . . . threatening to kill or murder any of his Majesty's Subject or Subjects, or to burn their [property], though no Money or Venison or other

valuable Thing shall be demanded." 27 Geo. II, ch. 15, in 7 Eng. Stat. at Large 61 (1754); see also 4 W. Blackstone, Commentaries on the Laws of England 144 (1768) (describing this statute). Early English decisions applying this threat statute indicated that the appropriate mental state was general intent. In *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (K. B. 1776), for example, the trial court instructed the jurors that, "if they were of opinion that" the "terms of the letter conveyed an actual threat to kill or murder," "and that the prisoner knew the contents of it, they ought to find him guilty; but that if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit," *id.*, at 143, 168 Eng. Rep., at 173. On appeal following conviction, the judges "thought that the case had been properly left to the Jury." *Ibid.*, 168 Eng. Rep., at 174. Other cases likewise appeared to consider only the import of the letter's language, not the intent of its sender. See, *e. g.*, *Rex* v. *Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (K. B. 1831) (concluding that an indictment was sufficient because "th[e] letter very plainly conveys a threat to kill and murder" and "[n]o one who received it could have any doubt as to what the writer meant to threaten"); see also 2 E. East, A Treatise of the Pleas of the Crown 1116 (1806) (discussing *Jepson and Springett's Case*, in which the judges disagreed over whether "the letter must be understood as . . . importing a threat" and whether that was "a necessary construction").

Unsurprisingly, these early English cases were well known in the legal world of the 19th-century United States. For instance, Nathan Dane's A General Abridgement of American Law—"a necessary adjunct to the library of every American lawyer of distinction," 1 C. Warren, History of the Harvard Law School and of Early Legal Conditions in America 414 (1908)—discussed the English threat statute and summarized decisions such as *Girdwood*. 7 N. Dane, A General Abridgement of American Law 31–32 (1824). And

as this Court long ago recognized, "It is doubtless true . . . that where English statutes . . . have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829); see also, *e. g.*, *Commonwealth* v. *Burdick*, 2 Pa. 163, 164 (1846) (considering English cases persuasive authority in interpreting similar state statute creating the offense of obtaining property through false pretenses). In short, there is good reason to believe that States bound by their own Constitutions to protect freedom of speech long ago enacted general-intent threat statutes.

Elonis disputes this historical analysis on two grounds, but neither is persuasive. He first points to a treatise stating that the 1754 English statute was "levelled against such whose intention it was, (by writing such letters, either without names or in fictitious names,) to conceal themselves from the knowledge of the party threatened, that they might obtain their object by creating terror in [the victim's] mind." 2 W. Russell & D. Davis, A Treatise on Crimes & Misdemeanors 1845 (1st Am. ed. 1824). But the fact that the ordinary prosecution under this provision involved a defendant who intended to cause fear does not mean that such a mental state was *required* as a matter of law. After all, § 875(c) is frequently deployed against people who wanted to cause their victims fear, but that fact does not answer the legal question presented in this case. See, *e. g.*, *United States* v. *Sutcliffe*, 505 F. 3d 944, 952 (CA9 2007); see also Tr. of Oral Arg. 53 (counsel for the Government noting that "I think Congress would well have understood that the majority of these cases probably [involved] people who intended to threaten").

Elonis also cobbles together an assortment of older American authorities to prove his point, but they fail to stand up to close scrutiny. Two of his cases address the offense of

breaching the peace, *Ware* v. *Loveridge*, 75 Mich. 488, 490–493, 42 N. W. 997, 998 (1889); *State* v. *Benedict*, 11 Vt. 236, 239 (1839), which is insufficiently similar to the offense criminalized in § 875(c) to be of much use. Another involves a prosecution under a blackmailing statute similar to § 875(b) and § 875(c) in that it expressly required an "intent to extort." *Norris* v. *State*, 95 Ind. 73, 74 (1884). And his treatises do not clearly distinguish between the offense of making threats with the intent to extort and the offense of sending threatening letters without such a requirement in their discussions of threat statutes, making it difficult to draw strong inferences about the latter category. See 2 J. Bishop, Commentaries on the Criminal Law § 1201, p. 664, and nn. 5–6 (1877); 2 J. Bishop, Commentaries on the Law of Criminal Procedure § 975, p. 546 (1866); 25 The American and English Encyclopædia of Law 1073 (C. Williams ed. 1894).

Two of Elonis' cases appear to discuss an offense of sending a threatening letter without an intent to extort, but even these fail to make his point. One notes in passing that character evidence is admissible "to prove *guilty knowledge* of the defendant, when that is an essential element of the crime; that is, the *quo animo*, the *intent* or design," and offers as an example that in the context of "sending a threatening letter, . . . prior and subsequent letters to the same person are competent in order to show the intent and meaning of the particular letter in question." *State* v. *Graham*, 121 N. C. 623, 627, 28 S. E. 409, 409 (1897). But it is unclear from that statement whether that court thought an *intent to threaten* was required, especially as the case it cited for this proposition—*Rex* v. *Boucher*, *supra*, at 563, 172 Eng. Rep., at 827—supports a general-intent approach. The other case Elonis cites involves a statutory provision that had been judicially limited to "'pertain to one or the other acts which are denounced by the statute,'" namely, terroristic activities carried out by the Ku Klux Klan. *Commonwealth* v. *Morton*, 140 Ky. 628, 630, 131 S. W. 506, 507 (1910) (quoting *Common-*

wealth v. *Patrick*, 127 Ky. 473, 478, 105 S. W. 981, 982 (1907)). That case thus provides scant historical support for Elonis' position.

B

Elonis also insists that our precedents require a mental state of intent when it comes to threat prosecutions under § 875(c), primarily relying on *Watts*, 394 U. S. 705, and *Virginia* v. *Black*, 538 U. S. 343 (2003). Neither of those decisions, however, addresses whether the First Amendment requires a particular mental state for threat prosecutions.

As Elonis admits, *Watts* expressly declined to address the mental state required under the First Amendment for a "true threat." See 394 U. S., at 707–708. True, the Court in *Watts* noted "grave doubts" about *Raganksy*'s construction of "willfully" in the Presidential threats statute. 394 U. S., at 707–708. But "grave doubts" do not make a holding, and that stray statement in *Watts* is entitled to no precedential force. If anything, *Watts* continued the long tradition of focusing on objective criteria in evaluating the mental requirement. See *ibid.*

The Court's fractured opinion in *Black* likewise says little about whether an intent-to-threaten requirement is constitutionally mandated here. *Black* concerned a Virginia cross-burning law that expressly required " 'an intent to intimidate a person or group of persons,' " 538 U. S., at 347 (quoting Va. Code Ann. § 18.2–423 (1996)), and the Court thus had no occasion to decide whether such an element was necessary in threat provisions silent on the matter. Moreover, the focus of the *Black* decision was on the statutory presumption that "any cross burning [w]as prima facie evidence of intent to intimidate." 538 U. S., at 347–348. A majority of the Court concluded that this presumption failed to distinguish unprotected threats from protected speech because it might allow convictions "based solely on the fact of cross burning itself," including cross burnings in a play or at a political rally. *Id.*, at 365–366 (plurality opinion); *id.*, at 386 (Souter,

J., concurring in judgment in part and dissenting in part) ("The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression"). The objective standard for threats under § 875(c), however, helps to avoid this problem by "forc-[ing] jurors to examine the circumstances in which a statement is made." *Jeffries*, 692 F. 3d, at 480.

In addition to requiring a departure from our precedents, adopting Elonis' view would make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine. We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech. For instance, the Court has indicated that a legislature may constitutionally prohibit "'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen* v. *California*, 403 U. S. 15, 20 (1971)—without proof of an intent to provoke a violent reaction. Because the definition of "fighting words" turns on how the "ordinary citizen" would react to the language, *ibid.*, this Court has observed that a defendant may be guilty of a breach of the peace if he "makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and that the punishment of such statements "as a criminal act would raise no question under [the Constitution]," *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310 (1940); see also *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572–573 (1942) (rejecting a First Amendment challenge to a general-intent construction of a state statute punishing "'fighting' words"); *State* v. *Chaplinsky*, 91 N. H. 310, 318, 18 A. 2d 754, 758 (1941) ("[T]he only intent required for conviction . . . was an intent to speak the words"). The Court has similarly held that a defendant may be convicted of mailing obscenity under the First Amendment without proof that he knew the mate-

rials were legally obscene. *Hamling*, 418 U. S., at 120–124. And our precedents allow liability in tort for false statements about private persons on matters of private concern even if the speaker acted negligently with respect to the falsity of those statements. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 770, 773–775 (1986). I see no reason why we should give threats pride of place among unprotected speech.

* * *

There is always a risk that a criminal threat statute may be deployed by the Government to suppress legitimate speech. But the proper response to that risk is to adhere to our traditional rule that only a narrow class of true threats, historically unprotected, may be constitutionally proscribed.

The solution is not to abandon a mental-state requirement compelled by text, history, and precedent. Not only does such a decision warp our traditional approach to *mens rea*, it results in an arbitrary distinction between threats and other forms of unprotected speech. Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not—and should not—be the case.

Nor should it be the case that we cast aside the mental-state requirement compelled by our precedents yet offer nothing in its place. Our job is to decide questions, not create them. Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests.

I respectfully dissent.

Syllabus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ABERCROMBIE & FITCH STORES, INC.

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

No. 14–86. Argued February 25, 2015—Decided June 1, 2015

Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim, because the headscarf that she wore pursuant to her religious obligations conflicted with Abercrombie's employee dress policy. The Equal Employment Opportunity Commission (EEOC) filed suit on Elauf's behalf, alleging a violation of Title VII of the Civil Rights Act of 1964, which, *inter alia*, prohibits a prospective employer from refusing to hire an applicant because of the applicant's religious practice when the practice could be accommodated without undue hardship. The EEOC prevailed in the District Court, but the Tenth Circuit reversed, awarding Abercrombie summary judgment on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with actual knowledge of his need for an accommodation.

Held: To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of his need. Title VII's disparate-treatment provision requires Elauf to show that Abercrombie (1) "fail[ed] . . . to hire" her (2) "because of" (3) "[her] religion" (including a religious practice). 42 U. S. C. § 2000e–2(a)(1). And its "because of" standard is understood to mean that the protected characteristic cannot be a "motivating factor" in an employment decision. § 2000e–2(m). Thus, rather than imposing a knowledge standard, § 2000e–2(a)(1) prohibits certain *motives*, regardless of the state of the actor's knowledge: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. Title VII contains no knowledge requirement. Furthermore, Title VII's definition of religion clearly indicates that failure-to-accommodate challenges can be brought as disparate-treatment claims. And Title VII gives favored treatment to religious practices, rather than demanding that religious practices be treated no worse than other practices. Pp. 771–775.

731 F. 3d 1106, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Syllabus

ALITO, J., filed an opinion concurring in the judgment, *post*, p. 775. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 780.

Deputy Solicitor General Gershengorn argued the cause for petitioner. With him on the briefs were *Solicitor General Verrilli*, *Rachel P. Kovner*, *P. David Lopez*, *Carolyn L. Wheeler*, *Jennifer S. Goldstein*, and *James M. Tucker*.

Shay Dvoretzky argued the cause for respondent. With him on the brief were *Eric S. Dreiband*, *Jeffrey R. Johnson*, *Mark A. Knueve*, and *Daniel J. Clark*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, and *Rose Daly-Rooney* and *Chris Carlsen*, Assistant Attorneys General, *Russell A. Suzuki*, Attorney General of Hawaii, *Lisa Madigan*, Attorney General of Illinois, *Douglas F. Gansler*, Attorney General of Maryland, *Timothy C. Fox*, Attorney General of Montana, and *Dale Schowengerdt*, Solicitor General, *Joseph A. Foster*, Attorney General of New Hampshire, *Eric T. Schneiderman*, Attorney General of New York, *Ellen F. Rosenblum*, Attorney General of Oregon, and *Robert W. Ferguson*, Attorney General of Washington; for the American-Arab Anti-Discrimination Committee et al. by *Abed A. Ayoub*; for the American Jewish Committee et al. by *David T. Goldberg*, *Toby J. Heytens*, *Daniel R. Ortiz*, *Marc D. Stern*, and *Douglas Laycock*; for the Becket Fund for Religious Liberty by *Eric S. Baxter*, *Eric C. Rassbach*, *Asma T. Uddin*, and *Diana M. Verm*; for the Council on American-Islamic Relations by *Jenifer Wicks*; for Fifteen Religious and Civil Rights Organizations by *Gene C. Schaerr*, *Todd R. McFarland*, *Dwayne Leslie*, *Kimberlee Wood Colby*, *Stephen F. Rohde*, and *Carl H. Esbeck*; for the Lambda Legal Defense and Education Fund, Inc., by *Gregory R. Nevins* and *Jennifer C. Pizer*; for the National Jewish Commission on Law and Public Affairs et al. by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; and for Umme-Hani Khan by *Christopher Ho*.

Briefs of *amici curiae* urging affirmance were filed for the Cato Institute by *Brendan J. Morrissey* and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America et al. by *Melissa Arbus Sherry*, *Kate Comerford Todd*, *Warren Postman*, *Karen R. Harned*, and *Elizabeth Milito*; for the Equal Employment Advisory Council by *Rae T. Vann*; and for the National Conference of State Legislatures et al. by *Charles W. Thompson, Jr.*, and *Lisa Soronen*.

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

I

We summarize the facts in the light most favorable to the Equal Employment Opportunity Commission (EEOC), against whom the Tenth Circuit granted summary judgment. Respondent Abercrombie & Fitch Stores, Inc., operates several lines of clothing stores, each with its own "style." Consistent with the image Abercrombie seeks to project for each store, the company imposes a Look Policy that governs its employees' dress. The Look Policy prohibits "caps"—a term the Policy does not define—as too informal for Abercrombie's desired image.

Samantha Elauf is a practicing Muslim who, consistent with her understanding of her religion's requirements, wears a headscarf. She applied for a position in an Abercrombie store, and was interviewed by Heather Cooke, the store's assistant manager. Using Abercrombie's ordinary system for evaluating applicants, Cooke gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, that Elauf's headscarf would conflict with the store's Look Policy.

Cooke sought the store manager's guidance to clarify whether the headscarf was a forbidden "cap." When this yielded no answer, Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, claiming that its refusal to hire Elauf violated Title VII. The District Court granted the EEOC summary judgment on the issue of liability, 798 F. Supp. 2d 1272 (ND Okla. 2011), held a trial on damages, and awarded $20,000. The Tenth Circuit reversed and awarded Abercrombie summary judgment. 731 F. 3d 1106 (2013). It concluded that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation. *Id.*, at 1131. We granted certiorari. 573 U. S. 991 (2014).

II

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, prohibits two categories of employment practices. It is unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a).

These two proscriptions, often referred to as the "disparate treatment" (or "intentional discrimination") provision and the "disparate impact" provision, are the only causes of action under Title VII. The word "religion" is defined to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observ-

ance or practice without undue hardship on the conduct of the employer's business." § 2000e(j).[1]

Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.[2]

The disparate-treatment provision forbids employers to: (1) "fail . . . to hire" an applicant (2) "because of" (3) "such individual's . . . religion" (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf's wearing of a headscarf is (3) a "religious practice." All that remains is whether she was not hired (2) "because of" her religious practice.

The term "because of" appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. *University of Tex.*

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[1] For brevity's sake, we will in the balance of this opinion usually omit reference to the § 2000e(j) "undue hardship" defense to the accommodation requirement, discussing the requirement as though it is absolute.

[2] The concurrence mysteriously concludes that it is not the plaintiff's burden to prove failure to accommodate. *Post*, at 779. But of course that *is* the plaintiff's burden, if failure to hire "because of" the plaintiff's "religious practice" is the gravamen of the complaint. Failing to hire for that reason is *synonymous* with refusing to accommodate the religious practice. To accuse the employer of the one is to accuse him of the other. If he is willing to "accommodate"—which means nothing more than allowing the plaintiff to engage in her religious practice despite the employer's normal rules to the contrary—adverse action "because of" the religious practice is not shown. "The clause that begins with the term 'unless,'" as the concurrence describes it, *post*, at 780, has no function except to place upon the employer the burden of establishing an "undue hardship" defense. The concurrence provides no example, not even an unrealistic hypothetical one, of a claim of failure to hire because of religious practice that does not say the employer refused to permit ("failed to accommodate") the religious practice. In the nature of things, there cannot be one.

Southwestern Medical Center v. *Nassar*, 570 U. S. 338 (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a "motivating factor" in an employment decision. 42 U. S. C. § 2000e–2(m). "Because of" in § 2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.

It is significant that § 2000e–2(a)(1) does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans with Disabilities Act of 1990 defines discrimination to include an employer's failure to make "reasonable accommodations to the *known* physical or mental limitations" of an applicant. § 12112(b)(5)(A) (emphasis added). Title VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommo-

dation is a motivating factor in his decision, the employer violates Title VII.

Abercrombie urges this Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict." Brief for Respondent 46. This would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence. Its disparate-treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.[3]

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of "religion" in Title VII to religious *belief*—so that discriminating against a particular religious *practice* would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined "religion," for Title VII's purposes, as "includ[ing] all aspects of religious observance and practice, as

[3] While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—*i. e.*, that he cannot discriminate "because of" a "religious practice" unless he knows or suspects it to be a religious practice. That issue is not presented in this case, since Abercrombie knew—or at least suspected—that the scarf was worn for religious reasons. The question has therefore not been discussed by either side, in brief or oral argument. It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.

well as belief." 42 U. S. C. § 2000e(j). Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute "intentional discrimination" may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual . . . because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

* * *

The Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment. We reverse its judgment and remand the case for further consideration consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

This case requires us to interpret a provision of Title VII of the Civil Rights Act of 1964 that prohibits an employer from taking an adverse employment action (refusal to hire, discharge, etc.) "against any individual . . . because of [[1]] such

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[1] Under 42 U. S. C. § 2000e–2(m), an employer takes an action "because of" religion if religion is a "motivating factor" in the decision.

individual's . . . religion." 42 U. S. C. § 2000e–2(a). Another provision states that the term "religion" "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 2000e(j). When these two provisions are put together, the following rule (expressed in somewhat simplified terms) results: An employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.

In this case, Samantha Elauf, a practicing Muslim, wore a headscarf for a religious reason when she was interviewed for a job in a store operated by Abercrombie & Fitch. She was rejected because her scarf violated Abercrombie's dress code for employees. There is sufficient evidence in the summary judgment record to support a finding that Abercrombie's decisionmakers knew that Elauf was a Muslim and that she wore the headscarf for a religious reason. But she was never asked why she wore the headscarf and did not volunteer that information. Nor was she told that she would be prohibited from wearing the headscarf on the job. The Tenth Circuit held that Abercrombie was entitled to summary judgment because, except perhaps in unusual circumstances, "[a]pplicants or employees must initially inform employers of their religious practices that conflict with a work requirement and their need for a reasonable accommodation for them." 731 F. 3d 1106, 1142 (2013) (emphasis deleted).

The relevant provisions of Title VII, however, do not impose the notice requirement that formed the basis for the Tenth Circuit's decision. While I interpret those provisions to require proof that Abercrombie knew that Elauf wore the

headscarf for a religious reason, the evidence of Abercrombie's knowledge is sufficient to defeat summary judgment.

The opinion of the Court states that "§ 2000e–2(a)(1) does not impose a knowledge requirement," *ante*, at 773, but then reserves decision on the question whether it is a condition of liability that the employer know or suspect that the practice he refuses to accommodate is a religious practice, *ante*, at 774, n. 3, but in my view, the answer to this question, which may arise on remand,[2] is obvious. I would hold that an employer cannot be held liable for taking an adverse action because of an employee's religious practice unless the employer knows that the employee engages in the practice for a religious reason. If § 2000e–2(a)(1) really "does not impose a knowledge requirement," *ante*, at 773, it would be irrelevant in this case whether Abercrombie had any inkling that Elauf is a Muslim or that she wore the headscarf for a religious reason. That would be very strange.

The scarves that Elauf wore were not articles of clothing that were designed or marketed specifically for Muslim women. Instead, she generally purchased her scarves at ordinary clothing stores. In this case, the Abercrombie employee who interviewed Elauf had seen her wearing scarves on other occasions, and for reasons that the record does not make clear, came to the (correct) conclusion that she is a Muslim. But suppose that the interviewer in this case had never seen Elauf before. Suppose that the interviewer thought Elauf was wearing the scarf for a secular reason. Suppose that nothing else about Elauf made the interviewer

[2] Cooke testified that she told Johnson that she believed Elauf wore a head scarf for a religious reason, App. 87, but Johnson testified that Cooke did not share this belief with him, *id.*, at 146. If Abercrombie's knowledge is irrelevant, then the lower courts will not have to decide whether there is a genuine dispute on this question. But if Abercrombie's knowledge is relevant and if the lower courts hold that there is a genuine dispute of material fact about Abercrombie's knowledge, the question will have to be submitted to the trier of fact. For these reasons, we should decide this question now.

even suspect that she was a Muslim or that she was wearing the scarf for a religious reason. If "§ 2000e–2(a)(1) does not impose a knowledge requirement," Abercrombie would still be liable. The EEOC, which sued on Elauf's behalf, does not adopt that interpretation, see, *e. g.*, Brief for Petitioner 19, and it is surely wrong.

The statutory text does not compel such a strange result. It is entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may not take an adverse action because of a practice that the employer knows to be religious. Consider the following sentences. The parole board granted the prisoner parole because of an *exemplary* record in prison. The court sanctioned the attorney because of a *flagrant* violation of Rule 11 of the Federal Rules of Civil Procedure. No one is likely to understand these sentences to mean that the parole board granted parole because of a record that, unbeknownst to the board, happened to be exemplary or that the court sanctioned the attorney because of a violation that, unbeknownst to the court, happened to be flagrant. Similarly, it is entirely reasonable to understand this statement—"The employer rejected the applicant because of a *religious* practice" —to mean that the employer rejected the applicant because of a practice that the employer knew to be religious.

This interpretation makes sense of the statutory provisions. Those provisions prohibit intentional discrimination, which is blameworthy conduct, but if there is no knowledge requirement, an employer could be held liable without fault. The prohibition of discrimination because of religious practices is meant to force employers to consider whether those practices can be accommodated without undue hardship. See § 2000e(j). But the "no-knowledge" interpretation would deprive employers of that opportunity. For these reasons, an employer cannot be liable for taking adverse ac-

tion because of a religious practice if the employer does not know that the practice is religious.

A plaintiff need not show, however, that the employer took the adverse action because of the religious nature of the practice. Cf. *post*, at 783 (THOMAS, J., concurring in part and dissenting in part). Suppose, for example, that an employer rejected all applicants who refuse to work on Saturday, whether for religious or nonreligious reasons. Applicants whose refusal to work on Saturday was known by the employer to be based on religion will have been rejected because of a religious practice.

This conclusion follows from the reasonable accommodation requirement imposed by § 2000e(j). If neutral work rules (*e. g.*, every employee must work on Saturday, no employee may wear any head covering) precluded liability, there would be no need to provide that defense, which allows an employer to escape liability for refusing to make an exception to a neutral work rule if doing so would impose an undue hardship.

This brings me to a final point. Under the relevant statutory provisions, an employer's failure to make a reasonable accommodation is not an element that the plaintiff must prove. I am therefore concerned about the Court's statement that it "*is* the plaintiff's burden [to prove failure to accommodate]." *Ante*, at 772, n. 2. This blatantly contradicts the language of the statutes. As I noted at the beginning, when § 2000e–2(a) and § 2000e(j) are combined, this is the result:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of [any aspect of] such individual's . . . religious . . . practice . . . *unless an employer demonstrates that he is unable to reasonably accommodate to [the] employee's or prospective employee's religious . . . practice . . . without undue hardship on the conduct of the employer's business.*" (Emphasis added.)

The clause that begins with the term "unless" unmistakably sets out an employer defense. If an employer chooses to assert that defense, it bears both the burden of production and the burden of persuasion. A plaintiff, on the other hand, must prove the elements set out prior to the "unless" clause, but that portion of the rule makes no mention of accommodation. Thus, a plaintiff need not plead or prove that the employer wished to avoid making an accommodation or could have done so without undue hardship. If a plaintiff shows that the employer took an adverse employment action because of a religious observance or practice, it is then up to the employer to plead and prove the defense. The Court's statement subverts the statutory text, and in close cases, the Court's reallocation of the burden of persuasion may be decisive.

In sum, the EEOC was required in this case to prove that Abercrombie rejected Elauf because of a practice that Abercrombie knew was religious. It is undisputed that Abercrombie rejected Elauf because she wore a headscarf, and there is ample evidence in the summary judgment record to prove that Abercrombie knew that Elauf is a Muslim and that she wore the scarf for a religious reason. The Tenth Circuit therefore erred in ordering the entry of summary judgment for Abercrombie. On remand, the Tenth Circuit can consider whether there is sufficient evidence to support summary judgment in favor of the EEOC on the question of Abercrombie's knowledge. The Tenth Circuit will also be required to address Abercrombie's claim that it could not have accommodated Elauf's wearing the headscarf on the job without undue hardship.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with the Court that there are two—and only two—causes of action under Title VII of the Civil Rights Act of 1964 as understood by our precedents: a disparate-treatment

(or intentional-discrimination) claim and a disparate-impact claim. *Ante*, at 771. Our agreement ends there. Unlike the majority, I adhere to what I had thought before today was an undisputed proposition: Mere application of a neutral policy cannot constitute "intentional discrimination." Because the Equal Employment Opportunity Commission (EEOC) can prevail here only if Abercrombie engaged in intentional discrimination, and because Abercrombie's application of its neutral Look Policy does not meet that description, I would affirm the judgment of the Tenth Circuit.

I

This case turns on whether Abercrombie's conduct constituted "intentional discrimination" within the meaning of 42 U. S. C. § 1981a(a)(1). That provision allows a Title VII plaintiff to "recover compensatory and punitive damages" only against an employer "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." The damages award the EEOC obtained against Abercrombie is thus proper only if that company engaged in "intentional discrimination"—as opposed to "an employment practice that is unlawful because of its disparate impact"—within the meaning of § 1981a(a)(1).

The terms "intentional discrimination" and "disparate impact" have settled meanings in federal employment discrimination law. "[I]ntentional discrimination . . . occur[s] where an employer has treated a particular person less favorably than others because of a protected trait." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks and alteration omitted). "[D]isparate-impact claims," by contrast, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 52 (2003) (internal quotation marks omitted). Con-

ceived by this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this "theory of discrimination" provides that "a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate-treatment case," *Raytheon*, *supra*, at 52–53 (internal quotation marks and alteration omitted).

I would hold that Abercrombie's conduct did not constitute "intentional discrimination." Abercrombie refused to create an exception to its neutral Look Policy for Samantha Elauf's religious practice of wearing a headscarf. *Ante*, at 770. In doing so, it did not treat religious practices less favorably than similar secular practices, but instead remained neutral with regard to religious practices. To be sure, the *effects* of Abercrombie's neutral Look Policy, absent an accommodation, fall more harshly on those who wear headscarves as an aspect of their faith. But that is a classic case of an alleged disparate impact. It is not what we have previously understood to be a case of disparate treatment because Elauf received the *same* treatment from Abercrombie as any other applicant who appeared unable to comply with the company's Look Policy. See *ibid.*; App. 134, 144. Because I cannot classify Abercrombie's conduct as "intentional discrimination," I would affirm.

II

A

Resisting this straightforward application of § 1981a, the majority expands the meaning of "intentional discrimination" to include a refusal to give a religious applicant "favored treatment." *Ante*, at 775. But contrary to the majority's assumption, this novel theory of discrimination is not commanded by the relevant statutory text.

Title VII makes it illegal for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's . . . religion." § 2000e–2(a)(1). And as used in Title VII, "[t]he

term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." § 2000e(j). With this gloss on the definition of "religion" in § 2000e–2(a)(1), the majority concludes that an employer may violate Title VII if he "'refuse[s] to hire . . . any individual . . . because of such individual's . . . religious . . . practice'" (unless he has an "'undue hardship'" defense). *Ante*, at 771–772.

But inserting the statutory definition of religion into § 2000e–2(a) does not answer the question whether Abercrombie's refusal to hire Elauf was "because of her religious practice." At first glance, the phrase "because of such individual's religious practice" could mean one of two things. Under one reading, it could prohibit taking an action because of the religious nature of an employee's particular practice. Under the alternative reading, it could prohibit taking an action because of an employee's practice that *happens* to be religious.

The distinction is perhaps best understood by example. Suppose an employer with a neutral grooming policy forbidding facial hair refuses to hire a Muslim who wears a beard for religious reasons. Assuming the employer applied the neutral grooming policy to all applicants, the motivation behind the refusal to hire the Muslim applicant would not be the religious nature of his beard, but its existence. Under the first reading, then, the Muslim applicant would lack an intentional-discrimination claim, as he was not refused employment "because of" the religious nature of his practice. But under the second reading, he would have such a claim, as he was refused employment "because of" a practice that happens to be religious in nature.

One problem with the second, more expansive reading is that it would punish employers who have no discriminatory

motive. If the phrase "because of such individual's religious practice" sweeps in any case in which an employer takes an adverse action because of a practice that happens to be religious in nature, an employer who had no idea that a particular practice was religious would be penalized. That strict-liability view is plainly at odds with the concept of intentional discrimination. Cf. *Raytheon*, 540 U. S., at 54, n. 7 ("If [the employer] were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on [the applicant's] disability. And, if no part of the hiring decision turned on [the applicant's] status as disabled, he cannot, *ipso facto*, have been subject to disparate treatment"). Surprisingly, the majority leaves the door open to this strict-liability theory, reserving the question whether an employer who does not even "suspec[t] that the practice in question is a religious practice" can nonetheless be punished for *intentional* discrimination. *Ante*, at 774, n. 3.

For purposes of today's decision, however, the majority opts for a compromise, albeit one that lacks a foothold in the text and fares no better under our precedents. The majority construes § 2000e–2(a)(1) to punish employers who refuse to accommodate applicants under neutral policies when they act "with the motive of avoiding accommodation." *Ante*, at 773. But an employer who is aware that strictly applying a neutral policy will have an adverse effect on a religious group, and applies the policy anyway, is not engaged in intentional discrimination, at least as that term has traditionally been understood. As the Court explained many decades ago, "'Discriminatory purpose'"—*i. e.*, the purpose necessary for a claim of intentional discrimination—demands "more than . . . awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v.

Feeney, 442 U. S. 256, 279 (1979) (citation and footnote omitted).

I do not dispute that a refusal to accommodate can, in some circumstances, constitute intentional discrimination. If an employer declines to accommodate a particular religious practice, yet accommodates a similar secular (or other denominational) practice, then that may be proof that he has "treated a particular person less favorably than others because of [a religious practice]." *Ricci*, 557 U. S., at 577 (internal quotation marks and alteration omitted); see also, *e. g.*, *Dixon* v. *Hallmark Cos.*, 627 F. 3d 849, 853 (CA11 2010) (addressing a policy forbidding display of "religious items" in management offices). But merely refusing to create an exception to a neutral policy for a religious practice cannot be described as treating a particular applicant "less favorably than others." The majority itself appears to recognize that its construction requires something more than equal treatment. See *ante*, at 775 ("Title VII does not demand mere neutrality with regard to religious practices," but instead "gives them favored treatment"). But equal treatment is not disparate treatment, and that basic principle should have disposed of this case.

B

The majority's novel theory of intentional discrimination is also inconsistent with the history of this area of employment discrimination law. As that history shows, cases arising out of the application of a neutral policy absent religious accommodations have traditionally been understood to involve only disparate-impact liability.

When Title VII was enacted in 1964, it prohibited discrimination "because of . . . religion" and did not include the current definition of "religion" encompassing "religious observance and practice" that was added to the statute in 1972. Civil Rights Act of 1964, §§ 701, 703(a), 78 Stat. 253–255. Shortly thereafter, the EEOC issued guidelines purporting

to create "an obligation on the part of the employer to accommodate to the religious needs of employees." 31 Fed. Reg. 8370 (1966). From an early date, the EEOC defended this obligation under a disparate-impact theory. See Brief for United States as *Amicus Curiae* in *Dewey* v. *Reynolds Metals Co.*, O. T. 1970, No. 835, pp. 7, 13, 29–32. Courts and commentators at the time took the same view. See, *e. g.*, *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346, 350 (CA6 1972); *Dewey* v. *Reynolds Metals Co.*, 300 F. Supp. 709, 713 (WD Mich. 1969), rev'd, 429 F. 2d 324 (CA6 1970), aff'd by an equally divided Court, 402 U. S. 689 (1971) (*per curiam*); 1 B. Lindemann & P. Grossman, Employment Discrimination Law 187–188 (3d ed. 1976).

This Court's first decision to discuss a refusal to accommodate a religious practice, *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), similarly did not treat such conduct as intentional discrimination. *Hardison* involved a conflict between an employer's neutral seniority system for assigning shifts and an employee's observance of a Saturday Sabbath. The employer denied the employee an accommodation, so he refused to show up for work on Saturdays and was fired. *Id.*, at 67–69. This Court held that the employer was not liable under Title VII because the proposed accommodations would have imposed an undue hardship on the employer. *Id.*, at 77. To bolster its conclusion that there was no statutory violation, the Court relied on a provision of Title VII shielding the application of a "'bona fide seniority or merit system'" from challenge unless that application is "'the result of an intention to discriminate because of . . . religion.'" *Id.*, at 81–82 (quoting § 2000e–2(h)). In applying that provision, the Court observed that "[t]here ha[d] been no suggestion of discriminatory intent in th[e] case." *Id.*, at 82. But if the majority's view were correct—if a mere refusal to accommodate a religious practice under a neutral policy could constitute intentional discrimination—then the Court in *Hardison* should never have engaged in

such reasoning. After all, the employer in *Hardison* knew of the employee's religious practice and refused to make an exception to its neutral seniority system, just as Abercrombie arguably knew of Elauf's religious practice and refused to make an exception to its neutral Look Policy.*

Lower courts following *Hardison* likewise did not equate a failure to accommodate with intentional discrimination. To the contrary, many lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a free-standing failure-to-accommodate claim distinct from either disparate treatment or disparate impact. See, *e. g.*, 731 F. 3d 1106, 1120 (2013) ("A claim for religious discrimination under

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*Contrary to the EEOC's suggestion, *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), did not establish that a refusal to accommodate a religious practice automatically constitutes intentional discrimination. To be sure, *Hardison* remarked that the "effect of" the 1972 amendment expanding the definition of religion "was to make it an unlawful employment practice under [§ 2000e–2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Id.*, at 74. But that statement should not be understood as a holding that such conduct automatically gives rise to a disparate-treatment claim. Although this Court has more recently described § 2000e–2(a)(1) as originally creating only disparate-treatment liability, *e. g.*, *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009), it was an open question at the time *Hardison* was decided whether § 2000e–2(a)(1) also created disparate-impact liability, see, *e. g.*, *Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 144 (1977); *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 153–155 (1976) (Brennan, J., dissenting). In fact, both the employee and the EEOC in *Hardison* argued before this Court that the employer had violated § 2000e–2(a)(1) under a disparate-impact theory. See Brief for Respondent 15, 25–26, and Brief for United States et al. as *Amici Curiae* 33–36, 50, in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1976, No. 75–1126 etc. In any event, the relevant language in *Hardison* is dictum. Because the employee's termination had occurred before the 1972 amendment to Title VII's definition of religion, *Hardison* applied the then-existing EEOC guideline—which also contained an "undue hardship" defense—not the amended statutory definition. 432 U. S., at 76, and n. 11. *Hardison*'s comment about the effect of the 1972 amendment was thus entirely beside the point.

Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate" (internal quotation marks omitted)); *Protos* v. *Volkswagen of Am., Inc.*, 797 F. 2d 129, 134, n. 2 (CA3 1986) ("In addition to her religious accommodation argument, [the plaintiff] maintains that she prevailed in the district court on a disparate treatment claim"). That assumption appears to have grown out of statements in our cases suggesting that Title VII's definitional provision concerning religion created an independent duty. See, *e. g.*, *Ansonia Bd. of Ed.* v. *Philbrook*, 479 U. S. 60, 63, n. 1 (1986) ("The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion"). But in doing so, the lower courts correctly recognized that a failure-to-accommodate claim based on the application of a neutral policy is not a disparate-treatment claim. See, *e. g.*, *Reed* v. *International Union, United Auto, Aerospace and Agricultural Implement Workers of Am.*, 569 F. 3d 576, 579–580 (CA6 2009); *Chalmers* v. *Tulon Co. of Richmond*, 101 F. 3d 1012, 1018 (CA4 1996).

At least before we granted a writ of certiorari in this case, the EEOC too understood that merely applying a neutral policy did not automatically constitute intentional discrimination giving rise to a disparate-treatment claim. For example, the EEOC explained in a recent compliance manual, "A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." EEOC Compliance Manual § 12–IV, p. 46 (2008). Indeed, in asking us to take this case, the EEOC dismissed one of Abercrombie's supporting authorities as "a case addressing intentional discrimination, not religious accommodation." Reply to Brief in Opposition 7, n. Once we granted certiorari in this case, however, the EEOC altered course and advanced the intentional-discrimination theory now adopted by the majority. The Court should have rejected this eleventh-hour request to expand our understand-

ing of "intentional discrimination" to include merely applying a religion-neutral policy.

* * *

The Court today rightly puts to rest the notion that Title VII creates a freestanding religious-accommodation claim, *ante*, at 771, but creates in its stead an entirely new form of liability: the disparate-treatment-based-on-equal-treatment claim. Because I do not think that Congress' 1972 redefinition of "religion" also redefined "intentional discrimination," I would affirm the judgment of the Tenth Circuit. I respectfully dissent from the portions of the majority's decision that take the contrary view.

Syllabus

BANK OF AMERICA, N. A. *v.* CAULKETT

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

No. 13–1421. Argued March 24, 2015—Decided June 1, 2015*

Respondent debtors each filed for Chapter 7 bankruptcy, and each owned a house encumbered with a senior mortgage lien and a junior mortgage lien, the latter held by petitioner bank. Because the amount owed on each senior mortgage is greater than each house's current market value, the bank would receive nothing if the properties were sold today. The junior mortgage liens were thus wholly underwater. The debtors sought to void their junior mortgage liens under § 506 of the Bankruptcy Code, which provides, "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void." 11 U. S. C. § 506(d). In each case, the Bankruptcy Court granted the motion, and both the District Court and the Eleventh Circuit affirmed.

Held: A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under § 502 of the Bankruptcy Code. Pp. 793–797.

(a) The debtors here prevail only if the bank's claims are "not . . . allowed secured claim[s]." The parties do not dispute that the bank's claims are "allowed" under the Code. Instead, the debtors argue that the bank's claims are not "secured" because § 506(a)(1) provides that "[a]n allowed claim . . . is a secured claim to the extent of the value of such creditor's interest in . . . such property" and "an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Because the value of the bank's interest here is zero, a straightforward reading of the statute would seem to favor the debtors. This Court's construction of § 506(d)'s term "secured claim" in *Dewsnup* v. *Timm*, 502 U. S. 410, however, forecloses that reading and resolves the question presented here. In declining to permit a Chapter 7 debtor to "strip down" a partially underwater lien under § 506(d) to the value of the collateral, the Court in *Dewsnup* concluded that an allowed claim "secured by a lien with recourse to the underlying collateral . . . does not come within the scope of § 506(d)."

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*Together with No. 14–163, *Bank of America, N. A.* v. *Toledo-Cardona*, also on certiorari to the same court.

Syllabus

Id., at 415. Thus, under *Dewsnup*, a "secured claim" is a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. Pp. 793–795.

(b) This Court declines to limit *Dewsnup* to partially underwater liens. *Dewsnup*'s definition did not depend on such a distinction. Nor is this distinction supported by *Nobelman* v. *American Savings Bank*, 508 U. S. 324, which addressed the interaction between the meaning of the term "secured claim" in § 506(a)—a definition that *Dewsnup* declined to use for purposes of § 506(d)—and an entirely separate provision, § 1322(b)(2). See 508 U. S., at 327–332. Finally, the debtors' suggestion that the historical and policy concerns that motivated the Court in *Dewsnup* do not apply in the context of wholly underwater liens is an insufficient justification for giving the term "secured claim" a different definition depending on the value of the collateral. Ultimately, the debtors' proposed distinction would do nothing to vindicate § 506(d)'s original meaning and would leave an odd statutory framework in its place. Pp. 795–797.

No. 13–1421, 566 Fed. Appx. 879, and No. 14–163, 556 Fed. Appx. 911, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, ALITO, and KAGAN, JJ., joined, and in which KENNEDY, BREYER, and SOTOMAYOR, JJ., joined except as to the footnote.

Danielle Spinelli argued the cause for petitioner in both cases. With her on the briefs were *Seth P. Waxman*, *Craig Goldblatt*, *Sonya L. Lebsack*, and *Isley M. Gostin*.

Stephanos Bibas argued the cause for respondents in both cases. With him on the brief were *James A. Feldman* and *David J. Volk*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Community Bankers Association of Illinois by *John Collen*; and for the Loan Syndications and Trading Association et al. by *Ronald J. Mann*, *Kevin Carroll*, and *Elliott Ganz*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Jerome N. Frank Legal Services Organization et al. by *J. L. Pottenger Jr.*; for the National Association of Consumer Bankruptcy Attorneys et al. by *David R. Kuney*, *Tara Twomey*, and *Jean Constantine-Davis*; for NYU Law School Bankruptcy Appellate Clinic by *Arthur J. Gonzalez*; for Occupy the SEC by *Akshat Tewary*; for Jagdeep S. Bhandari et al. by *Richard Lieb*; for Margaret Howard by *Timothy C. MacDonnell*; for Robert

JUSTICE THOMAS delivered the opinion of the Court.*

Section 506(d) of the Bankruptcy Code allows a debtor to void a lien on his property "[t]o the extent that [the] lien secures a claim against the debtor that is not an allowed secured claim." 11 U. S. C. § 506(d). These consolidated cases present the question whether a debtor in a Chapter 7 bankruptcy proceeding may void a junior mortgage under § 506(d) when the debt owed on a senior mortgage exceeds the present value of the property. We hold that a debtor may not, and we therefore reverse the judgments of the Court of Appeals.

I

The facts in these consolidated cases are largely the same. The debtors, respondents David Caulkett and Edelmiro Toledo-Cardona, each have two mortgage liens on their respective houses. Petitioner Bank of America (Bank) holds the junior mortgage lien—*i. e.*, the mortgage lien subordinate to the other mortgage lien—on each home. The amount owed on each debtor's senior mortgage lien is greater than each home's current market value. The Bank's junior mortgage liens are thus wholly underwater: Because each home is worth less than the amount the debtor owes on the senior mortgage, the Bank would receive nothing if the properties were sold today.

In 2013, the debtors each filed for Chapter 7 bankruptcy. In their respective bankruptcy proceedings, they moved to "strip off"—or void—the junior mortgage liens under § 506(d) of the Bankruptcy Code. In each case, the Bankruptcy Court granted the motion, and both the District Court and the Court of Appeals for the Eleventh Circuit affirmed. *In re Caulkett*, 566 Fed. Appx. 879 (2014) (*per curiam*); *In re*

M. Lawless et al. by *Deepak Gupta*; and for Adam J. Levitin by *Michael T. Kirkpatrick*.

*JUSTICE KENNEDY, JUSTICE BREYER, and JUSTICE SOTOMAYOR join this opinion, except as to the footnote.

Toledo-Cardona, 556 Fed. Appx. 911 (2014) (*per curiam*). The Eleventh Circuit explained that it was bound by Circuit precedent holding that § 506(d) allows debtors to void a wholly underwater mortgage lien.

We granted certiorari, 574 U. S. 1011 (2014), and now reverse the judgments of the Eleventh Circuit.

II

Section 506(d) provides, "To the extent that a lien secures a claim against the debtor that is not an *allowed secured claim*, such lien is void." (Emphasis added.) Accordingly, § 506(d) permits the debtors here to strip off the Bank's junior mortgages only if the Bank's "claim"—generally, its right to repayment from the debtors, § 101(5)—is "not an allowed secured claim." Subject to some exceptions not relevant here, a claim filed by a creditor is deemed "allowed" under § 502 if no interested party objects or if, in the case of an objection, the Bankruptcy Court determines that the claim should be allowed under the Code. §§ 502(a)–(b). The parties agree that the Bank's claims meet this requirement. They disagree, however, over whether the Bank's claims are "secured" within the meaning of § 506(d).

The Code suggests that the Bank's claims are not secured. Section 506(a)(1) provides that "[a]n allowed claim of a creditor secured by a lien on property . . . is a *secured claim* to the extent of the value of such creditor's interest in . . . such property," and "an *unsecured claim* to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." (Emphasis added.) In other words, if the value of a creditor's interest in the property is zero—as is the case here—his claim cannot be a "secured claim" within the meaning of § 506(a). And given that these identical words are later used in the same section of the same Act—§ 506(d)—one would think this "presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act

are intended to have the same meaning." *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 101 (2003) (internal quotation marks omitted). Under that straightforward reading of the statute, the debtors would be able to void the Bank's claims.

Unfortunately for the debtors, this Court has already adopted a construction of the term "secured claim" in § 506(d) that forecloses this textual analysis. See *Dewsnup* v. *Timm*, 502 U. S. 410 (1992). In *Dewsnup*, the Court confronted a situation in which a Chapter 7 debtor wanted to "'strip down'"—or reduce—a partially underwater lien under § 506(d) to the value of the collateral. *Id.*, at 412–413. Specifically, she sought, under § 506(d), to reduce her debt of approximately $120,000 to the value of the collateral securing her debt at that time ($39,000). *Id.*, at 413. Relying on the statutory definition of "'allowed secured claim'" in § 506(a), she contended that her creditors' claim was "secured only to the extent of the judicially determined value of the real property on which the lien [wa]s fixed." *Id.*, at 414.

The Court rejected her argument. Rather than apply the statutory definition of "secured claim" in § 506(a), the Court reasoned that the term "secured" in § 506(d) contained an ambiguity because the self-interested parties before it disagreed over the term's meaning. *Id.*, at 416, 420. Relying on policy considerations and its understanding of pre-Code practice, the Court concluded that if a claim "has been 'allowed' pursuant to § 502 of the Code and is secured by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d)." *Id.*, at 415; see *id.*, at 417–420. It therefore held that the debtor could not strip down the creditors' lien to the value of the property under § 506(d) "because [the creditors'] claim [wa]s secured by a lien and ha[d] been fully allowed pursuant to § 502." *Id.*, at 417. In other words, *Dewsnup* defined the term "secured claim" in § 506(d) to mean a claim supported by a security interest in property, regardless of whether the value of that property would be sufficient to cover the claim. Under this definition,

§ 506(d)'s function is reduced to "voiding a lien whenever a claim secured by the lien itself has not been allowed." *Id.*, at 416.

Dewsnup's construction of "secured claim" resolves the question presented here. *Dewsnup* construed the term "secured claim" in § 506(d) to include any claim "secured by a lien and . . . fully allowed pursuant to § 502." *Id.*, at 417. Because the Bank's claims here are both secured by liens and allowed under § 502, they cannot be voided under the definition given to the term "allowed secured claim" by *Dewsnup*.

III

The debtors do not ask us to overrule *Dewsnup*,* but instead request that we limit that decision to partially—as opposed to wholly—underwater liens. We decline to adopt this distinction. The debtors offer several reasons why we should cabin *Dewsnup* in this manner, but none of them is compelling.

To start, the debtors rely on language in *Dewsnup* stating that the Court was not addressing "all possible fact situations," but was instead "allow[ing] other facts to await their legal resolution on another day." *Id.*, at 416–417. But this disclaimer provides an insufficient foundation for the debtors'

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*From its inception, *Dewsnup* v. *Timm*, 502 U. S. 410 (1992), has been the target of criticism. See, *e. g.*, *id.*, at 420–436 (SCALIA, J., dissenting); *In re Woolsey*, 696 F. 3d 1266, 1273–1274, 1278 (CA10 2012); *In re Dever*, 164 B. R. 132, 138, 145 (Bkrtcy. Ct. CD Cal. 1994); Carlson, Bifurcation of Undersecured Claims in Bankruptcy, 70 Am. Bankr. L. J. 1, 12–20 (1996); Ponoroff & Knippenberg, The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy, 95 Mich. L. Rev. 2234, 2305–2307 (1997); see also *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 463, and n. 3 (1999) (THOMAS, J., concurring in judgment) (collecting cases and observing that "[t]he methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and . . . Bankruptcy Courts"). Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*.

proposed distinction. *Dewsnup* considered several possible definitions of the term "secured claim" in § 506(d). See *id.*, at 414–416. The definition it settled on—that a claim is "secured" if it is "secured by a lien" and "has been fully allowed pursuant to § 502," *id.*, at 417—does not depend on whether a lien is partially or wholly underwater. Whatever the Court's hedging language meant, it does not provide a reason to limit *Dewsnup* in the manner the debtors propose.

The debtors next contend that the term "secured claim" in § 506(d) could be redefined as any claim that is backed by collateral with *some* value. Embracing this reading of § 506(d), however, would give the term "allowed secured claim" in § 506(d) a different meaning than its statutory definition in § 506(a). We refuse to adopt this artificial definition.

Nor do we think *Nobelman* v. *American Savings Bank*, 508 U. S. 324 (1993), supports the debtors' proposed distinction. *Nobelman* said nothing about the meaning of the term "secured claim" in § 506(d). Instead, it addressed the interaction between the meaning of the term "secured claim" in § 506(a) and an entirely separate provision, § 1322(b)(2). See 508 U. S., at 327–332. *Nobelman* offers no guidance on the question presented in these cases because the Court in *Dewsnup* already declined to apply the definition in § 506(a) to the phrase "secured claim" in § 506(d).

The debtors alternatively urge us to limit *Dewsnup*'s definition to the facts of that case because the historical and policy concerns that motivated the Court do not apply in the context of wholly underwater liens. Whether or not that proposition is true, it is an insufficient justification for giving the term "secured claim" in § 506(d) a different definition depending on the value of the collateral. We are generally reluctant to give the "same words a different meaning" when construing statutes, *Pasquantino* v. *United States*, 544 U. S. 349, 358 (2005) (internal quotation marks omitted), and we decline to do so here based on policy arguments.

Ultimately, embracing the debtors' distinction would not vindicate § 506(d)'s original meaning, and it would leave an odd statutory framework in its place. Under the debtors' approach, if a court valued the collateral at one dollar more than the amount of a senior lien, the debtor could not strip down a junior lien under *Dewsnup*, but if it valued the property at one dollar less, the debtor could strip off the entire junior lien. Given the constantly shifting value of real property, this reading could lead to arbitrary results. To be sure, the Code engages in line-drawing elsewhere, and sometimes a dollar's difference will have a significant impact on bankruptcy proceedings. See, *e. g.*, § 707(b)(2)(A)(i) (presumption of abuse of provisions of Chapter 7 triggered if debtor's projected disposable income over the next five years is $12,475). But these lines were set by Congress, not this Court. There is scant support for the view that § 506(d) applies differently depending on whether a lien was partially or wholly underwater. Even if *Dewsnup* were deemed not to reflect the correct meaning of § 506(d), the debtors' solution would not either.

* * *

The reasoning of *Dewsnup* dictates that a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral. The debtors here have not asked us to overrule *Dewsnup*, and we decline to adopt the artificial distinction they propose instead. We therefore reverse the judgments of the Court of Appeals and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

MELLOULI *v.* LYNCH, ATTORNEY GENERAL

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

No. 13–1034. Argued January 14, 2015—Decided June 1, 2015

Petitioner Moones Mellouli, a lawful permanent resident, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia "to . . . store [or] conceal . . . a controlled substance." Kan. Stat. Ann. §21–5709(b)(2). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four unidentified orange tablets. Citing Mellouli's misdemeanor conviction, an Immigration Judge ordered him deported under 8 U. S. C. §1227(a)(2)(B)(i), which authorizes the deportation (removal) of an alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." Section 802, in turn, limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. 21 U. S. C. §802(6). Kansas defines "controlled substance" as any drug included on its own schedules, without reference to §802. Kan. Stat. Ann. §21–5701(a). At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not on the federal lists. The Board of Immigration Appeals (BIA) affirmed Mellouli's deportation order, and the Eighth Circuit denied his petition for review.

Held: Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under §1227(a)(2)(B)(i). Pp. 804–813.

(a) The categorical approach historically taken in determining whether a state conviction renders an alien removable looks to the statutory definition of the offense of conviction, not to the particulars of the alien's conduct. The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. The BIA has long applied the categorical approach to assess whether a state drug conviction triggers removal under successive versions of what is now §1227(a)(2)(B)(i). *Matter of Paulus*, 11 I. & N. Dec. 274, is illustrative. At the time the BIA decided *Paulus*, California controlled certain "narcotics" not listed as "narcotic drugs" under federal law. *Id.*, at 275. The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance controlled only under California, not federal, law. Under the *Paulus* analysis, Mellouli would not be deportable. The

state law involved in Mellouli's conviction, like the California statute in *Paulus*, was not confined to federally controlled substances; it also included substances controlled only under state, not federal, law.

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118. There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general," reasoning that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id.*, at 120–121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in § 802.

The BIA's disparate approach to drug possession and distribution offenses and paraphernalia possession offenses finds no home in § 1227(a)(2)(B)(i)'s text and "leads to consequences Congress could not have intended." *Moncrieffe* v. *Holder*, 569 U. S. 184, 200. That approach has the anomalous result of treating less grave paraphernalia possession misdemeanors more harshly than drug possession and distribution offenses. The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation is owed no deference under the doctrine described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. Pp. 804–810.

(b) The Government's interpretation of the statute is similarly flawed. The Government argues that aliens who commit *any* drug crime, not just paraphernalia offenses, in States whose drug schedules substantially overlap the federal schedules are deportable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances." Brief for Respondent 17. While the words "relating to" are broad, the Government's reading stretches the construction of § 1227(a)(2)(B)(i) to the breaking point, reaching state-court convictions, like Mellouli's, in which "[no] controlled substance (as defined in [§ 802])" figures as an element of the offense. Construction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802. Accordingly, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]." Pp. 810–813.

719 F. 3d 995, reversed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 813.

Jon Laramore argued the cause for petitioner. With him on the briefs were *D. Lucetta Pope*, *Daniel E. Pulliam*, *Katherine Evans*, *Benjamin Casper*, *John Keller*, and *Sheila Stuhlman*.

Rachel P. Kovner argued the cause for respondent. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Kneedler*, *Donald E. Kenner*, and *W. Manning Evans*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case requires us to decide how immigration judges should apply a deportation (removal) provision, defined with reference to federal drug laws, to an alien convicted of a state drug-paraphernalia misdemeanor.

Lawful permanent resident Moones Mellouli, in 2010, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. §21–5709(b)(2) (2013 Cum. Supp.). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four orange tablets. The criminal charge and plea agreement did not identify the controlled substance involved, but Mellouli had acknowledged, prior to the charge and plea, that the tablets were Adderall. Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

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*Briefs of *amici curiae* urging reversal were filed for Immigration Law Professors by *Alina Das, pro se*; for the National Association of Criminal Defense Lawyers et al. by *Alan Schoenfeld* and *Mark C. Fleming*; and for the National Immigrant Justice Center et al. by *Julian L. André* and *Charles Roth*.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under 8 U. S. C. § 1227(a)(2)(B)(i) based on his Kansas misdemeanor conviction. Section 1227(a)(2)(B)(i) authorizes the removal of an alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." We hold that Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under § 1227(a)(2)(B)(i). The drug-paraphernalia possession law under which he was convicted, Kan. Stat. Ann. § 21–5709(b), by definition, related to a controlled substance: The Kansas statute made it unlawful "to use or possess with intent to use any drug paraphernalia to . . . store [or] conceal . . . a controlled substance." But it was immaterial under that law whether the substance was *defined in 21 U. S. C. § 802*. Nor did the State charge, or seek to prove, that Mellouli possessed a substance on the § 802 schedules. Federal law (§ 1227(a)(2)(B)(i)), therefore, did not authorize Mellouli's removal.

I

A

This case involves the interplay between several federal and state statutes. Section 1227(a)(2)(B)(i), a provision of the Immigration and Nationality Act, 66 Stat. 163, as amended, authorizes the removal of an alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Section 1227(a)(2)(B)(i) incorporates 21 U. S. C. § 802, which limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. § 802(6).

The statute defining the offense to which Mellouli pleaded guilty, Kan. Stat. Ann. §21–5709(b), proscribes "possess[ion] with intent to use any drug paraphernalia to," among other things, "store" or "conceal" a "controlled substance." Kansas defines "controlled substance" as any drug included on its own schedules, and makes no reference to §802 or any other federal law. §21–5701(a).[1] At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists. See §65–4105(d)(30), (31), (33), (34), (36) (2010 Cum. Supp.); §65–4111(g) (2002); §65–4113(d)(1), (e), (f) (2010 Cum. Supp.); see also Brief for Respondent 9, n. 2.

The question presented is whether a Kansas conviction for using drug paraphernalia to store or conceal a controlled substance, §21–5709(b), subjects an alien to deportation under §1227(a)(2)(B)(i), which applies to an alien "convicted of a violation of [a state law] relating to a controlled substance (as defined in [§802])."

B

Mellouli, a citizen of Tunisia, entered the United States on a student visa in 2004. He attended U. S. universities, earning a bachelor of arts degree, *magna cum laude*, as well as master's degrees in applied mathematics and economics. After completing his education, Mellouli worked as an actuary and taught mathematics at the University of Missouri-Columbia. In 2009, he became a conditional permanent resident and, in 2011, a lawful permanent resident. Since December 2011, Mellouli has been engaged to be married to a U. S. citizen.

In 2010, Mellouli was arrested for driving under the influence and driving with a suspended license. During a post-arrest search in a Kansas detention facility, deputies dis-

[1] At the time of Mellouli's conviction, Kan. Stat. Ann. §§21–5701(a) and 21–5709(b) (2013 Cum. Supp.) were codified at, respectively, §§21–36a01(a) and 21–36a09(b) (2010 Cum. Supp.).

covered four orange tablets hidden in Mellouli's sock. According to a probable-cause affidavit submitted in the state prosecution, Mellouli acknowledged that the tablets were Adderall and that he did not have a prescription for the drugs. Adderall, the brand name of an amphetamine-based drug typically prescribed to treat attention-deficit hyperactivity disorder,[2] is a controlled substance under both federal and Kansas law. See 21 CFR § 1308.12(d)(1) (2014) (listing "amphetamine" and its "salts" and "isomers"); Kan. Stat. Ann. § 65–4107(d)(1) (2013 Cum. Supp.) (same). Based on the probable-cause affidavit, a criminal complaint was filed charging Mellouli with trafficking contraband in jail.

Ultimately, Mellouli was charged with only the lesser offense of possessing drug paraphernalia, a misdemeanor. The amended complaint alleged that Mellouli had "use[d] or possess[ed] with intent to use drug paraphernalia, to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance." App. 23. The complaint did not identify the substance contained in the sock. Mellouli pleaded guilty to the paraphernalia possession charge; he also pleaded guilty to driving under the influence. For both offenses, Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under § 1227(a)(2)(B)(i) based on his paraphernalia possession conviction. An Immigration Judge ordered Mellouli deported, and the Board of Immigration Appeals (BIA) affirmed the order. Mellouli was deported in 2012.

Under federal law, Mellouli's concealment of controlled-substance tablets in his sock would not have qualified as a drug-paraphernalia offense. Federal law criminalizes the

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[2] See H. Silverman, The Pill Book 23 (13th ed. 2008).

sale of or commerce in drug paraphernalia, but possession alone is not criminalized at all. See 21 U. S. C. § 863(a)–(b). Nor does federal law define drug paraphernalia to include common household or ready-to-wear items like socks; rather, it defines paraphernalia as any "equipment, product, or material" which is "primarily *intended or designed for use*" in connection with various drug-related activities. § 863(d) (emphasis added). In 19 States as well, the conduct for which Mellouli was convicted—use of a sock to conceal a controlled substance—is not a criminal offense. Brief for National Immigrant Justice Center et al. as *Amici Curiae* 7. At most, it is a low-level infraction, often not attended by a right to counsel. *Id.*, at 9–11.

The Eighth Circuit denied Mellouli's petition for review. 719 F. 3d 995 (2013). We granted certiorari, 573 U. S. 944 (2014), and now reverse the judgment of the Eighth Circuit.

II

We address first the rationale offered by the BIA and affirmed by the Eighth Circuit, which differentiates paraphernalia offenses from possession and distribution offenses. Essential background, in evaluating the rationale shared by the BIA and the Eighth Circuit, is the categorical approach historically taken in determining whether a state conviction renders an alien removable under the immigration statute.[3]

[3] We departed from the categorical approach in *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), based on the atypical cast of the prescription at issue, 8 U. S. C. § 1101(a)(43)(M)(i). That provision defines as an "aggravated felony" an offense "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000." The following subparagraph, (M)(ii), refers to an offense "described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." No offense "described in section 7201 of title 26," we pointed out, "has a specific loss amount as an element." 557 U. S., at 38. Similarly, "no widely applicable federal fraud statute . . . contains a relevant monetary loss threshold," *id.*, at 39, and "[most] States had no major fraud or deceit statute with any relevant monetary threshold," *id.*, at 40. As categorically inter-

Because Congress predicated deportation "on convictions, not conduct," the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior. Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N. Y. U. L. Rev. 1669, 1701, 1746 (2011). The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. *Ibid.* An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must "presume that the conviction rested upon nothing more than the least of the acts criminalized" under the state statute. *Moncrieffe* v. *Holder*, 569 U. S. 184, 190–191 (2013) (internal quotation marks and alterations omitted).[4]

The categorical approach "has a long pedigree in our Nation's immigration law." *Id.*, at 191. As early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to *convic-*

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preted, (M)(ii), the tax evasion provision, would have no application, and (M)(i), the fraud or deceit provision, would apply only in an extraordinarily limited and haphazard manner. *Ibid.* We therefore concluded that Congress intended the monetary thresholds in subparagraphs (M)(i) and (M)(ii) to apply "to the specific circumstances surrounding an offender's commission of [the defined] crime on a specific occasion." *Ibid.* In the main, § 1227(a)(2)(B)(i), the provision at issue here, has no such circumstance-specific thrust; its language refers to crimes generically defined.

[4] A version of this approach, known as the "modified categorical approach," applies to "state statutes that contain several different crimes, each described separately." *Moncrieffe* v. *Holder*, 569 U. S. 184, 191 (2013). In such cases, "a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Ibid.* (internal quotation marks omitted). Off limits to the adjudicator, however, is any inquiry into the particular facts of the case. Because the Government has not argued that this case falls within the compass of the modified-categorical approach, we need not reach the issue.

tions, intended to "limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense," and to disallow "[examination] of the facts underlying the crime." Das, *supra*, at 1688, 1690.

Rooted in Congress' specification of conviction, not conduct, as the trigger for immigration consequences, the categorical approach is suited to the realities of the system. Asking immigration judges in each case to determine the circumstances underlying a state conviction would burden a system in which "large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions." Koh, The Whole Better Than the Sum: A Case for the Categorical Approach To Determining the Immigration Consequences of Crime, 26 Geo. Immigration L. J. 257, 295 (2012). By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law. See *id.*, at 295–310; Das, *supra*, at 1725–1742. In particular, the approach enables aliens "to anticipate the immigration consequences of guilty pleas in criminal court," and to enter "'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." Koh, *supra*, at 307. See Das, *supra*, at 1737–1738.[5]

The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute. As originally enacted, the removal statute specifically listed covered offenses and covered substances. It made deportable, for example, any alien convicted of "import[ing]," "buy[ing]," or "sell[ing]" any "narcotic drug," defined as "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium or coca leaves, or

[5] Mellouli's plea may be an example. In admitting only paraphernalia possession, Mellouli avoided any identification, in the record of conviction, of the federally controlled substance (Adderall) his sock contained. See *supra*, at 803.

cocaine." Ch. 202, 42 Stat. 596–597. Over time, Congress amended the statute to include additional offenses and additional narcotic drugs.[6] Ultimately, the Anti-Drug Abuse Act of 1986 replaced the increasingly long list of controlled substances with the now familiar reference to "a controlled substance (as defined in [§ 802])." See § 1751, 100 Stat. 3207–47. In interpreting successive versions of the removal statute, the BIA inquired whether the state statute under which the alien was convicted covered federally controlled substances and not others.[7]

Matter of Paulus, 11 I. & N. Dec. 274 (1965), is illustrative. At the time the BIA decided *Paulus*, the immigration statute made deportable any alien who had been "convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana." *Id.*, at 275. California controlled certain "narcotics," such as peyote, not listed as "narcotic drugs" under federal law. *Ibid.* The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a

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[6] The 1956 version of the statute, for example, permitted removal of any alien "who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate." Narcotic Control Act of 1956, § 301(b), 70 Stat. 575.

[7] See, *e. g.*, *Matter of Fong*, 10 I. & N. Dec. 616, 619 (BIA 1964) (a Pennsylvania conviction for unlawful use of a drug rendered alien removable because "every drug enumerated in the Pennsylvania law [was] found to be a narcotic drug or marijuana within the meaning of [the federal removal statute]"), overruled in part on other grounds, *Matter of Sum*, 13 I. & N. Dec. 569 (1970).

deportable offense, for it was possible that the conviction involved a substance, such as peyote, controlled only under California law. *Id.*, at 275–276. Because the alien's conviction was not necessarily predicated upon a federally controlled "narcotic drug," the BIA concluded that the conviction did not establish the alien's deportability. *Id.*, at 276.

Under the *Paulus* analysis, adhered to as recently as 2014 in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014),[8] Mellouli would not be deportable. Mellouli pleaded guilty to concealing unnamed pills in his sock. At the time of Mellouli's conviction, Kansas' schedules of controlled substances included at least nine substances—*e. g.*, salvia and jimson weed—not defined in § 802. See Kan. Stat. Ann. § 65–4105(d)(30), (31). The state law involved in Mellouli's conviction, therefore, like the California statute in *Paulus*, was not confined to federally controlled substances; it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under § 802, as opposed to a substance controlled only under Kansas law. Under the categorical approach applied in *Paulus*, Mellouli's drug-paraphernalia conviction does not render him deportable. In short, the state law under which he was charged categorically "relat[ed] to a controlled substance," but was not limited to substances "defined in [§ 802]."[9]

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[8] The Government acknowledges that *Ferreira* "assumed the applicability of [the *Paulus*] framework." Brief for Respondent 49. Whether *Ferreira* applied that framework correctly is not a matter this case calls upon us to decide.

[9] The dissent maintains that it is simply following "the statutory text." *Post*, at 813. It is evident, however, that the dissent shrinks to the vanishing point the words "as defined in [§ 802]." If § 1227(a)(2)(B)(i) stopped with the words "relating to a controlled substance," the dissent would make sense. But Congress did not stop there. It qualified "relating to a controlled substance" by adding the limitation "as defined in [§ 802]." If those words do not confine § 1227(a)(2)(B)(i)'s application to drugs defined in § 802, one can only wonder why Congress put them there.

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (2009). There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general." *Id.*, at 121. The BIA rejected the argument that a paraphernalia conviction should not count at all because it targeted implements, not controlled substances. *Id.*, at 120. It then reasoned that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id.*, at 121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in § 802.

The Immigration Judge in this case relied upon *Martinez Espinoza* in ordering Mellouli's removal, quoting that decision for the proposition that "'the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* . . . has never been extended'" to paraphernalia offenses. App. to Pet. for Cert. 32 (quoting *Martinez Espinoza*, 25 I. & N. Dec., at 121). The BIA affirmed, reasoning that Mellouli's conviction for possession of drug paraphernalia "involves drug trade in general and, thus, is covered under [§ 1227(a)(2)(B)(i)]." App. to Pet. for Cert. 18. Denying Mellouli's petition for review, the Eighth Circuit deferred to the BIA's decision in *Martinez Espinoza*, and held that a Kansas paraphernalia conviction "'relates to' a federal controlled substance because it is a crime . . . 'associated with the drug trade in general.'" 719 F. 3d, at 1000.

The disparate approach to state drug convictions, devised by the BIA and applied by the Eighth Circuit, finds no home in the text of § 1227(a)(2)(B)(i). The approach, moreover, "leads to consequences Congress could not have intended." *Moncrieffe*, 569 U. S., at 200. Statutes should be interpreted "as a symmetrical and coherent regulatory scheme."

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000) (internal quotation marks omitted). The BIA, however, has adopted conflicting positions on the meaning of § 1227(a)(2)(B)(i), distinguishing drug possession and distribution offenses from offenses involving the drug trade in general, with the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses. Drug possession and distribution convictions trigger removal only if they necessarily involve a federally controlled substance, see *Paulus*, 11 I. & N. Dec. 274, while convictions for paraphernalia possession, an offense less grave than drug possession and distribution, trigger removal whether or not they necessarily implicate a federally controlled substance, see *Martinez Espinoza*, 25 I. & N. Dec. 118. The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

III

Offering an addition to the BIA's rationale, the Eighth Circuit reasoned that a state paraphernalia possession conviction categorically relates to a federally controlled substance so long as there is "nearly a complete overlap" between the drugs controlled under state and federal law. 719 F. 3d, at 1000.[10] The Eighth Circuit's analysis, however, scarcely explains or ameliorates the BIA's anomalous separation of paraphernalia possession offenses from drug possession and distribution offenses.

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[10] The BIA posited, but did not rely on, a similar rationale in *Matter of Martinez Espinoza*. See 25 I. & N. Dec. 118, 121 (2009) (basing decision on a "distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general").

Apparently recognizing this problem, the Government urges, as does the dissent, that the overlap between state and federal drug schedules supports the removal of aliens convicted of *any* drug crime, not just paraphernalia offenses. As noted, § 1227(a)(2)(B)(i) authorizes the removal of any alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [§ 802])." According to the Government, the words "relating to" modify "law or regulation," rather than "violation." Brief for Respondent 25–26 (a limiting phrase ordinarily modifies the last antecedent). Therefore, the Government argues, aliens who commit "drug crimes" in States whose drug schedules substantially overlap the federal schedules are removable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances." Brief for Respondent 17.

We do not gainsay that, as the Government urges, the last reasonable referent of "relating to," as those words appear in § 1227(a)(2)(B)(i), is "law or regulation." The removal provision is thus satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance. As this case illustrates, however, the Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions, like Mellouli's, in which "[no] controlled substance (as defined in [§ 802])" figures as an element of the offense. We recognize, too, that the § 1227(a)(2)(B)(i) words to which the dissent attaches great weight, *i. e.*, "relating to," *post*, at 814–815, are "broad" and "indeterminate." *Maracich* v. *Spears*, 570 U. S. 48, 59 (2013) (internal quotation marks and brackets omitted).[11] As we

[11] The dissent observes that certain provisions of the immigration statute involving firearms and domestic violence "specif[y] the conduct that subjects an alien to removal" without "the expansive phrase 'relating to.'" *Post*, at 815. From this statutory context, the dissent infers that Congress must have intended the words "relating to" to have expansive meaning. *Post*, at 815–816. But the dissent overlooks another contextual

cautioned in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645 (1995), those words, "extend[ed] to the furthest stretch of [their] indeterminacy, . . . 'stop nowhere,' " *id.*, at 655 (internal quotation marks omitted). "[C]ontext," therefore, may "tu[g] . . . in favor of a narrower reading." *Yates* v. *United States*, 574 U. S. 528, 539 (2015). Context does so here.

The historical background of § 1227(a)(2)(B)(i) demonstrates that Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug. *Supra*, at 807–808. The Government's position here severs that link by authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs. The Government offers no cogent reason why its position is limited to state drug schedules that have a "substantial overlap" with the federal schedules. Brief for Respondent 31. A statute with *any* overlap would seem to be *related to* federally controlled drugs. Indeed, the Government's position might well encompass convictions for offenses related to drug activity more generally, such as gun possession, even if those convictions do not actually involve drugs (let alone federally controlled drugs). The Solicitor General, while resisting this particular example, acknowledged that convictions under statutes "that have some connection to drugs indirectly" might fall within § 1227(a)(2)(B)(i). Tr. of Oral

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clue—*i. e.*, that other provisions of the immigration statute tying immigration consequences to controlled-substance offenses contain no reference to § 802. See 8 U. S. C. § 1357(d) (allowing detainer of any alien who has been "arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances"); § 1184(d)(3)(B)(iii) (allowing Secretary of Homeland Security to deny certain visa applications when applicant has at least three convictions of crimes "relating to a controlled substance or alcohol not arising from a single act"). These provisions demonstrate that when Congress seeks to capture conduct involving a "controlled substance," it says just that, not "a controlled substance (as defined in [§ 802])."

Arg. 36. This sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading.

In sum, construction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802. We therefore reject the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]."

* * *

For the reasons stated, the judgment of the U. S. Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court reverses the decision of the United States Court of Appeals for the Eighth Circuit on the ground that it misapplied the federal removal statute. It rejects the Government's interpretation of that statute, which would supply an alternative ground for affirmance. Yet it offers no interpretation of its own. Lower courts are thus left to guess which convictions qualify an alien for removal under 8 U. S. C. § 1227(a)(2)(B)(i), and the majority has deprived them of their only guide: the statutory text itself. Because the statute renders an alien removable whenever he is convicted of violating a law "relating to" a federally controlled substance, I would affirm.

I

With one exception not applicable here, § 1227(a)(2)(B)(i) makes removable "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or

attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." I would hold, consistent with the text, that the provision requires that the conviction arise under a "law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." Thus, Mellouli was properly subject to removal if the Kansas statute of conviction "relat[es] to a controlled substance (as defined in section 802 of title 21)," regardless of whether his particular conduct would also have subjected him to prosecution under federal controlled-substances laws. See *ante*, at 805 ("An alien's actual conduct is irrelevant to the inquiry"). The majority's 12 references to the sock that Mellouli used to conceal the pills are thus entirely beside the point.[1]

The critical question, which the majority does not directly answer, is what it means for a law or regulation to "relat[e] to a controlled substance (as defined in section 802 of title 21)." At a minimum, we know that this phrase does not require a complete overlap between the substances controlled under the state law and those controlled under 21 U. S. C. § 802. To "relate to" means "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). In ordinary parlance, one thing can "relate to" another even if it also relates to other things. As ordinarily understood, therefore, a state law regulating various controlled substances may

[1] It is likewise beside the point that the pills were, in fact, federally controlled substances, that Mellouli concealed them in his sock while being booked into jail, that he was being booked into jail for his second arrest for driving under the influence in less than one year, that he pleaded to the paraphernalia offense after initially being charged with trafficking contraband in jail, or that he has since been charged with resisting arrest and failure to display a valid driver's license upon demand.

"relat[e] to a controlled substance (as defined in section 802 of title 21)" even if the statute also controls a few substances that do not fall within the federal definition.

The structure of the removal statute confirms this interpretation. Phrases like "relating to" and "in connection with" have broad but indeterminate meanings that must be understood in the context of "the structure of the statute and its other provisions." *Maracich* v. *Spears*, 570 U. S. 48, 60 (2013) ("in connection with"); see also *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995) ("relate to"); see generally *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 324 (1997) (describing the Court's efforts to interpret the " 'clearly expansive' " "relate to" language in the pre-emption provision of the Employee Retirement Income Security Act of 1974). In interpreting such phrases, we must be careful to honor Congress' choice to use expansive language. *Maracich*, *supra*, at 87 (GINSBURG, J., dissenting) (noting that a statute should be interpreted broadly in light of Congress' decision to use sweeping language like "in connection with"); see also, *e. g.*, *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 484 (2004) (GINSBURG, J.) (interpreting Environmental Protection Agency's authority in light of the "notably capacious terms" contained in its authorizing statute).

Here, the "structure of the statute and its other provisions" indicate that Congress understood this phrase to sweep quite broadly. Several surrounding subsections of the removal statute reveal that when Congress wanted to define with greater specificity the conduct that subjects an alien to removal, it did so by omitting the expansive phrase "relating to." For example, a neighboring provision makes removable "[a]ny alien who . . . is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part, or accessory *which is* a firearm or destructive device (as defined

in section 921(a) of title 18)." 8 U. S. C. § 1227(a)(2)(C) (emphasis added). This language explicitly requires that the object of the offense fit within a federal definition. Other provisions adopt similar requirements. See, *e. g.*, § 1227(a)(2)(E)(i) (making removable "[a]ny alien who . . . is convicted of a crime of domestic violence," where "the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18) . . . committed by" a person with a specified family relationship with the victim); see generally § 1101(a)(43) (defining certain aggravated felonies using federal definitions as elements). That Congress, in this provision, required only that a law *relate to* a federally controlled substance, as opposed to *involve* such a substance, suggests that it understood "relating to" as having its ordinary and expansive meaning. See, *e. g.*, *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

Applying this interpretation of "relating to," a conviction under Kansas' drug paraphernalia statute qualifies as a predicate offense under § 1227(a)(2)(B)(i). That state statute prohibits the possession or use of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21–5709(b)(2) (2013 Cum. Supp.). And, as used in this statute, a "controlled substance" is a substance that appears on Kansas' schedules, § 21–5701(a), which in turn consist principally of federally controlled substances. *Ante*, at 802; see also Brief for Petitioner 3 (listing nine substances on Kansas' schedules that were not on the federal schedules at the time of Mellouli's arrest); Brief for Respondent 8 (noting that, at the time of Mellouli's arrest, more than 97 percent of the named substances on Kansas' schedules were federally controlled). The law certainly "relat[es] to a controlled substance (as defined in section 802 of title 21)" because it prohibits conduct involving controlled substances falling within the federal definition in § 802.

True, approximately three percent of the substances appearing on Kansas' lists of "controlled substances" at the time of Mellouli's conviction did not fall within the federal definition, *ante*, at 802, meaning that an individual convicted of possessing paraphernalia may never have used his paraphernalia with a federally controlled substance. But that fact does not destroy the relationship between the *law* and federally controlled substances. Mellouli was convicted for violating a state law "relating to a controlled substance (as defined in section 802 of title 21)," so he was properly removed under 8 U. S. C. § 1227(a)(2)(B)(i).

II

A

The majority rejects this straightforward interpretation because it "reach[es] state-court convictions . . . in which '[no] controlled substance (as defined in [§ 802])' figures as an element of the offense." *Ante*, at 811. This assumes the answer to the question at the heart of this case: whether the removal statute does in fact reach such convictions. To answer that question by assuming the answer is circular.

The majority hints that some more limited definition of "relating to" is suggested by context. See *ante*, at 812. I wholeheartedly agree that we must look to context to understand indeterminate terms like "relating to," which is why I look to surrounding provisions of the removal statute. These "reveal that when Congress wanted to define with greater specificity the conduct that subjects an alien to removal, it did so by omitting the expansive phrase 'relating to.'" *Supra*, at 815. For its part, the majority looks to the context of other provisions referring to "controlled substances" without a definitional parenthetical, *ante*, at 13, n. 11, and rejoins that the most natural reading of the statute "shrinks to the vanishing point the words 'as defined in [§ 802],'" *ante*, at 808, n. 9. But the definition of controlled substances *does*

play a role in my interpretation, by requiring that the law bear some relationship to *federally* controlled substances. Although we need not establish the precise boundaries of that relationship in this case given that Kansas' paraphernalia law clearly qualifies under any reasonable definition of "relating to," the definition of controlled substances imposes a meaningful limit on the statutes that qualify.

B

The majority *appears* to conclude that a statute "relates to" a federally controlled substance if its "definition of the offense of conviction" necessarily includes as an element of that offense a federally controlled substance. *Ante,* at 805. The text will not bear this meaning.

The first problem with the majority's interpretation is that it converts a removal provision expressly keyed to features of the statute itself into one keyed to features of the underlying generic offense. To understand the difference, one need look no further than this Court's decision in *Moncrieffe* v. *Holder*, 569 U. S. 184 (2013). In that case, removal was predicated on the generic offense of " 'illicit trafficking in a controlled substance.' " *Id.*, at 188. Thus, in order to satisfy the federal criteria, it was necessary for the state offense at issue to have as elements the same elements that make up that generic offense. *Id.*, at 190. By contrast, § 1227(a)(2)(B)(i) does not refer to a generic offense for which we must discern the relevant criteria from its nature. Instead, it establishes the relevant criteria explicitly, and does so for the law of conviction itself rather than for some underlying generic offense—that is, the law of conviction must "relat[e] to" a federally controlled substance.

The only plausible way of reading the text here to refer to a generic offense that has as one element the involvement of a federally controlled substance would be to read "relating to" as modifying "violation" instead of "law." Under that reading, the statute would attach immigration consequences

to a "*violation* . . . relating to a controlled substance (as defined in section 802 of title 21)," rather than a violation of a "*law* . . . relating to a controlled substance (as defined in section 802 of title 21)." Yet the majority expressly—and correctly—rejects as grammatically incorrect Mellouli's argument that the "relating to" clause modifies "violation." *Ante*, at 811.

Having done so, the majority can reconcile its outcome with the text only by interpreting the words "relating to" to mean "regulating only." It should be obvious why the majority does not make this argument explicit. Even assuming "regulating only" were a *permissible* interpretation of "relating to"—for it certainly is not the most natural one—that interpretation would be foreclosed by Congress' pointed word choice in the surrounding provisions. And given the logical upshot of the majority's interpretation, it is even more understandable that it avoids offering an explicit exegesis. For unless the Court ultimately adopts the modified categorical approach for statutes, like the one at issue here, that define offenses with reference to "controlled substances" generally, and treats them as divisible by each separately listed substance, *ante*, at 805, n. 4, its interpretation would mean that *no* conviction under a controlled-substances regime more expansive than the Federal Government's would trigger removal.[2] Thus, whenever a State moves first in subjecting some newly discovered drug to regulation, every

[2] If the Court ultimately adopts the modified categorical approach, it runs into new textual problems. Under that approach, an alien would be subject to removal for violating Kansas' drug paraphernalia statute whenever a qualifying judicial record reveals that the conviction involved a federally controlled substance. If that result is permissible under the removal statute, however, then Kansas' paraphernalia law must qualify as a law "relating to" a federally controlled substance. Otherwise, the text of the statute would afford no basis for his removal. It would then follow that any alien convicted of "a violation of" that law is removable under § 1227(a)(2)(B)(i), *regardless* of whether a qualifying judicial record reveals the controlled substance at issue.

alien convicted during the lag between state and federal regulation would be immunized from the immigration consequences of his conduct. Cf. Brief for Respondent 10 (explaining that two of the nine nonfederally controlled substances on Kansas' schedules at the time Mellouli was arrested became federally controlled within a year of his arrest). And the Government could never, under § 1227(a)(2)(B)(i), remove an alien convicted of violating the controlled-substances law of a State that defines "controlled substances" with reference to a list containing even one substance that does not appear on the federal schedules.

Finding no support for its position in the text, the majority relies on the historical background, *ante*, at 812–813, and especially the Board of Immigration Appeals' (BIA) decision in *Matter of Paulus*, 11 I. & N. Dec. 274 (1965)—a surprising choice, given that the majority concludes its discussion of that history by acknowledging that the BIA's atextual approach to the statute makes "scant sense," *ante*, at 810. To the extent that the BIA's approach to § 1227(a)(2)(B)(i) and its predecessors is consistent with the majority's, it suffers from the same flaw: It fails to account for the text of the removal provision because it looks at whether the *conviction* itself necessarily involved a substance regulated under federal law, not at whether the statute related to one. See *Paulus*, *supra*, at 276 ("[O]nly a *conviction* for illicit possession of or traffic in a substance which is defined as a narcotic drug under federal laws can be the basis for deportation" (emphasis added)); *Matter of Ferreira*, 26 I. & N. Dec. 415, 418–419 (BIA 2014) (modeling its categorical approach to § 1227(a)(2)(B)(i) after the analysis in *Moncrieffe*, which, as explained above, keyed removal to the characteristics of the offense).

Section 1227(a)(2)(B)(i) requires only that the state law itself, not the "generic" offense defined by the law, "relat[e] to" a federally controlled substance. The majority has not

offered a textual argument capable of supporting a different conclusion.

* * *

The statutory text resolves this case. True, faithfully applying that text means that an alien may be deported for committing an offense that does not involve a federally controlled substance. Nothing about that consequence, however, is so outlandish as to call this application into doubt. An alien may be removed only if he is convicted of violating a law, and I see nothing absurd about removing individuals who are unwilling to respect the drug laws of the jurisdiction in which they find themselves.

The majority thinks differently, rejecting the only plausible reading of this provision and adopting an interpretation that finds no purchase in the text. I fail to understand why it chooses to do so, apart from a gut instinct that an educated professional engaged to an American citizen should not be removed for concealing unspecified orange tablets in his sock. Or perhaps the majority just disapproves of the fact that Kansas, exercising its police powers, has decided to criminalize conduct that Congress, exercising its limited powers, has decided not to criminalize, *ante*, at 803–804. Either way, that is not how we should go about interpreting statutes, and I respectfully dissent.

Per Curiam

TAYLOR ET AL. *v.* BARKES ET AL.

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

No. 14–939. Decided June 1, 2015

After Christopher Barkes entered a Delaware correctional facility, a nurse conducted a medical evaluation, which included a mental health screening designed in part to assess whether an inmate is suicidal. Barkes later committed suicide. His wife and children, respondents, filed suit under 42 U. S. C. § 1983 against petitioners Stanley Taylor, the Commissioner of the Delaware Department of Correction; Raphael Williams, the facility's warden; and others. Respondents alleged that petitioners had violated Barkes's constitutional right to be free from cruel and unusual punishment by failing to supervise and monitor the private contractor that provided the institution's medical treatment. The District Court denied petitioners' motion for summary judgment, concluding that they were not entitled to qualified immunity. The Court of Appeals for the Third Circuit affirmed, holding, as relevant here, that it was clearly established at the time of Barkes's death that an incarcerated individual had an Eighth Amendment right to the proper implementation of adequate suicide protocols.

Held: Petitioners are entitled to qualified immunity because they did not contravene clearly establish law. No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. The weight of authority among the courts of appeals—to the extent that consensus in those courts may clearly establish a right—suggests that the right at issue did *not* exist. And even assuming that a right can be "clearly established" by circuit precedent despite disagreement in the courts of appeals, no Third Circuit decision relied upon by that court clearly established the right at issue.

Certiorari granted; 766 F. 3d 307, reversed.

PER CURIAM.

Christopher Barkes, "a troubled man with a long history of mental health and substance abuse problems," was arrested on November 13, 2004, for violating his probation. *Barkes* v. *First Correctional Medical, Inc.*, 766 F. 3d 307, 310–311 (CA3 2014). Barkes was taken to the Howard R. Young Correctional Institution (Institution) in Wilmington,

Delaware. As part of Barkes's intake, a nurse who worked for the contractor providing healthcare at the Institution conducted a medical evaluation. *Id.*, at 311.

The evaluation included a mental health screening designed in part to assess whether an inmate was suicidal. The nurse employed a suicide screening form based on a model form developed by the National Commission on Correctional Health Care (NCCHC) in 1997. The form listed 17 suicide risk factors. If the inmate's responses and nurse's observations indicated that at least eight were present, or if certain serious risk factors were present, the nurse would notify a physician and initiate suicide prevention measures. *Id.*, at 311, 313.

Barkes disclosed that he had a history of psychiatric treatment and was on medication. He also disclosed that he had attempted suicide in 2003, though not—as far as the record indicates—that he had also done so on three other occasions. And he indicated that he was not currently thinking about killing himself. Because only two risk factors were apparent, the nurse gave Barkes a "routine" referral to mental health services and did not initiate any special suicide prevention measures. *Id.*, at 311.

Barkes was placed in a cell by himself. Despite what he had told the nurse, that evening he called his wife and told her that he "can't live this way anymore" and was going to kill himself. Barkes's wife did not inform anyone at the Institution of this call. The next morning, correctional officers observed Barkes awake and behaving normally at 10:45, 10:50, and 11:00 a.m. At 11:35 a.m., however, an officer arrived to deliver lunch and discovered that Barkes had hanged himself with a sheet. *Id.*, at 311–312.

Barkes's wife and children, respondents here, brought suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, against various entities and individuals connected with the Institution, who they claimed had violated Barkes's civil rights in failing to prevent his suicide. At issue here is a claim against peti-

tioners Stanley Taylor, Commissioner of the Delaware Department of Correction, and Raphael Williams, the Institution's warden. Although it is undisputed that neither petitioner had personally interacted with Barkes or knew of his condition before his death, respondents alleged that Taylor and Williams had violated Barkes's constitutional right to be free from cruel and unusual punishment. *Barkes* v. *First Correctional Medical, Inc.*, 2008 WL 523216, *7 (D Del., Feb. 27, 2008). They did so, according to respondents, by failing to supervise and monitor the private contractor that provided the medical treatment—including the intake screening—at the Institution. Petitioners moved for summary judgment on the ground that they were entitled to qualified immunity, but the District Court denied the motion. *Barkes* v. *First Correctional Medical, Inc.*, 2012 WL 2914915, *8–*12 (D Del., July 17, 2012).

A divided panel of the Court of Appeals for the Third Circuit affirmed. The majority first determined that respondents had alleged a cognizable theory of supervisory liability (a decision upon which we express no view). 766 F. 3d, at 316–325. The majority then turned to the two-step qualified immunity inquiry, asking "first, whether the plaintiff suffered a deprivation of a constitutional or statutory right; and second, if so, whether that right was 'clearly established' at the time of the alleged misconduct." *Id.*, at 326.

Taking these questions in reverse order, the Third Circuit held that it was clearly established at the time of Barkes's death that an incarcerated individual had an Eighth Amendment "right to the proper implementation of adequate suicide prevention protocols." *Id.*, at 327. The panel majority then concluded there were material factual disputes about whether petitioners had violated this right by failing to adequately supervise the contractor providing medical services at the prison. There was evidence, the majority noted, that the medical contractor's suicide screening process did not comply with NCCHC's latest standards, as required by the

contract. Those standards allegedly called for a revised screening form and for screening by a qualified mental health professional, not a nurse. There was also evidence that the contractor did not have access to Barkes's probation records (which would have shed light on his mental health history), and that the contractor had been short-staffing to increase profits. *Id.*, at 330–331.

Judge Hardiman dissented. As relevant here, he concluded that petitioners were entitled to qualified immunity because the right on which the majority relied was "a departure from Eighth Amendment case law that had never been established before today." *Id.*, at 345.

Taylor and Williams petitioned for certiorari. We grant the petition and reverse on the ground that there was no violation of clearly established law.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ibid.* (brackets and internal quotation marks omitted). "When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 743 (2011) (internal quotation marks omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*, at 741.

The Third Circuit concluded that the right at issue was best defined as "an incarcerated person's right to the proper implementation of adequate suicide prevention protocols." 766 F. 3d, at 327. This purported right, however, was not clearly established in November 2004 in a way that placed beyond debate the unconstitutionality of the Institution's procedures, as implemented by the medical contractor.

No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols. And "to the extent that a 'robust consensus of cases of persuasive authority'" in the Courts of Appeals "could itself clearly establish the federal right respondent alleges," *City and County of San Francisco* v. *Sheehan*, 575 U. S. 600, 617 (2015), the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist. See, *e. g.*, *Comstock* v. *McCrary*, 273 F. 3d 693, 702 (CA6 2001) ("[T]he right to medical care for serious medical needs does not encompass the right to be screened correctly for suicidal tendencies" (internal quotation marks omitted)); *Tittle* v. *Jefferson Cty. Comm'n*, 10 F. 3d 1535, 1540 (CA11 1994) (alleged "weaknesses in the [suicide] screening process, the training of deputies[,] and the supervision of prisoners" did not "amount to a showing of deliberate indifference toward the rights of prisoners"); *Burns* v. *Galveston*, 905 F. 2d 100, 104 (CA5 1990) (rejecting the proposition that "the right of detainees to adequate medical care includes an absolute right to psychological screening"); *Belcher* v. *Oliver*, 898 F. 2d 32, 34–35 (CA4 1990) ("The general right of pretrial detainees to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies").

The Third Circuit nonetheless found this right clearly established by two of its own decisions, both stemming from the same case. Assuming for the sake of argument that a right can be "clearly established" by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue. The first, *Colburn I*, said that if officials "know or should know of the particular vulnerability to suicide of an inmate," they have an obligation "not to act with reckless indifference to that vulnerability." *Colburn* v. *Upper Darby Twp.*, 838 F. 2d 663, 669 (1988). The decision

did not say, however, that detention facilities must implement procedures to identify such vulnerable inmates, let alone specify what procedures would suffice. And the Third Circuit later acknowledged that *Colburn I*'s use of the phrase "or should know"—which might seem to nod toward a screening requirement of some kind—was erroneous in light of *Farmer* v. *Brennan*, 511 U. S. 825 (1994), which held that Eighth Amendment liability requires actual awareness of risk. See *Serafin* v. *Johnstown*, 53 Fed. Appx. 211, 213 (2002).

Nor would *Colburn II* have put petitioners on notice of any possible constitutional violation. *Colburn II* reiterated that officials who know of an inmate's particular vulnerability to suicide must not be recklessly indifferent to that vulnerability. *Colburn* v. *Upper Darby Twp.*, 946 F. 2d 1017, 1023 (1991). But it did not identify any minimum screening procedures or prevention protocols that facilities must use. In fact, *Colburn II* revealed that the booking process of the jail at issue "include[d] no formal physical or mental health screening," *ibid.*, and yet the Third Circuit ruled for the defendants on all claims, see *id.*, at 1025–1031.

In short, even if the Institution's suicide screening and prevention measures contained the shortcomings that respondents allege, no precedent on the books in November 2004 would have made clear to petitioners that they were overseeing a system that violated the Constitution. Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity. The judgment of the Third Circuit is reversed.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 827 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 9 THROUGH
JUNE 5, 2015

MARCH 9, 2015

Certiorari Granted—Vacated and Remanded

No. 14–392. UNIVERSITY OF NOTRE DAME *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014). Reported below: 743 F. 3d 547.

Certiorari Dismissed

No. 14–7834. LAVERGNE *v.* BUSTED IN ACADIANA. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 368.

Miscellaneous Orders. (See also No. 126, Orig., *ante*, p. 134.)

No. 14M90. OROS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 14M92. OBY *v.* STURDIVANT ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M91. EILER *v.* AVERA MCKENNAN HOSPITAL ET AL. Motion for leave to proceed as a veteran denied.

No. 13–895. ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.* ALABAMA ET AL. D. C. M. D. Ala. [Probable jurisdiction noted, 572 U. S. 1149.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 13–1412. CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. *v.* SHEEHAN. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1021.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 14–46. MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 14–47. UTILITY AIR REGULATORY GROUP *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 14–49. NATIONAL MINING ASSN. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. [Certiorari granted, 574 U. S. 1021.] Motions for enlargement of time and for divided argument granted.

No. 14–656. RJR PENSION INVESTMENT COMMITTEE ET AL. *v.* TATUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 14–8444. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 14–8412. IN RE RHODES. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 14–7505. HURST *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U. S. 584 (2002)." Reported below: 147 So. 3d 435.

Certiorari Denied

No. 14–615. JONES ET AL. *v.* WAGNER. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 3d 1030.

No. 14–625. OPALINSKI ET AL. *v.* ROBERT HALF INTERNATIONAL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 3d 326.

No. 14–647. GILEAD SCIENCES, INC., ET AL. *v.* NATCO PHARMA LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 3d 1208.

No. 14–650. AL JANKO *v.* GATES, FORMER SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 741 F. 3d 136.

No. 14–658. CENTER FOR CONSTITUTIONAL RIGHTS *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 3d 161.

No. 14–660. CETINA *v.* WESTCHESTER COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 583 Fed. Appx. 1.

No. 14–756. LUNDIN *v.* MACOMBER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 686.

No. 14–764. GOMEZ BEREZOWSKY *v.* RENDON OJEDA. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 3d 456.

No. 14–767. WALKER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 14–768. ZWICKER & ASSOCIATES, PSC *v.* BURTON. C. A. 6th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 555.

No. 14–769. PREMIUM BALLOON ACCESSORIES, INC. *v.* CREATIVE BALLOONS MFG., INC. C. A. 6th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 547.

No. 14–778. MARTIN *v.* NATIONAL GENERAL ASSURANCE CO. Sup. Ct. Del. Certiorari denied. Reported below: 99 A. 3d 227.

No. 14–782. STAIR *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 14–789. MCMULLAN *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 3d 662.

No. 14–846. NHAM HO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 118 App. Div. 3d 1390, 988 N. Y. S. 2d 362.

No. 14–863. PHILIPS SOUTH BEACH, LLC *v.* JPMCC 2005–CIBC13 COLLINS LODGING, LLC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 162 So. 3d 1020.

No. 14–892. HINKLE *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 583 Fed. Appx. 907.

No. 14–918. CRAPSER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 148 So. 3d 794.

No. 14–947. CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION ET AL. *v.* MCKENNA, ATTORNEY GENERAL OF WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 3d 989.

No. 14–956. PHILLIPS *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 582 Fed. Appx. 890.

No. 14–971. HRD CORP., DBA MARCUS OIL & CHEMICAL *v.* DOW CHEMICAL CANADA INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 741.

No. 14–5536. LECROY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 3d 1297.

No. 14–6899. CHAPLIN *v.* BECHTOLD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 438.

No. 14–6980. BASILE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 252.

No. 14–6982. MCTAW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 612.

No. 14–7038. GONZALEZ-MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 3d 425.

No. 14–7210. FONDREN *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 680.

No. 14–7349. FOWLER *v.* JOYNER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 3d 446.

No. 14–7399. NEYLAND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 139 Ohio St. 3d 353, 2014-Ohio-1914, 12 N. E. 3d 1112.

No. 14–7777. MICHAEL *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 176.

No. 14–7783. DIXON *v.* WACHTENDORF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 3d 992.

No. 14–7831. SIMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120797–U.

No. 14–7835. SABIN *v.* KARBER ET AL. Ct. App. Mich. Certiorari denied.

No. 14–7836. DUMAS ET AL. *v.* DECKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 514.

No. 14–7838. CHILINSKI *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 376 Mont. 122, 330 P. 3d 1169.

No. 14–7840. MANGES *v.* NEAL, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 14–7842. TOLIVER *v.* ARTUS, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–7845. SORO *v.* SORO. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 145 So. 3d 183.

No. 14–7848. SCHWARZ *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–7850. ALLISON *v.* CITY OF BRIDGEPORT, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 603.

No. 14–7852. AHMAD *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–7853. ALVAREZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–7854. NATION *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 408 S. C. 474, 759 S. E. 2d 428.

No. 14–7859. TAFFARO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–7861. TWEED *v.* COBURN ET AL. C. A. 1st Cir. Certiorari denied.

No. 14–7864. READ *v.* DE BELLEFEUILLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 647.

No. 14–7865. BOWLING *v.* APPALACHIAN FEDERAL CREDIT UNION. Ct. App. Ky. Certiorari denied.

No. 14–7866. BOYKINS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–7868. DOTSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 450 S. W. 3d 1.

No. 14–7965. TYLER *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 77.

No. 14–7999. GOZA *v.* WELCH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 367.

No. 14–8288. WILLIAMS *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 219 N. J. 89, 95 A. 3d 701.

No. 14–8297. SIMMONS *v.* FLORIDA COMMISSION ON OFFENDER REVIEW. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1140.

No. 14–8306. SCHMITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 524.

No. 14–8310. ANAYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 280.

No. 14–8318. OSWALT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 3d 849.

No. 14–8335. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 452.

No. 14–8341. RODRIGUEZ-NEGRETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 3d 221.

No. 14–8343. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 449.

No. 14–8345. DAVILA-FELIX, AKA MONA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 763 F. 3d 105.

No. 14–8346. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 181.

No. 14–8353. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 473.

No. 14–8363. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 188.

No. 14–8364. KATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 496.

No. 14–8369. FERGUSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 590 Fed. Appx. 41.

No. 14–8371. STOREY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 822.

No. 14–8373. CHRISTIANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 921.

No. 13–1361. SAMANTAR *v.* YOUSUF ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–8004. DYCHES *v.* MARTIN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 579 Fed. Appx. 162.

Rehearing Denied

No. 14–382. DAVIS *v.* DAVIS ET AL., 574 U. S. 1074;
No. 14–5360. MCFARLAND *v.* UNITED STATES, 574 U. S. 895;
No. 14–6631. CORTES *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 574 U. S. 1064;
No. 14–6799. WHITE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1084;
No. 14–6857. CUSTIS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 574 U. S. 1085;
No. 14–7226. WOODS *v.* ARIZONA ET AL., 574 U. S. 1139;
No. 14–7329. KING *v.* UNITED STATES, 574 U. S. 1099;
No. 14–7452. ASHE *v.* UNITED STATES, 574 U. S. 1102; and
No. 14–7547. CHAMBERS *v.* UNITED STATES, 574 U. S. 1104. Petitions for rehearing denied.

MARCH 17, 2015

Miscellaneous Orders

No. 14A911. CLAYTON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by

him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

No. 14A975. CLAYTON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

Certiorari Denied

No. 14–8828 (14A959). CLAYTON *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 457 S. W. 3d 735.

MARCH 20, 2015

Miscellaneous Orders

No. 13–720. KIMBLE ET AL. *v.* MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1058.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–896. COMMIL USA, LLC *v.* CISCO SYSTEMS, INC. C. A. Fed. Cir. [Certiorari granted, 574 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 14–116. BULLARD *v.* BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK. C. A. 1st Cir. [Certiorari granted, 574 U. S. 1058.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 23, 2015

Certiorari Granted—Vacated

No. 14–148. AMANATULLAH ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 14–6575. AL-NAJAR *v.* CARTER, SECRETARY OF DEFENSE, ET AL. Petitions in these cases seek review of the judgments of

the United States Court of Appeals for the District of Columbia Circuit in No. 12–5401, *Al-Najar* v. *Obama*, and No. 12–5407, *Amanatullah* v. *Obama*. They do not seek review of the judgments in No. 12–5404, *Al Maqaleh* v. *Hagel*, or No. 12–5399, *Al Bakri* v. *Obama*, which were consolidated with petitioners' appeals. Subsequent to the decisions of the court below, petitioners were transferred from custody of the United States to custody of other nations. As a result, these cases have become moot. Motion of petitioner in No. 14–6575 for leave to proceed *in forma pauperis* granted. Certiorari granted and judgments vacated with respect to these petitioners. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *al-Marri* v. *Spagone*, 555 U. S. 1220 (2009). JUSTICE KAGAN took no part in the consideration or decision of this motion and these petitions. Reported below: 738 F. 3d 312.

Certiorari Dismissed

No. 14–7894. MARGARET B. *v.* MILWAUKEE COUNTY, WISCONSIN, ET AL. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7895. BACH *v.* CIRCUIT COURT OF WISCONSIN, MILWAUKEE COUNTY, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7899. PERRY *v.* EDD ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7928. LUH *v.* MISSOURI. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8020. LAVERGNE *v.* TURK ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 367.

No. 14–8118. CLARK *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma*

pauperis denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2827. In re Shipley. Response having been filed, the order to show cause, dated December 8, 2014 [574 U. S. 1045], is discharged. All members of the Bar are reminded, however, that they are responsible—as officers of the Court—for compliance with the requirement of this Court's Rule 14.3 that petitions for writs of certiorari be stated "in plain terms," and may not delegate that responsibility to the client.

No. 14M93. Anthony *v.* Coffee County, Georgia, et al.;
No. 14M94. Bowman *v.* United States;
No. 14M97. Atkins *v.* Creighton Elementary School District; and
No. 14M98. Reed *v.* McDonald, Secretary of Veterans Affairs. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M95. Arsis *v.* Jones, Secretary, Florida Department of Corrections, et al.; and
No. 14M96. Williams *v.* Woods, Warden. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 126, Orig. Kansas *v.* Nebraska et al. The Honorable William J. Kayatta, Jr., of Portland, Me., Special Master in this case, is hereby discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, *ante*, p. 134.]

No. 14–614. Hughes, Chairman, Maryland Public Service Commission, et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 4th Cir.;
No. 14–623. CPV Maryland, LLC *v.* PPL EnergyPlus, LLC, et al. C. A. 4th Cir.;
No. 14–634. CPV Power Development, Inc., et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 3d Cir.; and
No. 14–694. Fiordaliso, Commissioner of the New Jersey Board of Public Utilities, et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 3d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 14–8144. LARMANGER *v.* KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, DBA KAISER PERMANENTE, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 13, 2015, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 14–8452. IN RE SMITH;
No. 14–8455. IN RE RODRIGUEZ;
No. 14–8595. IN RE EDKINS; and
No. 14–8631. IN RE ZARYCHTA. Petitions for writs of habeas corpus denied.

No. 14–8600. IN RE ADAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 14–7901. IN RE TREVINO;
No. 14–7919. IN RE KLAUDT; and
No. 14–8060. IN RE AUSTIN. Petitions for writs of mandamus denied.

No. 14–7959. IN RE REHBERGER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Certiorari Granted

No. 14–462. DIRECTV, INC. *v.* IMBURGIA ET AL. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari granted. Reported below: 225 Cal. App. 4th 338, 170 Cal. Rptr. 3d 190.

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in

this case to our decision in *Miller* v. *Alabama*, 567 U. S. 460 (2012)?" Reported below: 2013–1163 (La. 6/20/14), 141 So. 3d 264.

Certiorari Denied

No. 13–1512. HAMMOND ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 3d 880.

No. 13–10288. DEMOLA *v.* JOHNSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 3d 857.

No. 14–493. KENT RECYCLING SERVICES, LLC *v.* UNITED STATES ARMY CORPS OF ENGINEERS. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 383.

No. 14–552. ILLINOIS PUBLIC TELECOMMUNICATIONS ASSN. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 752 F. 3d 1018.

No. 14–681. CEATS, INC. *v.* CONTINENTAL AIRLINES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 755 F. 3d 1356.

No. 14–685. OLSON *v.* MERRILL LYNCH CREDIT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 576 Fed. Appx. 506.

No. 14–687. STIEFEL LABORATORIES, INC., ET AL. *v.* FINNERTY. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1310.

No. 14–688. SHAMOKIN FILLER CO. INC. *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 3d 330.

No. 14–708. TRUVIA ET AL. *v.* CONNICK, DISTRICT ATTORNEY, PARISH OF ORLEANS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 317.

No. 14–721. MORTON GROVE PHARMACEUTICALS, INC., ET AL. *v.* ADAMS ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 74 A. 3d 221.

No. 14–779. ARNESON, COUNTY ATTORNEY FOR BLUE EARTH COUNTY, MINNESOTA, OR HIS SUCCESSOR, ET AL. *v.* 281 CARE

COMMITTEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 3d 774.

No. 14–793. ROME *v.* DEVELOPMENT ALTERNATIVES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 38.

No. 14–799. CAPPS ET AL. *v.* WEFLEN ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 201, 855 N. W. 2d 637.

No. 14–800. MCGEE-HUDSON *v.* AT&T ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 134.

No. 14–803. FRANK ET AL. *v.* WALKER, GOVERNOR OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 3d 744.

No. 14–806. TRIPLETT-FAZZONE *v.* CITY OF COLUMBUS DIVISION OF POLICE ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–811. DAVIS *v.* PRODUCERS AGRICULTURAL INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 3d 1276.

No. 14–815. KIENITZ *v.* SCONNIE NATION, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 3d 756.

No. 14–816. GYAMFI *v.* SSCI CORP. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 181.

No. 14–826. DUMMETT ET AL. *v.* PADILLA, CALIFORNIA SECRETARY OF STATE, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–831. EICHERS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 853 N. W. 2d 114.

No. 14–833. VICTORICK *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–834. COUNTY OF SANTA CRUZ, CALIFORNIA, ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 425.

No. 14–836. BRUNETTI *v.* FALCONE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 14–842. CORBETT *v.* TRANSPORTATION SECURITY ADMINISTRATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 690.

No. 14–865. RUNDGREN ET AL. *v.* WASHINGTON MUTUAL BANK, F. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 3d 1056.

No. 14–868. DOBRYDNEV *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 566 Fed. Appx. 976.

No. 14–870. PARKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 184 So. 3d 465.

No. 14–878. RENAISSANCE ART INVESTORS, LLC *v.* AXA ART INSURANCE CORP. C. A. 2d Cir. Certiorari denied.

No. 14–879. HARP *v.* RAHME ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–895. LEMON *v.* SHAW. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 427 S. W. 3d 536.

No. 14–914. CARNACCHI *v.* U. S. BANK N. A. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 414.

No. 14–917. DEMERS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 136 So. 3d 634.

No. 14–928. SINGLETARY *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Reported below: 766 F. 3d 66.

No. 14–942. SHEPLEY, BULFINCH, RICHARDSON & ABBOTT, INC. *v.* W. J. O'NEIL CO. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 3d 625.

No. 14–948. CAUDILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 389.

No. 14–949. HARRISON *v.* BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 413.

No. 14–962. Texas Entertainment Assn., Inc., et al. *v.* Hegar, Texas Comptroller of Public Accounts, et al. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 431 S. W. 3d 790.

No. 14–967. Coffman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 541.

No. 14–970. Friedlander *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 883.

No. 14–994. We The People Foundation for Constitutional Education, Inc., et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied.

No. 14–1016. Bethany *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 447.

No. 14–5069. Harris *v.* Change, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 271.

No. 14–5241. Carter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 226.

No. 14–5246. Hodges *v.* Carpenter, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 3d 517.

No. 14–5757. Taylor *v.* United States; and
No. 14–5794. Edelen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 226.

No. 14–6212. Justice *v.* United States.; and
No. 14–6295. Richards *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 3d 269.

No. 14–6505. Taal *v.* St. Mary's Bank. Sup. Ct. N. H. Certiorari denied.

No. 14–6820. Duran *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 568 Fed. Appx. 90.

No. 14–6831. Barcus *v.* Sears, Roebuck & Co. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 252.

No. 14–6996. Jory *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 562 Fed. Appx. 926.

No. 14–7004. STARKS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2013 WI 69, 349 Wis. 2d 274, 833 N. W. 2d 146.

No. 14–7073. MORALES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 625 Pa. 146, 91 A. 3d 80.

No. 14–7103. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 3d 351.

No. 14–7212. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 249.

No. 14–7316. WHEETLEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 14–7548. CARMICHAEL *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–7617. PARRIS *v.* WEAVER. C. A. 11th Cir. Certiorari denied.

No. 14–7855. POPE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 3d 1254.

No. 14–7870. WILLIAMS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–7873. MATA *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–7874. SCOTT *v.* FORSHEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 3d 497.

No. 14–7875. O'NEAL *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 566.

No. 14–7877. PAGLIACCETTI *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 134.

No. 14–7880. MCKENZIE *v.* CASILLAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 369.

No. 14–7893. BALLARD *v.* ANDREWS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 97.

No. 14–7896. JOHNSON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 14–7902. WARE *v.* RILEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 705.

No. 14–7908. KISSNER *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–7912. ALNUTT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 14–7913. THOMPSON *v.* DEPOND. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 442.

No. 14–7916. DEVILLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 14–7923. KOKINDA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 160.

No. 14–7925. MOORE *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–7930. PURDIE *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xix.

No. 14–7934. AUGUST *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–7937. MILLER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 180 Wash. App. 413, 325 P. 3d 230.

No. 14–7942. BOGAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 14–7951. LUNGBERG *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 809.

No. 14–7956. HINCHLIFFE *v.* WELLS FARGO BANK. Super. Ct. Pa. Certiorari denied. Reported below: 82 A. 3d 468.

No. 14–7958. FORD *v.* WALLACE-BRYANT ET AL. Sup. Ct. Va. Certiorari denied.

No. 14–7960. GALLOWAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 122942–U.

No. 14–7962. HAMMERSLEY *v.* COUNTY OF OCONTO, WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 14–7967. VILLA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–7971. MCCLAM *v.* THOMAS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 231.

No. 14–7981. HERNANDEZ MEJIA *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 14–7985. ZAKRZEWSKI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 147 So. 3d 531.

No. 14–7986. NOORDMAN *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 545.

No. 14–7988. HIRAMANEK ET AL. *v.* CLARK ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–7992. INGLIS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 151 Conn. App. 283, 94 A. 3d 1204.

No. 14–7994. MCMILLER *v.* PATTON, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 749.

No. 14–7998. FLORES *v.* SAMUELS, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 248.

No. 14–8000. FALK *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 449 S. W. 3d 500.

No. 14–8005. CHAE *v.* RODRIGUEZ ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 623.

No. 14–8012. JACKSON *v.* ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 3d 115.

No. 14–8015. MCCURDY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 1063, 331 P. 3d 265.

No. 14–8018. STORM *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 14–8023. COLBERT *v.* MARTEL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 382.

No. 14–8024. WELLS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–8028. DAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2013 IL App (4th) 120486–U.

No. 14–8032. CLEVELAND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 14–8037. OSIE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 131, 2014-Ohio-2966, 16 N. E. 3d 588.

No. 14–8064. MCCANN *v.* KENNEDY UNIVERSITY HOSPITAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 140.

No. 14–8065. PRYOR *v.* MCHUGH, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 55.

No. 14–8098. MADISON *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 3d 1240.

No. 14–8127. REED *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 3d 1252.

No. 14–8128. CHHUON *v.* MCEWEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8133. CARLUCCI, AKA ODICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 482.

No. 14–8136. ALFONSO CURIEL *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8141. RUDDOCK *v.* HOLDER, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied.

No. 14–8154. CABALLERO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–8174. ROBERTSON *v.* SAMUELS, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 91.

No. 14–8185. HALE *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8199. ENGELHARDT *v.* HEIMGARTNER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 671.

No. 14–8207. WIELAND *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 792.

No. 14–8219. ENGLISH *v.* JOHNS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 229.

No. 14–8221. MASSEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8239. WILLIAMS *v.* MACOMBER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8244. REED *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 494, 332 P. 3d 172.

No. 14–8246. HOFFMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 428, 2014-Ohio-4795, 25 N. E. 3d 993.

No. 14–8250. JOHNSON *v.* BURTON. C. A. 8th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 745.

No. 14–8255. TORRENCE *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Ct. App. S. C. Certiorari denied.

No. 14–8257. ANDERSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 97 A. 3d 814.

No. 14–8264. MERCHANT *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–8269. FULWOOD *v.* SAMUELS, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 753.

No. 14–8272. GRATE *v.* MCFADDEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 240.

No. 14–8278. STAGG *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–8308. SEAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8309. BLANCHARD *v.* WALLACE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–8314. CASTEEL *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA. C. A. 8th Cir. Certiorari denied.

No. 14–8317. NIE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 254.

No. 14–8321. SHIPTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8348. HOLMES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 583 Fed. Appx. 910.

No. 14–8352. SHEAFE-CARTER *v.* DONAHOE, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 579 Fed. Appx. 44.

No. 14–8357. BROWN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 721.

No. 14–8361. BOYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8377. BROOKS *v.* CARAWAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8386. BLANGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8387. MATTHEWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 843.

No. 14–8389. KNIGHT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8394. BROCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8396. SODANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 114.

No. 14–8397. ROGERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 598 Fed. Appx. 114.

No. 14–8398. BADGETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8399. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8400. KRAMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 3d 766.

No. 14–8405. VILLA-RODRIGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 342.

No. 14–8407. MURO-INCLAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 936.

No. 14–8415. CAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 104.

No. 14–8417. BURT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 14–8420. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 14–8421. CISNEROS-CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 196.

No. 14–8423. MCCREA *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 14–8426. MANUEL LUIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 1061.

No. 14–8432. BATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8433. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 367.

No. 14–8434. BROWN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–8436. MOSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 260.

No. 14–8437. MERCADO-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 3d 105.

No. 14–8442. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 3d 225.

No. 14–8445. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 284.

No. 14–8450. ELBE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 3d 885.

No. 14–8453. SPRIGGS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 Fed. Appx. 149.

No. 14–8458. DILLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 198.

No. 14–8459. COLEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 3d 706.

No. 14–8460. DOMINGUEZ-ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 205.

No. 14–8463. MUNDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 320.

No. 14–8465. LEDEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 3d 224.

No. 14–8468. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 1064.

No. 14–8469. BURCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8473. SEXTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 304.

No. 14–8474. COLON-VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8476. TRAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 574.

No. 14–8481. BIRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8489. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 107.

No. 14–8490. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8494. ONTIVEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 236.

No. 14–8496. RUBIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 643.

No. 14–8500. CABRERA-PARADES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 212.

No. 14–8501. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 583 Fed. Appx. 35.

No. 14–8502. RUIZ-ACOSTA *v.* UNITED STATES (Reported below: 587 Fed. Appx. 840); and GOMEZ-PEREZ *v.* UNITED STATES (606 Fed. Appx. 157). C. A. 5th Cir. Certiorari denied.

No. 14–8504. GOODWIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8505. HAMILTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 43.

No. 14–8506. GRAVLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 899.

No. 14–8507. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 573.

No. 14–8510. FARMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 901.

No. 14–8514. FRANCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8515. HUERTA-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8516. HARMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 455.

No. 14–8518. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 164.

No. 14–8519. GASKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 290.

No. 14–8531. KOMASA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 3d 151 and 577 Fed. Appx. 43.

No. 14–8539. ARCHIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 3d 217.

No. 14–8544. LINO GUILLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 240.

No. 14–8560. MALDONADO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 252.

No. 14–8561. BRUNO-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 267.

No. 14–8647. GISSENDANER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 3d 1275.

No. 14–8663. GISSENDANER *v.* KENNEDY, WARDEN. Super. Ct. Habersham County, Ga. Certiorari denied.

No. 14–292. BOWER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

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

On April 28, 1984, petitioner Lester Leroy Bower was convicted in a Texas court of murdering four men. Each of the four men had been shot multiple times. Their bodies were left in an airplane hangar, and an ultralight aircraft was missing.

The State sought the death penalty. Bower introduced evidence that was, in his view, mitigating. He noted that he was 36 years old, married, employed full time, and a father of two. He had no prior criminal record. Through the testimony of Bower's family members and friends, the jury also heard about Bower's religious devotion, his commitment to his family, his community service, his concern for others, his even temperament, and his lack of any previous violent (or criminal) behavior.

At the time of Bower's sentencing, Texas law permitted the jury to consider this mitigating evidence only insofar as it was relevant to three "special issues": (1) whether the conduct of the defendant that caused the death of the four victims was committed deliberately and with the reasonable expectation that the victims' deaths would result; (2) whether there was a probability that the defendant would continue to commit violent criminal acts, and as such would be a continuing threat to society; and (3) whether the defendant acted in response to provocation. See Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Cum. Supp. 1986). Since the third issue was irrelevant in Bower's case, the court asked the jury to consider only the first two. Because the jury answered "yes" to both, the trial judge automatically imposed a death sentence, as required by then-controlling Texas law. Arts. 37.071(c)–(e).

Bower appealed his case, lost, sought state postconviction relief, lost, appealed that loss, and lost again. See *Bower* v. *Texas*, 769 S. W. 2d 887 (Tex. Crim. App.), cert. denied, 492 U. S. 927 (1989); *Ex parte Bower*, 823 S. W. 2d 284 (Tex. Crim. App. 1991), cert. denied, 506 U. S. 835 (1992). But a week before Bower's conviction became final, this Court decided in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that Texas' special issues procedure was unconstitutional. Specifically, the Court held that Texas' procedure impermissibly prevented the jury from considering or acting upon

potentially mitigating evidence. The Court wrote that a State cannot,

> "consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Id.*, at 318.

Penry himself had offered evidence of mental retardation and childhood abuse. This Court decided that Texas' special issues, while allowing the jury to decide if Penry might commit violent crimes in the future, did not give the jury the constitutionally requisite opportunity to consider whether Penry's mental retardation or childhood abuse constituted significantly mitigating evidence regardless. It "is not enough," the Court wrote,

> "simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing [a] sentence. Only then can [the court] be sure that the sentencer has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence." *Id.*, at 319 (citations and internal quotation marks omitted; last alteration in original).

After this Court decided *Penry*, Bower filed a petition for habeas corpus in Federal District Court. He argued, among other things, that, given *Penry*, his own sentencing proceeding was constitutionally deficient. After a hearing, the court denied his petition and also refused to issue a certificate of appealability on the *Penry* issue. The Fifth Circuit affirmed the District Court's denial of a certificate of appealability, reasoning that, in Bower's case, the second special issue (about future dangerousness) sufficiently permitted the jury to take account of Bower's mitigating evidence. *Bower* v. *Dretke*, 145 Fed. Appx. 879, 885, 887 (2005). In doing so, the Circuit referred to several of its earlier decisions reaching the same conclusion in similar circumstances. See *ibid.* (citing *Coble* v. *Dretke*, 417 F. 3d 508 (2005); *Boyd* v. *Johnson*, 167 F. 3d 907 (1999); *Barnard* v. *Collins*, 958 F. 2d 634 (1992)). Bower then sought certiorari here, but we denied his petition. *Bower* v. *Dretke*, 546 U. S. 1140 (2006).

The Fifth Circuit subsequently changed its mind about the meaning of *Penry*. And, in doing so, it specifically said that it

had been wrong about Bower's *Penry* claim. See *Pierce* v. *Thaler*, 604 F. 3d 197, 210, n. 9 (2010). It said this not in Bower's case, but in an unrelated one. At that point, Bower's case was no longer in federal court. So Bower could not take advantage of the Fifth Circuit's change of mind; he had already brought a subsequent application for postconviction relief in Texas court, arguing (among other things) that Texas had used an unconstitutional sentencing procedure in his case.

The Texas trial court decided that Bower was right. Conclusions of Law ¶97 in *Ex parte Bower*, No. 33426–B (15th Jud. Dist. Ct., Grayson Cty., Dec. 10, 2012), App. to Pet. for Cert. 127 (hereinafter Conclusions of Law). It issued an opinion requiring a new sentencing proceeding. See *ibid.* But the State appealed, and the Texas Court of Criminal Appeals reversed the trial court. See Order in *Ex parte Bower*, No. WR–21005–02 etc. (Tex. Crim. App., June 11, 2014), App. to Pet. for Cert. 1. It explained that "unlike the double-edged evidence in *Penry* . . . , the mitigating evidence presented by [Bower] during the punishment phase of his trial—evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record—was not outside the scope of special issues given." *Id.*, at 4 (citing *Ex parte Bower*, 823 S. W. 2d, at 286; footnote omitted). Because Bower's evidence was not "double-edged" as Penry's had been, the Texas Court of Criminal Appeals believed that the use of the special issues proceeding in Bower's sentencing proceeding did not constitutionally entitle him to resentencing. See *ibid.*

Bower now asks us to grant certiorari and to reverse the Texas Court of Criminal Appeals. In my view, we should do so. *Penry*'s holding rested on the fact that Texas' former special issues did not tell the jury "what 'to do if it decided that [the defendant] . . . should not be executed' " because of his mitigating evidence. *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 256 (2007) (quoting *Penry*, *supra*, at 324). Bower's sentencing procedure suffered from this defect just as Penry's did. The distinction that the Texas court drew between Penry's and Bower's evidence is irrelevant. Indeed, we have expressly made "clear that *Penry* . . . applies in cases involving evidence that is neither double edged nor purely aggravating, because in some cases a defendant's evidence may have mitigating effect beyond its ability to negate the special issues." 550 U. S., at 255, n. 16. The trial court and the Fifth Circuit both recognized that Bower's *Penry* claim was

improperly rejected on that basis. See Conclusions of Law ¶97; *Pierce*, *supra*, at 210, n. 9.

The Constitution accordingly entitles Bower to a new sentencing proceeding. I recognize that we do not often intervene only to correct a case-specific legal error. But the error here is glaring, and its consequence may well be death. After all, because Bower already filed an application for federal habeas relief raising his *Penry* claim, the law may bar him from filing another application raising this same issue. See 28 U. S. C. § 2254(b)(1). In these circumstances, I believe we should act and act now. I would grant the petition and summarily reverse the judgment below. I dissent from the Court's decision not to do so.

No. 14–531. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* COX. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 757 F. 3d 113.

No. 14–877. BRIGHT *v.* GALLIA COUNTY, OHIO, ET AL. C. A. 6th Cir. Motion of National Association for Public Defense et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 753 F. 3d 639.

No. 14–966. BERMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 766 F. 3d 9.

No. 14–988. SPRINT SPECTRUM L. P., DBA SPRINT PCS *v.* EMILIO. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 582 Fed. Appx. 63.

No. 14–999. D'AMELIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 565 Fed. Appx. 61.

No. 14–1003. AWAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 14–6302. CARLOS ELSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 550 Fed. Appx. 815.

No. 14–8454. DeGlace *v.* Edenfield, Warden. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–10797. McNab *v.* New York et al., 574 U. S. 868;

No. 14–532. Wideman *v.* Pueblo County Department of Social Services, Colorado, Child Support Enforcement, 574 U. S. 1077;

No. 14–5358. Hardy *v.* Colvin, Acting Commissioner of Social Security, et al., 574 U. S. 895;

No. 14–6332. Nhuong Van Nguyen *v.* Pham et al., 574 U. S. 1123;

No. 14–6338. Dixon *v.* Greene et al., 574 U. S. 1030;

No. 14–6636. Robinson *v.* Lassiter, Warden, 574 U. S. 1034;

No. 14–6746. Bailey *v.* Sherman, Acting Warden, 574 U. S. 1082;

No. 14–6785. Warefield *v.* Warefield, 574 U. S. 1083;

No. 14–6808. Mammola *v.* Feeney, Judge, United States Bankruptcy Court for the District of Massachusetts, et al., 574 U. S. 1084;

No. 14–6908. Manuel Navarrette *v.* Texas, 574 U. S. 1086;

No. 14–6924. Scarlett *v.* Rikers Island, 574 U. S. 1086;

No. 14–6935. Phillips et al. *v.* Davis, 574 U. S. 1087;

No. 14–7021. Scott *v.* Nevada, 574 U. S. 1089;

No. 14–7039. Rishar *v.* United States et al., 574 U. S. 1090;

No. 14–7047. Rocco *v.* Superior Court of California, Orange County, 574 U. S. 1123;

No. 14–7061. Lucas *v.* Reynolds, Warden, 574 U. S. 1123;

No. 14–7069. Prater *v.* City of Philadelphia Family Court et al., 574 U. S. 1124;

No. 14–7071. Magana-Torres *v.* Biter, Warden, 574 U. S. 1091;

No. 14–7115. Williams *v.* Maryland, 574 U. S. 1093;

No. 14–7117. Webster *v.* Aramark Correctional Services, Inc., et al., 574 U. S. 1124;

No. 14–7145. Rubio *v.* Gray et al., 574 U. S. 1094;

No. 14–7153. Richards *v.* Clarke, Director, Virginia Department of Corrections, 574 U. S. 1137;

No. 14–7166. WILLIAMS *v.* BOARD OF EDUCATION OF BALTIMORE COUNTY, 574 U. S. 1137;

No. 14–7167. WEEKLEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1137;

No. 14–7225. KLINEFELTER *v.* ALFARO, WARDEN, 574 U. S. 1096;

No. 14–7227. CARTER *v.* CARTER ET AL., 574 U. S. 1139;

No. 14–7228. IN RE CLARK, 574 U. S. 1060;

No. 14–7229. BRATTON *v.* CALIFORNIA, 574 U. S. 1139;

No. 14–7241. PEREZ SANTIAGO *v.* CALIFORNIA, 574 U. S. 1139;

No. 14–7256. SANTISTEVAN *v.* YORDY, WARDEN, 574 U. S. 1097;

No. 14–7262. VIOLA *v.* UNITED STATES, 574 U. S. 1097;

No. 14–7308. HILTON *v.* MCCALL, WARDEN, 574 U. S. 1125;

No. 14–7381. VIVO *v.* CONNECTICUT, 574 U. S. 1126; and

No. 14–7605. AMAR *v.* UNITED STATES, 574 U. S. 1141. Petitions for rehearing denied.

No. 14–426. NIVIA, AKA ROUSSELL *v.* BANK UNITED, 574 U. S. 1075; and

No. 14–490. MOLINA *v.* AURORA LOAN SERVICES LLC, 574 U. S. 1062. Motions for leave to file petitions for rehearing denied.

MARCH 30, 2015

Vacated and Remanded on Appeal

No. 14–518. CANTOR ET AL. *v.* PERSONHUBALLAH ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, *ante*, p. 254. Reported below: 58 F. Supp. 3d 533.

Certiorari Granted—Reversed and Remanded. (See No. 14–618, *ante*, p. 312.)

Certiorari Granted—Vacated and Remanded. (See also No. 14–593, *ante*, p. 306.)

No. 13–1505. FREIDUS ET AL. *v.* ING GROEP N. V. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, *ante*, p. 175. Reported below: 543 Fed. Appx. 93.

Certiorari Dismissed

No. 14–8081. DAKER *v.* ROBINSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8082. DAKER *v.* DAWES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8084. JENNINGS *v.* VILSACK, SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8096. LAVERGNE *v.* TAYLOR ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 606 Fed. Appx. 135.

No. 14–8104. RENNEKE *v.* FLORENCE COUNTY, WISCONSIN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 594 Fed. Appx. 878.

No. 14–8129. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. C. A. 10th Cir.;

No. 14–8130. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. C. A. 10th Cir.;

No. 14–8131. HUNTER *v.* BORON ET AL. C. A. 7th Cir.; and

No. 14–8132. HUNTER *v.* BORON ET AL. C. A. 7th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As peti-

tioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8203. LANCASTER *v.* HICKS ET AL. Ct. App. Tex., 12th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8337. CAMPBELL *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8483. PINDER *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 14M99. SMITH *v.* CAIN, WARDEN;

No. 14M100. EDWARDS *v.* WALSH ET AL.; and

No. 14M101. MUHAMMAD *v.* MUHAMMAD ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, *ante*, p. 911.] Richard Bernstein, Esq., of Washington, D. C., is invited to brief and argue as *amicus curiae* against this Court's jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller* v. *Alabama*, 567 U. S. 460 (2012). Brief for Court-appointed *amicus curiae* is to be filed on or before Wednesday, June 10, 2015. Brief for petitioner is to be filed on or before Friday, July 10, 2015. Brief for respondent is

to be filed on or before Monday, August 10, 2015. Reply briefs are to be filed on or before Wednesday, September 9, 2015.

No. 14–574. BOURKE ET AL. *v.* BESHEAR, GOVERNOR OF KENTUCKY. C. A. 6th Cir. [Certiorari granted, 574 U. S. 1118.] Motion of Chris Sevier for leave to intervene denied.

No. 14–8080. HIGHSMITH *v.* MACFADYEN ET AL. Ct. Sp. App. Md.; and

No. 14–8190. ADKINS *v.* BANK OF AMERICA, N. A. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 20, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–8744. IN RE WATTS;

No. 14–8755. IN RE RAJKOVIC; and

No. 14–8762. IN RE WELLS. Petitions for writs of habeas corpus denied.

No. 14–8125. IN RE MCGUIRE; and

No. 14–8143. IN RE MUHAMMAD. Petitions for writs of mandamus denied.

No. 14–8152. IN RE AJAMIAN. Petition for writ of prohibition denied.

Certiorari Granted

No. 14–723. MONTANILE *v.* BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN. C. A. 11th Cir. Certiorari granted. Reported below: 593 Fed. Appx. 903.

No. 14–449. KANSAS *v.* CARR; and

No. 14–450. KANSAS *v.* CARR. Sup. Ct. Kan. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 3 presented by the petitions, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 14–449, 300 Kan. 340, 329 P. 3d 1195; No. 14–450, 300 Kan. 1, 331 P. 3d 544.

No. 14–452. KANSAS *v.* GLEASON. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 299 Kan. 1127, 329 P. 3d 1102.

Certiorari Denied

No. 14–472. Viloski *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 557 Fed. Appx. 28.

No. 14–519. Caminiti *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 45, 353 Wis. 2d 553, 846 N. W. 2d 34.

No. 14–525. Coons et al. *v.* Lew, Secretary of the Treasury, et al. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 3d 891.

No. 14–555. Nelson *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 2014 WI 70, 355 Wis. 2d 722, 849 N. W. 2d 317.

No. 14–714. Kozak *v.* Workers' Compensation Appeals Board et al. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–717. STC.UNM *v.* Intel Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 754 F. 3d 940.

No. 14–720. Dariano et al., on Behalf of Their Minor Child, M. D., et al. *v.* Morgan Hill Unified School District et al. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 764.

No. 14–730. Davis *v.* Kohn et al.; and
No. 14–736. Trezziova *v.* Kohn et al. C. A. 2d Cir. Certiorari denied. Reported below: 730 F. 3d 112.

No. 14–746. Bigley *v.* Ciber, Inc., Long Term Disability Coverage. C. A. 10th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 756.

No. 14–860. Albecker *v.* Contour Products, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 578 Fed. Appx. 969.

No. 14–861. Target Media Partners Operating Co., LLC, et al. *v.* Specialty Marketing Corp. Sup. Ct. Ala. Certiorari denied.

No. 14–862. Twersky et al. *v.* Yeshiva University et al. C. A. 2d Cir. Certiorari denied. Reported below: 579 Fed. Appx. 7.

No. 14–869. LESKINEN *v.* HALSEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 571 Fed. Appx. 36.

No. 14–871. TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, LOCAL 514 *v.* KOVACS ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 14–876. BUTLER ET AL. *v.* CITY OF RYE PLANNING COMMISSION ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 114 App. Div. 3d 937, 980 N. Y. S. 2d 831.

No. 14–888. SLATER *v.* HARDIN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–890. G. M. ET AL. *v.* SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 702.

No. 14–897. KRUEGER *v.* GRAND FORKS COUNTY, NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 170, 852 N. W. 2d 354.

No. 14–909. AZAM *v.* U. S. BANK N. A., AS TRUSTEE (Reported below: 582 Fed. Appx. 710); AZAM *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.; RINGGOLD ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL.; and TURNER ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–922. GOMEZ *v.* CHASE HOME FINANCE, LLC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 151 So. 3d 1256.

No. 14–934. NEGLEY *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 726.

No. 14–943. HAKIM *v.* O'DONNELL ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 49,139, 49,140 (La. App. 2 Cir. 6/25/14), 144 So. 3d 1179.

No. 14–945. SCHULLER ET AL. *v.* NAYLOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 307.

No. 14–951. JOHNSON *v.* SECURITAS SECURITY SERVICES USA, INC. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 3d 605.

No. 14–955. NIWAYAMA *v.* TEXAS TECH UNIVERSITY. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 351.

No. 14–968. ROBERTSON *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 3d 1351.

No. 14–985. JOHNSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 136, 2014-Ohio-5021, 22 N. E. 3d 1061.

No. 14–1009. HASHEMIAN *v.* LOUISVILLE REGIONAL AIRPORT AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–1010. HUSTON ET UX. *v.* U. S. BANK N. A., AS TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 306.

No. 14–1033. STAN LEE MEDIA, INC. *v.* POW! ENTERTAINMENT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 597.

No. 14–6810. CARR *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 1, 331 P. 3d 544.

No. 14–7264. WOLVERINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 646.

No. 14–7327. CARR *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 340, 329 P. 3d 1195.

No. 14–7664. NOONER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 296, 438 S. W. 3d 233.

No. 14–7680. BANKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 1113, 331 P. 3d 1206.

No. 14–7683. CROSS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 178 Wash. 2d 519, 309 P. 3d 1186.

No. 14–8033. SINGLETARY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8036. SMITH *v.* IDAHO. Ct. App. Idaho. Certiorari denied.

No. 14–8043. RAMIREZ *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 14–8046. WESTFALL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8048. MCGUGAN *v.* ALDANA-BERNIER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 752 F. 3d 224.

No. 14–8052. PIPER *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 722.

No. 14–8054. KATZENBACH *v.* ABEL. Ct. App. Ore. Certiorari denied. Reported below: 260 Ore. App. 767, 320 P. 3d 675.

No. 14–8057. JAMES *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 14–8061. BARNHILL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 14–8063. ARTIGA-MORALES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 795, 335 P. 3d 179.

No. 14–8066. MASON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 14–8067. CATO *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8068. CHANCE *v.* CHANCE. App. Ct. Conn. Certiorari denied. Reported below: 148 Conn. App. 903, 87 A. 3d 629.

No. 14–8085. KUNKEL *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 14–8086. JENKINS *v.* LIVONIA POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8087. JOYCE *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–8088. SHEPPARD *v.* COURT OF CRIMINAL APPEALS OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 298.

No. 14–8089. LUGO *v.* DAVEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8092. POUNDS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 150 So. 3d 1158.

No. 14–8094. PARIS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8095. SUTTON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1140.

No. 14–8097. PRUETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8099. ANTONIO RODRIGUEZ *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1277.

No. 14–8101. SCHLEIGER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 67, 2014-Ohio-3970, 21 N. E. 3d 1033.

No. 14–8103. RANDELL *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 456.

No. 14–8105. CAPELL *v.* CARTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 199.

No. 14–8109. HENNESS *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 3d 550.

No. 14–8111. WILLIAMS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8113. ROSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8114. Cook *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 289 Neb. xxi.

No. 14–8117. Cortez *v.* Butler, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8119. Scott *v.* Cohen et al. Ct. App. Ga. Certiorari denied. Reported below: 324 Ga. App. XXVIII.

No. 14–8122. Bouie *v.* Crockett et al. C. A. 11th Cir. Certiorari denied.

No. 14–8137. Davis *v.* Parker, aka Adams, aka Spearbeck. C. A. 9th Cir. Certiorari denied.

No. 14–8139. Idrogo *v.* Gonzalez et al. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 14–8142. Mills *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 14–8146. Jones *v.* Missouri. C. A. 8th Cir. Certiorari denied.

No. 14–8148. Armitage *v.* Sherman, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 808.

No. 14–8157. Murray *v.* Middleton et al. Sup. Ct. Va. Certiorari denied.

No. 14–8164. Cochrun *v.* Dooley, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8165. Cox *v.* McEwen, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8171. Stephens *v.* Texas Board of Pardons and Paroles. C. A. 5th Cir. Certiorari denied.

No. 14–8172. Roland *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–8184. Bland *v.* Operative Plasterers' and Cement Masons' International Assn. C. A. 8th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 701.

No. 14–8191. Avila *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 496, 327 P. 3d 821.

No. 14–8208. ANTONIO JIMENEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 153 So. 3d 906.

No. 14–8211. SIMMS *v.* BESTEMPS CAREER ASSOCIATES. Cir. Ct. Wicomico County, Md. Certiorari denied.

No. 14–8215. SCHEUING *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 161 So. 3d 245.

No. 14–8217. DURAN *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 14–8218. CISNEROS *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8220. MAKKALI, AKA CLOIRD *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–8232. MENDOZA *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 3d 1213.

No. 14–8245. GRAY *v.* PFISTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8248. SIMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8259. LUCIEN *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 14–8263. PARKER *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–1050 (La. App. 1 Cir. 2/20/14).

No. 14–8273. HARRIS *v.* LEWIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8287. ANDERSON *v.* HUMPHREYS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8292. MICHAEL C. B. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 119 App. Div. 3d 1356, 989 N. Y. S. 2d 556.

No. 14–8311. ZUNIGA *v.* WILLIAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8320. RANALLO *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8347. GREEN *v.* LESTER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–8356. SMITH *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 14–8366. RENTERIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 14–8388. LEE *v.* MAYE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 416.

No. 14–8391. TURCOTTE *v.* HUMANE SOCIETY WATERVILLE AREA. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 123, 103 A. 3d 1023.

No. 14–8392. BREWER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 14–8393. TREJO *v.* WOHLER. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 423.

No. 14–8402. MENDES *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 180 Wash. 2d 188, 322 P. 3d 791.

No. 14–8410. SIMPKINS *v.* NIXON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8430. SANDERS *v.* STRAUGHN, WARDEN, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 312, 439 S. W. 3d 1.

No. 14–8456. DUPPINS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 218 Md. App. 745.

No. 14–8470. AUSTIN *v.* BUTLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8472. BRANCH *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 273.

No. 14–8475. WEBB *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2013–0146 (La. App. 4 Cir. 1/30/14), 133 So. 3d 258.

No. 14–8482. VASQUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8488. JOSEPH *v.* DONAHOE, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied.

No. 14–8512. FERGUSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 749.

No. 14–8535. MILLER *v.* TAX CLAIM BUREAU OF WESTMORELAND COUNTY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 84 A. 3d 337.

No. 14–8547. EPHRAIM, AKA WILLIAMS *v.* HOGSTEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 65.

No. 14–8549. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 14–8554. HILLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 224.

No. 14–8555. BRANDON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 553.

No. 14–8556. BOSWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 3d 469.

No. 14–8557. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8558. BONILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 138.

No. 14–8559. ARMSTRONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 239.

No. 14–8563. ANGEL REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 3d 1184.

No. 14–8566. KORZYBSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8570. CHAPMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8573. HERRING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 Fed. Appx. 201.

No. 14–8574. FRANKLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 3d 1068.

No. 14–8576. HYMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 900.

No. 14–8577. PRIOR PEREIRA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 580 Fed. Appx. 908.

No. 14–8581. BURNETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 3d 122.

No. 14–8590. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 213.

No. 14–8591. QUIROZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 687.

No. 14–8593. MAJORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 878.

No. 14–8594. CASTEEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8599. ARANGUREN-SUAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 908.

No. 14–8604. HENDRICKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 699.

No. 14–8605. GALARZA-BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 744.

No. 14–8607. CASTEEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8609. DECRESCENZO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 563 Fed. Appx. 858.

No. 14–8610. CAMPBELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 556.

No. 14–8612. KEMP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 138.

No. 14–8619. VEACH *v.* FEATHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8623. SPEARS *v.* FEATHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8626. LIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 699.

No. 14–8629. MYERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 98 A. 3d 192.

No. 14–8630. PERNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 186.

No. 14–8635. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 194.

No. 14–8638. ANGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–8648. BROOMFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 847.

No. 14–8649. ADAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 219.

No. 14–8659. FINLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 964.

No. 14–8660. MYTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8661. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 149.

No. 14–8666. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8668. MOHR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 3d 1143.

No. 14–8672. BREAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 949.

No. 14–8678. LAMAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8681. WAGNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 818.

No. 14–8683. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 413.

No. 14–8684. WELLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–354. BRONX HOUSEHOLD OF FAITH ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 750 F. 3d 184.

No. 14–544. PLIVA, INC., ET AL. *v.* HUCK. Sup. Ct. Iowa. Motion of Generic Pharmaceutical Association for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 850 N. W. 2d 353.

No. 14–896. LEGRAND, WARDEN, ET AL. *v.* GIBBS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 767 F. 3d 879.

No. 14–8602. BENFORD, AKA MOSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–8628. WARE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 14–680. WHITE *v.* DELOITTE & TOUCHE ET AL., 574 U. S. 1155;

No. 14–7068. ALVARADO *v.* BITER, WARDEN, ET AL., 574 U. S. 1123;

No. 14–7112. MARR *v.* FLORIDA BAR, 574 U. S. 1093;

No. 14–7215. NAKAGAWA *v.* COLORADO, 574 U. S. 1096; and

No. 14–7552. CHHIM *v.* ALDINE INDEPENDENT SCHOOL DISTRICT, 574 U. S. 1168. Petitions for rehearing denied.

No. 14–6968. CRAWFORD *v.* UNITED STATES, 574 U. S. 1037. Motion for leave to file petition for rehearing denied.

APRIL 3, 2015

Dismissal Under Rule 46

No. 14–709. WINSLOW *v.* PENN. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 764 F. 3d 102.

Miscellaneous Order

No. 14–556. OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH;

No. 14–562. TANCO ET AL. *v.* HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

No. 14–571. DEBOER ET AL. *v.* SNYDER, GOVERNOR OF MICHIGAN, ET AL.; and

No. 14–574. BOURKE ET AL. *v.* BESHEAR, GOVERNOR OF KENTUCKY. C. A. 6th Cir. [Certiorari granted, 574 U. S. 1118.] Upon consideration of the March 17 and March 31, 2015, letters from counsel for petitioners and respondents, the following order of argument is adopted. On Question 1 the time is allocated as follows: 30 minutes for one advocate on behalf of petitioners, 15 minutes for the Solicitor General, and 45 minutes for one advocate on behalf of respondents. On Question 2 the time is allocated as follows: 30 minutes for one advocate on behalf of petitioners, and 30 minutes for one advocate on behalf of respondents.

APRIL 6, 2015

Certiorari Dismissed

No. 14–8286. HALL *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8327. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 588 Fed. Appx. 232.

No. 14–8328. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8329. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8330. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8331. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8332. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8625. RAMON OCHOA *v.* RUBIN. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8695. RAPOSO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 14M102. TURNER *v.* VIRGINIA ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 14M103. TRILLO *v.* BITER, WARDEN; and

No. 14M104. GRIFFIN *v.* SMITH ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14–770. BANK MARKAZI, AKA CENTRAL BANK OF IRAN *v.* PETERSON ET AL. C. A. 2d Cir. The Solicitor General is invited

to file a brief in this case expressing the views of the United States.

No. 14–7110. RIGGINS *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1119] denied.

No. 14–8160. JONES *v.* LOCKHEED MARTIN CORP. C. A. 11th Cir.;

No. 14–8204. MANGUM ET AL., INDIVIDUALLY AND AS PARENTS OF I. M., A MINOR *v.* RENTON SCHOOL DISTRICT #403. C. A. 9th Cir.;

No. 14–8601. BROWN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS PAROLE BOARD. C. A. 6th Cir.; and

No. 14–8624. MILIAN *v.* WELLS FARGO BANK, N. A., ET AL. Dist. Ct. App. Fla., 3d Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 27, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–8811. IN RE MALLORY; and

No. 14–8859. IN RE HARD. Petitions for writs of habeas corpus denied.

No. 14–1027. IN RE DEL RIO;

No. 14–8296. IN RE JONES; and

No. 14–8374. IN RE CHAFE. Petitions for writs of mandamus denied.

No. 14–961. IN RE ANGHEL; and

No. 14–8237. IN RE PIOTROWSKI. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 14–523. BROWN *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 3d 454.

No. 14–629. DEGNAN ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 805.

No. 14–641. SD–3C, LLC, ET AL. *v.* OLIVER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 3d 1081.

No. 14–703. ZEBROWSKI ET AL. *v.* EVONIK DEGUSSA CORPORATION ADMINISTRATIVE COMMITTEE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 578 Fed. Appx. 89.

No. 14–775. CASHCALL, INC. *v.* INETIANBOR. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 3d 1346.

No. 14–780. NORTH CAROLINA ET AL. *v.* LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 3d 224.

No. 14–906. WOODEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 145 So. 3d 782.

No. 14–923. HUMPHRIES *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–926. ALLSTON ET AL. *v.* LOWER MERION SCHOOL DISTRICT. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 3d 247.

No. 14–927. SHALABY *v.* BERNZOMATIC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 419.

No. 14–929. LEVY GARDENS PARTNERS 2007, L. P. *v.* COMMONWEALTH LAND TITLE INSURANCE CO. C. A. 5th Cir. Certiorari denied.

No. 14–930. BARNETT *v.* PADILLA, CALIFORNIA SECRETARY OF STATE, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–933. FAIR *v.* WALKER ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 743 and 759.

No. 14–936. CARDINALLI *v.* CARDINALLI ET AL. Sup. Ct. Cal. Certiorari denied.

No. 14–937. PORTEADORES DEL NOROESTE, S. A. DE C. V. *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 234 Ariz. 53, 316 P. 3d 1241.

No. 14–938. SULLIVAN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 14–950. SCHAFLER *v.* HSBC BANK USA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 194.

No. 14–957. COLLARD *v.* NOAH ET AL. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 14–959. KEHE DISTRIBUTORS, LLC *v.* KILLION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 3d 574.

No. 14–960. LLESHI *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 14–982. GROSS ET UX. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 771 F. 3d 10.

No. 14–1026. GOSSAGE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–1029. COLLIER *v.* RELIASTAR LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 821.

No. 14–1032. MEGGISON *v.* BAILEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT. C. A. 11th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 865.

No. 14–1035. HAMILTON *v.* AVPM CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 314.

No. 14–1065. TYRONE FIRE PATROL COMPANY, NO. 1, ET AL. *v.* BOROUGH OF TYRONE, PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 92 A. 3d 79.

No. 14–1066. WEBER *v.* TADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 563.

No. 14–1076. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 572 Fed. Appx. 1.

No. 14–6893. URIBE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 14–6969. CAPISTRANO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 830, 331 P. 3d 201.

No. 14–7461. LINDNER *v.* NEWELL ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–7502. TIRU-PLAZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 3d 111.

No. 14–7663. PARKER *v.* U. S. BANK N. A. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 776.

No. 14–7701. BELL *v.* NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–7726. KIRKLAND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N. E. 3d 818.

No. 14–7731. TYREE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–7760. WILLIAMS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 561.

No. 14–8158. CANCHOLA *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8161. YUNG LO *v.* GOLDEN GAMING, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8162. GAINES *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8179. THOMPSON *v.* KELLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 280.

No. 14–8188. MILLER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 997 N. E. 2d 1184.

No. 14–8197. BODNAR *v.* RIVERSIDE COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8198. ATLAS *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8200. DEMARY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8201. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 152 So. 3d 575.

No. 14–8205. SCOTT *v.* DAVEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 547.

No. 14–8210. BROWN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8222. TAFOYA *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8224. MENDEZ CUELLAR *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8227. DUDLEY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8228. ELSWICK *v.* PLUMLEY, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–8234. REED-RAJAPASKE *v.* MEMPHIS LIGHT, GAS AND WATER, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8236. MILTON *v.* COMERICA BANK. Ct. App. Mich. Certiorari denied.

No. 14–8242. PRINCE *v.* LOMA LINDA UNIVERSITY MEDICAL CENTER. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 14–8243. CALVO *v.* COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS. Sup. Ct. N. Mar. I. Certiorari denied. Reported below: 2014 MP 7.

No. 14–8252. LOZANO *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 413.

No. 14–8261. LOVE *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8262. JONES *v.* CALIFORNIA ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–8270. GIBBS *v.* OHIO. Ct. App. Ohio, 11th App. Dist., Geauga County. Certiorari denied. Reported below: 2014-Ohio-1341.

No. 14–8271. GRONDON *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8274. GADDY *v.* SOUTH CAROLINA DISTRICT COURTS. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 268.

No. 14–8276. JAVIER BERRIO *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 98.

No. 14–8277. ALLEN *v.* RACKLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8283. VASQUEZ GONZALES *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 310.

No. 14–8299. ROLAND *v.* LEWIS. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 288.

No. 14–8301. COLE *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–8302. CHAPPELL *v.* MORGAN, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 1449, 2014-Ohio-4414, 17 N. E. 3d 596.

No. 14–8312. WRIGHT *v.* HOLLOWAY, CLERK, SUPERIOR COURT OF GRAHAM COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 14–8313. WATSON *v.* PERRITT, SUPERINTENDENT, LUMBERTON CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 147.

No. 14–8315. LEA *v.* WARREN COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8316. MCDONALD *v.* FOX RUN MEADOWS PLANNED UNIT DEVELOPMENT. Ct. App. Colo. Certiorari denied.

No. 14–8319. MORRIS *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 14–8322. Richardson *v.* Michigan State Treasurer. C. A. 6th Cir. Certiorari denied.

No. 14–8324. Cook *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8325. Christopher *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–8334. Caldeira *v.* Janda, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8336. Castanon *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 14–8339. Allen *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 108 So. 3d 1099.

No. 14–8340. Jones *v.* Ando. C. A. 7th Cir. Certiorari denied.

No. 14–8342. Yegorov *v.* Melnichuk. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–8344. Tablas *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–8350. Papol *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8370. Dongsheng Huang *v.* Department of Labor, Administrative Review Board, et al. C. A. 5th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 228.

No. 14–8378. Maharaj *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied.

No. 14–8467. Lee *v.* Benuelos et al. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 743.

No. 14–8485. Richard *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–8495. Sledge *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120094–U.

No. 14–8523. CARROLL *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 395, 442 S. W. 3d 834.

No. 14–8580. LEONARD *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 171 So. 3d 716.

No. 14–8627. LUX *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8636. AUDAIN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 97.

No. 14–8674. GREENE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 280.

No. 14–8687. COLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 98.

No. 14–8692. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 869.

No. 14–8705. IFENATUORA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 303.

No. 14–8738. CAUDEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 339.

No. 14–8739. CAICEDO-CUERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 363.

No. 14–8741. BAMDAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8746. ROSSETTI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 3d 322.

No. 14–8749. GLAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8751. HOOSER *v.* WALTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8758. DAVIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 463.

No. 14–8764. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8769. PIRPICH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 471.

No. 14–8770. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 3d 809 and 592 Fed. Appx. 544.

No. 14–8773. BOCANEGRA-SANCHEZ *v.* UNITED STATES (Reported below: 606 Fed. Appx. 157); AVALOS-GALVAN *v.* UNITED STATES (606 Fed. Appx. 172); GONZALEZ-SILVA *v.* UNITED STATES (606 Fed. Appx. 162); and HERNANDEZ-GONZALEZ, AKA ESPINOZA-GONZALEZ *v.* UNITED STATES (606 Fed. Appx. 162). C. A. 5th Cir. Certiorari denied.

No. 14–8774. ADAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 126.

No. 14–8775. BUCCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–754. TERRITORY OF THE VIRGIN ISLANDS *v.* UNITED INDUSTRIAL, SERVICE, TRANSPORTATION, PROFESSIONAL AND GOVERNMENT WORKERS OF NORTH AMERICA SEAFARERS INTERNATIONAL UNION, ON BEHALF OF BASON. C. A. 3d Cir. Motion of Office of the Territorial Public Defender for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 767 F. 3d 193.

No. 14–8524. GOODEN *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 14–8737. CAPOCCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 578 Fed. Appx. 47.

Rehearing Denied

No. 14–724. JOHNSON *v.* CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF HEALTH, 574 U. S. 1156;

No. 14–737. FORD *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS, 574 U. S. 1157;

No. 14–830. SHAH *v.* MOTORS LIQUIDATION COMPANY GUC TRUST, 574 U. S. 1159;

No. 14–5991. SANGSTER *v.* CALIFORNIA ET AL., 574 U. S. 1159;

No. 14–6865. SIMMONS *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1085;

No. 14–7087. YAZDCHI *v.* TEXAS, 574 U. S. 1124;

No. 14–7344. WRIGHT *v.* WASHBURN, WARDEN, ET AL., 574 U. S. 1162;

No. 14–7473. CHHIM *v.* UNIVERSITY OF HOUSTON, 574 U. S. 1165;

No. 14–7564. TORRES *v.* REYBOLD HOMES, INC., 574 U. S. 1168;

No. 14–7584. WIDEMAN *v.* THOMAS, WARDEN, 574 U. S. 1169;

No. 14–7607. ROBINSON *v.* KINGS COUNTY DISTRICT ATTORNEY'S OFFICE ET AL., 574 U. S. 1170;

No. 14–7642. FLANDERS *v.* UNITED STATES, 574 U. S. 1141; and

No. 14–8053. DUSHANE *v.* UNITED STATES, 574 U. S. 1183. Petitions for rehearing denied.

No. 14–6117. GRUBBS *v.* UNITED STATES, 574 U. S. 950; and

No. 14–7597. GAREY *v.* UNITED STATES, 574 U. S. 1132. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

APRIL 14, 2015

Miscellaneous Order

No. 14A1036 (14–9223). ZINK *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

Certiorari Denied

No. 14–9165 (14A1032). COLE *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 14–9268 (14A1048). COLE *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, pre-

sented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 460 S. W. 3d 349.

No. 14–9293 (14A1060). COLE *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 783 F. 3d 707.

APRIL 17, 2015

Dismissal Under Rule 46

No. 14–418. PINPOINT IT SERVICES, LLC *v.* RIVERA, CHAPTER 7 TRUSTEE OF ATLAS IT EXPORT CORP. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 761 F. 3d 177.

Miscellaneous Orders

No. 14–185. REYES MATA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. [Certiorari granted, 574 U. S. 1118.] Motion of respondent for divided argument granted.

No. 14–6368. KINGSLEY *v.* HENDRICKSON ET AL. C. A. 7th Cir. [Certiorari granted, 574 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

APRIL 20, 2015

Certiorari Granted—Vacated and Remanded

No. 14–839. DICKSON ET AL. *v.* RUCHO ET AL. Sup. Ct. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, *ante*, p. 254. Reported below: 367 N. C. 542, 766 S. E. 2d 238.

No. 14–976. CSR PLC ET AL. *v.* AZURE NETWORKS, LLC, ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318 (2015). Reported below: 771 F. 3d 1336.

Certiorari Dismissed

No. 14–8499. MANKO *v.* LENOX HILL HOSPITAL. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pau-*

peris denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 24 N. Y. 3d 1009, 21 N. E. 3d 564.

No. 14–8508. KING *v.* MCDONNELL, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8931. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 14A632. WARNER *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 14M105. LYON *v.* WISE CARTER CHILD AND CARAWAY, P. A., ET AL. (three judgments). Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 14M106. YURI INOUE *v.* BOARD OF TRUSTEES, FLORIDA A&M UNIVERSITY. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 14M107. IN RE POTTS. Motion for leave to proceed as a veteran granted.

No. 14–5939. CREDICO *v.* CHIEF EXECUTIVE OFFICER, SIEMENS (NUCLEAR POWER SYSTEMS AND SOFTWARE), ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 970] denied.

No. 14–7509. STEINER *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of

petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1148] denied.

No. 14–7514. STEINER *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1148] denied.

No. 14–7743. GORBEY *v.* MONONGALIA COUNTY, WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1188] denied.

No. 14–7955. GLOSSIP ET AL. *v.* GROSS ET AL. C. A. 10th Cir. [Certiorari granted, 574 U. S. 1133.] Motion of petitioners for leave to file volume II of the joint appendix under seal with redacted copies for the public record granted.

No. 14–8355. CLEWIS *v.* MEDCO HEALTH SOLUTIONS, INC., ET AL. C. A. 5th Cir.;

No. 14–8413. SMITH *v.* CITY OF ST. MARTINVILLE, LOUISIANA. C. A. 5th Cir.;

No. 14–8491. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL. Ct. App. Mich.;

No. 14–8617. HORSLEY *v.* UNIVERSITY OF ALABAMA ET AL. C. A. 11th Cir.;

No. 14–8840. GUARASCIO *v.* UNITED STATES. C. A. 4th Cir.; and

No. 14–8976. GILMORE *v.* UNITED STATES. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 11, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9119. IN RE ORNELAS; and

No. 14–9124. IN RE CONDREY. Petitions for writs of habeas corpus denied.

No. 14–9026. IN RE TATUM. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 14–963. IN RE WYTTENBACH; and

No. 14–8435. IN RE SHIELDS BEY. Petitions for writs of mandamus denied.

Certiorari Denied

No. 14–534. GUPTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 747 F. 3d 111.

No. 14–668. SWEENEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 3d 857.

No. 14–728. TORRESSO ET AL. *v.* TEREBESI. C. A. 2d Cir. Certiorari denied. Reported below: 764 F. 3d 217.

No. 14–777. MARIA CARDONA ET AL. *v.* CHIQUITA BRANDS INTERNATIONAL, INC.; and
No. 14–1011. DOE ET AL. *v.* CHIQUITA BRANDS INTERNATIONAL, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 3d 1185.

No. 14–781. UNITED STATES *v.* CMS CONTRACT MANAGEMENT SERVICES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 745 F. 3d 1379.

No. 14–792. WISCONSIN ET AL. *v.* LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 3d 543.

No. 14–798. MCLAURIN *v.* UNITED STATES; and
No. 14–7954. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 764 F. 3d 372.

No. 14–850. BECTON, DICKINSON & CO. *v.* RETRACTABLE TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 757 F. 3d 1366.

No. 14–858. LVNV FUNDING, LLC, ET AL. *v.* CRAWFORD. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 3d 1254.

No. 14–864. HILLCREST PROPERTY, LLP *v.* PASCO COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 3d 1279.

No. 14–866. BRILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 3d 267.

No. 14–946. MACON *v.* J. C. PENNEY CO. C. A. 6th Cir. Certiorari denied.

No. 14–952. VONG ET AL. *v.* AUNE, EXECUTIVE DIRECTOR OF THE ARIZONA BOARD OF COSMETOLOGY. Ct. App. Ariz. Certiorari denied. Reported below: 235 Ariz. 116, 328 P. 3d 1057.

No. 14–974. DUBLIN EYE ASSOCIATES, P. C., ET AL. *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 463.

No. 14–977. BRYANT *v.* DASILVA. C. A. 2d Cir. Certiorari denied. Reported below: 582 Fed. Appx. 56.

No. 14–978. EON CORP. IP HOLDINGS, LLC *v.* APPLE INC. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 581 Fed. Appx. 886.

No. 14–984. TRAYLOR *v.* HOWARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 958.

No. 14–987. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND ET AL. *v.* GERBER LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 3d 150.

No. 14–993. THOMAS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–0866 (La. App. 1 Cir. 7/15/13).

No. 14–1001. LITCHFIELD HISTORIC DISTRICT COMMISSION ET AL. *v.* CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 183.

No. 14–1022. PARTINGTON *v.* HOUCK ET AL. C. A. D. C. Cir. Certiorari denied.

No. 14–1034. SCHMUDE *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 14–1041. BROOKS *v.* SOUTH CAROLINA COMMISSION OF INDIGENT DEFENSE ET AL. Sup. Ct. S. C. Certiorari denied.

No. 14–1048. NATIONAL ORGANIZATION FOR MARRIAGE, INC. *v.* GEIGER ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–1054. SANTOMENNO ET AL. *v.* JOHN HANCOCK LIFE INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 768 F. 3d 284.

No. 14–1067. GROVES ET AL. *v.* BAC HOME LOANS SERVICING L. P. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 414.

No. 14–1075. JARBO ET UX. *v.* BANK OF NEW YORK MELLON. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 287.

No. 14–1086. FOSTER *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–1089. ZINSTEIN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 100.

No. 14–1107. O'SHELL *v.* CLINE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER, INDIANA DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 571 Fed. Appx. 487.

No. 14–1108. YUFA *v.* TSI, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 600 Fed. Appx. 747.

No. 14–1109. LOWE *v.* DANIELS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–1117. PASTERNAK *v.* CALIFORNIA; and BOJEAUX *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–1125. BOTELLO ET AL. *v.* CHRISTUS SANTA ROSA HEALTH CARE CORP. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 424 S. W. 3d 117.

No. 14–1126. BETSINGER *v.* D. R. HORTON, INC., ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 842, 335 P. 3d 1230.

No. 14–1135. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 3d 1085.

No. 14–1162. CANTRELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 576 Fed. Appx. 439.

No. 14–7059. SMITH *v.* CALIFORNIA; and

No. 14–7386. WHEELER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 60 Cal. 4th 335, 334 P. 3d 573.

No. 14–7119. HERNANDEZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied.

No. 14–7376. CLAYTON *v.* NEW YORK CITY TAXI & LIMOUSINE COMMISSION ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 117 App. Div. 3d 602, 986 N. Y. S. 2d 117.

No. 14–7553. COOPER *v.* COOPER. App. Ct. Mass. Certiorari denied. Reported below: 85 Mass. App. 1110, 5 N. E. 3d 968.

No. 14–7909. MARINOV *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 14–7977. HUNT *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–7996. M. M. R. *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 14–8003. HOPPER *v.* UNITED STATES; and
No. 14–8550. DUNN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 3d 690.

No. 14–8303. EATON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 103 A. 3d 545.

No. 14–8338. WILLIAMS *v.* CIRCUIT COURT OF WISCONSIN, RACINE COUNTY, ET AL. Ct. App. Wis. Certiorari denied.

No. 14–8354. CURRIE *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 454 S. W. 3d 903.

No. 14–8360. BENNERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 127.

No. 14–8365. LEARY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 302.

No. 14–8367. PERRY *v.* ENTERTAINMENT ONE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 293.

No. 14–8368. POPE *v.* PUBLIC DEFENDER OFFICE, CRAWFORD COUNTY. C. A. 3d Cir. Certiorari denied.

No. 14–8372. EADY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 711.

No. 14–8375. ALLEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 121739–U.

No. 14–8376. BENEDETTO *v.* BROADHEAD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8382. MOSES *v.* TEXAS WORKFORCE COMMISSION ET AL. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 14–8383. REINARD *v.* NEW YORK. County Ct., Niagara County, N. Y. Certiorari denied.

No. 14–8385. PRICE *v.* MITCHELL, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 14–8390. THORNTON *v.* BUTLER ET AL. C. A. 7th Cir. Certiorari denied.

No. 14–8395. QUILLING *v.* ARNOLD, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8403. MCGUIRE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8404. PERRY *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xviii.

No. 14–8406. WILLIAMS *v.* RUSSELL, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–8408. MCKISSICK *v.* DEAL, GOVERNOR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8409. WARD *v.* PRICE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8411. JAIME REYNA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8414. MARTINS *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–8416. CARRASCO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 924, 330 P. 3d 859.

No. 14–8418. ADAMS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8419. TAYLOR *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2014 IL App (4th) 120900–U.

No. 14–8422. MERMER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 14–8424. JONES, AKA SHABAZZ *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8425. URIAS SANCHEZ *v.* SHANAHAN, SECRETARY OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 278.

No. 14–8428. LOGAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 14–8429. TONEY *v.* HAKALA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 570.

No. 14–8431. RICHARDSON *v.* TEXAS WORKFORCE COMMISSION ET AL. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–8438. PERRY *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8439. CLARK *v.* THOMPSON, INTERIM WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 213.

No. 14–8440. DAVIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8441. MARTS *v.* BELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 897.

No. 14–8443. JOHNSON *v.* ARNOLD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8446. TWILLIE *v.* ERIE SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 575 Fed. Appx. 28.

No. 14–8447. TACKETT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 445 S. W. 3d 20.

No. 14–8448. WALTERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8451. MEJIA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8457. SITTERLY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120620–U.

No. 14–8461. NESBIT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 452 S. W. 3d 779.

No. 14–8466. KENNARD *v.* CITY OF ASHLAND, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8471. BOLTON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8477. WALKER *v.* U. S. BANK N. A. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 572 Fed. Appx. 740.

No. 14–8478. TRUSTY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8479. TANNER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 14–8480. BELTRAN *v.* MCDOWELL, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8484. MORRIS *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 14–8487. LACOY *v.* IAC. C. A. 4th Cir. Certiorari denied. Reported below: 566 Fed. Appx. 269.

No. 14–8497. STRAND *v.* FOULK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8498. MARTINEZ *v.* BROWN, DISTRICT ATTORNEY, COUNTY OF QUEENS, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 10.

No. 14–8503. SPECKMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8509. JACKSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 14–8511. HARRIS *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 526.

No. 14–8525. HARPER *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 204.

No. 14–8527. KINNEY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 264 Ore. App. 612, 333 P. 3d 1129.

No. 14–8529. LESTER *v.* LOGAN'S ROADHOUSE, INC. C. A. 6th Cir. Certiorari denied.

No. 14–8532. LARSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 14–8543. DONGSHENG HUANG *v.* ULTIMO SOFTWARE SOLUTIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 669.

No. 14–8548. OLSON *v.* POLLARD, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–8551. YOUNG *v.* GLUNT, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–8553. WALTON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8562. LEPRE *v.* LUKUS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 602 Fed. Appx. 864.

No. 14–8564. RILEY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 86 Mass. App. 309, 15 N. E. 3d 1165.

No. 14–8571. JOHNSON *v.* FOLKS ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8579. O'Dowd *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–1107 (La. App. 1 Cir. 3/24/14).

No. 14–8588. Stewart *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8592. Ross *v.* Ohio. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied. Reported below: 2014-Ohio-2867, 15 N. E. 3d 1213.

No. 14–8596. Sheley *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2014 IL App (3d) 120012, 16 N. E. 3d 857.

No. 14–8597. Alexandrette *v.* McFadden, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 80.

No. 14–8603. Smith *v.* Allison, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8606. Barker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 708.

No. 14–8613. Smith *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 158 So. 3d 584.

No. 14–8634. Trotter *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 148.

No. 14–8637. Avila *v.* Kempf, Director, Idaho Department of Correction, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8650. Russo *v.* Idaho. Sup. Ct. Idaho. Certiorari denied. Reported below: 157 Idaho 299, 336 P. 3d 232.

No. 14–8657. Shatlaw *v.* Oregon. Ct. App. Ore. Certiorari denied.

No. 14–8671. Benton *v.* Clark County Jail et al. C. A. 7th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 231.

No. 14–8685. Freeman *v.* Koster, Attorney General of Missouri, et al. C. A. 8th Cir. Certiorari denied.

No. 14–8688. MITCHELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 920.

No. 14–8689. LAWNIK *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–8691. SULLIVAN *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 127.

No. 14–8698. BOTTORFF *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 152 So. 3d 566.

No. 14–8699. LEWIS *v.* DAVEY, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 561.

No. 14–8701. SANFORD *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 104 A. 3d 50.

No. 14–8703. GRIFFITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 14–8706. NIA *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2014-Ohio-2527, 15 N. E. 3d 892.

No. 14–8711. KATSIPIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 162.

No. 14–8713. TURNER *v.* PORTER. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 211.

No. 14–8714. SWARTZWELDER *v.* FISHER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–8718. DORSEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 217 Md. App. 745.

No. 14–8719. SHAW *v.* MACOMBER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 346.

No. 14–8721. ABDULLAH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 145.

No. 14–8722. BOYKIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 809.

No. 14–8723. BERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–8724. SYKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 223.

No. 14–8725. SANCHEZ-LARITA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 877.

No. 14–8726. BOOKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 3d 928.

No. 14–8730. KING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 48.

No. 14–8742. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8745. WOODS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 764 F. 3d 1242.

No. 14–8750. GEWIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 759 F. 3d 72.

No. 14–8752. GREEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 100 A. 3d 170.

No. 14–8771. MCCAFFERTY ET AL. *v.* WELLS FARGO BANK, N. A. Sup. Ct. Del. Certiorari denied. Reported below: 105 A. 3d 989.

No. 14–8772. GING-HWANG TSOA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 153.

No. 14–8776. BEST *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 236 N. C. App. 505.

No. 14–8784. LEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 3d 692.

No. 14–8786. OKEAYAINNEH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 3d 513.

No. 14–8787. CISNEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 353.

No. 14–8788. ZAVALA-AMADOR *v.* UNITED STATES (Reported below: 586 Fed. Appx. 182); and ROMERO-HERNANDEZ *v.* UNITED STATES (588 Fed. Appx. 382). C. A. 5th Cir. Certiorari denied.

No. 14–8789. DURON-ROSALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 218.

No. 14–8790. BANNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8794. FOSTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 504.

No. 14–8795. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8797. HALBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8798. ANTONIO GUEVARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 273.

No. 14–8801. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8802. GRAYSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 501.

No. 14–8803. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 360.

No. 14–8810. JOHANSEN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 132, 105 A. 3d 433.

No. 14–8813. ROLON-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 645.

No. 14–8814. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 3d 1253.

No. 14–8816. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 70.

No. 14–8817. COGSWELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 3d 298.

No. 14–8821. COLLINS, AKA CLINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 25.

No. 14–8829. RANIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8830. ESTEVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 186.

No. 14–8832. LAGRONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 673.

No. 14–8836. STRONG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 3d 920.

No. 14–8838. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 808.

No. 14–8841. MCKINNEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 631.

No. 14–8843. PRAT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 921.

No. 14–8845. ESQUIVEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 282.

No. 14–8852. LUMPKIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 726.

No. 14–8854. HESTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 805.

No. 14–8855. HARMON-WRIGHT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8857. BONG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 607.

No. 14–8862. COAXUM *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 410 S. C. 320, 764 S. E. 2d 242.

No. 14–8863. DEBOLT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 239.

No. 14–8865. SINGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8866. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8870. MURRAY *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL.

C. A. 3d Cir. Certiorari denied. Reported below: 591 Fed. Appx. 142.

No. 14–8876. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 815.

No. 14–8877. WADE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 520.

No. 14–8879. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 79.

No. 14–8880. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8882. HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 71.

No. 14–8883. SMARR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 808, 766 S. E. 2d 650.

No. 14–8885. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 276.

No. 14–8888. FLORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8895. GOMEZ-PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 156.

No. 14–8896. GRAVES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8898. BURTTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8900. ACOSTA-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 774.

No. 14–8901. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 103 A. 3d 204.

No. 14–8902. RAMEY *v.* TRAXLER, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, ET AL.

C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 260.

No. 14–8904. Reed *v.* Gavin, Superintendent, State Correctional Institution at Waymart, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8905. Tucker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 224.

No. 14–8906. Walker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 162.

No. 14–8910. Owens *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 97 A. 3d 594.

No. 14–8914. Cuevas *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–8917. Sullivan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 631.

No. 14–8924. Kennedy *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 14–8925. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 356.

No. 14–8928. Gaines *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8930. Ferrufino-Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 222.

No. 14–8933. Oliver *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 149.

No. 14–8938. Fields *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 916.

No. 14–8939. Griner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 212.

No. 14–8940. Inzano *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–8942. FULFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8944. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 107 A. 3d 1119.

No. 14–8946. HOON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 762 F. 3d 1172.

No. 14–8952. WILLIAMS *v.* CARTLEDGE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 287.

No. 14–8953. WARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 880.

No. 14–8955. VISHNEVETSKY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–8959. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 630.

No. 14–8960. LARRIMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 168.

No. 14–8963. BROWNLEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 632.

No. 14–8968. GASTELUM-CAMPA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 646.

No. 14–8971. SUDDUTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 676.

No. 14–8972. ROUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 82.

No. 14–8973. SANABRIA-ARCHIGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 439.

No. 14–8974. EALY *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 14–8981. FLOWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 142.

No. 14–8985. BATTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 3d 504.

No. 14–8996. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8999. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 100 A. 3d 95.

No. 14–9000. GIBBONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 528 Fed. Appx. 771.

No. 14–9001. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 777 F. 3d 984.

No. 14–9005. BALDWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 3d 711.

No. 14–9010. WADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 138.

No. 14–9015. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 299.

No. 14–9017. ANTONIO MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 950.

No. 14–9021. VIGIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 3d 331.

No. 14–9034. BARSOUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 3d 1321.

No. 14–9037. CASTRO-CAICEDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 3d 93.

No. 14–804. GAINES ET AL. *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. (Reported below: 589 Fed. Appx. 314); and BERNARD *v.* FEDERAL HOUSING FINANCE AGENCY ET AL. (587 Fed. Appx. 266). C. A. 6th Cir. Motion of Michigan Legal Services et al. for leave to file brief as *amici curiae* granted. Certiorari denied.

No. 14–965. AHMAD *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 553 Fed. Appx. 58.

No. 14–969. LANDERS *v.* QUALITY COMMUNICATIONS, INC., ET AL. C. A. 9th Cir. Motion of Civil Procedure Law Professors for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 771 F. 3d 638.

No. 14–1039. FLORIDA *v.* TEAMER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 151 So. 3d 421.

No. 14–8189. SCOTT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BREYER and JUSTICE SOTOMAYOR dissent. Reported below: 163 So. 3d 389.

No. 14–8194. LOCKHART *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BREYER and JUSTICE SOTOMAYOR dissent. Reported below: 163 So. 3d 1088.

No. 14–8694. PAKES *v.* FRAUENHEIM, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 588 Fed. Appx. 724.

No. 14–8734. CLEAVER *v.* MAYE, WARDEN. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 773 F. 3d 230.

No. 14–8835. BEANE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 589 Fed. Appx. 805.

No. 14–8886. FULLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 14–9022. LAN NGOC TRAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–9941. ANDERSON *v.* PRIVATE CAPITAL GROUP ET AL., 571 U. S. 1023;

No. 14–644. WILLIS *v.* VIRGINIA ET AL., 574 U. S. 1154;

No. 14–822. ANORUO *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS, 574 U. S. 1191;

No. 14–919. Native Wholesale Supply *v.* Oklahoma ex rel. Pruitt, Attorney General of Oklahoma, 574 U. S. 1192;

No. 14–5500. Fourstar *v.* Decon et al., 574 U. S. 902;

No. 14–5501. Fourstar *v.* Farley, Warden, 574 U. S. 902;

No. 14–6822. Goings *v.* Sumner County District Attorney's Office et al., 574 U. S. 1137;

No. 14–6988. McGhee *v.* United States District Court for the Southern District of Mississippi et al., 574 U. S. 1088;

No. 14–7152. May *v.* Amgen, Inc., 574 U. S. 1193;

No. 14–7244. Shao *v.* Tsan-Kuen Wang, 574 U. S. 1161;

No. 14–7293. Wilcox *v.* Florida, 574 U. S. 1161;

No. 14–7395. Antonio Marroquin *v.* MacDonald, Warden, 574 U. S. 1140;

No. 14–7424. Taylor *v.* Virginia, 574 U. S. 1165;

No. 14–7520. Everett *v.* Barrow, Warden, 574 U. S. 1167;

No. 14–7545. Ramos *v.* Florida Department of Corrections, 574 U. S. 1168;

No. 14–7577. In re Smith et al., 574 U. S. 1151;

No. 14–7580. In re Bowles, 574 U. S. 1152;

No. 14–7659. Nguyen Vu *v.* Evers, 574 U. S. 1172;

No. 14–7673. In re McDonald, 574 U. S. 1072;

No. 14–7734. Price *v.* Burwell, Secretary of Health and Human Services, 574 U. S. 1174;

No. 14–7747. Howard *v.* Corrections Corporation of America et al., 574 U. S. 1195;

No. 14–7784. Perry *v.* McDonald, Secretary of Veterans Affairs, 574 U. S. 1176;

No. 14–7865. Bowling *v.* Appalachian Federal Credit Union, *ante*, p. 906;

No. 14–7924. Millis *v.* Cross, Warden, 574 U. S. 1180;

No. 14–7927. Perry *v.* United States, 574 U. S. 1180;

No. 14–7978. Sesson *v.* City of Tuscaloosa, Alabama, 574 U. S. 1197; and

No. 14–8233. Somsak Saeku *v.* United States, 574 U. S. 1201. Petitions for rehearing denied.

No. 14–7637. Hernandez *v.* United States, 574 U. S. 1185. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 14–7023. In re Ford, 574 U. S. 1073. Motion for leave to file petition for rehearing denied.

April 27, 2015

Certiorari Granted—Vacated and Remanded

No. 14–209. Illinois *v.* Cummings. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rodriguez* v. *United States*, *ante*, p. 348. Reported below: 2014 IL 115769, 6 N. E. 3d 725.

No. 14–701. Michigan Catholic Conference et al. *v.* Burwell, Secretary of Health and Human Services, et al. C. A. 6th Cir. Motion of Association of American Physicians and Surgeons et al. for leave to file brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014). Reported below: 755 F. 3d 372.

Certiorari Dismissed

No. 14–8608. Daker *v.* Warren, Sheriff, Cobb County, Georgia, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8620. Stevens *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 146 So. 3d 1204.

Miscellaneous Orders

No. 14M108. Schultz *v.* Obama, President of the United States, et al.; and

No. 14M109. Patterson *v.* Illinois Department of Human Services et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 141, Orig. Texas *v.* New Mexico et al. Motion of Elephant Butte Irrigation District for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 574 U. S. 972.]

No. 14–6629. D'ANTUONO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1022] denied.

No. 14–7959. IN RE REHBERGER. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 911] denied.

No. 14–8118. CLARK *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 909] denied.

No. 14–8806. TEICHMANN *v.* NEW YORK. C. A. 2d Cir.; and
No. 14–8856. BISTRIKA ET AL. *v.* OREGON; and BISTRIKA *v.* OREGON. Ct. App. Ore. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 18, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9161. IN RE ORNELAS-CASTRO;
No. 14–9217. IN RE AYERS; and
No. 14–9230. IN RE RAMON. Petitions for writs of habeas corpus denied.

No. 14–1030. IN RE MILLS;
No. 14–8493. IN RE SESSON;
No. 14–8521. IN RE COLEY; and
No. 14–8818. IN RE PLATTS. Petitions for writs of mandamus denied.

No. 14–8708. IN RE BRADIN. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 14–9042. IN RE LEWIS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–1339. SPOKEO, INC. *v.* ROBINS. C. A. 9th Cir. Certiorari granted. Reported below: 742 F. 3d 409.

No. 14–613. GREEN *v.* BRENNAN, POSTMASTER GENERAL. C. A. 10th Cir. Certiorari granted. Reported below: 760 F. 3d 1135.

Certiorari Denied

No. 14–326. YACUBIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 750 F. 3d 100.

No. 14–646. SAI *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied.

No. 14–837. ALEXANDER-IGBANI *v.* DEKALB COUNTY SCHOOL DISTRICT. C. A. 11th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 803.

No. 14–874. APEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 800.

No. 14–884. ROSEBROCK *v.* HOFFMAN, ACTING POLICE CHIEF FOR THE DEPARTMENT OF VETERANS AFFAIRS GREATER LOS ANGELES HEALTHCARE SYSTEM, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 3d 963.

No. 14–887. BALTIMORE CITY POLICE DEPARTMENT ET AL. *v.* OWENS. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 3d 379.

No. 14–893. UNIVERSITY OF TEXAS SYSTEM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 3d 437.

No. 14–991. WESTERN SKY FINANCIAL ET AL. *v.* JACKSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 3d 765.

No. 14–996. COLLIS *v.* BANK OF AMERICA ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 739 and 741.

No. 14–998. CITIZEN CENTER *v.* GESSLER, COLORADO SECRETARY OF STATE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 770 F. 3d 900.

No. 14–1002. BALLESTEROS *v.* RONEY. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 412, 443 S. W. 3d 548.

No. 14–1007. STULL RANCHES, LLC *v.* ENTEK GRB, LLC. C. A. 10th Cir. Certiorari denied. Reported below: 763 F. 3d 1252.

No. 14–1012. ESCAMILLA ET AL. *v.* M2 TECHNOLOGY, INC. (Reported below: 589 Fed. Appx. 671); and ESCAMILLA *v.* M2 TECHNOLOGY, INC., ET AL. (581 Fed. Appx. 449). C. A. 5th Cir. Certiorari denied.

No. 14–1013. SEGALL ET AL. *v.* OSF HEALTHCARE SYSTEM ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 14–1014. SEGALL ET AL. *v.* BAC HOME LOANS SERVICING L. P. ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 14–1015. KORMAN ET UX. *v.* SCHOTT. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 14–1017. GROGAN *v.* BLOOMING GROVE VOLUNTEER AMBULANCE CORPS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 259.

No. 14–1018. VIEWCREST INVESTMENTS, LLC *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 262 Ore. App. 666, 328 P. 3d 840.

No. 14–1023. IOPPOLO *v.* RUMANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 321.

No. 14–1024. COLE *v.* GENERATIONS ADOPTIONS ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 407 S. W. 3d 904.

No. 14–1031. POPE ET AL. *v.* JAMES B. ET AL. Ct. App. S. C. Certiorari denied.

No. 14–1036. HOLMES *v.* CASSEL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 14–1038. NWAWKA *v.* ATLANTA CLASSIC CARS ET AL. Ct. App. Ga. Certiorari denied. Reported below: 326 Ga. App. XXVII.

No. 14–1042. WESTERN RADIO SERVICES CO., INC. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 770.

No. 14–1045. MATZ *v.* KLOTKA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 3d 517.

No. 14–1046. FLANDER *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied.

No. 14–1050. NATIONWIDE FINANCIAL, LP *v.* POBUDA ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 122540–U.

No. 14–1051. JULIAN ET AL. *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 850.

No. 14–1059. SCHUTZ *v.* FAILLA. Sup. Ct. Wash. Certiorari denied. Reported below: 181 Wash. 2d 642, 336 P. 3d 1112.

No. 14–1078. NATIONAL MILK PRODUCERS FEDERATION, AKA COOPERATIVES WORKING TOGETHER, ET AL. *v.* EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–1081. GREEN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 586 Fed. Appx. 586.

No. 14–1105. DEAN *v.* SLADE ET AL. Ct. App. Miss. Certiorari denied. Reported below: 164 So. 3d 468.

No. 14–1114. COSSETTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 28.

No. 14–1159. GROSE *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 334.

No. 14–1181. DIAMOND *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 603 Fed. Appx. 947.

No. 14–1185. SAOUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 182.

No. 14–1188. GAIL VENTO, LLC, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 Fed. Appx. 170.

No. 14–6927. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–7593. TERAN-SALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 3d 453.

No. 14–7676. GUEVARA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 364.

No. 14–7688. OLTEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 565 Fed. Appx. 558.

No. 14–8021. KLINEFELTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 355.

No. 14–8056. LAMBERT *v.* CITY OF DANA POINT, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 14–8193. LAMBRIX *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1246.

No. 14–8513. RAGIN *v.* CIRCUIT COURT OF VIRGINIA, CITY OF NEWPORT NEWS. Sup. Ct. Va. Certiorari denied.

No. 14–8517. HAWK *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–8520. CULP *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 141 So. 3d 1279.

No. 14–8522. DAVIDSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 453 S. W. 3d 386.

No. 14–8528. SCOTT *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8533. PERKINSON *v.* CHATMAN, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 14–8534. PONTE *v.* DISCOVER BANK ET AL. Ct. App. Mich. Certiorari denied.

No. 14–8536. REVIS *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8537. LEWIS *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied.

No. 14–8538. LEWIS *v.* BATON ROUGE POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 400.

No. 14–8541. WARITH *v.* AMALGAMATED TRANSIT UNION LOCAL CHAPTER 268. C. A. 6th Cir. Certiorari denied.

No. 14–8542. REED *v.* JOB COUNCIL OF THE OZARKS ET AL. C. A. 8th Cir. Certiorari denied.

No. 14–8546. HOWARD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 14–8552. MERRITT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–8565. LINDENSMITH *v.* WALLACE ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8567. MCDOWELL *v.* TAYLOR, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–8568. NIKA *v.* BAKER, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1223.

No. 14–8572. K. R. *v.* MONTEREY COUNTY DEPARTMENT OF SOCIAL AND EMPLOYMENT SERVICES. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 14–8578. MEMMER *v.* LUDWICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–8582. ORTA *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8583. ORTIZ *v.* MAHALLY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–8584. PRYOR *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–0983 (La. App. 1 Cir. 8/15/13).

No. 14–8585. MILLER *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 588 Fed. Appx. 96.

No. 14–8586. ALONZO NAJERA *v.* LONG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8587. BLUEFORD *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 48,823, 48,824 (La. App. 2 Cir. 3/5/14), 137 So. 3d 54.

No. 14–8598. DAVIS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–8611. JOHNSON *v.* HOLLOWAY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8614. NAPOSKI *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 14–8615. MATT N. *v.* MICHELE I. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–8616. OYELAKIN *v.* RENO, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8618. SHEPPARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 151 So. 3d 1154.

No. 14–8621. LANE-EL *v.* SPEARS ET AL. Ct. App. Ind. Certiorari denied. Reported below: 13 N. E. 3d 859.

No. 14–8622. RICK *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8632. WILKERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8633. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 130015–U.

No. 14–8639. BELL *v.* LITTLEFIELD ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8640. JARAMILLO *v.* ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8641. CROCKETT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8642. SANDERSON *v.* ESTES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8643. SERNA *v.* CHROMES. C. A. 9th Cir. Certiorari denied.

No. 14–8652. LACY *v.* JACKSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 309.

No. 14–8653. JOHNSON *v.* FARM CREDIT OF FLORIDA ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 156 So. 3d 1079.

No. 14–8654. OTWORTH *v.* BUDNIK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 859.

No. 14–8662. COLE *v.* TOOLE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 3d 1150.

No. 14–8690. MAZUJI *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 959.

No. 14–8696. ALFORD *v.* CARLTON. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 438.

No. 14–8716. ALLEN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8748. HILL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8785. NICKERSON *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 94 A. 3d 1116.

No. 14–8822. CAMPBELL *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8825. QURESHI *v.* HUGHES ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 14–8844. MILLER *v.* WALT DISNEY CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8849. WARDELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 418.

No. 14–8864. DONOGHUE *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 599.

No. 14–8887. GREER *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–8918. SANTIBANEZ *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–8920. PEREZ-GONZALEZ *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 423.

No. 14–8926. SPRINGER *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 2014 S.D. 80, 856 N. W. 2d 460.

No. 14–8937. HALL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 151 So. 3d 1245.

No. 14–8958. MADAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 666.

No. 14–8979. GALICIA *v.* BAKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9004. BROUGHTON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 581 Fed. Appx. 882.

No. 14–9008. JONES *v.* BUTLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–9011. CLARKE *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 294.

No. 14–9029. LORCA VERAS *v.* OSHER. Ct. App. Colo. Certiorari denied.

No. 14–9050. BRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9051. CHERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 117.

No. 14–9054. BERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 377.

No. 14–9055. FEKRAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 669.

No. 14–9066. SNOW ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 223.

No. 14–9070. VARGAS-SANTILLAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 369.

No. 14–9073. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 224.

No. 14–9076. BRUNO-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 274.

No. 14–9082. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 10.

No. 14–9083. GONZALEZ-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 3.

No. 14–9087. CANADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 80.

No. 14–9090. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 296.

No. 14–9091. ZUNIGA-BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 268.

No. 14–9092. BAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 206.

No. 14–9094. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 119.

No. 14–9100. WERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 914.

No. 14–9102. REY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9103. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9106. LARA-RENTERIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 561.

No. 14–9118. MORALES-ZARATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 739.

No. 14–9130. CHOCANO *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9132. AURELHOMME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 645.

No. 14–711. TEVA PHARMACEUTICALS USA, INC., ET AL. *v.* BENTLEY ET AL. Super. Ct. Pa. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 81 A. 3d 80.

Rehearing Denied

No. 13–8778. DIXON *v.* CALDWELL, WARDEN, 572 U. S. 1091;

No. 14–802. HATCHIGIAN *v.* STATE FARM INSURANCE CO., 574 U. S. 1158;

No. 14–6743. SANCHEZ *v.* SHERMAN, ACTING WARDEN, 574 U. S. 1082;

No. 14–6752. MCDONALD *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 574 U. S. 1083;

No. 14–7283. OKOH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 574 U. S. 1161;

No. 14–7369. FORD *v.* SURPRISE FAMILY URGENT CARE CENTER, LLC, ET AL., 574 U. S. 1163;

No. 14–7742. FLENTROY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 574 U. S. 1194;

No. 14–7746. GRENIER *v.* COLORADO, 574 U. S. 1194;

No. 14–7777. MICHAEL *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 904;

No. 14–7910. THIBODEAUX *v.* AFRICK, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, ET AL., 574 U. S. 1197;

No. 14–7923. KOKINDA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *ante*, p. 917;

No. 14–8123. SHABAZZ *v.* UNITED STATES, 574 U. S. 1185;

No. 14–8153. AMAYA *v.* UNITED STATES, 574 U. S. 1199; and

No. 14–8744. IN RE WATTS, *ante*, p. 934. Petitions for rehearing denied.

No. 14–8524. GOODEN *v.* UNITED STATES ET AL., *ante*, p. 957. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

April 28, 2015

Certiorari Denied

No. 14–8837 (14A1090). Pruett *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

No. 14–9469 (14A1091). Pruett *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 608 Fed. Appx. 182.

No. 14–9498 (14A1096). Pruett *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 784 F. 3d 287.

April 29, 2015

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1051; and amendments to the Federal Rules of Civil Procedure, see *post,* p. 1057.)

May 4, 2015

Certiorari Dismissed

No. 14–8644. Derringer *v.* Derringer. Ct. App. N. M. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8707. Norris *v.* Reinbold et al. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8763. Thomas et al. *v.* Loveless et al. Ct. Civ. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 194 So. 3d 1001.

Miscellaneous Orders

No. 14M110. MARTIN *v.* CARAWAY, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 14M111. J. D. T., JUVENILE MALE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 144, Orig. NEBRASKA ET AL. *v.* COLORADO. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 14–556. OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH;

No. 14–562. TANCO ET AL. *v.* HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

No. 14–571. DEBOER ET AL. *v.* SNYDER, GOVERNOR OF MICHIGAN, ET AL.; and

No. 14–574. BOURKE ET AL. *v.* BESHEAR, GOVERNOR OF KENTUCKY. C. A. 6th Cir. [Certiorari granted, 574 U. S. 1118.] Motion of Theodore Coates for leave to file brief as *amicus curiae* denied.

No. 14–8412. IN RE RHODES. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 902] denied.

No. 14–8809. OVERALL *v.* ALABAMA STATE BAR. Sup. Ct. Ala.;

No. 14–9012. DICKERSON *v.* UNITED WAY OF NEW YORK CITY ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept.; and

No. 14–9135. MILLAN *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 26, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9278. IN RE ETCHISON; and

No. 14–9297. IN RE MCKINNON. Petitions for writs of habeas corpus denied.

No. 14–9308. IN RE WEBB. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has

repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–8697. In re Burgo. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 14–840. Federal Energy Regulatory Commission *v.* Electric Power Supply Assn. et al.; and

No. 14–841. EnerNOC, Inc., et al. *v.* Electric Power Supply Assn. et al. C. A. D. C. Cir. Motion of NRG Energy, Inc., for leave to file brief as *amicus curiae* granted. Certiorari granted limited to the following questions: "(1) Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U. S. C. § 791a *et seq.*, to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates. (2) Whether the Court of Appeals erred in holding that the rule issued by the Federal Energy Regulatory Commission is arbitrary and capricious." Cases consolidated, and a total of one hour is allotted for oral argument. Justice Alito took no part in the consideration or decision of this motion and these petitions. Reported below: 753 F. 3d 216.

Certiorari Denied

No. 13–10282. Sanchez *v.* United States; and

No. 13–10307. Troya *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 3d 1125.

No. 14–1. AEP Energy Services et al. *v.* Heartland Regional Medical Center et al. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 3d 716.

No. 14–610. United States Cellular Corp. *v.* Federal Communications Commission et al.;

No. 14–898. Cellular South, Inc., dba C Spire Wireless, et al. *v.* Federal Communications Commission et al.;

No. 14–900. ALLBAND COMMUNICATIONS COOPERATIVE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 14–901. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 753 F. 3d 1015.

No. 14–672. KING ET AL. *v.* CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 3d 216.

No. 14–677. SKYE *v.* MAERSK LINE, LTD. CORP., DBA MAERSK LINE LTD. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 3d 1262.

No. 14–710. GIDDENS, AS TRUSTEE FOR THE SIPA LIQUIDATION OF LEHMAN BROTHERS INC. *v.* BARCLAYS CAPITAL INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 761 F. 3d 303.

No. 14–745. VELASCO-GIRON *v.* LYNCH, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 3d 774.

No. 14–757. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL ENERGY REGULATORY COMMISSION (two judgments). C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 540 (first judgment); 771 F. 3d 903 (second judgment).

No. 14–762. PROMEDICA HEALTH SYSTEM, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 3d 559.

No. 14–801. PENSKE LOGISTICS, LLC, ET AL. *v.* DILTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 3d 637.

No. 14–819. VITRAN EXPRESS, INC. *v.* CAMPBELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 756.

No. 14–886. BRISTOL-MYERS SQUIBB CO. *v.* TEVA PHARMACEUTICALS USA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 752 F. 3d 967.

No. 14–894. CASHCALL, INC., ET AL. *v.* MORRISSEY, ATTORNEY GENERAL OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–908. STEEN ET UX. *v.* MURRAY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 3d 698.

No. 14–913. BROWN ET AL. *v.* COLUMBIA GAS TRANSMISSION, LLC. C. A. 3d Cir. Certiorari denied. Reported below: 768 F. 3d 300.

No. 14–944. JUPITER MEDICAL CENTER, INC. *v.* VISITING NURSE ASSOCIATION OF FLORIDA, INC. Sup. Ct. Fla. Certiorari denied. Reported below: 154 So. 3d 1115.

No. 14–1047. ZANKE-JODWAY ET AL. *v.* CITY OF BOYNE CITY, MICHIGAN, ET AL. Ct. App. Mich. Certiorari denied.

No. 14–1049. PROFESSIONAL BUSINESS AUTOMATION TECHNOLOGY, LLC *v.* OLD PLANK TRAIL COMMUNITY BANK, N. A. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2014 IL App (3d) 130044–U.

No. 14–1056. GALLAGHER *v.* KATTAR, CLERK-MAGISTRATE, NEWBURYPORT DISTRICT COURT, MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 470 Mass. 1012, 20 N. E. 3d 256.

No. 14–1057. FULLER ET AL. *v.* DAVIS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 935.

No. 14–1063. BARNABY *v.* ANDREWS UNIVERSITY. Ct. App. Mich. Certiorari denied.

No. 14–1064. TERRY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2014 OK CR 14, 334 P. 3d 953.

No. 14–1087. HOLLANDER *v.* PEYTON ET AL. Ct. App. D. C. Certiorari denied.

No. 14–1092. BARNETT *v.* CONNECTICUT LIGHT & POWER CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 30.

No. 14–1094. HARRY'S NURSES REGISTRY, INC., ET AL. *v.* GAYLE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 714.

No. 14–1120. KOSILEK *v.* O'BRIEN, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 3d 63.

No. 14–1134. VASQUEZ *v.* CITIMORTGAGE, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 163 So. 3d 1213.

No. 14–1157. MYERS *v.* KNIGHT PROTECTIVE SERVICE, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 3d 1246.

No. 14–1171. HINOJOSA *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 262.

No. 14–1183. HUBBARD *v.* WASHINGTON MUTUAL BANK, FA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 539.

No. 14–1202. C. W. SALMAN PARTNERS ET AL. *v.* STANSELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 771 F. 3d 713.

No. 14–1203. BABARIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 775 F. 3d 593.

No. 14–8140. FEARANCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 416.

No. 14–8144. LARMANGER *v.* KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, DBA KAISER PERMANENTE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 578.

No. 14–8182. RODRIGUEZ-HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 830.

No. 14–8213. STEPHENS-MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 626.

No. 14–8223. MONJARAZ SALAS *v.* UNITED STATES (Reported below: 588 Fed. Appx. 343); ALCANTARA MEJIA, AKA ALCANTARA *v.* UNITED STATES (589 Fed. Appx. 267); TORRES-HERNANDEZ *v.* UNITED STATES (589 Fed. Appx. 266); CASTRO-NAJERA, AKA CASTRO NAJERA, AKA CASTRO *v.* UNITED STATES (590 Fed. Appx.

410); BANEGAS-ARIAS *v.* UNITED STATES (589 Fed. Appx. 312); and GASPAR, AKA GASPAR-GUTIERREZ, AKA GASPAR-GILBERTO, AKA GASPAR-GUETIERREZ *v.* UNITED STATES (591 Fed. Appx. 266). C. A. 5th Cir. Certiorari denied.

No. 14–8462. POOLE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 151 So. 3d 402.

No. 14–8645. DICKERSON *v.* MURRAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 515.

No. 14–8646. DAWSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 14–8651. WRIGHT *v.* WASHINGTON, WARDEN. Super. Ct. Muscogee County, Ga. Certiorari denied.

No. 14–8655. MOORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8656. MILLSAP *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 493, 449 S. W. 3d 701.

No. 14–8658. SHAKOURI *v.* RAINES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 505.

No. 14–8664. SENSALE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8667. KHALIFA *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 339.

No. 14–8669. NELSON *v.* DENMARK, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 14–8670. ERNANDEZ *v.* MERRILL LYNCH & CO., INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 14–8673. MARSHALL *v.* WYOMING DEPARTMENT OF CORRECTIONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 713.

No. 14–8675. HAIRSTON *v.* D'ILIO, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 578 Fed. Appx. 122.

No. 14–8676. REDDY *v.* NUANCE COMMUNICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 407.

No. 14–8677. KLAUDT *v.* DOOLEY, WARDEN. Sup. Ct. S. D. Certiorari denied.

No. 14–8679. REDDY *v.* MEDQUIST, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 411.

No. 14–8682. WINDHAM *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 911.

No. 14–8693. TRAUTH *v.* FOREST LABORATORIES, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8700. SWAIN *v.* HARRIS, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8702. MEIER *v.* MEGGS ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8704. HOFFMANN ET AL. *v.* MARION COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 256.

No. 14–8709. OJI *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 14–8710. VERA *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 14–8712. JONES *v.* NUECES COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 682.

No. 14–8715. KEMPO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 574 Fed. Appx. 1.

No. 14–8717. DEROCK *v.* SPRINT-NEXTEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 737.

No. 14–8720. BUCKLEY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8727. L. B. *v.* San Diego County Health and Human Services Agency. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–8728. Bryant *v.* Soto, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 290.

No. 14–8729. Stephens *v.* County of Hawaii Police Department. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 506.

No. 14–8731. Mendoza *v.* Madden, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 355.

No. 14–8732. Simmons *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8733. Dopp *v.* Oklahoma Department of Corrections. Sup. Ct. Okla. Certiorari denied.

No. 14–8735. Cunningham *v.* Department of Justice. C. A. D. C. Cir. Certiorari denied.

No. 14–8868. Jackson *v.* Fleming, Warden. Sup. Ct. Va. Certiorari denied.

No. 14–8890. Garcia *v.* Allison, Warden (two judgments). C. A. 9th Cir. Certiorari denied.

No. 14–8909. Hamilton *v.* McDaniel, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 634.

No. 14–8912. Miner *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 3d 336.

No. 14–8915. Everist *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 569.

No. 14–8927. Casciola *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8936. Harrison *v.* Biter, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8956. Hernandez *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 14–8983. ANTONIO HEREDIA *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 566 Fed. Appx. 853.

No. 14–9007. BARBER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 809.

No. 14–9018. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9023. YOUNG *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 542.

No. 14–9027. WRIGHT *v.* WILLIAMSBURG AREA MEDICAL ASSISTANCE CORP., AKA OLDE TOWNE MEDICAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 143.

No. 14–9035. BOWER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 520.

No. 14–9038. DUKES, AKA WHITE-GRIER *v.* NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 81.

No. 14–9086. SCAIFE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 190.

No. 14–9095. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 271.

No. 14–9104. REDDY *v.* WEBMEDX, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 403.

No. 14–9105. YONG LOR *v.* PERRY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9107. CZECK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9109. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 350.

No. 14–9127. CONYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 462.

No. 14–9128. DENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 775 F. 3d 1214.

No. 14–9133. REA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9140. HOLMES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 600 Fed. Appx. 853.

No. 14–9142. DELORME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9145. FITZGERALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 736.

No. 14–9146. SPENGLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9147. HERNANDEZ-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 562.

No. 14–9149. HENLEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 3d 893.

No. 14–9153. AMAYA-TEJADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 401.

No. 14–9155. GARCIA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 263.

No. 14–9157. PENA-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 398.

No. 14–9158. RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9162. SOTO-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9167. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 76 A. 3d 920.

No. 14–9171. BENITEZ *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 108 A. 3d 1253.

No. 14–9183. ROWLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9184. DOUGLAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 Fed. Appx. 702.

No. 14–9185. DAKING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 501.

No. 14–9186. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 85.

No. 14–9188. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 652.

No. 14–9190. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 3d 777.

No. 14–9194. CARLOS CABO *v.* HASTINGS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–9198. PETTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9201. LONG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 3d 653.

No. 14–9202. MARTIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 218 Md. App. 1, 96 A. 3d 765.

No. 14–9204. SUIBIN ZHANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 663.

No. 14–9206. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 941.

No. 14–9209. BRUMMETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9213. BURT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 14–9216. ASKEW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9221. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 909.

No. 14–9224. MORMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 214.

No. 14–912. NEW YORK *v.* LLOYD-DOUGLAS; and

No. 14–941. NEW YORK *v.* DUNBAR. Ct. App. N. Y. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 24 N. Y. 3d 304, 23 N. E. 3d 946.

No. 14–9024. TELLIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–10012. CARPENTER *v.* UNITED STATES, 572 U. S. 1158;

No. 14–752. GUNKLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 574 U. S. 1157;

No. 14–800. MCGEE-HUDSON *v.* AT&T ET AL., *ante*, p. 913;

No. 14–7378. CALDERON *v.* EVERGREEN OWNERS, INC., ET AL., 574 U. S. 1163;

No. 14–7538. RANGEL *v.* RIOS ET AL., 574 U. S. 1168;

No. 14–7571. THOMAS *v.* DUNCAN, WARDEN, 574 U. S. 1168;

No. 14–7707. WARREN-BEY *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 574 U. S. 1193;

No. 14–7850. ALLISON *v.* CITY OF BRIDGEPORT, ILLINOIS, ET AL., *ante*, p. 905;

No. 14–7873. MATA *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., *ante*, p. 916;

No. 14–8133. CARLUCCI, AKA ODICE *v.* UNITED STATES, *ante*, p. 920; and

No. 14–8175. THOMPSON *v.* UNITED STATES, 574 U. S. 1199. Petitions for rehearing denied.

No. 14–666. GRAY *v.* CITY OF NEW YORK, NEW YORK, ET AL., 574 U. S. 1155. Motion for leave to file petition for rehearing denied.

No. 14–8004. DYCHES *v.* MARTIN, *ante*, p. 907. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

MAY 12, 2015

Certiorari Denied

No. 14–9605 (14A1149). CHARLES *v.* TEXAS. 184th Jud. Dist. Ct. Tex., Harris County. Application for stay of execution of

sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 14–9684 (14A1157). CHARLES *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 612 Fed. Appx. 214.

MAY 13, 2015

Dismissal Under Rule 46

No. 14–1044. MALU *v.* LYNCH, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 764 F. 3d 1282.

MAY 18, 2015

Certiorari Dismissed

No. 14–8757. CLAY *v.* ZAE YOUNG ZEON ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8970. LACROIX *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari before judgment dismissed. See this Court's Rule 39.8.

No. 14–9019. LAVERGNE *v.* DATELINE NBC ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 597 Fed. Appx. 760.

No. 14–9032. BARTLETT *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* denied,

and certiorari dismissed. See this Court's Rule 39.8. Reported below: 367 N. C. 266, 749 S. E. 2d 458.

No. 14–9245. SIMMONS *v.* WILSON, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 589 Fed. Appx. 919.

Miscellaneous Orders

No. 14A1066. MEZA-NOYOLA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 14M112. PEREZ *v.* TEXAS A&M UNIVERSITY AT CORPUS CHRISTI ET AL.;

No. 14M113. SIMMS *v.* AARONS SALES & LEASE;

No. 14M114. WARREN *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; and

No. 14M116. LAMARCA *v.* JANSEN, CHAPTER 7 TRUSTEE. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M115. Y. W. *v.* NEW MILFORD PUBLIC SCHOOLS ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 142, Orig. FLORIDA *v.* GEORGIA. Motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of $47,635.01 for the period November 19, 2014, through March 31, 2015, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 574 U. S. 1021.]

No. 14–493. KENT RECYCLING SERVICES, LLC *v.* UNITED STATES ARMY CORPS OF ENGINEERS, *ante*, p. 912. Respondent is requested to file a response to petition for rehearing within 30 days.

No. 14–8204. MANGUM ET AL., INDIVIDUALLY AND AS PARENTS OF I. M., A MINOR *v.* RENTON SCHOOL DISTRICT #403. C. A. 9th Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 949] denied.

No. 14–8483. PINDER *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Motion of petitioner

for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 933] denied.

No. 14–8600. In re Adams. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 911] denied.

No. 14–8805. Graham *v.* Bluebonnet Trails Community Services. C. A. 5th Cir.;

No. 14–8867. Lea *v.* Lawrence, Trustee, et al. C. A. 6th Cir.; and

No. 14–8911. Pilger *v.* Department of Education et al. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 8, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9378. In re Miller;

No. 14–9451. In re Green Bey; and

No. 14–9481. In re Ornelas Castro. Petitions for writs of habeas corpus denied.

No. 14–8743. In re Sutton;

No. 14–8812. In re Halabi;

No. 14–8847. In re Cunningham;

No. 14–9057. In re Portnoy; and

No. 14–9058. In re Cunningham. Petitions for writs of mandamus denied.

No. 14–9294. In re Harris. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 14–857. Campbell-Ewald Co. *v.* Gomez. C. A. 9th Cir. Certiorari granted. Reported below: 768 F. 3d 871.

Certiorari Denied

No. 13–1547. Ridley School District *v.* M. R. et al., as Parents of E. R., a Minor. C. A. 3d Cir. Certiorari denied. Reported below: 744 F. 3d 112.

No. 14–564. Baker County Medical Services, Inc. *v.* Lynch, Attorney General, et al. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 3d 1274.

No. 14–622. KURETSKI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 755 F. 3d 929.

No. 14–654. SALAHUDDIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 765 F. 3d 329.

No. 14–655. PACKARD *v.* LEE, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 751 F. 3d 1307.

No. 14–705. TEVA PHARMACEUTICALS USA, INC., ET AL. *v.* HASSETT. Super. Ct. Pa. Certiorari denied. Reported below: 74 A. 3d 202.

No. 14–761. MCBRIDE, INDIVIDUALLY AND ON BEHALF OF I. M. S., ET AL. *v.* ESTIS WELL SERVICE, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 3d 382.

No. 14–774. MYER ET AL. *v.* AMERICO LIFE, INC., ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 440 S. W. 3d 18.

No. 14–835. MENDOZA MARTINEZ ET AL. *v.* AERO CARIBBEAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 3d 1062.

No. 14–953. OHIO EX REL. WASSERMAN ET AL. *v.* CITY OF FREMONT, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 471, 2014-Ohio-2962, 20 N. E. 3d 664.

No. 14–1020. MOODY ET AL. *v.* TATUM. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 3d 806.

No. 14–1079. BISCHOFF *v.* USA FUNDS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 965.

No. 14–1084. SCERBA ET AL. *v.* ALLIED PILOTS ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 554.

No. 14–1090. OLIVER ET AL. *v.* ORLEANS PARISH SCHOOL BOARD ET AL. Sup. Ct. La. Certiorari denied. Reported below: 2014–0329, 2014–0330 (La. 10/31/14), 156 So. 3d 596.

No. 14–1093. JONES *v.* FROST ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 3d 1183.

No. 14–1097. SEVOSTIYANOVA *v.* COBB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 666.

No. 14–1099. KAMMONA *v.* ONTECO CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 575.

No. 14–1100. LOOK *v.* CITY OF MOUNTAIN VIEW, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 297.

No. 14–1101. MACKINNON *v.* CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 44.

No. 14–1102. HURD *v.* SUPERIOR COURT OF CALIFORNIA, SAN MATEO COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 14–1104. BAILEY *v.* TRITT, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–1110. LAUER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–1112. GIBSON *v.* KILPATRICK. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 661.

No. 14–1113. CAMPBELL *v.* HINES, ENVIRONMENTAL ADMINISTRATOR, OHIO ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 357.

No. 14–1116. MOORE *v.* BLAIR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 577.

No. 14–1127. BATEY *v.* HAAS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 590.

No. 14–1137. MASHUE *v.* RIVARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–1141. WADE ET AL. *v.* CHASE BANK USA, N. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 291.

No. 14–1192. TULLBERG *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2014 WI 134, 359 Wis. 2d 421, 857 N. W. 2d 120.

No. 14–1207. BARKER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 467, 448 S. W. 3d 197.

No. 14–1222. COOMBS *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 129.

No. 14–1232. BUONORA *v.* COGGINS. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 3d 108.

No. 14–1234. GUNTER, AKA BAXTER *v.* UNITED STATES; and No. 14–9346. ODONI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 782 F. 3d 1226.

No. 14–1235. GERALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 224.

No. 14–1237. QUIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 692.

No. 14–1245. PEN, DBA PEOPLE'S EMAIL NETWORK *v.* WMAL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 14–7176. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 F. 3d 891.

No. 14–7884. LARKIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 147 So. 3d 452.

No. 14–8190. ADKINS *v.* BANK OF AMERICA, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 61.

No. 14–8241. QUEZADA ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 770 F. 3d 366.

No. 14–8291. BEATTY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 3d 455.

No. 14–8380. OYENIRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 338.

No. 14–8540. BRUMWELL *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 264 Ore. App. 784, 333 P. 3d 364.

No. 14–8601. BROWN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS PAROLE BOARD. C. A. 6th Cir. Certiorari denied.

No. 14–8736. EILER *v.* AVERA MCKENNAN HOSPITAL ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 854 N. W. 2d 353.

No. 14–8747. ICENOGLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8753. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8754. STUCKEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8756. DICKSON *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8759. WARZEK *v.* LACKNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 453.

No. 14–8760. THOMAS *v.* ROCKBRIDGE REGIONAL JAIL. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 224.

No. 14–8761. WIGGINTON ET AL. *v.* BANK OF AMERICA CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 521.

No. 14–8765. LEACHMAN *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 390.

No. 14–8766. KIRK *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 14–8767. ROEDER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 901, 336 P. 3d 831.

No. 14–8777. BROWN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–8778. CARE ET AL. *v.* MUNICIPAL HOUSING AUTHORITY OF THE CITY OF YONKERS, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8779. DOOLEY *v.* MYLAN PHARMACEUTICALS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 757.

No. 14–8783. MAY *v.* BARBER ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8792. BORRELL *v.* WILLIAMS, COLORADO SECRETARY OF STATE. Sup. Ct. Colo. Certiorari denied.

No. 14–8796. SPIKER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8799. COLEMAN *v.* SCHOLLMEYER, SPECIAL JUDGE, CIRCUIT COURT OF MISSOURI, COLE COUNTY, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 14–8800. GALVAN *v.* ESCOBAR. C. A. 9th Cir. Certiorari denied.

No. 14–8804. FANA *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 954.

No. 14–8807. PATCH *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 13 N. E. 3d 913.

No. 14–8808. MORROW *v.* ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8815. LEWIS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 427 S. W. 3d 500.

No. 14–8819. MESSINA *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied.

No. 14–8820. SEARS *v.* THOMAS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8823. CASHIOTTA *v.* DIVISION OF PARKS AND MAINTENANCE, CLEVELAND, OHIO. Sup. Ct. Ohio. Certiorari denied.

Reported below: 139 Ohio St. 3d 1402, 2014-Ohio-2245, 9 N. E. 3d 1060.

No. 14–8824. DAVIS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 327 Ga. App. 729, 761 S. E. 2d 139.

No. 14–8826. TAYLOR *v.* VERIZON COMMUNICATIONS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 107 A. 3d 1117.

No. 14–8827. WOODSON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–8831. DAVIS ET AL. *v.* CITY OF NEW HAVEN, CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8833. NOLAN *v.* PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 534.

No. 14–8834. SAYERS *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 138.

No. 14–8839. BROOKS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 157 So. 3d 1041.

No. 14–8842. MOORE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8846. MILLER *v.* ABC HOLDING CO., INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8850. JACKSON *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 2013–00808 (La. App. 3 Cir. 2/12/14), 131 So. 3d 1134.

No. 14–8851. YOUNG *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 14–8853. DUNIGAN *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8858. FARRAJ *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8860. HAENDEL *v.* DIGIANTONIO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 259.

No. 14–8861. CRANEY *v.* FUJISHIGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 348.

No. 14–8869. MCNEILL *v.* WAYNE COUNTY, MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 14–8871. MCILWAINE *v.* MCILWAINE ET AL. C. A. 4th Cir. Certiorari denied.

No. 14–8872. PAGAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 14–8873. TORRENCE *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 14–8874. TAYLOR *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–8875. TAYLOR *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 3d 1284.

No. 14–8878. MCCOY *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8881. GOLDEN *v.* OHIO. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2014-Ohio-2148.

No. 14–8889. FLORES *v.* JANDA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8891. SACHS *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8892. C. G. *v.* WHELAN. Sup. Ct. N. D. Certiorari denied. Reported below: 2013 ND 205, 839 N. W. 2d 841.

No. 14–8897. ABRAMS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8899. BUNCH *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8919. DEL RANTZ *v.* HARTLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 805.

No. 14–8954. VENKATARAM *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 568 Fed. Appx. 63.

No. 14–8961. LISNICHY *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 427.

No. 14–8987. LOPEZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 106 A. 3d 160.

No. 14–8997. PRATHER *v.* SOUTH CAROLINA. Ct. Common Pleas of Aiken County, S. C. Certiorari denied.

No. 14–9039. HUERATA ORDUNA *v.* STEWARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9045. DE JESUS MORAN *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 14–9060. HEATHER S. *v.* CONNECTICUT COMMISSIONER OF CHILDREN AND FAMILIES. App. Ct. Conn. Certiorari denied. Reported below: 151 Conn. App. 724, 95 A. 3d 1258.

No. 14–9063. GREEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 803, 766 S. E. 2d 850.

No. 14–9065. RILEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 166 So. 3d 705.

No. 14–9068. RIVAS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 14–9079. JONES *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD. C. A. 3d Cir. Certiorari denied.

No. 14–9081. HAYES *v.* BLADES ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 14–9096. HARVEY *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 14–9111. KIEREN *v.* LAXALT, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 305.

No. 14–9116. TEMPLE *v.* MILLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9121. BOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 637.

No. 14–9123. BRADLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–9152. MCKINNEY *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 587 Fed. Appx. 655.

No. 14–9168. TOLEN *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9182. CUNNINGHAM *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 598 Fed. Appx. 790.

No. 14–9193. CHAPPELL *v.* OHIO. Ct. App. Ohio, 7th App. Dist., Mahoning County. Certiorari denied. Reported below: 2014-Ohio-3877.

No. 14–9203. ROSARIO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 87 A. 3d 888.

No. 14–9208. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 14–9210. BARKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–9214. CRUMP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 579.

No. 14–9215. BUHL *v.* BERKEBILE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 958.

No. 14–9222. VAUGHTER *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9226. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9228. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 371.

No. 14–9231. RIZO-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 442.

No. 14–9233. ESPINAL *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9235. MARCHET *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2014 UT App 147, 330 P. 3d 138.

No. 14–9236. BACH TUYET TRAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 139.

No. 14–9238. ETIENNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9242. DIAZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 363.

No. 14–9244. COPELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 255.

No. 14–9246. DUNBAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 604 Fed. Appx. 437.

No. 14–9249. KEEL *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 602 Fed. Appx. 522.

No. 14–9250. PLEDGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 229.

No. 14–9251. BOOKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 390.

No. 14–9252. BARRERA ALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 290.

No. 14–9256. PRATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9258. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9261. ORTIZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 3d 964.

No. 14–9262. NORMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 776 F. 3d 67.

No. 14–9263. NAMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9266. COMBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–9271. WHITWORTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9272. ZEPHIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 813.

No. 14–9273. LEDESMA-NOLASCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 147.

No. 14–9274. GALVAN-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 270.

No. 14–9276. CHAVOUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 468.

No. 14–9277. EPPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–9280. WILLIAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 217 Md. App. 758.

No. 14–9281. BECK ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 147.

No. 14–9282. BACA-ARIAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 221.

No. 14–9285. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 773 F. 3d 98.

No. 14–9288. JEFFERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9290. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 218.

No. 14–9295. DE LA CRUZ *v.* QUINTANA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9296. DE LA CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9303. ALVAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 601 Fed. Appx. 16.

No. 14–9310. GAMEZ REYES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 3d 1152 and 585 Fed. Appx. 660.

No. 14–9314. VIERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9318. LOCKHART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 Fed. Appx. 170.

No. 14–9321. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 172.

No. 14–9329. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9331. HUNTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 770 F. 3d 740.

No. 14–9332. AVILA-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 376.

No. 14–9333. BENNETT, AKA SHANNON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 604 Fed. Appx. 11.

No. 14–9341. LUIS MEDEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 601.

No. 14–9350. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 784.

No. 14–9351. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9359. PARSHALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 485.

No. 14–9363. GODETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 212.

No. 14–9366. DUTERVIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 204.

No. 14–9371. RASHID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 132.

No. 14–9372. MANUEL JORGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 766.

No. 14–9386. GREGG *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–1416. GORDON ET AL. *v.* BANK OF AMERICA, N. A., ET AL. C. A. 10th Cir. Motion of Public Citizen, Inc., et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 743 F. 3d 720.

No. 14–849. AMERICAN CYANAMID CO. ET AL. *v.* GIBSON. C. A. 7th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 760 F. 3d 600.

No. 14–872. O'KEEFE ET AL. *v.* CHISHOLM ET AL. C. A. 7th Cir. Motions of Wisconsin Institute for Law & Liberty, MacIver Institute for Public Policy, Cause of Action, Center for Competitive Politics et al., and Cato Institute for leave to file briefs as *amici curiae* granted. Motion of respondents John T. Chisholm, David Robles, and Bruce J. Landgraf for leave to file brief in opposition under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 769 F. 3d 936.

No. 14–931. HOLBROOK, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* WOODS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 764 F. 3d 1109.

No. 14–958. CHAPMAN ET VIR *v.* PROCTER & GAMBLE DISTRIBUTING, LLC, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 766 F. 3d 1296.

No. 14–1080. GONZALEZ *v.* PLANNED PARENTHOOD OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Motion of Professor Joel D. Hesch for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 759 F. 3d 1112.

No. 14–9324. WARE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 14–9337. WEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–9348. WELLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 590 Fed. Appx. 77.

Rehearing Denied

No. 14–888. SLATER *v.* HARDIN ET AL., *ante*, p. 936;
No. 14–917. DEMERS *v.* FLORIDA, *ante*, p. 914;
No. 14–948. CAUDILL *v.* UNITED STATES, *ante*, p. 914;
No. 14–1108. YUFA *v.* TSI, INC., *ante*, p. 964;
No. 14–5246. HODGES *v.* CARPENTER, WARDEN, *ante*, p. 915;
No. 14–5856. MATTHEWS *v.* MIKOLAITIES ET AL., 574 U. S. 915;
No. 14–7599. RODGERS *v.* PERKINS ET AL., 574 U. S. 1169;
No. 14–7692. TERRELL *v.* GOWER ET AL., 574 U. S. 1173;
No. 14–7749. COLEMAN *v.* JABE ET AL., 574 U. S. 1195;
No. 14–7782. DONG LANG *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, 574 U. S. 1196;
No. 14–7810. BELL *v.* BERGHUIS, WARDEN, 574 U. S. 1196;
No. 14–7819. IN RE WILSON, 574 U. S. 1190;
No. 14–7823. DAVILA *v.* UNITED STATES, 574 U. S. 1177;
No. 14–7956. HINCHLIFFE *v.* WELLS FARGO BANK, *ante*, p. 917;
No. 14–8098. MADISON *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 919;
No. 14–8152. IN RE AJAMIAN, *ante*, p. 934;
No. 14–8161. YUNG LO *v.* GOLDEN GAMING, INC., ET AL., *ante*, p. 952;
No. 14–8164. COCHRUN *v.* DOOLEY, WARDEN, *ante*, p. 940;
No. 14–8184. BLAND *v.* OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSN., *ante*, p. 940;

No. 14–8211. SIMMS *v.* BESTEMPS CAREER ASSOCIATES, *ante*, p. 941;

No. 14–8216. DARWICH *v.* UNITED STATES, 574 U. S. 1200;

No. 14–8317. NIE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 921;

No. 14–8348. HOLMES *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 921;

No. 14–8386. BLANGO *v.* UNITED STATES, *ante*, p. 922;

No. 14–8417. BURT *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 922;

No. 14–8444. IN RE JOHNSON, *ante*, p. 902;

No. 14–8593. MAJORS *v.* UNITED STATES, *ante*, p. 944; and

No. 14–8610. CAMPBELL *v.* UNITED STATES, *ante*, p. 944. Petitions for rehearing denied.

MAY 26, 2015

Certiorari Dismissed

No. 14–9025. SHOVE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–9030. LAVERGNE *v.* HARSON ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 361.

No. 14–9043. LAVERGNE *v.* PUBLIC DEFENDER 15TH JUDICIAL DISTRICT COURT ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 362.

No. 14–9044. LAVERGNE *v.* LOUISIANA STATE POLICE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 363.

No. 14–9248. LYLES *v.* MCCAIN, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–9485. FLORENCE *v.* BECHTOLD, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–9486. RUIZ *v.* BUTLER, WARDEN. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 589 Fed. Appx. 48.

Miscellaneous Orders

No. 14A1070. LIBBERT *v.* UNITED STATES. Application for bail, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 14M117. CHANEY *v.* RACES AND ACES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 14M118. WILBORN *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY. Motion for leave to proceed as a veteran granted.

No. 14–8337. CAMPBELL *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 933] denied.

No. 14–8965. ROWELL *v.* METROPOLITAN LIFE INSURANCE CO. C. A 11th Cir.;

No. 14–9036. DORWARD *v.* MACY'S, INC. C. A. 11th Cir.;

No. 14–9239. COLES *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir.; and

No. 14–9301. BLOUNT *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 16, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9534. IN RE JONES;

No. 14–9535. IN RE RANKIN; and

No. 14–9609. IN RE NORMAN. Petitions for writs of habeas corpus denied.

No. 14–8923. IN RE PORTNOY; and

No. 14–8932. IN RE MITCHELL. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 14–940. EVENWEL ET AL. *v.* ABBOTT, GOVERNOR OF TEXAS, ET AL. Appeal from D. C. W. D. Tex. Probable jurisdiction noted.

Certiorari Granted

No. 14–8349. FOSTER *v.* CHATMAN, WARDEN. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 14–8358. LOCKHART *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 749 F. 3d 148.

Certiorari Denied

No. 14–812. DE BOISE ET AL. *v.* ST. LOUIS COUNTY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 760 F. 3d 892.

No. 14–845. FIRST AMERICAN TITLE INSURANCE CO. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 750 F. 3d 573.

No. 14–975. COHEN *v.* NVIDIA CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 3d 1046.

No. 14–986. SHADADPURI *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 767 F. 3d 1288.

No. 14–989. MURPHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–995. METROPOLITAN EDISON CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 3d 335.

No. 14–1053. YAMAN *v.* YAMAN. Sup. Ct. N. H. Certiorari denied. Reported below: 167 N. H. 82, 105 A. 3d 600.

No. 14–1119. IBSON *v.* UNITED HEALTHCARE SERVICES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 776 F. 3d 941.

No. 14–1130. NEVADA *v.* CONNER. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 457, 327 P. 3d 503.

No. 14–1139. ESTATE OF BROWN *v.* THOMAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 3d 1001.

No. 14–1144. RYAN *v.* ZEMANIAN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 406.

No. 14–1147. RYAN *v.* QUICK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 486.

No. 14–1148. RYAN ET AL. *v.* HYDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 699.

No. 14–1149. RYAN *v.* HYDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 653.

No. 14–1150. MEDFORD VILLAGE EAST ASSOCIATES ET AL. *v.* TOWNSHIP OF MEDFORD, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–1151. BOYD ET AL. *v.* NEW JERSEY DEPARTMENT OF CORRECTIONS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 583 Fed. Appx. 30.

No. 14–1152. RYAN *v.* RUBY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 59.

No. 14–1155. BAUER *v.* MARMARA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 774 F. 3d 1026.

No. 14–1156. BISHOP ET AL. *v.* CITY OF GALVESTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 372.

No. 14–1158. CAIRNS ET AL. *v.* LSF6 MERCURY REO INVESTMENTS TRUST SERIES 2008–1 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 348.

No. 14–1161. RYAN *v.* HYDEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 416.

No. 14–1163. SIMS ET AL. *v.* FITZPATRICK ET AL. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–1165. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE ET AL. *v.* BERCH, CHIEF JUSTICE, SUPREME COURT OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 773 F. 3d 1037.

No. 14–1169. GOLDBLATT *v.* CITY OF KANSAS CITY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 14–1173. JOHNSON *v.* ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 14–1174. WALLACE *v.* LAMSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 283.

No. 14–1180. HEINTZ ET UX. *v.* JPMORGAN CHASE BANK, N. A., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 181 Wash. App. 1033.

No. 14–1182. BOYD *v.* GMAC MORTGAGE LLC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 656.

No. 14–1210. CLARK *v.* FAIRFAX COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 123.

No. 14–1219. ISAACS *v.* NEW HAMPSHIRE BOARD OF MEDICINE. Sup. Ct. N. H. Certiorari denied.

No. 14–1223. ATWOOD *v.* CERTAINTEED CORP. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 157.

No. 14–1224. E. A. F. F. ET AL. *v.* GONZALEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 205.

No. 14–1236. STOP THE CASINO 101 COALITION ET AL. *v.* BROWN, GOVERNOR OF CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied. Reported below: 230 Cal. App. 4th 280, 178 Cal. Rptr. 3d 481.

No. 14–1242. LEWIS *v.* WASHINGTON STATE UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 271.

No. 14–1249. BASU *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 594 Fed. Appx. 981.

No. 14–1262. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 764 F. 3d 554.

No. 14–1269. MOORE *v.* LIGHTSTROM ENTERTAINMENT, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 143.

No. 14–1275. VERDUGO ET AL. *v.* TARGET CORP. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 3d 1203.

No. 14–1284. SMITH ET AL. *v.* GUARDIAN LIFE INSURANCE COMPANY OF AMERICA. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 116 App. Div. 3d 1031, 984 N. Y. S. 2d 597.

No. 14–1287. SUMNER *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–7448. ROACH, AKA HOLMES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 219 N. J. 58, 95 A. 3d 683.

No. 14–7993. LEE *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 628 Pa. 10, 102 A. 3d 419.

No. 14–8008. BRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 753.

No. 14–8160. JONES *v.* LOCKHEED MARTIN CORP. C. A. 11th Cir. Certiorari denied.

No. 14–8401. J. M., A JUVENILE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2014–0054 (La. App. 4 Cir. 8/27/14), 147 So. 3d 1270.

No. 14–8492. WILSON *v.* UNITED STATES; and
No. 14–8545. GADSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 3d 1189.

No. 14–8624. MILIAN *v.* WELLS FARGO BANK, N. A., ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 151 So. 3d 1257.

No. 14–8894. GETHERS *v.* HARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 763.

No. 14–8907. HARRIS *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES ET AL. Ct. App. Ark. Certiorari denied. Reported below: 2014 Ark. App. 447.

No. 14–8908. SEWELL *v.* HOWARD. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 277.

No. 14–8922. SMITH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 94.

No. 14–8929. FOSTER *v.* FRANKLIN COUNTY COMMON PLEAS COURT ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8934. GUILLEMETTE *v.* GUILLEMETTE. Sup. Ct. N. H. Certiorari denied.

No. 14–8935. HILL *v.* CHAVIS. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 97.

No. 14–8941. GREENSHIELDS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 14–8945. HARMON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 136 So. 3d 1223.

No. 14–8947. DAKER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8948. DAKER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8949. DAKER *v.* HEAD ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8950. DAKER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8951. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8957. ANDRADE CALLES *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. C. A. 9th Cir. Certiorari denied.

No. 14–8962. AMES *v.* KOTORA. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 14–8966. HILL *v.* VIRGA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 723.

No. 14–8975. HOFFMAN *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8977. BLANCO-HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8978. GRAVES *v.* WINGARD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–8982. FISHER *v.* YELICH, SUPERINTENDENT, BARE HILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–8984. GARCIA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8986. SHABAZZ *v.* RICHARDS, ACTING JUDGE, FRANKLIN COUNTY COURT OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 990, 2 N. E. 3d 924.

No. 14–8988. CAMPBELL *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 14–8990. TANASESCU *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 502.

No. 14–8991. LEGRONE *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 571 Fed. Appx. 417.

No. 14–8992. ROBINSON *v.* JARRELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 212.

No. 14–8994. MCGEE *v.* CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 638.

No. 14–8998. HULETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 296 Ga. 49, 766 S. E. 2d 1.

No. 14–9002. MASSEY *v.* WALKER ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–9003. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 111525–U.

No. 14–9006. BIGBY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 350.

No. 14–9009. TYLER *v.* LASSITER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 104.

No. 14–9014. CUMBERLAND *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9028. SHEHEE *v.* BACA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 716.

No. 14–9031. BARASHKOFF *v.* CITY OF SEATTLE, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9033. BREWER *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9040. MCCLENDON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9046. MOORE *v.* HELLING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 763 F. 3d 1011.

No. 14–9059. DEROCK *v.* SPRINT-NEXTEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 556.

No. 14–9061. HENRY *v.* HAWS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 359.

No. 14–9069. CODIGA *v.* UTTECHT, SUPERINTENDENT, COYOTE RIDGE CORRECTIONS CENTER. Sup. Ct. Wash. Certiorari denied.

No. 14–9099. D'AMICO *v.* HOLMES, ADMINISTRATOR, SOUTH WOODS STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 76.

No. 14–9112. KRETCHMAR *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 14–9125. SULLIVAN *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9177. PEREZ-CHINCHILLA *v.* LYNCH, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 595 Fed. Appx. 139.

No. 14–9192. ELLIS *v.* IDAHO. Ct. App. Idaho. Certiorari denied.

No. 14–9199. KRAFT *v.* CITY OF MOBILE, ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 867.

No. 14–9259. SERRANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 598 Fed. Appx. 72.

No. 14–9265. KIRK *v.* PRICE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 684.

No. 14–9307. SUMMERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 157.

No. 14–9316. MUTH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 120914–U.

No. 14–9334. BARTKO *v.* WHEELER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 181.

No. 14–9345. MAGALLON PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 285.

No. 14–9353. BERRELLEZA-VERDUZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 707.

No. 14–9354. ANDREWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9360. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 512.

No. 14–9361. JENKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9364. GARCIA-MONROY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 429.

No. 14–9365. GARREY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 14–9377. GERAGHTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 572 Fed. Appx. 456.

No. 14–9390. Cooper *v.* Varouxis, Executrix of Theodore Varouxis Estate and Trust. Sup. Ct. Va. Certiorari denied.

No. 14–9399. Files *v.* Jarvis, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 576 Fed. Appx. 938.

No. 14–9404. Padilla-Garcia *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 253.

No. 14–9406. Nunley *v.* Nooth, Superintendent, Snake River Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 14–9407. Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 430.

No. 14–9418. Candelario *v.* Wilson, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 784.

No. 14–9424. Santiago-Serrano *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 598 Fed. Appx. 17.

No. 14–9426. Taylor *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–9428. Aquino Lafuente *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 141.

No. 14–9444. Webster *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 3d 897.

No. 14–9445. Trufant *v.* Department of the Air Force. C. A. Fed. Cir. Certiorari denied. Reported below: 578 Fed. Appx. 982.

No. 14–9449. Atwood *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 455.

No. 14–9454. Ojeda Cabada *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 613.

No. 14–9456. Brewer *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9457. Andrews *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 14–9458. FULTZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 226.

No. 14–9461. BERGRIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 439.

No. 14–9466. HOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 3d 638.

No. 14–9468. CARTAGENA-CRUZ, AKA MELLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9474. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 170.

No. 14–9475. JONES *v.* UNITED STATES CONGRESS ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9478. CARWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 773 F. 3d 837.

No. 14–9480. CRADDOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 235.

No. 14–9482. CHILDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9488. ESTUPINAN-SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 260.

No. 14–9492. CHAMBERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 597 Fed. Appx. 707.

No. 14–751. PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA ET AL. *v.* COUNTY OF ALAMEDA, CALIFORNIA, ET AL. C. A. 9th Cir. Motions of Chamber of Commerce of the United States of America and Washington Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 768 F. 3d 1037.

No. 14–1199. TARTT *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 14–9013. CHENG *v.* SCHLUMBERGER. C. A. 5th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 583 Fed. Appx. 422.

No. 14–9368. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 14–7543. WHITE *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., 574 U. S. 1168;

No. 14–7791. GONZALEZ *v.* FLORIDA, 574 U. S. 1196;

No. 14–8137. DAVIS *v.* PARKER, AKA ADAMS, AKA SPEARBECK, *ante*, p. 940;

No. 14–8200. DEMARY *v.* VIRGINIA, *ante*, p. 952;

No. 14–8215. SCHEUING *v.* ALABAMA, *ante*, p. 941;

No. 14–8347. GREEN *v.* LESTER, WARDEN, *ante*, p. 942;

No. 14–8488. JOSEPH *v.* DONAHOE, POSTMASTER GENERAL, *ante*, p. 943;

No. 14–8594. CASTEEL *v.* UNITED STATES, *ante*, p. 944; and

No. 14–8741. BAMDAD *v.* UNITED STATES, *ante*, p. 956. Petitions for rehearing denied.

JUNE 1, 2015

Certiorari Granted—Vacated and Remanded

No. 14–238. UNITED STATES EX REL. SHEA *v.* CELLCO PARTNERSHIP, DBA VERIZON WIRELESS, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, *ante*, p. 650. Reported below: 748 F. 3d 338.

Certiorari Granted—Reversed. (See No. 14–939, *ante*, p. 822.)

Certiorari Dismissed

No. 14–9089. MARIN *v.* RICE. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 630 Pa. 330, 106 A. 3d 678.

No. 14–9144. DIXON *v.* HART, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 14M119. CARTER ET AL. *v.* HOUSTON BUSINESS DEVELOPMENT, INC.; and

No. 14M121. SCHAFLER *v.* BANK OF AMERICA MERRILL LYNCH. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M120. CHARNOCK *v.* VIRGINIA ET AL. Motion for leave to proceed as a veteran denied.

No. 14–1168. SMITH *v.* AEGON COMPANIES PENSION PLAN. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 14–8491. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL. Ct. App. Mich. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 961] denied.

No. 14–9078. BARRY *v.* DIALLO. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 25, 2015, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 14–1334. IN RE VADDE; and
No. 14–9667. IN RE SHEPPARD. Petitions for writs of habeas corpus denied.

No. 14–9683. IN RE CARLTON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 14–9075. IN RE PORTNOY. Petition for writ of mandamus denied.

No. 14–9126. IN RE SPENGLER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 14–384. DIAZ-BARBA ET AL. *v.* KISMET ACQUISITION, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 757 F. 3d 1044.

No. 14–740. MASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 512.

No. 14–790. BRIDGESTONE RETAIL OPERATIONS, LLC, FKA MORGAN TIRE & AUTO, LLC *v.* BROWN ET AL. Sup. Ct. Cal. Certiorari denied.

No. 14–932. CITY OF FARMINGTON HILLS, MICHIGAN, ET AL. *v.* MARSHALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 516.

No. 14–1000. MURPHY ET AL. *v.* VERIZON COMMUNICATIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 140.

No. 14–1004. PYSARENKO *v.* CARNIVAL CORP., DBA CARNIVAL CRUISE LINES. C. A. 11th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 844.

No. 14–1005. SECURITY HEALTH CARE, L. L. C., DBA GRACE LIVING CENTER-NORMAN, ET AL. *v.* BOLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF BOLER. Sup. Ct. Okla. Certiorari denied. Reported below: 2014 OK 80, 336 P. 3d 468.

No. 14–1008. HARDIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 1409, 2014-Ohio-3785, 15 N. E. 3d 878.

No. 14–1028. DUBLE *v.* FEDEX GROUND PACKAGE SYSTEM, INC. C. A. 11th Cir. Certiorari denied. Reported below: 572 Fed. Appx. 889.

No. 14–1040. WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., ET AL. *v.* GARCIA PADILLA, GOVERNOR OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 3d 1.

No. 14–1154. UNITED STATES EX REL. MASTEJ *v.* HEALTH MANAGEMENT ASSOCIATES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 693.

No. 14–1166. TRAVERS *v.* CELLCO PARTNERSHIP, DBA VERIZON WIRELESS. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 409.

No. 14–1170. GUERRA-DELGADO ET AL. *v.* POPULAR, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 774 F. 3d 776.

No. 14–1178. KAMPS *v.* BAYLOR UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 282.

No. 14–1186. SCIENTIFIC PLASTIC PRODUCTS, INC. *v.* BIOTAGE AB. C. A. Fed. Cir. Certiorari denied. Reported below: 766 F. 3d 1355.

No. 14–1187. HRALIMA *v.* BACA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–1195. DOWNEY ET AL. *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. C. A. 6th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 587.

No. 14–1213. WETHERBE *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 323.

No. 14–1215. JONES *v.* JONES. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 14–1228. JACKSON *v.* OWENS CORNING/FIBERBOARD ASBESTOS PERSONAL INJURY SETTLEMENT TRUST. C. A. 7th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 908.

No. 14–1243. MEINTS *v.* CITY OF BEATRICE, NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 289 Neb. 558, 856 N. W. 2d 410.

No. 14–1256. KAZZAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 553.

No. 14–1282. BOSHEARS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 85 Mass. App. 1124, 10 N. E. 3d 177.

No. 14–1283. ADMIRALTY CONDOMINIUM ASSN., INC. *v.* DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, NATIONAL FLOOD INSURANCE PROGRAM. C. A. 3d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 738.

No. 14–1303. PARAMOUNT CONTRACTORS & DEVELOPERS, INC., ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 14–8011. LESTER *v.* LONG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 738.

No. 14–8107. CAMILLO-AMISANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–8204. MANGUM ET AL., INDIVIDUALLY AND AS PARENTS OF I. M., A MINOR *v.* RENTON SCHOOL DISTRICT #403. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 618.

No. 14–8381. MODANLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 762 F. 3d 403.

No. 14–8413. SMITH *v.* CITY OF ST. MARTINVILLE, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 435.

No. 14–8840. GUARASCIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 288.

No. 14–9020. WRIGHT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 3d 1256.

No. 14–9047. ZAMORA *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 14–9052. THEMEUS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9053. ZINK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 14–9067. ALBERTO SALGADO *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9071. WEDGEWORTH *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–9072. JACOBS *v.* BIANDO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 838.

No. 14–9074. MCELFRESH *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Licking County. Certiorari denied. Reported below: 2014-Ohio-2605.

No. 14–9080. JONES *v.* WOLFE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 242.

No. 14–9084. MCMANUS *v.* JUSTICE OF THE PEACE COURT #13. Sup. Ct. Del. Certiorari denied.

No. 14–9085. DAWSON *v.* ABSTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 162.

No. 14–9088. DOSS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–9093. BURNS *v.* FOX, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9097. ROBINSON *v.* BENJAMIN. C. A. 5th Cir. Certiorari denied.

No. 14–9098. DINGLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–9101. ROBBINS *v.* BOULDER COUNTY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 710.

No. 14–9110. TROY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 3d 1305.

No. 14–9115. WEST *v.* MAGRUDER ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9117. WILLIAMS *v.* ARTUS ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–9120. PARKER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 595.

No. 14–9129. LANZA *v.* DISTRICT ATTORNEY OF DELAWARE COUNTY ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9131. AVILA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 14–9134. MURFF *v.* CORIZON MEDICAL SERVICES ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–9136. VALENZUELA, FKA MENDEZ *v.* CORIZON HEALTH CARE ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9137. LUCAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 60 Cal. 4th 153, 333 P. 3d 587.

No. 14–9141. COAKLEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9143. COLLINS *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 14–9179. DOWNING *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 158 So. 3d 575.

No. 14–9181. PETERKA *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–9189. PREACELY *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 588 Fed. Appx. 996.

No. 14–9212. BENEFIELD *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 153 Conn. App. 691, 103 A. 3d 990.

No. 14–9234. CABEZA *v.* GRIFFIN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9237. MOELLER *v.* GILBERT. C. A. 9th Cir. Certiorari denied.

No. 14–9241. FOSTER *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 14–9243. DICH *v.* JACQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 639.

No. 14–9257. SALARY *v.* NUSS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 543.

No. 14–9279. DAVIS *v.* KEITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–9287. DAMIAN PENA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 181 Wash. App. 1023.

No. 14–9319. JAMISON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 410 S. C. 456, 765 S. E. 2d 123.

No. 14–9322. KRATOCHVIL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–9340. JACKSON *v.* DOMZALSKI. C. A. 3d Cir. Certiorari denied. Reported below: 598 Fed. Appx. 811.

No. 14–9352. BEARD *v.* LIZARRAGA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 856.

No. 14–9356. CARRASCOSA *v.* ARTHUR, ADMINISTRATOR, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9379. HINGLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 153 So. 3d 659.

No. 14–9384. SHI WEI GUO *v.* LYNCH, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 140.

No. 14–9387. LYON *v.* WISE CARTER CHILD AND CARAWAY, P. A., ET AL. (three judgments). C. A. 5th Cir. Certiorari denied.

No. 14–9398. GIBSON *v.* PAQUIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 635.

No. 14–9400. HAMPTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 113 App. Div. 3d 1131, 977 N. Y. S. 2d 859.

No. 14–9403. REECE *v.* DICKENSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 398.

No. 14–9423. JONES *v.* WILSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 826.

No. 14–9429. HAMMONDS *v.* BO'S FOOD STORE. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 279.

No. 14–9431. HILL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 120506, 9 N. E. 3d 65.

No. 14–9437. BASNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9493. POWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 3d 719.

No. 14–9494. ONCIU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 703.

No. 14–9502. VELAZQUEZ-CORCHADO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9503. WARREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 14–9507. ROBISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 3d 256.

No. 14–9510. ARMSTRONG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 Fed. Appx. 169.

No. 14–9511. BEJARANO-ORDONEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 254.

No. 14–9512. BAILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9514. COX *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9520. ALEXANDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9522. DUNGY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9529. DANIEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9537. TRUMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 26.

No. 14–9538. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9546. NAILON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 Fed. Appx. 766.

No. 14–9547. McMillian *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 444.

No. 14–9551. McDuffie *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 403.

No. 14–9553. Walker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 302.

No. 14–9557. Bryant *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–9558. Gallegos-Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 238.

No. 13–1162. Purdue Pharma L. P. et al. *v.* United States ex rel. May et al. C. A. 4th Cir. Motions of Pharmaceutical Research and Manufacturers of America et al. and Washington Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 737 F. 3d 908.

No. 14–631. Manzano *v.* Indiana. Ct. App. Ind. Certiorari denied. Justice Sotomayor dissents. Reported below: 12 N. E. 3d 321.

No. 14–825. County of Maricopa, Arizona, et al. *v.* Lopez-Valenzuela et al. C. A. 9th Cir. Certiorari denied. Justice Alito dissents. Reported below: 770 F. 3d 772.

Justice Thomas, with whom Justice Scalia joins, dissenting.

The Court's refusal to hear this case shows insufficient respect to the State of Arizona, its voters, and its Constitution. And it suggests to the lower courts that they have free rein to strike down state laws on the basis of dubious constitutional analysis. I respectfully dissent.

In 2006, Arizona voters amended their State Constitution to render ineligible for bail those individuals charged with "serious felony offenses" who have "entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." Ariz. Const., Art. II, § 22(A)(4). A divided en banc panel of the U. S. Court of Appeals for the Ninth Circuit held this provision unconstitutional under two theories based on the "substantive component of the Due Process Clause." *Lopez-Valenzuela* v. *Arpaio*, 770 F. 3d 772, 775 (2014).

It first reasoned that the amendment implicates a fundamental interest "'in liberty'" and is not narrowly tailored to serve Arizona's interest in ensuring that persons accused of crimes are available for trial. *Id.*, at 780–786. Second, the court held that the amendment "violate[s] substantive due process by imposing punishment before trial." *Id.*, at 791.

Shortly after that decision, Arizona sought a stay of the judgment from this Court. In a statement respecting denial of the stay application, I noted the unfortunate reality that there "appeare[d] to be no reasonable probability that four Justices [would] consider the issue sufficiently meritorious to grant certiorari." *Maricopa County* v. *Lopez-Valenzuela*, 574 U. S. 1006, 1007 (2014) (internal quotation marks omitted). Though I had hoped my prediction would prove wrong, today's denial confirms that there was "little reason to be optimistic." *Ibid.*

It is disheartening that there are not four Members of this Court who would even review the decision below. As I previously explained, States deserve our careful consideration when lower courts invalidate their constitutional provisions. *Ibid.* After all, that is the approach we take when lower courts hold federal statutes unconstitutional. See, *e. g.*, *Department of Transportation* v. *Association of American Railroads*, *ante*, p. 43 (granting review when a federal statutory provision was held unconstitutional, notwithstanding absence of a Circuit split). In fact, Congress historically required this Court to review any decision of a federal court of appeals holding that a state statute violated the Federal Constitution. 28 U. S. C. § 1254(2) (1982 ed.). It was not until 1988 that Congress eliminated that mandatory jurisdiction and gave this Court discretion to review such cases by writ of certiorari. See § 2, 102 Stat. 662. In my view, that discretion should be exercised with a strong dose of respect for state laws. In exercising that discretion, we should show at least as much respect for state laws as we show for federal laws.

Our indifference to cases such as this one will only embolden the lower courts to reject state laws on questionable constitutional grounds. This Court once emphasized the need for judicial restraint when asked to review the constitutionality of state laws. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726, 729 (1963) (noting that this Court should refuse to use the Due Process Clause "to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social phi-

losophy"); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391 (1937) (refusing to strike down a state regulation on the basis of substantive due process because "the Constitution does not recognize an absolute and uncontrollable liberty"); *Nebbia* v. *New York*, 291 U. S. 502, 537–538 (1934) ("Times without number we have said that the legislature is primarily the judge of the necessity of [a regulation], that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power"); *Tyson & Brother* v. *Banton*, 273 U. S. 418, 446 (1927) (Holmes, J., dissenting) ("[A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution . . . , and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain"). But for reasons that escape me, state statutes have encountered closer scrutiny under the Due Process Clause of the Fourteenth Amendment than federal statutes have under the sister Clause in the Fifth Amendment. *Davidson* v. *New Orleans*, 96 U. S. 97, 103–104 (1878) (declining to overturn a state tax assessment on due process grounds, and noting the "remarkable" fact that the Fifth Amendment Due Process Clause had been invoked very rarely since the founding, but that in the short time since the Fourteenth Amendment had been ratified, "the docket [had become] crowded with cases in which [the Court was] asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law"). This Court's previous admonitions are all too rare today, and our steadfast refusal to review decisions straying from them only undercuts their influence.

For these reasons, I respectfully dissent from the Court's denial of certiorari.

No. 14–954. ANIMAL CARE TRUST ET AL. *v.* UNITED PET SUPPLY, INC. C. A. 6th Cir. Motions of International Municipal Lawyers Association et al. and American Society for the Prevention of Cruelty to Animals for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 768 F. 3d 464.

No. 14–1021. BYARS, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. *v.* AIKEN ET AL. Sup. Ct. S. C.

Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 410 S. C. 534, 765 S. E. 2d 572.

Rehearing Denied

No. 13–10787. HOVARTER *v.* CALIFORNIA ET AL., 574 U. S. 867;
No. 14–1026. GOSSAGE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL., *ante*, p. 951;
No. 14–7635. GREENFIELD *v.* DEUTSCHE BANK AG ET AL., 574 U. S. 1171;
No. 14–7765. BURGEST *v.* CARAWAY, WARDEN, 574 U. S. 1175;
No. 14–8157. MURRAY *v.* MIDDLETON ET AL., *ante*, p. 940;
No. 14–8234. REED-RAJAPASKE *v.* MEMPHIS LIGHT, GAS AND WATER, ET AL., *ante*, p. 953;
No. 14–8261. LOVE *v.* DUCART, WARDEN, *ante*, p. 953;
No. 14–8340. JONES *v.* ANDO, *ante*, p. 955;
No. 14–8370. DONGSHENG HUANG *v.* DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD, ET AL., *ante*, p. 955;
No. 14–8495. SLEDGE *v.* ILLINOIS, *ante*, p. 955;
No. 14–8616. OYELAKIN *v.* RENO, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *ante*, p. 988;
No. 14–8653. JOHNSON *v.* FARM CREDIT OF FLORIDA ET AL., *ante*, p. 989; and
No. 14–8774. ADAMS *v.* UNITED STATES, *ante*, p. 957. Petitions for rehearing denied.

JUNE 3, 2015

Miscellaneous Order

No. 14–1409 (14A1219). IN RE BOWER. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 14–1408 (14A1218). BOWER *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 612 Fed. Appx. 748.

JUNE 5, 2015

Dismissals Under Rule 46

No. 14–1043. CYCLONE MICROSYSTEMS, INC., ET AL. *v.* INTERNET MACHINES LLC; and

No. 14–1088. INTERNET MACHINES LLC *v.* CYCLONE MICROSYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 575 Fed. Appx. 895.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 29, 2015, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1050. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, 563 U. S. 1051, 566 U. S. 1045, 569 U. S. 1141, and 572 U. S. 1169.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2015

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying this rule are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2015

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rule 1007.

[See *infra*, p. 1053.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2015, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, schedules, statements, and other documents; time limits.

(*a*) *Corporate ownership statement, list of creditors and equity security holders, and other lists.*

(*1*) *Voluntary case.*—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(*2*) *Involuntary case.*—In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 29, 2015, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1056. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, 556 U. S. 1341, 559 U. S. 1139, 569 U. S. 1149, and 572 U. S. 1217.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 2015

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 2015

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84, and the Appendix of Forms.

[See *infra*, pp. 1059–1068.]

2. That the foregoing amendments to the Federal Rules of Civil Procedures shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and purpose.

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4. Summons.

. . . . .

(*d*) *Waiving service.*

(*1*) *Requesting a waiver.*—An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

. . . . .

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

. . . . .

(*m*) *Time limit for service.*—If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order

that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

. . . . .

RULE 4 NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF SUMMONS.

(Caption)

To *(name the defendant or—if the defendant is a corporation, partnership, or association—name an officer or agent authorized to receive service)* :

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

RULE 4 WAIVER OF THE SERVICE OF SUMMONS.

(Caption)

To *(name the plaintiff's attorney or the unrepresented plaintiff)*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Rule 16. Pretrial conferences; scheduling; management.

. . . . .

(*b*) *Scheduling.*

(*1*) *Scheduling order.*—Except in categories of actions exempted by local rule, the district judge or a magistrate judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(*2*) *Time to issue.*—The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(*3*) *Contents of the order.*

. . . . .

(*B*) *Permitted contents.* The scheduling order may:

. . . . .

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

. . . . .

Rule 26. Duty to disclose; general provisions governing discovery.

. . . . .

(*b*) *Discovery scope and limits.*

(*1*) *Scope in general.*—Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(*2*) *Limitations on frequency and extent.*

. . . . .

(*C*) *When required.*—On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

. . . . .

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

. . . . .

(*c*) *Protective orders.*

(*1*) *In general.*—A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. . . . .

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

. . . . .

(*d*) *Timing and sequence of discovery.*

. . . . .

(*2*) *Early Rule 34 requests.*

(*A*) *Time to deliver.*—More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(*B*) *When considered served.*—The request is considered to have been served at the first Rule 26(f) conference.

(*3*) *Sequence.*—Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

. . . . .

(*f*) *Conference of the parties; planning for discovery.*

. . . . .

(*3*) *Discovery plan.*—A discovery plan must state the parties' views and proposals on:

. . . . .

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

. . . . .

Rule 30. Depositions by oral examination.

(*a*) *When a deposition may be taken.*

. . . . .

(*2*) *With leave.*—A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

. . . . .

(*d*) *Duration; sanction; motion to terminate or limit.*

(*1*) *Duration.*—Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

. . . . .

Rule 31. Depositions by written questions.

(*a*) *When a deposition may be taken.*

. . . . .

(*2*) *With leave.*—A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

. . . . .

Rule 33. Interrogatories to parties.

(*a*) *In general.*

(*1*) *Number.*—Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

. . . . .

Rule 34. Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

. . . . .

(*b*) *Procedure.*

. . . . .

(*2*) *Responses and objections.*

(*A*) *Time to respond.*—The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(*B*) *Responding to each item.*—For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electroni-

cally stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(*C*) *Objections.*—An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

. . . . .

Rule 37. Failure to make disclosures or to cooperate in discovery; sanctions.

(*a*) *Motion for an order compelling disclosure or discovery.*

. . . . .

(*3*) *Specific motions.*

. . . . .

(*B*) *To compel a discovery response.*—A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

. . . . .

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

. . . . .

(*e*) *Failure to preserve electronically stored information.*—If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

. . . . .

Rule 55. Default; default judgment.

. . . . .

(c) *Setting aside a default or a default judgment.*—The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

. . . . .

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[Abrogated (Apr. 29, 2015, eff. Dec. 1, 2015).]

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[Abrogated (Apr. 29, 2015, eff. Dec. 1, 2015).]

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