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VOLUME 582

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2016

JUNE 12 THROUGH SEPTEMBER 29, 2017

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2024

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

JOHN G. ROBERTS, JR., CHIEF 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.
NEIL M. GORSUCH, ASSOCIATE JUSTICE.

RETIRED

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

OFFICERS OF THE COURT

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL.
JEFFREY B. WALL, ACTING SOLICITOR GENERAL.[1]
NOEL J. FRANCISCO, SOLICITOR GENERAL.[2]
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] Acting Solicitor General Wall resigned effective September 19, 2017.

[2] The Honorable Noel J. Francisco, of Washington, D. C., was nominated by President Trump on March 7, 2017, to be Solicitor General; the nomination was confirmed by the Senate on September 19, 2017; he was commissioned and took the oath of office on the same date.

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 February 25, 2016, 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, Clarence Thomas, 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.

February 25, 2016.

(For next previous allotment, see 577 U. S., p. iv.)
(For next subsequent allotment, see *post*, p. vi.)

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 June 27, 2017, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

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

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

For the Eighth Circuit, Neil M. Gorsuch, 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.

June 27, 2017.

(For next previous allotment, see *ante*, p. v.)

APPOINTMENT OF JUSTICE GORSUCH

Supreme Court of the United States

THURSDAY, JUNE 15, 2017

Present: Chief Justice Roberts, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, Justice Kagan and Justice Gorsuch.

The Chief Justice said:

This special sitting of the Court is held today to receive the Commission of the newly appointed Associate Justice of the Supreme Court of the United States, Neil M. Gorsuch.

We are pleased to have with us today the President of the United States. On behalf of the Court, Mr. President, I extend to you and the First Lady a warm welcome. We are also pleased to have with us our retired colleague, Justice Stevens. Welcome back.

The Court now recognizes the Deputy Attorney General of the United States, Rod J. Rosenstein.

Deputy Attorney General Rosenstein said:

Mr. Chief Justice, and may it please the Court. I have the Commission which has been issued to the Honorable Neil M. Gorsuch, as an Associate Justice of the Supreme Court of the United States. The Commission has been duly signed by the President of the United States and attested by the Attorney General of the United States. I move that the Clerk read the Commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Deputy Attorney General Rosenstein, your motion is granted. Mr. Clerk, will you please read the Commission.

The Clerk read the Commission:

DONALD J. TRUMP,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Neil M. Gorsuch, of Colorado, I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto him, the said Neil M. Gorsuch, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this eighth day of April, in the year of our Lord two thousand and seventeen, and of the Independence of the United States of America the two hundred and forty-first.

[SEAL] DONALD J. TRUMP

By the President:

JEFFERSON B. SESSIONS, III,
Attorney General

THE CHIEF JUSTICE said:

I now ask the Deputy Clerk of the Court to escort Justice Gorsuch to the bench.

THE CHIEF JUSTICE said:

Please repeat after me.

Justice Gorsuch said:

I, Neil M. Gorsuch, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States. So help me God.

NEIL M. GORSUCH

Subscribed and sworn to before me this fifteenth day of June, 2017.

JOHN G. ROBERTS, JR.
Chief Justice

THE CHIEF JUSTICE said:

Congratulations. JUSTICE GORSUCH, on behalf of all the members of the Court, it is my pleasure to extend to you a very warm welcome as the 101st Associate Justice of the Supreme Court of the United States. We wish for you a long and happy career in our common calling.

JUSTICE GORSUCH said:

Mr. Chief Justice, I want to thank all of my colleagues and all of those who serve in this remarkable institution for the warm welcome I've received. Thank you.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2016

SANDOZ INC. *v.* AMGEN INC. ET AL.

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

No. 15–1039. Argued April 26, 2017—Decided June 12, 2017*

The Biologics Price Competition and Innovation Act of 2009 (BPCIA or Act) provides an abbreviated pathway for obtaining Food and Drug Administration (FDA) approval of a drug that is biosimilar to an already licensed biological product (reference product). 42 U. S. C. § 262(k). It also provides procedures for resolving patent disputes between biosimilar manufacturers (applicants) and manufacturers of reference products (sponsors). § 262(*l*). The Act treats the mere submission of a biosimilar application as an "artificial" act of infringement, enabling parties to bring patent infringement actions at certain points in the application process even if the applicant has not committed a traditional act of patent infringement. See 35 U. S. C. §§ 271(e)(2)(C)(i), (ii).

Under § 262(*l*)(2)(A), an applicant seeking FDA approval of a biosimilar must provide its application and manufacturing information to the sponsor within 20 days of the date the FDA notifies the applicant that it has accepted the application for review. This triggers an exchange of information between the applicant and sponsor designed to create lists of relevant patents and flesh out potential legal arguments. § 262(*l*)(3). The BPCIA then channels the parties into two phases of patent litigation. In the first, the parties collaborate to identify patents

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*Together with No. 15–1195, *Amgen Inc. et al.* v. *Sandoz Inc.*, also on certiorari to the same court.

on the lists for immediate litigation. The second phase—triggered when the applicant, pursuant to § 262(*l*)(8)(A), gives the sponsor notice at least 180 days before commercially marketing the biosimilar—involves any listed patents not litigated in the first phase. The applicant has substantial control over the timing and scope of both phases of litigation.

Failure to comply with these procedural requirements may lead to two consequences relevant here. Under § 262(*l*)(9)(C), if an applicant fails to provide its application and manufacturing information to the sponsor under § 262(*l*)(2)(A), then the sponsor, but not the applicant, may immediately bring an action "for a declaration of infringement, validity, or enforceability of any patent that claims the biological product or a use of the biological product." And under § 262(*l*)(9)(B), if an applicant provides the application and manufacturing information but fails to complete a subsequent step in the process, the sponsor, but not the applicant, may bring a declaratory-judgment action with respect to any patent included on the sponsor's list of relevant patents.

Neupogen is a filgrastim product marketed by Amgen, which claims to hold patents on methods of manufacturing and using filgrastim. Sandoz sought FDA approval to market a biosimilar filgrastim product under the brand name Zarxio, with Neupogen as the reference product. A day after the FDA informed Sandoz that its application had been accepted for review, Sandoz notified Amgen that it had submitted an application and that it intended to market Zarxio immediately upon receiving FDA approval. It later informed Amgen that it did not intend to provide the application and manufacturing information required by § 262(*l*)(2)(A) and that Amgen could sue immediately for infringement under § 262(*l*)(9)(C).

Amgen sued Sandoz for patent infringement and also asserted that Sandoz engaged in "unlawful" conduct in violation of California's unfair competition law. This latter claim was predicated on two alleged violations of the BPCIA: Sandoz's failure to provide its application and manufacturing information under § 262(*l*)(2)(A), and its provision of notice of commercial marketing under § 262(*l*)(8)(A) prior to obtaining licensure from the FDA. Amgen sought injunctions to enforce both BPCIA requirements. Sandoz counterclaimed for declaratory judgments that the asserted patent was invalid and not infringed and that it had not violated the BPCIA.

While the case was pending, the FDA licensed Zarxio, and Sandoz provided Amgen a further notice of commercial marketing. The District Court subsequently granted partial judgment on the pleadings to Sandoz on its BPCIA counterclaims and dismissed Amgen's unfair competition claims with prejudice. The Federal Circuit affirmed in part,

vacated in part, and remanded. The court affirmed the dismissal of Amgen's state-law claim based on Sandoz's alleged violation of § 262(*l*)(2)(A), holding that Sandoz did not violate the BPCIA in failing to disclose its application and manufacturing information and that the BPCIA provides the exclusive remedies for failure to comply with this requirement. The court also held that under § 262(*l*)(8)(A) an applicant must provide notice of commercial marketing after obtaining licensure, and that this requirement is mandatory. It thus enjoined Sandoz from marketing Zarxio until 180 days after the date it provided its second notice.

Held: Section 262(*l*)(2)(A) is not enforceable by injunction under federal law, but the Federal Circuit on remand should determine whether a state-law injunction is available. An applicant may provide notice under § 262(*l*)(8)(A) prior to obtaining licensure. Pp. 14–22.

(a) Section 262(*l*)(2)(A)'s requirement that an applicant provide the sponsor with its application and manufacturing information is not enforceable by an injunction under federal law. The Federal Circuit reached the proper result on this point, but its reasoning was flawed. It cited § 271(e)(4), which expressly provides the "only remedies" for an act of artificial infringement. In light of this language, the court reasoned that no remedy other than those specified in the text—such as an injunction to compel the applicant to provide its application and manufacturing information—was available. The problem with this reasoning is that Sandoz's failure to disclose was not an act of artificial infringement remediable under § 271(e)(4). Submitting an application constitutes an act of artificial infringement; failing to disclose the application and manufacturing information required by § 262(*l*)(2)(A) does not.

Another provision, § 262(*l*)(9)(C), provides a remedy for an applicant's failure to turn over its application and manufacturing information. It authorizes the sponsor, but not the applicant, to bring an immediate declaratory-judgment action for artificial infringement, thus vesting in the sponsor the control that the applicant would otherwise have exercised over the scope and timing of the patent litigation and depriving the applicant of the certainty it could have obtained by bringing a declaratory-judgment action prior to marketing its product. The presence of this remedy, coupled with the absence of any other textually specified remedies, indicates that Congress did not intend sponsors to have access to injunctive relief, at least as a matter of federal law, to enforce the disclosure requirement. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 209. Statutory context further confirms that Congress did not authorize courts to enforce § 262(*l*)(2)(A) by injunction. Pp. 14–17.

Syllabus

(b) The Federal Circuit should determine on remand whether an injunction is available under state law to enforce § 262(*l*)(2)(A). Whether Sandoz's conduct was "unlawful" under California's unfair competition statute is a question of state law, and the Federal Circuit thus erred in attempting to answer that question by referring only to the BPCIA. There is no dispute about how the federal scheme actually works on the facts of these cases: Sandoz failed to disclose the requisite information under § 262(*l*)(2)(A), and was accordingly subject to the consequence specified in § 262(*l*)(9)(C). As a result, there is nothing to decide on this point as a matter of federal law. The court on remand should determine whether California law would treat noncompliance with § 262(*l*)(2)(A) as "unlawful," and whether the BPCIA pre-empts any additional state-law remedy for failure to comply with § 262(*l*)(2)(A). Pp. 17–19.

(c) An applicant may provide notice of commercial marketing before obtaining a license. Section 262(*l*)(8)(A) states that the applicant "shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." Because the phrase "of the biological product licensed under subsection (k)" modifies "commercial marketing" rather than "notice," "commercial marketing" is the point in time by which the biosimilar must be "licensed." Accordingly, the applicant may provide notice either before or after receiving FDA approval. Statutory context confirms that § 262(*l*)(8)(A) contains a single timing requirement (180 days before marketing) rather than the two requirements posited by the Federal Circuit (after licensing, and 180 days before marketing). "Had Congress intended to" impose two timing requirements in § 262(*l*)(8)(A), "it presumably would have done so expressly as it did in the" adjacent provision, § 262(*l*)(8)(B). *Russello* v. *United States*, 464 U. S. 16, 23. Amgen's contrary arguments are unpersuasive, and its various policy arguments cannot overcome the statute's plain language. Pp. 19–21.

794 F. 3d 1347, vacated in part, reversed in part, and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, *post*, p. 22.

Deanne E. Maynard argued the cause for petitioner in No. 15–1039 and respondent in No. 15–1195. With her on the briefs were *Joseph R. Palmore*, *Marc A. Hearron*, *Bryan J. Leitch*, *Rachel Krevans*, and *Julie Y. Park*.

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JUSTICE THOMAS delivered the opinion of the Court.

These cases involve 42 U. S. C. § 262(*l*), which was enacted as part of the Biologics Price Competition and Innovation Act of 2009 (BPCIA), 124 Stat. 808. The BPCIA governs a type of drug called a biosimilar, which is a biologic product that is highly similar to a biologic product that has already been approved by the Food and Drug Administration (FDA). Under § 262(*l*), an applicant that seeks FDA approval of a biosimilar must provide its application materials and manu-

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†Briefs of *amici curiae* urging reversal in No. 15–1039 were filed for AARP et al. by *William Alvarado Rivera*; for Adello Biologics, LLC, by *Clifton S. Elgarten*, *Teresa Stanek Rea*, and *Deborah Yellin*; and for Pharmaceutical Care Management Association et al. by *James P. Ellison*.

Kevin E. Noonan, *John D. Cravero*, and *Erika Lietzan* filed a brief for 11 Professors as *amici curiae* urging reversal in No. 15–1195.

Briefs of *amici curiae* in both cases were filed for AbbVie Inc. by *Melissa Arbus Sherry*, *Gregory G. Garre*, *Michael A. Morin*, and *Alexandra Shechtel*; for America's Health Insurance Plans by *Carlos T. Angulo* and *Julie Simon Miller*; for Apotex Inc. et al. by *David C. Frederick*, *Miles J. Sweet*, *Kerry B. McTigue*, *Barry P. Golob*, *Aaron S. Lukas*, and *Stephen A. Miller*; for Biosimilars Council by *William M. Jay*, *Jaime A. Santos*, and *Elaine Hermann Blais*; for Biotechnology Innovation Organization by *Donald R. Ware* and *Barbara A. Fiacco*; for Coherus Biosciences, Inc., by *W. Chad Shear* and *Craig E. Countryman*; for Genentech, Inc., by *E. Joshua Rosenkranz* and *Eric A. Shumsky*; for Janssen Biotech Inc. by *Gregory L. Diskant*, *Eugene M. Gelernter*, and *Irena Royzman*; and for Mylan Inc. by *William A. Rakoczy*.

facturing information to the manufacturer of the corresponding biologic within 20 days of the date the FDA notifies the applicant that it has accepted the application for review. The applicant then must give notice to the manufacturer at least 180 days before marketing the biosimilar commercially.

The first question presented by these cases is whether the requirement that an applicant provide its application and manufacturing information to the manufacturer of the biologic is enforceable by injunction. We conclude that an injunction is not available under federal law, but we remand for the court below to decide whether an injunction is available under state law. The second question is whether the applicant must give notice to the manufacturer after, rather than before, obtaining a license from the FDA for its biosimilar. We conclude that an applicant may provide notice before obtaining a license.

I

The complex statutory scheme at issue in these cases establishes processes both for obtaining FDA approval of biosimilars and for resolving patent disputes between manufacturers of licensed biologics and manufacturers of biosimilars. Before turning to the questions presented, we first explain the statutory background.

A

A biologic is a type of drug derived from natural, biological sources such as animals or microorganisms. Biologics thus differ from traditional drugs, which are typically synthesized from chemicals.[1] A manufacturer of a biologic may market the drug only if the FDA has licensed it pursuant to either of two review processes set forth in § 262. The default pathway for approval, used for new biologics, is set forth in § 262(a). Under that subsection, the FDA may li-

[1] FDA, What Are "Biologics" Questions and Answers (Aug. 5, 2015), http://www.fda.gov/aboutfda/centersoffices/officeofmedicalproductsandtobacco/cber/ucm133077.htm (as last visited June 6, 2017).

cense a new biologic if, among other things, the manufacturer demonstrates that it is "safe, pure, and potent." § 262(a)(2)(C)(i)(I). In addition to this default route, the statute also prescribes an alternative, abbreviated route for FDA approval of biosimilars, which is set forth in § 262(k).

To obtain approval through the BPCIA's abbreviated process, the manufacturer of a biosimilar (applicant) does not need to show that the product is "safe, pure, and potent." Instead, the applicant may piggyback on the showing made by the manufacturer (sponsor) of a previously licensed biologic (reference product). See § 262(k)(2)(A)(iii). An applicant must show that its product is "highly similar" to the reference product and that there are no "clinically meaningful differences" between the two in terms of "safety, purity, and potency." §§ 262(i)(2)(A), (B); see also § 262(k)(2)(A)(i)(I). An applicant may not submit an application until 4 years after the reference product is first licensed, and the FDA may not license a biosimilar until 12 years after the reference product is first licensed. §§ 262(k)(7)(A), (B). As a result, the manufacturer of a new biologic enjoys a 12-year period when its biologic may be marketed without competition from biosimilars.

B

A sponsor may hold multiple patents covering the biologic, its therapeutic uses, and the processes used to manufacture it. Those patents may constrain an applicant's ability to market its biosimilar even after the expiration of the 12-year exclusivity period contained in § 262(k)(7)(A).

The BPCIA facilitates litigation during the period preceding FDA approval so that the parties do not have to wait until commercial marketing to resolve their patent disputes. It enables the parties to bring infringement actions at certain points in the application process, even if the applicant has not yet committed an act that would traditionally constitute patent infringement. See 35 U. S. C. § 271(a) (traditionally infringing acts include making, using, offering to sell,

or selling any patented invention within the United States without authority to do so). Specifically, it provides that the mere submission of a biosimilar application constitutes an act of infringement. §§271(e)(2)(C)(i), (ii). We will refer to this kind of preapproval infringement as "artificial" infringement. Section 271(e)(4) provides remedies for artificial infringement, including injunctive relief and damages.

C

The BPCIA sets forth a carefully calibrated scheme for preparing to adjudicate, and then adjudicating, claims of infringement. See 42 U. S. C. §262(*l*). When the FDA accepts an application for review, it notifies the applicant, who within 20 days "shall provide" to the sponsor a copy of the application and information about how the biosimilar is manufactured. §262(*l*)(2)(A). The applicant also "may provide" the sponsor with any additional information that it requests. §262(*l*)(2)(B). These disclosures enable the sponsor to evaluate the biosimilar for possible infringement of patents it holds on the reference product (*i. e.*, the corresponding biologic). §262(*l*)(1)(D). The information the applicant provides is subject to strict confidentiality rules, enforceable by injunction. See §262(*l*)(1)(H). The first question presented by these cases is whether §262(*l*)(2)(A)'s requirement—that the applicant provide its application and manufacturing information to the sponsor—is itself enforceable by injunction.

After the applicant makes the requisite disclosures, the parties exchange information to identify relevant patents and to flesh out the legal arguments that they might raise in future litigation. Within 60 days of receiving the application and manufacturing information, the sponsor "shall provide" to the applicant "a list of patents" for which it believes it could assert an infringement claim if a person without a license made, used, offered to sell, sold, or imported "the biological product that is the subject of the [biosimilar] appli-

cation." § 262(*l*)(3)(A)(i). The sponsor must also identify any patents on the list that it would be willing to license. § 262(*l*)(3)(A)(ii).

Next, within 60 days of receiving the sponsor's list, the applicant may provide to the sponsor a list of patents that the applicant believes are relevant but that the sponsor omitted from its own list, § 262(*l*)(3)(B)(i), and "shall provide" to the sponsor reasons why it could not be held liable for infringing the relevant patents, § 262(*l*)(3)(B)(ii). The applicant may argue that the relevant patents are invalid, unenforceable, or not infringed, or the applicant may agree not to market the biosimilar until a particular patent has expired. *Ibid.* The applicant must also respond to the sponsor's offers to license particular patents. § 262(*l*)(3)(B)(iii). Then, within 60 days of receiving the applicant's responses, the sponsor "shall provide" to the applicant its own arguments concerning infringement, enforceability, and validity as to each relevant patent. § 262(*l*)(3)(C).

Following this exchange, the BPCIA channels the parties into two phases of patent litigation. In the first phase, the parties collaborate to identify patents that they would like to litigate immediately. The second phase is triggered by the applicant's notice of commercial marketing and involves any patents that were included on the parties' § 262(*l*)(3) lists but not litigated in the first phase.

At the outset of the first phase, the applicant and the sponsor must negotiate to determine which patents included on the § 262(*l*)(3) lists will be litigated immediately. See §§ 262(*l*)(4)(A), (*l*)(6). If they cannot agree, then they must engage in another list exchange. § 262(*l*)(4)(B). The applicant "shall notify" the sponsor of the number of patents it intends to list for litigation, § 262(*l*)(5)(A), and, within five days, the parties "shall simultaneously exchange" lists of the patents they would like to litigate immediately. § 262(*l*)(5)(B)(i). This process gives the applicant substantial control over the scope of the first phase of litigation:

The number of patents on the sponsor's list is limited to the number contained in the applicant's list, though the sponsor always has the right to list at least one patent. § 262(*l*)(5)(B)(ii).

The parties then proceed to litigate infringement with respect to the patents they agreed to litigate or, if they failed to agree, the patents contained on the lists they simultaneously exchanged under § 262(*l*)(5). §§ 262(*l*)(6)(A), (B). Section 271(e)(2)(C)(i) facilitates this first phase of litigation by making it an act of artificial infringement, with respect to any patent included on the parties' § 262(*l*)(3) lists, to submit an application for a license from the FDA. The sponsor "shall bring an action" in court within 30 days of the date of agreement or the simultaneous list exchange. §§ 262(*l*)(6)(A), (B). If the sponsor brings a timely action and prevails, it may obtain a remedy provided by § 271(e)(4).

The second phase of litigation involves patents that were included on the original § 262(*l*)(3) lists but not litigated in the first phase (and any patents that the sponsor acquired after the § 262(*l*)(3) exchange occurred and added to the lists, see § 262(*l*)(7)). The second phase is commenced by the applicant's notice of commercial marketing, which the applicant "shall provide" to the sponsor "not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." § 262(*l*)(8)(A). The BPCIA bars any declaratory-judgment action prior to this notice. § 262(*l*)(9)(A) (prohibiting, in situations where the parties have complied with each step of the BPCIA process, either the sponsor or the applicant from seeking a "declaration of infringement, validity, or enforceability of any patent" that was included on the § 262(*l*)(3) lists but not litigated in the first phase "prior to the date notice is received under paragraph (8)(A)"). Because the applicant (subject to certain constraints) chooses when to begin commercial marketing and when to give notice, it wields substantial control over the timing of the second phase of litigation. The second

question presented is whether notice is effective if an applicant provides it prior to the FDA's decision to license the biosimilar.

In this second phase of litigation, *either* party may sue for declaratory relief. See § 262(*l*)(9)(A). In addition, prior to the date of first commercial marketing, the sponsor may "seek a preliminary injunction prohibiting the [biosimilar] applicant from engaging in the commercial manufacture or sale of [the biosimilar] until the court decides the issue of patent validity, enforcement, and infringement with respect to any patent that" was included on the § 262(*l*)(3) lists but not litigated in the first phase. § 262(*l*)(8)(B).

D

If the parties comply with each step outlined in the BPCIA, they will have the opportunity to litigate the relevant patents before the biosimilar is marketed. To encourage parties to comply with its procedural requirements, the BPCIA includes various consequences for failing to do so. Two of the BPCIA's remedial provisions are at issue here. Under § 262(*l*)(9)(C), if an applicant fails to provide its application and manufacturing information to the sponsor—thus effectively pretermitting the entire two-phase litigation process—then the sponsor, but not the applicant, may immediately bring an action "for a declaration of infringement, validity, or enforceability of any patent that claims the biological product or a use of the biological product." Section 271(e)(2)(C)(ii) facilitates this action by making it an artificial act of infringement, with respect to any patent that *could* have been included on the § 262(*l*)(3) lists, to submit a biosimilar application. Similarly, when an applicant provides the application and manufacturing information but fails to complete a subsequent step, § 262(*l*)(9)(B) provides that the sponsor, but not the applicant, may bring a declaratory-judgment action with respect to any patent included on the sponsor's § 262(*l*)(3)(A) list of patents (as well as those it acquired later

and added to the list). As noted, it is an act of artificial infringement, with respect to any patent on the § 262(*l*)(3) lists, to submit an application to the FDA. See § 271(e)(2)(C)(i).

II

These cases concern filgrastim, a biologic used to stimulate the production of white blood cells. Amgen (collectively), the respondent in No. 15–1039 and the petitioner in No. 15–1195, has marketed a filgrastim product called Neupogen since 1991 and claims to hold patents on methods of manufacturing and using filgrastim. In May 2014, Sandoz, the petitioner in No. 15–1039 and the respondent in No. 15–1195, filed an application with the FDA seeking approval to market a filgrastim biosimilar under the brand name Zarxio, with Neupogen as the reference product. The FDA informed Sandoz on July 7, 2014, that it had accepted the application for review. One day later, Sandoz notified Amgen both that it had submitted an application and that it intended to begin marketing Zarxio immediately upon receiving FDA approval, which it expected in the first half of 2015. Sandoz later confirmed that it did not intend to provide the requisite application and manufacturing information under § 262(*l*)(2)(A) and informed Amgen that Amgen could sue for infringement immediately under § 262(*l*)(9)(C).

In October 2014, Amgen sued Sandoz for patent infringement. Amgen also asserted two claims under California's unfair competition law, which prohibits "any unlawful . . . business act or practice." Cal. Bus. & Prof. Code Ann. § 17200 (West 2008). A "business act or practice" is "unlawful" under the unfair competition law if it violates a rule contained in some other state or federal statute. *Rose* v. *Bank of America, N. A.*, 57 Cal. 4th 390, 396, 304 P. 3d 181, 185 (2013). Amgen alleged that Sandoz engaged in "unlawful" conduct when it failed to provide its application and manufacturing information under § 262(*l*)(2)(A), and when it provided notice of commercial marketing under § 262(*l*)(8)(A)

before, rather than after, the FDA licensed its biosimilar. Amgen sought injunctions to enforce both requirements. Sandoz counterclaimed for declaratory judgments that the asserted patent was invalid and not infringed and that it had not violated the BPCIA.

While the case was pending in the District Court, the FDA licensed Zarxio, and Sandoz provided Amgen a further notice of commercial marketing. The District Court subsequently granted partial judgment on the pleadings to Sandoz on its BPCIA counterclaims and dismissed Amgen's unfair competition claims with prejudice. 2015 WL 1264756, *7–*9 (ND Cal., Mar. 19, 2015). After the District Court entered final judgment as to these claims, Amgen appealed to the Federal Circuit, which granted an injunction pending appeal against the commercial marketing of Zarxio.

A divided Federal Circuit affirmed in part, vacated in part, and remanded. First, the court affirmed the dismissal of Amgen's state-law claim based on Sandoz's alleged violation of §262(*l*)(2)(A). It held that Sandoz did not violate the BPCIA in failing to disclose its application and manufacturing information. It further held that the remedies contained in the BPCIA are the exclusive remedies for an applicant's failure to comply with §262(*l*)(2)(A). 794 F. 3d 1347, 1357, 1360 (2015).

Second, the court held that an applicant may provide effective notice of commercial marketing only *after* the FDA has licensed the biosimilar. *Id.*, at 1358. Accordingly, the 180-day clock began after Sandoz's second, postlicensure notice. The Federal Circuit further concluded that the notice requirement is mandatory and extended its injunction pending appeal to bar Sandoz from marketing Zarxio until 180 days after the date it provided its second notice. *Id.*, at 1360–1361.

We granted Sandoz's petition for certiorari, No. 15–1039, and Amgen's conditional cross-petition for certiorari, No. 15–1195, and consolidated the cases. 580 U. S. 1089 (2017).

III

The first question we must answer is whether § 262(*l*)(2)(A)'s requirement that an applicant provide the sponsor with its application and manufacturing information is enforceable by an injunction under either federal or state law.

A

We agree with the Federal Circuit that an injunction under federal law is not available to enforce § 262(*l*)(2)(A), though for slightly different reasons than those provided by the court below. The Federal Circuit held that "42 U. S. C. § 262(*l*)(9)(C) and 35 U. S. C. § 271(e) expressly provide the only remedies" for a violation of § 262(*l*)(2)(A), 794 F. 3d, at 1357, and neither of those provisions authorizes a court to compel compliance with § 262(*l*)(2)(A). In concluding that the remedies specified in the BPCIA are exclusive, the Federal Circuit relied primarily on § 271(e)(4), which states that it provides "'the only remedies which may be granted by a court for an act of [artificial] infringement.'" *Id.*, at 1356 (emphasis deleted).

The flaw in the Federal Circuit's reasoning is that Sandoz's failure to disclose its application and manufacturing information was not an act of artificial infringement, and thus was not remediable under § 271(e)(4). Submitting an application constitutes an act of artificial infringement. See §§ 271(e)(2)(C)(i), (ii) ("It shall be an act of infringement to submit . . . an application seeking approval of a biological product"). Failing to disclose the application and manufacturing information under § 262(*l*)(2)(A) does not.

In reaching the opposite conclusion, the Federal Circuit relied on § 271(e)(2)(C)(ii), which states that "[i]t shall be an act of infringement to submit[,] *if the applicant for the application fails to provide the application and information required under [§ 262(l)(2)(A)]*, an application seeking approval of a biological product for a patent that could be identified pursuant to [§ 262(*l*)(3)(A)(i)]." (Emphasis added.)

The court appeared to conclude, based on the italicized language, that an applicant's noncompliance with § 262(*l*)(2)(A) is an element of the act of artificial infringement (along with the submission of the application). 794 F. 3d, at 1356. We disagree. The italicized language merely assists in identifying which patents will be the subject of the artificial infringement suit. It does not define the act of artificial infringement itself.

This conclusion follows from the structure of § 271(e)(2)(C). Clause (i) of § 271(e)(2)(C) defines artificial infringement in the situation where the parties proceed through the list exchange process and the patents subject to suit are those contained in the § 262(*l*)(3) lists, as supplemented under § 262(*l*)(7). That clause provides that it is an act of artificial infringement to submit, "*with respect to a patent that is identified in the list of patents described in [§ 262(l)(3)] (including as provided under [§ 262(l)(7)])*, an application seeking approval of a biological product." (Emphasis added.) Clause (ii) of § 271(e)(2)(C), in contrast, defines artificial infringement in the situation where an applicant fails to disclose its application and manufacturing information altogether and the parties never prepare the § 262(*l*)(3) lists. That clause provides that the submission of the application represents an act of artificial infringement with respect to any patent that *could* have been included on the lists.

In this way, the two clauses of § 271(e)(2)(C) work in tandem. They both treat submission of the application as the act of artificial infringement for which § 271(e)(4) provides the remedies. And they both identify the patents subject to suit, although by different means depending on whether the applicant disclosed its application and manufacturing information under § 262(*l*)(2)(A). If the applicant made the disclosures, clause (i) applies; if it did not, clause (ii) applies. In neither instance is the applicant's failure to provide its application and manufacturing information an element of the act of artificial infringement, and in neither instance does

§271(e)(4) provide a remedy for that failure. See Brief for Amgen Inc. et al. 66–67 (conceding both points).

A separate provision of §262, however, does provide a remedy for an applicant's failure to turn over its application and manufacturing information. When an applicant fails to comply with §262(*l*)(2)(A), §262(*l*)(9)(C) authorizes the sponsor, but not the applicant, to bring an immediate declaratory-judgment action for artificial infringement as defined in §271(e)(2)(C)(ii). Section 262(*l*)(9)(C) thus vests in the sponsor the control that the applicant would otherwise have exercised over the scope and timing of the patent litigation. It also deprives the applicant of the certainty that it could have obtained by bringing a declaratory-judgment action prior to marketing its product.

The remedy provided by §262(*l*)(9)(C) excludes all other federal remedies, including injunctive relief. Where, as here, "a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios* v. *Federal Employees*, 489 U. S. 527, 533 (1989). The BPCIA's "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 209 (2002) (internal quotation marks omitted). The presence of §262(*l*)(9)(C), coupled with the absence of any other textually specified remedies, indicates that Congress did not intend sponsors to have access to injunctive relief, at least as a matter of federal law, to enforce the disclosure requirement.

Statutory context further confirms that Congress did not authorize courts to enforce §262(*l*)(2)(A) by injunction. Section 262(*l*)(1)(H) provides that "the court shall consider immediate injunctive relief to be an appropriate and necessary remedy for any violation or threatened violation" of the rules governing the confidentiality of information disclosed under §262(*l*). We assume that Congress acted intention-

ally when it provided an injunctive remedy for breach of the confidentiality requirements but not for breach of § 262(*l*)(2)(A)'s disclosure requirement. Cf. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 572 (1979) ("[W]hen Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").[2] Accordingly, the Federal Circuit properly declined to grant an injunction under federal law.

B

The Federal Circuit rejected Amgen's request for an injunction under state law for two reasons. First, it interpreted California's unfair competition law not to provide a remedy when the underlying statute specifies an "expressly . . . exclusive" remedy. 794 F. 3d, at 1360 (citing Cal. Bus. & Prof. Code Ann. § 17205; *Loeffler* v. *Target Corp.*, 58 Cal. 4th 1081, 1125–1126, 324 P. 3d 50, 76 (2014)). It further held that § 271(e)(4), by its text, "provides 'the only remedies'" for an applicant's failure to disclose its application and manufacturing information. 794 F. 3d, at 1360 (quoting § 271(e)(4)). The court thus concluded that no state remedy was available for Sandoz's alleged violation of § 262(*l*)(2)(A) under the terms of California's unfair competition law.

This state-law holding rests on an incorrect interpretation of federal law. As we have explained, failure to comply with § 262(*l*)(2)(A) is not an act of artificial infringement. Because § 271(e)(4) provides remedies only for artificial infringement, it provides no remedy at all, much less an "ex-

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[2] In holding that § 262(*l*)(9)(C) represents the exclusive remedy for an applicant's failure to provide its application and manufacturing information, we express no view on whether a district court could take into account an applicant's violation of § 262(*l*)(2)(A) (or any other BPCIA procedural requirement) in deciding whether to grant a preliminary injunction under 35 U. S. C. § 271(e)(4)(B) or § 283 against marketing the biosimilar. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008) (court should consider "balance of equities" in deciding whether to grant a preliminary injunction).

pressly . . . exclusive" one, for Sandoz's failure to comply with § 262(*l*)(2)(A).

Second, the Federal Circuit held in the alternative that Sandoz's failure to disclose its application and manufacturing information was not "unlawful" under California's unfair competition law. In the court's view, when an applicant declines to provide its application and manufacturing information to the sponsor, it takes a path "expressly contemplated by" § 262(*l*)(9)(C) and § 271(e)(2)(C)(ii) and thus does not violate the BPCIA. 794 F. 3d, at 1357, 1360. In their briefs before this Court, the parties frame this issue as whether the § 262(*l*)(2)(A) requirement is mandatory in all circumstances, see Brief for Amgen Inc. et al. 58, or merely a condition precedent to the information exchange process, see Reply Brief for Sandoz Inc. 33. If it is only a condition precedent, then an applicant effectively has the option to withhold its application and manufacturing information and does not commit an "unlawful" act in doing so.

We decline to resolve this particular dispute definitively because it does not present a question of federal law. The BPCIA, standing alone, does not require a court to decide whether § 262(*l*)(2)(A) is mandatory or conditional; the court need only determine whether the applicant supplied the sponsor with the information required under § 262(*l*)(2)(A). If the applicant failed to provide that information, then the sponsor, but not the applicant, could bring an immediate declaratory-judgment action pursuant to § 262(*l*)(9)(C). The parties in these cases agree—as did the Federal Circuit—that Sandoz failed to comply with § 262(*l*)(2)(A), thus subjecting itself to that consequence. There is no dispute about how the federal scheme actually works, and thus nothing for us to decide as a matter of federal law. The mandatory or conditional nature of the BPCIA's requirements matters *only* for purposes of California's unfair competition law, which penalizes "unlawful" conduct. Whether Sandoz's conduct was "unlawful" under the unfair competition law is a

state-law question, and the court below erred in attempting to answer that question by referring to the BPCIA alone.

On remand, the Federal Circuit should determine whether California law would treat noncompliance with § 262(*l*)(2)(A) as "unlawful." If the answer is yes, then the court should proceed to determine whether the BPCIA pre-empts any additional remedy available under state law for an applicant's failure to comply with § 262(*l*)(2)(A) (and whether Sandoz has forfeited any pre-emption defense, see 794 F. 3d, at 1360, n. 5). The court is also of course free to address the pre-emption question first by assuming that a remedy under state law exists.

IV

The second question at issue in these cases is whether an applicant must provide notice *after* the FDA licenses its biosimilar, or if it may also provide effective notice before licensure. Section 262(*l*)(8)(A) states that the applicant "shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k)." The Federal Circuit held that an applicant's biosimilar must already be "licensed" at the time the applicant gives notice. 794 F. 3d, at 1358.

We disagree. The applicant must give "notice" at least 180 days "before the date of the first commercial marketing." "[C]ommercial marketing," in turn, must be "of the biological product licensed under subsection (k)." § 262(*l*)(8)(A). Because this latter phrase modifies "commercial marketing" rather than "notice," "commercial marketing" is the point in time by which the biosimilar must be "licensed." The statute's use of the word "licensed" merely reflects the fact that, on the "date of the first commercial marketing," the product must be "licensed." See § 262(a)(1)(A). Accordingly, the applicant may provide notice either before or after receiving FDA approval.

Statutory context confirms this interpretation. Section 262(*l*)(8)(A) contains a single timing requirement: The applicant must provide notice at least 180 days prior to marketing its biosimilar. The Federal Circuit, however, interpreted the provision to impose two timing requirements: The applicant must provide notice after the FDA licenses the biosimilar *and* at least 180 days before the applicant markets the biosimilar. An adjacent provision expressly sets forth just that type of dual timing requirement. See § 262(*l*)(8)(B) ("*After* receiving notice under subparagraph (A) and *before* such date of the first commercial marketing of such biological product, the reference product sponsor may seek a preliminary injunction" (emphasis added)). But Congress did not use that structure in § 262(*l*)(8)(A). "Had Congress intended to" impose two timing requirements in § 262(*l*)(8)(A), "it presumably would have done so expressly as it did in the immediately following" subparagraph. *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

We are not persuaded by Amgen's arguments to the contrary. Amgen points out that other provisions refer to "'the biological product *that is the subject of*'" the application rather than the "'biological product *licensed under* subsection (k).'" Brief for Amgen Inc. et al. 28 (emphasis added). In its view, this variation "is a strong textual indication that § 262(*l*)(8)(A), unlike the other provisions, refers to a product that has already been 'licensed' by the FDA." *Ibid.*

Amgen's interpretation is not necessary to harmonize Congress' use of the two different phrases. The provision upon which Amgen primarily relies (and that is generally illustrative of the other provisions it cites) requires the applicant to explain why the sponsor's patents are "'invalid, unenforceable, or will not be infringed by the commercial marketing of the biological product that is the subject of the subsection (k) application.'" *Id.*, at 29–30 (quoting § 262(*l*)(3)(B)(ii)(I); emphasis deleted). This provision uses the phrase "subject of the subsection (k) application" rather than "product li-

censed under subsection (k)" because the applicant can evaluate validity, enforceability, and infringement with respect to the biosimilar only as it exists *when the applicant is conducting the evaluation*, which it does before licensure. The applicant cannot make the same evaluation with respect to the biosimilar as it will exist after licensure, because the biosimilar's specifications may change during the application process. See, *e. g.*, 794 F. 3d, at 1358. In contrast, nothing in § 262(*l*)(8)(A) turns on the precise status or characteristics of the biosimilar application.

Amgen also advances a host of policy arguments that prelicensure notice is undesirable. See Brief for Amgen Inc. et al. 35–42. Sandoz and the Government, in turn, respond with their own bevy of arguments that Amgen's concerns are misplaced and that prelicensure notice affirmatively furthers Congress' intent. See Brief for Sandoz Inc. 39–42, 56; Brief for United States as *Amicus Curiae* 28–29. The plausibility of the contentions on both sides illustrates why such disputes are appropriately addressed to Congress, not the courts. Even if we were persuaded that Amgen had the better of the policy arguments, those arguments could not overcome the statute's plain language, which is our "primary guide" to Congress' preferred policy. *McFarland* v. *Scott*, 512 U. S. 849, 865 (1994) (THOMAS, J., dissenting).

In sum, because Sandoz fully complied with § 262(*l*)(8)(A) when it first gave notice (before licensure) in July 2014, the Federal Circuit erred in issuing a federal injunction prohibiting Sandoz from marketing Zarxio until 180 days after licensure. Furthermore, because Amgen's request for state-law relief is predicated on its argument that the BPCIA forbids prelicensure notice, its claim under California's unfair competition law also fails. We accordingly reverse the Federal Circuit's judgment as to the notice provision.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is vacated in part and reversed in part, and the

cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring.

The Court's interpretation of the statutory terms before us is a reasonable interpretation, and I join its opinion. In my view, Congress implicitly delegated to the Food and Drug Administration authority to interpret those same terms. That being so, if that agency, after greater experience administering this statute, determines that a different interpretation would better serve the statute's objectives, it may well have authority to depart from, or to modify, today's interpretation, see *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982–984 (2005), though we need not now decide any such matter.

Syllabus

MICROSOFT CORP. *v.* BAKER ET AL.

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

No. 15–457. Argued March 21, 2017—Decided June 12, 2017

Orders granting or denying class certification are inherently interlocutory, hence not immediately reviewable under 28 U. S. C. § 1291, which empowers federal courts of appeals to review only "final decisions of the district courts." In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, a 1978 decision, this Court held that the death-knell doctrine—which rested on courts' recognition that a denial of class certification would sometimes end a lawsuit for all practical purposes—did not warrant mandatory appellate jurisdiction of certification orders. *Id.*, at 470, 477. Although the death-knell theory likely "enhanced the quality of justice afforded a few litigants," it did so at a heavy cost to § 1291's finality requirement. *Id.*, at 473. First, the potential for multiple interlocutory appeals inhered in the doctrine. See *id.*, at 474. Second, the death-knell theory forced appellate courts indiscriminately into the trial process, circumventing the two-tiered "screening procedure" Congress established for interlocutory appeals in 28 U. S. C. § 1292(b). 437 U. S., at 474, 476. Finally, the doctrine "operat[ed] only in favor of plaintiffs," even though the class-certification question may be critically important to defendants as well. *Id.*, at 476.

Two decades later, in 1998, after Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, to empower this Court to promulgate rules providing for interlocutory appeal of orders "not otherwise provided for [in § 1292]," § 1292(e), this Court approved Federal Rule of Civil Procedure 23(f). Rule 23(f) authorizes "permissive interlocutory appeal" from adverse class-certification orders in "the sole discretion of the court of appeals." 28 U. S. C. App., p. 815. This discretionary arrangement was the product of careful calibration on the part of the rulemakers.

Respondents, owners of Microsoft's videogame console, the Xbox 360, filed this putative class action alleging a design defect in the device. The District Court struck respondents' class allegations from the complaint, and the Court of Appeals denied respondents permission to appeal that order under Rule 23(f). Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District

Syllabus

Court's certification denial. Respondents then appealed, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. It then held that the District Court's rationale for striking respondents' class allegations was an impermissible one, but refused to opine on whether class certification was inappropriate for a different reason, leaving that question for the District Court on remand.

Held: Federal courts of appeals lack jurisdiction under § 1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice. Pp. 36–42.

(a) Section 1291's final-judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. This Court has resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, *e. g.*, *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 112. Attempts to secure appeal as of right from adverse class-certification orders fit that bill. Pp. 36–37.

(b) Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff "ha[d] adequate incentive to continue" despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Under respondents' theory, however, the decision whether an immediate appeal will lie resides exclusively with the plaintiff, who need only dismiss her claims with prejudice in order to appeal the district court's order denying class certification. And she may exercise that option more than once, interrupting district court proceedings with an interlocutory appeal again, should the court deny class certification on a different ground.

Respondents contend that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. But plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. And the same argument was evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was "apparent and serious." *Id.*, at 474. That potential is greater still under respondents' theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling. Pp. 37–39.

(c) Also like the death-knell doctrine, respondents' theory allows indiscriminate appellate review of interlocutory orders. Beyond disturb-

ing the "'appropriate relationship between the respective courts,'" *Coopers & Lybrand*, 437 U. S., at 476, respondents' dismissal tactic undercuts Rule 23(f)'s discretionary regime. This consideration is "[o]f prime significance to the jurisdictional issue" in this case, *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 46, because Congress has established rulemaking as the means for determining when a decision is final for purposes of § 1291 and for providing for appellate review of interlocutory orders not covered by statute, see §§ 2072(c) and 1292(e).

Respondents maintain that Rule 23(f) is irrelevant, for it concerns interlocutory orders, whereas this case involves an actual final judgment. Yet permitting respondents' voluntary-dismissal tactic to yield an appeal of right would seriously undermine Rule 23(f)'s careful calibration, as well as Congress' designation of rulemaking "as the preferred means for determining whether and when prejudgment orders should be immediately appealable," *Mohawk Industries*, 558 U. S., at 113. Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice. Finality "is not a technical concept of temporal or physical termination." *Cobbledick* v. *United States*, 309 U. S. 323, 326. It is one "means [geared to] achieving a healthy legal system," *ibid.*, and its contours are determined accordingly. Pp. 39–41.

(d) The one-sidedness of respondents' voluntary-dismissal device reinforces the conclusion that it does not support mandatory appellate jurisdiction of refusals to grant class certification. The tactic permits only plaintiffs, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the "class issue" may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for class certification may force a defendant to settle rather than run the risk of ruinous liability. Pp. 41–42.

797 F. 3d 607, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and ALITO, J., joined, *post*, p. 42. GORSUCH, J., took no part in the consideration or decision of the case.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Stephen M. Rummage*, *Fred B. Burnside*, *Bradford L. Smith*, *Horacio E. Gutiérrez*, *David M. Howard*, *Timothy G. Fielden*, and *Charles B. Casper*.

Peter K. Stris argued the cause for respondents. With him on the brief were *Brendan S. Maher*, *Daniel L. Geyser*, *Douglas D. Geyser*, *Radha A. Pathak*, *Dana Berkowitz*, *Victor O'Connell*, *Shaun P. Martin*, *Robert L. Esensten*, *Jeffrey M. Ostrow*, *Jonathan M. Streisfeld*, *Darren T. Kaplan*, *Mark A. Griffin*, *Amy Williams-Derry*, *Benjamin Gould*, *Paul L. Stritmatter*, and *Bradley J. Moore*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns options open to plaintiffs, when denied class-action certification by a district court, to gain appellate review of the district court's order. Orders granting or denying class certification, this Court has held, are "inherently interlocutory," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 470 (1978), hence not immediately reviewable under 28 U. S. C. § 1291, which provides for appeals from "final decisions." Pursuant to Federal Rule of Civil Procedure 23(f), promulgated in 1998, however, orders denying or granting class certification may be appealed immediately if the court of appeals so permits. Absent such permission, plaintiffs may pursue their individual claims on the merits to final judgment, at which point the denial of class-action certification becomes ripe for review.

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Mark W. Mosier*, *Kate Comerford Todd*, *Warren Postman*, and *Deborah R. White*; for Civil Procedure Scholars by *E. Joshua Rosenkranz*, *Robert M. Loeb*, and *Thomas M. Bondy*; for DRI–The Voice of the Defense Bar by *Mary Massaron*, *Laura E. Proctor*, and *Hilary A. Ballentine*; for the Pacific Legal Foundation by *Deborah J. La Fetra*; for the Product Liability Advisory Council, Inc., by *John H. Beisner* and *Geoffrey M. Wyatt*; and for the Washington Legal Foundation et al. by *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for Complex Litigation Law Professors by *Rishi Bhandari*; and for Public Citizen, Inc., by *Adina H. Rosenbaum* and *Scott L. Nelson*.

A brief of *amicus curiae* was filed for Public Justice, P. C., by *Jason L. Lichtman*, *Jonathan D. Selbin*, *Andrew R. Kaufman*, *Leslie A. Brueckner*, and *F. Paul Bland, Jr.*

The plaintiffs in the instant case, respondents here, were denied Rule 23(f) permission to appeal the District Court's refusal to grant class certification. Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial.

We hold that the voluntary dismissal essayed by respondents does not qualify as a "final decision" within the compass of § 1291. The tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.

I

A

Under § 1291 of the Judicial Code, federal courts of appeals are empowered to review only "final decisions of the district courts." 28 U. S. C. § 1291.[1] Two guides, our decision in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), and Federal Rule of Civil Procedure 23(f), control our application of that finality rule here.

1

In *Coopers & Lybrand*, this Court considered whether a plaintiff in a putative class action may, under certain circumstances, appeal as of right a district court order striking class allegations or denying a motion for class certification. We held unanimously that the so-called "death-knell" doctrine did not warrant mandatory appellate jurisdiction of such "inherently interlocutory" orders. 437 U. S., at 470, 477. Courts of Appeals employing the doctrine "regarded

[1] Section 1292, which authorizes review of certain interlocutory decisions, does not include among those decisions class-action certifications. See 28 U. S. C. § 1292.

[their] jurisdiction as depending on whether [rejection of class-action status] had sounded the 'death knell' of the action." *Id.*, at 466. These courts asked whether the refusal to certify a class would end a lawsuit for all practical purposes because the value of the named plaintiff's individual claims made it "economically imprudent to pursue his lawsuit to a final judgment and [only] then seek appellate review of [the] adverse class determination." *Id.*, at 469–470. If, in the court of appeals' view, the order would terminate the litigation, the court deemed the order an appealable final decision under § 1291. *Id.*, at 471. If, instead, the court determined that the plaintiff had "adequate incentive to continue [litigating], the order [was] considered interlocutory." *Ibid.* Consequently, immediate appeal would be denied.

The death-knell theory likely "enhance[d] the quality of justice afforded a few litigants," we recognized. *Id.*, at 473. But the theory did so, we observed, at a heavy cost to § 1291's finality requirement, and therefore to "the judicial system's overall capacity to administer justice." *Id.*, at 473; see *id.*, at 471 (Section 1291 "evinces a legislative judgment that 'restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition.'" (quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 170 (1974); alterations and internal quotation marks omitted)). First, the potential for multiple interlocutory appeals inhered in the doctrine: When a ruling denying class certification on one ground was reversed on appeal, a death-knell plaintiff might again claim "entitle-[ment] to an appeal as a matter of right" if, on remand, the district court denied class certification on a different ground. *Coopers & Lybrand*, 437 U. S., at 474.

Second, the doctrine forced appellate courts indiscriminately into the trial process, thereby defeating a "vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." *Id.*, at 476 (internal quotation marks omitted); see *id.*, at 474.

The Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b), we explained, had created a two-tiered "screening procedure" to preserve this relationship and to restrict the availability of interlocutory review to "appropriate cases." 437 U. S., at 474. For a party to obtain review under § 1292(b), the district court must certify that the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals may then, "in its discretion, permit an appeal to be taken from such order." The death-knell doctrine, we stressed, "circumvent[ed] [§ 1292(b)'s] restrictions." *Id.*, at 475.

Finally, we observed, the doctrine was one sided: It "operate[d] only in favor of plaintiffs," even though the class-certification question is often "of critical importance to defendants as well." *Id.*, at 476. Just as a denial of class certification may sound the death knell for plaintiffs, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Ibid.*[2]

In view of these concerns, the Court reached this conclusion in *Coopers & Lybrand*: "[T]he fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering [the order] a 'final decision' within the meaning of § 1291." *Id.*, at 477.[3]

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[2] This scenario has been called a "reverse death knell," Sullivan & Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F. R. D. 277, 280 (2008), or "inverse death knell," 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1802, p. 299 (3d ed. 2005), for it too ends the litigation as a practical matter.

[3] *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), also rejected the collateral-order doctrine as a basis for invoking § 1291 to appeal an order denying class certification. The collateral-order doctrine applies only to a "small class" of decisions that are conclusive, that resolve important

2

After *Coopers & Lybrand*, a party seeking immediate review of an adverse class-certification order had no easy recourse. The Federal Rules of Civil Procedure did not then "contain any unique provisions governing appeals" in class actions, *id.*, at 470, so parties had to survive § 1292(b)'s two-level inspection, see *id.*, at 474–475, and n. 27; *supra*, at 29, or satisfy the extraordinary-circumstances test applicable to writs of mandamus, see *Will* v. *United States*, 389 U. S. 90, 108 (1967) (Black, J., concurring) ("[In] extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes."); cf. *Coopers & Lybrand*, 437 U. S., at 466, n. 6.

Another avenue opened in 1998 when this Court approved Federal Rule of Civil Procedure 23(f). Seen as a response to *Coopers & Lybrand*, see, *e. g.*, *Blair* v. *Equifax Check Services, Inc.*, 181 F. 3d 832, 834 (CA7 1999); Solimine & Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1568 (2000), Rule 23(f) authorizes "permissive interlocutory appeal" from adverse class-certification orders in the discretion of the court of appeals, Advisory Committee's 1998 Note on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815 (hereinafter Committee Note on Rule 23(f)). The Rule was adopted pursuant to § 1292(e), see Committee Note on Rule 23(f), which empowers this Court, in accordance with the Rules Enabling Act, 28 U. S. C. § 2072, to promulgate rules "to provide for an appeal of an interlocutory decision to the

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issues "completely separate from the merits," and that are "effectively unreviewable on appeal from a final judgment." *Id.*, at 468. An order concerning class certification, we explained, fails each of these criteria. See *id.*, at 469.

courts of appeals that is not otherwise provided for [in § 1292]." § 1292(e).[4] Rule 23(f) reads:

> "A court of appeals may permit an appeal from an order granting or denying class-action certification . . . if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."[5]

Courts of appeals wield "unfettered discretion" under Rule 23(f), akin to the discretion afforded circuit courts under § 1292(b). Committee Note on Rule 23(f). But Rule 23(f) otherwise "departs from the § 1292(b) model," for it requires neither district court certification nor adherence to § 1292(b)'s other "limiting requirements." Committee Note on Rule 23(f); see *supra*, at 29.

This resolution was the product of careful calibration. By "[r]emoving the power of the district court to defeat any opportunity to appeal," the drafters of Rule 23(f) sought to provide "significantly greater protection against improvident certification decisions than § 1292(b)" alone offered. Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995. But the drafters declined to go further and provide for appeal as a

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[4] Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, in 1990 to authorize this Court to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." § 2072(c). Congress enacted § 1292(e) two years later, and that same year the Advisory Committee on the Federal Rules of Civil Procedure began to review proposals for what would become Rule 23(f). See Solimine & Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1563–1564, 1566, n. 189 (2000).

[5] Rule 23(f) has changed little since its adoption in 1998. See Advisory Committee's 2007 and 2009 Notes on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 820 (deleting a redundancy and increasing the time to petition for permission to appeal from 10 to 14 days, respectively).

matter of right. "[A] right to appeal would lead to abuse" on the part of plaintiffs and defendants alike, the drafters apprehended, "increas[ing] delay and expense" over "routine class certification decisions" unworthy of immediate appeal. *Ibid.* (internal quotation marks omitted). See also Brief for Civil Procedure Scholars as *Amici Curiae* 6–7, 11–14 ("Rule 23(f) was crafted to balance the benefits of immediate review against the costs of interlocutory appeals." (capitalization omitted)). Rule 23(f) therefore commits the decision whether to permit interlocutory appeal from an adverse certification decision to "the sole discretion of the court of appeals." Committee Note on Rule 23(f); see Federal Judicial Center, T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 86 (1996) (hereinafter Federal Judicial Center Study) ("The discretionary nature of the proposed rule . . . is designed to be a guard against abuse of the appellate process.").[6]

The Rules Committee offered some guidance to courts of appeals considering whether to authorize appeal under Rule 23(f). "Permission is most likely to be granted," the Committee Note states, "when the certification decision turns on a novel or unsettled question of law," or when "the decision on certification is likely dispositive of the litigation," as in a death-knell or reverse death-knell situation. Committee Note on Rule 23(f); see *supra*, at 29, and n. 2. Even so, the Rule allows courts of appeals to grant or deny review "on

[6] Legislation striking this balance was also introduced in Congress. See H. R. 660, 105th Cong., 1st Sess. (1997). The bill, which would have amended § 1292(b) to provide for interlocutory appeal of adverse class determinations, likewise committed the decision whether an immediate appeal would lie exclusively to the courts of appeals: "The court of appeals may, in its discretion, permit the appeal to be taken from such determination." *Ibid.* Upon learning that "proposed Rule 23(f) [was] well advanced," the bill's sponsor, Representative Charles Canady, joined forces with the Rules Committee. See Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of May 1–2, 1997.

the basis of *any* consideration." Committee Note on Rule 23(f) (emphasis added).

B

With this background in mind, we turn to the putative class action underlying our jurisdictional inquiry. The lawsuit is not the first of its kind. A few years after petitioner Microsoft Corporation released its popular videogame console, the Xbox 360, a group of Xbox owners brought a putative class action against Microsoft based on an alleged design defect in the device. See *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350, *1 (WD Wash., Oct. 5, 2009). The named plaintiffs, advised by some of the same counsel representing respondents in this case, asserted that the Xbox scratched (and thus destroyed) game discs during normal game-playing conditions. See *ibid.* The District Court denied class certification, holding that individual issues of damages and causation predominated over common issues. See *id.*, at *6–*7. The plaintiffs petitioned the Ninth Circuit under Rule 23(f) for leave to appeal the class-certification denial, but the Ninth Circuit denied the request. See 851 F. Supp. 2d 1274, 1276 (WD Wash. 2012). Thereafter, the *Scratched Disc* plaintiffs settled their claims individually. 851 F. Supp. 2d, at 1276.

Two years later, in 2011, respondents filed this lawsuit in the same Federal District Court. They proposed a nationwide class of Xbox owners based on the same design defect alleged in *Scratched Disc Litigation*. See 851 F. Supp. 2d, at 1275–1276. The class-certification analysis in the earlier case did not control, respondents urged, because an intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity, the previous certification denial. *Id.*, at 1277–1278. The District Court disagreed. Concluding that the relevant Circuit decision had not undermined *Scratched Disc Litigation*'s causation analysis, the court determined that comity required adherence to the earlier certification denial

and therefore struck respondents' class allegations. 851 F. Supp. 2d, at 1280–1281.

Invoking Rule 23(f), respondents petitioned the Ninth Circuit for permission to appeal that ruling.[7] Interlocutory review was appropriate in this case, they argued, because the District Court's order striking the class allegations created a "death-knell situation": The "small size of [their] claims ma[de] it economically irrational to bear the cost of litigating th[e] case to final judgment," they asserted, so the order would "effectively kil[l] the case." Pet. for Permission To Appeal Under Rule 23(f) in No. 12–80085 (CA9), App. 118. The Ninth Circuit denied the petition. Order in No. 12–80085 (CA9, June 12, 2012), App. 121.

Respondents then had several options. They could have settled their individual claims like their *Scratched Disc* predecessors or petitioned the District Court, pursuant to § 1292(b), to certify the interlocutory order for appeal, see *supra*, at 29. They could also have proceeded to litigate their case, mindful that the District Court could later reverse course and certify the proposed class. See Fed. Rule Civ. Proc. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *Coopers & Lybrand*, 437 U. S., at 469 (a certification order "is subject to revision in the District Court"). Or, in the event the District Court did not change course, respondents could have litigated the case to final judgment and then appealed. *Ibid.* ("an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff").

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[7] An order striking class allegations is "functional[ly] equivalent" to an order denying class certification and therefore appealable under Rule 23(f). *Scott* v. *Family Dollar Stores, Inc.*, 733 F. 3d 105, 110–111, n. 2 (CA4 2013) (quoting *In re Bemis Co.*, 279 F. 3d 419, 421 (CA7 2002)). See also *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 388, and n. 4 (1977) (equating order striking class allegations with "a denial of class certification").

Instead of taking one of those routes, respondents moved to dismiss their case with prejudice. "After the [c]ourt has entered a final order and judgment," respondents explained, they would "appeal the . . . order striking [their] class allegations." Motion To Dismiss in No. 11–cv–00722 (WD Wash., Sept. 25, 2012), App. 122–123. In respondents' view, the voluntary dismissal enabled them "to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed." Brief for Respondents 15. Microsoft stipulated to the dismissal, but maintained that respondents would have "no right to appeal" the order striking the class allegations after thus dismissing their claims. App. to Pet. for Cert. 35a–36a. The District Court granted the stipulated motion to dismiss, *id.*, at 39a, and respondents appealed. They challenged only the District Court's interlocutory order striking their class allegations, not the dismissal order which they invited. See Brief for Plaintiffs-Appellants in No. 12–35946 (CA9).

The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. 797 F. 3d 607, 612 (2015). The Court of Appeals rejected Microsoft's argument that respondents' voluntary dismissal, explicitly engineered to appeal the District Court's interlocutory order striking the class allegations, impermissibly circumvented Rule 23(f). *Ibid.*, n. 3. Because the stipulated dismissal "did not involve a settlement," the court reasoned, it was "'a sufficiently adverse—and thus appealable—final decision'" under § 1291. *Id.*, at 612 (quoting *Berger* v. *Home Depot USA, Inc.*, 741 F. 3d 1061, 1065 (CA9 2014)); see *id.*, at 1065 (relying on 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1802, pp. 297–298 (3d ed. 2005), for the proposition "that finality for appeal purposes can be achieved in this manner").

Satisfied of its jurisdiction, the Ninth Circuit held that the District Court had abused its discretion in striking respondents' class allegations. 797 F. 3d, at 615. The Court of Appeals "express[ed] no opinion on whether" respondents

"should prevail on a motion for class certification," *ibid.*, concluding only that the District Court had misread recent Circuit precedent, see *id.*, at 613–615, and therefore misapplied the comity doctrine, *id.*, at 615. Whether a class should be certified, the court said, was a question for remand, "better addressed if and when [respondents] move[d] for class certification." *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Do federal courts of appeals have jurisdiction under § 1291 and Article III of the Constitution to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice?[8] 577 U. S. 1099 (2016). Because we hold that § 1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment.

II

"From the very foundation of our judicial system," the general rule has been that "the whole case and every matter in controversy in it [must be] decided in a single appeal." *McLish* v. *Roff*, 141 U. S. 661, 665–666 (1891). This final-judgment rule, now codified in § 1291, preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration

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[8] Compare *Berger* v. *Home Depot USA, Inc.*, 741 F. 3d 1061, 1065 (CA9 2014) (assuming jurisdiction under these circumstances); *Gary Plastic Packaging Corp.* v. *Merrill Lynch*, 903 F. 2d 176, 179 (CA2 1990) (assuming jurisdiction after dismissal for failure to prosecute), with *Camesi* v. *University of Pittsburgh Medical Center*, 729 F. 3d 239, 245–247 (CA3 2013) (no jurisdiction under § 1291 or Article III in this situation); *Rhodes* v. *E. I. du Pont de Nemours & Co.*, 636 F. 3d 88, 100 (CA4 2011) (no jurisdiction under Article III).

of justice. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981).

Construing § 1291 in line with these reasons for the rule, we have recognized that "finality is to be given a practical rather than a technical construction." *Eisen*, 417 U. S., at 171 (internal quotation marks omitted). Repeatedly we have resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, *e. g.*, *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 112 (2009); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 878–879, 884 (1994); *Cobbledick* v. *United States*, 309 U. S. 323, 324–325, 330 (1940) (construing § 1291's predecessor statute). Attempts to secure appeal as of right from adverse class-certification orders fit that bill. See *supra*, at 27–29. Because respondents' dismissal device subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed, see §§ 2072(c) and 1292(e), the tactic does not give rise to a "final decisio[n]" under § 1291.

A

Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff "ha[d] adequate incentive to continue" despite the denial of class certification. *Coopers & Lybrand*, 437 U. S., at 471. Appellate courts lack even that authority under respondents' theory. Instead, the decision whether an immediate appeal will lie resides exclusively with the plaintiff; she need only dismiss her claims with prejudice, whereupon she may appeal the district court's order denying class certification. And, as under the death-knell doctrine, she may exercise that option more than once, stopping and starting the district court proceedings with repeated inter-

locutory appeals. See *id.*, at 474 (death-knell doctrine offered "no assurance that the trial process [would] not again be disrupted by interlocutory review").

Consider this case. The Ninth Circuit reviewed and rejected only the District Court's application of comity as a basis for striking respondents' class allegations. 797 F. 3d, at 615. The appeals court declined to reach Microsoft's other arguments against class certification. See *ibid.* It remained open to the District Court, in the Court of Appeals' view, to deny class certification on a different ground, and respondents would be free, under their theory, to force appellate review of any new order denying certification by again dismissing their claims. In designing Rule 23(f)'s provision for discretionary review, the Rules Committee sought to prevent such disruption and delay. See *supra*, at 31–34.[9]

Respondents nevertheless maintain that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. Brief for Respondents 38–39. Their way, they say, means prompt resolution of many lawsuits and infrequent use of the voluntary-dismissal tactic, for "most appeals lose" and few plaintiffs will "take th[e] risk" of losing their claims for good. *Id.*, at 35–36. Respondents overlook the prospect that plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. See *Coopers & Lybrand*, 437 U. S., at 476 (defendant facing the specter of classwide liability may "abandon a meritorious defense"). Indeed, the same argument—that the case was over if the plaintiff lost on appeal—was

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[9] Rule 23(f) avoids delay not only by limiting class-certification appeals to those permitted by the federal courts of appeals, but also by specifying that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." See *Blair* v. *Equifax Check Services, Inc.*, 181 F. 3d 832, 835 (CA7 1999) ("Rule 23(f) is drafted to avoid delay."). Respondents' dismissal tactic, by contrast, halts district court proceedings whenever invoked.

evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was "apparent and serious." *Id.*, at 474.[10] And that potential is greater still under respondents' theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling.

B

Another vice respondents' theory shares with the death-knell doctrine, both allow indiscriminate appellate review of interlocutory orders. *Ibid.* Beyond disturbing the "appropriate relationship between the respective courts," *id.*, at 476 (internal quotation marks omitted), respondents' dismissal tactic undercuts Rule 23(f)'s discretionary regime. This consideration is "[o]f prime significance to the jurisdictional issue before us." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 46 (1995) (pendent appellate jurisdiction in collateral-order context would undermine § 1292(b)); see *supra*, at 28–29 (death-knell doctrine impermissibly circumvented § 1292(b)).

In the Rules Enabling Act, as earlier recounted, Congress authorized this Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by statute. See *supra*, at 30–32, and n. 4. These changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys. See *Swint*, 514 U. S., at 48. In this case, the rulemaking process has dealt with the matter, yielding a "measured, practical solutio[n]" to the questions

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[10] The very premise of the death-knell doctrine was that plaintiffs "would not pursue their claims individually." *Coopers & Lybrand*, 437 U. S., at 466. Having pressed such an argument for the benefit of immediate review, a death-knell plaintiff who lost on appeal would encounter the general proposition, long laid down, that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis* v. *Wakelee*, 156 U. S. 680, 689 (1895).

whether and when adverse certification orders may be immediately appealed. *Mohawk Industries*, 558 U. S., at 114. Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note. See Solimine & Hines, 41 Wm. & Mary L. Rev., at 1564–1566, and nn. 178–189; Federal Judicial Center Study 80–87. Rule 23(f) reflects the rulemakers' informed assessment, permitting, as explained *supra*, at 30–32, interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals. That assessment "warrants the Judiciary's full respect." *Swint*, 514 U. S., at 48; see *Mohawk Industries*, 558 U. S., at 118–119 (THOMAS, J., concurring in part and concurring in judgment).

Here, however, the Ninth Circuit, after denying respondents permission to appeal under Rule 23(f), nevertheless assumed jurisdiction of their appeal challenging only the District Court's order striking the class allegations. See *supra*, at 34–35. According to respondents, even plaintiffs who altogether bypass Rule 23(f) may force an appeal by dismissing their claims with prejudice. See Tr. of Oral Arg. 34. Rule 23(f), respondents say, is irrelevant, for it "address[es] *interlocutory* orders," whereas this case involves "an *actual* final judgment." Brief for Respondents 26, 28.

We are not persuaded. If respondents' voluntary-dismissal tactic could yield an appeal of right, Rule 23(f)'s careful calibration—as well as Congress' designation of rulemaking "as the preferred means for determining whether and when prejudgment orders should be immediately appealable," *Mohawk Industries*, 558 U. S., at 113 (majority opinion)—"would be severely undermined," *Swint*, 514 U. S., at 47. Respondents, after all, "[sought] review of only the [inherently interlocutory] orde[r]" striking their class allegations; they "d[id] not complain of the 'final' orde[r] that dis-

missed their cas[e]." *Camesi* v. *University of Pittsburgh Medical Center*, 729 F. 3d 239, 244 (CA3 2013).

Plaintiffs in putative class actions cannot transform a tentative interlocutory order, see *supra*, at 34–35, into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice—subject, no less, to the right to "revive" those claims if the denial of class certification is reversed on appeal, see Brief for Respondents 45; Tr. of Oral Arg. 31 (assertion by respondents' counsel that, if the appeal succeeds, "everything would spring back to life" on remand). Were respondents' reasoning embraced by this Court, "Congress['] final decision rule would end up a pretty puny one." *Digital Equipment Corp.*, 511 U. S., at 872. Contrary to respondents' argument, § 1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation. Finality, we have long cautioned, "is not a technical concept of temporal or physical termination." *Cobbledick*, 309 U. S., at 326. It is one "means [geared to] achieving a healthy legal system," *ibid.*, and its contours are determined accordingly, see *supra*, at 37.[11]

C

The one-sidedness of respondents' voluntary-dismissal device "reinforce[s] our conclusion that [it] does not support appellate jurisdiction of prejudgment orders denying class certification." *Coopers & Lybrand*, 437 U. S., at 476; see *supra*, at 29. Respondents' theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the "class issue" may be just as important to defendants, *Coopers & Lybrand*, 437 U. S., at 476, for "[a]n order granting certification . . . may force a defend-

[11] Respondents also invoke our decision in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958), but that case—a civil antitrust enforcement action—involved neither class-action certification nor the sort of dismissal tactic at issue here. See *id.*, at 681 (the Government "did not consent to a judgment against [it]" (internal quotation marks omitted)).

ant to settle rather than . . . run the risk of potentially ruinous liability," Committee Note on Rule 23(f); see *supra*, at 29, and n. 2 (defendants may face a "reverse death knell"). Accordingly, we recognized in *Coopers & Lybrand* that "[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress." 437 U. S., at 476. Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)'s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement. See *supra*, at 39–40.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE ALITO join, concurring in the judgment.

I agree with the Court that the Court of Appeals lacked jurisdiction over respondents' appeal, but I would ground that conclusion in Article III of the Constitution instead of 28 U. S. C. § 1291. I therefore concur only in the judgment.

The plaintiffs in this case, respondents here, sued Microsoft, petitioner here, to recover damages after they purchased allegedly faulty video game consoles that Microsoft manufactured. The plaintiffs brought claims for themselves (individual claims) and on behalf of a putative class of similarly situated consumers (class allegations). Early in the litigation, the District Court granted Microsoft's motion to strike the class allegations, effectively declining to certify

the class. The Court of Appeals denied permission to appeal that decision under Federal Rule of Civil Procedure 23(f), which requires a party to obtain permission from the court of appeals before appealing a decision regarding class certification.

The plaintiffs decided not to pursue their individual claims, instead stipulating to a voluntary dismissal of those claims with prejudice. They then filed a notice of appeal from the voluntary dismissal order. On appeal, they did not ask the Court of Appeals to reverse the District Court's dismissal of their individual claims. They instead asked the Court of Appeals to reverse the order striking their class allegations. The question presented in this case is whether the Court of Appeals had jurisdiction to hear the appeal under both § 1291, which grants appellate jurisdiction to the courts of appeals over "final decisions" by district courts, and under Article III of the Constitution, which limits the jurisdiction of federal courts to "cases" and "controversies."

The Court today holds that the Court of Appeals lacked jurisdiction under § 1291 because the voluntary dismissal with prejudice did not result in a "final decision." I disagree with that holding. A decision is "final" for purposes of § 1291 if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). The order here dismissed all of the plaintiffs' claims with prejudice and left nothing for the District Court to do but execute the judgment. See App. to Pet. for Cert. 39a ("direct[ing] the Clerk to enter Judgment . . . and close th[e] case").

The Court reaches the opposite conclusion, relying not on the text of § 1291 or this Court's precedents about finality, but on Rule 23(f). Rule 23(f) makes interlocutory orders regarding class certification appealable only with the permission of the court of appeals. The Court concludes that the plaintiffs' "voluntary dismissal" "does not qualify as a 'final decision' " because allowing the plaintiffs' appeal would "sub-

vert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Ante*, at 27.

The Court's conclusion does not follow from its reasoning. Whether a dismissal with prejudice is "final" depends on the meaning of § 1291, not Rule 23(f). Rule 23(f) says nothing about finality, much less about the finality of an order dismissing individual claims with prejudice. I agree with the Court that the plaintiffs are trying to avoid the requirements for interlocutory appeals under Rule 23(f), but our view of the balance struck in that Rule should not warp our understanding of finality under § 1291.

Although I disagree with the Court's reading of § 1291, I agree that the plaintiffs could not appeal in these circumstances. In my view, they could not appeal because the Court of Appeals lacked jurisdiction under Article III of the Constitution. The "judicial Power" of the United States extends only to "Cases" and "Controversies." Art. III, § 2. This requirement limits the jurisdiction of the federal courts to issues presented "in an adversary context," *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), in which the parties maintain an "actual" and "concrete" interest, *Campbell-Ewald Co.* v. *Gomez*, 577 U. S. 153, 160–161 (2016) (internal quotation marks omitted). Put another way, "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477 (1990) (internal quotation marks, citation, and alteration omitted).

The plaintiffs' appeal from their voluntary dismissal did not satisfy this jurisdictional requirement. When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of

Appeals could not "affect the[ir] rights" in any legally cognizable manner. *Ibid.* Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. See, *e. g.*, *Evans* v. *Phillips*, 4 Wheat. 73 (1819); *Lord* v. *Veazie*, 8 How. 251, 255–256 (1850); *United States* v. *Babbitt*, 104 U. S. 767 (1882); *Deakins* v. *Monaghan*, 484 U. S. 193, 199–200 (1988).

The plaintiffs contend that their interest in reversing the order striking their class allegations is sufficient to satisfy Article III's case-or-controversy requirement, but they misunderstand the status of putative class actions. Class allegations, without an underlying individual claim, do not give rise to a "case" or "controversy." Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class. See *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 408 (2010) (plurality opinion). Thus, because the Court of Appeals lacked Article III jurisdiction to adjudicate the individual claims, it could not hear the plaintiffs' appeal of the order striking their class allegations.

The plaintiffs' representation that they hope to "revive their [individual] claims should they prevail" on the appeal of the order striking their class allegations does not undermine this conclusion. Brief for Respondents 45. This Court has interpreted Article III "to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed." *Campbell Ewald Co.*, *supra*, at 160 (internal quotation marks and alterations omitted). And in any event, a favorable ruling on class certification would not "revive" their individual claims: A court's decision about class allegations "in no way touch[es] the merits" of those claims. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478, 482 (1978) (internal quotation marks omitted).

* * *

Because I would hold that the Court of Appeals lacked jurisdiction under Article III to consider respondents' appeal, I concur in the judgment.

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SESSIONS, ATTORNEY GENERAL *v.* MORALES-SANTANA

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

No. 15–1191. Argued November 9, 2016—Decided June 12, 2017

The Immigration and Nationality Act provides the framework for acquisition of U. S. citizenship from birth by a child born abroad, when one parent is a U. S. citizen and the other a citizen of another nation. Applicable to married couples, the main rule in effect at the time here relevant, 8 U. S. C. § 1401(a)(7) (1958 ed.), required the U. S.-citizen parent to have ten years' physical presence in the United States prior to the child's birth, "at least five of which were after attaining" age 14. The rule is made applicable to unwed U. S.-citizen fathers by § 1409(a), but § 1409(c) creates an exception for an unwed U. S.-citizen mother, whose citizenship can be transmitted to a child born abroad if she has lived continuously in the United States for just one year prior to the child's birth.

Respondent Luis Ramón Morales-Santana, who has lived in the United States since he was 13, asserts U. S. citizenship at birth based on the U. S. citizenship of his biological father, José Morales. José moved to the Dominican Republic 20 days short of his 19th birthday, therefore failing to satisfy § 1401(a)(7)'s requirement of five years' physical presence after age 14. There, he lived with the Dominican woman who gave birth to Morales-Santana. José accepted parental responsibility and included Morales-Santana in his household; he married Morales-Santana's mother and his name was then added to hers on Morales-Santana's birth certificate. In 2000, the Government sought to remove Morales-Santana based on several criminal convictions, ranking him as alien because, at his time of birth, his father did not satisfy the requirement of five years' physical presence after age 14. An immigration judge rejected Morales-Santana's citizenship claim and ordered his removal. Morales-Santana later moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. The Board of Immigration Appeals denied the motion, but the Second Circuit reversed. Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. To cure this infirmity, the

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Court of Appeals held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen.

Held:

1. The gender line Congress drew is incompatible with the Fifth Amendment's requirement that the Government accord to all persons "the equal protection of the laws." Pp. 56–72.

(a) Morales-Santana satisfies the requirements for third-party standing in seeking to vindicate his father's right to equal protection. José Morales' ability to pass citizenship to his son easily satisfies the requirement that the third party have a "'close' relationship with the person who possesses the right." *Kowalski* v. *Tesmer*, 543 U. S. 125, 130. And José's death many years before the current controversy arose is "a 'hindrance' to [José's] ability to protect his own interests." *Ibid.* Pp. 56–57.

(b) Sections 1401 and 1409 date from an era when the Nation's lawbooks were rife with overbroad generalizations about the way men and women are. Today, such laws receive the heightened scrutiny that now attends "all gender-based classifications," *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136, including laws granting or denying benefits "on the basis of the sex of the qualifying parent," *Califano* v. *Westcott*, 443 U. S. 76, 84. Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications declared unconstitutional in *Westcott*; *Reed* v. *Reed*, 404 U. S. 71, 74, 76–77; *Frontiero* v. *Richardson*, 411 U. S. 677, 688–691; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648–653; and *Califano* v. *Goldfarb*, 430 U. S. 199, 206–207. A successful defense therefore requires an "'exceedingly persuasive justification.'" *United States* v. *Virginia*, 518 U. S. 515, 531. Pp. 57–59.

(c) The Government must show, at least, that its gender-based "'classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to [achieving] those objectives."'" *Virginia*, 518 U. S., at 533. The classification must serve an important governmental interest *today*, for "new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell* v. *Hodges*, 576 U. S. 644, 673. Pp. 59–64.

(1) At the time § 1409 was enacted as part of the Nationality Act of 1940 (1940 Act), two once habitual, but now untenable, assumptions pervaded the Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the sole guardian of a nonmarital child. In the 1940 Act, Congress codified the mother-as-sole-guardian perception for unmarried parents. According to the stereotype, a residency re-

quirement was justified for unwed citizen fathers, who would care little about, and have scant contact with, their nonmarital children. Unwed citizen mothers needed no such prophylactic, because the alien father, along with his foreign ways, was presumptively out of the picture. Pp. 59–62.

(2) For close to a half century, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U. S., at 533. No "important [governmental] interest" is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital children. *Caban* v. *Mohammed*, 441 U. S. 380, 382, 394. In light of this equal protection jurisprudence, § 1409(a) and (c)'s discrete duration-of-residence requirements for mothers and fathers are anachronistic. Pp. 62–64.

(d) The Government points to *Fiallo* v. *Bell*, 430 U. S. 787; *Miller* v. *Albright*, 523 U. S. 420; and *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, for support. But *Fiallo* involved entry preferences for alien children; the case did not present a claim of U. S. citizenship. And *Miller* and *Nguyen* addressed a paternal-acknowledgment requirement well met here, not the length of a parent's prebirth residency in the United States. Pp. 64–66.

(e) The Government's suggested rationales for § 1409(a) and (c)'s gender-based differential do not survive heightened scrutiny. Pp. 66–72.

(1) The Government asserts that Congress sought to ensure that a child born abroad has a strong connection to the United States. The statute, the Government suggests, bracketed an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens because she is the only legally recognized parent at birth; and aligned an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien, because of the competing national influence of the alien mother. This rationale conforms to the long-held view that unwed fathers care little about their children. And the gender-based means scarcely serve the suggested congressional interest. Citizenship may be transmitted to children who have no tie to the United States so long as their U. S.-citizen mother was continuously present in the United States for one year at any point in her life *prior* to the child's birth; but it may not be transmitted by a U. S.-citizen father who falls a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if he acknowledges paternity on the day the child is born and raises the child in the United States. Pp. 66–68.

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(2) The Government also maintains that Congress wished to reduce the risk of statelessness for the foreign-born child of a U. S. citizen. But congressional hearings and reports offer no support for the assertion that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed U. S.-citizen mothers. Pp. 68–72.

2. Because this Court is not equipped to convert § 1409(c)'s exception for unwed U. S.-citizen mothers into the main rule displacing §§ 1401(a)(7) and 1409(a), it falls to Congress to select a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, § 1401(a)(7)'s current requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. The legislature's intent, as revealed by the statute at hand, governs the choice between the two remedial alternatives: extending favorable treatment to the excluded class or withdrawing favorable treatment from the favored class. Ordinarily, the preferred rule is to extend favorable treatment. *Westcott*, 443 U. S., at 89–90. Here, however, extension to fathers of § 1409(c)'s favorable treatment for mothers would displace Congress' general rule, the longer physical-presence requirements of §§ 1401(a)(7) and 1409 applicable to unwed U. S.-citizen fathers and U. S.-citizen parents, male as well as female, married to the child's alien parent. Congress' "'commitment to th[is] residual policy'" and "'the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation,'" *Heckler* v. *Mathews*, 465 U. S. 728, 739, n. 5, indicate that Congress would likely have abrogated § 1409(c)'s special exception, preferring to preserve "the importance of residence in this country as the talisman of dedicated attachment," *Rogers* v. *Bellei*, 401 U. S. 815, 834. Pp. 72–77.

804 F. 3d 520, affirmed in part, reversed in part, and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part, in which ALITO, J., joined, *post*, p. 78. GORSUCH, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Kneedler argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Mizer*, *Sarah E. Harrington*, *Donald E. Keener*, and *Andrew C. MacLachlan*.

Stephen A. Broome argued the cause for respondent. With him on the brief were *Kathleen M. Sullivan*, *Todd Anten*, *Justin T. Reinheimer*, and *Ellyde R. Thompson*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a gender-based differential in the law governing acquisition of U. S. citizenship by a child born abroad, when one parent is a U. S. citizen, the other, a citizen of another nation. The main rule appears in 8 U. S. C. § 1401(a)(7) (1958 ed.), now § 1401(g) (2012 ed.). Applicable to married couples, § 1401(a)(7) requires a period of physical presence in the United States for the U. S.-citizen parent. The requirement, as initially prescribed, was ten years' physical presence prior to the child's birth, § 601(g) (1940 ed.); currently, the requirement is five years prebirth, § 1401(g) (2012 ed.). That main rule is rendered applicable to unwed U. S.-citizen fathers by § 1409(a). Congress ordered an exception, however, for unwed U. S.-citizen mothers. Contained in § 1409(c), the exception allows an unwed mother to transmit her citizenship to a child born abroad if she has lived in the United States for just one year prior to the child's birth.

The respondent in this case, Luis Ramón Morales-Santana, was born in the Dominican Republic when his father was just 20 days short of meeting § 1401(a)(7)'s physical-presence requirement. Opposing removal to the Dominican Republic,

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Sandra S. Park*, *Lee Gelernt*, *Lenora M. Lapidus*, *Steven R. Shapiro*, *Jennifer Chang Newell*, *Cecillia D. Wang*, and *Arthur N. Eisenberg*; for Constitutional Law Scholars et al. by *Meir Feder*, and *Judith Resnik* and *Stephen I. Vladeck*, both *pro se*; for Equality Now et al. by *Martha F. Davis*, *William R. Stein*, *Scott H. Christensen*, and *Steven A. Hammond*; for the National Immigrant Justice Center et al. by *Charles Roth*; for Population and Family Scholars by *Suzanne B. Goldberg*, *Peter K. Stris*, and *Elizabeth Rogers Brannen*; for Professors of History et al. by *Catherine E. Stetson* and *Kristin A. Collins*, *pro se*; and for Scholars on Statelessness by *Max Gitter*.

Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment[1] entitles him to citizenship stature. We hold that the gender line Congress drew is incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." Nevertheless, we cannot convert § 1409(c)'s exception for unwed mothers into the main rule displacing § 1401(a)(7) (covering married couples) and § 1409(a) (covering unwed fathers). We must therefore leave it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination.

I

A

We first describe in greater detail the regime Congress constructed. The general rules for acquiring U. S. citizenship are found in 8 U. S. C. § 1401, the first section in Chapter 1 of Title III of the Immigration and Nationality Act (1952 Act or INA), § 301, 66 Stat. 235–236. Section 1401 sets forth the INA's rules for determining who "shall be nationals and citizens of the United States at birth" by establishing a range of residency and physical-presence requirements calibrated

[1] As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment's Due Process Clause. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." (citations and internal quotation marks omitted; alteration in original)).

primarily to the parents' nationality and the child's place of birth. § 1401(a) (1958 ed.); § 1401 (2012 ed.). The primacy of § 1401 in the statutory scheme is evident. Comprehensive in coverage, § 1401 provides the general framework for the acquisition of citizenship at birth. In particular, at the time relevant here,[2] § 1401(a)(7) provided for the U. S. citizenship of

> "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph."

Congress has since reduced the duration requirement to five years, two after age 14. § 1401(g) (2012 ed.).[3]

Section 1409 pertains specifically to children with unmarried parents. Its first subsection, § 1409(a), incorporates by reference the physical-presence requirements of § 1401, thereby allowing an acknowledged unwed citizen parent to transmit U. S. citizenship to a foreign-born child under the same terms as a married citizen parent. Section 1409(c)—a provision applicable only to unwed U. S.-citizen mothers—

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[2] Unless otherwise noted, references to 8 U. S. C. §§ 1401 and 1409 are to the 1958 edition of the U. S. Code, the version in effect when respondent Morales-Santana was born. Section 1409(a) and (c) have retained their numbering; § 1401(a)(7) has become § 1401(g).

[3] The reduction affects only children born on or after November 14, 1986. § 8(r), 102 Stat. 2619; see §§ 12–13, 100 Stat. 3657. Because Morales-Santana was born in 1962, his challenge is to the ten-years, five-after-age-14 requirement applicable at the time of his birth.

states an exception to the physical-presence requirements of §§ 1401 and 1409(a). Under § 1409(c)'s exception, only one year of continuous physical presence is required before unwed mothers may pass citizenship to their children born abroad.

B

Respondent Luis Ramón Morales-Santana moved to the United States at age 13, and has resided in this country most of his life. Now facing deportation, he asserts U. S. citizenship at birth based on the citizenship of his biological father, José Morales, who accepted parental responsibility and included Morales-Santana in his household.

José Morales was born in Guánica, Puerto Rico, on March 19, 1900. Record 55–56. Puerto Rico was then, as it is now, part of the United States, see *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 63–65 (2016); 8 U. S. C. § 1101(a)(38) (1958 ed.) ("The term United States . . . means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the [U. S.] Virgin Islands." (internal quotation marks omitted)); § 1101(a)(38) (2012 ed.) (similar), and José became a U. S. citizen under the Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 953 (a predecessor to 8 U. S. C. § 1402). After living in Puerto Rico for nearly two decades, José left his childhood home on February 27, 1919, 20 days short of his 19th birthday, therefore failing to satisfy § 1401(a)(7)'s requirement of five years' physical presence after age 14. Record 57, 66. He did so to take up employment as a builder-mechanic for a U. S. company in the then-U. S.-occupied Dominican Republic. *Ibid.*[4]

By 1959, José attested in a June 21, 1971 affidavit presented to the U. S. Embassy in the Dominican Republic, he was living with Yrma Santana Montilla, a Dominican woman

[4] See generally B. Calder, The Impact of Intervention: The Dominican Republic During the U. S. Occupation of 1916–1924, pp. 17, 204–205 (1984) (describing establishment of a U. S. military government in the Dominican Republic in 1916, and plans, beginning in late 1920, for withdrawal).

he would eventually marry. *Id.*, at 57. In 1962, Yrma gave birth to their child, respondent Luis Morales-Santana. *Id.*, at 166–167. While the record before us reveals little about Morales-Santana's childhood, the Dominican archives disclose that Yrma and José married in 1970, and that José was then added to Morales-Santana's birth certificate as his father. *Id.*, at 163–164, 167. José also related in the same affidavit that he was then saving money "for the susten[ance] of [his] family" in anticipation of undergoing surgery in Puerto Rico, where members of his family still resided. *Id.*, at 57. In 1975, when Morales-Santana was 13, he moved to Puerto Rico, *id.*, at 368, and by 1976, the year his father died, he was attending public school in the Bronx, a New York City borough, *id.*, at 140, 369.[5]

C

In 2000, the Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law, all of them rendered on May 17, 1995. *Id.*, at 426. Morales-Santana ranked as an alien despite the many years he lived in the United States, because, at the time of his birth, his father did not satisfy the requirement of five years' physical presence after age 14. See *supra*, at 53–54, and n. 3. An immigration judge rejected Morales-Santana's claim to citizenship derived from the U. S. citizenship of his father, and ordered Morales-Santana's removal to the Dominican Republic. Record 253, 366; App. to Pet. for Cert. 45a–49a. In 2010, Morales-Santana moved to reopen the proceedings, asserting that the Government's refusal to recognize that he derived citizenship from his U. S.-citizen father violated the Constitution's equal protection guarantee. See Record 27, 45. The Board of Immigration

[5] There is no question that Morales-Santana himself satisfied the five-year residence requirement that once conditioned a child's acquisition of citizenship under § 1401(a)(7). See § 1401(b).

Appeals (BIA) denied the motion. App. to Pet. for Cert. 8a, 42a–44a.

The United States Court of Appeals for the Second Circuit reversed the BIA's decision. 804 F. 3d 520, 524 (2015). Relying on this Court's post-1970 construction of the equal protection principle as it bears on gender-based classifications, the court held unconstitutional the differential treatment of unwed mothers and fathers. *Id.*, at 527–535. To cure the constitutional flaw, the court further held that Morales-Santana derived citizenship through his father, just as he would were his mother the U. S. citizen. *Id.*, at 535–538. In so ruling, the Second Circuit declined to follow the conflicting decision of the Ninth Circuit in *United States* v. *Flores-Villar*, 536 F. 3d 990 (2008), see 804 F. 3d, at 530, 535, n. 17. We granted certiorari in *Flores-Villar*, but ultimately affirmed by an equally divided Court. *Flores-Villar* v. *United States*, 564 U. S. 210 (2011) (*per curiam*). Taking up Morales-Santana's request for review, 579 U. S. 940 (2016), we consider the matter anew.

II

Because § 1409 treats sons and daughters alike, Morales-Santana does not suffer discrimination on the basis of *his* gender. He complains, instead, of gender-based discrimination against his father, who was unwed at the time of Morales-Santana's birth and was not accorded the right an unwed U. S.-citizen mother would have to transmit citizenship to her child. Although the Government does not contend otherwise, we briefly explain why Morales-Santana may seek to vindicate his father's right to the equal protection of the laws.[6]

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[6] We explain why Morales-Santana has third-party standing in view of the Government's opposition to such standing in *Flores-Villar* v. *United States*, 564 U. S. 210 (2011) (*per curiam*). See Brief for United States, O. T. 2010, No. 09–5801, pp. 10–14.

Ordinarily, a party "must assert his own legal rights" and "cannot rest his claim to relief on the legal rights . . . of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). But we recognize an exception where, as here, "the party asserting the right has a close relationship with the person who possesses the right [and] there is a hindrance to the possessor's ability to protect his own interests." *Kowalski* v. *Tesmer*, 543 U. S. 125, 130 (2004) (quoting *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991)). José Morales' ability to pass citizenship to his son, respondent Morales-Santana, easily satisfies the "close relationship" requirement. So, too, is the "hindrance" requirement well met. José Morales' failure to assert a claim in his own right "stems from disability," not "disinterest," *Miller* v. *Albright*, 523 U. S. 420, 450 (1998) (O'Connor, J., concurring in judgment), for José died in 1976, Record 140, many years before the current controversy arose. See *Hodel* v. *Irving*, 481 U. S. 704, 711–712, 723, n. 7 (1987) (children and their guardians may assert Fifth Amendment rights of deceased relatives). Morales-Santana is thus the "obvious claimant," see *Craig* v. *Boren*, 429 U. S. 190, 197 (1976), the "best available proponent," *Singleton* v. *Wulff*, 428 U. S. 106, 116 (1976), of his father's right to equal protection.

III

Sections 1401 and 1409, we note, date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are. See, *e. g.*, *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961) (women are the "center of home and family life," therefore they can be "relieved from the civic duty of jury service"); *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948) (States may draw "a sharp line between the sexes"). Today, laws of this kind are subject to review under the heightened scrutiny that now attends "all gender-based classifications." *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136 (1994); see, *e. g.*, *United States* v. *Virginia*, 518

U. S. 515, 555–556 (1996) (state-maintained military academy may not deny admission to qualified women).

Laws granting or denying benefits "on the basis of the sex of the qualifying parent," our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. *Califano* v. *Westcott*, 443 U. S. 76, 84 (1979); see *id.*, at 88–89 (holding unconstitutional provision of unemployed-parent benefits exclusively to fathers). Accord *Califano* v. *Goldfarb*, 430 U. S. 199, 206–207 (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survivors' benefits available to widows); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648–653 (1975) (holding unconstitutional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); *Frontiero* v. *Richardson*, 411 U. S. 677, 688–691 (1973) (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); cf. *Reed* v. *Reed*, 404 U. S. 71, 74, 76–77 (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child's estate).[7]

Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Westcott*. As in those cases, heightened scrutiny is in order. Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an "exceedingly persuasive justification." *Virginia*, 518 U. S., at 531 (internal quotation marks omitted); *Kirchberg* v. *Feen-*

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[7] See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) ("It is difficult to understand [*Reed*] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means . . . can the [*Reed*] result be made entirely persuasive.").

stra, 450 U. S. 455, 461 (1981) (internal quotation marks omitted).

A

The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U. S., at 533 (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); alteration in original); see *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, 60, 70 (2001). Moreover, the classification must substantially serve an important governmental interest *today*, for "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell* v. *Hodges*, 576 U. S. 644, 673 (2015). Here, the Government has supplied no "exceedingly persuasive justification," *Virginia*, 518 U. S., at 531 (internal quotation marks omitted), for § 1409(a) and (c)'s "gender-based" and "gender-biased" disparity, *Westcott*, 443 U. S., at 84 (internal quotation marks omitted).

1

History reveals what lurks behind § 1409. Enacted in the Nationality Act of 1940 (1940 Act), see 54 Stat. 1139–1140, § 1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents.[8] During this era, two once habitual, but now untenable, assumptions pervaded our Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.

[8] The provision was first codified in 1940 at 8 U. S. C. § 605, see § 205, 54 Stat. 1139–1140, and recodified in 1952 at § 1409, see § 309, 66 Stat. 238–239. For simplicity, we here use the latter designation.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. "[D]ominance [of] the husband," this Court observed in 1915, "is an ancient principle of our jurisprudence." *Mackenzie* v. *Hare*, 239 U. S. 299, 311 (1915).[9] See generally Brief for Professors of History et al. as *Amici Curiae* 4–15. Through the early 20th century, a male citizen automatically conferred U. S. citizenship on his alien wife. Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see *Kelly* v. *Owen*, 7 Wall. 496, 498 (1869) (the 1855 Act "confers the privileges of citizenship upon women married to citizens of the United States"); C. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 15–16, 20–21 (1998). A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien.[10] The family of a citizen or a lawfully admitted permanent resident enjoyed statutory exemptions from entry requirements, but only if the citizen or resident was male. See, *e. g.*, Act of Mar. 3, 1903, ch. 1012, § 37, 32 Stat. 1221 (wives and children entering the country to join permanent-resident aliens and found to have contracted contagious diseases during transit shall not be deported if the diseases were easily curable or did not present a danger to others); S. Rep. No. 1515, 81st Cong., 2d Sess., 415–417 (1950) (wives exempt from literacy and quota requirements). And

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[9] This "ancient principle" no longer guides the Court's jurisprudence. See *Kirchberg* v. *Feenstra*, 450 U. S. 455, 456 (1981) (invalidating, on equal protection inspection, Louisiana's former "head and master" rule).

[10] See generally C. Bredbenner, A Nationality of Her Own: Women, Marriage, and the Law of Citizenship 58–61 (1998); Sapiro, Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States, 13 Politics & Soc. 1, 4–10 (1984). In 1907, Congress codified several judicial decisions and prevailing State Department views by providing that a female U. S. citizen automatically lost her citizenship upon marriage to an alien. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228; see L. Gettys, The Law of Citizenship in the United States 119 (1934). This Court upheld the statute. *Mackenzie* v. *Hare*, 239 U. S. 299, 311 (1915).

from 1790 until 1934, the foreign-born child of a married couple gained U. S. citizenship only through the father.[11]

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." 2 J. Kent, Commentaries on American Law *215–*216; see *Nguyen*, 533 U. S., at 91–92 (O'Connor, J., dissenting). In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice. See Hearings on H. R. 6127 before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 43, 431 (1940) (hereinafter 1940 Hearings); 39 Op. Atty. Gen. 397, 397–398 (1939); 39 Op. Atty. Gen. 290, 291 (1939). See also Collins, Illegitimate Borders: *Jus Sanguinis* Citizenship and the Legal Construction of Family, Race, and Nation, 123 Yale L. J. 2134, 2199–2205 (2014) (hereinafter Collins).

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration, which proposed § 1409, explained: "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative

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[11] Act of Mar. 26, 1790, ch. 3, 1 Stat. 104; Act of Jan. 29, 1795, § 3, 1 Stat. 415; Act of Apr. 14, 1802, § 4, 2 Stat. 155; Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604; see 2 J. Kent, Commentaries on American Law *52–*53 (explaining that the 1802 Act, by adding "fathers," "seem[ed] to remove the doubt" about "whether the act intended by the words, 'children of persons,' both the father and mother, . . . or the father only"); L. Kerber, No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship 36 (1998); Brief for Professors of History et al. as *Amici Curiae* 5–6. In 1934, Congress moved in a new direction by allowing a married mother to transmit her citizenship to her child. Act of May 24, ch. 344, § 1, 48 Stat. 797.

father, and is bound to maintain it as its natural guardian." 1940 Hearings 431 (internal quotation marks omitted).

This unwed-mother-as-natural-guardian notion renders § 1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. *Id.*, at 426–427. Concern about the attachment of foreign-born children to the United States explains the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic: The alien father, who might transmit foreign ways, was presumptively out of the picture. See *id.*, at 431; Collins 2203 (in "nearly uniform view" of U. S. officials, "almost invariably," the mother alone "concern[ed] herself with [a nonmarital] child" (internal quotation marks omitted)).

2

For close to a half century, as earlier observed, see *supra*, at 57–58, this Court has viewed with suspicion laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U. S., at 533; see *Wiesenfeld*, 420 U. S., at 643, 648. In particular, we have recognized that if a "statutory objective is to exclude or 'protect' members of one gender" in reliance on "fixed notions concerning [that gender's] roles and abilities," the "objective itself is illegitimate." *Mississippi Univ. for Women*, 458 U. S., at 725.

In accord with this eventual understanding, the Court has held that no "important [governmental] interest" is served by laws grounded, as § 1409(a) and (c) are, in the obsolescing view that "unwed fathers [are] invariably less qualified and entitled than mothers" to take responsibility for nonmarital

children. *Caban* v. *Mohammed*, 441 U. S. 380, 382, 394 (1979).[12] Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives.[13] Laws according or denying benefits in reliance on "[s]tereotypes about women's domestic roles," the Court has observed, may "creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver." *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736 (2003). Correspondingly, such laws may disserve men who exercise responsibility for raising their children. See *ibid.* In light of the

[12] *Lehr* v. *Robertson*, 463 U. S. 248 (1983), on which the Court relied in *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, 62–64 (2001), recognized that laws treating fathers and mothers differently "may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child," *Lehr*, 463 U. S., at 267. The "similarly situated" condition was not satisfied in *Lehr*, however, for the father in that case had "never established any custodial, personal, or financial relationship" with the child. *Ibid.*

Here, there is no dispute that José Morales formally accepted parental responsibility for his son during Morales-Santana's childhood. See *supra*, at 54–55. If subject to the same physical-presence requirements that applied to unwed U. S.-citizen mothers, José would have been recognized as Morales-Santana's father "as of the date of birth." § 1409(a); see § 1409(c) ("at birth").

[13] Even if stereotypes frozen into legislation have "statistical support," our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn. *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 139, n. 11 (1994); see, *e. g.*, *Craig* v. *Boren*, 429 U. S. 190, 198–199 (1976); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975). In fact, unwed fathers assume responsibility for their children in numbers already large and notably increasing. See Brief for Population and Family Scholars as *Amici Curiae* 3, 5–13 (documenting that nonmarital fathers "are [often] in a parental role at the time of their child's birth," and "most . . . formally acknowledge their paternity either at the hospital or in the birthing center just after the child is born"); Brief for American Civil Liberties Union et al. as *Amici Curiae* 22 (observing, *inter alia*, that "[i]n 2015, fathers made up 16 percent of single parents with minor children in the United States").

equal protection jurisprudence this Court has developed since 1971, see *Virginia*, 518 U. S., at 531–534, § 1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who have accepted parental responsibility is stunningly anachronistic.

B

In urging this Court nevertheless to reject Morales-Santana's equal protection plea, the Government cites three decisions of this Court: *Fiallo* v. *Bell*, 430 U. S. 787 (1977); *Miller* v. *Albright*, 523 U. S. 420; and *Nguyen* v. *INS*, 533 U. S. 53. None controls this case.

The 1952 Act provision at issue in *Fiallo* gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. 430 U. S., at 788–789, and n. 1. Unwed fathers and their children, asserting their right to equal protection, sought the same preferences. *Id.*, at 791. Applying minimal scrutiny (rational-basis review), the Court upheld the provision, relying on Congress' "exceptionally broad power" to admit or exclude aliens. *Id.*, at 792, 794.[14] This case, however, involves no entry preference for aliens. Morales-Santana claims he is, and since birth has been, a U. S. citizen. Examining a claim of that order, the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review. See *Nguyen*, 533 U. S., at 60–61, 70; *Miller*, 523 U. S., at 434–435, n. 11 (opinion of Stevens, J.).

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[14] In 1986, nine years after the decision in *Fiallo* v. *Bell*, 430 U. S. 787 (1977), Congress amended the governing law. The definition of "child" that included offspring of natural mothers but not fathers was altered to include children born out of wedlock who established a bona fide parent-child relationship with their natural fathers. See Immigration Reform and Control Act of 1986, § 315(a), 100 Stat. 3439, as amended, 8 U. S. C. § 1101(b)(1)(D) (1982 ed., Supp. IV); *Miller* v. *Albright*, 523 U. S. 420, 429, n. 4 (1998) (opinion of Stevens, J.).

The provision challenged in *Miller* and *Nguyen* as violative of equal protection requires unwed U. S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U. S. citizenship to those children. See § 1409(a)(4) (2012 ed.).[15] After *Miller* produced no opinion for the Court, see 523 U. S., at 423, we took up the issue anew in *Nguyen*. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth. See 533 U. S., at 62–63. Morales-Santana's challenge does not renew the contest over § 1409's paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government does not dispute that Morales-Santana's father, by marrying Morales-Santana's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in *Nguyen* and *Miller*, the physical-presence requirements

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[15] Section 1409(a), following amendments in 1986 and 1988, see § 13, 100 Stat. 3657; § 8(k), 102 Stat. 2618, now states:

"The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, . . . shall apply as of the date of birth to a person born out of wedlock if—

"(1) a blood relationship between the person and the father is established by clear and convincing evidence,

"(2) the father had the nationality of the United States at the time of the person's birth,

"(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

"(4) while the person is under the age of 18 years—

"(A) the person is legitimated under the law of the person's residence or domicile,

"(B) the father acknowledges paternity of the person in writing under oath, or

"(C) the paternity of the person is established by adjudication of a competent court."

now before us relate solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his] child." 804 F. 3d, at 531. And unlike *Nguyen*'s parental-acknowledgment requirement, § 1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as "minimal." 533 U. S., at 70.

C

Notwithstanding § 1409(a) and (c)'s provenance in traditional notions of the way women and men are, the Government maintains that the statute serves two important objectives: (1) ensuring a connection between the child to become a citizen and the United States and (2) preventing "statelessness," *i. e.*, a child's possession of no citizenship at all. Even indulging the assumption that Congress intended § 1409 to serve these interests, but see *supra*, at 59–62, neither rationale survives heightened scrutiny.

1

We take up first the Government's assertion that § 1409(a) and (c)'s gender-based differential ensures that a child born abroad has a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government does not contend, nor could it, that unmarried men take more time to absorb U. S. values than unmarried women do. See *supra* this page. Instead, it presents a novel argument, one it did not advance in *Flores-Villar*.[16]

An unwed mother, the Government urges, is the child's only "legally recognized" parent at the time of childbirth.

[16] In *Flores-Villar*, the Government asserted only the risk-of-statelessness rationale, which it repeats here. See Brief for United States, O. T. 2010, No. 09–5801, at 22–39; *infra*, at 68–72.

Brief for Petitioner 9–10, 28–32.[17] An unwed citizen father enters the scene later, as a second parent. A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the alien mother. *Id.*, at 9–10. Congress, the Government suggests, designed the statute to bracket an unwed U. S.-citizen mother with a married couple in which both parents are U. S. citizens,[18] and to align an unwed U. S.-citizen father with a married couple, one spouse a citizen, the other, an alien.

Underlying this apparent design is the assumption that the alien father of a nonmarital child born abroad to a U. S.-citizen mother will not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the "competing national influence" that, according to the Government, justifies imposing on unwed U. S.-citizen fathers, but not unwed U. S.-citizen mothers, lengthy physical-presence requirements. Hardly gender neutral, see *id.*, at 9, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. See *supra*, at 59–63. Lump characterization of that kind, however, no longer passes equal protection inspection. See *supra*, at 63–64, and n. 13.

Accepting, *arguendo*, that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end. The scheme permits the transmis-

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[17] But see § 1409(a) (unmarried U. S.-citizen father who satisfies the physical-presence requirements and, after his child is born, accepts parental responsibility transmits his citizenship to the child "as of the date of birth").

[18] When a child is born abroad to married parents, both U. S. citizens, the child ranks as a U. S. citizen at birth if either parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of [the child]." § 1401(a)(3) (1958 ed.); § 1401(c) (2012 ed.) (same).

sion of citizenship to children who have no tie to the United States so long as their mother was a U. S. citizen continuously present in the United States for one year at any point in her life *prior* to the child's birth. The transmission holds even if the mother marries the child's alien father immediately after the child's birth and never returns with the child to the United States. At the same time, the legislation precludes citizenship transmission by a U. S.-citizen father who falls a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledges paternity on the day of the child's birth and raises the child in the United States.[19] One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny. See, *e. g.*, *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 151–152 (1980) (holding unconstitutional state workers' compensation death-benefits statute presuming widows' but not widowers' dependence on their spouse's earnings); *Westcott*, 443 U. S., at 88–89.

2

The Government maintains that Congress established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. Brief for Petitioner 33. This risk,

[19] Brief for Respondent 26, n. 9, presents this example: "Child A is born in Germany and raised there by his U. S.-citizen mother who spent only a year of her life in the United States during infancy; Child B is born in Germany and is legitimated and raised in Germany by a U. S.-citizen father who spent his entire life in the United States before leaving for Germany one week before his nineteenth birthday. Notwithstanding the fact that Child A's 'legal relationship' with his U. S.-citizen mother may have been established 'at the moment of birth,' and Child B's 'legal relationship' with his U. S.-citizen father may have been established a few hours later, Child B is more likely than Child A to learn English and assimilate U. S. values. Nevertheless, under the discriminatory scheme, only Child A obtains U. S. citizenship at birth." For another telling example, see Brief for Equality Now et al. as *Amici Curiae* 19–20.

according to the Government, was substantially greater for the foreign-born child of an unwed U. S.-citizen mother than it was for the foreign-born child of an unwed U. S.-citizen father. *Ibid.* But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception,[20] nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." 804 F. 3d, at 532–533. See Collins 2205, n. 283 (author examined "many hundreds of pre-1940 administrative memos . . . defend[ing] or explain[ing] recognition of the nonmarital foreign-born children of American mothers as citizens"; of the hundreds, "exactly one memo by a U. S. official . . . mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern"). Reducing the incidence of statelessness was the express goal of *other* sections of the 1940 Act. See 1940 Hearings 430 ("stateless[ness]" is "object" of section on foundlings). The justification for § 1409's gender-based di-

[20] A Senate Report dated January 29, 1952, is the sole exception. That Report relates that a particular problem of statelessness accounts for the 1952 Act's elimination of a 1940 Act provision the State Department had read to condition a citizen mother's ability to transmit nationality to her child on the father's failure to legitimate the child prior to the child's 18th birthday. See 1940 Act, § 205, 54 Stat. 1140 ("*In the absence of . . . legitimation or adjudication* [during the child's minority], . . . the child" born abroad to an unmarried citizen mother "shall be held to have acquired at birth [the mother's] nationality status." (emphasis added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father's actions. S. Rep. No. 1137, 82d Cong., 2d Sess., 39 (1952) ("This provision establish[es] the child's nationality as that of the [citizen] mother *regardless of legitimation or establishment of paternity* . . . ." (emphasis added)). This sole reference to a statelessness problem does not touch or concern the different physical-presence requirements carried over from the 1940 Act into the 1952 Act.

chotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. See *supra*, at 59–63; Collins 2205 ("[T]he pronounced gender asymmetry of the Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship."). It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "*post hoc* in response to litigation." *Virginia*, 518 U. S., at 533, 535–536.

Infecting the Government's risk-of-statelessness argument is an assumption without foundation. "[F]oreign laws that would put the child of the U. S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would *protect* the child of the U. S.-citizen father against statelessness by providing that the child would take his mother's citizenship." Brief for Petitioner 35. The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child. See Brief for Scholars on Statelessness as *Amici Curiae* 13–22, A1–A15.

Experts who have studied the issue report that, at the time relevant here, in "at least thirty countries," citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother's country. *Id.*, at 14; see *id.*, at 14–17. "[A]s many as forty-five countries," they further report, "did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father." *Id.*, at 18; see *id.*, at 18–21. In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. *Id.*, at 21–22; see Sandifer, A Compara-

tive Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 256, 258 (1935) (of 79 nations studied, about half made no specific provision for the nationality of nonmarital children). Taking account of the foreign laws actually in force, these experts concluded, "the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U. S. mothers." Brief for Scholars on Statelessness as *Amici Curiae* 9–10; see *id.*, at 38–39. One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U. S.-citizen mothers while ignoring the same risk for children of unwed U. S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See generally UNHCR, Ending Statelessness Within 10 Years, online at http://www.unhcr.org/en-us/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html (all Internet materials as last visited June 9, 2017). Cognizant that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the Commissioner has made a key component of its project the elimination of gender discrimination in such laws. UNHCR, The Campaign To End Statelessness: April 2016 Update 1 (referring to speech of UNHCR "highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally"), online at http://www.unhcr.org/ibelong/wp-content/uploads/Campaign-Update-April-2016.pdf; UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016, p. 1 ("Ensuring gender equality in nationality laws can mitigate the risks of statelessness."), online at http://www.refworld.org/docid/56de83ca4.html. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than

strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no "exceedingly persuasive" justification for § 1409(a) and (c)'s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.[21]

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i. e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserves for unwed mothers.

There are "two remedial alternatives," our decisions instruct, *Westcott*, 443 U. S., at 89 (quoting *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)), when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Westcott*, 443 U. S., at 89 (quoting

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[21] JUSTICE THOMAS, joined by JUSTICE ALITO, sees our equal protection ruling as "unnecessary," *post*, at 78, given our remedial holding. But, "as we have repeatedly emphasized, discrimination itself . . . perpetuat[es] 'archaic and stereotypic notions' " incompatible with the equal treatment guaranteed by the Constitution. *Heckler* v. *Mathews*, 465 U. S. 728, 739 (1984) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 725 (1982)).

Welsh, 398 U. S., at 361 (opinion of Harlan, J.)).[22] "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 247 (1931); emphasis deleted). "How equality is accomplished . . . is a matter on which the Constitution is silent." *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 426–427 (2010).[23]

The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand. See *id.*, at 427 ("On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institutional competence,

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[22] After silently following the path Justice Harlan charted in *Welsh* v. *United States*, 398 U. S. 333 (1970), in several cases involving gender-based discrimination, see, *e. g.*, *Wiesenfeld*, 420 U. S., at 642, 653 (extending benefits); *Frontiero* v. *Richardson*, 411 U. S. 677, 690–691, and n. 25 (1973) (plurality opinion) (same), the Court unanimously adopted his formulation in *Califano* v. *Westcott*, 443 U. S. 76 (1979). See *id.*, at 89–90 (opinion for the Court); *id.*, at 94–95 (Powell, J., concurring in part and dissenting in part). The appropriate remedy, the *Westcott* majority held, was extension to unemployed mothers of federal family-aid unemployment benefits provided by statute only for families of unemployed fathers. *Id.*, at 90–93. In the dissent's view, nullification was the proper course. *Id.*, at 94–96.

[23] Because the manner in which a State eliminates discrimination "is an issue of state law," *Stanton* v. *Stanton*, 421 U. S. 7, 18 (1975), upon finding state statutes constitutionally infirm, we have generally remanded to permit state courts to choose between extension and invalidation. See *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 427 (2010). In doing so, we have been explicit in leaving open on remand the option of removal of a benefit, as opposed to extension. See, *e. g.*, *Orr* v. *Orr*, 440 U. S. 268, 283–284 (1979) (leaving to state courts remedy for unconstitutional imposition of alimony obligations on husbands but not wives); *Stanton*, 421 U. S., at 17–18 (how to eliminate unconstitutional age differential, for child-support purposes, between male and female children, is "an issue of state law to be resolved by the Utah courts").

to implement what the legislature would have willed had it been apprised of the constitutional infirmity."). See also *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 330 (2006) ("the touchstone for any decision about remedy is legislative intent").[24]

Ordinarily, we have reiterated, "extension, rather than nullification, is the proper course." *Westcott*, 443 U. S., at 89. Illustratively, in a series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended. See, *e. g.*, *Goldfarb*, 430 U. S., at 202–204, 213–217 (plurality opinion) (survivors' benefits), aff'g 396 F. Supp. 308, 309 (EDNY 1975) (*per curiam*); *Jimenez* v. *Weinberger*, 417 U. S. 628, 630–631, and n. 2, 637–638 (1974) (disability benefits); *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 529–530, 538 (1973) (food stamps); *Frontiero*, 411 U. S., at 678–679, and n. 2, 691, and n. 25 (plurality opinion) (military spousal benefits). Here, however, the discriminatory exception consists of *favorable*

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[24] We note, however, that a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity. In *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), for example, the defendant participated in a civil rights demonstration in front of a school. Convicted of violating a local "antipicketing" ordinance that exempted "peaceful picketing of any school involved in a labor dispute," he successfully challenged his conviction on equal protection grounds. *Id.*, at 107 (internal quotation marks omitted). It was irrelevant to the Court's decision whether the legislature likely would have cured the constitutional infirmity by excising the labor-dispute exemption. In fact, the legislature had done just that subsequent to the defendant's conviction. *Ibid.*, and n. 2. "Necessarily," the Court observed, "we must consider the facial constitutionality of the ordinance in effect when [the defendant] was arrested and convicted." *Id.*, at 107, n. 2. See also *Welsh*, 398 U. S., at 361–364 (Harlan, J., concurring in result) (reversal required even if, going forward, Congress would cure the unequal treatment by extending rather than invalidating the criminal proscription).

treatment for a discrete group (a shorter physical-presence requirement for unwed U. S.-citizen mothers giving birth abroad). Following the same approach as in those benefits cases—striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group.

The Court has looked to Justice Harlan's concurring opinion in *Welsh* v. *United States*, 398 U. S., at 361–367, in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation. In making this assessment, a court should "'measure the intensity of commitment to the residual policy'"—the main rule, not the exception—"'and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Heckler*, 465 U. S., at 739, n. 5 (quoting *Welsh*, 398 U. S., at 365 (opinion of Harlan, J.)).

The residual policy here, the longer physical-presence requirement stated in §§ 1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." *Rogers* v. *Bellei*, 401 U. S. 815, 834 (1971); see *Weedin* v. *Chin Bow*, 274 U. S. 657, 665–666 (1927) (Congress "attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent. . . . [T]he heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship." (internal quotation marks omitted)). And the potential for "disruption of the statutory scheme" is large. For if § 1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U. S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital chil-

dren is scarcely a purpose one can sensibly attribute to Congress.[25]

Although extension of benefits is customary in federal benefit cases, see *supra*, at 73, n. 22, 74, all indicators in this case point in the opposite direction.[26] Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.[27]

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The gender-based distinction infecting §§ 1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the rea-

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[25] Distinctions based on parents' marital status, we have said, are subject to the same heightened scrutiny as distinctions based on gender. *Clark* v. *Jeter*, 486 U. S. 456, 461 (1988).

[26] In crafting the INA in 1952, Congress considered, but did not adopt, an amendment that would have applied the shorter one-year continuous physical-presence requirement now contained in § 1409(c) to all foreign-born children of parents with different nationalities. See S. 2842, 82d Cong., 2d Sess., § 301(a)(5) (1952).

[27] Compare with the remedial issue presented here suits under Title VII of the Civil Rights Act of 1964 challenging laws prescribing terms and conditions of employment applicable to women only, *e. g.*, minimum wage, premium pay, rest breaks, or lunch breaks. Most courts, perhaps mindful of the mixed motives implicated in passage of such legislation (some conceiving the laws as protecting women, others, as discouraging employers from hiring women), and, taking into account the economic burdens extension would impose on employers, have invalidated the provisions. See, *e. g.*, *Homemakers, Inc., of Los Angeles* v. *Division of Industrial Welfare*, 509 F. 2d 20, 22–23 (CA9 1974), aff'g 356 F. Supp. 1111 (1973) (ND Cal. 1973); *Burns* v. *Rohr Corp.*, 346 F. Supp. 994, 997–998 (SD Cal. 1972); *RCA del Caribe, Inc.* v. *Silva Recio*, 429 F. Supp. 651, 655–658 (PR 1976); *Doctors Hospital, Inc.* v. *Recio*, 383 F. Supp. 409, 417–418 (PR 1974); *State* v. *Fairfield Communities Land Co.*, 260 Ark. 277, 279–281, 538 S. W. 2d 698, 699–700 (1976); *Jones Metal Products Co.* v. *Walker*, 29 Ohio St. 2d 173, 178–183, and n. 6, 281 N. E. 2d 1, 6–9, and n. 6 (1972); *Vick* v. *Pioneer Oil Co.*, 569 S. W. 2d 631, 633–635 (Tex. Civ. App. 1978).

sons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." *Levin*, 560 U. S., at 427. Although the preferred rule in the typical case is to extend favorable treatment, see *Westcott*, 443 U. S., at 89–90, this is hardly the typical case.[28] Extension here would render the special treatment Congress prescribed in § 1409(c), the one-year physical-presence requirement for U. S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U. S.-citizen parent and one foreign-citizen parent, therefore, must hold sway.[29] Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U. S.-citizen mothers. See Brief for Petitioner 12, 51; Reply Brief 19, n. 3.

* * *

The judgment of the Court of Appeals for the Second Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

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[28] The Court of Appeals found the remedial issue "the most vexing problem in this case." 804 F. 3d 520, 535 (2015).

[29] That Morales-Santana did not seek this outcome does not restrain the Court's judgment. The issue turns on what the legislature would have willed. "The relief the complaining party requests does not circumscribe this inquiry." *Levin*, 560 U. S., at 427.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, concurring in the judgment in part.

The Court today holds that we are "not equipped to" remedy the equal protection injury that respondent claims his father suffered under the Immigration and Nationality Act (INA) of 1952. *Ante*, at 72. I agree with that holding. As the majority concludes, extending 8 U. S. C. § 1409(c)'s 1-year physical presence requirement to unwed citizen fathers (as respondent requests) is not, under this Court's precedent, an appropriate remedy for any equal protection violation. See *ante*, at 72. Indeed, I am skeptical that we even have the "power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress." *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, 73 (2001) (Scalia, J., joined by THOMAS, J., concurring) (citing *Miller* v. *Albright*, 523 U. S. 420, 452 (1998) (Scalia, J., joined by THOMAS, J., concurring in judgment)).

The Court's remedial holding resolves this case. Because respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional, whether respondent has third-party standing to raise an equal protection claim on behalf of his father, or whether other immigration laws (such as the current versions of §§ 1401(g) and 1409) are constitutional. I therefore concur only in the judgment reversing the Second Circuit.

Syllabus

HENSON ET AL. *v.* SANTANDER CONSUMER USA INC.

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

No. 16–349. Argued April 18, 2017—Decided June 12, 2017

The Fair Debt Collection Practices Act authorizes private lawsuits and weighty fines designed to deter the wayward practices of "debt collector[s]," a term embracing anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." 15 U. S. C. § 1692a(6). The complaint filed in this case alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; and that respondent Santander then purchased the defaulted loans from CitiFinancial and sought to collect in ways petitioners believe violated the Act. The district court and Fourth Circuit held that Santander didn't qualify as a debt collector because it did not regularly seek to collect debts "owed . . . another" but sought instead only to collect debts that it purchased and owned.

Held: A company may collect debts that it purchased for its own account, like Santander did here, without triggering the statutory definition in dispute. By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself.

Petitioners' arguments to the contrary do not dislodge the statute's plain meaning. Petitioners point out that the word "owed" is the *past* participle of the verb "to owe," and so suggest that the debt collector definition must exclude loan originators (who never seek to collect debts previously owed someone else) but embrace debt purchasers like Santander (who necessarily do). But past participles like "owed" are routinely used as adjectives to describe the present state of a thing. Congress also used the word "owed" to refer to present debt relationships in neighboring provisions of the Act, and petitioners have not rebutted the presumption that identical words in the same statute carry the same meaning. Neither would reading the word "owed" to refer to present debt relationships render any of the Act's provisions surplusage, contrary to what petitioners suggest.

Petitioners also contend that their interpretation best furthers the Act's perceived purposes because, they primarily argue, if Congress had been aware of defaulted debt purchasers like Santander it would have

Syllabus

treated them like traditional debt collectors because they pose similar risks of abusive collection practices. But it is not this Court's job to rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. And neither are petitioners' policy arguments unassailable, as reasonable legislators might contend both ways on the question of how defaulted debt purchasers should be treated. This fact suggests for certain but one thing: that these are matters for Congress, not this Court, to resolve. Pp. 83–90.

817 F. 3d 131, affirmed.

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

Kevin K. Russell argued the cause for petitioners. With him on the briefs was *Cory L. Zajdel*.

Kannon K. Shanmugam argued the cause for respondent. With him on the brief were *Allison Jones Rushing*, *Masha G. Hansford*, *Barrett J. Anderson*, and *Matthew A. Fitzgerald*.*

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*Briefs of *amici curiae* urging reversal were filed by the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Jona Maukonen*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Joseph A. Foster* of New Hampshire, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the Jerome N. Frank Legal Services Organization at Yale Law School et al. by *Jeffrey Gentes* and *Seth E. Mermin*; for the National Consumer Law Center et al. by *Daniel A. Edelman*; and for Public Counsel by *Anne Richardson* and *Stuart Banner*.

Briefs of *amici curiae* urging affirmance were filed for ACA International by *Brian Melendez*; for the Chamber of Commerce of the United

JUSTICE GORSUCH delivered the opinion of the Court.

Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection practices. So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a "debt collector" subject to the Act's rigors. Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt. But what if you purchase a debt and then try to collect it for yourself—does that make you a "debt collector" too? That's the nub of the dispute now before us.

The parties approach the question from common ground. The complaint alleges that CitiFinancial Auto loaned money to petitioners seeking to buy cars; that petitioners defaulted on those loans; that respondent Santander then purchased the defaulted loans from CitiFinancial; and that Santander sought to collect in ways petitioners believe troublesome under the Act. The parties agree, too, that in deciding whether Santander's conduct falls within the Act's ambit we should look to statutory language defining the term "debt collector" to embrace anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another." 15 U. S. C. § 1692a(6).

Even when it comes to that question, the parties agree on at least part of an answer. Both sides accept that third party debt collection agents generally qualify as "debt collectors" under the relevant statutory language, while those who seek only to collect for themselves loans they originated generally do not. These results follow, the parties tell us, be-

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States of America et al. by *Kate Comerford Todd* and *Joseph R. Palmore*; and for the Clearing House Association, LLC, et al. by *H. Rodgin Cohen*, *Michael M. Wiseman*, *Matthew A. Schwartz*, and *Thomas Pinder*.

cause debt collection agents seek to collect debts "owed . . . another," while loan originators acting on their own account aim only to collect debts owed to themselves. All that remains in dispute is how to classify individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account. Does the Act treat the debt purchaser in that scenario more like the repo man or the loan originator?

For their part, the district court and Fourth Circuit sided with Santander. They held that the company didn't qualify as a debt collector because it didn't regularly seek to collect debts "owed . . . another" but sought instead only to collect debts that it purchased and owned. At the same time, the Fourth Circuit acknowledged that some circuits faced with the same question have ruled otherwise—and it is to resolve this conflict that we took the case. Compare 817 F. 3d 131, 133–134, 137–138 (2016) (case below); *Davidson* v. *Capital One Bank (USA), N. A.*, 797 F. 3d 1309, 1315–1316 (CA11 2015), with *McKinney* v. *Caldeway Properties, Inc.*, 548 F. 3d 496, 501 (CA7 2008); *FTC* v. *Check Investors, Inc.*, 502 F. 3d 159, 173–174 (CA3 2007).

Before attending to that job, though, we pause to note two related questions we do not attempt to answer today. First, petitioners suggest that Santander can qualify as a debt collector not only because it regularly seeks to collect for its own account debts that it has purchased, but also because it regularly acts as a third party collection agent for debts owed to others. Petitioners did not, however, raise the latter theory in their petition for certiorari and neither did we agree to review it. Second, the parties briefly allude to another statutory definition of the term "debt collector"—one that encompasses those engaged "in any business the principal purpose of which is the collection of any debts." § 1692a(6). But the parties haven't much litigated that alternative definition and in granting certiorari, see 580 U. S. 1089 (2017), we didn't agree to address it either.

With these preliminaries by the board, we can turn to the much narrowed question properly before us. In doing so, we begin, as we must, with a careful examination of the statutory text. And there we find it hard to disagree with the Fourth Circuit's interpretive handiwork. After all, the Act defines debt collectors to include those who regularly seek to collect debts "owed . . . another." And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—not on a debt owner seeking to collect debts for itself. Neither does this language appear to suggest that we should care how a debt owner came to be a debt owner—whether the owner originated the debt or came by it only through a later purchase. All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for "another." And given that, it would seem a debt purchaser like Santander may indeed collect debts for its own account without triggering the statutory definition in dispute, just as the Fourth Circuit explained.

Petitioners reply that this seemingly straightforward reading overlooks an important question of tense. They observe that the word "owed" is the *past* participle of the verb "to owe." And this, they suggest, means the statute's definition of debt collector captures anyone who regularly seeks to collect debts *previously* "owed . . . another." So it is that, on petitioners' account, the statute excludes from its compass loan originators (for they never seek to collect debts previously owed someone else) but embraces many debt purchasers like Santander (for in collecting purchased debts they necessarily seek to collect debts previously owed another). If Congress wanted to exempt all present debt owners from its debt collector definition, petitioners submit, it would have used the *present* participle "owing." That would have better sufficed to do the job—to make clear that you must collect debts *currently* "owing . . . another" before implicating the Act.

But this much doesn't follow even as a matter of good grammar, let alone ordinary meaning. Past participles like "owed" are routinely used as adjectives to describe the present state of a thing—so, for example, *burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her. See P. Peters, The Cambridge Guide to English Usage 409 (2004) (explaining that the term "past participle" is a "misnomer[ ], since" it "can occur in what is technically a present . . . tense"). Just imagine if you told a friend that you were seeking to "collect a debt owed to Steve." Doesn't it seem likely your friend would understand you as speaking about a debt *currently* owed to Steve, not a debt Steve *used* to own and that's now actually yours? In the end, even petitioners find themselves forced to admit that past participles can and regularly do work just this way, as adjectives to describe the present state of the nouns they modify. See Brief for Petitioners 28; see also B. Garner, Modern English Usage 666 (4th ed. 2016) (while "*owing* . . . is an old and established usage . . . the more logical course is simply to write *owed*").

Widening our view to take in the statutory phrase in which the word "owed" appears—"owed or due . . . another"—serves to underscore the point. Petitioners acknowledge that the word "due" describes a debt *currently* due at the time of collection and not a debt that *was* due only in some previous period. Brief for Petitioners 26–28. So to rule for them we would have to suppose Congress set two words cheek by jowl in the same phrase but meant them to speak to entirely different periods of time. All without leaving any clue. We would have to read the phrase not as referring to "debts that *are* owed or due another" but as describing "debts that *were* owed or *are* due another." And supposing such a surreptitious subphrasal shift in time seems to us a bit much. Neither are we alone in that assessment, for even petitioners acknowledge that theirs "may not

be the most natural interpretation of the phrase standing in isolation." *Id.*, at 26–27.

Given that, you might wonder whether extending our gaze from the narrow statutory provision at issue to take in the larger statutory landscape might offer petitioners a better perspective. But it does not. Looking to other neighboring provisions in the Act, it quickly comes clear that Congress routinely used the word "owed" to refer to present (not past) debt relationships. For example, in one nearby subsection, Congress defined a creditor as someone "to whom a debt is owed." 15 U. S. C. § 1692a(4). In another subsection, too, Congress required a debt collector to identify "the creditor to whom the debt is owed." § 1692g(a)(2). Yet petitioners offer us no persuasive reason why the word "owed" should bear a different meaning here, in the subsection before us, or why we should abandon our usual presumption that "identical words used in different parts of the same statute" carry "the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005).

Still other contextual clues add to petitioners' problems. While they suggest that the statutory definition before us implicitly distinguishes between loan originators and debt purchasers, a pass through the statute shows that when Congress wished to distinguish between originators and purchasers it left little doubt in the matter. In the very definitional section where we now find ourselves working, Congress expressly differentiated between a person "who offers" credit (the originator) and a person "to whom a debt is owed" (the present debt owner). § 1692a(4). Elsewhere, Congress recognized the distinction between a debt "originated by" the collector and a debt "owed or due" another. § 1692a(6)(F)(ii). And elsewhere still, Congress drew a line between the "original" and "current" creditor. § 1692g(a)(5). Yet no similar distinction can be found in the language now before us. To the contrary, the statutory text at issue speaks not at all about originators and current debt owners

but only about whether the defendant seeks to collect on behalf of itself or "another." And, usually at least, when we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning. See, *e. g.*, *Loughrin* v. *United States*, 573 U. S. 351, 358 (2014).

Even what may be petitioners' best piece of contextual evidence ultimately proves unhelpful to their cause. Petitioners point out that the Act exempts from the definition of "debt collector" certain individuals who have "obtained" particular kinds of debt—for example, debts not yet in default or debts connected to secured commercial credit transactions. §§ 1692a(6)(F)(iii) and (iv). And because these exemptions contemplate the possibility that someone might "obtain" a debt "owed or due . . . another," petitioners submit, the word "owed" must refer only to a *previous* owner. *Ibid.* This conclusion, they say, necessarily follows because, once you have "obtained" a debt, that same debt just cannot be *currently* "owed or due" another.

This last and quite essential premise of the argument, however, misses its mark. As a matter of ordinary English, the word "obtained" can (and often does) refer to taking possession of a piece of property without also taking ownership—so, for example, you might obtain a rental car or a hotel room or an apartment. See, *e. g.*, 10 Oxford English Dictionary 669 (2d ed. 1989) (defining "obtain" to mean, among other things, "[t]o come into the possession or enjoyment of (something) by one's own effort or by request"); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 532–533 (2013) (distinguishing between ownership and obtaining possession). And it's easy enough to see how you might also come to possess (obtain) a debt without taking ownership of it. You might, for example, take possession of a debt for servicing and collection even while the debt formally remains owed another. Or as a secured party you might take possession of a debt as collateral, again without taking full

ownership of it. See, *e. g.*, U. C. C. § 9–207, 3 U. L. A. 197 (2010). So it simply isn't the case that the statute's exclusions imply that the phrase "owed . . . another" must refer to debts *previously* owed to another.

By this point petitioners find themselves in retreat. Unable to show that debt purchasers regularly collecting for their own account always qualify as debt collectors, they now suggest that purchasers sometimes qualify as debt collectors. On their view, debt purchasers surely qualify as collectors at least when they regularly purchase and seek to collect *defaulted* debts—just as Santander allegedly did here. In support of this narrower and more particular understanding of the Act, petitioners point again to the fact that the statute excludes from the definition of "debt collector" certain persons who obtain debts before default. 15 U. S. C. § 1692a(6)(F)(iii). This exclusion, petitioners now suggest, implies that the term "debt collector" must embrace those who regularly seek to collect debts obtained after default. Others aligned with petitioners also suggest that the Act treats everyone who attempts to collect a debt as either a "debt collector" or a "creditor," but not both. And because the statutory definition of the term "creditor" excludes those who seek to collect a debt obtained "in default," § 1692a(4), they contend it again follows as a matter of necessary inference that these persons must qualify as debt collectors.

But these alternative lines of inferential argument bear their own problems. For while the statute surely excludes from the debt collector definition certain persons who acquire a debt before default, it doesn't necessarily follow that the definition must include anyone who regularly collects debts acquired after default. After all and again, under the definition at issue before us you have to attempt to collect debts owed *another* before you can ever qualify as a debt collector. And petitioners' argument simply does not fully confront this plain and implacable textual prerequisite. Likewise, even spotting (without granting) the premise that

a person cannot be both a creditor and a debt collector with respect to a particular debt, we don't see why a defaulted debt purchaser like Santander couldn't qualify as a creditor. For while the creditor definition excludes persons who "receive an assignment or transfer of a debt in default," it does so only (and yet again) when the debt is assigned or transferred "*solely* for the purpose of facilitating collection of such debt *for another*." *Ibid.* (emphasis added). So a company collecting purchased defaulted debt for its own account—like Santander—would hardly seem to be barred from qualifying as a creditor under the statute's plain terms.

Faced with so many obstacles in the text and structure of the Act, petitioners ask us to move quickly on to policy. Indeed, from the beginning that is the field on which they seem most eager to pitch battle. Petitioners assert that Congress passed the Act in large measure to add new incentives for independent debt collectors to treat consumers well. In their view, Congress excluded loan originators from the Act's demands because it thought they already faced sufficient economic and legal incentives to good behavior. But, on petitioners' account, Congress never had the chance to consider what should be done about those in the business of purchasing defaulted debt. That's because, petitioners tell us, the "advent" of the market for defaulted debt represents "'one of the most significant changes'" to the debt market generally since the Act's passage in 1977. Brief for Petitioners 8 (quoting Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014, p. 7 (2014)). Had Congress known this new industry would blossom, they say, it surely would have judged defaulted debt purchasers more like (and in need of the same special rules as) independent debt collectors. Indeed, petitioners contend that no other result would be consistent with the overarching congressional goal of deterring untoward debt collection practices.

All this seems to us quite a lot of speculation. And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. See *Magwood* v. *Patterson*, 561 U. S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent"). Indeed, it is quite mistaken to assume, as petitioners would have us, that "whatever" might appear to "further[ ] the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*) (emphasis deleted). Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known "pursues its [stated] purpose[ ] at all costs." *Id.*, at 525–526. For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead "that [the] legislature says . . . what it means and means . . . what it says." *Dodd* v. *United States*, 545 U. S. 353, 357 (2005) (internal quotation marks omitted; brackets in original).

Even taken on its own terms, too, the speculation petitioners urge upon us is far from unassailable. After all, is it really impossible to imagine that reasonable legislators might contend both ways on the question whether defaulted debt purchasers should be treated more like loan originators than independent debt collection agencies? About whether other existing incentives (in the form of common law duties, other statutory and regulatory obligations, economic incentives, or otherwise) suffice to deter debt purchasers from engaging in certain undesirable collection activities? Couldn't a reasonable legislator endorsing the Act as written wonder whether a large financial institution like Santander is any

more or less likely to engage in abusive conduct than another large financial institution like CitiFinancial Auto? Especially where (as here) the institution says that its primary business is loan origination and not the purchase of defaulted debt? We do not profess sure answers to any of these questions, but observe only that the parties and their *amici* manage to present many and colorable arguments both ways on them all, a fact that suggests to us for certain but one thing: that these are matters for Congress, not this Court, to resolve.

In the end, reasonable people can disagree with how Congress balanced the various social costs and benefits in this area. We have no difficulty imagining, for example, a statute that applies the Act's demands to anyone collecting any debts, anyone collecting debts originated by another, or to some other class of persons still. Neither do we doubt that the evolution of the debt collection business might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past. After all, it's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models. Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judiciary in that process—to apply, not amend, the work of the People's representatives.

The judgment of the Court of Appeals is

Affirmed.

Per Curiam

VIRGINIA ET AL. *v.* LEBLANC

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

No. 16–1177. Decided June 12, 2017

Respondent was sentenced to life in prison in 2003 for crimes that he committed when he was 16. The Court later decided in *Graham* v. *Florida*, 560 U. S. 48, that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to life without parole. Respondent sought resentencing in light of *Graham*, but the Virginia courts denied relief based on a Supreme Court of Virginia decision holding that the Commonwealth's framework for granting release to inmates 60 years and older under certain conditions satisfies *Graham*'s requirement of a meaningful opportunity for parole. Respondent next sought federal habeas relief. The District Court granted relief, finding no possibility that fairminded jurists could disagree that the state court's decision conflicts with *Graham*. A divided panel of the Fourth Circuit affirmed.

Held: The Fourth Circuit failed to accord the state court's decision the deference owed under the Antiterrorism and Effective Death Penalty Act of 1996. For a state court's decision to be an unreasonable application of the Court's case law, the ruling must be not just wrong but "objectively unreasonable." *Woods* v. *Donald*, 575 U. S. 312, 316. This is "meant to be" a difficult standard to meet. *Harrington* v. *Richter*, 562 U. S. 86, 102. It was not objectively unreasonable based on current case law for the state court to conclude that Virginia's release program satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole. *Graham* did not consider whether a release program like Virginia's fails to satisfy the Eighth Amendment. That question cannot be resolved in the narrow context of federal habeas review, and the Court expresses no view on the merits of the underlying Eighth Amendment claim.

Certiorari granted; 841 F. 3d 256, reversed.

PER CURIAM.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner is eligible for federal habeas relief if the underlying state-court merits ruling

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). In this case, the Court of Appeals for the Fourth Circuit held that this demanding standard was met by a Virginia court's application of *Graham* v. *Florida*, 560 U. S. 48 (2010). The question presented is whether the Court of Appeals erred in concluding that the state court's ruling involved an unreasonable application of this Court's holding.

I

On July 6, 1999, respondent Dennis LeBlanc raped a 62-year-old woman. He was 16 at the time. In 2003, a state trial court sentenced him to life in prison for his crimes. In the 1990's, Virginia had, for felony offenders, abolished parole that followed a traditional framework. See Va. Code Ann. §53.1–165.1 (2013). As a form of replacement, Virginia enacted its so-called geriatric release program, which allows older inmates to receive conditional release under some circumstances. *LeBlanc* v. *Mathena*, 841 F. 3d 256, 261 (CA4 2016) (citing Va. Code Ann. §53.1–40.01).

Seven years after respondent was sentenced, this Court decided *Graham* v. *Florida*. *Graham* established that the Eighth Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to life without parole. While a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," the Court held, it must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U. S., at 75. The Court in *Graham* left it to the States, "in the first instance, to explore the means and mechanisms for compliance" with the *Graham* rule. *Ibid.*

Respondent later filed a motion in state trial court—the Virginia Beach Circuit Court—seeking to vacate his sentence in light of *Graham*. The trial court denied the motion. In so doing, it relied on the Supreme Court of Virginia's deci-

sion in *Angel* v. *Commonwealth*, 281 Va. 248, 704 S. E. 2d 386 (2011). The *Angel* court held that Virginia's geriatric release program satisfies *Graham*'s requirement of parole for juvenile offenders. The statute establishing the program provides:

> "Any person serving a sentence imposed upon a conviction for a felony offense . . . (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release." § 53.1–40.01.

The *Angel* court explained that "[t]he regulations for conditional release under this statute provide that if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute." 281 Va., at 275, 704 S. E. 2d, at 402. The geriatric release program thus complied with *Graham*, the *Angel* court held, because it provided "the meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation required by the Eighth Amendment." 281 Va., at 275, 704 S. E. 2d, at 402 (internal quotation marks omitted).

The Virginia Supreme Court, in reviewing the trial court's ruling in the instant case, summarily denied respondent's requests for appeal and for rehearing.

In 2012, respondent filed a federal habeas petition in the Eastern District of Virginia pursuant to 28 U. S. C. § 2254. A Magistrate Judge recommended dismissing the petition, but the District Court disagreed and granted the writ. The District Court explained that "there is no possibility that fairminded jurists could disagree that the state court's decision conflicts wit[h] the dictates of *Graham*." *LeBlanc* v. *Mathena*, 2015 WL 4042175, *18 (July 1, 2015).

A divided panel of the Court of Appeals for the Fourth Circuit affirmed, holding that the state trial court's ruling was an unreasonable application of *Graham*. 841 F. 3d, at 259–260. In the panel majority's view, Virginia's geriatric release program did not provide a meaningful opportunity for juvenile nonhomicide offenders to obtain release based on demonstrated maturity and rehabilitation.

Judge Niemeyer dissented. He criticized the majority for "fail[ing] to respect, in any meaningful way, the deference Congress requires federal courts to give state court decisions on postconviction review." *Id.*, at 275.

The Commonwealth of Virginia petitioned for certiorari. The petition is now granted, and the judgment is reversed: The Virginia trial court did not unreasonably apply the *Graham* rule.

II

In order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods* v. *Donald*, 575 U. S. 312, 316 (2015) (*per curiam*) (internal quotation marks omitted). In other words, a litigant must "show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ibid.* (internal quotation marks omitted). This is "meant to be" a difficult standard to meet. *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011).

The Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under AEDPA. *Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s require-

ment that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole. The geriatric release program instructs Virginia's parole board to consider factors like the "individual's history . . . and the individual's conduct . . . during incarceration," as well as the prisoner's "inter-personal relationships with staff and inmates" and "[c]hanges in attitude toward self and others." See 841 F. 3d, at 280–281 (Niemeyer, J., dissenting) (citing Virginia Parole Board Policy Manual 2–4 (Oct. 2006)). Consideration of these factors could allow the parole board to order a former juvenile offender's conditional release in light of his or her "demonstrated maturity and rehabilitation." *Graham*, 560 U. S., at 75. The state court thus did not diverge so far from *Graham*'s dictates as to make it "so obvious that . . . there could be no 'fairminded disagreement' " about whether the state court's ruling conflicts with this Court's case law. *White* v. *Woodall*, 572 U. S. 415, 427 (2014).

"Perhaps the logical next step from" *Graham* would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but "perhaps not." 572 U. S., at 427. "[T]here are reasonable arguments on both sides." *Ibid.* With respect to petitioners, these include the arguments discussed above. With regards to respondent, these include the contentions that the parole board's substantial discretion to deny geriatric release deprives juvenile nonhomicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison.

These arguments cannot be resolved on federal habeas review. Because this case arises "only in th[at] narrow context," the Court "express[es] no view on the merits of the underlying" Eighth Amendment claim. *Woods*, *supra*, at 319 (internal quotation marks omitted). Nor does the Court "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*); accord, *Woodall*,

supra, at 427. The Court today holds only that the Virginia trial court's ruling, resting on the Virginia Supreme Court's earlier ruling in *Angel*, was not objectively unreasonable in light of this Court's current case law.

III

A proper respect for AEDPA's high bar for habeas relief avoids unnecessarily "disturb[ing] the State's significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, *supra*, at 103 (internal quotation marks omitted). The federalism interest implicated in AEDPA cases is of central relevance in this case, for the Court of Appeals for the Fourth Circuit's holding created the potential for significant discord in the Virginia sentencing process. Before today, Virginia courts were permitted to impose—and required to affirm—a sentence like respondent's, while federal courts presented with the same fact pattern were required to grant habeas relief. Reversing the Court of Appeals' decision in this case—rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire.

For these reasons, the petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

Graham v. *Florida*, 560 U. S. 48 (2010), as today's *per curiam* recognizes, established that a juvenile offender convicted of a nonhomicide offense must have "some meaningful opportunity to obtain release [from prison] based on demonstrated maturity and rehabilitation." *Id.*, at 75. See *ante*,

at 92. I join the Court's judgment on the understanding that the Virginia Supreme Court, in *Angel* v. *Commonwealth*, 281 Va. 248, 704 S. E. 2d 386 (2011), interpreted Virginia law to require the parole board to provide such a meaningful opportunity under the geriatric release program. See *id.*, at 275, 704 S. E. 2d, at 402 ("the factors used in the normal parole consideration process apply to conditional release decisions under this statute"). In other words, contrary to the Fourth Circuit's interpretation of Virginia law, the parole board may not deny a juvenile offender geriatric release "for *any* reason whatsoever," 841 F. 3d 256, 269 (2016) (emphasis in original); instead, the board, when evaluating a juvenile offender for geriatric release, must consider the normal parole factors, including rehabilitation and maturity. See *ante*, at 95.

Syllabus

PACKINGHAM *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 15–1194. Argued February 27, 2017—Decided June 19, 2017

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e). According to sources cited to the Court, the State has prosecuted over 1,000 people for violating this law, including petitioner, who was indicted after posting a statement on his personal Facebook profile about a positive experience in traffic court. The trial court denied petitioner's motion to dismiss the indictment on the ground that the law violated the First Amendment. He was convicted and given a suspended prison sentence. On appeal, the State Court of Appeals struck down § 14–202.5 on First Amendment grounds, but the State Supreme Court reversed.

Held: The North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. Pp. 104–109.

(a) A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers "relatively unlimited, low-cost capacity for communication of all kinds," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 870, to users engaged in a wide array of protected First Amendment activity on any number of diverse topics. The Internet's forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow. Here, in one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium. Pp. 104–105.

(b) This background informs the analysis of the statute at issue. Even assuming that the statute is content neutral and thus subject to intermediate scrutiny, the provision is not "'"narrowly tailored to serve a significant governmental interest."'" *McCullen* v. *Coakley*, 573 U. S. 464, 486. Like other inventions heralded as advances in human progress, the Internet and social media will be exploited by the criminal

mind. It is also clear that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people," *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244, and that a legislature "may pass valid laws to protect children" and other sexual assault victims, *id.*, at 245. However, the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley* v. *Georgia*, 394 U. S. 557, 563.

Two assumptions are made in resolving this case. First, while the Court need not decide the statute's precise scope, it is enough to assume that the law applies to commonplace social networking sites like Facebook, LinkedIn, and Twitter. Second, the Court assumes that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

Even with these assumptions, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives. Pp. 105–108.

(c) The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims. No case or holding of this Court has approved of a statute as broad in its reach. The State relies on *Burson* v. *Freeman*, 504 U. S. 191, but that case considered a more limited restriction—prohibiting campaigning within 100 feet of a polling place—in order to protect the fundamental right to vote. The Court noted, moreover, that a larger buffer zone could "become an impermissible burden" under the First Amendment. *Id.*, at 210. The better analogy is *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569. If an ordinance prohibiting any "First Amendment activities" at a single Los Angeles airport could be struck down because it covered all manner of protected, nondisruptive behavior, including "talking and reading, or the wearing of campaign buttons or symbolic

clothing," *id.*, at 571, 575, it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture. Pp. 108–109.

368 N. C. 380, 777 S. E. 2d 738, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 109. GORSUCH, J., took no part in the consideration or decision of the case.

David T. Goldberg argued the cause for petitioner. With him on the briefs were *Jeffrey L. Fisher*, *Pamela S. Karlan*, and *Glenn Gerding*.

Robert C. Montgomery, Senior Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Josh Stein*, Attorney General, *John F. Maddrey*, Solicitor General, and *Daniel P. O'Brien* and *Anne Murray Middleton*, Special Deputy Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the Association for the Treatment of Sexual Abusers et al. by *John J. Korzen*; for the Cato Institute et al. by *Mark C. Fleming*, *Jason D. Hirsch*, *Ari J. Savitzky*, *Ilya Shapiro*, *Esha Bhandari*, *Lee Rowland*, and *Christopher A. Brook*; for the Electronic Frontier Foundation et al. by *Jonathan Sherman*, *Perry M. Grossman*, *David G. Post*, and *Charles Duan;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for the National Association of Criminal Defense Lawyers by *Johnathan D. Hacker*, *Deanna M. Rice*, and *Jeffrey T. Green*; and for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Gregg P. Leslie*, and *J. Joshua Wheeler*.

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, *Elizabeth Murrill*, Solicitor General, *Colin Clark*, Deputy Solicitor General, and *Andrea Barient*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Cynthia H. Coffman* of Colorado, *Douglas S. Chin* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Adam Paul Laxalt* of Nevada, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, and *Brad D. Schimel* of Wisconsin; for the Council of State Gov-

JUSTICE KENNEDY delivered the opinion of the Court.

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

I

A

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." § 14–202.5(b). Second, it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." *Ibid.* Third, it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." *Ibid.* And fourth, it "[p]rovides users or visitors . . . mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." *Ibid.*

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ernments et al. by *Lisa Soronen*, *John C. Neiman, Jr.*, and *Braxton Thrash*; and for Stop Child Predators et al. by *Melissa Arbus Sherry.*

The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." § 14–202.5(c)(1). The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." § 14–202.5(c)(2).

According to sources cited to the Court, § 14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it. Brief for Petitioner 6–8.

B

In 2002, petitioner Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See § 14–208.6A; see § 14–208.7(a). As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:

> "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . . .Praise be to GOD, WOW! Thanks JESUS!" App. 136.

At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating § 14–202.5. The officer noticed that a "'J. R. Gerrard'" had posted the statement quoted above. 368 N. C. 380, 381, 777 S. E. 2d 738, 742 (2015). By checking

court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J. R. Gerrard.

Petitioner was indicted by a grand jury for violating § 14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.

Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse. 229 N. C. App. 293, 304, 748 S. E. 2d 146, 154 (2013). Rather, the law "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Ibid.* The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." 368 N. C., at 381, 777 S. E. 2d, at 741. Among other things, the court explained that the law is "carefully tailored . . . to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." *Id.*, at 389, 777 S. E. 2d, at 747. The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the "same or similar" functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. *Id.*, at 390, 777 S. E. 2d, at 747. Two justices dissented. They stated that the law impermissibly "creates a criminal prohibition of alarming breadth and extends well beyond the evils the State seeks to combat." *Id.*, at 401, 777

S. E. 2d, at 754 (opinion of Hudson, J.) (alteration, citation, and internal quotation marks omitted).

The Court granted certiorari, 580 U. S. 951 (2016), and now reverses.

II

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 796 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 868 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6 (Brief for Electronic Frontier Foundation). One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.*, at 6. This is about three times the population of North America.

Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, *supra*, at 870. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and other-

wise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Reno*, *supra*, at 870 (internal quotation marks omitted).

The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: "'The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed'"). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

III

This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to

serve a significant governmental interest." *McCullen* v. *Coakley*, 573 U. S. 464, 486 (2014) (internal quotation marks omitted). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (internal quotation marks omitted).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. Crichton, The Great Train Robbery, p. xv (1975), and the telephone another, see 18 U. S. C. § 1343. So it will be with the Internet and social media.

There is also no doubt that, as this Court has recognized, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 244 (2002). And it is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." See *id.*, at 245; accord, *New York* v. *Ferber*, 458 U. S. 747, 757 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley* v. *Georgia*, 394 U. S. 557, 563 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. See *post*, at 114–117; see also Brief for Electronic Frontier Foundation 24–27; Brief for Cato Institute et al. as *Amici Curiae* 10–12, and n. 6. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Face-

book, LinkedIn, and Twitter. See Brief for Respondent 54; Tr. of Oral Arg. 27.

Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969) (*per curiam*). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Cf. Brief for Respondent 42–43. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. *Supra*, at 104–105. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U. S., at 870.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen*, 573 U. S., at 496.

It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson* v. *Freeman*, 504 U. S. 191 (1992). There, the Court upheld a prohibition on campaigning within 100 feet of a polling place. That case gives little or no support to the State. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in *Burson* meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." *Id.*, at 210. And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment. *Ibid.*

The better analogy to this case is *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987), where the Court struck down an ordinance prohibit-

ing any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.*, at 571, 575. If a law prohibiting "all protected expression" at a single airport is not constitutional, *id.*, at 574 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.

* * *

It is well established that, as a general rule, the government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft*, 535 U. S., at 255. That is what North Carolina has done here. Its law must be held invalid.

The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in the judgment.

The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." *New York* v. *Ferber*, 458 U. S. 747, 757 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.

I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the Internet with public streets and parks. *Ante*, at 104. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any Internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.

I

A

The North Carolina law at issue makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N. C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a "commercial social networking Web site" is very broad.

Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (*i. e.*, the Internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," Brief for Petitioner 37, and he advocates a more demanding standard of review, *id.*, at 37–39.

Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.

B

A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, *Ward*, *supra*, at 798, and the North Carolina law easily satisfies this requirement. As we have frequently noted, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, *supra*, at 757. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." *McKune* v. *Lile*, 536 U. S. 24, 32 (2002) (plurality opinion); see *Connecticut Dept. of Public Safety* v. *Doe*, 538 U. S. 1, 4 (2003). "[T]he . . . interest [of] safeguarding the physical and psychological well-being of a minor . . . is a compelling one," *Globe Newspaper Co.* v. *Superior Court*, *County of Norfolk*, 457 U. S. 596, 607 (1982), and "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," *Ferber*, *supra*, at 757.

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, *supra*, at 33 (plurality opinion); see *United States* v. *Kebodeaux*, 570 U. S. 387, 395–396 (2013).

The State's interest in protecting children from recidivist sex offenders plainly applies to Internet use. Several factors make the Internet a powerful tool for the would-be child abuser. First, children often use the Internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location.[1] Second, the Internet pro-

[1] See Pew Research Center, Teens, Social Media, and Privacy 5 (May 21, 2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf (all Internet materials as last visited June 16, 2017); J. Wolak, K. Mitchell, & D. Finkelhor, National Center for Missing & Exploited Children, Online Victimization of Youth: Five Years Later 7 (2006)

vides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the Internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the Internet are already well documented, both in research[2] and in reported decisions.[3]

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the Internet

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(prepared by Univ. of N. H., Crimes Against Children Research Center), http://www.unh.edu/ccrc/pdf/CV138.pdf.

[2] See *id.*, at 2–3; Wolak, Finkelhor, Mitchell, & Ybarra, Online "Predators" and Their Victims, 63 Am. Psychologist 111, 112 (Feb.–Mar. 2008).

[3] For example, in *State* v. *Gallo*, 275 Ore. App. 868, 869, 365 P. 3d 1154, 1154–1155 (2015), a 32-year-old defendant posing as a 15-year-old boy used a social networking site to contact and befriend a 16-year-old autistic girl. "He then arranged to meet the victim, took her to a park, and sexually abused her." *Ibid.*, 365 P. 3d, at 1155. In *United States* v. *Steele*, 664 Fed. Appx. 260, 261 (CA3 2016), the defendant "began interacting with a minor [victim] on the gay social networking cell phone application 'Jack'd.'" He eventually met the 14-year-old victim and sexually abused him. *Ibid.* Sadly, these cases are not unique. See, *e. g.*, *Himko* v. *English*, 2016 WL 7645584, *1 (ND Fla., Dec. 5, 2016) (a convicted rapist and registered sex offender "contacted a sixteen-year-old girl using . . . Facebook" and then exchanged explicit text messages and photographs with her), report and recommendation adopted, 2017 WL 54246 (Jan. 4, 2017); *Roberts* v. *United States*, 2015 WL 7424858, *2–*3 (SD Ohio, Nov. 23, 2015) (the defendant "met a then 14-year-old child online via a social networking website called vampirefreaks.com" and then enticed the child to his home and "coerced the child to perform oral sex on him"), report and recommendation adopted, 2016 WL 112647 (Jan. 8, 2016), certificate of appealability denied, No. 16–3050 (CA6, June 15, 2016); *State* v. *Murphy*, 2016–0901, p. 3 (La. App. 1 Cir. 10/28/16), 206 So. 3d 219, 224 (a defendant "initiated conversations" with his 12-year-old victim "on a social network chat site called 'Kik'" and later sent sexually graphic photographs of himself to the victim and received sexually graphic photos from her).

to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U. S., at 798–799; see also *McCullen* v. *Coakley*, 573 U. S. 464, 486 (2014). The North Carolina law fails this requirement.

A straightforward reading of the text of N. C. Gen. Stat. Ann. § 14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." § 14–202.5(b)(1). Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach.

Second, the website must "[f]acilitat[e] the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." § 14–202.5(b)(2). The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must "[a]llo[w] users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information

about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." § 14–202.5(b)(3) (emphasis added). This definition covers websites that allow users to create anything that can be called a "personal profile," *i. e.*, a short description of the user.[4] Contrary to the argument of the State, Brief for Respondent 26–27, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must "[p]rovid[e] users or visitors . . . mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger." § 14–202.5(b)(4) (emphasis added). This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a "mechanis[m] to communicate with other users," *ibid.*, it appears to follow that any website with such a function satisfies this requirement.

2

The fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services[5] and meets all four requirements of § 14–202.5's definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its

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[4] See New Oxford American Dictionary 1394 (3d ed. 2010); Webster's Third New International Dictionary 1811 (2002); 12 Oxford English Dictionary 576 (2d ed. 1989).

[5] See Amazon, Conditions of Use (June 21, 2016), https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=201909000&qid=1490898710&sr=1-2.

website. Second, the Amazon site facilitates the social introduction of people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review.[6] This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture.[7] And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.[8]

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access[9] and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can

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[6] See Amazon, About Customer Reviews, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=201967050; Amazon, About Public Activity, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076150.

[7] See Amazon, About Your Profile, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_v4_sib?ie=UTF8&nodeId=202076210; Amazon, About Public Information, https://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-2?ie=UTF8&nodeId=202076170&qid=1490835739&sr=1-2.

[8] Amazon does not appear to fall within the statute's exemption for websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." § 14–202.5(c)(2). Amazon's primary purpose seems to be the facilitation of commercial transactions between its users and *itself*.

[9] See Washington Post, Terms of Service (July 1, 2014), https://www.washingtonpost.com/terms-of-service/2011/11/18/gIQAldiYiN_story.html?utm_term=.9be5851f95.

comment on articles, reply to other users' comments, and recommend another user's comment.[10] Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site.[11] And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements.[12] It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues.[13] It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes."[14] WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users." N. C. Gen. Stat. Ann. § 14–202.5(b)(4).

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[10] See Washington Post, Ad choices (Nov. 21, 2011), https://www.washingtonpost.com/how-can-i-opt-out-of-online-advertising-cookies/2011/11/18/gIQABECbiN_story.html?utm_term=3da1f56d67e7; Washington Post, Privacy Policy (May 2, 2017), https://www.washingtonpost.com/privacypolicy/2011/11/18/gIQASIiaiN_story.html?utm_term=.8252a76f8df2.

[11] See WebMD, Terms and Conditions of Use (Nov. 2, 2016), https://www.webmd.com/about-webmd-policies/about-terms-and-conditions-of-use.

[12] WebMD, Advertising Policy (June 9, 2016), http://www.webmd.com/about-webmd-policies/about-advertising-policy.

[13] WebMD, Message Board Overview (Sept. 22, 2016), http://www.webmd.com/about-webmd-policies/about-community-overview.

[14] See WebMD, Change Your Profile Settings (Feb. 19, 2014), http://www.webmd.com/about-webmd-policies/profile.

As these examples illustrate, the North Carolina law has a very broad reach and covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.[15]

II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyber-

[15] I express no view on whether a law that does not reach the sort of sites discussed above would satisfy the First Amendment. Until such a law is before us, it is premature to address that question.

space" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." *Ante*, at 104. The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the Internet or even just "social media" sites[16] are the 21st-century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to Internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their Internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the Internet offers an unprecedented degree of anonymity and easily permits a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the Internet. *Ante*, at 105. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet"

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[16] As the law at issue here shows, it is not easy to provide a precise definition of a "social media" site, and the Court makes no effort to do so. Thus, the scope of its dicta is obscure.

the "full dimensions and vast potential" of "the Cyber Age," *ibid.*, we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

Syllabus

ZIGLAR *v.* ABBASI ET AL.

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

No. 15–1358. Argued January 18, 2017—Decided June 19, 2017*

In the immediate aftermath of the September 11 terrorist attacks, the Federal Government ordered hundreds of illegal aliens to be taken into custody and held pending a determination whether a particular detainee had connections to terrorism. Respondents, six men of Arab or South Asian descent, were detained for periods of three to six months in a federal facility in Brooklyn. After their release, they were removed from the United States. They then filed this putative class action against petitioners, two groups of federal officials. The first group consisted of former Attorney General John Ashcroft, former Federal Bureau of Investigation Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar (Executive Officials). The second group consisted of the facility's warden and assistant warden, Dennis Hasty and James Sherman (Wardens). Respondents sought damages for constitutional violations under the implied cause-of-action theory adopted in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the Fifth Amendment; that petitioners did so because of their actual or apparent race, religion, or national origin, in violation of the Fifth Amendment; that the Wardens subjected them to punitive strip searches, in violation of the Fourth and Fifth Amendments; and that the Wardens knowingly allowed the guards to abuse them, in violation of the Fifth Amendment. Respondents also brought a claim under 42 U. S. C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Second Circuit affirmed in most respects as to the Wardens but reversed as to the Executive Officials, reinstating respondents' claims.

Held: The judgment is reversed in part and vacated and remanded in part.

789 F. 3d 218, reversed in part and vacated and remanded in part.

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*Together with No. 15–1359, *Ashcroft, Former Attorney General, et al.* v. *Abbasi et al.*, and No. 15–1363, *Hasty et al.* v. *Abbasi et al.*, also on certiorari to the same court.

Syllabus

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B, concluding:

1. The limited reach of the *Bivens* action informs the decision whether an implied damages remedy should be recognized here. Pp. 130–137.

(a) In 42 U. S. C. § 1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights were violated by state officials, but Congress provided no corresponding remedy for constitutional violations by agents of the Federal Government. In 1971, and against this background, this Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures. In the following decade, the Court allowed *Bivens*-type remedies twice more, in a Fifth Amendment gender-discrimination case, *Davis* v. *Passman*, 442 U. S. 228, and in an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson* v. *Green*, 446 U. S. 14. These are the only cases in which the Court has approved of an implied damages remedy under the Constitution itself. Pp. 130–131.

(b) *Bivens*, *Davis*, and *Carlson* were decided at a time when the prevailing law assumed that a proper judicial function was to "provide such remedies as are necessary to make effective" a statute's purpose. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433. The Court has since adopted a far more cautious course, clarifying that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. *Alexander* v. *Sandoval*, 532 U. S. 275, 286. If a statute does not evince Congress' intent "to create the private right of action asserted," *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568, no such action will be created through judicial mandate. Similar caution must be exercised with respect to damages actions implied to enforce the Constitution itself. *Bivens* is well-settled law in its own context, but expanding the *Bivens* remedy is now considered a "disfavored" judicial activity. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675.

When a party seeks to assert an implied cause of action under the Constitution, separation-of-powers principles should be central to the analysis. The question is whether Congress or the courts should decide to authorize a damages suit. *Bush* v. *Lucas*, 462 U. S. 367, 380. Most often it will be Congress, for *Bivens* will not be extended to a new context if there are "'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Carlson*, *supra*, at 18. If there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, courts must refrain from creating that kind

of remedy. An alternative remedial structure may also limit the Judiciary's power to infer a new *Bivens* cause of action. Pp. 131–137.

2. Considering the relevant special factors here, a *Bivens*-type remedy should not be extended to the claims challenging the confinement conditions imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks. These "detention policy claims" include the allegations that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement, and the allegations that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The detention policy claims do not include the guard-abuse claim against Warden Hasty. Pp. 137–146.

(a) The proper test for determining whether a claim arises in a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Meaningful differences may include, *e. g.*, the rank of the officers involved; the constitutional right at issue; the extent of judicial guidance for the official conduct; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors not considered in previous *Bivens* cases. Respondents' detention policy claims bear little resemblance to the three *Bivens* claims the Court has approved in previous cases. The Second Circuit thus should have held that this was a new *Bivens* context and then performed a special-factors analysis before allowing this damages suit to proceed. Pp. 138–140.

(b) The special factors here indicate that Congress, not the courts, should decide whether a damages action should be allowed.

With regard to the Executive Officials, a *Bivens* action is not "a proper vehicle for altering an entity's policy," *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 74, and is not designed to hold officers responsible for acts of their subordinates, see *Iqbal*, *supra*, at 676. Even an action confined to the Executive Officials' own discrete conduct would call into question the formulation and implementation of a high-level executive policy, and the burdens of that litigation could prevent officials from properly discharging their duties, see *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 382. The litigation process might also implicate the discussion and deliberations that led to the formation of the particular policy, requiring courts to interfere with sensitive Executive Branch functions. See *Clinton* v. *Jones*, 520 U. S. 681, 701.

Other special factors counsel against extending *Bivens* to cover the detention policy claims against any of the petitioners. Because those

claims challenge major elements of the Government's response to the September 11 attacks, they necessarily require an inquiry into national-security issues. National-security policy, however, is the prerogative of Congress and the President, and courts are "reluctant to intrude upon" that authority absent congressional authorization. *Department of Navy* v. *Egan*, 484 U. S. 518, 530. Thus, Congress' failure to provide a damages remedy might be more than mere oversight, and its silence might be more than "inadvertent." *Schweiker* v. *Chilicky*, 487 U. S. 412, 423. That silence is also relevant and telling here, where Congress has had nearly 16 years to extend "the kind of remedies [sought by] respondents," *id.*, at 426, but has not done so. Respondents also may have had available "'other alternative forms of judicial relief,'" *Minneci* v. *Pollard*, 565 U. S. 118, 124, including injunctions and habeas petitions.

The proper balance in situations like this, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril, is one for the Congress to undertake, not the Judiciary. The Second Circuit thus erred in allowing respondents' detention policy claims to proceed under *Bivens*. Pp. 140–146.

3. The Second Circuit also erred in allowing the prisoner abuse claim against Warden Hasty to go forward without conducting the required special-factors analysis. Respondents' prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation should a *Bivens* remedy be implied. But the first question is whether the claim arises in a new *Bivens* context. This claim has significant parallels to *Carlson*, which extended *Bivens* to cover a failure to provide medical care to a prisoner, but this claim nevertheless seeks to extend *Carlson* to a new context. The constitutional right is different here: *Carlson* was predicated on the Eighth Amendment while this claim was predicated on the Fifth. The judicial guidance available to this warden with respect to his supervisory duties was less developed. There might have been alternative remedies available. And Congress did not provide a standalone damages remedy against federal jailers when it enacted the Prison Litigation Reform Act some 15 years after *Carlson*. Given this Court's expressed caution about extending the *Bivens* remedy, this context must be regarded as a new one. Pp. 146–149.

4. Petitioners are entitled to qualified immunity with respect to respondents' claims under 42 U. S. C. § 1985(3). Pp. 149–156.

(a) Assuming that respondents' allegations are true and well pleaded, the question is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. The qualified immunity inquiry turns on the "objective legal reasonable-

ness" of the official's acts, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 819, "assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken," *Anderson* v. *Creighton*, 483 U. S. 635, 639. If it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted," *Saucier* v. *Katz*, 533 U. S. 194, 202, the defendant officer is not entitled to qualified immunity. But if a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Pp. 150–152.

(b) Here, reasonable officials in petitioners' positions would not have known with sufficient certainty that § 1985(3) prohibited their joint consultations and the resulting policies. There are two reasons. First, the conspiracy is alleged to have been among officers in the same Department of the Federal Government. And there is no clearly established law on the issue whether agents of the same executive department are distinct enough to "conspire" with one another within the meaning of 42 U. S. C. § 1985(3). Second, open discussion among federal officers should be encouraged to help those officials reach consensus on department policies, so there is a reasonable argument that § 1985(3) liability should not extend to cases like this one. As these considerations indicate, the question whether federal officials can be said to "conspire" in these kinds of situations is sufficiently open that the officials in this suit would not have known that § 1985(3) applied to their discussions and actions. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by that statute. Pp. 152–155.

KENNEDY, J., delivered the opinion of the Court, except as to Part IV–B. ROBERTS, C. J., and ALITO, J., joined that opinion in full, and THOMAS, J., joined except as to Part IV–B. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 156. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 160. SOTOMAYOR, KAGAN, and GORSUCH, JJ., took no part in the consideration or decision of the cases.

Acting Solicitor General Gershengorn argued the cause for petitioners in Nos. 15–1358 and 15–1359. With him on the briefs in No. 15–1359 were *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Curtis E. Gannon*, *Douglas N. Letter*, *Barbara L. Herwig*, *H. Thomas Byron III*, and *Michael Shih*. *William Alden McDaniel*, *Jr.*, filed briefs for petitioner in No. 15–1358.

Jeffrey A. Lamken argued the cause for petitioners in No. 15–1363. With him on the briefs were *Michael G. Pattillo, Jr.*, *Eric R. Nitz*, *James A. Barta*, *Clifton S. Elgarten*, *Kate M. Growley*, and *Debra L. Roth.*

Rachel A. Meeropol argued the cause for respondents in all cases. With her on the brief were *Michael Winger*, *Baher A. Azmy*, *Shayana Kadidal*, *Alexander A. Reinert*, *Nancy L. Kestenbaum*, and *David M. Zionts.*†

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV–B.

After the September 11 terrorist attacks in this country, and in response to the deaths, destruction, and dangers they caused, the United States Government ordered hundreds of illegal aliens to be taken into custody and held. Pending a determination whether a particular detainee had connections to terrorism, the custody, under harsh conditions to be described, continued. In many instances custody lasted for days and weeks, then stretching into months. Later, some

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Briefs of *amici curiae* urging affirmance in all cases were filed for the American Association for Justice by *Jeffrey R. White* and *Julie Braman Kane*; for the American Civil Liberties Union et al. by *Matthew E. Price*, *Trina Realmuto*, *Hina Shamsi*, *Lee Gelernt*, *David Cole*, *Jonathan Hafetz*, *Matt Adams*, *Mary A. Kenney*, and *Eugene Iredale*; for Americans United for Separation of Church and State et al. by *Richard B. Katskee* and *Elliot M. Mincberg*; for Asian Americans Advancing Justice et al. by *Catherine E. Stetson*; for the Commonwealth Lawyers Association by *Gary A. Isaac* and *Logan A. Steiner*; for Former Correctional Officials by *Andrew S. Pollis*; for Immigration Detention Advocacy Organizations by *Brian J. Murray* and *Ranjana Natarajan*; for Medical and Other Scientific and Health-Related Professionals by *Eric Ordway*, *Kami Lizarraga*, *Glenda Bleiberg*, and *Alexandria Swette*; and for Karen Korematsu et al. by *Joseph Margulies*, *Robert L. Rusky*, and *Eric K. Yamamoto.*

Allan Ides, pro se, filed a brief in all cases for Professors of Civil Procedure as *amici curiae.*

of the aliens who had been detained filed suit, leading to the cases now before the Court.

The complaint named as defendants three high executive officers in the Department of Justice and two of the wardens at the facility where the detainees had been held. Most of the claims, alleging various constitutional violations, sought damages under the implied cause-of-action theory adopted by this Court in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Another claim in the complaint was based upon the statutory cause of action authorized and created by Congress under Rev. Stat. § 1980, 42 U. S. C. § 1985(3). This statutory cause of action allows damages to persons injured by conspiracies to deprive them of the equal protection of the laws.

The suit was commenced in the United States District Court for the Eastern District of New York. After this Court's decision in *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009), a fourth amended complaint was filed; and that is the complaint to be considered here. Motions to dismiss the fourth amended complaint were denied as to some defendants and granted as to others. These rulings were the subject of interlocutory appeals to the United States Court of Appeals for the Second Circuit. Over a dissenting opinion by Judge Raggi with respect to the decision of the three-judge panel—and a second unsigned dissent from the court's order declining to rehear the suit en banc, joined by Judge Raggi and five other judges—the Court of Appeals ruled that the complaint was sufficient for the action to proceed against the named officials who are now before us. See *Turkmen* v. *Hasty*, 789 F. 3d 218 (2015) (panel decision); *Turkmen* v. *Hasty*, 808 F. 3d 197 (2015) (en banc decision).

The Court granted certiorari to consider these rulings. 580 U. S. 915 (2016). The officials who must defend the suit on the merits, under the ruling of the Court of Appeals, are the petitioners here. The former detainees who seek relief under the fourth amended complaint are the respondents.

The various claims and theories advanced for recovery, and the grounds asserted for their dismissal as insufficient as a matter of law, will be addressed in turn.

I

Given the present procedural posture of the suit, the Court accepts as true the facts alleged in the complaint. See *Iqbal*, 556 U. S., at 678.

A

In the weeks following the September 11, 2001, terrorist attacks—the worst in American history—the Federal Bureau of Investigation (FBI) received more than 96,000 tips from members of the public. See *id.*, at 667. Some tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims. FBI agents "questioned more than 1,000 people with suspected links to the [September 11] attacks in particular or to terrorism in general." *Ibid.*

While investigating the tips—including the less substantiated ones—the FBI encountered many aliens who were present in this country without legal authorization. As a result, more than 700 individuals were arrested and detained on immigration charges. *Ibid.* If the FBI designated an alien as not being "of interest" to the investigation, then he or she was processed according to normal procedures. In other words the alien was treated just as if, for example, he or she had been arrested at the border after an illegal entry. If, however, the FBI designated an alien as "of interest" to the investigation, or if it had doubts about the proper designation in a particular case, the alien was detained subject to a "hold-until-cleared policy." The aliens were held without bail.

Respondents were among some 84 aliens who were subject to the hold-until-cleared policy and detained at the Metropolitan Detention Center (MDC) in Brooklyn, New York. They were held in the Administrative Maximum Special Housing

Unit (or Unit) of the MDC. The complaint includes these allegations: Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in "'tiny cells for over 23 hours a day.'" 789 F. 3d, at 228. Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.

Some of the harsh conditions in the Unit were not imposed pursuant to official policy. According to the complaint, prison guards engaged in a pattern of "physical and verbal abuse." *Ibid.* Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

B

Respondents are six men of Arab or South Asian descent. Five are Muslims. Each was illegally in this country, arrested during the course of the September 11 investigation, and detained in the Administrative Maximum Special Housing Unit for periods ranging from three to eight months. After being released respondents were removed from the United States.

Respondents then sued on their own behalf, and on behalf of a putative class, seeking compensatory and punitive damages, attorney's fees, and costs. Respondents, it seems fair to conclude from the arguments presented, acknowledge that in the ordinary course aliens who are present in the United States without legal authorization can be detained for some period of time. But here the challenge is to the conditions

of their confinement and the reasons or motives for imposing those conditions. The gravamen of their claims was that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions.

As relevant here, respondents sued two groups of federal officials in their official capacities. The first group consisted of former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar. This opinion refers to these three petitioners as the "Executive Officials." The other petitioners named in the complaint were the MDC's warden, Dennis Hasty, and associate warden, James Sherman. This opinion refers to these two petitioners as the "Wardens."

Seeking to invoke the Court's decision in *Bivens*, respondents brought four claims under the Constitution itself. First, respondents alleged that petitioners detained them in harsh pretrial conditions for a punitive purpose, in violation of the substantive due process component of the Fifth Amendment. Second, respondents alleged that petitioners detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment. Third, respondents alleged that the Wardens subjected them to punitive strip searches unrelated to any legitimate penological interest, in violation of the Fourth Amendment and the substantive due process component of the Fifth Amendment. Fourth, respondents alleged that the Wardens knowingly allowed the guards to abuse respondents, in violation of the substantive due process component of the Fifth Amendment.

Respondents also brought a claim under 42 U. S. C. § 1985(3), which forbids certain conspiracies to violate equal protection rights. Respondents alleged that petitioners conspired with one another to hold respondents in harsh con-

ditions because of their actual or apparent race, religion, or national origin.

C

The District Court dismissed the claims against the Executive Officials but allowed the claims against the Wardens to go forward. The Court of Appeals affirmed in most respects as to the Wardens, though it held that the prisoner abuse claim against Sherman (the associate warden) should have been dismissed. 789 F. 3d, at 264–265. As to the Executive Officials, however, the Court of Appeals reversed, reinstating respondents' claims. *Ibid.* As noted above, Judge Raggi dissented. She would have held that only the prisoner abuse claim against Hasty should go forward. *Id.*, at 295, n. 41, 302 (opinion concurring in part in judgment and dissenting in part). The Court of Appeals declined to rehear the suit en banc, 808 F. 3d, at 197; and, again as noted above, Judge Raggi joined a second dissent along with five other judges, *id.*, at 198. This Court granted certiorari. 580 U. S. 915 (2016).

II

The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent.

A

In 1871, Congress passed a statute that was later codified at Rev. Stat. § 1979, 42 U. S. C. § 1983. It entitles an injured person to money damages if a state official violates his or her constitutional rights. Congress did not create an analogous statute for federal officials. Indeed, in the 100 years leading up to *Bivens*, Congress did not provide a specific damages remedy for plaintiffs whose constitutional rights were violated by agents of the Federal Government.

In 1971, and against this background, this Court decided *Bivens*. The Court held that, even absent statutory au-

thorization, it would enforce a damages remedy to compensate persons injured by federal officers who violated the prohibition against unreasonable search and seizures. See 403 U. S., at 397. The Court acknowledged that the Fourth Amendment does not provide for money damages "in so many words." *Id.*, at 396. The Court noted, however, that Congress had not foreclosed a damages remedy in "explicit" terms and that no "special factors" suggested that the Judiciary should "hesitat[e]" in the face of congressional silence. *Id.*, at 396–397. The Court, accordingly, held that it could authorize a remedy under general principles of federal jurisdiction. See *id.*, at 392 (citing *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

In the decade that followed, the Court recognized what has come to be called an implied cause of action in two cases involving other constitutional violations. In *Davis* v. *Passman*, 442 U. S. 228 (1979), an administrative assistant sued a Congressman for firing her because she was a woman. The Court held that the Fifth Amendment Due Process Clause gave her a damages remedy for gender discrimination. *Id.*, at 248–249. And in *Carlson* v. *Green*, 446 U. S. 14 (1980), a prisoner's estate sued federal jailers for failing to treat the prisoner's asthma. The Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave him a damages remedy for failure to provide adequate medical treatment. See *id.*, at 19. These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.

B

To understand *Bivens* and the two other cases implying a damages remedy under the Constitution, it is necessary to understand the prevailing law when they were decided. In the mid-20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime*," *Alexander* v. *Sandoval*,

532 U. S. 275, 287 (2001), the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. See, *e. g.*, *id.*, at 430–432; *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 557 (1969); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies").

These statutory decisions were in place when *Bivens* recognized an implied cause of action to remedy a constitutional violation. Against that background, the *Bivens* decision held that courts must "'adjust their remedies so as to grant the necessary relief'" when "'federally protected rights have been invaded.'" 403 U. S., at 392 (quoting *Bell*, *supra*, at 684); see also 403 U. S., at 402 (Harlan, J., concurring in judgment) (discussing cases recognizing implied causes of action under federal statutes). In light of this interpretive framework, there was a possibility that "the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U. S. C. § 1983." Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123, 1139–1140 (2014).

C

Later, the arguments for recognizing implied causes of action for damages began to lose their force. In cases decided after *Bivens*, and after the statutory implied cause-of-action cases that *Bivens* itself relied upon, the Court adopted a far more cautious course before finding implied causes of action. In two principal cases under other statutes, it declined to find an implied cause of action. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 42, 45–46 (1977); *Cort* v. *Ash*, 422 U. S. 66, 68–69 (1975). Later, in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), the Court did allow an implied cause of action; but it cautioned that, where Congress "intends private litigants to have a cause of action," the "far

better course" is for Congress to confer that remedy in explicit terms. *Id.*, at 717.

Following this expressed caution, the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. *Sandoval*, 532 U. S., at 286. If the statute itself does not "displa[y] an intent" to create "a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.*, at 286–287; see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16, 23–24 (1979); *Karahalios* v. *Federal Employees*, 489 U. S. 527, 536–537 (1989). The Court held that the judicial task was instead "limited solely to determining whether Congress intended to create the private right of action asserted." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). If the statute does not itself so provide, a private cause of action will not be created through judicial mandate. See *Transamerica*, *supra*, at 24.

The decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself. When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages rem-

edy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered. In an analogous context, Congress, it is fair to assume, weighed those concerns in deciding not to substitute the Government as defendant in suits seeking damages for constitutional violations. See 28 U. S. C. § 2679(b)(2)(A) (providing that certain provisions of the Federal Tort Claims Act do not apply to any claim against a federal employee "which is brought for a violation of the Constitution").

For these and other reasons, the Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself. Indeed, in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions. And it must be understood that this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.

Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Iqbal*, 556 U. S., at 675. This is in accord with the Court's observation that it has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68 (2001). Indeed, the Court has refused to do so for the past 30 years.

For example, the Court declined to create an implied damages remedy in the following cases: a First Amendment suit against a federal employer, *Bush* v. *Lucas*, 462 U. S. 367, 390 (1983); a race-discrimination suit against military officers, *Chappell* v. *Wallace*, 462 U. S. 296, 297, 304–305 (1983); a substantive due process suit against military officers, *United States* v. *Stanley*, 483 U. S. 669, 671–672, 683–684 (1987); a procedural due process suit against Social Security officials, *Schweiker* v. *Chilicky*, 487 U. S. 412, 414 (1988); a procedural due process suit against a federal agency for wrongful termination, *FDIC* v. *Meyer*, 510 U. S. 471, 473–474 (1994); an Eighth Amendment suit against a private prison operator, *Malesko*, *supra*, at 63; a due process suit against officials from the Bureau of Land Management, *Wilkie* v. *Robbins*, 551 U. S. 537, 547–548, 562 (2007); and an Eighth Amendment suit against prison guards at a private prison, *Minneci* v. *Pollard*, 565 U. S. 118, 120 (2012).

When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? *Bush*, 462 U. S., at 380.

The answer most often will be Congress. When an issue "'involves a host of considerations that must be weighed and appraised,'" it should be committed to "'those who write

the laws'" rather than "'those who interpret them.'" *Ibid.* (quoting *United States* v. *Gilman*, 347 U. S. 507, 512–513 (1954)). In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if "'the public interest would be served'" by imposing a "'"new substantive legal liability."'" *Schweiker*, *supra*, at 426–427 (quoting *Bush*, *supra*, at 390). As a result, the Court has urged "caution" before "extending *Bivens* remedies into any new context." *Malesko*, *supra*, at 74. The Court's precedents now make clear that a *Bivens* remedy will not be available if there are "'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Carlson*, 446 U. S., at 18 (quoting *Bivens*, 403 U. S., at 396).

This Court has not defined the phrase "special factors counselling hesitation." The necessary inference, though, is that the inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. Thus, to be a "special factor counselling hesitation," a factor must cause a court to hesitate before answering that question in the affirmative.

It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others. It is true that, if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies. These and other considerations may make it less probable

that Congress would want the Judiciary to entertain a damages suit in a given case.

Sometimes there will be doubt because the case arises in a context in which Congress has designed its regulatory authority in a guarded way, making it less likely that Congress would want the Judiciary to interfere. See *Chappell*, *supra*, at 302 (military); *Stanley*, *supra*, at 679 (same); *Meyer*, *supra*, at 486 (public purse); *Wilkie*, *supra*, at 561–562 (federal land). And sometimes there will be doubt because some other feature of a case—difficult to predict in advance—causes a court to pause before acting without express congressional authorization. In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III.

In a related way, if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action. For if Congress has created "any alternative, existing process for protecting the [injured party's] interest" that itself may "amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, *supra*, at 550; see also *Bush*, *supra*, at 385–388 (recognizing that civil-service regulations provided alternative means for relief); *Malesko*, 534 U. S., at 73–74 (recognizing that state tort law provided alternative means for relief); *Minneci*, *supra*, at 127–130 (same).

III

It is appropriate now to turn first to the *Bivens* claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials in the wake of the September 11 attacks.

The Court will refer to these claims as the "detention policy claims." The detention policy claims allege that petitioners violated respondents' due process and equal protection rights by holding them in restrictive conditions of confinement; the claims further allege that the Wardens violated the Fourth and Fifth Amendments by subjecting respondents to frequent strip searches. The term "detention policy claims" does not include respondents' claim alleging that Warden Hasty allowed guards to abuse the detainees. That claim will be considered separately, and further, below. At this point, the question is whether, having considered the relevant special factors in the whole context of the detention policy claims, the Court should extend a *Bivens*-type remedy to those claims.

A

Before allowing respondents' detention policy claims to proceed under *Bivens*, the Court of Appeals did not perform any special-factors analysis at all. 789 F. 3d, at 237. The reason, it said, was that the special-factors analysis is necessary only if a plaintiff asks for a *Bivens* remedy in a new context. 789 F. 3d, at 234. And in the Court of Appeals' view, the context here was not new. *Id.*, at 235.

To determine whether the *Bivens* context was novel, the Court of Appeals employed a two-part test. First, it asked whether the asserted constitutional right was at issue in a previous *Bivens* case. 789 F. 3d, at 234. Second, it asked whether the mechanism of injury was the same mechanism of injury in a previous *Bivens* case. 789 F. 3d, at 234. Under the Court of Appeals' approach, if the answer to both questions is "yes," then the context is not new and no special-factors analysis is required. *Ibid.*

That approach is inconsistent with the analysis in *Malesko*. Before the Court decided that case, it had approved a *Bivens* action under the Eighth Amendment against federal prison officials for failure to provide medical treatment. See *Carlson*, 446 U. S., at 16, n. 1, 18–19. In *Malesko*, the plaintiff

sought relief against a private prison operator in almost parallel circumstances. 534 U. S., at 64. In both cases, the right at issue was the same: the Eighth Amendment right to be free from cruel and unusual punishment. And in both cases, the mechanism of injury was the same: failure to provide adequate medical treatment. Thus, if the approach followed by the Court of Appeals is the correct one, this Court should have held that the cases arose in the same context, obviating any need for a special-factors inquiry.

That, however, was not the controlling analytic framework in *Malesko*. Even though the right and the mechanism of injury were the same as they were in *Carlson*, the Court held that the contexts were different. 534 U. S., at 70, and n. 4. The Court explained that special factors counseled hesitation and that the *Bivens* remedy was therefore unavailable. 534 U. S., at 74.

For similar reasons, the holding of the Court of Appeals in the instant suit is inconsistent with this Court's analytic framework in *Chappell*. In *Davis*, decided before the Court's cautionary instructions with respect to *Bivens* suits, see *supra*, at 135–136, the Court had held that an employment-discrimination claim against a Congressman could proceed as a *Bivens*-type action. *Davis*, 442 U. S., at 230–231. In *Chappell*, however, the cautionary rules were applicable; and, as a result, a similar discrimination suit against military officers was not allowed to proceed. It is the *Chappell* framework that now controls; and, under it, the Court of Appeals erred by holding that this suit did not present a new *Bivens* context.

The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaning-

ful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

In the present suit, respondents' detention policy claims challenge the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack on American soil. Those claims bear little resemblance to the three *Bivens* claims the Court has approved in the past: a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma. See *Bivens*, 403 U. S. 388; *Davis*, 442 U. S. 228; *Carlson*, 446 U. S. 14. The Court of Appeals therefore should have held that this was a new *Bivens* context. Had it done so, it would have recognized that a special-factors analysis was required before allowing this damages suit to proceed.

B

After considering the special factors necessarily implicated by the detention policy claims, the Court now holds that those factors show that whether a damages action should be allowed is a decision for the Congress to make, not the courts.

With respect to the claims against the Executive Officials, it must be noted that a *Bivens* action is not "a proper vehicle for altering an entity's policy." *Malesko*, *supra*, at 74. Furthermore, a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others. "[T]he purpose of *Bivens* is to deter *the officer*." *Meyer*,

510 U. S., at 485. *Bivens* is not designed to hold officers responsible for acts of their subordinates. See *Iqbal*, 556 U. S., at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*").

Even if the action is confined to the conduct of a particular Executive Official in a discrete instance, these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them—or, to be more precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties. See *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 382 (2004) (noting "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties").

A closely related problem, as just noted, is that the discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question. See *Federal Open Market Comm.* v. *Merrill*, 443 U. S. 340, 360 (1979) (noting that disclosure of Executive Branch documents "could inhibit the free flow of advice, including analysis, reports, and expression of opinion within an agency"). Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch. See *Clinton* v. *Jones*, 520 U. S. 681, 701 (1997) (recognizing that "'[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional du-

ties'" (quoting *Loving* v. *United States*, 517 U. S. 748, 757 (1996))). These considerations also counsel against allowing a damages claim to proceed against the Executive Officials. See *Cheney*, *supra*, at 385 (noting that "special considerations control" when a case implicates "the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications").

In addition to this special factor, which applies to the claims against the Executive Officials, there are three other special factors that apply as well to the detention policy claims against all of the petitioners. First, respondents' detention policy claims challenge more than standard "law enforcement operations." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 273 (1990). They challenge as well major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. Were this inquiry to be allowed in a private suit for damages, the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself, or in either of its two follow-on cases, or indeed in any putative *Bivens* case yet to come before the Court.

National-security policy is the prerogative of the Congress and President. See U. S. Const., Art. I, § 8; Art. II, §§ 1, 2. Judicial inquiry into the national-security realm raises "concerns for the separation of powers in trenching on matters committed to the other branches." *Christopher* v. *Harbury*, 536 U. S. 403, 417 (2002). These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief. The risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.

For these and other reasons, courts have shown deference to what the Executive Branch "has determined . . . is 'essential to national security.'" *Winter* v. *Natural Resources De-*

fense Council, Inc., 555 U. S. 7, 24, 26 (2008). Indeed, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise." *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988). Congress has not provided otherwise here.

There are limitations, of course, on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. See, *e. g.*, *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 527, 532–537 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake"); *Boumediene* v. *Bush*, 553 U. S. 723, 798 (2008) ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law"). And national-security concerns must not become a talisman used to ward off inconvenient claims—a "label" used to "cover a multitude of sins." *Mitchell* v. *Forsyth*, 472 U. S. 511, 523 (1985). This "'danger of abuse'" is even more heightened given "'the difficulty of defining'" the "'security interest'" in domestic cases. *Ibid.* (quoting *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 313–314 (1972)).

Even so, the question is only whether "congressionally uninvited intrusion" is "inappropriate" action for the Judiciary to take. *Stanley*, 483 U. S., at 683. The factors discussed above all suggest that Congress' failure to provide a damages remedy might be more than mere oversight, and that congressional silence might be more than "inadvertent." *Schweiker*, 487 U. S., at 423. This possibility counsels hesitation "in the absence of affirmative action by Congress." *Bivens*, 403 U. S., at 396.

Furthermore, in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant;

and here that silence is telling. In the almost 16 years since September 11, the Federal Government's responses to that terrorist attack have been well documented. Congressional interest has been "frequent and intense," *Schweiker*, *supra*, at 425, and some of that interest has been directed to the conditions of confinement at issue here. Indeed, at Congress' behest, the Department of Justice's Office of the Inspector General compiled a 300-page report documenting the conditions in the MDC in great detail. See 789 F. 3d, at 279 (opinion of Raggi, J.) (noting that the USA PATRIOT Act required "the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism"). Nevertheless, "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U. S., at 426.

This silence is notable because it is likely that high-level policies will attract the attention of Congress. Thus, when Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that "congressional inaction" was "inadvertent." *Id.*, at 423.

It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which "it is damages or nothing." *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment); *Davis*, 442 U. S., at 245. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief. And in addition to that, we have left open the question whether they might be able to challenge their confinement conditions via a petition for a writ of habeas corpus. See *Bell* v. *Wolfish*, 441 U. S. 520, 526–527, n. 6 (1979) ("[W]e

leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"); *Preiser* v. *Rodriguez*, 411 U. S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal").

Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages. A successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately; yet this damages suit remains unresolved some 15 years later. (As in *Bell* and *Preiser*, the Court need not determine the scope or availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued.) In sum, respondents had available to them "'other alternative forms of judicial relief.'" *Minneci*, 565 U. S., at 124. And when alternative methods of relief are available, a *Bivens* remedy usually is not. See *Bush*, 462 U. S., at 386–388; *Schweiker*, *supra*, at 425–426; *Malesko*, 534 U. S., at 73–74; *Minneci*, *supra*, at 125–126.

There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution. In circumstances like those presented here, however, the stakes on both sides of the argument are far higher than in past cases the Court has considered. If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office.

On the other side of the balance, the very fact that some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to

impose restraint and to provide some redress from injury. There is therefore a balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril. Cf. *Stanley*, 483 U. S., at 681 (noting that the special-factors analysis in that case turned on "how much occasional, unintended impairment of military discipline one is willing to tolerate"). The proper balance is one for the Congress, not the Judiciary, to undertake. For all of these reasons, the Court of Appeals erred by allowing respondents' detention policy claims to proceed under *Bivens*.

IV

A

One of respondents' claims under *Bivens* requires a different analysis: the prisoner abuse claim against the MDC's warden, Dennis Hasty. The allegation is that Warden Hasty violated the Fifth Amendment by allowing prison guards to abuse respondents.

The warden argues, as an initial matter, that the complaint does not "'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U. S., at 678 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 570 (2007)). Applying its precedents, the Court of Appeals held that the substantive standard for the sufficiency of the claim is whether the warden showed "deliberate indifference" to prisoner abuse. 789 F. 3d, at 249–250. The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct.

The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as "'terrorists,'" App. to Pet. for Cert. in No. 15–1359, p. 280a; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via "inmate complaints, staff complaints,

hunger strikes, and suicide attempts," *id.*, at 260a; that he ignored other "direct evidence of [the] abuse, including logs and other official [records]," *id.*, at 280a; that he took no action "to rectify or address the situation," *id.*, at 260a; and that the abuse resulted in the injuries described above, see *supra*, at 128. These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden's deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied.

Warden Hasty argues, however, that *Bivens* ought not to be extended to this instance of alleged prisoner abuse. As noted above, the first question a court must ask in a case like this one is whether the claim arises in a new *Bivens* context, *i. e.*, whether "the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Supra*, at 139.

It is true that this case has significant parallels to one of the Court's previous *Bivens* cases, *Carlson* v. *Green*, 446 U. S. 14. There, the Court did allow a *Bivens* claim for prisoner mistreatment—specifically, for failure to provide medical care. And the allegations of injury here are just as compelling as those at issue in *Carlson*. This is especially true given that the complaint alleges serious violations of Bureau of Prisons policy. See 28 CFR § 552.20 (2016) (providing that prison staff may use force "only as a last alternative after all other reasonable efforts to resolve a situation have failed" and that staff may "use only that amount of force necessary to [ensure prison safety and security]"); § 552.22(j) ("All incidents involving the use of force . . . must be carefully documented"); § 542.11 (requiring the warden to investigate certain complaints of inmate abuse).

Yet even a modest extension is still an extension. And this case does seek to extend *Carlson* to a new context. As

noted above, a case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. See *supra*, at 135–136.

The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. See 446 U. S., at 16. And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—"deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976). The standard for a claim alleging that a warden allowed guards to abuse detainees is less clear under the Court's precedents.

This case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. *Supra*, at 137. And there might have been alternative remedies available here, for example, a writ of habeas corpus, *Wolfish*, 441 U. S., at 526, n. 6; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief.

Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. See *supra,* at 137. Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U. S. C. § 1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This

Court has said in dicta that the Act's exhaustion provisions would apply to *Bivens* suits. See *Porter* v. *Nussle*, 534 U. S. 516, 524 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special-factors analysis. It should have analyzed whether there were alternative remedies available or other "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in a suit like this one. *Supra*, at 137.

B

Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special-factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.

V

One issue remains to be addressed: the claim that petitioners are subject to liability for civil conspiracy under 42 U. S. C. § 1985(3). Unlike the prisoner abuse claim just discussed, this claim implicates the activities of all the petition-

ers—the Executive Officials as well as the Wardens—in creating the conditions of confinement at issue here.

The civil-conspiracy prohibition contained in § 1985(3) was enacted as a significant part of the civil rights legislation passed in the aftermath of the Civil War. See *Carpenters* v. *Scott*, 463 U. S. 825, 834–837 (1983) (detailing the legislative history of § 1985(3)); *Griffin* v. *Breckenridge*, 403 U. S. 88, 99–101 (1971) (same); *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 379 (1979) (Powell, J., concurring) (describing § 1985(3) as a "Civil War Era remedial statute"). The statute imposes liability on two or more persons who "conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws." § 1985(3). In the instant suit, respondents allege that petitioners violated the statute by "agreeing to implement a policy" under which respondents would be detained in harsh conditions "because of their race, religion, ethnicity, and national origin." App. to Pet. for Cert. in No. 15–1359, at 347a. Assuming these allegations to be true and well pleaded, the question is whether petitioners are entitled to qualified immunity.

A

The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits "may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U. S. 635, 638 (1987). As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to "discretionary functions" performed in their official capacities. *Ibid.* The doctrine of qualified immunity gives officials "breathing

room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 743 (2011).

The Court's cases provide additional instruction to define and implement that immunity. Whether qualified immunity can be invoked turns on the "objective legal reasonableness" of the official's acts. *Harlow*, *supra*, at 819. And reasonableness of official action, in turn, must be "assessed in light of the legal rules that were clearly established at the time [the action] was taken." *Anderson*, *supra*, at 639 (internal quotation marks omitted); see also *Mitchell*, 472 U. S., at 528. This requirement—that an official loses qualified immunity only for violating clearly established law—protects officials accused of violating "extremely abstract rights." *Anderson*, *supra*, at 639.

The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights. By its plain terms, the Amendment forbids unreasonable searches and seizures, yet it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered. See *Saucier* v. *Katz*, 533 U. S. 194, 205 (2001) ("It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts"). For this reason, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix* v. *Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (quoting *Ashcroft*, *supra*, at 742).

It is not necessary, of course, that "the very action in question has previously been held unlawful." *Anderson*, *supra*, at 640. That is, an officer might lose qualified immunity even if there is no reported case "directly on point." *Ashcroft*, *supra*, at 741. But "in the light of pre-existing law," the unlawfulness of the officer's conduct "must be apparent." *Anderson*, *supra*, at 640. To subject officers to any broader liability would be to "disrupt the balance that our cases

strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984). For then, both as a practical and legal matter, it would be difficult for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Ibid.*

In light of these concerns, the Court has held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986). To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted." *Saucier*, *supra*, at 202. If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i. e.*, if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.

B

Under these principles, it must be concluded that reasonable officials in petitioners' positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.

At least two aspects of the complaint indicate that petitioners' potential liability for this statutory offense would not have been known or anticipated by reasonable officials in their position. First, the conspiracy recited in the complaint is alleged to have been between or among officers in the same branch of the Government (the Executive Branch) and in the same Department (the Department of Justice). Second, the discussions were the preface to, and the outline of, a general and far-reaching policy.

As to the fact that these officers were in the same Department, an analogous principle discussed in the context of anti-

trust law is instructive. The Court's precedent indicates that there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 769–771 (1984). Under this principle—sometimes called the intracorporate-conspiracy doctrine—an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy. *Ibid.* The rule is derived from the nature of the conspiracy prohibition. Conspiracy requires an agreement—and in particular an agreement to do an unlawful act—between or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people. See *id.*, at 771 (analogizing to "a multiple team of horses drawing a vehicle under the control of a single driver").

To be sure, this Court has not given its approval to this doctrine in the specific context of § 1985(3). See *Great American*, 442 U. S., at 372, n. 11. There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies. See *Hull* v. *Shuck*, 501 U. S. 1261, 1261–1262 (1991) (White, J., dissenting from denial of certiorari) (discussing the Circuit split); *Bowie* v. *Maddox*, 642 F. 3d 1122, 1130–1131 (CADC 2011) (detailing a long-standing split about whether the intracorporate-conspiracy doctrine applies to civil rights conspiracies). Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust

context. Yet the fact that the courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See *Wilson* v. *Layne*, 526 U. S. 603, 618 (1999) (noting that it would be "unfair" to subject officers to damages liability when even "judges . . . disagree"); *Reichle* v. *Howards*, 566 U. S. 658, 669–670 (2012) (same).

In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under § 1985(3). To state a claim under § 1985(3), a plaintiff must first show that the defendants conspired—that is, reached an agreement—with one another. See *Carpenters*, 463 U. S., at 828 (stating that the elements of a § 1985(3) claim include "a conspiracy"). Thus, a § 1985(3) claim against federal officials by necessity implicates the substance of their official discussions.

As indicated above with respect to other claims in this suit, open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue. See *supra*, at 141–142. Close and frequent consultations to facilitate the adoption and implementation of policies are essential to the orderly conduct of governmental affairs. Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies. See *Cheney*, 542 U. S., at 383 (discussing the need for confidential communications among Executive Branch officials); *Merrill*, 443 U. S., at 360 (same).

These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law. See *Saucier*, 533 U. S., at 202. Petitioners are entitled to qualified immunity with respect to the claims under 42 U. S. C. § 1985(3).

* * *

If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis.

Instead, the question with respect to the *Bivens* claims is whether to allow an action for money damages in the absence of congressional authorization. For the reasons given above, the Court answers that question in the negative as to the detention policy claims. As to the prisoner abuse claim, because the briefs have not concentrated on that issue, the Court remands to allow the Court of Appeals to consider the claim in light of the *Bivens* analysis set forth above.

The question with respect to the § 1985(3) claim is whether a reasonable officer in petitioners' position would have known the alleged conduct was an unlawful conspiracy. For the reasons given above, the Court answers that question, too, in the negative.

The judgment of the Court of Appeals is reversed as to all of the claims except the prisoner abuse claim against Warden Hasty. The judgment of the Court of Appeals with respect to that claim is vacated, and that case is remanded for further proceedings.

It is so ordered.

JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE GORSUCH took no part in the consideration or decision of these cases.

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

I join the Court's opinion except for Part IV–B. I write separately to express my view on the Court's decision to remand some of respondents' claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and my concerns about our qualified immunity precedents.

I

With respect to respondents' *Bivens* claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that *Bivens* does not supply a cause of action against petitioners for most of the alleged Fourth and Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context. See *ante*, at 147.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. *Ante*, at 156. I have previously noted that "'*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.'" *Wilkie* v. *Robbins*, 551 U. S. 537, 568 (2007) (concurring opinion) (quoting *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring)). I have thus declined to "extend *Bivens* even [where] its reasoning logically applied," thereby

limiting "*Bivens* and its progeny . . . to the precise circumstances that they involved." *Wilkie*, *supra*, at 568 (internal quotation marks omitted). This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

As for respondents' claims under 42 U. S. C. § 1985(3), I join Part V of the Court's opinion, which holds that respondents are entitled to qualified immunity. The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.

The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See §§ 1, 2, 17 Stat. 13. Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U. S. 335, 339 (1986) (internal quotation marks omitted). We have done so because "[c]ertain immunities were so well established in 1871 . . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 268 (1993); accord, *Briscoe* v. *LaHue*, 460 U. S. 325, 330 (1983). Immunity is thus available under the statute if it was "historically accorded the relevant official" in an analogous situation "at common law," *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see *Tower* v. *Glover*, 467 U. S. 914, 920 (1984).

In some contexts, we have conducted the common-law inquiry that the statute requires. See *Wyatt* v. *Cole*, 504 U. S. 158, 170 (1992) (KENNEDY, J., concurring). For example, we have concluded that legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871. See *Tenney* v. *Brandhove*, 341 U. S. 367, 372–376 (1951) (legislators); *Pierson* v. *Ray*, 386 U. S. 547, 553–555 (1967) (judges). We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the "judicial phase of the criminal process," *Imbler*, *supra*, at 430; *Burns* v. *Reed*, 500 U. S. 478, 489–492 (1991); but see *Kalina* v. *Fletcher*, 522 U. S. 118, 131–134 (1997) (Scalia, J., joined by THOMAS, J., concurring) (arguing that the Court in *Imbler* misunderstood 1871 common-law rules), although not from suits relating to the prosecutor's advice to police officers, *Burns*, *supra*, at 493.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson*, we held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. 386 U. S., at 555. Rather, we concluded that police officers could assert "the defense of good faith and probable cause" against the claim for an unconstitutional arrest because that defense was available against the analogous torts of "false arrest and imprisonment" at common law. *Id.*, at 557.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See *Wyatt*, *supra*, at 170 (KENNEDY, J., concurring); accord, *Crawford-El* v. *Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting). In the decisions following *Pierson*, we have "completely reformulated qualified immunity along principles not at all embodied in the common law." *Ander-*

son v. *Creighton*, 483 U. S. 635, 645 (1987) (discussing *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982)). Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 577 U. S. 7, 11 (2015) (*per curiam*) (internal quotation marks omitted); *Taylor* v. *Barkes*, 575 U. S. 822, 825 (2015) (*per curiam*) (a Government official is liable under the 1871 Act only if "'existing precedent . . . placed the statutory or constitutional question beyond debate'" (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 741 (2011))). We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson*, *supra*, at 641–643 (internal quotation marks omitted).* We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 51–62 (2018).

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act. *Malley*, 475 U. S., at 342; see *Burns*, *supra*, at 493. Our qualified immunity precedents instead represent precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to

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*Although we first formulated the "clearly established" standard in *Bivens* cases like *Harlow* and *Anderson*, we have imported that standard directly into our 1871 Act cases. See, *e. g.*, *Pearson* v. *Callahan*, 555 U. S. 223, 243–244 (2009) (applying the clearly established standard to a § 1983 claim).

make. *Rehberg* v. *Paulk*, 566 U. S. 356, 363 (2012) (internal quotation marks omitted); see also *Tower*, *supra*, at 922–923 ("We do not have a license to establish immunities from" suits brought under the Act "in the interests of what we judge to be sound public policy"). We have acknowledged, in fact, that the "clearly established" standard is designed to "protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties." *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012) (internal quotation marks omitted); *Harlow*, *supra*, at 807 (explaining that "the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values"). The Constitution assigns this kind of balancing to Congress, not the Courts.

In today's decision, we continue down the path our precedents have marked. We ask "whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted," *ante*, at 152 (internal quotation marks omitted), rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), this Court held that the Fourth Amendment provides a damages remedy for those whom federal officials have injured as a result of an unconstitutional search or seizure. In *Davis* v. *Passman*, 442 U. S. 228 (1979), the Court held that the Fifth Amendment provides a damages remedy

to an individual dismissed by her employer (a Member of Congress) on the basis of her sex in violation of the equal protection component of that Amendment's Due Process Clause. And in *Carlson* v. *Green*, 446 U. S. 14 (1980), the Court held that the Eighth Amendment provides a damages remedy to a prisoner who died as a result of prison officials' deliberate indifference to his medical needs, in violation of the Amendment's prohibition against cruel and unusual punishment.

It is by now well established that federal law provides damages actions at least in similar contexts, where claims of constitutional violation arise. Congress has ratified *Bivens* actions, plaintiffs frequently bring them, courts accept them, and scholars defend their importance. See J. Pfander, Constitutional Torts and the War on Terror (2017) (canvassing the history of *Bivens* and cataloging cases). Moreover, the courts, in order to avoid deterring federal officials from properly performing their work, have developed safeguards for defendants, including the requirement that plaintiffs plead "plausible" claims, *Ashcroft* v. *Iqbal*, 556 U. S. 662, 679 (2009), as well as the defense of "qualified immunity," which frees federal officials from both threat of liability and involvement in the lawsuit, unless the plaintiffs establish that officials have violated "'clearly established . . . constitutional rights,'" *id.*, at 672 (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982)). "[This] Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, *supra*, at 675 (quoting *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68 (2001)). But the Court has made clear that it would not narrow *Bivens*' existing scope. See *FDIC* v. *Meyer*, 510 U. S. 471, 485 (1994) (guarding against "the evisceration of the *Bivens* remedy" so that its "deterrent effects . . . would [not] be lost").

The plaintiffs before us today seek damages for unconstitutional conditions of confinement. They alleged that federal officials slammed them against walls, shackled them, exposed them to nonstop lighting, lack of hygiene, and the like, all

based upon invidious discrimination and without penological justification. See *ante*, at 128–129. In my view, these claims are well pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law. For those reasons, I would affirm the judgment of the Court of Appeals. I shall discuss at some length what I believe is the most important point of disagreement. The Court, in my view, is wrong to hold that permitting a constitutional tort action here would "extend" *Bivens*, applying it in a new context. To the contrary, I fear that the Court's holding would significantly shrink the existing *Bivens* contexts, diminishing the compensatory remedy constitutional tort law now offers to harmed individuals.

I shall explain why I believe this suit falls well within the scope of traditional constitutional tort law and why I cannot agree with the Court's arguments to the contrary. I recognize, and write separately about, the strongest of the Court's arguments, namely, the fact that the plaintiffs' claims concern detention that took place soon after a serious attack on the United States and some of them concern actions of high-level Government officials. While these facts may affect the substantive constitutional questions (*e. g.*, were any of the conditions "legitimate"?) or the scope of the qualified-immunity defense, they do not extinguish the *Bivens* action itself. If I may paraphrase Justice Harlan, concurring in *Bivens*: In wartime as well as in peacetime, "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy" "for the most flagrant and patently unjustified," unconstitutional "abuses of official power." 403 U. S., at 410–411 (opinion concurring in judgment); cf. *Boumediene* v. *Bush*, 553 U. S. 723, 798 (2008).

I

The majority opinion well summarizes the particular claims that the plaintiffs make in this suit. All concern the conditions of their confinement, which began soon after the

September 11, 2001, attacks and "lasted for days and weeks, then stretching into months." *Ante*, at 125. At some point, the plaintiffs allege, all the defendants knew that they had nothing to do with the September 11 attacks but continued to detain them anyway in harsh conditions. Official Government policy, both before and after the defendants became aware of the plaintiffs' innocence, led to the plaintiffs being held in "tiny cells for over 23 hours a day" with lights continuously left on, "shackled" when moved, often "strip searched," and "denied access to most forms of communication with the outside world." *Ante*, at 128 (internal quotation marks omitted). The defendants detained the plaintiffs in these conditions on the basis of their race or religion and without justification.

Moreover, the prison wardens were aware of, but deliberately indifferent to, certain unofficial activities of prison guards involving a pattern of "physical and verbal abuse," such as "slam[ming] detainees into walls; twist[ing] their arms, wrists, and fingers; [breaking] their bones;" and subjecting them to verbal taunts. *Ibid.* (internal quotation marks omitted).

The plaintiffs' complaint alleges that all the defendants—high-level Department of Justice officials and prison wardens alike—were directly responsible for the official confinement policy, which, in some or all of the aspects mentioned, violated the due process and equal protection components of the Fifth Amendment. The complaint adds that, insofar as the prison wardens were deliberately indifferent to the unofficial conduct of the guards, they violated the Fourth and the Fifth Amendments.

I would hold that the complaint properly alleges constitutional torts, *i. e.*, *Bivens* actions for damages.

A

The Court's holdings in *Bivens*, *Carlson*, and *Davis* rest upon four basic legal considerations. First, the *Bivens*

Court referred to longstanding Supreme Court precedent stating or suggesting that the Constitution provides federal courts with considerable legal authority to use traditional remedies to right constitutional wrongs. That precedent begins with *Marbury* v. *Madison*, 1 Cranch 137 (1803), which effectively placed upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special. Chief Justice John Marshall wrote for the Court that

> "[t]he very essence of civil liberty [lies] in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163.

The Chief Justice referred to Blackstone's Commentaries stating that there

> " 'is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . [and that] it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.' " *Ibid.*

The Chief Justice then wrote:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will [not] deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Ibid.*

He concluded for the Court that there must be something "peculiar" (*i. e.*, special) about a case that warrants "exclu[ding] the injured party from legal redress [and placing it within] that class of cases which come under the description of *damnum absque injuria*—a loss without an injury." *Id.*, at 163–164; but cf. *id.*, at 164 (placing "political" questions in the latter, special category).

Much later, in *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), the Court wrote that,

> "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

See also *Bivens*, 403 U. S., at 392 (citing opinions of Justices Cardozo and Holmes to similar effect).

The *Bivens* Court reiterated these principles and confirmed that the appropriate remedial "'adjust[ment]'" in the case before it was an award of money damages, the "remedial mechanism normally available in the federal courts." *Id.*, at 392, 397. Justice Harlan agreed, adding that, since Congress' "general" statutory "grant of jurisdiction" authorized courts to grant equitable relief in cases arising under federal jurisdiction, courts likewise had the authority to award damages—the "traditional remedy at law"—in order to "vindicate the interests of the individual" protected by the Bill of Rights. *Id.*, at 405–407 (opinion concurring in judgment).

Second, our cases have recognized that Congress' silence on the subject indicates a willingness to leave this matter to the courts. In *Bivens*, the Court noted, as an argument favoring its conclusion, the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." *Id.*, at 397. Similarly, in *Davis*, the Court stressed that there was "no evidence . . . that Congress meant . . . to foreclose" a damages remedy. 442 U. S., at 247. In *Carlson*, the Court went further, observing that not only was there no sign "that Congress meant to pre-empt a *Bivens* remedy," but there was also "clear" evidence that Congress intended to preserve it. 446 U. S., at 19–20.

Third, our *Bivens* cases acknowledge that a constitutional tort may not lie when "special factors counse[l] hesitation" and when Congress has provided an adequate alternative

remedy. 446 U. S., at 18–19. The relevant special factors in those cases included whether the court was faced "with a question of 'federal fiscal policy,'" *Bivens*, *supra*, at 396, or a risk of "deluging federal courts with claims," *Davis*, *supra*, at 248 (internal quotation marks omitted). *Carlson* acknowledged an additional factor—that damages suits "might inhibit [federal officials'] efforts to perform their official duties"—but concluded that "the qualified immunity accorded [federal officials] under [existing law] provides adequate protection." 446 U. S., at 19.

Fourth, as the Court recognized later in *Carlson*, a *Bivens* remedy was needed to cure what would, without it, amount to a constitutional anomaly. Long before this Court incorporated many of the Bill of Rights' guarantees against the States, see Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992), federal civil rights statutes afforded a damages remedy to any person whom a state official deprived of a federal constitutional right, see 42 U. S. C. § 1983; *Monroe* v. *Pape*, 365 U. S. 167, 171–187 (1961) (describing this history). But federal statutory law did not provide a damages remedy to a person whom a federal official had deprived of that same right, even though the Bill of Rights was at the time of the founding primarily aimed at constraining the Federal Government. Thus, a person harmed by an unconstitutional search or seizure might sue a city mayor, a state legislator, or even a Governor. But that person could not sue a federal agent, a national legislator, or a Justice Department official for an identical offense. "[Our] 'constitutional design,'" the Court wrote, "would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Carlson*, *supra*, at 22 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)).

The *Bivens* Court also recognized that the Court had previously inferred damages remedies caused by violations of certain federal statutes that themselves did not explicitly au-

thorize damages remedies. 403 U. S., at 395–396. At the same time, *Bivens*, *Davis*, and *Carlson* treat the courts' power to derive a damages remedy from a constitutional provision not as included within a power to find a statute-based damages remedy but as flowing from those statutory cases *a fortiori*.

As the majority opinion points out, this Court in more recent years has indicated that "*expanding* the *Bivens* remedy is *now* a 'disfavored' judicial activity." *Ante*, at 135 (quoting *Iqbal*, 556 U. S., at 675; emphasis added). Thus, it has held that the remedy is not available in the context of suits against *military* officers, see *Chappell* v. *Wallace*, 462 U. S. 296, 298–300 (1983); *United States* v. *Stanley*, 483 U. S. 669, 683–684 (1987); in the context of suits against *privately* operated prisons and their employees, see *Minneci* v. *Pollard*, 565 U. S. 118, 120 (2012); *Malesko*, 534 U. S., at 70–73; in the context of suits seeking to vindicate procedural, rather than substantive, constitutional protections, see *Schweiker* v. *Chilicky*, 487 U. S. 412, 423 (1988); and in the context of suits seeking to vindicate two quite different forms of important substantive protection, one involving free speech, see *Bush* v. *Lucas*, 462 U. S. 367, 368 (1983), and the other involving protection of land rights, see *Wilkie* v. *Robbins*, 551 U. S. 537, 551 (2007). Each of these cases involved a context that differed from that of *Bivens*, *Davis*, and *Carlson* with respect to the kind of defendant, the basic nature of the right, or the kind of harm suffered. That is to say, as we have explicitly stated, these cases were "*fundamentally different* from anything recognized in *Bivens* or subsequent cases." *Malesko*, *supra*, at 70 (emphasis added). In each of them, the plaintiffs were asking the Court to "'authoriz[e] a *new kind* of federal litigation.'" *Wilkie*, *supra*, at 550 (emphasis added).

Thus the Court, as the majority opinion says, repeatedly wrote that it was not "expanding" the scope of the *Bivens* remedy. *Ante*, at 135. But the Court nowhere suggested

that it would narrow *Bivens*' existing scope. In fact, to diminish any ambiguity about its holdings, the Court set out a framework for determining whether a claim of constitutional violation calls for a *Bivens* remedy. See *Wilkie*, *supra*, at 549–550. At step one, the court must determine whether the case before it arises in a "new context," that is, whether it involves a "new category of defendants," *Malesko*, *supra*, at 68, or (presumably) a significantly different kind of constitutional harm, such as a purely procedural harm, a harm to speech, or a harm caused to physical property. *If the context is new, then* the court proceeds to step two and asks "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U. S., at 550. *If there is none, then* the court proceeds to step three and asks whether there are "'any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Ibid.*

Precedent makes this framework applicable here. I would apply it. And, doing so, I cannot get past step one. This suit, it seems to me, arises in a context similar to those in which this Court has previously permitted *Bivens* actions.

B

1

The context here is not "new," *Wilkie*, *supra*, at 550, or "fundamentally different" from our previous *Bivens* cases, *Malesko*, *supra*, at 70. First, the plaintiffs are civilians, not members of the military. They are not citizens, but the Constitution protects noncitizens against serious mistreatment, as it protects citizens. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). Some or all of the plaintiffs

here may have been illegally present in the United States. But that fact cannot justify physical mistreatment. Nor does anyone claim that that fact deprives them of a *Bivens* right available to other persons, citizens and noncitizens alike.

Second, the defendants are Government officials. They are not members of the military or private persons. Two are prison wardens. Three others are high-ranking Department of Justice officials. Prison wardens have been defendants in *Bivens* actions, as have other high-level Government officials. One of the defendants in *Carlson* was the Director of the Bureau of Prisons; the defendant in *Davis* was a Member of Congress. We have also held that the Attorney General of the United States is not entitled to absolute immunity in a damages suit arising out of his actions related to national security. See *Mitchell* v. *Forsyth*, 472 U. S. 511, 520 (1985).

Third, from a *Bivens* perspective, the injuries that the plaintiffs claim they suffered are familiar ones. They focus upon the conditions of confinement. The plaintiffs say that they were unnecessarily shackled, confined in small unhygienic cells, subjected to continuous lighting (presumably preventing sleep), unnecessarily and frequently strip searched, slammed against walls, injured physically, and subject to verbal abuse. They allege that they suffered these harms because of their race or religion, the defendants having either turned a blind eye to what was happening or themselves introduced policies that they knew would lead to these harms even though the defendants knew the plaintiffs had no connections to terrorism.

These claimed harms are similar to, or even worse than, the harms the plaintiffs suffered in *Bivens* (unreasonable search and seizure in violation of the Fourth Amendment), *Davis* (unlawful discrimination in violation of the Fifth Amendment), and *Carlson* (deliberate indifference to medical need in violation of the Eighth Amendment). Indeed, we have said that, "[i]f a federal prisoner in a [Bureau of Pris-

ons] facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, *supra*, at 72; see also *Farmer* v. *Brennan*, 511 U. S. 825, 832 (1994) (*Bivens* case about prisoner abuse). The claims in this suit would seem to fill the *Bivens'* bill. See *Sell* v. *United States*, 539 U. S. 166, 193 (2003) (Scalia, J., dissenting) ("[A] [*Bivens*] action . . . is available to federal pretrial detainees challenging the conditions of their confinement").

It is true that the plaintiffs bring their "deliberate indifference" claim against Warden Hasty under the Fifth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishments Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens'* remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is "fundamental." See *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 244 (1983) ("due process rights" of an unconvicted person "are at least as great as the Eighth Amendment protections available to a convicted prisoner"); *Kingsley* v. *Hendrickson*, 576 U. S. 389, 400 (2015) ("pretrial detainees (unlike convicted prisoners) cannot be punished at all"); *Zadvydas* v. *Davis*, 533 U. S. 678, 721 (2001) (KENNEDY, J., dissenting) (detention "incident to removal . . . cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish"). See also *Bistrian* v. *Levi*, 696 F. 3d 352, 372 (CA3 2012) (permitting *Bivens* action brought by detainee in administrative segregation); *Thomas* v. *Ashcroft*, 470 F. 3d 491, 493, 496–497 (CA2 2006) (detainee alleging failure to provide adequate medical care); *Magluta* v. *Samples*, 375 F. 3d 1269, 1271, 1275–1276 (CA11 2004) (de-

tainee in solitary confinement); *Papa* v. *United States*, 281 F. 3d 1004, 1010–1011 (CA9 2002) (due process claims arising from death of immigration detainee); *Loe* v. *Armistead*, 582 F. 2d 1291, 1293–1296 (CA4 1978) (detainee's claim of deliberate indifference to medical need). If an arrestee can bring a claim of excessive force (*Bivens* itself), and a convicted prisoner can bring a claim for denying medical care (*Carlson*), someone who has neither been charged nor convicted with a crime should also be able to challenge abuse that causes him to need medical care.

Nor has Congress suggested that it wants to withdraw a damages remedy in circumstances like these. By its express terms, the Prison Litigation Reform Act of 1995 (PLRA) does not apply to immigration detainees. See 42 U. S. C. § 1997e(h) ("[T]he term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law . . . "); see also *Agyeman* v. *INS*, 296 F. 3d 871, 886 (CA9 2002) ("[W]e hold that an alien detained by the [Immigration and Naturalization Service] pending deportation is not a 'prisoner' within the meaning of the PLRA"); *LaFontant* v. *INS*, 135 F. 3d 158, 165 (CADC 1998) (same); *Ojo* v. *INS*, 106 F. 3d 680, 683 (CA5 1997) (same). And, in fact, there is strong evidence that Congress assumed that *Bivens* remedies would be available to prisoners when it enacted the PLRA—*e. g.*, Congress continued to permit prisoners to recover for physical injuries, the typical kinds of *Bivens* injuries. See 28 U. S. C. § 1346(b)(2); Pfander, Constitutional Torts, at 105–106.

If there were any lingering doubt that the claim against Warden Hasty arises in a familiar *Bivens* context, the Court has made clear that conditions-of-confinement claims and medical-care claims are subject to the same substantive standard. See *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992) ("[*Wilson* v. *Seiter*, 501 U. S. 294, 303 (1991)] extended the deliberate indifference standard applied to Eighth Amend-

ment claims involving medical care to claims about conditions of confinement"). Indeed, the Court made this very point in a *Bivens* case alleging that prison wardens were deliberately indifferent to an inmate's safety. See *Farmer*, *supra*, at 830, 834.

I recognize that the Court finds a significant difference in the fact that the confinement here arose soon after a national-security emergency, namely, the September 11 attacks. The short answer to this argument, in respect to at least some of the claimed harms, is that some plaintiffs continued to suffer those harms up to eight months after the September 11 attacks took place and after the defendants knew the plaintiffs had no connection to terrorism. See App. to Pet. for Cert. in No. 15–1359, p. 280a. But because I believe the Court's argument here is its strongest, I will consider it at greater length below. See Part II–C, *infra*.

Because the context here is not new, I would allow the plaintiffs' constitutional claims to proceed. The plaintiffs have adequately alleged that the defendants were personally involved in imposing the conditions of confinement and did so with knowledge that the plaintiffs bore no ties to terrorism, thus satisfying *Iqbal*'s pleading standard. See 556 U. S., at 679 (claims must be "plausible"); see also *id.*, at 699–700 (BREYER, J., dissenting). And because it is clearly established that it is unconstitutional to subject detainees to punitive conditions of confinement and to target them based solely on their race, religion, or national origin, the defendants are not entitled to qualified immunity on the constitutional claims. See *Bell* v. *Wolfish*, 441 U. S. 520, 535–539, and n. 20 (1979); *Davis*, 442 U. S., at 236 ("It is equally clear . . . that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination"). (Similarly, I would affirm the judgment of the Court of Appeals with respect to the plaintiffs' statutory claim, namely, that the defendants conspired to deprive the plaintiffs of equal protection of the laws in violation of 42 U. S. C. § 1985(3).

See *Turkmen* v. *Hasty*, 789 F. 3d 218, 262–264 (CA2 2015). I agree with the Court of Appeals that the defendants are not entitled to qualified immunity on this claim. See *ibid.*)

2

Even were I wrong and were the context here "fundamentally different," *Malesko*, 534 U. S., at 70, the plaintiffs' claims would nonetheless survive step two and step three of the Court's framework for determining whether *Bivens* applies, see *supra*, at 168. Step two consists of asking whether "any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U. S., at 550. I can find no such "alternative, existing process" here.

The Court does not claim that the PLRA provides the plaintiffs with a remedy. *Ante*, at 148–149. Rather, it says that the plaintiffs *may* have "had available to them" relief in the form of a prospective injunction or an application for a writ of habeas corpus. *Ante*, at 145. Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered. And here the plaintiffs make a strong claim that neither was available to them—at least not for a considerable time. Some of the plaintiffs allege that for two or three months they were subject to a "communications blackout"; that the prison "staff did not permit them visitors, legal or social telephone calls, or mail"; that their families and attorneys did not know where they were being held; that they could not receive visits from their attorneys; that subsequently their lawyers could call them only once a week; and that some or all of the defendants "interfered with the detainees' effective access to legal counsel." Office of Inspector General (OIG) Report, App. 223, 293, 251, 391; see App. to Pet. for Cert. in No. 15–1359, at 253a, n. 1 (incorporating the OIG report into the complaint). These claims make it

virtually impossible to say that here there is an "elaborate, comprehensive" alternative remedial scheme similar to schemes that, in the past, we have found block the application of *Bivens* to new contexts. *Bush*, 462 U. S., at 385. If these allegations are proved, then in this suit, it is "damages or nothing." *Bivens*, 403 U. S., at 410 (Harlan, J., concurring in judgment).

There being no "alternative, existing process" that provides a "convincing reason" for not applying *Bivens,* we must proceed to step three. *Wilkie*, *supra*, at 550. Doing so, I can find no "'special factors [that] counse[l] hesitation before authorizing'" this *Bivens* action. 551 U. S., at 550. I turn to this matter next.

II

A

The Court describes two general considerations that it believes argue against an "extension" of *Bivens.* First, the majority opinion points out that the Court is now far less likely than at the time it decided *Bivens* to imply a cause of action for damages from a statute that does not explicitly provide for a damages claim. See *ante,* at 132–133. Second, it finds the "silence" of Congress "notable" in that Congress, though likely aware of the "high-level policies" involved in this suit, did not "choose to extend to any person the kind of remedies" that the plaintiffs here "seek." *Ante,* at 144 (internal quotation marks omitted). I doubt the strength of these two general considerations.

The first consideration, in my view, is not relevant. I concede that the majority and concurring opinions in *Bivens* looked in part for support to the fact that the Court had implied damages remedies from *statutes* silent on the subject. See 403 U. S., at 397; *id.,* at 402–403 (Harlan, J., concurring in judgment). But that was not the main argument favoring the Court's conclusion. Rather, the Court drew far stronger support from the need for such a remedy when

measured against a common-law and constitutional history of allowing traditional legal remedies where necessary. *Id.*, at 392, 396–397. The Court believed such a remedy was necessary to make effective the Constitution's protection of certain basic individual rights. See *id.*, at 392; *id.*, at 407 (opinion of Harlan, J.). Similarly, as the Court later explained, a damages remedy against federal officials prevented the serious legal anomaly I previously mentioned. Its existence made basic constitutional protections of the individual against *Federal* Government abuse (the Bill of Rights' pre-Civil War objective) as effective as protections against abuse by *state* officials (the post-Civil War, post-selective-incorporation objective). See *supra*, at 166.

Nor is the second circumstance—congressional silence—relevant in the manner that the majority opinion describes. The Court initially saw that silence as indicating an absence of congressional hostility to the Court's exercise of its traditional remedy-inferring powers. See *Bivens*, *supra*, at 397; *Davis*, 442 U. S., at 246–247. Congress' subsequent silence contains strong signs that it accepted *Bivens* actions as part of the law. After all, Congress rejected a proposal that would have eliminated *Bivens* by substituting the U. S. Government as a defendant in suits against federal officers that raised constitutional claims. See Pfander, Constitutional Torts, at 102. Later, Congress expressly immunized federal employees acting in the course of their official duties from tort claims *except* those premised on violations of the Constitution. See Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, 28 U. S. C. §2679(b)(2)(A). We stated that it is consequently "crystal clear that Congress views [the Federal Tort Claims Act] and *Bivens* as [providing] parallel, complementary causes of action." *Carlson*, 446 U. S., at 20; see *Malesko*, 534 U. S., at 68 (similar). Congress has even assumed the existence of a *Bivens* remedy in suits brought by noncitizen detainees suspected of terrorism. See 42 U. S. C.

§ 2000dd–1 (granting qualified immunity—but not absolute immunity—to military and civilian federal officials who are sued by alien detainees suspected of terrorism).

B

The majority opinion also sets forth a more specific list of factors that it says bear on "whether a case presents a new *Bivens* context." *Ante*, at 139. In the Court's view, a "case might differ" from *Bivens* "in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; [7] or the presence of potential special factors that previous *Bivens* cases did not consider." *Ante*, at 139–140. In my view, these factors do not make a "meaningful difference" at step one of the *Bivens* framework. Some of them are better cast as "special factors" relevant to step three. But, as I see it, none should normally foreclose a *Bivens* action and none is determinative here. Consider them one by one:

(1) *The rank of the officers.* I can understand why an officer's rank might bear on whether he violated the Constitution, because, for example, a plaintiff might need to show the officer was willfully blind to a harm caused by lower ranking officers or that the officer had actual knowledge of the misconduct. And I can understand that rank might relate to the existence of a legal defense, such as qualified, or even absolute, immunity. But *if*—and I recognize that this is often a very big if—a plaintiff proves a clear constitutional violation, say, of the Fourth Amendment, *and* he shows that the defendant does not possess any form of immunity or other defense, *then* why should he not have a damages remedy for harm suffered? What does rank have to do with

that question, namely, the *Bivens* question? Why should the law treat differently a high-level official and the local constable where each has similarly violated the Constitution and where neither can successfully assert immunity or any other defense?

(2) *The constitutional right at issue.* I agree that this factor can make a difference, but only when the substance of the right is distinct. See, *e. g.*, *Wilkie*, 551 U. S. 537 (land rights). But, for reasons I have already pointed out, there is no relevant difference between the rights at issue here and the rights at issue in our previous *Bivens* cases, namely, the rights to be free of unreasonable searches, invidious discrimination, and physical abuse in federal custody. See *supra*, at 169–170.

(3) *The generality or specificity of the individual action.* I should think that it is not the "generality or specificity" of an official action but rather the nature of the official action that matters. *Bivens* should apply to some generally applicable actions, such as actions taken deliberately to jail a large group of known-innocent people. And it should not apply to some highly specific actions, depending upon the nature of those actions.

(4) *The extent of judicial guidance.* This factor may be relevant to the existence of a constitutional violation or a qualified-immunity defense. Where judicial guidance is lacking, it is more likely that a constitutional violation is not clearly established. See *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987) (Officials are protected by qualified immunity unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right"). But I do not see how, assuming the violation is clear, the presence or absence of "judicial guidance" is relevant to the existence of a damages remedy.

(5) *The statutory (or other) legal mandate under which the officer was operating.* This factor too may prove relevant to the question whether a constitutional violation exists

or is clearly established. But, again, assuming that it is, I do not understand why this factor is relevant to the existence of a damages remedy. See *Stanley*, 483 U. S., at 684 (the question of immunity is "analytically distinct" from the question whether a *Bivens* action should lie).

(6) *Risk of disruptive judicial intrusion.* All damages actions risk disrupting to some degree future decisionmaking by members of the Executive or Legislative Branches. Where this Court has authorized *Bivens* actions, it has found that disruption tolerable, and it has explained why disruption is, from a constitutional perspective, desirable. See *Davis*, 442 U. S., at 242 (Unless constitutional rights "are to become merely precatory, . . . litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for . . . protection"); *Malesko*, 534 U. S., at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations"). Insofar as the Court means this consideration to provide a reason why there should be no *Bivens* action where a Government employee acts in time of security need, I shall discuss the matter next, in Part C.

(7) *Other potential special factors.* Since I am not certain what these other "potential factors" are and, since the Court does not specify their nature, I would not, and the Court cannot, consider them in differentiating this suit from our previous *Bivens* cases or as militating against recognizing a *Bivens* action here.

C

In my view, the Court's strongest argument is that *Bivens* should not apply to policy-related actions taken in times of national-security need, for example, during war or national-security emergency. As the Court correctly points out, the Constitution grants primary power to protect the Nation's security to the Executive and Legislative Branches, not to

the Judiciary. But the Constitution also delegates to the Judiciary the duty to protect an individual's fundamental constitutional rights. Hence when protection of those rights and a determination of security needs conflict, the Court has a role to play. The Court most recently made this clear in cases arising out of the detention of enemy combatants at Guantanamo Bay. Justice O'Connor wrote that "a state of war is not a blank check." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). In *Boumediene*, 553 U. S., at 732–733, the Court reinforced that point, holding that noncitizens detained as enemy combatants were entitled to challenge their detention through a writ of habeas corpus, notwithstanding the national-security concerns at stake.

We have not, however, answered the specific question the Court places at issue here: Should *Bivens* actions continue to exist in respect to policy-related actions taken in time of war or national emergency? In my view, they should.

For one thing, a *Bivens* action comes accompanied by many legal safeguards designed to prevent the courts from interfering with Executive and Legislative Branch activity reasonably believed to be necessary to protect national security. In Justice Jackson's well-known words, the Constitution is not "a suicide pact." *Terminiello* v. *Chicago*, 337 U. S. 1, 37 (1949) (dissenting opinion). The Constitution itself takes account of public necessity. Thus, for example, the Fourth Amendment does not forbid *all* Government searches and seizures; it forbids only those that are "unreasonable." Ordinarily, it requires that a police officer obtain a search warrant before entering an apartment, but should the officer observe a woman being dragged against her will into that apartment, he should, and will, act at once. The Fourth Amendment makes allowances for such "exigent circumstances." *Brigham City* v. *Stuart*, 547 U. S. 398, 401–402 (2006) (warrantless entry justified to forestall imminent injury). Similarly, the Fifth Amendment bars only conditions of confinement that are not "reasonably related to a

legitimate governmental objective." *Bell* v. *Wolfish*, 441 U. S., at 539. What is unreasonable and illegitimate in time of peace may be reasonable and legitimate in time of war.

Moreover, *Bivens* comes accompanied with a qualified-immunity defense. Federal officials will face suit only if they have violated a constitutional right that was "clearly established" at the time they acted. *Harlow*, 457 U. S., at 818.

Further, in order to prevent the very presence of a *Bivens* lawsuit from interfering with the work of a Government official, this Court has held that a complaint must state a claim for relief that is "plausible." *Iqbal*, 556 U. S., at 679. "[C]onclusory" statements and "[t]hreadbare" allegations will not suffice. *Id.*, at 678. And the Court has protected high-level officials in particular by requiring that plaintiffs plead that an official was personally involved in the unconstitutional conduct; an official cannot be vicariously liable for another's misdeeds. *Id.*, at 676.

Finally, where such a claim is filed, courts can, and should, tailor discovery orders so that they do not unnecessarily or improperly interfere with the official's work. The Second Circuit has emphasized the "need to vindicate the purpose of the qualified immunity defense by dismissing nonmeritorious claims against public officials at an early stage of litigation." *Iqbal* v. *Hasty*, 490 F. 3d 143, 158 (2007). Where some of the defendants are "current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court" not only "may, but '*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that'" those officials "'are not subjected to unnecessary and burdensome discovery or trial proceedings.'" *Id.*, at 158–159. The court can make "all such discovery subject to prior court approval." *Id.*, at 158. It can "structure . . . limited discovery by examining written responses to interrogatories and requests to admit before au-

thorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks." *Ibid.* In a word, a trial court can and should so structure the proceedings with full recognition that qualified immunity amounts to immunity from suit as well as immunity from liability.

Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of, *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.

At the same time, there may well be a particular need for *Bivens* remedies when security-related Government actions are at issue. History tells us of far too many instances where the Executive or Legislative Branch took actions during time of war that, on later examination, turned out unnecessarily and unreasonably to have deprived American citizens of basic constitutional rights. We have read about the Alien and Sedition Acts, the thousands of civilians imprisoned during the Civil War, and the suppression of civil liberties during World War I. See W. Rehnquist, All the Laws but One: Civil Liberties in Wartime 209–210, 49–50, 173–180, 183 (1998); see also *Ex parte Milligan*, 4 Wall. 2 (1866) (decided *after* the Civil War was over). The pages of the U. S. Reports themselves recite this Court's refusal to set aside the Government's World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps, see *Korematsu* v. *United States*, 323 U. S. 214 (1944)—an action that at least some officials knew at the time was unnecessary, see *id.*, at 233–242 (Murphy, J., dissenting); P. Irons, Justice at War 202–204, 288 (1983). President Franklin Roosevelt's Attorney General, perhaps exaggerating, once said that "'[t]he Constitution has not greatly bothered any wartime President.'" Rehnquist, *supra*, at 191.

Can we, in respect to actions taken during those periods, rely exclusively, as the Court seems to suggest, upon injunctive remedies or writs of habeas corpus, their retail equivalent? Complaints seeking that kind of relief typically come during the emergency itself, when emotions are strong, when courts may have too little or inaccurate information, and when courts may well prove particularly reluctant to interfere with even the least well-founded Executive Branch activity. That reluctance may itself set an unfortunate precedent, which, as Justice Jackson pointed out, can "li[e] about like a loaded weapon" awaiting discharge in another case. *Korematsu*, *supra*, at 246 (dissenting opinion).

A damages action, however, is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts. We have applied the Constitution to actions taken during periods of war and national-security emergency. See *Boumediene*, 553 U. S., at 732–733; *Hamdi* v. *Rumsfeld*, 542 U. S. 507; cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). I should think that the wisdom of permitting courts to consider *Bivens* actions, later granting monetary compensation to those wronged at the time, would follow *a fortiori*.

As is well known, Lord Atkins, a British judge, wrote in the midst of World War II that "amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." *Liversidge* v. *Anderson*, [1942] A. C. 206 (H. L. 1941) 244. The Court, in my view, should say the same of this *Bivens* action.

With respect, I dissent.

Syllabus

McWILLIAMS *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 16–5294. Argued April 24, 2017—Decided June 19, 2017

Ake v. *Oklahoma*, 470 U. S. 68, 83, clearly established that when an indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

One month after *Ake* was decided, Alabama charged petitioner McWilliams with rape and murder. Finding him indigent, the trial court appointed counsel, who requested a psychiatric evaluation of McWilliams. The court granted the motion and the State convened a commission, which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. A jury convicted McWilliams of capital murder and recommended a death sentence. Later, while the parties awaited McWilliams' judicial sentencing hearing, McWilliams' counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed and McWilliams was examined by Dr. Goff. Dr. Goff filed a report two days before the judicial sentencing hearing. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some genuine neuropsychological problems. Just before the hearing, counsel also received updated records from the commission's evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel's requests. At the conclusion of the hearing, the court sentenced McWilliams to death.

On appeal, McWilliams argued that the trial court denied him the right to meaningful expert assistance guarantee by *Ake*. The Alabama Court of Criminal Appeals affirmed McWilliams' conviction and sentence, holding that Dr. Goff's examination satisfied *Ake*'s requirements. The State Supreme Court affirmed, and McWilliams failed to obtain state postconviction relief. On federal habeas review, a Magistrate

Syllabus

Judge also found that the Goff examination satisfied *Ake* and, therefore, that the State Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. § 2254(d)(1). Adopting the Magistrate Judge's report and recommendation, the District Court denied relief. The Eleventh Circuit affirmed.

Held:

1. *Ake* clearly established that when certain threshold criteria are met, the state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83. The Alabama courts' determination that McWilliams received all the assistance to which *Ake* entitled him was contrary to, or an unreasonable application of, clearly established federal law. Pp. 195–199.

(a) Three preliminary issues require resolution. First, the conditions that trigger *Ake*'s application are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70, and his "mental condition" was both "relevant to . . . the punishment he might suffer," *id.*, at 80, and "seriously in question," *id.*, at 70. Second, this Court rejects Alabama's claim that the State was relieved of its *Ake* obligations because McWilliams received brief assistance from a volunteer psychologist at the University of Alabama. Even if the episodic help of an outside volunteer could satisfy *Ake*, the State does not refer to any specific record facts that indicate that the volunteer psychologist was available to the defense at the judicial sentencing proceeding. Third, contrary to Alabama's suggestion, the record indicates that McWilliams did not get all the mental health assistance that he requested. Rather, he asked for additional help at the judicial sentencing hearing, but was rebuffed. Pp. 195–196.

(b) This Court does not have to decide whether *Ake* requires a State to provide an indigent defendant with a qualified mental health expert retained specifically for the defense team. That is because Alabama did not meet even *Ake*'s most basic requirements in this case. *Ake* requires more than just an examination. It requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." 470 U. S., at 83. Even assuming that Alabama met the examination requirement, it did not meet any of the other three. No expert helped the defense evaluate the Goff report or McWilliams' extensive medical records and translate these data into a legal strategy. No expert helped the defense prepare

and present arguments that might, *e. g.*, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing. Since Alabama's provision of mental health assistance fell so dramatically short of *Ake*'s requirements, the Alabama courts' decision affirming McWilliams' sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). Pp. 196–199.

2. The Eleventh Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, *Davis* v. *Ayala*, 576 U. S. 257, 268, specifically considering whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires could have made a difference. P. 200.

634 Fed. Appx. 698, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and GORSUCH, JJ., joined, *post*, p. 200.

Stephen B. Bright, by appointment of the Court, 580 U. S. 1170, argued the cause for petitioner. With him on the briefs were *Mark Loudon-Brown*, *Patrick Mulvaney*, *Donald B. Verrilli, Jr.*, and *Michael B. DeSanctis*.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for respondents. With him on the brief were *Steven T. Marshall*, Attorney General, and *Henry M. Johnson* and *Megan A. Kirkpatrick*, Assistant Attorneys General.*

JUSTICE BREYER delivered the opinion of the Court.

Thirty-one years ago, petitioner James Edmond McWilliams, Jr., was convicted of capital murder by an Alabama

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Aaron M. Panner, *David W. Ogden*, *Daniel S. Volchok*, *Deanne M. Ottaviano*, and *Nathalie F. P. Gilfoyle* filed a brief for the American Psychiatric Association et al. as *amici curiae* urging reversal.

George H. Kendall, *Jenay Nurse*, *Corrine A. Irish*, *David Oscar Markus*, and *Janet Moore* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae*.

jury and sentenced to death. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. We now consider, in this habeas corpus case, whether the Alabama courts' refusal was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). We hold that it was. Our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." *Id.*, at 83. Petitioner in this case did not receive that assistance.

I

McWilliams and the State of Alabama agree that *Ake* (which this Court decided in February 1985) sets forth the applicable constitutional standards. Before turning to the circumstances of McWilliams' case, we describe what the Court held in *Ake*. We put in italics language that we find particularly pertinent here.

The Court began by stating that the "issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination *and assistance necessary to prepare an effective defense based on his mental condition*, when his sanity at the time of the offense is seriously in question." *Id.*, at 70 (emphasis added). The Court said it would consider that issue within the framework of earlier cases granting "an indigent defendant . . . a fair opportunity to present his defense" and "to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.*, at 76. "Meaningful access to justice," the Court added, "has been the consistent theme of these cases." *Id.*, at 77.

The Court then wrote that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.*, at 80. A psychiatrist may, among other things, "gather facts," "analyze the information gathered and from it draw plausible conclusions," and "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Ibid.* These and related considerations

> "lea[d] inexorably to the conclusion that, *without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses*, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination." *Id.*, at 82 (emphasis added).

The Court concluded: "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*. . . . Our concern is that the indigent defendant have access to a competent psychiatrist *for the[se] purpose[s]*." *Id.*, at 83 (emphasis added).

Ake thus clearly establishes that when its threshold criteria are met, a State must provide a mental health professional capable of performing a certain role: "conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense." *Ibid.* Unless a defendant is "assure[d]" the assistance of someone who can

effectively perform these functions, he has not received the "minimum" to which *Ake* entitles him. *Ibid.*

II

A

One month after this Court decided *Ake*, the State of Alabama charged McWilliams with rape and murder. The trial court found McWilliams indigent and provided him with counsel. It also granted counsel's pretrial motion for a psychiatric evaluation of McWilliams' sanity, including aspects of his mental condition relevant to "mitigating circumstances to be considered in a capital case in the sentencing stage." Rec. 1526 (certified trial record) (hereinafter "T." refers to the certified trial record; "P. C. T." refers to the certified court reporter's state postconviction proceedings transcript). The court ordered the State to convene a "Lunacy Commission," which would examine McWilliams and file a report with the court. See *id.*, at 1528–1529.

Subsequently a three-member Lunacy Commission examined McWilliams at a state hospital, the Taylor Hardin Secure Medical Facility. The three members, all psychiatrists, concluded that McWilliams was competent to stand trial and that he had not been suffering from mental illness at the time of the alleged offense. *Id.*, at 1544–1546. One of them, Dr. Kamal Nagi, wrote that "Mr. McWilliams is grossly exaggerating his psychological symptoms to mimic mental illness." *Id.*, at 1546. Dr. Nagi noted that McWilliams' performance on one of the tests "suggested that [McWilliams] had exaggerated his endorsement of symptoms of illness and the profile was considered a 'fake bad.'" *Ibid.*

McWilliams' trial took place in late August 1986. On August 26 the jury convicted him of capital murder. The prosecution sought the death penalty, which under then-applicable Alabama law required both a jury recommendation (with at least 10 affirmative votes) and a later determination by the judge. See Ala. Code § 13A–5–46(f) (1986). The jury-related portion of the sentencing proceeding took

place the next day. The prosecution reintroduced evidence from the guilt phase and called a police officer to testify that McWilliams had a prior conviction. T. 1297, 1299–1303. The defense called McWilliams and his mother. Both testified that McWilliams, when a child, had suffered multiple serious head injuries. *Id.*, at 1303–1318, 1320–1335. McWilliams also described his history of psychiatric and psychological evaluations, reading from the prearrest report of one psychologist, who concluded that McWilliams had a "blatantly psychotic thought disorder" and needed inpatient treatment. *Id.*, at 1329–1332.

When the prosecutor, cross-examining McWilliams, asked about the neurological effects of his head injuries, McWilliams replied, "I am not a psychiatrist." *Id.*, at 1328. Similarly, when the prosecutor asked McWilliams' mother whether her son was "crazy," she answered, "I am no expert: I don't know whether my son is crazy or not. All I know, that my son do need help." *Id.*, at 1317.

The prosecution then called two of the mental health professionals who had signed the Lunacy Commission's report, Dr. Kamal Nagi and Dr. Norman Poythress. Dr. Nagi testified that he had found no evidence of psychosis, but did not appear to be aware of McWilliams' history of head trauma. See *id.*, at 1351–1352. Dr. Poythress testified that one of the tests that McWilliams took was "clinically invalid" because the test's "validity scales" indicated that McWilliams had exaggerated or faked his symptoms. *Id.*, at 1361–1363.

Although McWilliams' counsel had subpoenaed further mental health records from Holman State Prison, where McWilliams was being held, the jury did not have the opportunity to consider them, for, though subpoenaed on August 13, the records had not arrived by August 27, the day of the jury hearing.

After the hearing, the jury recommended the death penalty by a vote of 10 to 2, the minimum required by Alabama law. The court scheduled its judicial sentencing hearing for October 9, about six weeks later.

B

Five weeks before that hearing, the trial court ordered the Alabama Department of Corrections to respond to McWilliams' subpoena for mental health records. *Id.*, at 1619. The court also granted McWilliams' motion for neurological and neuropsychological exams. *Id.*, at 1615–1617. That motion (apparently filed at the suggestion of a University of Alabama psychologist who had "volunteer[ed]" to help counsel "in her spare time," P. C. T. 251–252) asked the court to "issue an order requiring the State of Alabama to do complete neurological and neuropsychological testing on the Defendant in order to have the test results available for his sentencing hearing." T. 1615.

Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined McWilliams. On October 7, two days before the judicial sentencing hearing, Dr. Goff filed his report. The report concluded that McWilliams presented "some diagnostic dilemmas." *Id.*, at 1635. On the one hand, he was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." *Ibid.* But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems." *Ibid.* Tests revealed "cortical dysfunction attributable to right cerebral hemisphere dysfunction," shown by "left hand weakness, poor motor coordination of the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." *Id.*, at 1636. These deficiencies were "suggestive of a right hemisphere lesion" and "compatible with the injuries [McWilliams] sa[id] he sustained as a child." *Id.*, at 1635. The report added that McWilliams' "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." *Ibid.*

The day before the sentencing hearing defense counsel also received updated records from Taylor Hardin hospital,

and on the morning of the hearing he received the records (subpoenaed in mid-August) from Holman Prison. The prison records indicated that McWilliams was taking an assortment of psychotropic medications including Desyrel, Librium, and an antipsychotic, Mellaril. See App. 190a–193a.

C

The judicial sentencing hearing began on the morning of October 9. Defense counsel told the trial court that the eleventh-hour arrival of the Goff report and the mental health records left him "unable to present any evidence today." *Id.*, at 194a. He said he needed more time to go over the new information. Furthermore, since he was "not a psychologist or a psychiatrist," he needed "to have someone else review these findings" and offer "a second opinion as to the severity of the organic problems discovered." *Id.*, at 192a–196a.

The trial judge responded, "All right. Well, let's proceed." *Id.*, at 197a. The prosecution then presented its case. Once it had finished, defense counsel moved for a continuance in order "to allow us to go through the material that has been provided to us in the last 2 days." *Id.*, at 204a. The judge offered to give defense counsel until 2 p.m. that afternoon. He also stated that "[a]t that time, The Court will entertain any motion that you may have with some other person to review" the new material. *Id.*, at 205a. Defense counsel protested that "there is no way that I can go through this material," but the judge immediately added, "Well, I will give you the opportunity. . . . If you do not want to try, then you may not." *Id.*, at 206a. The court then adjourned until 2 p.m.

During the recess, defense counsel moved to withdraw. He said that "the abritrary [*sic*] position taken by this Court regarding the Defendant's right to present mitigating circumstances is unconscionable resulting in this proceeding being a mockery." T. 1644. He added that "further partici-

pation would be tantamount to exceptance [*sic*] of the Court's ruling." *Ibid.* The trial court denied the motion to withdraw.

When the proceedings resumed, defense counsel renewed his motion for a continuance, explaining:

> "It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance." App. 207a.

The trial court denied the motion.

The prosecutor then offered his closing statement, in which he argued that there were "no mitigating circumstances." *Id.*, at 209a. Defense counsel replied that he "would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce . . . any mitigating circumstances." *Id.*, at 210a. But, he said, since neither he nor his co-counsel were "doctors," neither was "really capable of going through those records on our own." *Ibid.* The court had thus "foreclosed by structuring this hearing as it has,

the Defendant from presenting any evidence of mitigation in psychological—psychiatric terms." *Id.*, at 211a.

The trial judge then said that he had reviewed the records himself and found evidence that McWilliams was faking and manipulative. *Ibid.* Defense counsel attempted to contest that point, which led to the following exchange:

> "MR. SOGOL: I told Your Honor that my looking at those records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me. Did I not tell Your Honor that?
>
> "THE COURT: As I said, on the record earlier, Mr. Sogol, and I don't want to argue or belabor this, but I would have given you the opportunity to make a motion to present someone to evaluate that.
>
> "MR. SOGOL: Your Honor gave me no time in which to do that. Your Honor told me to be here at 2 o'clock this afternoon. Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?
>
> "THE COURT: I want you to approach with your client, please." *Id.*, at 211a–212a.

The court then sentenced McWilliams to death.

The court later issued a written sentencing order. It found three aggravating circumstances and no mitigating circumstances. It found that McWilliams "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [McWilliams] to be feigning, faking, and manipulative." *Id.*, at 188a. The court wrote that even if McWilliams' mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." *Ibid.*

D

McWilliams appealed, arguing that the trial court had denied him the right to meaningful expert assistance guar-

anteed by *Ake*. The Alabama Court of Criminal Appeals rejected his argument. It wrote that *Ake*'s requirements "are met when the State provides the [defendant] with a competent psychiatrist." *McWilliams* v. *State*, 640 So. 2d 982, 991 (1991). And Alabama, by "allowing Dr. Goff to examine" McWilliams, had satisfied those requirements. *Ibid.* The court added that "[t]here is no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings," *ibid.*; that "the trial court indicated that it would have considered a motion to present an expert to evaluate this report" had one been made, *ibid.*; and that there was "no prejudice by the trial court's denial of [McWilliams'] motion for continuance," *id.*, at 993. The appeals court therefore affirmed McWilliams' conviction and sentence. The Alabama Supreme Court, in turn, affirmed the appeals court (without addressing the *Ake* issue). *Ex parte McWilliams*, 640 So. 2d 1015 (1993). After McWilliams failed to obtain postconviction relief from the state courts, he sought a federal writ of habeas corpus. See 28 U. S. C. § 2254.

E

In federal habeas court McWilliams argued before a Magistrate Judge that he had not received the expert assistance that *Ake* required. The Magistrate Judge recommended against issuing the writ. He wrote that McWilliams had "received the assistance required by *Ake*" because Dr. Goff "completed the testing" that McWilliams requested. App. 88a. Hence, the decision of the Alabama Court of Criminal Appeals was not contrary to, or an unreasonable application of, clearly established federal law. See 28 U. S. C. § 2254(d)(1). The District Court adopted the Magistrate Judge's report and recommendation and denied relief. A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. See *McWilliams* v. *Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698 (2015) (*per curiam*); *id.*, at

711 (Jordan, J., concurring); *id.*, at 712 (Wilson, J., dissenting). McWilliams filed a petition for certiorari. We granted the petition.

III

A

The question before us is whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance to which *Ake* entitled him was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). Before turning to the heart of that question, we resolve three preliminary issues.

First, no one denies that the conditions that trigger application of *Ake* are present. McWilliams is and was an "indigent defendant," 470 U. S., at 70. See *supra*, at 188. His "mental condition" was "relevant to . . . the punishment he might suffer," 470 U. S., at 80. See *supra*, at 189. And, that "mental condition," *i. e.*, his "sanity at the time of the offense," was "seriously in question," 470 U. S., at 70. See *supra*, at 189. Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U. S., at 83.

Second, we reject Alabama's claim that the State was exempted from its obligations because McWilliams already had the assistance of Dr. Rosenszweig, the psychologist at the University of Alabama who "volunteer[ed]" to help defense counsel "in her spare time" and suggested the defense ask for further testing, P. C. T. 251–252. Even if the episodic assistance of an outside volunteer could relieve the State of its constitutional duty to ensure an indigent defendant access to meaningful expert assistance, no lower court has held or suggested that Dr. Rosenszweig was available to help, or might have helped, McWilliams at the judicial sentencing proceeding, the proceeding here at issue. Alabama does not

refer to any specific record facts that indicate that she was available to the defense at this time.

Third, Alabama argues that *Ake*'s requirements are irrelevant because McWilliams "never asked for more expert assistance" than he got, "even though the trial court gave him the opportunity to do so." Brief for Respondents 50–51. The record does not support this contention. When defense counsel requested a continuance at the sentencing hearing, he repeatedly told the court that he needed "to have someone else review" the Goff report and medical records. App. 193a. See, *e. g.*, *id.*, at 196a ("[I]t is just incumbent upon me to have a second opinion as to the severity of the organic problems discovered"); *id.*, at 207a ("[W]e really need an opportunity to have the right type of experts in this field, take a look at all of these records and tell us what is happening with him"); *id.*, at 211a ("I told Your Honor that my looking at these records was not of any value to me; that I needed to have somebody look at those records who understood them, who could interpret them for me"). Counsel also explicitly asked the trial court what else he was supposed to ask for to obtain an expert: "Would Your Honor have wanted me to file a Motion for Extraordinary Expenses to get someone?" *Id.*, at 212a. We have reproduced a lengthier account of the exchanges, *supra*, at 191–193. They make clear that counsel wanted additional expert assistance to review the report and records—that was the point of asking for a continuance. In response, the court told counsel to approach the bench and sentenced McWilliams to death. Thus the record, in our view, indicates that McWilliams did request additional help from mental health experts.

B

We turn to the main question before us: whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance that *Ake* requires was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1).

McWilliams would have us answer "yes" on the ground that *Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. He points to language in *Ake* that seems to foresee that consequence. See, *e. g.*, 470 U. S., at 81 ("By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them" (emphasis added)).

We need not, and do not, decide, however, whether this particular McWilliams claim is correct. As discussed above, *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." *Id.*, at 83. As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 8–35 (describing practice in capital-active jurisdictions); Tr. of Oral Arg. 40 (respondents conceding that "this issue really has been mooted over the last 30-some-odd years because of statutory changes"). It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake's* most basic requirements.

The dissent calls our unwillingness to resolve the broader question whether *Ake* clearly established a right to an expert independent from the prosecution a "most unseemly maneuver." *Post,* at 201 (opinion of ALITO, J.). We do not

agree. We recognize that we granted petitioner's first question presented—which addressed whether *Ake* clearly established a right to an independent expert—and not his second, which raised more case-specific concerns. See Pet. for Cert. i. Yet that does not bind us to issue a sweeping ruling when a narrow one will do. As we explain below, our determination that *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense," 470 U. S., at 83, is sufficient to resolve the case. We therefore need not decide whether *Ake* clearly established more. (Nor do we agree with the dissent that our approach is "acutely unfair to Alabama" by not "giv[ing] the State a fair chance to respond." *Post*, at 211. In fact, the State devoted an entire section of its merits brief to explaining why it thought that "[n]o matter how the Court resolves the [independent expert] question, the court of appeals correctly denied the habeas petition." Brief for Respondents 50. See also *id.*, at 14, 52 (referring to the lower courts' case-specific determinations that McWilliams got all the assistance *Ake* requires).)

The Alabama appeals court held that "the requirements of *Ake v. Oklahoma* . . . are met when the State provides the [defendant] with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine [McWilliams]." *McWilliams*, 640 So. 2d, at 991. This was plainly incorrect. *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense." *Ake*, *supra*, at 83 (emphasis added).

We are willing to assume that Alabama met the *examination* portion of this requirement by providing for Dr. Goff's

examination of McWilliams. See *supra*, at 190. But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings, see P. C. T. 936–943). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

The dissent emphasizes that Dr. Goff was never ordered to do any of these things by the trial court. See *post*, at 212, n. 5. But that is precisely the point. The relevant court order did not ask Dr. Goff or anyone else to provide the defense with help in evaluating, preparing, and presenting its case. It only required "the Department of Corrections" to "complete neurological and neuropsychological testing on the Defendant . . . and send all test materials, results and evaluations to the Clerk of the Court." T. 1612. Nor did the short timeframe allow for more expert assistance. (Indeed, given that timeframe, we do not see how Dr. Goff or any other expert could have satisfied the latter three portions of *Ake*'s requirements even had he been instructed to do so.) Then, when McWilliams asked for the additional assistance to which he was constitutionally entitled at the sentencing hearing, the judge rebuffed his requests. See *supra*, at 191–193.

Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams' conviction and sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1).

IV

The Eleventh Circuit held in the alternative that, even if the Alabama courts clearly erred in their application of federal law, their "error" nonetheless did not have the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, *Davis* v. *Ayala*, 576 U. S. 257, 268 (2015) (internal quotation marks omitted). See 634 Fed. Appx., at 707. In reaching this conclusion, however, the Eleventh Circuit only considered whether "[a] few additional days to review Dr. Goff's findings" would have made a difference. *Ibid.* It did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered. There is reason to think that it could have. For example, the trial judge relied heavily on his belief that McWilliams was malingering. See App. 188a, 211a. If McWilliams had the assistance of an expert to explain that "[m]alingering is not inconsistent with serious mental illness," Brief for American Psychiatric Association et al. as *Amici Curiae* 20, he might have been able to alter the judge's perception of the case.

Since "we are a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), we do not now resolve this question. Rather we leave it to the lower courts to decide in the first instance.

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

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE GORSUCH join, dissenting.

We granted review in this case to decide a straightforward legal question on which the lower courts are divided: whether our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), clearly established that an indigent defendant whose mental health will be a significant factor at trial is entitled to the

assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist both the prosecution and the defense.[1]

The answer to that question is plain: *Ake* did not clearly establish that a defendant is entitled to an expert who is a member of the defense team. Indeed, "*Ake* appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration." W. LaFave, Criminal Law § 8.2(d), p. 449 (5th ed. 2010) (LaFave). Accordingly, the proper disposition of this case is to affirm the judgment below.

The Court avoids that outcome by means of a most unseemly maneuver. The Court declines to decide the question on which we granted review and thus leaves in place conflicting lower court decisions regarding the meaning of a 32-year-old precedent.[2] That is bad enough. But to make matters worse, the Court achieves this unfortunate result by deciding a separate question *on which we expressly declined review.* And the Court decides that fact-bound question without giving Alabama a fair opportunity to brief the issue.

I

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief cannot be awarded

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[1] The question was worded as follows: "When this Court held in *Ake* that an indigent defendant is entitled to meaningful expert assistance for the 'evaluation, preparation, and presentation of the defense,' did it clearly establish that the expert should be independent of the prosecution?"

[2] Defending its approach, the Court says that it had no need to decide the "sweeping" question on which review was granted "when a narrow one will do." *Ante,* at 198. Narrow holdings have their place, but here: (1) We denied review of the narrow question; (2) the question decided is not just narrow, it is the sort of fact-bound question as to which review is disfavored, see this Court's Rule 10; (3) the narrow question is not fairly included in the question presented, see this Court's Rule 14(a); (4) deciding the case on this narrow ground leaves in place the conflict in the lower courts that supported the grant of certiorari; and (5) the parties were not given notice of this possible disposition, and the Court was thus deprived of the benefit of full briefing and argument on the issue.

on a claim that a state court decided on the merits unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). That standard, by design, is "difficult to meet." *White* v. *Woodall*, 572 U. S. 415, 419 (2014) (internal quotation marks omitted). It requires habeas petitioners to "show that the state court's ruling on the claim . . . 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). Put another way, "[w]hen 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." *Woods* v. *Donald*, 575 U. S. 312, 316 (2015) (*per curiam*).

In *Ake*, we held that a defendant must be provided "access to a competent psychiatrist" in two circumstances: first, "when [the] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," and, second, at the sentencing phase of a capital trial, "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U. S., at 83.

The question that we agreed to review concerns the type of expert that must be provided. Did *Ake* clearly establish that a defendant in the two situations just noted must be provided with the services of an expert who functions solely as a dedicated member of the defense team as opposed to a neutral expert who examines the defendant, reports his or her conclusions to the court and the parties, and is available to assist and testify for both sides? Did *Ake* speak with such clarity that it ruled out "any possibility for fairminded disagreement"? *Harrington*, *supra*, at 103. The answer is "no." *Ake* provides no clear guidance one way or the other.

A

It is certainly true that there is language in *Ake* that points toward the position that a defense-team psychiatrist should be provided. Explaining the need for the appointment of a psychiatric expert, *Ake* noted that a psychiatrist can "assist in preparing the cross-examination of a State's psychiatric witnesses" and would "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." 470 U. S., at 82, 80. And when *Ake* discussed expert assistance during capital sentencing, the Court said that it is important for a defendant to "offer a well-informed expert's opposing view" in the form of "responsive psychiatric testimony." *Id.*, at 84. *Ake* also explained that factfinding is improved when evidence is offered by "psychiatrists for each party." *Id.*, at 81. While it is possible for a neutral expert to provide these services, in our adversary system they are customarily performed by an expert working exclusively for one of the parties.

Other language in *Ake*, however, points at least as strongly in the opposite direction. *Ake* was clear that an indigent defendant does not have a constitutional right to "choose a psychiatrist of his personal liking or . . . receive funds to hire his own." *Id.*, at 83. Instead, the Court held only that a defendant is entitled to have "access" to "one competent psychiatrist" chosen by the trial judge. *Id.*, at 83, 79.

These limitations are at odds with the defense-expert model, which McWilliams characterizes as "the norm in our adversarial system." Reply Brief 3. As McWilliams explains, "other litigants of means" screen experts to find one whose tentative views are favorable, and they often hire both consulting and testifying experts. *Id.*, at 2–3. But the *Ake* Court was clear that it was not holding "that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." 470 U. S., at 77. On the contrary, *Ake* expressly stated that a State need only

provide for a single psychiatric expert to be selected by the trial judge. Thus, *Ake* does not give the defense the right to interview potential experts, to seek out an expert who offers a favorable preliminary diagnosis, or to hire more than one expert. And if the court-appointed expert reaches a conclusion unfavorable to the defendant on the issue of sanity or future dangerousness, *Ake* requires the defense team to live with the expert's unfavorable conclusions. As McWilliams concedes, when the only expert available to indigent defendants is one selected by the trial court, these defendants "face a risk that their expert will ultimately be unwilling or unable to offer testimony that will advance their cause." Reply Brief 3.

Ake also acknowledged that one of our prior cases, *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953), "support[ed] the proposition" that due process is satisfied if a defendant merely has access to a psychiatrist "not beholden to the prosecution." 470 U. S., at 85. While *Ake* also declared that *Baldi* did not limit the Court "in considering whether fundamental fairness today requires a different result," 470 U. S., at 85, *Ake* did not explicitly overrule *Baldi*, and ultimately its treatment of that case was "most ambiguous," LaFave § 8.2, at 450, n. 124.

It is also significant that the *Ake* Court had no need to decide whether due process requires the appointment of a defense-team expert as opposed to a neutral expert because Ake was denied the assistance of *any* psychiatrist—*neutral or otherwise*—for purposes of assessing his sanity at the time of the offense or his mental state as it related to capital sentencing. 470 U. S., at 71–73 (state experts who examined Ake and testified he was dangerous evaluated him only in connection with his competency to stand trial). As Ake's counsel explained at argument, the Court could rule in his client's favor without accepting his client's "primary submission" that due process requires the appointment of a defense-team expert. Tr. of Oral Arg. in No. 83–5424, p. 21 (arguing that Ake's rights were violated even under *Baldi*).

In short, *Ake* is ambiguous, perhaps "deliberately" so. LaFave § 8.2(d), at 449; see *ibid.* ("[C]omments supporting a move in either direction appear throughout the majority opinion in the case"). If the Justices who joined Justice Marshall's opinion for the Court had agreed that a defense-team expert must be appointed, it would have been a simple matter for the Court to say so expressly. Justice Marshall demonstrated this a few years later when he dissented from the denial of certiorari in a case that presented the very issue that the Court now dodges. *Granviel* v. *Texas*, 495 U. S. 963 (1990). There, Justice Marshall stated unambiguously that "*Ake* mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system." *Ibid.* If all the Justices who joined the opinion of the Court in *Ake* had shared this view, there is no obvious reason for the absence of the sort of clear statement that Justice Marshall would later provide when he wrote only for himself. The opinion in *Ake* has all the hallmarks of a compromise.

The Court's actions in the aftermath of *Ake* lend support to this conclusion. The Court repeatedly denied certiorari in cases that would have permitted it to resolve this question or others left open by *Ake*. See, *e. g.*, *Norris* v. *Starr*, 513 U. S. 995 (1994); *Vickers* v. *Arizona*, 497 U. S. 1033 (1990); *Brown* v. *Dodd*, 484 U. S. 874 (1987); *Johnson* v. *Oklahoma*, 484 U. S. 878 (1987); *Granviel*, *supra*, at 963. And in many of these cases (*Vickers*, *Dodd*, *Johnson*, and *Granviel*), Justice Marshall dissented. The most reasonable conclusion to draw from the Court's silence is that the exact type of expert required by *Ake* has remained "an open question in our jurisprudence." *Carey* v. *Musladin*, 549 U. S. 70, 76 (2006).

B

When the lower courts have "diverged widely" in assessing whether our precedents dictate a legal rule, that is a sign that the rule is not clearly established, *ibid.*, and that is the situation here. At the time the Alabama court addressed

McWilliams's *Ake* claim on the merits, some courts had held that *Ake* requires the appointment of a defense-team expert. See, *e. g.*, *Smith* v. *McCormick*, 914 F. 2d 1153, 1156–1160 (CA9 1990); *United States* v. *Sloan*, 776 F. 2d 926, 929 (CA10 1985). But others disagreed. The Fifth Circuit had held that a defense-team expert is not required. *Granviel* v. *Lynaugh*, 881 F. 2d 185, 191–192 (1989), cert. denied, 495 U. S. 963 (1990). And the Oklahoma courts *in Ake itself* also interpreted our holding this way. *Ake* v. *State*, 778 P. 2d 460, 465 (Okla. Crim. App. 1989) ("[D]ue process does not entitle [Ake] to a state-funded psychiatric expert to support his claim; rather, due process requires that he have access to a competent and impartial psychiatrist"). So had at least seven other state high courts. *Willie* v. *State*, 585 So. 2d 660, 671 (Miss. 1991); *State* v. *Hix*, 38 Ohio St. 3d 129, 131–132, 527 N. E. 2d 784, 787 (1988); *Dunn* v. *State*, 291 Ark. 131, 132–134, 722 S. W. 2d 595, 595–596 (1987); *State* v. *Indvik*, 382 N. W. 2d 623, 625–626 (N. D. 1986); *Palmer* v. *State*, 486 N. E. 2d 477, 481–482 (Ind. 1985); *State* v. *Smith*, 217 Mont. 453, 457–460, 705 P. 2d 1110, 1113–1114 (1985); *State* v. *Hoopii*, 68 Haw. 246, 248–251, 710 P. 2d 1193, 1195–1196 (1985).

Other courts struggled to reach agreement on the question. Two Eleventh Circuit panels held that a neutral expert suffices, see *Magwood* v. *Smith*, 791 F. 2d 1438, 1443 (1986) (*Ake* satisfied where neutral, court-appointed experts examined the defendant and testified); *Clisby* v. *Jones*, 907 F. 2d 1047, 1050 (1990) (*per curiam*) ("The state provided a duly qualified psychiatrist not beholden to the prosecution and, therefore, met its obligation under *Ake*"), reh'g en banc, 960 F. 2d 925, 928–934 (1992) (rejecting *Ake* claim on other grounds). But another Eleventh Circuit panel disagreed. *Cowley* v. *Stricklin*, 929 F. 2d 640, 644 (1991) (holding that due process requires more than a neutral expert). A Sixth Circuit panel held that *Ake* does not require appointment of a defense-team expert. *Kordenbrock* v. *Scroggy*, 889 F. 2d 69, 75 (1989). And when the Sixth Circuit reviewed that

decision en banc, its holding was fractured, but 7 of the 13 judges expressed the view that *Ake* requires only a neutral, court-appointed expert.[3] 919 F. 2d 1091, 1110, 1117–1120, 1131–1132 (1990).

Ake's ambiguity has been noted time and again by commentators. See, *e. g.*, LaFave § 8.2(d), at 449 (*Ake* appears to be "deliberately ambiguous"); Mosteller, The Sixth Amendment Right to Fairness: The Touchstone of Effectiveness and Pragmatism, 45 Tex. Tech. L. Rev. 1, 16 (2012) (*Ake* held that "the defense had the right of access to an expert, but the Court did not conclude that access had to be a defense expert"); Greeley, The Plight of Indigent Defendants in a Computer-Based Age: Maintaining the Adversarial System by Granting Defendants Access to Computer Experts, 16 Va. J. L. & Tech. 400, 426 (2011) ("[T]he Supreme Court should affirmatively state whether a defendant is entitled to a neutral expert working for the defense and the government, or an expert advocating for the defense"); Groendyke, *Ake* v. *Oklahoma*: Proposals for Making the Right a Reality, 10 N. Y. U. J. Legis. & Pub. Pol'y 367, 383 (2007) ("The intentions of the *Ake* Court regarding the role of the expert are not obvious from the opinion"); Giannelli, *Ake* v. *Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-

[3] The Sixth Circuit's experience, standing alone, is a telling reflection of *Ake*'s ambiguity. Years after *Kordenbrock*, a Sixth Circuit panel held that *Ake* requires a defense expert. *Powell* v. *Collins*, 332 F. 3d 376, 392 (2003). A later panel disagreed. *Smith* v. *Mitchell*, 348 F. 3d 177, 207–208, and n. 10 (2003). A different panel concluded three years later that the Circuit had "extend[ed] *Ake*" to require a defense expert. *Carter* v. *Mitchell*, 443 F. 3d 517, 526 (2006). A later panel insisted that "*Ake* does not entitle [defendants] to . . . an [independent psychiatric] expert," but to "a 'friend of the court' appointment." *Wogenstahl* v. *Mitchell*, 668 F. 3d 307, 340 (2012). The Sixth Circuit ultimately concluded that *Ake* did not itself clearly compel an answer to this question for AEDPA purposes. *Miller* v. *Colson*, 694 F. 3d 691, 698 (2012) ("[O]ur own internal conflict about the scope of *Ake* evidences the reasonableness of the state court decision").

DNA World, 89 Cornell L. Rev. 1305, 1399 (2004) ("It is uncertain from *Ake* whether the appointment of a neutral expert (who reports to the court) is sufficient or whether a 'partisan' defense expert is required"); Bailey, *Ake* v. *Oklahoma* and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined? 10 Wm. & Mary Bill Rts. J. 401, 403 (2002) ("[C]ourts have struggled with whether an indigent is entitled to his own independent advocate or a neutral expert provided by the state," and the Supreme Court "has . . . failed to confront this ambiguity"); Sullivan, Psychiatric Defenses in Arkansas Criminal Trials, 48 Ark. L. Rev. 439, 492 (1995) ("The issue left unresolved in *Ake*" is whether the defendant has "merely the right to an evaluation by a neutral mental health expert"); Giannelli et al., The Constitutional Right to Defense Experts, 16 Pub. Def. Rptr. 3 (Summer 1993) ("*Ake* fails to specify clearly the role of the expert—whether the appointment of a neutral expert, who reports to the court, satisfies due process, or whether a partisan defense expert is required"); Note, The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of *Ake*, 30 Am. Crim. L. Rev. 1329, 1356 (1993) (calling this the "preeminent ambiguity" in the opinion); Harris, *Ake* Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent, 68 N. C. L. Rev. 763, 768, n. 44 (1990) ("The Court gave mixed signals concerning the psychiatrist's role with regard to a criminal defendant, resulting in lower court disagreement on the proper interpretation of *Ake* on this point"); Comment, A Question of Competence: The Indigent Criminal Defendant's Right to Adequate and Competent Psychiatric Assistance After *Ake* v. *Oklahoma*, 14 Vt. L. Rev. 121, 127 (1989) (*Ake* "left unanswered many questions," including "whether the defendant is entitled to 'neutral' or 'partisan' assistance"); Dubia, The Defense Right to Psychiatric Assistance in Light of *Ake* v. *Oklahoma*, 1987 Army Lawyer 15, 19–20 (*Ake* "did not define clearly the role of the state-supplied psychiatrist," and "[a]

strong case can be made that *Ake* requires only access to an independent psychiatric examination"); Note, Due Process and Psychiatric Assistance: *Ake* v. *Oklahoma*, 21 Tulsa L. J. 121, 143 (1985) ("The Court is unclear as to the exact nature and scope of the substantive right it has created"); Sallet, Book Review, After Hinckley: The Insanity Defense Reexamined, 94 Yale L. J. 1545, 1551, n. 18 (1985) (predicting that "whether the Constitution requires one psychiatrist or rather one defense-oriented psychiatrist" would "likely be the next constitutional issue adjudicated").

In this case, the Alabama courts held that *Ake* is satisfied by the appointment of a neutral expert, and it is impossible to say that "there could be no reasonable dispute that they were wrong." *Donald*, 575 U. S., at 316.

II

McWilliams's petition for certiorari asked us to decide two questions. Pet. for Cert. i. The first was the legal question discussed above; the second raised an issue that is tied to the specific facts of McWilliams's case: whether the neutral expert appointed in this case failed to provide the assistance that *Ake* requires because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records." Pet. for Cert. i. Our Rules and practice disfavor questions of this nature, see this Court's Rule 10, and we denied review. Heeding our decision, the parties briefed the first question but scarcely mentioned anything related to the second.

The Court, however, feels no similar obligation to abide by the Rules. The Court refuses to decide the legal question on which we granted review and instead decides the question on which review was denied. The Court holds that "Alabama here did not meet even *Ake*'s most basic requirements." *Ante*, at 197. In support of this conclusion, the Court states that neither Dr. Goff (the expert appointed by the trial judge) nor any other expert provided assistance in

understanding and evaluating medical reports and records, preparing a legal strategy, presenting evidence, or preparing to cross-examine witnesses. *Ante*, at 199. The Court does not question Dr. Goff's qualifications or his objectivity. Instead, the crux of the Court's complaint is that Dr. Goff merely submitted his report and did not provide further assistance to the defense. *Ibid.* But as far as the record shows, Dr. Goff was never asked and never refused to provide assistance to McWilliams. He did not provide the assistance that the Court finds essential because his report was not given to the parties until two days before sentencing, and arrangements were not made for him to provide the assistance during that brief interlude. Thus, the question that the Court decides is precisely the question *on which we denied review*: namely, whether Dr. Goff's assistance was deficient because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records." Pet. for Cert. i.

Our Rules instruct litigants that we will consider only the questions on which review was granted and "subsidiary question fairly included therein." This Court's Rule 14.1(a); *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (The Court will consider an "unpresented question" only in "the most exceptional cases" (internal quotation marks omitted)); see also this Court's Rule 24.1(a) (parties may not change the substance of the question presented once granted). And we have not hesitated to enforce these Rules when petitioners who "persuaded us to grant certiorari" on one question instead "chose to rely on a different argument in their merits briefing." *Visa, Inc.* v. *Osborn*, 580 U. S. 993 (2016) (internal quotation marks omitted) (dismissing cases as improvidently granted on this ground).

These Rules exist for good reasons. Among other things, they give the parties notice of the question to be decided and ensure that we receive adversarial briefing, see *Yee*, *supra*, at 536, which in turn helps the Court reach sound decisions.

But in this case, the Court feels free to disregard our Rules and long-established practice. If McWilliams, after inducing us to grant certiorari on the first question presented, had decided to ignore that question and instead brief a fact-specific alternative theory, we would have dismissed the case as improvidently granted. We do not tolerate this sort of bait-and-switch tactic from litigants, and we should not engage in it ourselves.

The Court's approach is acutely unfair to Alabama. The State surely believed that it did not need to brief the second question presented in McWilliams's petition. The State vigorously opposed review of that question, calling it "an invitation to conduct factbound error correction," Brief in Opposition 13, and we denied review. It will come as a nasty surprise to Alabama that the Court has ruled against it on the very question we declined to review—and without giving the State a fair chance to respond.[4]

It is worth remembering that today's ruling requires the Court to conclude that the state court's treatment of McWilliams's *Ake* claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U. S., at 103. This "standard is difficult to meet," *id.*, at 102, and Alabama would surely have appreciated the opportunity to contest whether McWilliams has met

[4] The Court is incorrect in suggesting that Alabama "devoted an entire section of its merits brief" to the question that the Court decides. *Ante*, at 198. In the section to which the Court refers, Alabama argued that even if McWilliams was entitled to relief under *Ake* to a partisan expert, no relief was warranted because he "had a consulting expert that did not report to the State," *i. e.*, "a psychologist employed at the University of Alabama," and because the trial court ordered every form of testing that the defense requested. Brief for Respondents 50–52. Exactly six sentences of the State's briefing in this section, *id.*, at 52, touch on the services provided by Dr. Goff and the trial court's denial of a continuance. The State's inclusion of this fleeting discussion cannot justify a decision based on a question on which review was denied.

it. Denying Alabama that chance does not show "[a] proper respect for AEDPA's high bar for habeas relief," which counsels restraint in "disturbing the State's significant interest in repose for concluded litigation, denying society the right to punish some admitted offenders, and intruding on state sovereignty to a degree matched by few exercises of federal authority." *Virginia* v. *LeBlanc*, *ante*, at 96 (*per curiam*) (alterations and internal quotation marks omitted).

It is debatable whether the Court has even answered question two correctly (and, of course, meaningful briefing by the parties would have allowed the Court to answer the question with more confidence).[5] But the fundamental point is that the Court should not have addressed this question at all.

III

Having completed an arduous detour around the question that we agreed to decide, the majority encounters an inconvenient roadblock: The Court of Appeals has already determined that any error of the sort the majority identifies today

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[5] The Court never even recites the applicable standard: whether the Alabama courts erred beyond fairminded disagreement in rejecting McWilliams's claim under *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011). This bar is difficult for a habeas petitioner to hurdle, and it is far from clear that McWilliams has done so. The Court says that Dr. Goff did not play the role *Ake* requires of an expert because he only examined McWilliams and reported his findings to the trial court. *Ante*, at 198–199. But *that is exactly what the trial court (at McWilliams's request) ordered him to do.* Rec. 1615, 1616. The Court briskly concludes that Dr. Goff did not assist the defense in understanding his report prior to the hearing or testify for McWilliams at the judicial sentencing hearing. *Ante*, at 199. But the Alabama Court of Criminal Appeals found "no indication in the record that [McWilliams] could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." *McWilliams* v. *State*, 640 So. 2d 982, 991 (1991). And the Eleventh Circuit saw no reason why McWilliams's defense team could not have been in contact with Dr. Goff while he was preparing the report. *McWilliams* v. *Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698, 706–707 (2015) (*per curiam*).

was harmless. So the majority relies on the thinnest of reasons to require the Eleventh Circuit to redo its analysis. That conclusion is unwarranted, and nothing in the majority opinion prevents the Court of Appeals from reaching the same result on remand.

The majority claims that the Court of Appeals did not "specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered." *Ante*, at 200. But the Court of Appeals concluded that, even if Dr. Goff's performance did not satisfy *Ake*, the error did not have a substantial and injurious effect on the outcome of the sentencing proceeding. *McWilliams* v. *Commissioner, Ala. Dept. of Corrections*, 634 Fed. Appx. 698, 706–707 (CA11 2015) (*per curiam*). Thus, the Court of Appeals specifically addressed the very question that the majority instructs it to consider on remand.

If the majority disagrees with the Court of Appeals' decision on that question, it should explain its reasons, but the majority is unwilling to tackle that matter and instead recites that "we are a court of review, not of first view." *Ante*, at 200 (internal quotation marks omitted). The Court's invocation of this oft-used formulation is utterly inapt because the Eleventh Circuit has already reviewed the question of harmless error. Moreover, unlike the question that the majority does decide, the harmless-error issue was at least briefed in a meaningful way by the parties. Brief for Petitioner 41–46; Brief for Respondents 52–56; Reply Brief 14–16.

Had the Court confronted the harmless-error issue, it would have found it difficult to reject the Court of Appeals' conclusion that any *Ake* error here was harmless. In 1984, McWilliams "raped, robbed, and murdered Patricia Vallery Reynolds." *McWilliams* v. *State*, 640 So. 2d 982, 986 (Ala. Crim. App. 1991) (internal quotation marks omitted). Reynolds was a clerk at a convenience store in Tuscaloosa,

Alabama. *Ibid.* McWilliams robbed the store, brutally raped Reynolds in a back room, then left her on the floor to die after shooting her six times execution style with a .38-caliber pistol. *Ibid.* After McWilliams was apprehended, he bragged to other jail inmates about what he had done. *Id.*, at 987. The jury needed less than an hour of deliberation to find him guilty, and it recommended the death penalty by a 10-to-2 vote the following day. *Id.*, at 986.

Agreeing with the jury's nonbinding recommendation, the trial court imposed the death penalty based on three aggravating circumstances. McWilliams had prior violent felony convictions for first-degree robbery and first-degree rape. App. 182a–183a. He murdered Reynolds in the course of committing a robbery and rape. *Id.*, at 183a. And his crime "was especially heinous, atrocious, or cruel": He executed the only potential eyewitness to his robbery, and his conduct during and after the crime showed an "obvious lack of regard or compassion for the life and human dignity of the victim." *Id.*, at 184a. Balanced against these three aggravators was McWilliams's claim that he was psychotic and suffered from organic brain dysfunction—the mitigating evidence that Dr. Goff's report supposedly would have supported. But the sentencing court concluded that this evidence "d[id] not rise to the level of a mitigating circumstance," in part because of the extensive evidence that McWilliams was feigning symptoms. *Id.*, at 188a. And in any event, the sentencing court found that "*the aggravating circumstances would far outweigh this as a mitigating circumstance.*" *Ibid.* (emphasis added).

The majority hints that the sentencing court's weighing might have been different if McWilliams had been afforded more time to work with Dr. Goff to prepare a mitigation presentation and to introduce Dr. Goff's testimony at the sentencing hearing. But there is little basis for this belief. The defense would have faced potential rebuttal testimony from three doctors who evaluated McWilliams and firmly

concluded that McWilliams's mental state did not reduce his responsibility for his actions. Rec. 1545 (Dr. Yumul) (McWilliams "'was responsible and free of mental illness at the time of the alleged offense'"); *id.*, at 1546 (Dr. Nagi) (McWilliams "'was not suffering from a mental illness'" at the time of the crime and "'[t]here see[m] to be no mitigating circumstances involved in [his] case'"); *ibid.* (Dr. Bryant) (finding no "evidence of psychiatric symptoms of other illness that would provide a basis for mitigating factors at the time of the alleged crime"). One of these psychiatrists also concluded that McWilliams was "'grossly exaggerating his psychological symptoms to mimic mental illness'" and that he "'obviously'" did so "'to evade criminal prosecution.'" *Ibid.* (Dr. Nagi). Even Dr. Goff found it "quite obvious" that McWilliams's "symptoms of psychiatric disturbance [were] quite exaggerated and, perhaps, feigned." *Id.*, at 1635. In light of all this, the defense would have faced an uphill battle in convincing the sentencing judge that, despite McWilliams's consistent malingering, his mental health was so impaired that it constituted a mitigating circumstance and that it outweighed the three aggravators the State proved. If the sentencing judge had thought that there was a possibility that hearing from Dr. Goff would change his evaluation of aggravating and mitigating factors, he could have granted a continuance and called for Dr. Goff to appear. But he did not do so.

The majority also ignores the fact that McWilliams has already had the chance to show that the outcome of the sentencing proceeding would have been different if he had been given more expert assistance. In state postconviction proceedings, McWilliams argued that he was denied effective assistance of counsel because his lawyers did not obtain an expert who would have fully probed his mental state for purposes of mitigation. McWilliams called an expert, Dr. Woods, who offered the opinion that McWilliams suffered from bipolar disorder at the time of the crime and testified that McWilliams's exaggeration of symptoms was not incon-

sistent with psychiatric problems. But Dr. Woods also acknowledged that McWilliams "tr[ied] to malinger for purposes of making himself look worse than he is," agreed that this malingering could have been done for the purpose of avoiding the death penalty, and declined to say that McWilliams's disorder explains why he raped and murdered Reynolds. Rec. 1002–1005, 1022–1023. Dr. Woods even endorsed Dr. Goff's conclusion that McWilliams "exaggerated certain aspects of his impairment." *Id.*, at 955 ("I think Dr. Goff did an excellent job of attempting to separate out what were in fact exaggerations and what was real impairment"). The State introduced a psychologist of its own (Dr. Kirkland) who strenuously disagreed with Dr. Woods's diagnosis and concluded that nothing "indicate[s] that Mr. McWilliams was mentally impaired on the night of the offense." *Id.*, at 1088. At the end of a lengthy hearing in which both experts addressed the malingering issue (see, *e. g.*, *id.*, at 935–943, 955, 964–966, 1076–1077), the state postconviction court found that "McWilliams's claims based upon the testimony of Dr. Woods are without merit." *Id.*, at 1810. It credited the "consensus opinion" reached by the three neutral state psychiatrists, who observed and evaluated McWilliams for over a month before his trial and concluded that he "did not suffer from a mental illness." *Id.*, at 1812. It expressly found that "both the credibility of Dr. Woods and the reliability of his findings are questionable." *Id.*, at 1814. And even if Dr. Woods's diagnosis was accurate, the court stated, it "[would] not find that a failure to present" evidence of this sort "made a difference in the outcome." *Id.*, 1815.[6] The

[6] Dr. Goff was notably absent from the postconviction proceeding. McWilliams's failure to call him as a witness there creates a "void in the record" that prevents McWilliams from carrying his burden of showing "how additional time with Dr. Goff (and his report) would have benefited the defense." 634 Fed. Appx., at 712 (Jordan, J., concurring). It also suggests that, to McWilliams's postconviction counsel, Dr. Goff's diagnosis and the opportunity to present it to the sentencer was not as important as McWilliams suggests.

Alabama Court of Criminal Appeals affirmed, *McWilliams* v. *State*, 897 So. 2d 437 (2004), and the Alabama Supreme Court denied review. I see no ground for disturbing the Eleventh Circuit's decision on harmless error.[7]

* * *

The Court's decision represents an inexcusable departure from sound practice. I would affirm the judgment below, and I therefore respectfully dissent.

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[7] McWilliams's entitlement to relief under *Ake* is questionable for an additional reason. *Ake* held that the right to a psychiatric expert at capital sentencing comes into play "when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U. S., at 83–84, 86. Here, the State did not introduce such evidence because future dangerousness was not an aggravator under Alabama law. See App. 182a–184a. As lower courts have noted, we have never held that a capital defendant is entitled to the assistance of a psychiatric expert at sentencing where future dangerousness is not in issue and the State does not introduce psychiatric evidence to prove it. See, *e. g.*, *Revilla* v. *Gibson*, 283 F. 3d 1203, 1220–1221 (CA10 2002) ("*Ake* held only that an indigent capital defendant must, upon request, be provided an expert for the penalty phase when the State presents psychiatric evidence of the defendant's future dangerousness" (internal quotation marks omitted)); *Ramdass* v. *Angelone*, 187 F. 3d 396, 409 (CA4 1999) ("*Ake* provides a right to assistance of a mental health expert only if . . . , in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony"); *Goodwin* v. *Johnson*, 132 F. 3d 162, 189 (CA5 1997), as amended Jan. 15, 1998 ("*Ake* only creates an entitlement to the assistance of a psychiatrist during sentencing when the state offers psychiatric evidence of the defendant's future dangerousness" (emphasis deleted)).

Syllabus

MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE *v.* TAM

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

No. 15–1293. Argued January 18, 2017—Decided June 19, 2017

Simon Tam, lead singer of the rock group "The Slants," chose this moniker in order to "reclaim" the term and drain its denigrating force as a derogatory term for Asian persons. Tam sought federal registration of the mark "THE SLANTS." The Patent and Trademark Office (PTO) denied the application under a Lanham Act provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U. S. C. § 1052(a). Tam contested the denial of registration through the administrative appeals process, to no avail. He then took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause.

Held: The judgment is affirmed.

808 F. 3d 1321, affirmed.

JUSTICE ALITO delivered the opinion of the Court with respect to Parts I, II, and III–A, concluding:

1. The disparagement clause applies to marks that disparage the members of a racial or ethnic group. Tam's view, that the clause applies only to natural or juristic persons, is refuted by the plain terms of the clause, which uses the word "persons." A mark that disparages a "substantial" percentage of the members of a racial or ethnic group necessarily disparages many "persons," namely, members of that group. Tam's narrow reading also clashes with the breadth of the disparagement clause, which by its terms applies not just to "persons," but also to "institutions" and "beliefs." § 1052(a). Had Congress wanted to confine the reach of the clause, it could have used the phrase "particular living individual," which it used in neighboring § 1052(c). Tam contends that his interpretation is supported by legislative history and by the PTO's practice for many years of registering marks that plainly denigrated certain groups. But an inquiry into the meaning of the statute's text ceases when, as here, "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (internal quotation marks omitted). Even if resort to legislative history and early enforcement practice were appropriate, Tam has presented nothing showing a congressional intent to

adopt his interpretation, and the PTO's practice in the years following the disparagement clause's enactment is unenlightening. Pp. 230–233.

2. The disparagement clause violates the First Amendment's Free Speech Clause. Contrary to the Government's contention, trademarks are private, not government, speech. Because the "Free Speech Clause . . . does not regulate government speech," *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467, the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.

The Federal Government does not dream up the trademarks registered by the PTO. Except as required by § 1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. If the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. And once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. It is thus far-fetched to suggest that the content of a registered mark is government speech, especially given the fact that if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently. And none of this Court's government-speech cases supports the idea that registered trademarks are government speech. *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550; *Pleasant Grove City* v. *Summum*, *supra*; and *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, distinguished. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way. Pp. 233–239.

Justice Alito, joined by The Chief Justice, Justice Thomas, and Justice Breyer, concluded in Parts III–B, III–C, and IV:

(a) The Government's argument that this case is governed by the Court's subsidized-speech cases is unpersuasive. Those cases all involved cash subsidies or their equivalent, *e. g.*, funds to private parties for family planning services in *Rust* v. *Sullivan*, 500 U. S. 173, and cash grants to artists in *National Endowment for Arts* v. *Finley*, 524 U. S. 569. The federal registration of a trademark is nothing like these programs. The PTO does not pay money to parties seeking registration of a mark; it requires the payment of fees to file an application and to maintain the registration once it is granted. The Government responds that registration provides valuable non-monetary benefits traceable to

the Government's resources devoted to registering the marks, but nearly every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e. g.*, the adjudication of private lawsuits and the use of public parks and highways. Pp. 239–241.

(b) Also unpersuasive is the Government's claim that the disparagement clause is constitutional under a "government-program" doctrine, an argument which is based on a merger of this Court's government-speech cases and subsidy cases. It points to two cases involving a public employer's collection of union dues from its employees, *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, and *Ysursa* v. *Pocatello Ed. Assn.*, 555 U. S. 353, but these cases occupy a special area of First Amendment case law that is far removed from the registration of trademarks. Cases in which government creates a limited public forum for private speech, thus allowing for some content- and speaker-based restrictions, see, *e. g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831, are potentially more analogous. But even in those cases, viewpoint discrimination is forbidden. The disparagement clause denies registration to any mark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592. Pp. 241–244.

(c) The dispute between the parties over whether trademarks are commercial speech subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve "a substantial interest" and be "narrowly drawn." *Id.*, at 564–565 (internal quotation marks omitted). One purported interest is in preventing speech expressing ideas that offend, but that idea strikes at the heart of the First Amendment. The second interest asserted is protecting the orderly flow of commerce from disruption caused by trademarks that support invidious discrimination; but the clause, which reaches any trademark that disparages *any person, group, or institution*, is not narrowly drawn. Pp. 244–247.

JUSTICE KENNEDY, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, agreed that 15 U. S. C. § 1052(a) constitutes viewpoint discrimination, concluding:

(a) With few narrow exceptions, a fundamental principle of the First Amendment is that the government may not punish or suppress speech

based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829. The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. Here, the disparagement clause identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols," § 1052(a); and within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination. The Government's arguments in defense of the statute are unpersuasive. Pp. 248–251.

(b) Regardless of whether trademarks are commercial speech, the viewpoint based discrimination here necessarily invokes heightened scrutiny. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 566. To the extent trademarks qualify as commercial speech, they are an example of why that category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. To permit viewpoint discrimination in this context is to permit Government censorship. Pp. 251–253.

ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS, J., joined except for Part II, and an opinion with respect to Parts III–B, III–C, and IV, in which ROBERTS, C. J., and THOMAS and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 247. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 254. GORSUCH, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Stewart argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Mizer*, *Nicole A. Saharsky*, *Douglas N. Letter*, *Mark R. Freeman*, *Daniel Tenny*, *Joshua M. Salzman*, *Sarah Harris*, *Nathan K. Kelley*, *Thomas W. Krause*, *Christina J. Hieber*, *Thomas L. Casagrande*, *Molly R. Silfen*, and *Mary Beth Walker*.

Counsel

John C. Connell argued the cause for respondent. With him on the brief were *Ronald D. Coleman*, *Joel G. MacMull*, *Stuart Banner*, and *Eugene Volokh.**

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*Briefs of *amici curiae* urging reversal were filed for the Fred T. Korematsu Center for Law and Equity et al. by *William C. Rava*, *Elvira Castillo*, and *David A. Perez*; for Law Professors by *Christine Haight Farley* and *Rebecca Tushet*, both *pro se*; for Native American Organizations by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, *Richard A. Guest*, and *Larry S. Gondelman*; and for Amanda Blackhorse et al. by *Jesse A. Witten*.

Briefs of *amici curiae* urging affirmance were filed for the Alliance Defending Freedom by *Kristen Waggoner*, *Kevin H. Theriot*, *David A. Cortman*, and *Rory T. Gray*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the American Civil Liberties Union et al. by *Lee Rowland*, *Esha Bhandari*, *Arthur B. Spitzer*, *Scott Michelman*, and *David Cole*; for the American Jewish Committee by *Kannon K. Shanmugam* and *Allison Jones Rushing*; for the Becket Fund for Religious Liberty by *Mark L. Rienzi* and *Adele Auxier Keim*; for the Cato Institute et al. by *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Eugene Scalia*, *Amir C. Tayrani*, *Michael R. Huston*, *Lily Fu Claffee*, *Kate Comerford Todd*, and *Warren Postman*; for Constitutional Law Professors by *Floyd Abrams* and *Rodney A. Smolla*, both *pro se*; for the First Amendment Lawyers Association by *Marc J. Randazza*; for the International Trademark Association by *Anthony J. Dreyer*, *Andrew L. Green*, *Lawrence K. Nodine*, and *Robert D. Carroll*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the Pacific Legal Foundation by *Joshua P. Thompson*; for Pro-Football, Inc., by *Lisa S. Blatt*, *Robert A. Garrett*, *Robert L. Raskopf*, *Todd Anten*, and *Jessica A. Rose*; for The Rutherford Institute et al. by *Megan L. Brown*, *Joshua S. Turner*, *Christopher J. Kelly*, *Dwayne D. Sam*, and *John W. Whitehead*; for San Franciso Dykes on Bikes Women's Motorcycle Contingent, Inc., by *Mark A. Lemley*, *Michael A. Feldman*, *Brooke Oliver*, and *Tobias Barrington Wolff*; for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler*, *Clayton N. Hansen*, *David Greene*, and *Daniel Nazer*; for Erik Brunetti by *John R. Sommer*; for Gregory Dolin et al. by *Matthew J. Dowd*; for Hugh C. Hansen by *Mr. Hansen*, *pro se*; and for Edward Lee et al. by *Mr. Lee*, *pro se*.

Briefs of *amici curiae* were filed for the American Bar Association by *Linda A. Klein* and *Thomas H. Davis, Jr.*; for the American Intellectual Property Law Association by *Paul M. Smith* and *Mark L. Whitaker*; for

JUSTICE ALITO announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–A, and an opinion with respect to Parts III–B, III–C, and IV, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE BREYER join.

This case concerns a dance-rock band's application for federal trademark registration of the band's name, "The Slants." "Slants" is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to "reclaim" the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." 15 U. S. C. § 1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

I

A

"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." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*,

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Asian Americans Advancing Justice | AAJC et al. by *Daniel J. Kornstein* and *Cecelia Chang*; for Certain Members of Congress by *John Dragseth* and *John T. Johnson*; for the New York Intellectual Property Law Association by *Dyan Finguerra-DuCharme*, *Walter E. Hanley, Jr.*, *Charles R. Macedo*, *David P. Goldberg*, *Pina M. Campagna*, *Kathleen E. McCarthy*, *Robert J. Rando*, *Stephen J. Smirti, Jr.*, *William Thomashower*, and *Robert M. Isackson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, and *Julie A. Murray*; and for Public Knowledge by *Phillip R. Malone* and *Charles Duan*.

575 U. S. 138, 142 (2015); see also *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000). A trademark "designate[s] the goods as the product of a particular trader" and "protect[s] his good will against the sale of another's product as his." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 97 (1918); see also *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 412–413 (1916). It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid. See *Wal-Mart Stores*, *supra*, at 212–213; *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985).

"[F]ederal law does not create trademarks." *B&B Hardware*, *supra*, at 142. Trademarks and their precursors have ancient origins, and trademarks were protected at common law and in equity at the time of the founding of our country. 3 J. McCarthy, Trademarks and Unfair Competition § 19:8 (4th ed. 2017) (hereinafter McCarthy); 1 *id.*, §§ 5:1, 5:2, 5:3; Pattishall, The Constitutional Foundations of American Trademark Law, 78 Trademark Rep. 456, 457–458 (1988); Pattishall, Two Hundred Years of American Trademark Law, 68 Trademark Rep. 121, 121–123 (1978); see *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). For most of the 19th century, trademark protection was the province of the States. See *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 780–782 (1992) (Stevens, J., concurring in judgment); *id.*, at 785 (THOMAS, J., concurring in judgment). Eventually, Congress stepped in to provide a degree of national uniformity, passing the first federal legislation protecting trademarks in 1870. See Act of July 8, 1870, §§ 77–84, 16 Stat. 210–212. The foundation of current federal trademark law is the Lanham Act, enacted in 1946. See Act of July 5, 1946, ch. 540, 60 Stat. 427. By that time, trademark had expanded far beyond phrases that do no more than identify a good or service. Then, as now, trademarks often consisted of catchy phrases that convey a message.

Under the Lanham Act, trademarks that are "used in commerce" may be placed on the "principal register," that is,

they may be federally registered. 15 U. S. C. § 1051(a)(1). And some marks "capable of distinguishing [an] applicant's goods or services and not registrable on the principal register . . . which are in lawful use in commerce by the owner thereof" may instead be placed on a different federal register: the supplemental register. § 1091(a). There are now more than 2 million marks that have active federal certificates of registration. PTO Performance and Accountability Report, Fiscal Year 2016, p. 192 (Table 15), https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf (all Internet materials as last visited June 16, 2017). This system of federal registration helps to ensure that trademarks are fully protected and supports the free flow of commerce. "[N]ational protection of trademarks is desirable," we have explained, "because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 531 (1987) (internal quotation marks omitted); see also *Park 'N Fly, Inc.*, *supra*, at 198 ("The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers").

B

Without federal registration, a valid trademark may still be used in commerce. See 3 McCarthy § 19:8. And an unregistered trademark can be enforced against would-be infringers in several ways. Most important, even if a trademark is not federally registered, it may still be enforceable under § 43(a) of the Lanham Act, which creates a federal cause of action for trademark infringement. See *Two Pesos*, *supra*, at 768 ("Section 43(a) prohibits a broader range of practices than does § 32, which applies to registered marks, but it is common ground that § 43(a) protects qualifying unregistered trademarks" (internal quotation marks and cita-

tion omitted)).[1] Unregistered trademarks may also be entitled to protection under other federal statutes, such as the Anticybersquatting Consumer Protection Act, 15 U. S. C. § 1125(d). See 5 McCarthy § 25A:49, at 25A–198 ("[T]here is no requirement [in the Anticybersquatting Act] that the protected 'mark' be registered: unregistered common law marks are protected by the Act"). And an unregistered trademark can be enforced under state common law, or if it has been registered in a State, under that State's registration system. See 3 *id.*, § 19:3, at 19–23 (explaining that "[t]he federal system of registration and protection does not preempt parallel state law protection, either by state common law or state registration," and "[i]n the vast majority of situations, federal and state trademark law peacefully coexist"); *id.*, § 22:1 (discussing state trademark registration systems).

Federal registration, however, "confers important legal rights and benefits on trademark owners who register their marks." *B&B Hardware*, 575 U. S., at 142 (internal quotation marks omitted). Registration on the principal register (1) "serves as 'constructive notice of the registrant's claim of ownership' of the mark," *ibid.* (quoting 15 U. S. C. § 1072); (2) "is 'prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's own-

[1] In the opinion below, the Federal Circuit opined that although "[s]ection 43(a) allows for a federal suit to protect an unregistered trademark," "it is not at all clear" that respondent could bring suit under § 43(a) because "there is no authority extending § 43(a) to marks denied under § 2(a)'s disparagement provision." *In re Tam*, 808 F. 3d 1321, 1344–1345, n. 11 (en banc), as corrected (Feb. 11, 2016). When drawing this conclusion, the Federal Circuit relied in part on our statement in *Two Pesos* that "the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a)." 505 U. S., at 768. We need not decide today whether respondent could bring suit under § 43(a) if his application for federal registration had been lawfully denied under the disparagement clause.

ership 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,'" *B&B Hardware*, 575 U. S., at 142–143 (quoting § 1057(b)); and (3) can make a mark "'incontestable'" "once a mark has been registered for five years," *id.*, at 143 (quoting §§ 1065, 1115(b)); see *Park 'N Fly*, 469 U. S., at 193. Registration also enables the trademark holder "to stop the importation into the United States of articles bearing an infringing mark." 3 McCarthy § 19:9, at 19–38; see 15 U. S. C. § 1124.

C

The Lanham Act contains provisions that bar certain trademarks from the principal register. For example, a trademark cannot be registered if it is "merely descriptive or deceptively misdescriptive" of goods, § 1052(e)(1), or if it is so similar to an already registered trademark or trade name that it is "likely . . . to cause confusion, or to cause mistake, or to deceive," § 1052(d).

At issue in this case is one such provision, which we will call "the disparagement clause." This provision prohibits the registration of a trademark "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." § 1052(a).[2] This clause appeared in the original Lanham Act and has remained the same to this day. See § 2(a), 60 Stat. 428.

When deciding whether a trademark is disparaging, an examiner at the PTO generally applies a "two-part test." The examiner first considers "the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services." Trademark Manual of

[2] The disparagement clause also prevents a trademark from being registered on the supplemental register. § 1091(a).

Examining Procedure § 1203.03(b)(i) (Apr. 2017), p. 1200–150, http://tmep.uspto.gov. "If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols," the examiner moves to the second step, asking "whether that meaning may be disparaging to a substantial composite[3] of the referenced group." *Ibid.* If the examiner finds that a "substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes," a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging. *Ibid.* What is more, the PTO has specified that "[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable." *Ibid.*

D

Simon Tam is the lead singer of "The Slants." *In re Tam*, 808 F. 3d 1321, 1331 (CA Fed. 2015) (en banc), as corrected (Feb. 11, 2016). He chose this moniker in order to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes" and has given its albums names such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts." *Ibid.*

Tam sought federal registration of "THE SLANTS" on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO's two-part framework and finding that "there is . . . a substantial composite of persons who find the term in the applied-for mark offensive." *Id.*, at 30. The examining attorney relied in part on the fact that "numerous dictionaries define 'slants'

[3] By "composite," we assume the PTO means component.

or 'slant-eyes' as a derogatory or offensive term." *Id.*, at 29. The examining attorney also relied on a finding that "the band's name has been found offensive numerous times"—citing a performance that was canceled because of the band's moniker and the fact that "several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive." *Id.*, at 29–30.

Tam contested the denial of registration before the examining attorney and before the PTO's Trademark Trial and Appeal Board (TTAB) but to no avail. Eventually, he took the case to federal court, where the en banc Federal Circuit ultimately found the disparagement clause facially unconstitutional under the First Amendment's Free Speech Clause. The majority found that the clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny. See 808 F. 3d, at 1334–1339. The majority also rejected the Government's argument that registered trademarks constitute government speech, as well as the Government's contention that federal registration is a form of government subsidy. See *id.*, at 1339–1355. And the majority opined that even if the disparagement clause were analyzed under this Court's commercial-speech cases, the clause would fail the "intermediate scrutiny" that those cases prescribe. See *id.*, at 1355–1357.

Several judges wrote separately, advancing an assortment of theories. Concurring, Judge O'Malley agreed with the majority's reasoning but added that the disparagement clause is unconstitutionally vague. See *id.*, at 1358–1363. Judge Dyk concurred in part and dissented in part. He argued that trademark registration is a government subsidy and that the disparagement clause is facially constitutional, but he found the clause unconstitutional as applied to THE SLANTS because that mark constitutes "core expression" and was not adopted for the purpose of disparaging Asian-

Americans. See *id.*, at 1363–1374. In dissent, Judge Lourie agreed with Judge Dyk that the clause is facially constitutional but concluded for a variety of reasons that it is also constitutional as applied in this case. See *id.*, at 1374–1376. Judge Reyna also dissented, maintaining that trademarks are commercial speech and that the disparagement clause survives intermediate scrutiny because it "directly advances the government's substantial interest in the orderly flow of commerce." See *id.*, at 1376–1382.

The Government filed a petition for certiorari, which we granted in order to decide whether the disparagement clause "is facially invalid under the Free Speech Clause of the First Amendment." Pet. for Cert. i; see *sub nom. Lee* v. *Tam*, 579 U. S. 969 (2016).

II

Before reaching the question whether the disparagement clause violates the First Amendment, we consider Tam's argument that the clause does not reach marks that disparage racial or ethnic groups. The clause prohibits the registration of marks that disparage "persons," and Tam claims that the term "persons" "includes only natural and juristic persons," not "non-juristic entities such as racial and ethnic groups." Brief for Respondent 46.

Tam never raised this argument before the PTO or the Federal Circuit, and we declined to grant certiorari on this question when Tam asked us to do so, see Brief in Response to Pet. for Cert., pp. i, 17–21. Normally, that would be the end of the matter in this Court. See, *e. g.*, *Yee* v. *Escondido*, 503 U. S. 519, 534–538 (1992); *Freytag* v. *Commissioner*, 501 U. S. 868, 894–895 (1991) (Scalia, J., concurring in part and concurring in judgment).

But as the Government pointed out in connection with its petition for certiorari, accepting Tam's statutory interpretation would resolve this case and leave the First Amendment question for another day. See Reply to Brief in Response 9. "[W]e have often stressed" that it is "importan[t to] avoi[d]

the premature adjudication of constitutional questions," *Clinton* v. *Jones*, 520 U. S. 681, 690 (1997), and that "we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable," *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). See also *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945); *Burton* v. *United States*, 196 U. S. 283, 295 (1905). We thus begin by explaining why Tam's argument about the definition of "persons" in the Lanham Act is meritless.

As noted, the disparagement clause prohibits the registration of trademarks "which may disparage . . . persons, living or dead." 15 U. S. C. § 1052(a). Tam points to a definition of "person" in the Lanham Act, which provides that "[i]n the construction of this chapter, unless the contrary is plainly apparent from the context . . . [t]he term 'person' and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person." § 1127. Because racial and ethnic groups are neither natural nor "juristic" persons, Tam asserts, these groups fall outside this definition. Brief for Respondent 46–48.

Tam's argument is refuted by the plain terms of the disparagement clause. The clause applies to marks that disparage "persons." A mark that disparages a "substantial" percentage of the members of a racial or ethnic group, Trademark Manual § 1203.03(b)(i), at 1200–150, necessarily disparages many "persons," namely, members of that group. Tam's argument would fail even if the clause used the singular term "person," but Congress' use of the plural "persons" makes the point doubly clear.[4]

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[4] Tam advances a convoluted textual argument that goes as follows. The definition of a "person" in 15 U. S. C. § 1127 does not include a "nonjuristic person," *i. e.*, a group that cannot sue or be sued in its own right. Brief for Respondent 46–47. Such groups consist of multiple natural per-

Tam's narrow reading of the term "persons" also clashes with the breadth of the disparagement clause. By its terms, the clause applies to marks that disparage not just "persons" but also "institutions" and "beliefs." 15 U. S. C. § 1052(a). It thus applies to the members of any group whose members share particular "beliefs," such as political, ideological, and religious groups. It applies to marks that denigrate "institutions," and on Tam's reading, it also reaches "juristic" persons such as corporations, unions, and other unincorporated associations. See § 1127. Thus, the clause is not limited to marks that disparage a particular natural person. If Congress had wanted to confine the reach of the disparagement clause in the way that Tam suggests, it would have been easy to do so. A neighboring provision of the Lanham Act denies registration to any trademark that "[c]onsists of or comprises a name, portrait, or signature identifying a *particular living individual* except by his written consent." § 1052(c) (emphasis added).

Tam contends that his interpretation of the disparagement clause is supported by its legislative history and by the PTO's willingness for many years to register marks that plainly denigrated African-Americans and Native Americans. These arguments are unpersuasive. As always, our inquiry into the meaning of the statute's text ceases when "the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). Here, it is clear that the prohibition against registering trademarks "which may disparage . . . persons,"

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sons. Therefore, the members of such groups are not "persons" under the disparagement clause. *Id.*, at 46–48.

This argument leads to the absurd result that no person is a "person" within the meaning of the disparagement clause. This is so because every person is a member of a "non-juristic" group, *e. g.*, right-handers, left-handers, women, men, people born on odd-numbered days, people born on even-numbered days.

§ 1052(a), prohibits registration of terms that disparage persons who share a common race or ethnicity.

Even if resort to legislative history and early enforcement practice were appropriate, we would find Tam's arguments unconvincing. Tam has not brought to our attention any evidence in the legislative history showing that Congress meant to adopt his interpretation. And the practice of the PTO in the years following the enactment of the disparagement clause is unenlightening. The admitted vagueness of the disparagement test[5] and the huge volume of applications have produced a haphazard record of enforcement. (Even today, the principal register is replete with marks that many would regard as disparaging to racial and ethnic groups.[6]) Registration of the offensive marks that Tam cites is likely attributable not to the acceptance of his interpretation of the clause but to other factors—most likely the regrettable attitudes and sensibilities of the time in question.

III

Because the disparagement clause applies to marks that disparage the members of a racial or ethnic group, we must decide whether the clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider three arguments that would either eliminate any First Amendment protection or result in highly permissive rational-basis review. Specifically, the Government contends

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[5] The PTO has acknowledged that the guidelines "for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one." *In re In Over Our Heads, Inc.*, 16 USPQ 2d 1653, 1654 (TTAB 1990) (brackets and internal quotation marks omitted). The PTO has similarly observed that whether a mark is disparaging "is highly subjective and, thus, general rules are difficult to postulate." *Harjo* v. *Pro-Football Inc.*, 50 USPQ 2d 1705, 1737 (TTAB 1999), rev'd, 284 F. Supp. 2d 96 (DC 2003), rev'd and remanded in part, 415 F. 3d 44 (CADC 2005) (*per curiam*).

[6] See, *e. g.*, App. to Brief for Pro-Football, Inc., as *Amicus Curiae.*

(1) that trademarks are government speech, not private speech, (2) that trademarks are a form of government subsidy, and (3) that the constitutionality of the disparagement clause should be tested under a new "government-program" doctrine. We address each of these arguments below.

A

The First Amendment prohibits Congress and other government entities and actors from "abridging the freedom of speech"; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that "[t]he Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467 (2009); see *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 235 (2000).

As we have said, "it is not easy to imagine how government could function" if it were subject to the restrictions that the First Amendment imposes on private speech. *Summum*, *supra*, at 468; see *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, 207–208 (2015). "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,'" *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993), but imposing a requirement of viewpoint-neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint-neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions

of posters to promote the war effort.[7] There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources.[8] These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, 15 U. S. C. § 1052(a), an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory. *Ibid.* (requiring that "[n]o trademark . . . shall be refused registration on the principal register on account of its nature unless" it falls within an enumerated statutory exception). And if an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged. See

[7] See, *e. g.*, D. Nelson, The Posters That Won the War (1991).
[8] *Ibid.*

§§ 1062(a), 1071; 37 CFR § 41.31(a) (2016). Moreover, once a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds. See 15 U. S. C. §§ 1058(a), 1059, 1064; 37 CFR §§ 2.111(b), 2.160.

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. See App. to Brief for Pro-Football, Inc., as *Amicus Curiae*. It is expressing contradictory views.[9] It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to "make.believe" (Sony),[10] "Think different" (Apple),[11] "Just do it" (Nike),[12] or "Have it your way" (Burger King)[13]? Was the Government warning about a coming disaster when it registered the mark "EndTime Ministries"[14]?

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[9] Compare "Abolish Abortion," Registration No. 4,935,774 (Apr. 12, 2016), with "I Stand With Planned Parenthood," Registration No. 5,073,573 (Nov. 1, 2016); compare "Capitalism Is Not Moral, Not Fair, Not Freedom," Registration No. 4,696,419 (Mar. 3, 2015), with "Capitalism Ensuring Innovation," Registration No. 3,966,092 (May 24, 2011); compare "Global Warming Is Good," Registration No. 4,776,235 (July 21, 2015), with "A Solution to Global Warming," Registration No. 3,875,271 (Nov. 10, 2010).

[10] "make.believe," Registration No. 4,342,903 (May 28, 2013).

[11] "Think Different," Registration No. 2,707,257 (Apr. 15, 2003).

[12] "Just Do It," Registration No. 1,875,307 (Jan. 25, 1995).

[13] "Have It Your Way," Registration No. 0,961,016 (June 12, 1973).

[14] "EndTime Ministries," Registration No. 4,746,225 (June 2, 2015).

The PTO has made it clear that registration does not constitute approval of a mark. See *In re Old Glory Condom Corp.*, 26 USPQ 2d 1216, 1220, n. 3 (TTAB 1993) ("[I]ssuance of a trademark registration . . . is not a government imprimatur"). And it is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means. See *Application of National Distillers & Chemical Corp.*, 49 C. C. P. A. (Pat.) 854, 863, 297 F. 2d 941, 949 (1962) (Rich, J., concurring) ("The purchasing public knows no more about trademark registrations than a man walking down the street in a strange city knows about legal title to the land and buildings he passes" (emphasis deleted)).

None of our government-speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns*, we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising "'to advance the image and desirability of beef and beef products.'" 544 U. S., at 561 (quoting 7 U. S. C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U. S., at 561. Noting that "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government," we held that the ads were government speech. *Id.*, at 560–561. The Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.

Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. 555 U. S., at 464. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465. A religious group claimed that the city, by accepting donated mon-

uments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.

Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land"; and "[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message." *Id.*, at 472.

Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U. S. C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. 576 U. S., at 209–210. First, license plates have long been used by the States to convey state messages. *Id.*, at 210–212. Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." *Id.*, at 212 (internal quotation marks omitted). Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates." *Id.*, at 213. As explained above, none of these factors are present in this case.

In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.

Perhaps the most worrisome implication of the Government's argument concerns the system of copyright registration. If federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation? See 808 F. 3d, at 1346 (explaining that if trademark registration amounts to government speech, "then copyright registration" which "has identical accoutrements" would "likewise amount to government speech").

The Government attempts to distinguish copyright on the ground that it is "'the engine of free expression,'" Brief for Petitioner 47 (quoting *Eldred* v. *Ashcroft*, 537 U. S. 186, 219 (2003)), but as this case illustrates, trademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words.

Trademarks are private, not government, speech.

B

We next address the Government's argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint. These cases implicate a notoriously tricky question of constitutional law. "[W]e have held that the Government 'may not deny a bene-

fit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205, 214 (2013) (some internal quotation marks omitted). But at the same time, government is not required to subsidize activities that it does not wish to promote. *Id.*, at 215. Determining which of these principles applies in a particular case "is not always self-evident," *id.*, at 217, but no difficult question is presented here.

Unlike the present case, the decisions on which the Government relies all involved cash subsidies or their equivalent. In *Rust* v. *Sullivan*, 500 U. S. 173 (1991), a federal law provided funds to private parties for family planning services. In *National Endowment for Arts* v. *Finley*, 524 U. S. 569 (1998), cash grants were awarded to artists. And federal funding for public libraries was at issue in *United States* v. *American Library Assn., Inc.*, 539 U. S. 194 (2003). In other cases, we have regarded tax benefits as comparable to cash subsidies. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983); *Cammarano* v. *United States*, 358 U. S 498 (1959).

The federal registration of a trademark is nothing like the programs at issue in these cases. The PTO does not pay money to parties seeking registration of a mark. Quite the contrary is true: An applicant for registration must pay the PTO a filing fee of $225–$600. 37 CFR § 2.6(a)(1). (Tam submitted a fee of $275 as part of his application to register THE SLANTS. App. 18.) And to maintain federal registration, the holder of a mark must pay a fee of $300–$500 every 10 years. § 2.6(a)(5); see also 15 U. S. C. § 1059(a). The Federal Circuit concluded that these fees have fully supported the registration system for the past 27 years. 808 F. 3d, at 1353.

The Government responds that registration provides valuable non-monetary benefits that "are directly traceable to the

resources devoted by the federal government to examining, publishing, and issuing certificates of registration for those marks." Brief for Petitioner 27. But just about every government service requires the expenditure of government funds. This is true of services that benefit everyone, like police and fire protection, as well as services that are utilized by only some, *e. g.*, the adjudication of private lawsuits and the use of public parks and highways.

Trademark registration is not the only government registration scheme. For example, the Federal Government registers copyrights and patents. State governments and their subdivisions register the title to real property and security interests; they issue driver's licenses, motor vehicle registrations, and hunting, fishing, and boating licenses or permits.

Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services.

C

Finally, the Government urges us to sustain the disparagement clause under a new doctrine that would apply to "government-program" cases. For the most part, this argument simply merges our government-speech cases and the previously discussed subsidy cases in an attempt to construct a broader doctrine that can be applied to the registration of trademarks. The only new element in this construct consists of two cases involving a public employer's collection of union dues from its employees. But those cases occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks.

In *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181–182 (2007), a Washington law permitted a public employer automatically to deduct from the wages of employees who chose not to join the union the portion of union dues used for activities related to collective bargaining. But unless these employees affirmatively consented, the law did not allow the

employer to collect the portion of union dues that would be used in election activities. *Id.*, at 180–182. A public employee union argued that this law unconstitutionally restricted its speech based on its content; that is, the law permitted the employer to assist union speech on matters relating to collective bargaining but made it harder for the union to collect money to support its election activities. *Id.*, at 188. Upholding this law, we characterized it as imposing a "modest limitation" on an "extraordinary benefit," namely, taking money from the wages of non-union members and turning it over to the union free of charge. *Id.*, at 184. Refusing to confer an even greater benefit, we held, did not upset the marketplace of ideas and did not abridge the union's free speech rights. *Id.*, at 189–190.

Ysursa v. *Pocatello Ed. Assn.*, 555 U. S. 353 (2009), is similar. There, we considered an Idaho law that allowed public employees to elect to have union dues deducted from their wages but did not allow such a deduction for money remitted to the union's political action committee. *Id.*, at 355. We reasoned that the "the government [was] not required to assist others in funding the expression of particular ideas." *Id.*, at 358; see also *id.*, at 355 ("The First Amendment . . . does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression").

Davenport and *Ysursa* are akin to our subsidy cases. Although the laws at issue in *Davenport* and *Ysursa* did not provide cash subsidies to the unions, they conferred a very valuable benefit—the right to negotiate a collective-bargaining agreement under which non-members would be obligated to pay an agency fee that the public employer would collect and turn over to the union free of charge. As in the cash subsidy cases, the laws conferred this benefit because it was thought that this arrangement served important government interests. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 224–226 (1977). But the challenged laws did not

go further and provide convenient collection mechanisms for money to be used in political activities. In essence, the Washington and Idaho lawmakers chose to confer a substantial noncash benefit for the purpose of furthering activities that they particularly desired to promote but not to provide a similar benefit for the purpose of furthering other activities. Thus, *Davenport* and *Ysursa* are no more relevant for present purposes than the subsidy cases previously discussed.[15]

Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e. g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995); *Lamb's Chapel*, 508 U. S., at 392–393. See also *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 541–544 (2001). When government creates such a forum, in either a literal or "metaphysical" sense, see *Rosenberger*, 515 U. S., at 830, some content- and speaker-based restrictions may be allowed, see *id.*, at 830–831. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden. *Id.*, at 831.

Our cases use the term "viewpoint" discrimination in a broad sense, see *ibid.*, and in that sense, the disparagement clause discriminates on the basis of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

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[15] While these cases resemble subsidy cases insofar as the free speech rights of unions and their members are concerned, arrangements like those in these cases also implicate the free speech rights of non-union members. Our decision here has no bearing on that issue.

We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U. S. 576, 592 (1969). See also *Texas* v. *Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988); *Coates* v. *Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 161 (1939); *De Jonge* v. *Oregon*, 299 U. S. 353, 365 (1937).

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.[16]

IV

Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed "government-program" doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). The Government and *amici* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are com-

[16] We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.

mercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amici*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name "The Slants" not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review.[17] Under *Central Hudson*, a restriction of speech must serve "a substantial interest," and it must be "narrowly drawn." *Id.*, at 564–565 (internal quotation marks omitted). This means, among other things, that "[t]he regulatory technique may extend only as far as the interest it serves." *Id.*, at 565. The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing "'underrepresented groups'" from being "'bombarded with demeaning messages in commercial advertising.'" Brief for Petitioner 48 (quoting 808 F. 3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An *amicus* supporting the Government refers to "encouraging racial tolerance and protecting the privacy and welfare of individuals." Brief for Native American Organizations as *Amici Curiae* 21. But no mat-

[17] As with the framework discussed in Part III–C of this opinion, we leave open the question whether *Central Hudson* provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act. And nothing in our decision should be read to speak to the validity of state unfair competition provisions or product libel laws that are not before us and differ from § 1052(d)'s disparagement clause.

ter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F. 3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–21. Commerce, we are told, is disrupted by trademarks that "involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification." 808 F. 3d, at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as *Amici Curiae* 18–20.

A simple answer to this argument is that the disparagement clause is not "narrowly drawn" to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages *any person, group, or institution*. It applies to trademarks like the following: "Down with racists," "Down with sexists," "Down with homophobes." It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: "James Buchanan was a disastrous president" or "Slavery is an evil institution"?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social "volatility," free speech would be endangered.

* * *

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

The Patent and Trademark Office (PTO) has denied the substantial benefits of federal trademark registration to the mark THE SLANTS. The PTO did so under the mandate of the disparagement clause in 15 U. S. C. § 1052(a), which prohibits the registration of marks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead, institutions, beliefs, or national symbols."

As the Court is correct to hold, § 1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny.

The Court is correct in its judgment, and I join Parts I, II, and III–A of its opinion. This separate writing explains in greater detail why the First Amendment's protections

against viewpoint discrimination apply to the trademark here. It submits further that the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.

I

Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition. See *United States* v. *Stevens*, 559 U. S. 460, 468 (2010). Aside from these and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995).

The First Amendment guards against laws "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed* v. *Town of Gilbert*, 576 U. S. 155, 169 (2015). This category includes a subtype of laws that go further, aimed at the suppression of "particular views . . . on a subject." *Rosenberger*, 515 U. S., at 829. A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "'presumptively unconstitutional.'" *Id.*, at 829–830.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or na-

tional symbols." 15 U. S. C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government disputes this conclusion. It argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. Cf. *Rosenberger*, *supra*, at 831–832 ("The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways"). The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The Government next suggests that the statute is viewpoint neutral because the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark. Instead, registration is denied based on the expected reaction of the applicant's audience. In this way, the argument goes, it cannot be said that Government is acting with hostility toward a particular point of view. For example, the Government does not dispute that respondent seeks to use his mark in a positive way. Indeed, respondent endeavors to use The Slants to supplant a racial epithet, using new insights, musical talents, and wry humor

to make it a badge of pride. Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian-Americans.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed*, *supra*, at 169–170, but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.

Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 244 (collecting examples).

The Government's argument in defense of the statute assumes that respondent's mark is a negative comment. In addressing that argument on its own terms, this opinion is not intended to imply that the Government's interpretation is accurate. From respondent's submissions, it is evident he would disagree that his mark means what the Government says it does. The trademark will have the effect, respond-

ent urges, of reclaiming an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation. Brief for Respondent 1–4, 42–43. While thoughtful persons can agree or disagree with this approach, the dissonance between the trademark's potential to teach and the Government's insistence on its own, opposite, and negative interpretation confirms the constitutional vice of the statute.

II

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. The former issue may turn on whether certain commercial concerns for the protection of trademarks might, as a general matter, be the basis for regulation. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

"Commercial speech is no exception," the Court has explained, to the principle that the First Amendment "requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 566 (2011) (internal quotation marks omitted). Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 71–72 (1983).

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment's requirement of viewpoint neutrality. Justice Holmes' reference to the "free trade in ideas" and the "power of . . . thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dis-

senting opinion), was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. See *ante*, at 224. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. See Brief for Pro-Football, Inc., as *Amicus Curiae* 8 (collecting examples). Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. See *id.*, at 8–9 (collecting examples). To permit viewpoint discrimination in this context is to permit Government censorship.

This case does not present the question of how other provisions of the Lanham Act should be analyzed under the First Amendment. It is well settled, for instance, that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners. See, *e. g.*, *FTC* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493 (1922) ("The labels in question are literally false, and . . . palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public"). This case also does not involve laws related to product labeling or otherwise designed to protect consumers. See *Sorrell*, *supra*, at 579 ("[T]he government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech" (internal quotation marks omitted)). These considerations, however, do not alter the speech principles that bar the viewpoint discrimination embodied in the statutory provision at issue here.

It is telling that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf. See *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 540–542 (2001); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229, 235 (2000); *Rosenberger*, 515 U. S., at 833. The exception is necessary to allow the government to stake out positions and pursue policies. See *Southworth*, *supra*, at 235; see also *ante*, at 234–235. But it is also narrow, to prevent the government from claiming that every government program is exempt from the First Amendment. These cases have identified a number of factors that, if present, suggest the government is speaking on its own behalf; but none are present here. See *ante*, at 236–239.

There may be situations where private speakers are selected for a government program to assist the government in advancing a particular message. That is not this case either. The central purpose of trademark registration is to facilitate source identification. To serve that broad purpose, the Government has provided the benefits of federal registration to millions of marks identifying every type of product and cause. Registered trademarks do so by means of a wide diversity of words, symbols, and messages. Whether a mark is disparaging bears no plausible relation to that goal. While defining the purpose and scope of a federal program for these purposes can be complex, see, *e. g.*, *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U. S. 205, 214–215 (2013), our cases are clear that viewpoint discrimination is not permitted where, as here, the Government "expends funds to encourage a diversity of views from private speakers," *Velazquez*, *supra*, at 542 (internal quotation marks omitted).

* * *

A law that can be directed against speech found offensive to some portion of the public can be turned against minority

and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

For these reasons, I join the Court's opinion in part and concur in the judgment.

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

I join the opinion of JUSTICE ALITO, except for Part II. Respondent failed to present his statutory argument either to the Patent and Trademark Office or to the Court of Appeals, and we declined respondent's invitation to grant certiorari on this question. *Ante*, at 230. I see no reason to address this legal question in the first instance. See *Star Athletica, L. L. C.* v. *Varsity Brands, Inc.*, 580 U. S. 405, 413 (2017).

I also write separately because "I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 572 (2001) (THOMAS, J., concurring in part and concurring in judgment); see also, *e. g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518 (1996) (same). I nonetheless join Part IV of JUSTICE ALITO's opinion because it correctly concludes that the disparagement clause, 15 U. S. C. § 1052(a), is unconstitutional even under the less stringent test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980).

Syllabus

BRISTOL-MYERS SQUIBB CO. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 16–466. Argued April 25, 2017—Decided June 19, 2017

A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company's drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of summons on the nonresidents' claims for lack of personal jurisdiction, concluding that BMS's extensive activities in the State gave the California courts general jurisdiction. Following this Court's decision in *Daimler AG* v. *Bauman*, 571 U. S. 117, the State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a "sliding scale approach" to specific jurisdiction, concluding that BMS's "wide ranging" contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents' claims were similar in many ways to the California residents' claims and because BMS engaged in other activities in the State.

Held: California courts lack specific jurisdiction to entertain the nonresidents' claims. Pp. 261–269.

(a) The personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 918. This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent

place, one in which the corporation is fairly regarded as at home." *Id.*, at 924. Specific jurisdiction, however, requires "the suit" to "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Daimler*, *supra*, at 127 (internal quotation marks omitted).

The "primary concern" in assessing personal jurisdiction is "the burden on the defendant." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. At times, "the Due Process Clause, acting as an instrument of interstate federalism, may . . . divest the State of its power to render a valid judgment." *Id.*, at 294. Pp. 261–263.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*, *supra*, at 919 (internal quotation marks and brackets omitted). When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents' claims. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue. Cf. *Walden* v. *Fiore*, 571 U. S. 277. Pp. 264–266.

(c) The nonresident plaintiffs' reliance on *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, and *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, is misplaced. *Keeton* concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as here, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. And *Shutts*, which concerned the due process rights of *plaintiffs*, has no bearing on the question presented here. Pp. 266–267.

(d) BMS's decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively

Syllabus

liable for McKesson's conduct in California. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State. P. 268.

(e) The Court's decision will not result in the parade of horribles that respondents conjure up. It does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States. In addition, since this decision concerns the due process limits on the exercise of specific jurisdiction by a State, the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. Pp. 268–269.

1 Cal. 5th 783, 377 P. 3d 874, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 269.

Neal Kumar Katyal argued the cause for petitioner. With him on the briefs were *Jessica L. Ellsworth*, *Frederick Liu*, *Sean Marotta*, *Sara Solow*, *Anand Agneshwar*, and *Daniel S. Pariser*.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, and *Michael S. Raab*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Eric F. Citron*, *Charles H. Davis*, *Paul J. Napoli*, *Hunter J. Shkolnik*, and *Marie Napoli*.*

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*Briefs of *amici curiae* urging reversal were filed for the Atlantic Legal Foundation et al. by *Martin S. Kaufman* and *Mary-Christine Sungaila*; for the Chamber of Commerce of the United States of America et al. by *Andrew J. Pincus*, *Archis A. Parasharami*, *Matthew A. Waring*, *Kate Comerford Todd*, and *Sheldon Gilbert*; for DRI–The Voice of the Defense Bar by *Lawrence S. Ebner* and *John E. Cuttino*; for GlaxoSmithKline LLC by *Jeffrey S. Bucholtz* and *Ethan P. Davis*; for MoneyMutual LLC by *Jonathan S. Massey*, *Marc A. Goldman*, *Donald J. Putterman*, and *Thomas H. Boyd*; for Pharmaceutical Research and Manufacturers of America by *Mark Haddad*, *Alycia Degen*, *Naomi Igra*, *James C. Stansel*,

JUSTICE ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. 1 Cal. 5th 783, 790, 377 P. 3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research

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Melissa B. Kimmell, *Carter G. Phillips*, and *Rebecca K. Wood*; for the Product Liability Advisory Council, Inc., by *Joel G. Pieper*, *William F. Womble, Jr.*, and *James R. Morgan, Jr.*; for the Reporters Committee for Freedom of the Press et al. by *Thomas S. Leatherbury*, *Marc A. Fuller*, and *Megan M. Coker*; for TV Azteca, S.A.B. de C.V. et al. by *David C. Frederick* and *Derek T. Ho*; and for the Washington Legal Foundation et al. by *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Robert S. Peck* and *Julie Braman Kane*; for the Asbestos Disease Awareness Organization by *Brent M. Rosenthal*; for the Attorneys Information Exchange Group by *John Gsanger* and *Larry E. Coben*; for the California Constitution Center by *Erik S. Jaffe, David A. Carrillo, Stephen M. Duvernay, Mitchell Breit, Andy D. Birchfield, Jr., P. Leigh O'Dell, Peter W. Burg, George Fleming, Rand Nolen, G. Sean Jez, W. Mark Lanier,* and *John Boundas*; for the Center for Auto Safety by *Larry E. Coben*; for Civil Procedure Professors by *Pamela K. Bookman*, *pro se*; for Professors of Civil Procedure and Federal Courts by *Allan Ides*, *pro se*; for Public Justice, P. C., by *Louis M. Bograd, Rebecca L. Phillips*, and *Leslie A. Brueckner*; and for Alan B. Morrison by *Mr. Morrison*, *pro se.*

and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. *Id.*, at 790–791, 377 P. 3d, at 879. This amounts to a little over 1 percent of the company's nationwide sales revenue. *Id.*, at 790, 377 P. 3d, at 879.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.*, at 789, 377 P. 3d, at 878. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California."

App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG* v. *Bauman*, 571 U. S. 117 (2014), the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted." App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 175 Cal. Rptr. 3d 412 (2014) (officially depublished). Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS. 175 Cal. Rptr. 3d, at 425–439.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." 1 Cal. 5th, at 806, 377 P. 3d, at 889. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Ibid.* (internal quotation marks omitted). Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." *Ibid.* This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.*, at 803–806, 377 P. 3d, at 887–889. The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product." *Id.*, at 804, 377 P. 3d, at 888. And while acknowledging that "there is no claim that Plavix itself was designed

and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State. *Ibid.*

Three justices dissented. "The claims of . . . nonresidents injured by their use of Plavix they purchased and used in other states," they wrote, "in no sense arise from BMS's marketing and sales of Plavix in California," and they found that the "mere similarity" of the residents' and nonresidents' claims was not enough. *Id.*, at 819, 377 P. 3d, at 898 (opinion of Werdegar, J.). The dissent accused the majority of "expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.*, at 816, 377 P. 3d, at 896.

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U. S. 1097 (2017).[1]

II

A

It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, *e. g.*, *Daimler*, *supra*, at 125–132; *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291 (1980); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316–317 (1945); *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878). Because "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause," *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 918 (2011), which "limits the power of a state court to render a valid personal judgment against a nonresi-

[1] California law provides that its courts may exercise jurisdiction "on any basis not inconsistent with the Constitution . . . of the United States," Cal. Civ. Proc. Code Ann. § 410.10 (West 2004); see *Daimler AG* v. *Bauman*, 571 U. S. 117, 125 (2014).

dent defendant," *World-Wide Volkswagen*, *supra*, at 291. The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State. See *Walden* v. *Fiore*, 571 U. S. 277, 283–286 (2014); *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 806–807 (1985).

Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. *Goodyear*, 564 U. S., at 919. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State. *Daimler*, 571 U. S., at 137.

Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the *suit*" must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." *Id.*, at 127 (internal quotation marks omitted; emphasis added); see *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 472–473 (1985); *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414 (1984). In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets omitted). For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

B

In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Kulko* v. *Superior Court of Cal., City and County of San Francisco*, 436 U. S. 84, 92 (1978); see *Daimler*, *supra*, at 139–141, n. 20; *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113 (1987); *World-Wide Volkswagen*, 444 U. S., at 292. But the "primary concern" is "the burden on the defendant." *Id.*, at 292. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958). "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*, 444 U. S., at 293. And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen*, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.*, at 294.

III

A

Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*, 564 U. S., at 919 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See *id.*, at 931, n. 6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").

For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Id.*, at 927 (quoting *International Shoe*, 326 U. S., at 318).

The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.

The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U. S., at 286. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden*, *supra*, illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." *Id.*, at 289. Because the "*relevant* conduct occurred entirely in Georgia, . . . the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction." *Id.*, at 291 (emphasis added).

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World-Wide Volkswagen*, *supra*, at 295 (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a

single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement." *Id.*, at 776 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff's request for damages suffered outside the State, *id.*, at 774, but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9.

The Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised

personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State.[2] According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after receiving notice. *Id.*, at 812.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be "absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs." Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue.[3] Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts*, *supra*, at 812, n. 3.

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[2] The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant's own interests, specifically, the res judicata effect of an adverse judgment. 472 U. S., at 803–806.

[3] Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

C

In a last ditch contention, respondents assert that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980); see *Walden*, 571 U. S., at 286 ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal. 5th, at 815, 377 P. 3d, at 895 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person . . . . It's not possible for us to track particularly to McKesson"). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision

concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U. S. 97, 102, n. 5 (1987).

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG* v. *Bauman*, 571 U. S. 117 (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol-Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in

New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol-Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity, Plavix was a blockbuster, earning Bristol-Myers billions of dollars in annual revenues.

Bristol-Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol-Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol-Myers' revenue worldwide.

The 2005 publication of an article in the New England Journal of Medicine questioning the efficacy and safety of Plavix put Bristol-Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by the drug in other States.[1] They filed their suits in California Superior Court, raising product-liability claims against Bristol-Myers and McKesson. Their claims are "materially

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[1] Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante,* at 259; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1. For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

identical," as Bristol-Myers concedes. See Brief for Petitioner 4, n. 1. Bristol-Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol-Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol-Myers is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' "identical" claims.

II

A

As the majority explains, since our pathmarking opinion in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), the touchstone of the personal jurisdiction analysis has been the question whether a defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.*, at 316 (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)). For decades this Court has considered that question through two different jurisdictional frames: "general" and "specific" jurisdiction. See *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, nn. 8–9 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 919 (2011).[2]

[2] Respondents do not contend that the California courts would be able to exercise general jurisdiction over Bristol-Myers—a concession that follows directly from this Court's opinion in *Daimler AG* v. *Bauman*, 571 U. S. 117 (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co.* v. *Tyrrell*, 581 U. S. 402, 416–419 (2017) (SOTOMAYOR, J., concurring

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.*, at 923–924. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, Federal Practice and Procedure § 1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.*, at 22–27, n. 10 (collecting authority). First, the defendant must have "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State'" or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873, 877 (2011) (plurality opinion) (quoting *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958)). Second, the plaintiff's claim must "arise out of or relate to" the defendant's forum conduct. *Helicopteros*, 466 U. S., at 414. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 113–114 (1987); *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 477–478 (1985). The factors relevant to such an analysis include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*, at 477 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents' claims.

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in part and dissenting in part); *Daimler*, 571 U. S., at 149–160 (SOTOMAYOR, J., concurring in judgment). But I accept respondents' concession, for the purpose of this case, that Bristol-Myers is not subject to general jurisdiction in California.

First, there is no dispute that Bristol-Myers "purposefully avail[ed] itself," *Nicastro*, 564 U. S., at 877, of California and its substantial pharmaceutical market. Bristol-Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante*, at 258–259. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra*, at 270. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol-Myers' in-state conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. *International Shoe*, 326 U. S., at 319. So respondents could not, for instance, hale Bristol-Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol-Myers took in California. But respondents' claims against Bristol-Myers look nothing like such a claim. Respondents' claims against Bristol-Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol-Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol-Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents'

claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King*, 471 U. S., at 477 (internal quotation marks omitted), is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 245 (2013) (KAGAN., J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands"). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol-Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol-Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. See 1 Cal. 5th 783, 799, n. 2, 377 P. 3d 874, 885, n. 2 (2016). Instead, Bristol-Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims," *ante*, at 264—a result that it says follows from "settled principles [of] specific jurisdic-

tion," *ibid.* But our precedents do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden* v. *Fiore*, 571 U. S. 277 (2014). That is plainly not true. *Walden* concerned the requirement that a defendant "purposefully avai[l]" himself of a forum State or "purposefully direc[t]" his conduct toward that State, *Nicastro*, 564 U. S., at 877, 883 not the separate requirement that a plaintiff's claim "arise out of or relate to" a defendant's forum contacts. The lower court understood the case that way. See *Fiore* v. *Walden*, 688 F. 3d 558, 576–582 (CA9 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondents 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden* v. *Fiore*, O. T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, *e. g.*, 4 Wright § 1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship. See 571 U. S., at 285 ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California—to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante*, at 265–266, can *Walden* be made to seem relevant to the case at hand.

By contrast, our decision in *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corpora-

tion, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.*, at 781; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. See *ante*, at 266. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante*, at 263. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "'the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation'" but personal jurisdiction still will not lie. *Ibid.* (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 294 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction

first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U. S., at 316 (internal quotation marks omitted). The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim,[3] the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them have been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol-Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open . . . question"). *Ante*, at 268–269. Even setting aside the majority's caveats, what is the pur-

[3] Bristol-Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297 (1980). See Brief for Civil Procedure Professors as *Amici Curiae* 14–18; see also *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873, 906–907 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

pose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is "'essentially at home.'"[4] See *Daimler*, 571 U. S., at 127. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be farflung jurisdictions.

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Cf. *id.*, at 158–159 (SOTOMAYOR, J., concurring in judgment). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.*, the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horribles," *ante*, at 268, but says nothing about how suits

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[4] The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin* v. *Scardelletti*, 536 U. S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L. J. 597, 616–617 (1987).

like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It "does not offend 'traditional notions of fair play and substantial justice,'" *International Shoe*, 326 U. S., at 316, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

Syllabus

JENKINS, WARDEN *v.* HUTTON

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

No. 16–1116. Decided June 19, 2017

An Ohio jury convicted respondent Percy Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, the jury also made two additional findings: that Hutton engaged in a course of conduct designed to kill multiple people and that he committed kidnaping. Based on these aggravating factors, the State sought the death penalty. At the conclusion of the penalty phase of the trial, the trial court instructed the jury that it could recommend a death sentence only if it unanimously found that the State had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. The jury recommended death, and the trial court accepted that recommendation. The Ohio Court of Appeals and the Ohio Supreme Court affirmed. Hutton then sought federal habeas relief, arguing that the trial court gave the jurors insufficient guidance by failing to instruct them that, when weighing aggravating and mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. The District Court determined that Hutton's claim was procedurally defaulted because he failed to object to the trial court's instruction or to raise the argument on direct appeal. The Sixth Circuit reversed, concluding that notwithstanding the procedural default, Hutton had "show[n] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Sawyer* v. *Whitley*, 505 U. S. 333, 336.

Held: The Sixth Circuit was wrong to reach the merits of Hutton's claim. First, the jury found two aggravating circumstances during the guilt phase of the trial, each of which rendered Hutton death penalty eligible. The penalty phase instruction plainly had no effect on the jury's decision that those aggravating circumstances were present when Hutton committed the murder for which he was convicted. Second, assuming that the consequences of the trial court's alleged error excuses Hutton's procedural default, the Sixth Circuit should have asked whether, given proper instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating ones. Instead, the court considered whether, given the (alleged) improper instructions, the jury might have relied on

invalid aggravating circumstances when it recommended a death sentence. That approach, which would justify excusing default whenever an instructional error could have been relevant to a jury's decision, is incompatible with *Sawyer*.

Certiorari granted; 839 F. 3d 486, reversed and remanded.

PER CURIAM.

Respondent Percy Hutton accused two friends, Derek Mitchell and Samuel Simmons, Jr., of stealing a sewing machine, in which he had hidden $750. Mitchell and Simmons denied the accusation, but Hutton remained suspicious. On the night of September 16, 1985, he lured the pair into his car and, after pointing a gun at each, drove them around town in search of the machine. By night's end, Hutton had recovered his sewing machine, Simmons was in the hospital with two gunshot wounds to the head, and Mitchell was nowhere to be found. Simmons survived, but Mitchell was found dead a few weeks later, also having been shot twice.

More than 30 years ago, an Ohio jury convicted Hutton of aggravated murder, attempted murder, and kidnaping. In connection with the aggravated murder conviction, the jury made two additional findings: that Hutton engaged in "a course of conduct involving the . . . attempt to kill two or more persons," and that Hutton murdered Mitchell while "committing, attempting to commit, or fleeing immediately after . . . kidnapping," Ohio Rev. Code Ann. §§ 2929.04(A)(5), (7) (Lexis 1982). Because of these "aggravating circumstances," Ohio law required that Hutton be sentenced to "death, life imprisonment without parole, [or] life imprisonment with parole eligibility after" no fewer than 20 years in prison. § 2929.03(C)(2).

Several days after rendering its verdict, the jury reconvened for the penalty phase of the trial. The State argued for the death penalty. In opposition, Hutton gave an unsworn statement professing his innocence and presented evidence about his background and psychological profile. When the presentations concluded, the trial court instructed

the jury that it could recommend a death sentence only if it unanimously found that the State had "prove[d] beyond a reasonable doubt that the aggravating circumstances, of which the Defendant was found guilty, outweigh[ed] the [mitigating factors]." *State* v. *Hutton*, 100 Ohio St. 3d 176, 184–185, 2003-Ohio-5607, 797 N. E. 2d 948, 958; see Ohio Rev. Code Ann. § 2929.03(D)(2). The jury deliberated and recommended death. The trial court accepted the recommendation after also finding, "beyond a reasonable doubt, . . . that the aggravating circumstances . . . outweigh[ed] the mitigating factors." § 2929.03(D)(3).

The Ohio Court of Appeals and the Ohio Supreme Court affirmed Hutton's death sentence. In doing so, both concluded that "the evidence support[ed] the finding of the aggravating circumstances." § 2929.05(A); see *Hutton*, 100 Ohio St. 3d, at 187, 797 N. E. 2d, at 961; *State* v. *Hutton*, 72 Ohio App. 3d 348, 350, 594 N. E. 2d 692, 694 (1995). The courts also "independently weigh[ed] all of the facts . . . to determine whether the aggravating circumstances [Hutton] was found guilty of committing outweigh[ed] the mitigating factors." Ohio Rev. Code Ann. § 2929.05(A). Both agreed with the jury and the trial court that "aggravating circumstances outweigh[ed] the mitigating factors," and that a death sentence was warranted. *Hutton*, 100 Ohio St. 3d, at 191, 797 N. E. 2d, at 963–964; see *Hutton*, 72 Ohio App. 3d, at 352, 594 N. E. 2d, at 695.

The case before this Court concerns Hutton's subsequent petition for federal habeas relief. In 2005, Hutton filed such a petition pursuant to 28 U. S. C. § 2254, arguing that the trial court violated his due process rights during the penalty phase of his trial. According to Hutton, the court gave the jurors insufficient guidance because it failed to tell them that, when weighing aggravating and mitigating factors, they could consider only the two aggravating factors they had found during the guilt phase. Hutton, however, had not objected to the trial court's instruction or raised this argument

on direct appeal, and the District Court on federal habeas concluded that his due process claim was procedurally defaulted. *Hutton* v. *Mitchell*, 2013 WL 2476333, *64 (ND Ohio, June 7, 2013); see *State* v. *Hutton*, 53 Ohio St. 3d 36, 39–40, n. 1, 559 N. E. 2d 432, 437–438, n. 1 (1990) (declining to address trial court's instructions because Hutton "specifically declined to object . . . at trial, and ha[d] not raised or briefed the issue" on appeal).

The United States Court of Appeals for the Sixth Circuit reversed. The court concluded that, notwithstanding the procedural default, it could "reach the merits" of Hutton's claim to "avoid a fundamental miscarriage of justice." *Hutton* v. *Mitchell*, 839 F. 3d 486, 498 (2016) (internal quotation marks omitted). The Sixth Circuit began its analysis with *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). In that decision, this Court established that a habeas petitioner may obtain review of a defaulted claim upon "show[ing] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Id.*, at 336.

Hutton had not argued that this exception to default applied to his case. Nonetheless, the Sixth Circuit held that the exception justified reviewing his claim. The court gave two reasons: First, Hutton was not eligible to receive a death sentence because "the jury had not made the necessary finding of the existence of aggravating circumstances." 839 F. 3d, at 498–499. And second, since the trial court "gave the jury no guidance as to what to consider as aggravating circumstances" when weighing aggravating and mitigating factors, the record did not show that the jury's death recommendation "was actually based on a review of any valid aggravating circumstances." *Id.*, at 500. On the merits, the court concluded that the trial court violated Hutton's constitutional rights by giving an erroneous jury instruction. Judge Rogers dissented on the ground that Hutton could not overcome the procedural default.

The Sixth Circuit was wrong to reach the merits of Hutton's claim. The court's first reason for excusing default was that "the jury had not [found] the existence of aggravating circumstances." *Id.*, at 498–499. But it had, at the guilt phase of Hutton's trial. As Judge Rogers pointed out, "the jury found two such factors"—engaging in a course of conduct designed to kill multiple people and committing kidnaping—"in the process of convicting Hutton . . . of aggravated murder." *Id.*, at 511. Each of those findings "rendered Hutton eligible for the death penalty." *Ibid.* Hutton has not argued that the trial court improperly instructed the jury about aggravating circumstances at the guilt phase. Nor did the Sixth Circuit identify any such error. Instead, the instruction that Hutton contends is incorrect, and that the Sixth Circuit analyzed, was given at the *penalty* phase of trial. That penalty phase instruction plainly had no effect on the jury's decision—delivered after the *guilt* phase and pursuant to an unchallenged instruction—that aggravating circumstances were present when Hutton murdered Mitchell.

The Sixth Circuit's second reason for reaching the merits rests on a legal error. Under *Sawyer*, a court may review a procedurally defaulted claim if, "*but for a constitutional error*, no reasonable jury would have found the petitioner eligible for the death penalty." 505 U. S., at 336 (emphasis added). Here, the alleged error was the trial court's failure to specify that, when weighing aggravating and mitigating factors, the jury could consider only the aggravating circumstances it found at the guilt phase. Assuming such an error can provide a basis for excusing default, the Sixth Circuit should have considered the following: Whether, given *proper* instructions about the two aggravating circumstances, a reasonable jury could have decided that those aggravating circumstances outweighed the mitigating circumstances.

But the court did not ask that question. Instead, it considered whether, given the (alleged) *improper* instructions, the jury might have been relying on invalid aggravating cir-

cumstances when it recommended a death sentence. See 839 F. 3d, at 500 (explaining that, because the trial court gave "no guidance as to what to consider as aggravating circumstances," the court could not determine whether the death recommendation "was actually based on a review of any valid aggravating circumstances"). The court, in other words, considered whether the alleged error might have affected the jury's verdict, not whether a properly instructed jury could have recommended death. That approach, which would justify excusing default whenever an instructional error could have been relevant to a jury's decision, is incompatible with *Sawyer*.

Neither Hutton nor the Sixth Circuit has "show[n] by clear and convincing evidence that"—if properly instructed—"no reasonable juror would have" concluded that the aggravating circumstances in Hutton's case outweigh the mitigating circumstances. *Sawyer*, *supra*, at 336. In fact, the trial court, Ohio Court of Appeals, and Ohio Supreme Court each independently weighed those factors and concluded that the death penalty was justified. On the facts of this case, the Sixth Circuit was wrong to hold that it could review Hutton's claim under the miscarriage of justice exception to procedural default.

The petition for certiorari and motion for leave 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

WEAVER *v.* MASSACHUSETTS

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 16–240. Argued April 19, 2017—Decided June 22, 2017

When petitioner was tried in a Massachusetts trial court, the courtroom could not accommodate all the potential jurors. As a result, for two days of jury selection, an officer of the court excluded from the courtroom any member of the public who was not a potential juror, including petitioner's mother and her minister. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. Petitioner was convicted of murder and a related charge. Five years later, he filed a motion for a new trial in state court, arguing, as relevant here, that his attorney had provided ineffective assistance by failing to object to the courtroom closure. The trial court ruled that he was not entitled to relief. The Massachusetts Supreme Judicial Court affirmed in relevant part. Although it recognized that the violation of the right to public trial was a structural error, it rejected petitioner's ineffective-assistance claim because he had not shown prejudice.

Held:

1. In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial. Pp. 294–303.

(a) This case requires an examination of the proper application of the doctrines of structural error and ineffective assistance of counsel. They are intertwined, because the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error. Pp. 294–299.

(1) Generally, a constitutional error that "did not contribute to the verdict obtained" is deemed harmless, which means the defendant is not entitled to reversal. *Chapman* v. *California*, 386 U. S. 18, 24. However, a structural error, which "affect[s] the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U. S. 279, 310, defies harmless-error analysis, *id.*, at 309. Thus, when a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.

There appear to be at least three broad rationales for finding an error to be structural. One is when the right at issue does not protect the

defendant from erroneous conviction but instead protects some other interest—like the defendant's right to conduct his own defense—where harm is irrelevant to the basis underlying the right. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4. Another is when the error's effects are simply too hard to measure—*e. g.*, when a defendant is denied the right to select his or her own attorney—making it almost impossible for the government to show that the error was "harmless beyond a reasonable doubt," *Chapman*, *supra*, at 24. Finally, some errors always result in fundamental unfairness, *e. g.*, when an indigent defendant is denied an attorney, see *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345. For purposes of this case, a critical point is that an error can count as structural even if it does not lead to fundamental unfairness in every case. See *Gonzalez-Lopez*, *supra*, at 149, n. 4. Pp. 294–296.

(2) While a public-trial violation counts as structural error, it does not always lead to fundamental unfairness. This Court's opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. See *Waller* v. *Georgia*, 467 U. S. 39; *Presley* v. *Georgia*, 558 U. S. 209, 215–216. The fact that the public-trial right is subject to exceptions suggests that not every public-trial violation results in fundamental unfairness. Indeed, the Court has said that a public-trial violation is structural because of the "difficulty of assessing the effect of the error." *Gonzalez-Lopez*, *supra*, at 149, n. 4. The public-trial right also furthers interests other than protecting the defendant against unjust conviction, including the rights of the press and of the public at large. See, *e. g.*, *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508–510. Thus, an unlawful closure could take place and yet the trial will still be fundamentally fair from the defendant's standpoint. Pp. 296–299.

(b) The proper remedy for addressing the violation of the right to a public trial depends on when the objection was raised. If an objection is made at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." *Neder* v. *United States*, 527 U. S. 1, 7. If, however, the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance claim, the defendant generally bears the burden to show deficient performance and that the attorney's error "prejudiced the defense." *Strickland* v. *Washington*, 466 U. S. 668, 687. To demonstrate prejudice in most cases, the defendant must show "a reasonable probability that . . . the result of the proceeding would have been different" but for attorney error. *Id.*, at 694. For the analytical purposes of this case, the Court will assume, as petitioner has requested, that even if there is no showing of a reasonable probability of a different outcome, relief still

must be granted if the defendant shows that attorney errors rendered the trial fundamentally unfair.

Not every public-trial violation will lead to a fundamentally unfair trial. And the failure to object to that violation does not always deprive the defendant of a reasonable probability of a different outcome. Thus, a defendant raising a public-trial violation via an ineffective-assistance claim must show either a reasonable probability of a different outcome in his or her case or, as assumed here, that the particular violation was so serious as to render the trial fundamentally unfair.

Neither this reasoning nor the holding here calls into question the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness, see *Sullivan* v. *Louisiana*, 508 U. S. 275, 278–279; *Tumey* v. *Ohio*, 273 U. S. 510, 535; *Vasquez* v. *Hillery*, 474 U. S. 254, 261–264, or those granting automatic relief to defendants who prevailed on claims of race or gender discrimination in jury selection, *e. g.*, *Batson* v. *Kentucky*, 476 U. S. 79, 100. The errors in each of these cases were preserved and then raised on direct appeal. The reason for placing the burden on the petitioner here, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance claim.

When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation. The costs and uncertainties of a new trial are also greater because more time will have elapsed in most cases. And the finality interest is more at risk. See *Strickland*, *supra*, at 693–694. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or in an ineffective-assistance claim. Pp. 299–303.

2. Because petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, he is not entitled to a new trial. Although potential jurors might have behaved differently had petitioner's family or the public been present, petitioner has offered no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object. He has also failed to demonstrate fundamental unfairness. His mother and her minister were indeed excluded during jury selection. But his trial was not conducted in secret or in a remote place; closure was limited to the jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers, not the judge; venire

members who did not become jurors observed the proceedings; and the record of the proceedings indicates no basis for concern, other than the closure itself. There was no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case, *e. g.*, misbehavior by the prosecutor, judge, or any other party. Thus, even though this case comes here on the assumption that the closure was a Sixth Amendment violation, the violation here did not pervade the whole trial or lead to basic unfairness. Pp. 303–305.

474 Mass. 787, 54 N. E. 3d 495, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, SOTOMAYOR, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 305. ALITO, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 306. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 309.

Michael B. Kimberly argued the cause for petitioner. With him on the briefs were *Charles A. Rothfeld*, *Andrew J. Pincus*, *Paul W. Hughes*, *Ruth Greenberg*, and *Eugene R. Fidell*.

Randall E. Ravitz, Assistant Attorney General of Massachusetts, argued the cause for respondent. With him on the brief were *Maura Healey*, Attorney General, *Elizabeth N. Dewar*, State Solicitor, *Thomas E. Bocian*, Assistant Attorney General, and *John P. Zanini*, Special Assistant Attorney General.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Blanco*, *Deputy Solicitor General Dreeben*, and *David M. Lieberman*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Brian W. Stull*, *Cassandra Stubbs*, *Anna Arceneaux*, *David D. Cole*, *Matthew R. Segal*, and *Sarah R. Wunsch*; for the Massachusetts Association of Criminal Defense Lawyers by *Kirsten Mayer*; for the National Association of Criminal Defense Lawyers by *Stuart Banner* and *David M. Porter*; for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Gregg P. Leslie*, and *Bruce*

JUSTICE KENNEDY delivered the opinion of the Court.

During petitioner's trial on state criminal charges, the courtroom was occupied by potential jurors and closed to the public for two days of the jury selection process. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. And the case comes to the Court on the assumption that, in failing to object, defense counsel provided ineffective assistance.

In the direct review context, the underlying constitutional violation—the courtroom closure—has been treated by this Court as a structural error, *i. e.*, an error entitling the defendant to automatic reversal without any inquiry into prejudice. The question is whether invalidation of the conviction is required here as well, or if the prejudice inquiry is altered when the structural error is raised in the context of an ineffective-assistance-of-counsel claim.

W. Sanford; and for the Stein Center for Law and Ethics et al. by *Lawrence J. Fox*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arkansas et al. by *Leslie Rutledge*, Attorney General of Arkansas, *Lee Rudofsky*, Solicitor General, and *Nicholas J. Bronni*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steven T. Marshall* of Alabama, *Mark Brnovich* of Arizona, *Cynthia H. Coffman* of Colorado, *Kevin T. Kane* of Connecticut, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Douglas S. Chin* of Hawaii, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*.

I

In 2003, a 15-year-old boy was shot and killed in Boston. A witness saw a young man fleeing the scene of the crime and saw him pull out a pistol. A baseball hat fell off of his head. The police recovered the hat, which featured a distinctive airbrushed Detroit Tigers logo on either side. The hat's distinctive markings linked it to 16-year-old Kentel Weaver. He is the petitioner here. DNA obtained from the hat matched petitioner's DNA.

Two weeks after the crime, the police went to petitioner's house to question him. He admitted losing his hat around the time of the shooting but denied being involved. Petitioner's mother was not so sure. Later, she questioned petitioner herself. She asked whether he had been at the scene of the shooting, and he said he had been there. But when she asked if he was the shooter, or if he knew who the shooter was, petitioner put his head down and said nothing. Believing his response to be an admission of guilt, she insisted that petitioner go to the police station to confess. He did. Petitioner was indicted in Massachusetts state court for first-degree murder and the unlicensed possession of a handgun. He pleaded not guilty and proceeded to trial.

The pool of potential jury members was large, some 60 to 100 people. The assigned courtroom could accommodate only 50 or 60 in the courtroom seating. As a result, the trial judge brought all potential jurors into the courtroom so that he could introduce the case and ask certain preliminary questions of the entire venire panel. Many of the potential jurors did not have seats and had to stand in the courtroom. After the preliminary questions, the potential jurors who had been standing were moved outside the courtroom to wait during the individual questioning of the other potential jurors. The judge acknowledged that the hallway was not "the most comfortable place to wait" and thanked the potential jurors for their patience. 2 Tr. II–103 (Apr. 10, 2006).

The judge noted that there was simply not space in the courtroom for everybody.

As all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror. So when petitioner's mother and her minister came to the courtroom to observe the two days of jury selection, they were turned away.

All this occurred before the Court's decision in *Presley* v. *Georgia*, 558 U. S. 209 (2010) (*per curiam*). *Presley* made it clear that the public-trial right extends to jury selection as well as to other portions of the trial. *Id.*, at 213–215. Before *Presley*, Massachusetts courts would often close courtrooms to the public during jury selection, in particular during murder trials.

In this case petitioner's mother told defense counsel about the closure at some point during jury selection. But counsel "believed that a courtroom closure for [jury selection] was constitutional." Crim. No. 2003–11293 (Super. Ct. Mass., Feb. 22, 2013), App. to Pet. for Cert. 49a. As a result, he "did not discuss the matter" with petitioner, or tell him "that his right to a public trial included the [jury *voir dire*]," or object to the closure. *Ibid.*

During the ensuing trial, the government presented strong evidence of petitioner's guilt. Its case consisted of the incriminating details outlined above, including petitioner's confession to the police. The jury convicted petitioner on both counts. The court sentenced him to life in prison on the murder charge and to about a year in prison on the gun-possession charge.

Five years later, petitioner filed a motion for a new trial in Massachusetts state court. As relevant here, he argued that his attorney had provided ineffective assistance by failing to object to the courtroom closure. After an evidentiary hearing, the trial court recognized a violation of the right to

a public trial based on the following findings: The courtroom had been closed; the closure was neither *de minimis* nor trivial; the closure was unjustified; and the closure was full rather than partial (meaning that all members of the public, rather than only some of them, had been excluded from the courtroom). The trial court further determined that defense counsel failed to object because of "serious incompetency, inefficiency, or inattention." *Id.*, at 63a (quoting *Massachusetts* v. *Chleikh*, 82 Mass. App. 718, 722, 978 N. E. 2d 96, 100 (2012)). On the other hand, petitioner had not "offered any evidence or legal argument establishing prejudice." App. to Pet. for Cert. 64a. For that reason, the court held that petitioner was not entitled to relief.

Petitioner appealed the denial of the motion for a new trial to the Massachusetts Supreme Judicial Court. The court consolidated that appeal with petitioner's direct appeal. As noted, there had been no objection to the closure at trial; and the issue was not raised in the direct appeal. The Supreme Judicial Court then affirmed in relevant part. Although it recognized that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error," the court stated that petitioner had "failed to show that trial counsel's conduct caused prejudice warranting a new trial." 474 Mass. 787, 814, 54 N. E. 3d 495, 520 (2016). On this reasoning, the court rejected petitioner's claim of ineffective assistance of counsel.

There is disagreement among the Federal Courts of Appeals and some state courts of last resort about whether a defendant must demonstrate prejudice in a case like this one—in which a structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel. Some courts have held that, when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry. See, *e. g.*, *Johnson* v.

Sherry, 586 F. 3d 439, 447 (CA6 2009); *Owens* v. *United States*, 483 F. 3d 48, 64–65 (CA1 2007); *Littlejohn* v. *United States*, 73 A. 3d 1034, 1043–1044 (D. C. 2013); *State* v. *Lamere*, 327 Mont. 115, 125, 112 P. 3d 1005, 1013 (2005). Other courts have held that the defendant is entitled to relief only if he or she can show prejudice. See, *e. g.*, *Purvis* v. *Crosby*, 451 F. 3d 734, 738 (CA11 2006); *United States* v. *Gomez*, 705 F. 3d 68, 79–80 (CA2 2013); *Reid* v. *State*, 286 Ga. 484, 487, 690 S. E. 2d 177, 180–181 (2010). This Court granted certiorari to resolve that disagreement. 580 U. S. 1088 (2017). The Court does so specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection.

II

This case requires a discussion, and the proper application, of two doctrines: structural error and ineffective assistance of counsel. The two doctrines are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error.

A

The concept of structural error can be discussed first. In *Chapman* v. *California*, 386 U. S. 18 (1967), this Court "adopted the general rule that a constitutional error does not automatically require reversal of a conviction." *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991) (citing *Chapman*, *supra*). If the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," the Court held, then the error is deemed harmless and the defendant is not entitled to reversal. *Id.*, at 24.

The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. *Id.*, at 23, n. 8. These errors came to be known as structural errors. See *Fulminante*, 499 U. S., at 309–310. The purpose

of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.*, at 310. For the same reason, a structural error "def[ies] analysis by harmless error standards." *Id.*, at 309 (internal quotation marks omitted).

The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales.

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See *Faretta* v. *California*, 422 U. S. 806, 834 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 149, n. 4 (2006).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." *Ibid.* (quoting *Vasquez* v. *Hillery*, 474 U. S. 254, 263 (1986)). Because the government will, as a result, find it almost impossible to show that the error was "harm-

less beyond a reasonable doubt," *Chapman*, *supra*, at 24, the efficiency costs of letting the government try to make the showing are unjustified.

Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. See *Gideon* v. *Wainwright*, 372 U. S. 335, 343–345 (1963) (right to an attorney); *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.

These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. See *e. g.*, *id.*, at 280–282. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case. See *Gonzalez-Lopez*, *supra*, at 149, n. 4 (rejecting as "inconsistent with the reasoning of our precedents" the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable" (emphasis deleted)).

B

As noted above, a violation of the right to a public trial is a structural error. See *supra*, at 290, 293. It is relevant to determine why that is so. In particular, the question is whether a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason.

In *Waller* v. *Georgia*, 467 U. S. 39 (1984), the state court prohibited the public from viewing a weeklong suppression hearing out of concern for the privacy of persons other than those on trial. See *id.*, at 41–43. Although it recognized that there would be instances where closure was justified, this Court noted that "such circumstances will be rare" and

that the closure in question was unjustified. *Id.*, at 45, 48. Still, the Court did not order a new trial. *Id.*, at 49–50. Instead it ordered a new suppression hearing that was open to the public. *Id.*, at 50. If the same evidence was found admissible in that renewed pretrial proceeding, the Court held, no new trial as to guilt would be necessary. *Ibid.* This was despite the structural aspect of the violation.

Some 25 years after the *Waller* decision, the Court issued its *per curiam* ruling in *Presley* v. *Georgia*. 558 U. S. 209. In that case, as here, the courtroom was closed to the public during jury *voir dire*. *Id.*, at 210. Unlike here, however, there was a trial objection to the closure, and the issue was raised on direct appeal. *Id.*, at 210–211. On review of the State Supreme Court's decision allowing the closure, this Court expressed concern that the state court's reasoning would allow the courtroom to be closed during jury selection "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Id.*, at 215 (internal quotation marks omitted). Although the Court expressly noted that courtroom closure may be ordered in some circumstances, the Court also stated that it was "still incumbent upon" the trial court "to consider all reasonable alternatives to closure." *Id.*, at 215–216.

These opinions teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. The problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones. For example, there are often preliminary instructions that a judge may want to give to the venire as a whole, rather than repeating those instructions (perhaps with unintentional differences) to several groups of potential jurors. On the other hand, various constituencies of the public—the family of the accused, the family of the victim, members of the press, and

other persons—all have their own interests in observing the selection of jurors. How best to manage these problems is not a topic discussed at length in any decision or commentary the Court has found.

So although the public-trial right is structural, it is subject to exceptions. See Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2219–2222 (2014) (discussing situations in which a trial court may order a courtroom closure). Though these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so. See *Waller*, *supra*, at 45. The fact that the public-trial right is subject to these exceptions suggests that not every public-trial violation results in fundamental unfairness.

A public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence. See 558 U. S., at 215. It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings before making an otherwise valid decision to order the courtroom temporarily closed. As a result, it would be likewise unconvincing if the Court had said that a public-trial violation always leads to a fundamentally unfair trial.

Indeed, the Court has not said that a public-trial violation renders a trial fundamentally unfair in every case. In the two cases in which the Court has discussed the reasons for classifying a public-trial violation as structural error, the Court has said that a public-trial violation is structural for a different reason: because of the "difficulty of assessing the effect of the error." *Gonzalez-Lopez*, 548 U. S., at 149, n. 4; see also *Waller*, *supra*, at 49, n. 9.

The public-trial right also protects some interests that do not belong to the defendant. After all, the right to an open

courtroom protects the rights of the public at large, and the press, as well as the rights of the accused. See, *e. g.*, *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508–510 (1984); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 572–573 (1980). So one other factor leading to the classification of structural error is that the public-trial right furthers interests other than protecting the defendant against unjust conviction. These precepts confirm the conclusion the Court now reaches that, while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint.

III

The Court now turns to the proper remedy for addressing the violation of a structural right, and in particular the right to a public trial. Despite its name, the term "structural error" carries with it no talismanic significance as a doctrinal matter. It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was "harmless beyond a reasonable doubt." *Chapman*, 386 U. S., at 24. Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual "effect on the outcome." *Neder* v. *United States*, 527 U. S. 1, 7 (1999).

The question then becomes what showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim. To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards. First, the defendant must show deficient performance—that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the

Sixth Amendment." *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). Second, the defendant must show that the attorney's error "prejudiced the defense." *Ibid.*

The prejudice showing is in most cases a necessary part of a *Strickland* claim. The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties "mistake-free." *Gonzalez-Lopez*, 548 U. S., at 147. As a rule, therefore, a "violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *Ibid.* (emphasis deleted); see also *Premo* v. *Moore*, 562 U. S. 115, 128 (2011); *Lockhart* v. *Fretwell*, 506 U. S. 364, 370 (1993).

That said, the concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. *Id.*, at 696. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." *Ibid.* Petitioner therefore argues that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. For the analytical purposes of this case, the Court will assume that petitioner's interpretation of *Strickland* is the correct one. In light of the Court's ultimate holding, however, the Court need not decide that question here.

As explained above, not every public-trial violation will in fact lead to a fundamentally unfair trial. See *supra*, at 299. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant

raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, see *supra*, at 300, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Neither the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. See Murray, A Contextual Approach to Harmless Error Review, 130 Harv. L. Rev. 1791, 1813, 1822 (2017) (noting that the "eclectic normative objectives of criminal procedure" go beyond protecting a defendant from erroneous conviction and include ensuring "'that the administration of justice should reasonably appear to be disinterested'" (quoting *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 869–870 (1988))). Those precedents include *Sullivan* v. *Louisiana*, 508 U. S., at 278–279 (failure to give a reasonable-doubt instruction); *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927) (biased judge); and *Vasquez* v. *Hillery*, 474 U. S., at 261–264 (exclusion of grand jurors on the basis of race). See *Neder*, *supra*, at 8 (describing each of these errors as structural). This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, see *Batson* v. *Kentucky*, 476 U. S. 79, 100 (1986); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 145–146 (1994), though the Court has yet to label those errors structural in express terms, see, *e. g.*, *Neder*, *supra*, at 8. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the re-

sult should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.

The reason for placing the burden on the petitioner in this case, however, derives both from the nature of the error, see *supra*, at 300–301, and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim. As explained above, when a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed. See *supra*, at 297–298. When a defendant first raises the closure in an ineffective-assistance claim, however, the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.

Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. There are also advantages of direct judicial supervision. Reviewing courts, in the regular course of the appellate process, can give instruction to the trial courts in a familiar context that allows for elaboration of the relevant principles based on review of an adequate record. For instance, in this case, the factors and circumstances that might justify a temporary closure are best considered in the regular appellate process and not in the context of a later proceeding, with its added time delays.

When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, see *Strickland*, 466 U. S., at 693–694 (noting the "profound importance

of finality in criminal proceedings"), and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.

In sum, "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts. *Harrington* v. *Richter*, 562 U. S. 86, 105 (2011). For this reason, the rules governing ineffective-assistance claims "must be applied with scrupulous care." *Premo*, 562 U. S., at 122.

IV

The final inquiry concerns the ineffective-assistance claim in this case. Although the case comes on the assumption that petitioner has shown deficient performance by counsel, he has not shown prejudice in the ordinary sense, *i. e.*, a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure.

It is of course possible that potential jurors might have behaved differently if petitioner's family had been present. And it is true that the presence of the public might have had some bearing on juror reaction. But here petitioner offered no "evidence or legal argument establishing prejudice" in the sense of a reasonable probability of a different outcome but for counsel's failure to object. App. to Pet. for Cert. 64a; see *Strickland*, 466 U. S., at 694.

In other circumstances a different result might obtain. If, for instance, defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with little more detail. See *ibid.* Even in those circumstances, however, the burden would remain on the defendant to make the prejudice showing, *id.*, at 694, 696, because a public-trial violation

does not always lead to a fundamentally unfair trial, see *supra*, at 299.

In light of the above assumption that prejudice can be shown by a demonstration of fundamental unfairness, see *supra*, at 304, the remaining question is whether petitioner has shown that counsel's failure to object rendered the trial fundamentally unfair. See *Strickland*, *supra*, at 696. The Court concludes that petitioner has not made the showing. Although petitioner's mother and her minister were indeed excluded from the courtroom for two days during jury selection, petitioner's trial was not conducted in secret or in a remote place. Cf. *In re Oliver*, 333 U. S. 257, 269, n. 22 (1948). The closure was limited to the jury *voir dire*; the courtroom remained open during the evidentiary phase of the trial; the closure decision apparently was made by court officers rather than the judge; there were many members of the venire who did not become jurors but who did observe the proceedings; and there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself.

There has been no showing, furthermore, that the potential harms flowing from a courtroom closure came to pass in this case. For example, there is no suggestion that any juror lied during *voir dire*; no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands.

It is true that this case comes here on the assumption that the closure was a Sixth Amendment violation. And it must be recognized that open trials ensure respect for the justice system and allow the press and the public to judge the proceedings that occur in our Nation's courts. Even so, the violation here did not pervade the whole trial or lead to basic unfairness.

In sum, petitioner has not shown a reasonable probability of a different outcome but for counsel's failure to object, and

he has not shown that counsel's shortcomings led to a fundamentally unfair trial. He is not entitled to a new trial.

* * *

In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing. The judgment of the Massachusetts Supreme Judicial Court is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I write separately with two observations about the scope of the Court's holding. First, this case comes to us on the parties' "assumption[s]" that the closure of the courtroom during jury selection "was a Sixth Amendment violation" and that "defense counsel provided ineffective assistance" by "failing to object" to it. *Ante,* at 290, 304. The Court previously held in a *per curiam* opinion—issued without the benefit of merits briefing or argument—that the Sixth Amendment right to a public trial extends to jury selection. See *Presley* v. *Georgia*, 558 U. S. 209, 213 (2010); *id.*, at 216 (THOMAS, J., dissenting). I have some doubts about whether that holding is consistent with the original understanding of the right to a public trial, and I would be open to reconsidering it in a case in which we are asked to do so.

Second, the Court "assume[s]," for the "analytical purposes of this case," that a defendant may establish prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984), by demonstrating that his attorney's error led to a fundamentally unfair trial. *Ante*, at 300. According to *Strickland*, a defendant may establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; by showing an "[a]ctual or constructive denial of the assistance of counsel altogether"; or by showing that counsel labored under "an actual conflict of interest." 466 U. S., at 692–694. *Strickland* did not hold, as the Court assumes, that a defendant may establish prejudice by showing that his counsel's errors "rendered the trial fundamentally unfair." *Ante*, at 300. Because the Court concludes that the closure during petitioner's jury selection did not lead to fundamental unfairness in any event, *ante*, at 304–305, no part of the discussion about fundamental unfairness, see *ante*, at 300–304, is necessary to its result.

In light of these observations, I do not read the opinion of the Court to preclude the approach set forth in JUSTICE ALITO's opinion, which correctly applies our precedents.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring in the judgment.

This case calls for a straightforward application of the familiar standard for evaluating ineffective-assistance-of-counsel claims. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). Weaver cannot meet that standard, and therefore his claim must be rejected.

The Sixth Amendment protects a criminal defendant's right "to have the Assistance of Counsel for his defence." That right is violated when (1) "counsel's performance was deficient" in the relevant sense of the term and (2) "the deficient performance prejudiced the defense." *Strickland*, *supra*, at 687. The prejudice requirement—which is the one

at issue in this case—"arises from the very nature" of the right to effective representation: Counsel simply "cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147 (2006). In other words, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *Ibid.*

Strickland's definition of prejudice is based on the reliability of the underlying proceeding. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that *the trial cannot be relied on* as having produced a just result." 466 U. S., at 686 (emphasis added); see *United States* v. *Cronic*, 466 U. S. 648, 658 (1984). This is so because "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U. S., at 691–692. Accordingly, an attorney's error "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, at 691.

Weaver makes much of the *Strickland* Court's statement that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Id.*, at 696. But the very next sentence clarifies what the Court had in mind, namely, the reliability of the proceeding. In that sentence, the Court explains that the proper concern—"[i]n every case"—is "whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable." *Ibid.* In other words, the focus on reliability is consistent throughout the *Strickland* opinion.

To show that a counsel's error rendered a legal proceeding unreliable, a defendant ordinarily must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id., at 694. In a challenge to a conviction, such as the one in this case, this means that the defendant must show "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, at 695.

The Court has relieved defendants of the obligation to make this affirmative showing in only a very narrow set of cases in which the accused has effectively been denied counsel altogether: These include the actual or constructive denial of counsel, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest. *Id.*, at 692; *Cronic*, 466 U. S., at 658–660. Prejudice can be presumed with respect to these errors because they are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.*, at 658; see *Strickland*, *supra*, at 692; *Mickens* v. *Taylor*, 535 U. S. 162, 175 (2002).

In short, there are two ways of meeting the *Strickland* prejudice requirement. A defendant must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary.

Weaver attempts to escape this framework by stressing that the deprivation of the right to a public trial has been described as a "structural" error, but this is irrelevant under *Strickland*. The concept of "structural error" comes into play when it is established that an error occurred at the trial level and it must be decided whether the error was harmless. See *Neder* v. *United States*, 527 U. S. 1, 7 (1999); *Arizona* v. *Fulminante*, 499 U. S. 279, 309–310 (1991). The prejudice prong of *Strickland* is entirely different. It does not ask whether an error was harmless but whether there was an error at all, for unless counsel's deficient performance prejudiced the defense, there was no Sixth Amendment violation in the first place. See *Gonzalez-Lopez*, *supra*, at 150 (even

where an attorney's deficient performance "pervades the entire trial," "we do not allow reversal of a conviction for that reason without a showing of prejudice" because "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue"). Weaver's theory conflicts with *Strickland* because it implies that an attorney's error can be prejudicial even if it "had no effect," or only "some conceivable effect," on the outcome of his trial. *Strickland*, *supra*, at 691, 693. That is precisely what *Strickland* rules out.

To sum up, in order to obtain relief under *Strickland*, Weaver must show that the result of his trial was unreliable. He could do so by demonstrating a reasonable likelihood that his counsel's error affected the verdict. Alternatively, he could establish that the error falls within the very short list of errors for which prejudice is presumed. Weaver has not attempted to make either argument, so his claim must be rejected. I would affirm the judgment of the Supreme Judicial Court of Massachusetts on that ground.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The Court notes that *Strickland*'s "prejudice inquiry is not meant to be applied in a 'mechanical' fashion," *ante*, at 300 (quoting *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984)), and I agree. But, in my view, it follows from this principle that a defendant who shows that his attorney's constitutionally deficient performance produced a structural error should not face the additional—and often insurmountable—*Strickland* hurdle of demonstrating that the error changed the outcome of his proceeding.

In its harmless-error cases, this Court has "divided constitutional errors into two classes": trial errors and structural errors. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 148 (2006). Trial errors are discrete mistakes that "occu[r] during the presentation of the case to the jury." *Arizona* v.

Fulminante, 499 U. S. 279, 307 (1991). Structural errors, on the other hand, "affec[t] the framework within which the trial proceeds." *Id.*, at 310.

The Court has recognized that structural errors' distinctive attributes make them "defy analysis by 'harmless-error' standards." *Id.*, at 309. It has therefore *categorically* exempted structural errors from the case-by-case harmlessness review to which trial errors are subjected. Our precedent does not try to parse which structural errors are the truly egregious ones. It simply views *all* structural errors as "intrinsically harmful" and holds that *any* structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial. *Neder* v. *United States*, 527 U. S. 1, 7 (1999).

The majority here does not take this approach. It assumes that *some* structural errors—those that "lea[d] to fundamental unfairness"—but not others, can warrant relief without a showing of actual prejudice under *Strickland*. *Ante*, at 296, 300–301. While I agree that a showing of fundamental unfairness is sufficient to satisfy *Strickland*, I would not try to draw this distinction.

Even if some structural errors do not create fundamental unfairness, *all* structural errors nonetheless have features that make them "defy analysis by 'harmless-error' standards." *Fulminante*, *supra*, at 309. This is why *all* structural errors—not just the "fundamental unfairness" ones—are exempt from harmlessness inquiry and warrant automatic reversal on direct review. Those same features mean that *all* structural errors defy an actual-prejudice analysis under *Strickland*.

For instance, the majority concludes that some errors—such as the public-trial error at issue in this case—have been labeled "structural" because they have effects that "are simply too hard to measure." *Ante*, at 295; see, *e. g.*, *Sullivan* v. *Louisiana*, 508 U. S. 275, 281–282 (1993) (explaining that structural errors have "consequences that are necessarily

unquantifiable and indeterminate"). But how could any error whose effects are inherently indeterminate prove susceptible to actual-prejudice analysis under *Strickland*? Just as the "difficulty of assessing the effect" of such an error would turn harmless-error analysis into "a speculative inquiry into what might have occurred in an alternate universe," *Gonzalez-Lopez*, *supra*, at 149, n. 4, 150, so too would it undermine a defendant's ability to make an actual-prejudice showing to establish an ineffective-assistance claim.

The problem is evident with regard to public-trial violations. This Court has recognized that "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance." *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984). As a result, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" *Ibid.* (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F. 2d 599, 608 (CA3 1969) (en banc); alteration in original). In order to establish actual prejudice from an attorney's failure to object to a public-trial violation, a defendant would face the nearly impossible burden of establishing how his trial might have gone differently had it been open to the public. See *Waller*, *surpa*, at 49, n. 9 ("'[D]emonstration of prejudice in this kind of case is a practical impossibility . . .'" (quoting *State* v. *Sheppard*, 182 Conn. 412, 418, 438 A. 2d 125, 128 (1980))).

I do not see how we can read *Strickland* as requiring defendants to prove what this Court has held cannot be proved. If courts do not presume prejudice when counsel's deficient performance leads to a structural error, then defendants may well be unable to obtain relief for incompetence that deprived them "of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Neder*, *supra*, at 8–9 (inter-

nal quotation marks omitted). This would be precisely the sort of "mechanical" application that *Strickland* tells us to avoid.

In my view, we should not require defendants to take on a task that is normally impossible to perform. Nor would I give lower courts the unenviably complex job of deciphering which structural errors really undermine fundamental fairness and which do not—that game is not worth the candle. I would simply say that just as structural errors are categorically insusceptible to harmless-error analysis on direct review, so too are they categorically insusceptible to actual-prejudice analysis in *Strickland* claims. A showing that an attorney's constitutionally deficient performance produced a structural error should consequently be enough to entitle a defendant to relief. I respectfully dissent.

Syllabus

TURNER ET AL. *v.* UNITED STATES

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15–1503. Argued March 29, 2017—Decided June 22, 2017*

Petitioners—Timothy Catlett, Russell Overton, Levy Rouse, Kelvin Smith, Charles and Christopher Turner, and Clifton Yarborough—and several others were indicted for the kidnaping, robbery, and murder of Catherine Fuller. At trial, the Government advanced the theory that Fuller was attacked by a large group of individuals. Its evidentiary centerpiece consisted of the testimony of Calvin Alston and Harry Bennett, who confessed to participating in a group attack and cooperated with the Government in return for leniency. Several other Government witnesses corroborated aspects of Alston's and Bennett's testimony. Melvin Montgomery testified that he was in a park among a group of people, heard someone say they were "going to get that one," saw petitioner Overton pointing to Fuller, and saw several persons, including some petitioners, cross the street in her direction. Maurice Thomas testified that he saw the attack, identified some petitioners as participants, and later overheard petitioner Catlett say that they "had to kill her." Carrie Eleby and Linda Jacobs testified that they heard screams coming from an alley where a "gang of boys" was beating someone near a garage, approached the group, and saw some petitioners participating in the attack. Finally, the Government played a videotape of petitioner Yarborough's statement to detectives, describing how he was part of a large group that carried out the attack. None of the defendants rebutted the prosecution witnesses' claims that Fuller was killed in a group attack. The seven petitioners were convicted.

Long after their convictions became final, petitioners discovered that the Government had withheld evidence from the defense at the time of trial. In postconviction proceedings, they argued that seven specific pieces of withheld evidence were both favorable to the defense and material to their guilt under *Brady* v. *Maryland*, 373 U. S. 83. This evidence included the identity of a man seen running into the alley after the murder and stopping near the garage where Fuller's body had already been found; the statement of a passerby who claimed to hear groans coming from a closed garage; and evidence tending to impeach

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*Together with No. 15–1504, *Overton* v. *United States*, also on certiorari to the same court.

witnesses Eleby, Jacobs, and Thomas. The D. C. Superior Court rejected petitioners' *Brady* claims, finding that the withheld evidence was not material. The D. C. Court of Appeals affirmed.

Held: The withheld evidence is not material under *Brady*. Pp. 323–328.

(a) The Government does not contest petitioners' claim that the withheld evidence was "favorable to the defense." Petitioners and the Government, however, do contest the materiality of the undisclosed *Brady* information. Such "evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone* v. *Bell*, 556 U. S. 449, 469–470. "A 'reasonable probability' of a different result" is one in which the suppressed evidence "'undermines confidence in the outcome of the trial.'" *Kyles* v. *Whitley*, 514 U. S. 419, 434. To make that determination, this Court "evaluate[s]" the withheld evidence "in the context of the entire record." *United States* v. *Agurs*, 427 U. S. 97, 112. Pp. 323–325.

(b) Petitioners' main argument is that, had they known about the withheld evidence, they could have challenged the Government's basic group attack theory by raising an alternative theory, namely, that a single perpetrator (or two at most) had attacked Fuller. Considering the withheld evidence "in the context of the entire record," *Agurs*, *supra*, at 112, that evidence is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards.

A group attack was the very cornerstone of the Government's case, and virtually every witness to the crime agreed that Fuller was killed by a large group of perpetrators. It is not reasonably probable that the withheld evidence could have led to a different result at trial. Petitioners' problem is that their current alternative theory would have had to persuade the jury that both Alston and Bennett falsely confessed to being active participants in a group attack that never occurred; that Yarborough falsely implicated himself in that group attack and yet gave a highly similar account of how it occurred; that Thomas, an otherwise disinterested witness, wholly fabricated his story; that both Eleby and Jacobs likewise testified to witnessing a group attack that did not occur; and that Montgomery in fact did not see petitioners and others, as a group, identify Fuller as a target and leave together to rob her.

As for the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial. This is not to suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence, see *Wearry* v. *Cain*, 577 U. S. 385, 392–394. But in the context of this trial, with respect to these witnesses, the cumulative

effect of the withheld evidence is insufficient to undermine confidence in the jury's verdict, see *Smith* v. *Cain*, 565 U. S. 73, 75–76. Pp. 325–328.

116 A. 3d 894, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 330. GORSUCH, J., took no part in the consideration or decision of the cases.

John S. Williams argued the cause for petitioners in No. 15–1503. With him on the briefs were *Robert M. Cary*, *Kannon K. Shanmugam*, *Shawn Armbrust*, *Barry J. Pollack*, *Veronice A. Holt*, *Jenifer Wicks*, and *Donald P. Salzman*.

Deanna M. Rice argued the cause for petitioner in No. 15–1504. With her on the briefs were *Michael E. Antalics*, *Jonathan D. Hacker*, and *Kevin D. Feder*.

Deputy Solicitor General Dreeben argued the cause for the United States in both cases. With him on the brief were *Acting Solicitor General Francisco*, *Acting Assistant Attorney General Blanco*, *Ann O'Connell*, and *Elizabeth D. Collery*.†

JUSTICE BREYER delivered the opinion of the Court.

In *Brady* v. *Maryland*, 373 U. S. 83 (1963), this Court held that the government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment."

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Cato Institute by *Jeffrey M. Harris*, *Beth A. Williams*, *Damon C. Andrews*, and *Ilya Shapiro*; for the Center on Wrongful Convictions of Youth by *Laura H. Nirider*, *Steven A. Drizin*, and *Megan G. Crane*; for Former Prosecutors by *Julia M. Jordan*, *Elizabeth A. Cassady*, and *H. Rodgin Cohen*; for the Innocence Network by *Richard W. Mark*, *Amer S. Ahmed*, *Gabriel K. Gillett*, and *David Debold*; for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*, *David Porter*, and *Sarah O'Rourke Schrup*; for the Texas Public Policy Foundation et al. by *John D. Cline* and *Robert Henneke*; and for Wilfredo Lora by *Alan B. Morrison*.

Smith v. *Cain*, 565 U. S. 73, 75 (2012) (emphasis added) (summarizing *Brady* holding). In 1985 the seven petitioners in these cases were tried together in the Superior Court for the District of Columbia for the kidnaping, armed robbery, and murder of Catherine Fuller. Long after petitioners' convictions became final, it emerged that the Government possessed certain evidence that it failed to disclose to the defense. The only question before us here is whether that withheld evidence was "material" under *Brady.* The D. C. Superior Court, after a 16-day evidentiary hearing, determined that the withheld evidence was not material. *Catlett* v. *United States*, Crim. No. 8617–FEL–84 etc. (Aug. 6, 2012), App. to Pet. for Cert. in No. 15–1503, pp. 84a, n. 4, 81a–131a. The D. C. Court of Appeals reviewed the record, reached the same conclusion, and affirmed the Superior Court. 116 A. 3d 894 (2015). After reviewing the record, we reach the same conclusion as did the lower courts.

I

In these fact-intensive cases, we set out here only a basic description of the record facts along with our reasons for reaching our conclusion. We refer those who wish more detail to the opinions of the lower courts. App. to Pet. for Cert. in No. 15–1503, at 81a–131a; 116 A. 3d 894.

A

The Trial

On March 22, 1985, a grand jury indicted the seven petitioners—Timothy Catlett, Russell Overton, Levy Rouse, Kelvin Smith, Charles Turner, Christopher Turner, and Clifton Yarborough—and several others for the kidnaping, robbery, and murder of Catherine Fuller. The evidence produced at their joint trial showed that on October 1, 1984, at around 4:30 p.m., Catherine Fuller left her home to go shopping. At around 6 p.m., William Freeman, a street vendor, found Fuller's body inside an alley garage between

Eighth and Ninth Streets N. E., just a few blocks from Fuller's home. See Appendix, *infra* (showing a map of the area in which the murder was committed). Fuller had been robbed, severely beaten, and sodomized with an object that caused extensive internal injuries.

The Government advanced the theory at trial that Fuller had been attacked in the alley by a large group of individuals, including petitioners; codefendants Steve Webb, Alfonso Harris, and Felicia Ruffin; as well as by Calvin Alston and Harry Bennett. The Government's evidentiary centerpiece consisted of testimony by Alston and Bennett, who confessed to participating in the offense and who cooperated with the Government in return for leniency. Although the testimony of Alston and Bennett diverged on minor details, it was consistent in stating that, and describing how, Fuller was attacked by a sizable group of individuals, including petitioners and they themselves.

Alston testified that at about 4:10 p.m. on the day of the murder, he arrived in a park located on H Street between Eighth and Ninth Streets. He said he found a group of people gathered there. It included petitioners Levy Rouse, Russell Overton, Christopher Turner, Charles Turner, Kelvin Smith, Clifton Yarborough, and Timothy Catlett, as well as several codefendants and others. Those in the group were talking and singing while Catlett was banging out a beat. Alston suggested "getting paid" by robbing someone. Record A467. Catlett, Overton, Rouse, Smith, Charles Turner, Christopher Turner, Yarborough, and several others agreed. Alston pointed at Catherine Fuller, who was walking on the other side of H Street near the corner of H and Eighth Streets. Those in the group said they were "game for getting paid." *Id.*, at A471–A472. Alston, Rouse, Yarborough, and Charles Turner crossed H Street moving toward Eighth Street and followed Fuller down Eighth Street. The rest of the group crossed H Street and moved toward Ninth Street. When Alston's group approached Fuller, Charles

Turner shoved her into an alley that runs between Eighth and Ninth Streets. Charles Turner, Rouse, and Alston began punching Fuller. They were soon joined by Christopher Turner, Smith, and others. All of them continued to hit and kick Fuller until she fell to the ground. Rouse and Charles Turner then carried Fuller to the center of the alley and dropped her in front of a garage located at the point where the alley joins another, perpendicular alley that runs toward I Street. Someone dragged Fuller into the garage. Alston, Rouse, Charles Turner, Overton, Yarborough, and Catlett followed. Others stood outside. Members of the group tore Fuller's clothes off and struggled over her change purse. Overton and Charles Turner then held Fuller's legs, and Alston, Catlett, Harris, and Yarborough stood around her while Rouse sodomized her with a foot-long pipe. Shortly after, the group dispersed and left the alley.

Harry Bennett's testimony was similar. Bennett also described a group attack. He said that he had gone to the H Street park, where he saw Rouse, Overton, Christopher Turner, Smith, Catlett, and others gathered. Alston was talking to the group about "[g]etting paid" and said "let's go get that lady." *Id.*, at A368–A370. At that point Alston, Rouse, Overton, and Webb crossed H Street and approached Fuller, while Catlett, Christopher Turner, Charles Turner, and Harris followed in a separate group. Bennett added that he himself went to the corner of Eighth and H Streets to watch for police. He then went into the alley and joined the group in kicking and beating Fuller. He testified that at least 12 people were there, with some beating Fuller and others watching or picking up her jewelry. Overton then dragged Fuller into the garage, and Bennett, Rouse, Christopher Turner, Charles Turner, Catlett, Smith, Harris, and Webb followed, as did some "girls." *Id.*, at A402–A405. Alston and Steve Webb held Fuller's legs, and Rouse sodomized her with a pole. The group then dispersed from the garage and alley.

The Government presented several other witnesses who corroborated aspects of Alston's and Bennett's testimony, including the fact that Fuller was attacked by a group. Melvin Montgomery testified that he was in the H Street park on the afternoon of the murder. He saw Overton, Catlett, Rouse, Charles Turner, and others gathered there. The group was being noisy and singing a song about needing money. Somebody then said they were "going to get that one," and Montgomery saw that Overton was pointing to a woman standing on the corner of Eighth Street. App. 77–79. Overton, Catlett, Rouse, Charles Turner, and others crossed H Street. Some headed toward Eighth Street while others went toward Ninth Street. Montgomery did not follow them.

Maurice Thomas, then 14 years old, testified that he witnessed the attack itself. Thomas lived in the neighborhood and knew many of the defendants. As he was walking home, he glanced down the Eighth Street alley and saw a group surrounding Fuller. Thomas saw Catlett pat Fuller down and then hit her. He then saw everyone in the group join in hitting her. Thomas said he knew Catlett, Yarborough, Rouse, Charles Turner, Christopher Turner, and Smith and recognized them in the group. Thomas heard Fuller calling for help. He ran home where he found his aunt, who told him not to tell anyone what he saw. Later that day, Thomas saw Catlett at a corner store, and heard Catlett say to someone that they "had to kill her" because "she spotted someone he was with." *Id.*, at 127–128.

On the afternoon of the murder, Carrie Eleby and Linda Jacobs were looking for petitioner Smith, who was Eleby's boyfriend, near the corner of H and Eighth Streets. They heard screams coming from where a "gang of boys" was beating somebody near the garage in the alley. Record A539–A541. Eleby and Jacobs approached the group. Eleby recognized Christopher Turner, Smith, Catlett, Rouse, Overton, Alston, and Webb kicking Fuller while Yarborough stood

nearby. Both Eleby and Jacobs testified that they saw Rouse sodomize Fuller with a pole. Eleby added that Overton held Fuller's legs.

Finally, the Government played a videotape of a recorded statement that Yarborough, one of the petitioners, had given to detectives on December 9, 1984, approximately two months after the murder. Names were redacted. The video shows Yarborough describing in detail how he was part of a large group that forced Fuller into the alley, jointly robbed and assaulted her, and dragged her into the garage.

None of the defendants tried, through witnesses or other evidence, to rebut the prosecution's claim that Fuller was killed in a group attack. Rather, each petitioner pursued what was essentially a "not me, maybe them" defense, namely, that he was not part of the group that attacked Fuller. Each tried to establish this defense by impeaching witnesses who had placed that particular petitioner at the scene. Some, for example, provided evidence that Eleby and Jacobs had used PCP the day of Fuller's murder. Some also tried to establish alibis for the time of Fuller's death.

The jury convicted all seven petitioners, along with codefendant Steve Webb (who subsequently died). The jury acquitted codefendants Alfonso Harris and Felicia Ruffin. On direct appeal, the D. C. Court of Appeals affirmed petitioners' convictions, though it remanded for resentencing. *Catlett* v. *United States*, 545 A. 2d 1202, 1219 (1988). The trial court resentenced petitioners to the same amount of prison time. App. to Pet. for Cert. in No. 15–1503, at 82a, n. 2.

B

The Brady *Claims*

Beginning in 2010, petitioners pursued postconviction proceedings in which they sought to vacate their convictions or to be granted a new trial. App. to Pet. for Cert. in No. 15–1503, at 84a, n. 4. After petitioners' convictions became final, it emerged that the Government possessed certain evidence that it had withheld from the defense at the time of

trial. Petitioners discovered other withheld evidence in their review of the trial prosecutor's case file, which the Government turned over to petitioners in the course of the postconviction proceedings. Among other postconviction claims, petitioners contended that the withheld evidence was both favorable and material, entitling them to relief under *Brady*.

The D. C. Superior Court considered petitioners' *Brady* claims as part of a 16-day evidentiary hearing. It rejected those claims, finding that "none of the undisclosed information was material." App. to Pet. for Cert. in No. 15–1503, at 130a. The D. C. Court of Appeals affirmed. 116 A. 3d, at 901. It similarly concluded that the withheld evidence was not material under *Brady*. 116 A. 3d, at 913–926. At issue in those proceedings were the following seven specific pieces of evidence:

1. *The identity of James McMillan.* Freeman, the vendor who discovered Fuller's body in the alley garage, testified at trial that, while he was waiting for police to arrive, he saw two men run into the alley and stop near the garage for about five minutes before running away when an officer approached. One of the men had a bulge under his coat. Early in the trial, codefendant Harris' counsel had requested the identity of the two men to confirm that her client was not one of them. But the Government refused to disclose the men's identity.

In their postconviction review of the prosecutor's files, petitioners learned that Freeman had identified the two men he saw in the alley as James McMillan and Gerald Merkerson. McMillan lived in a house which opens in the back onto a connecting alley. In the weeks following Fuller's murder, but before petitioners' trial, McMillan was arrested for beating and robbing two women in the neighborhood. Neither attack included a sexual assault. Separately, petitioners learned that seven years after petitioners' trial, McMillan had robbed, sodomized, and murdered a young woman in an alley.

2. *The interview with Willie Luchie.* The prosecutor's notes also recorded an undisclosed interview with Willie Luchie, who told the prosecutor that he and three others walked through the alley on their way to an H Street liquor store between 5:30 and 5:45 p.m. on the evening of the murder. As the group walked by the garage, Luchie "heard several groans" and "remembers the doors to the garage being closed." App. 25. Another person in the group recalled "hear[ing] some moans," while the other two persons did not recall hearing anything unusual. *Id.*, at 27, 53; Record A992. The group continued walking without looking into the garage or otherwise investigating the source of the sounds. They did not see McMillan or any other person in the alley when they passed through.

3. *The interviews with Ammie Davis.* Undisclosed notes written by a police officer and the prosecutor refer to two interviews with Ammie Davis, who had been arrested for disorderly conduct a few weeks after Fuller's murder. Davis initially told a police investigator that she had seen another individual, James Blue, beat Fuller to death in the alley. Shortly thereafter, she said she only saw Blue grab Fuller and push her into the alley. Davis also said that a girlfriend, whom she did not name, accompanied her. She promised to call the investigator with more details, but she did not do so.

About 9 months later (after petitioners were indicted but approximately 11 weeks before their trial), a prosecutor learned of the investigator's notes and interviewed Davis. The prosecutor's notes state that Davis did not provide any more details, except to say that the girlfriend who accompanied her was nicknamed "'Shorty.'" App. 267–268. About two months later, which was shortly before petitioners' trial, Blue murdered Davis in an unrelated drug dispute.

During the postconviction evidentiary hearing, the prosecutor who interviewed Davis testified that he did not disclose Davis' statement because she acted "playful" and "not seri-

ous" during the interview and he found her to be "totally incredible." *Id.*, at 269–272. Additionally, the prosecutor stated that he knew Davis had previously falsely accused Blue of a different murder, and on another occasion had falsely accused a different individual of a different murder.

4. *Impeachment of Kaye Porter and Carrie Eleby.* Kaye Porter accompanied Eleby during an initial interview with homicide detectives. Porter agreed with Eleby that she had also heard Alston state that he was involved in robbing Fuller. An undisclosed prosecutorial note states that in a later interview with detectives, Porter stated that she did not actually recall hearing Alston's statement and just went along with what Eleby said. The note also states that Eleby likewise admitted that she had lied about Porter being present during Alston's statement and had asked Porter to support her.

5. *Impeachment of Carrie Eleby.* A prosecutor's undisclosed note revealed that Eleby said she had been high on PCP during a January 9, 1985, meeting with investigators.

6. *Impeachment of Linda Jacobs.* An undisclosed note of an interview with Linda Jacobs said that the detective had "question[ed] her hard" and that she had "vacillated" about what she saw. Record A1009. The prosecutor recalled that the detective "kept raising his voice" and was "smacking his hand on the desk" during the interview. *Id.*, at A2298–A2299.

7. *Impeachment of Maurice Thomas.* An undisclosed note of an interview with Maurice Thomas' aunt stated that she "does not recall Maurice ever telling her anything such as this." *Id.*, at A1010; see App. 295–296.

II

A

The Government does not contest petitioners' claim that the withheld evidence was "favorable to the accused, either because it is exculpatory, or because it is impeaching."

Strickler v. *Greene*, 527 U. S. 263, 281–282 (1999). Neither does the Government contest petitioners' claim that it "suppressed" the evidence, "either willfully or inadvertently." *Id.*, at 282. It does, as it must, concede that the *Brady* rule's "'overriding concern [is] with the justice of the finding of guilt,'" *United States* v. *Bagley*, 473 U. S. 667, 678 (1985) (quoting *United States* v. *Agurs*, 427 U. S. 97, 112 (1976)), and that the Government's "'interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,'" *Kyles* v. *Whitley*, 514 U. S. 419, 439 (1995) (quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935)). Consistent with these principles, the Government assured the Court at oral argument that subsequent to petitioners' trial, it has adopted a "generous policy of discovery" in criminal cases under which it discloses any "information that a defendant might wish to use." Tr. of Oral Arg. 47–48. As we have recognized, and as the Government agrees, *ibid.*, "[t]his is as it should be." *Kyles*, *supra*, at 439 (explaining that a "'prudent prosecutor['s]'" better course is to take care to disclose any evidence favorable to the defendant (quoting *Agurs*, *supra*, at 108)).

Petitioners and the Government, however, do contest the materiality of the undisclosed *Brady* information. "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone* v. *Bell*, 556 U. S. 449, 469–470 (2009) (citing *Bagley*, *supra*, at 682). "A 'reasonable probability' of a different result" is one in which the suppressed evidence "'undermines confidence in the outcome of the trial.'" *Kyles*, *supra*, at 434 (quoting *Bagley*, *supra*, at 678). In other words, petitioners here are entitled to a new trial only if they "establis[h] the prejudice necessary to satisfy the 'materiality' inquiry." *Strickler*, *supra*, at 282.

Consequently, the issue before us here is legally simple but factually complex. We must examine the trial record,

"evaluat[e]" the withheld evidence "in the context of the entire record," *Agurs*, *supra*, at 112, and determine in light of that examination whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," *Cone*, *supra*, at 470 (citing *Bagley*, *supra*, at 682). Having done so, we agree with the lower courts that there was no such reasonable probability.

B

Petitioners' main argument is that, had they known about McMillan's identity and Luchie's statement, they could have challenged the Government's basic theory that Fuller was killed in a group attack. Petitioners contend that they could have raised an alternative theory, namely, that a single perpetrator (or two at most) had attacked Fuller. According to petitioners, the groans that Luchie and his companion heard when they walked through the alley between 5:30 and 5:45 p.m. suggest that the attack was taking place inside the garage at that moment. The added facts that the garage was small and that Luchie's group saw no one in the alley could bolster a "single attacker" theory. Freeman's recollection that one garage door was open when he found Fuller's body at around 6 p.m., combined with Luchie's recollection that both doors were shut around 5:30 or 5:45 p.m., could suggest that one or two perpetrators were in the garage when Luchie walked by but left before Freeman arrived. McMillan's identity as one of the men Freeman saw enter the alley after Freeman discovered Fuller's body would have revealed McMillan's criminal convictions in the months before petitioners' trial. Petitioners argue that together, this evidence would have permitted the defense to knit together a theory that the group attack did not occur at all—and that it was actually McMillan, alone or with an accomplice, who murdered Fuller. They add that they could have used the investigators' failure to follow up on Ammie Davis' claim about James Blue, and the various pieces of withheld impeachment

evidence, to suggest that an incomplete investigation had ended up accusing the wrong persons.

Considering the withheld evidence "in the context of the entire record," however, *Agurs*, *supra*, at 112, we conclude that it is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards. As petitioners recognize, McMillan's guilt (or that of any other single, or near single, perpetrator) is inconsistent with petitioners' guilt only if there was no group attack. But a group attack was the very cornerstone of the Government's case. The witnesses may have differed on minor details, but virtually every witness to the crime itself agreed as to a main theme: that Fuller was killed by a large group of perpetrators. The evidence at trial was such that, even though petitioners knew that Freeman saw two men enter the alley after he discovered Fuller's body, that one appeared to have a bulky object hidden under his coat, and that both ran when the police arrived, none of the petitioners attempted to mount a defense that implicated those men as alternative perpetrators acting alone.

Is it reasonably probable that adding McMillan's identity, and Luchie's ambiguous statement that he heard groans but saw no one, could have led to a different result at trial? We conclude that it is not. The problem for petitioners is that their current alternative theory would have had to persuade the jury that both Alston and Bennett falsely confessed to being active participants in a group attack that never occurred; that Yarborough falsely implicated himself in that group attack and, through coordinated effort or coincidence, gave a highly similar account of how it occurred; that Thomas, a disinterested witness who recognized petitioners when he happened upon the attack and heard Catlett refer to it later that night, wholly fabricated his story; that both Eleby and Jacobs likewise testified to witnessing a group attack that did not occur; and that Montgomery in fact did

not see petitioners and others, as a group, identify Fuller as a target and leave the park to rob her.

With respect to the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial. For example, the jury heard multiple times about Eleby's frequent PCP use, including Eleby's own testimony that she and Jacobs had smoked PCP shortly before they witnessed Fuller's attack. In this context, it would not have surprised the jury to learn that Eleby used PCP on yet another occasion. Porter was a minor witness who was also impeached at trial with evidence about changes in her testimony over time, leaving little added significance to the note that she changed her mind about having agreed with Eleby's claims. The jury was also well aware of Jacobs' vacillation, as she was impeached on the stand with her shifting stories about what she witnessed. Knowledge that a detective raised his voice during an interview with her would have added little more. Nor do we see how the note about the statement by Thomas' aunt could have mattered much, given the facts that neither side chose to call the aunt as a witness and that the jury already knew, from Thomas' testimony, that his aunt had told him not to tell anyone what he saw. As for James Blue, petitioners argue that the investigators' delay in following up on Ammie Davis' statement could have led the jury to doubt the thoroughness of the investigation. But this likelihood is seriously undercut by notes about Davis' demeanor and lack of detail, and by her prior false accusations that Blue committed a different murder and that yet another person committed yet a different murder.

We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence. See *Wearry* v. *Cain*, 577 U. S. 385, 392–394 (2016) (*per curiam*). We conclude only that in the context of this trial, with respect to these wit-

nesses, the cumulative effect of the withheld evidence is insufficient to "'undermine confidence'" in the jury's verdict, *Smith*, 565 U. S., at 75–76 (quoting *Kyles*, 514 U. S., at 434; brackets omitted).

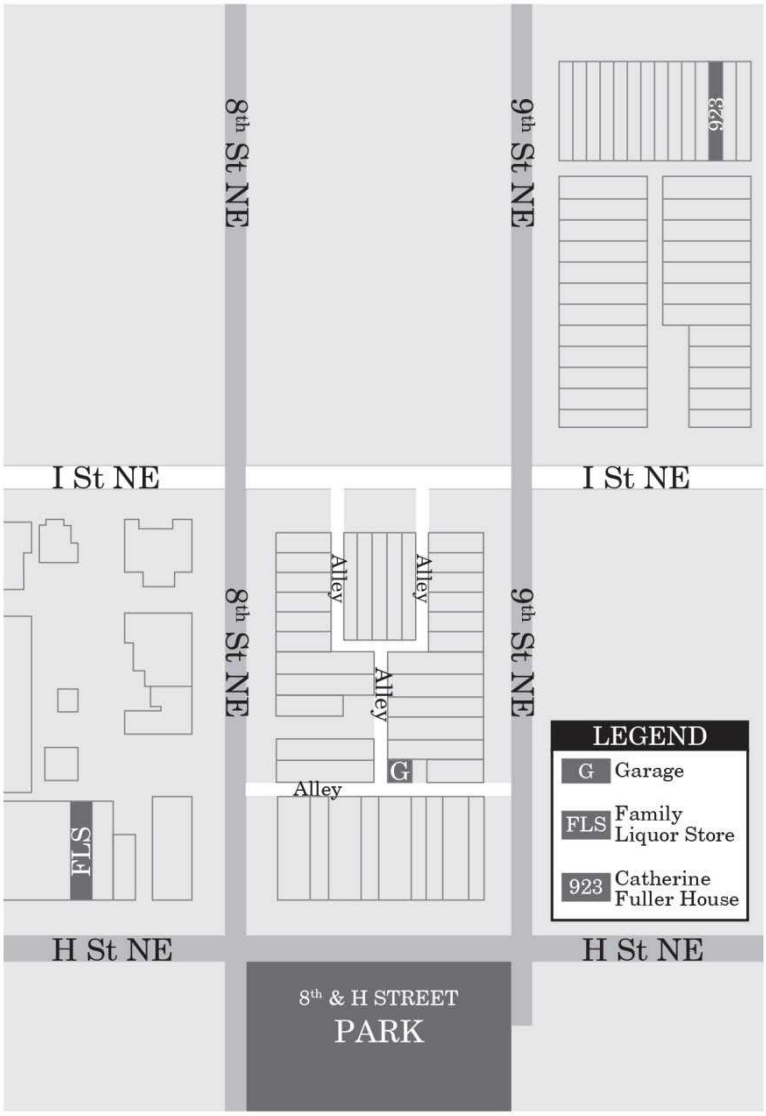
III

On the basis of our review of the record, we agree with the lower courts that there is not a "reasonable probability" that the withheld evidence would have changed the outcome of petitioners' trial, *id.*, at 434 (internal quotation marks omitted). The judgment of the D. C. Court of Appeals, accordingly, is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of these cases.

APPENDIX


8th St NE
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923
I St NE
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Alley
Alley
8th St NE
9th St NE
G
Alley
FLS
LEGEND
G Garage
FLS Family Liquor Store
923 Catherine Fuller House
H St NE
H St NE
8th & H STREET
PARK

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

Consider two criminal cases. In the first, the government accuses ten defendants of acting together to commit a vicious murder and robbery. At trial, each defendant accepts that the attack occurred almost exactly as the government describes—contending only that *he* wasn't part of the rampaging group. The defendants thus undermine each other's arguments at every turn. In the second case, the government makes the same arguments as before. But this time, all of the accused adopt a common defense, built around an alternative account of the crime. Armed with new evidence that someone else perpetrated the murder, the defendants vigorously dispute the government's gang-attack narrative and challenge the credibility of its investigation. The question this case presents is whether such a unified defense, relying on evidence unavailable in the first scenario, had a "reasonable probability" (less than a preponderance) of shifting even one juror's vote. *Cone* v. *Bell*, 556 U. S. 449, 452, 470 (2009); see *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995).

That is the relevant question because the Government here knew about but withheld the evidence of an alternative perpetrator—and so prevented the defendants from coming together to press that theory of the case. If the Government's non-disclosure was material, in the sense just described, this Court's decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963), demands a new trial. The Court today holds it was not material: In light of the evidence the Government offered, the majority argues, the transformed defense stood little chance of persuading a juror to vote to acquit. That conclusion is not indefensible: The Government put on quite a few witnesses who said that the defendants committed the crime. But in the end, I think the majority gets the answer in this case wrong. With the undisclosed evidence, the whole tenor of the trial would have changed. Rather than relying on a "not me, maybe them" defense, *ante*, at 320, all

the defendants would have relentlessly impeached the Government's (thoroughly impeachable) witnesses and offered the jurors a way to view the crime in a different light. In my view, that could well have flipped one or more jurors—which is all *Brady* requires.

Before explaining that view, I note that the majority and I share some common ground. We agree on the universe of exculpatory or impeaching evidence suppressed in this case: The majority's description of that evidence, and of the trial held without it, is scrupulously fair. See *ante*, at 316–320, 321–323. We also agree—as does the Government—that such evidence ought to be disclosed to defendants as a matter of course. See *ante*, at 324. Constitutional requirements aside, turning over exculpatory materials is a core responsibility of all prosecutors—whose professional interest and obligation is not to win cases but to ensure justice is done. See *Kyles*, 514 U. S., at 439. And finally, we agree on the legal standard by which to assess the materiality of undisclosed evidence for purposes of applying the constitutional rule: Courts are to ask whether there is a "reasonable probability" that disclosure of the evidence would have led to a different outcome—*i. e.*, an acquittal or hung jury rather than a conviction. See *ante*, at 325.

But I part ways with the majority in applying that standard to the evidence withheld in this case. That evidence falls into three basic categories, discussed below. Taken together, the materials would have recast the trial significantly—so much so as to "undermine[ ] confidence" in the guilty verdicts reached in their absence. *Kyles*, 514 U. S., at 434.

First, the Government suppressed information identifying a possible alternative perpetrator. The defendants knew that, shortly before the police arrived, witnesses had observed two men acting suspiciously near the alleyway garage where Catherine Fuller's body was found. But they did not know—because the Government never told them—that a

witness had identified one of those men as James McMillan. Equipped with that information, the defendants would have discovered that in the weeks following Fuller's murder, McMillan assaulted and robbed two other women of comparable age in the same neighborhood. And using *that* information, the defendants would have united around a common defense. They would all have pointed their fingers at McMillan (rather than at each other), arguing that he committed Fuller's murder as part of a string of similar crimes.

Second, the Government suppressed witness statements suggesting that one or two perpetrators—not a large group—carried out the attack. Those statements were given by two individuals who walked past the garage around the time of Fuller's death. They told the police that they heard groans coming from inside the garage; and one remarked that the garage's doors were closed at the time. Introducing that evidence at trial would have sown doubt about the Government's group-attack narrative, because that many people (as everyone agrees) couldn't have fit inside the small garage. And the questions thus raised would have further supported the defendants' theory that McMillan (and perhaps an accomplice) had committed the murder.

Third and finally, the Government suppressed a raft of evidence discrediting its investigation and impeaching its witnesses. Undisclosed files, for example, showed that the police took more than nine months to look into a witness's claim that a man named James Blue had murdered Fuller. Evidence of that kind of negligence could easily have led jurors to wonder about the competence of all the police work done in the case. Other withheld documents revealed that one of the Government's main witnesses was high on PCP when she met with investigators to identify participants in the crime—and that she also encouraged a friend to lie to the police to support her story. Using that sort of information, see also *ante*, at 323, the defendants could have undercut the Government's witnesses—even while presenting their own account of the murder.

In reply to all this, the majority argues that "none of the [accused] attempted to mount [an alternative-perpetrator] defense" and that such a defense would have challenged "the very cornerstone of the Government's case." *Ante,* at 326. But that just proves my point. The defendants didn't offer an alternative-perpetrator defense because the Government prevented them from learning what made it credible: that one of the men seen near the garage had a record of assaulting and robbing middle-aged women, and that witnesses would back up the theory that only one or two individuals had committed the murder. Moreover, that defense had game-changing potential exactly *because* it challenged the cornerstone of the Government's case. Without the withheld evidence, each of the defendants had little choice but to accept the Government's framing of the crime as a group attack—and argue only that *he* wasn't there. That meant the defendants often worked at cross-purposes. In particular, each defendant not identified by a Government witness sought to bolster that witness's credibility, no matter the harm to his co-defendants. As one defense lawyer remarked after another's supposed cross-examination of a Government witness: "They've got [an extra] prosecutor[ ] in the courtroom now." Saperstein & Walsh, 10 Defendants Complicate Trial, Washington Post, Nov. 17, 1985, p. A14, col. 1. Credible alternative-perpetrator evidence would have allowed the defendants to escape this cycle of mutually assured destruction. By enabling the defendants to jointly attack the Government's "cornerstone" theory, the withheld evidence would have reframed the case presented to the jury.

Still, the majority claims, an alternative-perpetrator defense would have had no realistic chance of changing the outcome because the Government had ample evidence of a group attack, including five witnesses who testified that they had participated in it or seen it happen. See *ante,* at 326–327. But the Government's case wasn't nearly the slam-dunk the majority suggests. No physical evidence tied any of the defendants to the crime—a highly surprising fact if, as the

Government claimed, more than ten people carried out a spur-of-the-moment, rampage-like attack in a confined space. And as even the majority recognizes, the Government's five eyewitnesses had some serious credibility deficits. See *ante*, at 327. Two had been charged as defendants, and agreed to testify only in exchange for favorable plea deals. See 116 A. 3d 894, 902 (D. C. 2015). Two admitted they were high on PCP at the time. See *id.*, at 903, 911; App. A535–A536, A649. (As noted above, one was also high when she later met with police to identify the culprits.) One was an eighth-grader whose own aunt contradicted parts of his trial testimony. See 116 A. 3d, at 903, 911. Even in the absence of an alternative account of the crime, the jury took more than a week—and many dozens of votes—to reach its final verdict. Had the defendants offered a unified counter-narrative, based on the withheld evidence, one or more jurors could well have concluded that the Government had not proved its case beyond a reasonable doubt.

Again, the issue here concerns the difference between two criminal cases. The Government got the case it most wanted—the one in which the defendants, each in an effort to save himself, formed something of a circular firing squad. And the Government avoided the case it most feared—the one in which the defendants acted jointly to show that a man known to assault women like Fuller committed her murder. The difference between the two cases lay in the Government's files—evidence of obvious relevance that prosecutors nonetheless chose to suppress. I think it could have mattered to the trial's outcome. For that reason, I respectfully dissent.

Syllabus

MASLENJAK *v.* UNITED STATES

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

No. 16–309. Argued April 26, 2017—Decided June 22, 2017

Petitioner Divna Maslenjak is an ethnic Serb who resided in Bosnia during the 1990's, when a civil war divided the new country. In 1998, she and her family sought refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution from both sides of the national rift: Muslims would mistreat them because of their ethnicity, and Serbs would abuse them because Maslenjak's husband had evaded service in the Bosnian Serb Army by absconding to Serbia. Persuaded of the Maslenjaks' plight, American officials granted them refugee status. Years later, Maslenjak applied for U. S. citizenship. In the application process, she swore that she had never given false information to a government official while applying for an immigration benefit or lied to an official to gain entry into the United States. She was naturalized as a U. S. citizen. But it soon emerged that her professions of honesty were false: Maslenjak had known all along that her husband spent the war years not secreted in Serbia, but serving as an officer in the Bosnian Serb Army.

The Government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U. S. C. § 1425(a). According to the Government's theory, Maslenjak violated § 1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U. S. C. § 1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding. The District Court instructed the jury that, to secure a conviction under § 1425(a), the Government need not prove that Maslenjak's false statements were material to, or influenced, the decision to approve her citizenship application. The Sixth Circuit affirmed the conviction, holding that if Maslenjak made false statements violating § 1015(a) and procured naturalization, then she also violated § 1425(a).

Held:

1. The text of § 1425(a) makes clear that, to secure a conviction, the Government must establish that the defendant's illegal act played a role in her acquisition of citizenship. To "procure . . . naturalization" means to obtain it. And the adverbial phrase "contrary to law" specifies *how* a person must procure naturalization so as to run afoul of the statute:

illegally. Thus, someone "procure[s], contrary to law, naturalization" when she obtains citizenship illegally. As ordinary usage demonstrates, the most natural understanding of that phrase is that the illegal act must have somehow contributed to the obtaining of citizenship. To get citizenship unlawfully is to get it through an unlawful means—and that is just to say that an illegality played some role in its acquisition.

The Government's contrary view—that § 1425(a) requires only a violation in the course of procuring naturalization—falters on the way language naturally works. Suppose that an applicant for citizenship fills out the paperwork in a government office with a knife tucked away in her handbag. She has violated the law against possessing a weapon in a federal building, and she has done so in the course of procuring citizenship, but nobody would say she has "procure[d]" her citizenship "contrary to law." That is because the violation of law and the acquisition of citizenship in that example are merely coincidental: The one has no causal relation to the other. Although the Government attempts to define such examples out of the statute, that effort falls short for multiple reasons. Most important, the Government's attempted carve-out does nothing to alter the linguistic understanding that gives force to the examples the Government would exclude. Under ordinary rules of language usage, § 1425(a) demands a causal or means-end connection between a legal violation and naturalization.

The broader statutory context reinforces the point, because the Government's reading would create a profound mismatch between the requirements for naturalization and those for denaturalization: Some legal violations that do not justify *denying* citizenship would nonetheless justify *revoking* it later. For example, lies told out of "embarrassment, fear, or a desire for privacy" (rather than "for the purpose of obtaining [immigration] benefits") are not generally disqualifying under the statutory requirement of "good moral character." *Kungys* v. *United States*, 485 U. S. 759, 780; 8 U. S. C. § 1101(f)(6). But under the Government's reading of § 1425(a), any lie told in the naturalization process would provide a basis for rescinding citizenship. The Government could thus take away on one day what it was required to give the day before. And by so unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which this Court would need far stronger textual support to believe Congress intended. The statute Congress passed, most naturally read, strips a person of citizenship not when she committed any illegal act during the naturalization process, but only when that act played some role in her naturalization. Pp. 341–346.

2. When the underlying illegality alleged in a § 1425(a) prosecution is a false statement to government officials, a jury must decide whether

the false statement so altered the naturalization process as to have influenced an award of citizenship. Because the entire naturalization process is set up to provide little room for subjective preferences or personal whims, that inquiry is properly framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.

If the facts the defendant misrepresented are themselves legally disqualifying for citizenship, the jury can make quick work of that inquiry. In such a case, the defendant's lie must have played a role in her naturalization. But that is not the only time a jury can find that a defendant's lies had the requisite bearing on a naturalization decision, because lies can also throw investigators off a trail leading to disqualifying facts. When relying on such an investigation-based theory, the Government must make a two-part showing. Initially, the Government must prove that the misrepresented fact was sufficiently relevant to a naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation. *Kungys,* 485 U. S., at 774, n. 9. If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit. The Government need not show definitively that its investigation would have unearthed a disqualifying fact. It need only establish that the investigation "would predictably have disclosed" some legal disqualification. *Id.,* at 774. If that is so, the defendant's misrepresentation contributed to the citizenship award in the way § 1425(a) requires. This demanding but still practicable causal standard reflects the real-world attributes of cases premised on what an unhindered investigation would have found.

When the Government can make its two-part showing, the defendant may overcome it by establishing that she was qualified for citizenship (even though she misrepresented facts that suggested the opposite). Thus, whatever the Government shows with respect to a thwarted investigation, qualification for citizenship is a complete defense to a prosecution under § 1425(a). Pp. 346–351.

3. Measured against this analysis, the jury instructions in this case were in error. The jury needed to find more than an unlawful false statement. However, it was not asked to—and so did not—make any of the necessary determinations. The Government's assertion that any instructional error was harmless is left for resolution on remand. Pp. 352–353.

821 F. 3d 675, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 353. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 354.

Christopher Landau argued the cause for petitioner. With him on the briefs were *Patrick Haney* and *Jeff Nye*.

Robert A. Parker argued the cause for the United States. With him on the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Blanco*, *Deputy Solicitor General Dreeben*, and *John P. Taddei*.*

JUSTICE KAGAN delivered the opinion of the Court.

A federal statute, 18 U. S. C. § 1425(a), makes it a crime to "knowingly procure[ ], contrary to law, the naturalization of any person." And when someone is convicted under § 1425(a) of unlawfully procuring her *own* naturalization, her citizenship is automatically revoked. See 8 U. S. C. § 1451(e). In this case, we consider what the Government must prove to obtain such a conviction. We hold that the Government must establish that an illegal act by the defendant played some role in her acquisition of citizenship. When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result.

I

Petitioner Divna Maslenjak is an ethnic Serb who resided in Bosnia during the 1990's, when a civil war between Serbs and Muslims divided the new country. In 1998, she and her family (her husband Ratko Maslenjak and their two children)

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*Briefs of *amici curiae* urging reversal were filed for Asian Americans Advancing Justice|AAJC et al. by *Theodore A. Howard* and *Cecelia Chang*; and for the Immigrant Defense Project et al. by *Nancy Morawetz*.

met with an American immigration official to seek refugee status in the United States. Interviewed under oath, Maslenjak explained that the family feared persecution in Bosnia from both sides of the national rift. Muslims, she said, would mistreat them because of their ethnicity. And Serbs, she testified, would abuse them because her husband had evaded service in the Bosnian Serb Army by absconding to Serbia—where he remained hidden, apart from the family, for some five years. See App. to Pet. for Cert. 58a–60a. Persuaded of the Maslenjaks' plight, American officials granted them refugee status, and they immigrated to the United States in 2000.

Six years later, Maslenjak applied for naturalization. Question 23 on the application form asked whether she had ever given "false or misleading information" to a government official while applying for an immigration benefit; question 24 similarly asked whether she had ever "lied to a[ ] government official to gain entry or admission into the United States." *Id.*, at 72a. Maslenjak answered "no" to both questions, while swearing under oath that her replies were true. *Id.*, at 72a, 74a. She also swore that all her written answers were true during a subsequent interview with an immigration official. In August 2007, Maslenjak was naturalized as a U. S. citizen.

But Maslenjak's professions of honesty were false: In fact, she had made up much of the story she told to immigration officials when seeking refuge in this country. Her fiction began to unravel at around the same time she applied for citizenship. In 2006, immigration officials confronted Maslenjak's husband Ratko with records showing that he had not fled conscription during the Bosnian civil war; rather, he had served as an officer in the Bosnian Serb Army. And not only that: He had served in a brigade that participated in the Srebrenica massacre—a slaughter of some 8,000 Bosnian Muslim civilians. Within a year, the Government convicted Ratko on charges of making false statements on immigration

documents. The newly naturalized Maslenjak attempted to prevent Ratko's deportation. During proceedings on that matter, Maslenjak admitted she had known all along that Ratko spent the war years not secreted in Serbia but fighting in Bosnia.

As a result, the Government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U. S. C. § 1425(a). According to the Government's theory, Maslenjak violated § 1425(a) because, in the course of procuring her naturalization, she broke another law: 18 U. S. C. § 1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding. The false statements the Government invoked were Maslenjak's answers to questions 23 and 24 on the citizenship application (stating that she had not lied in seeking refugee status) and her corresponding statements in the citizenship interview. Those statements, the Government argued to the District Court, need not have affected the naturalization decision to support a conviction under § 1425(a). The court agreed: Over Maslenjak's objection, it instructed the jury that a conviction was proper so long as the Government "prove[d] that one of [the] defendant's statements was false"—even if the statement was not "material" and "did not influence the decision to approve [her] naturalization." App. to Pet. for Cert. 86a. The jury returned a guilty verdict; and the District Court, based on that finding, stripped Maslenjak of her citizenship. See 8 U. S. C. § 1451(e).

The United States Court of Appeals for the Sixth Circuit affirmed the conviction. As relevant here, the Sixth Circuit upheld the District Court's instructions that Maslenjak's false statements need not have influenced the naturalization decision. If, the Court of Appeals held, Maslenjak made false statements violating § 1015(a) and she procured naturalization, then she also violated § 1425(a)—irrespective of whether the false statements played any role in her obtaining citizenship. See 821 F. 3d 675, 685–686 (2016). That

decision created a conflict in the Courts of Appeals.[1] We granted certiorari to resolve it, 580 U. S. 1089 (2017), and we now vacate the Sixth Circuit's judgment.

II

A

Section 1425(a), the parties agree, makes it a crime to commit some other illegal act in connection with naturalization. But the parties dispute the nature of the required connection. Maslenjak argues that the relationship must be "causal" in kind: A person "procures" her naturalization "contrary to law," she contends, only if a predicate crime in some way "contribut[ed]" to her gaining citizenship. Brief for Petitioner 21. By contrast, the Government proposes a basically chronological link: Section 1425(a), it urges, "punishes the commission of other violations of law *in the course of* procuring naturalization"—even if the illegality could not have had any effect on the naturalization decision. Brief for United States 14 (emphasis added). We conclude that Maslenjak has the better of this argument.

We begin, as usual, with the statutory text. In ordinary usage, "to procure" something is "to get possession of" it. Webster's Third New International Dictionary 1809 (2002); accord, Black's Law Dictionary 1401 (10th ed. 2014) (defining "procure" as "[t]o obtain (something), esp. by special effort or means"). So to "procure . . . naturalization" means to obtain naturalization (or, to use another word, citizenship). The adverbial phrase "contrary to law," wedged in between "procure" and "naturalization," then specifies *how* a person

[1] Compare 821 F. 3d 675, 685–686 (CA6 2016) (case below), with *United States* v. *Munyenyezi*, 781 F. 3d 532, 536 (CA1 2015) (requiring the Government to make some showing that a misrepresentation mattered to the naturalization decision); *United States* v. *Latchin*, 554 F. 3d 709, 712–715 (CA7 2009) (same); *United States* v. *Alferahin*, 433 F. 3d 1148, 1154–1156 (CA9 2006) (same); *United States* v. *Aladekoba*, 61 Fed. Appx. 27, 28 (CA4 2003) (same).

must procure naturalization so as to run afoul of the statute: in contravention of the law—or, in a word, illegally. Putting the pieces together, someone "procure[s], contrary to law, naturalization" when she obtains citizenship illegally.

What, then, does that whole phrase mean? The most natural understanding is that the illegal act must have somehow contributed to the obtaining of citizenship. Consider if someone said to you: "John obtained that painting illegally." You might imagine that he stole it off the walls of a museum. Or that he paid for it with a forged check. Or that he impersonated the true buyer when the auction house delivered it. But in all events, you would imagine illegal acts in some kind of means-end relation—or otherwise said, in some kind of causal relation—to the painting's acquisition. If someone said to you, "John obtained that painting illegally, but his unlawful acts did not play any role in his obtaining it," you would not have a clue what the statement meant. You would think it nonsense—or perhaps the opening of a riddle. That is because if no illegal act contributed at all to getting the painting, then the painting would not have been gotten illegally. And the same goes for naturalization. If whatever illegal conduct occurring within the naturalization process was a causal dead-end—if, so to speak, the ripples from that act could not have reached the decision to award citizenship—then the act cannot support a charge that the applicant obtained naturalization illegally. The conduct, though itself illegal, would not also make the obtaining of citizenship so. To get citizenship unlawfully, we understand, is to get it through an unlawful means—and that is just to say that an illegality played some role in its acquisition.[2]

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[2] To be fair, the idea of "obtaining citizenship illegally" has one other possible meaning, but no one defends it here because it does not fit with the rest of § 1425. On this alternative reading, a person would violate § 1425(a) by obtaining citizenship without the requisite legal qualifications—regardless of whether she committed another illegal act in the naturalization process. To vary our earlier example, suppose someone told

The Government's contrary view—that § 1425(a) requires only a "violation[ ] of law in the course of procuring naturalization"—falters on the way language naturally works. Brief for United States 14. Return for a moment to our artwork example. Imagine this time that John made an illegal turn while driving to the auction house to purchase a painting. Would you say that he had "procured the painting illegally" because he happened to violate the law in the course of obtaining it? Not likely. And again, the same is true with respect to naturalization. Suppose that an applicant for citizenship fills out the necessary paperwork in a government office with a knife tucked away in her handbag (but never mentioned or used). She has violated the law—specifically, a statute criminalizing the possession of a

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you that John procured a gun illegally. You might think that meant John got the gun through independently unlawful conduct (*e. g.*, he held up a gun store), as in the case of the painting. But you might instead think that John was just not legally qualified to take possession of a gun—because, for example, he once committed a felony. That alternative interpretation is plausible with respect to goods that not everyone is eligible to obtain, like guns—or like naturalization. And indeed, we have interpreted a civil statute closely resembling § 1425(a)—which authorizes denaturalization when, *inter alia*, citizenship is "illegally procured," 8 U. S. C. § 1451(a)—to cover that qualifications-based species of illegality. See *Fedorenko* v. *United States*, 449 U. S. 490, 506 (1981). But neither party urges that reading here, and for good reason. Unlike its civil analogue, § 1425(a) has a companion provision—§ 1425(b)—that makes it a crime to "procure or obtain naturalization" for "[one]self or another person not entitled thereto." If obtaining citizenship without legal entitlement were enough to violate § 1425(a), then that highly specific language in § 1425(b) would be superfluous. Rather than reading those words to do no work, in violation of ordinary canons of statutory construction, we understand Congress to have defined two separate crimes in § 1425: Assuming the appropriate *mens rea*, subsection (a) covers illegal means of procurement, as described above, while subsection (b) covers simple lack of qualifications. As we will explain, however, questions relating to citizenship qualifications play a significant role when applying § 1425(a)'s causal standard in cases (like this one) predicated on false statements. See *infra*, at 347–348.

weapon in a federal building. See 18 U. S. C. § 930. And she has surely done so "in the course of" procuring citizenship. But would you say, using English as you ordinarily would, that she has "procure[d]" her citizenship "contrary to law" (or, as you would really speak, "illegally")? Once again, no. That is because the violation of law and the acquisition of citizenship are in that example merely coincidental: The one has no causal relation to the other.

The Government responds to such examples by seeking to define them out of the statute, but that effort falls short for multiple reasons. According to the Government, the laws to which § 1425(a) speaks are only laws "pertaining to naturalization." Brief for United States 20. But to begin with, that claim fails on its own terms. The Government's proposed limitation has no basis in § 1425(a)'s text (which refers to "law" generally); it is a *deus ex machina*—rationalized only by calling it "necessary," Tr. of Oral Arg. 39, and serving only to get the Government out of a tight interpretive spot. Indeed, the Government does not really buy its own argument: At another point, it asserts that an applicant for citizenship can violate § 1425(a) by bribing a government official, see Brief for United States 16—even though the law against that conduct has nothing in particular to do with naturalization. See 18 U. S. C. § 201(b)(1). And still more important, the Government's (sometime) carve-out does nothing to alter the linguistic understanding that gives force to the examples the Government would exclude—and that applies just as well to every application that would remain. Laws pertaining to naturalization, in other words, are subject to the same rules of language usage as laws concerning other subjects. And under those rules, as we have shown, § 1425(a) demands a means-end connection between a legal violation and naturalization. See *supra*, at 342. Take § 1015(a)'s bar on making false statements in connection with naturalization—the prototypical § 1425(a) predicate, and the one at issue here. If such a statement (in an interview, say)

has no bearing at all on the decision to award citizenship, then it cannot render that award—as § 1425(a) requires—illegally gained.

The broader statutory context reinforces that point, because the Government's reading would create a profound mismatch between the requirements for naturalization on the one hand and those for denaturalization on the other. See *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991) ("[I]t is our role to make sense rather than nonsense out of the *corpus juris*"). The immigration statute requires all applicants for citizenship to have "good moral character," and largely defines that term through a list of unlawful or unethical behaviors. 8 U. S. C. §§ 1427(a)(3), 1101(f).[3] On the Government's theory, some legal violations that do not justify *denying* citizenship under that definition would nonetheless justify *revoking* it later. Again, false statements under § 1015(a) offer an apt illustration. The statute's description of "good moral character" singles out a specific class of lies—"false testimony for the purpose of obtaining [immigration] benefits"—as a reason to deny naturalization. 8 U. S. C. § 1101(f)(6). By contrast, "[w]illful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character"—and so are not generally disqualifying. *Kungys* v. *United States*, 485 U. S. 759, 780 (1988) (quoting Supplemental Brief for United States 12). But under the Government's reading of § 1425(a), a lie told in the naturalization process—even out of embarrassment, fear, or a desire for privacy—would always provide a basis for rescinding citizenship. The Government could thus take away on one day what it was required to give the day before.

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[3] The list of disqualifying conduct is wide-ranging. See, *e. g.*, 8 U. S. C. § 1101(f)(4) (illegal gambling); § 1101(f)(8) (aggravated felony conviction); § 1101(f)(9) (participation in genocide).

And by so wholly unmooring the revocation of citizenship from its award, the Government opens the door to a world of disquieting consequences—which we would need far stronger textual support to believe Congress intended. Consider the kinds of questions a person seeking citizenship confronts on the standard application form. Says one: "Have you **EVER** been . . . in any way associated with[ ] any organization, association, fund, foundation, party, club, society, or similar group[?]" Form N–400, Application for Naturalization 12 (2016), online at http://www.uscis.gov/n-400 (as last visited June 22, 2017) (bold in original). Asks another: "Have you **EVER** committed . . . a crime or offense for which you were **NOT** arrested?" *Id.*, at 14. Suppose, for reasons of embarrassment or what-have-you, a person concealed her membership in an online support group or failed to disclose a prior speeding violation. Under the Government's view, a prosecutor could scour her paperwork and bring a § 1425(a) charge on that meager basis, even many years after she became a citizen. That would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security. Small wonder that Congress, in enacting § 1425(a), did not go so far as the Government claims. The statute it passed, most naturally read, strips a person of citizenship not when she committed any illegal act during the naturalization process, but only when that act played some role in her naturalization.

B

That conclusion leaves us with a more operational question: How should § 1425(a)'s requirement of causal influence apply in practice, when charges are brought under that law? [4]

[4] JUSTICE GORSUCH would stop before answering that question, see *post*, at 354 (opinion concurring in part and concurring in judgment), but we think that such a halfway-decision would fail to fulfill our responsibility to both parties and courts. The Government needs to know what prosecutions to bring; defendants need to know what defenses to offer; and district

Because the proper analysis may vary with the nature of the predicate crime, we confine our discussion of that issue to the kind of underlying illegality alleged here: a false statement made to government officials. Such conduct can affect a naturalization decision in a single, significant way—by distorting the Government's understanding of the facts when it investigates, and then adjudicates, an application. So the issue a jury must decide in a case like this one is whether a false statement sufficiently altered those processes as to have influenced an award of citizenship.

The answer to that question, like the naturalization decision itself, turns on objective legal criteria. Congress has prescribed specific eligibility standards for new citizens, respecting such matters as length of residency and "physical[ ] presen[ce]," understanding of English and American government, and (as previously mentioned) "good moral character," with all its many specific components. See 8 U. S. C. §§ 1423(a), 1427(a); *supra*, at 345. Government officials are obligated to apply that body of law faithfully—granting naturalization when the applicable criteria are satisfied, and denying it when they are not. See *Kungys*, 485 U. S., at 774, n. 9 (opinion of Scalia, J.); *id.*, at 787 (Stevens, J., concurring in judgment). And to ensure right results are reached, a

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courts need to know how to instruct juries. Telling them only "§ 1425(a) has something to do with causation" would not much help them make those decisions. And we are well-positioned to provide further guidance. The parties have had every opportunity to address the nature of the statute's causal standard, and both gave us considered views about how the law should work in practice. See, *e. g.*, Brief for Petitioner 23–24, 30; Brief for United States 17–18, 48; Tr. of Oral Arg. 14–16, 23–25, 39–46. Moreover, many lower courts have already addressed those same issues—including one that has called this Court's failure to provide clear guidance "maddening[ ]." *Latchin*, 554 F. 3d, at 713; see, *e. g.*, *id.*, at 713–714; *Munyenyezi*, 781 F. 3d, at 536–538; *Alferahin*, 433 F. 3d, at 1155; *Aladekoba*, 61 Fed. Appx., at 27–28; *United States* v. *Acheampong*, 2015 WL 926113, *2–*3 (D Kan., Mar. 3, 2015); *United States* v. *Odeh*, 2014 WL 5473042, *7–*8 (ED Mich., Oct. 27, 2014).

court can reverse such a determination, at an applicant's request, based on its "own findings of fact and conclusions of law." 8 U. S. C. § 1421(c). The entire system, in other words, is set up to provide little or no room for subjective preferences or personal whims. Because that is so, the question of what any individual decisionmaker might have done with accurate information is beside the point: The defendant in a § 1425(a) case should neither benefit nor suffer from a wayward official's deviations from legal requirements. Accordingly, the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law.

If the facts the defendant misrepresented are themselves disqualifying, the jury can make quick work of that inquiry. In such a case, there is an obvious causal link between the defendant's lie and her procurement of citizenship. To take an example: An applicant for citizenship must be physically present in the United States for more than half of the five-year period preceding her application. See 8 U. S. C. § 1427(a)(1). Suppose a defendant misrepresented her travel history to convey she had met that requirement, when in fact she had not. The Government need only expose that lie to establish that she obtained naturalization illegally—for had she told the truth instead, the official would have promptly denied her application. Or consider another, perhaps more common case stemming from the "good moral character" criterion. See § 1427(a)(3); *supra*, at 345. That phrase is defined to exclude any person who has been convicted of an aggravated felony. See § 1101(f)(8). If a defendant falsely denied such a conviction, she too would have gotten her citizenship by means of a lie—for otherwise the outcome would have been different. In short, when the defendant misrep-

resents facts that the law deems incompatible with citizenship, her lie must have played a role in her naturalization.

But that is not the only time a jury can find that a defendant's lie had the requisite bearing on a naturalization decision. For even if the true facts lying behind a false statement would not "in and of themselves justify denial of citizenship," they could have "led to the discovery of other facts which would" do so. *Chaunt* v. *United States*, 364 U. S. 350, 352–353 (1960). We previously addressed that possibility when considering the civil statute that authorizes the Government to revoke naturalization. See *Kungys*, 485 U. S., at 774–777 (opinion of Scalia, J.) (interpreting 8 U. S. C. § 1451(a)).[5] As we explained in that context, a person whose lies throw investigators off a trail leading to disqualifying facts gets her citizenship by means of those lies—no less than if she had denied the damning facts at the very end of the trail. See *ibid.*

When relying on such an investigation-based theory, the Government must make a two-part showing to meet its burden. As an initial matter, the Government has to prove that the misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, "seeking only evidence concerning citizenship qualifications," to undertake further investigation. *Id.*, at 774, n. 9. If that much is true, the inquiry turns to the prospect that such an investigation would have borne disqualifying fruit. As to that second link in the causal chain, the Government need not show definitively that its investigation would have unearthed a disqualifying fact (though, of course, it may). Rather, the Government need

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[5] *Kungys* concerned the part of that statute providing for the revocation of citizenship "procured by concealment of a material fact or by willful misrepresentation." § 1451(a). As noted earlier, the same statute includes a prong covering citizenship that is "illegally procured." See n. 2, *supra*.

only establish that the investigation "would predictably have disclosed" some legal disqualification. *Id.*, at 774; see *id.*, at 783 (Brennan, J., concurring). If that is so, the defendant's misrepresentation contributed to the citizenship award in the way we think § 1425(a) requires.

That standard reflects two real-world attributes of cases premised on what an unhindered investigation would have found. First is the difficulty of proving that a hypothetical inquiry would have led to some disqualifying discovery, often several years after the defendant told her lies. As witnesses and other evidence disappear, the Government's effort to reconstruct the course of a "could have been" investigation confronts ever-mounting obstacles. See *id.*, at 779 (opinion of Scalia, J.). Second, and critical to our analysis, is that the defendant—not the Government—bears the blame for that evidentiary predicament. After all, the inquiry cannot get this far unless the defendant made an unlawful false statement and, by so doing, obstructed the normal course of an investigation. See *id.*, at 783 (Brennan, J., concurring) (emphasizing that "the citizen's misrepresentation [in a naturalization proceeding] necessarily frustrated the Government's investigative efforts"); see also *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created").

Section 1425(a) is best read to take those exigencies and equities into account, by enabling the Government (as just described) to rest on disqualifications that a thwarted investigation predictably would have uncovered. A yet-stricter causal requirement, demanding proof positive that a disqualifying fact would have been found, sets the bar so high that "we cannot conceive that Congress intended" that result. *Kungys*, 485 U. S., at 777 (opinion of Scalia, J.). And nothing in the statutory text requires that approach. While § 1425(a) clearly imports some kind of causal or means-end

relation, see *supra,* at 342–346, Congress left that relation's precise character unspecified. Cf. *Burrage* v. *United States*, 571 U. S. 204, 214 (2014) (noting that courts have not always construed criminal statutes to "require[ ] strict but-for causality," and have greater reason to reject such a reading when the laws do not use language like "results from" or "because of"). The open-endedness of the statutory language allows, indeed supports, our adoption of a demanding but still practicable causal standard.

Even when the Government can make its two-part showing, however, the defendant may be able to overcome it. Section 1425(a) is not a tool for denaturalizing people who, the available evidence indicates, were actually qualified for the citizenship they obtained. When addressing the civil denaturalization statute, this Court insisted on a similar point: We provided the defendant with an opportunity to rebut the Government's case "by showing, through a preponderance of the evidence, that the statutory requirement as to which [a lie] had a natural tendency to produce a favorable decision was in fact met." *Kungys*, 485 U. S., at 777 (opinion of Scalia, J.) (emphasis deleted); accord, *id.*, at 783–784 (Brennan, J., concurring). Or said otherwise, we gave the defendant a chance to establish that she was qualified for citizenship, and held that she could not be denaturalized if she did so—even though she concealed or misrepresented facts that suggested the opposite. And indeed, all our denaturalization decisions share this crucial feature: We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. See, *e. g.*, *Fedorenko* v. *United States*, 449 U. S. 490, 505–507 (1981); *Costello* v. *United States*, 365 U. S. 265, 269–272 (1961); *Schneiderman* v. *United States*, 320 U. S. 118, 122–123 (1943). We will not start now. Whatever the Government shows with respect to a thwarted investigation, qualification for citizenship is a complete defense to a prosecution brought under § 1425(a).

III

Measured against all we have said, the jury instructions in this case were in error. As earlier noted, the District Court told the jury that it could convict based on any false statement in the naturalization process (*i. e.*, any violation of § 1015(a)), no matter how inconsequential to the ultimate decision. See App. to Pet. for Cert. 86a; *supra*, at 340. But as we have shown, the jury needed to find more than an unlawful false statement. Recall that Maslenjak's lie in the naturalization process concerned her prior statements to immigration officials: She swore that she had been honest when applying for admission as a refugee, but in fact she had not. See *supra*, at 339–340. The jury could have convicted if that earlier dishonesty (*i. e.*, the thing she misrepresented when seeking citizenship) were itself a reason to deny naturalization—say, because it counted as "false testimony for the purpose of obtaining [immigration] benefits" and thus demonstrated bad moral character. See *supra*, at 348–349. Or else, the jury could have convicted if (1) knowledge of that prior dishonesty would have led a reasonable official to make some further investigation (say, into the circumstances of her admission), (2) that inquiry would predictably have yielded a legal basis for rejecting her citizenship application, and (3) Maslenjak failed to show that (notwithstanding such an objective likelihood) she was in fact qualified to become a U. S. citizen. See *supra*, at 349–351. This jury, however, was not asked to—and so did not—make any of those determinations. Accordingly, Maslenjak was not convicted by a properly instructed jury of "procur[ing], contrary to law, [her] naturalization."

The Government asserts that any instructional error in this case was harmless. "[H]ad officials known the truth," the Government asserts, "it would have affected their decision to grant [Maslenjak] citizenship." Brief for United States 12. Unsurprisingly, Maslenjak disagrees. See Tr. of Oral Arg. 6–8; Reply to Brief in Opposition 9–10. In keep-

ing with our usual practice, we leave that dispute for resolution on remand. See, *e. g.*, *Skilling* v. *United States*, 561 U. S. 358, 414 (2010).

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.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

The Court holds that the plain text and structure of the statute before us require the Government to prove causation as an element of conviction: The defendant's illegal conduct must, in some manner, cause her naturalization. I agree with this much and concur in Part II–A of the Court's opinion to the extent it so holds. And because the jury wasn't instructed at all about causation, I agree too that reversal is required.

But, respectfully, there I would stop. In an effort to "operational[ize]" the statute's causation requirement, the Court says a great deal more, offering, for example, two newly announced tests, the second with two more subparts, and a new affirmative defense—all while indicating that some of these new tests and defenses may apply only in some but not all cases. See, *e. g.*, *ante*, at 346–351. The work here is surely thoughtful and may prove entirely sound. But the question presented and the briefing before us focused primarily on whether the statute contains a *materiality* element, not on the contours of a *causation* requirement. So the parties have not had the chance to join issue fully on the matters now decided. Compare *ante*, at 346, n. 4, with Brief for Petitioner, pp. i, 18–38; Brief for United States, pp. i, 12–51. And, of course, the lower courts have not had a chance to pass on any of these questions in the first instance. Most cited by the Court have (again) focused only on the materiality (not causation) question; none has tested the elaborate

operational details advanced today; and at least one has found our prior unilateral and fractured foray into a related statute in *Kungys* v. *United States*, 485 U. S. 759 (1988), "maddening[ ]." See *ante*, at 347, n. 4 (collecting cases).

Respectfully, it seems to me at least reasonably possible that the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights. So while I agree with the Court that the parties will need guidance about the details of the statute's causation requirement, see *ibid.*, I have no doubt that the Court of Appeals, with aid of briefing from the parties, can supply that on remand. Other circuits may improve that guidance over time too. And eventually we can bless the best of it. For my part, I believe it is work enough for the day to recognize that the statute requires some proof of causation, that the jury instructions here did not, and to allow the parties and courts of appeals to take it from there as they usually do. This Court often speaks most wisely when it speaks last.

JUSTICE ALITO, concurring in the judgment.

We granted review in this case to decide whether "a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement." Pet. for Cert. i. The answer to that question is "no." Although the relevant criminal statute, 18 U. S. C. § 1425(a), does not expressly refer to the concept of materiality, the critical statutory language effectively requires proof of materiality in a case involving false statements. The statute makes it a crime for a person to "procure" naturalization "contrary to law." In false statement cases, then, the statute essentially imposes the familiar materiality requirement that applies in other contexts. That is, a person violates the statute by procuring naturalization through an ille-

gal false statement which has a "natural tendency to influence" the outcome—that is, the obtaining of naturalization. *Kungys* v. *United States*, 485 U. S. 759, 772 (1988).

Understood in this way, § 1425(a) does not require proof that a false statement actually had some effect on the naturalization decision. The operative statutory language—"procure" naturalization "contrary to law"—imposes no such requirement.

Here is an example. Eight co-workers jointly buy two season tickets to see their favorite football team play. They all write their names on a piece of paper and place the slips in a hat to see who will get the tickets for the big game with their team's traditional rival. One of the friends puts his name in twice, and his name is drawn. I would say that he "procured" the tickets "contrary to" the rules of the drawing even though he might have won if he had put his name in only once.

Here is another example. A runner who holds the world's record in an event wants to make sure she wins the gold medal at the Olympics, so she takes a performance enhancing drug. She wins the race but fails a drug test and is disqualified. The second-place time is slow, and sportswriters speculate that she would have won without taking the drug. But it would be entirely consistent with standard English usage for the race officials to say that she "procured" her first-place finish "contrary to" the governing rules.

As these examples illustrate—and others could be added—the language of 18 U. S. C. § 1425(a) does not require that an illegal false statement have a demonstrable effect on the naturalization decision. Instead, the statute applies when a person makes an illegal false statement to obtain naturalization, and that false statement is material to the outcome. I see no indication that Congress meant to require more.

One additional point is worth mentioning. Section 1425(a) not only makes it a crime to procure naturalization contrary to law; it applies equally to any person who "attempts to

procure, contrary to law . . . naturalization." Therefore, if a defendant knowingly performs a substantial act that he or she thinks will procure naturalization, that is sufficient for conviction. See *United States* v. *Resendiz-Ponce*, 549 U. S. 102, 106–108 (2007).

Syllabus

JAE LEE *v.* UNITED STATES

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

No. 16–327. Argued March 28, 2017—Decided June 23, 2017

Petitioner Jae Lee moved to the United States from South Korea with his parents when he was 13. In the 35 years he has spent in this country, he has never returned to South Korea, nor has he become a U. S. citizen, living instead as a lawful permanent resident. In 2008, federal officials received a tip from a confidential informant that Lee had sold the informant ecstasy and marijuana. After obtaining a warrant, the officials searched Lee's house, where they found drugs, cash, and a loaded rifle. Lee admitted that the drugs were his, and a grand jury indicted him on one count of possessing ecstasy with intent to distribute. Lee retained counsel and entered into plea discussions with the Government. During the plea process, Lee repeatedly asked his attorney whether he would face deportation; his attorney assured him that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted a plea and was sentenced to a year and a day in prison. Lee had in fact pleaded guilty to an "aggravated felony" under the Immigration and Nationality Act, 8 U. S. C. § 1101(a)(43)(B), so he was, contrary to his attorney's advice, subject to mandatory deportation as a result of that plea. See § 1227(a)(2)(A)(iii). When Lee learned of this consequence, he filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance. At an evidentiary hearing, both Lee and his plea-stage counsel testified that "deportation was the determinative issue" to Lee in deciding whether to accept a plea, and Lee's counsel acknowledged that although Lee's defense to the charge was weak, if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. A Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated. The District Court, however, denied relief, and the Sixth Circuit affirmed. Applying the two-part test for ineffective assistance claims from *Strickland* v. *Washington*, 466 U. S. 668, the Sixth Circuit concluded that, while the Government conceded that Lee's counsel had performed deficiently, Lee could not show that he was prejudiced by his attorney's erroneous advice.

Held: Lee has demonstrated that he was prejudiced by his counsel's erroneous advice. Pp. 363–371.

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(a) When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U. S. 52, 59.

Lee contends that he can make this showing because he never would have accepted a guilty plea had he known the result would be deportation. The Government contends that Lee cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to acquittal. Pp. 364–366.

(b) The Government makes two errors in urging the adoption of a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. First, it forgets that categorical rules are ill suited to an inquiry that demands a "case-by-case examination" of the "totality of the evidence." *Williams* v. *Taylor*, 529 U. S. 362, 391 (internal quotation marks omitted); *Strickland*, 466 U. S., at 695. More fundamentally, it overlooks that the *Hill* v. *Lockhart* inquiry focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See *INS* v. *St. Cyr*, 533 U. S. 289, 322–323. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For Lee, deportation after some time in prison was not meaningfully different from deportation after somewhat less time; he says he accordingly would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial. Pointing to *Strickland*, the Government urges that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." 466 U. S., at 695. That statement, however, was made in the context of discussing the presumption of reliability applied to judicial proceedings, which has no place where, as here, a defendant was deprived of a proceeding altogether. When the inquiry is focused on what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected the defendant's decisionmaking. Pp. 366–368.

(c) Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences. In the unusual circumstances of this case, Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he

Syllabus

known that it would lead to mandatory deportation: Both Lee and his attorney testified that "deportation was the determinative issue" to Lee; his responses during his plea colloquy confirmed the importance he placed on deportation; and he had strong connections to the United States, while he had no ties to South Korea.

The Government argues that Lee cannot "convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla* v. *Kentucky*, 559 U. S. 356, 372, since deportation would almost certainly result from a trial. Unlike the Government, this Court cannot say that it would be irrational for someone in Lee's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation. Pp. 368–371.

825 F. 3d 311, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined except as to Part I, *post*, p. 371. GORSUCH, J., took no part in the consideration or decision of the case.

John J. Bursch argued the cause for petitioner. With him on the briefs were *Patrick McNally*, *Matthew T. Nelson*, and *Gaëtan Gerville-Réache*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Acting Solicitor General Francisco*, *Acting Assistant Attorney General Blanco*, *Deputy Solicitor General Dreeben*, and *Francesco Valentini*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Linda A. Klein*, *Paul M. Thompson*, and *A. Marisa Chun*; for Asian Americans Advancing Justice|AAJC et al. by *Mark C. Fleming* and *Cecelia Chang*; for the Cato Institute by *Mitchell A. Mosvick*, *Ilya Shapiro*, and *Timothy Lynch*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle*; for the Immigrant Defense Project et al. by *Ira J. Kurzban* and *Jenny Roberts*; and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*, *Barbara E. Bergman*, and *Sarah O'Rourke Schrup*.

A brief of *amici curiae* urging affirmance was filed for the State of Alabama et al. by *Steven T. Marshall*, Attorney General of Alabama, *Andrew L. Brasher*, Solicitor General, and *Laura E. Howell*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace

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Jo Bondi of Florida, *Chris Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Josh Hawley* of Missouri, *Timothy C. Fox* of Montana, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute in violation of 21 U. S. C. § 841(a)(1). Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. App. 167. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. *Lee* v. *United States*, 825 F. 3d 311, 313 (CA6 2016). Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an "aggravated felony" under the Immigration and Nationality Act, and a noncitizen convicted

of such an offense is subject to mandatory deportation. See 8 U. S. C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001). Upon learning that he would be deported after serving his sentence, Lee filed a motion under 28 U. S. C. § 2255 to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." Report and Recommendation in No. 2:10–cv–02698 (WD Tenn.), pp. 6–7 (Report and Recommendation). In fact, Lee explained, his attorney became "pretty upset because every time something comes up I always ask about immigration status," and the lawyer "always said why [are you] worrying about something that you don't need to worry about." App. 170. According to Lee, the lawyer assured him that if deportation was not in the plea agreement, "the government cannot deport you." *Ibid.* Lee's attorney testified that he thought Lee's case was a "bad case to try" because Lee's defense to the charge was weak. *Id.*, at 218–219. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. *Id.*, at 236, 244. Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel.

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from *Strickland* v. *Washington*, 466 U. S. 668 (1984), the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, "[i]n light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sen-

tence, and subsequent deportation," had he gone to trial. Order in No. 2:10–cv–02698 (WD Tenn.), p. 25 (Order). Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 825 F. 3d, at 313 (quoting *Hill* v. *Lockhart*, 474 U. S. 52, 59 (1985); internal quotation marks omitted). Lee had "no *bona fide* defense, not even a weak one," so he "stood to gain nothing from going to trial but more prison time." 825 F. 3d, at 313, 316. Relying on Circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence," the Court of Appeals concluded that Lee could not show prejudice. *Id.*, at 314 (internal quotation marks omitted). We granted certiorari. 580 U. S. 1039 (2016).

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. *Lafler* v. *Cooper*, 566 U. S. 156, 165 (2012); *Hill*, 474 U. S., at 58. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced as a result. *Strickland*, 466 U. S., at 688, 692. The first requirement is not at issue in today's case:

The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. Brief for United States 15. The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding"—for example, that counsel failed to raise an objection at trial or to present an argument on appeal. *Roe* v. *Flores-Ortega*, 528 U. S. 470, 481 (2000). A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 482 (quoting *Strickland*, 466 U. S., at 694; internal quotation marks omitted).

But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Flores-Ortega*, 528 U. S., at 483. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place." *Id.*, at 482–483 (internal quotation marks omitted).

We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." *Id.*, at 483. As we held in *Hill* v. *Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's er-

rors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S., at 59.

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession. *Premo* v. *Moore*, 562 U. S. 115, 118 (2011); cf., *e. g.*, *Hill*, 474 U. S., at 59 (discussing failure to investigate potentially exculpatory evidence).

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. See *id.*, at 60 ("the claimed error of counsel is erroneous advice as to eligibility for parole"). Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Ibid.*[1]

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[1] The dissent also relies heavily on *Missouri* v. *Frye*, 566 U. S. 134 (2012), and *Lafler* v. *Cooper*, 566 U. S. 156 (2012). Those cases involved defendants who alleged that, but for their attorney's incompetence, they would have *accepted* a plea deal—not, as here and as in *Hill*, that they would have rejected a plea. In both *Frye* and *Lafler*, the Court highlighted this difference: Immediately following the sentence that the dissent plucks from *Frye*, *post*, at 377–378 (opinion of THOMAS, J.), the Court explained that its "application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*." 566 U. S., at 148 ("*Hill* was correctly decided and applies in the context in which it arose"). *Lafler*, decided the same day as *Frye*, reiterated that "[i]n contrast

Lee, on the other hand, argues he can establish prejudice under *Hill* because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States.[2] The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Brief for United States 26. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a

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to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection." 566 U. S., at 163. *Frye* and *Lafler* articulated a *different* way to show prejudice, suited to the context of pleas not accepted, not an *additional* element to the *Hill* inquiry. See *Frye*, 566 U. S., at 148 ("*Hill* does not . . . provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations"). Contrary to the dissent's assertion, *post,* at 379, we do not depart from *Strickland*'s requirement of prejudice. The issue is how the required prejudice may be shown.

[2] Lee also argues that he can show prejudice because, had his attorney advised him that he would be deported if he accepted the Government's plea offer, he would have bargained for a plea deal that did not result in certain deportation. Given our conclusion that Lee can show prejudice based on the reasonable probability that he would have gone to trial, we need not reach this argument.

guilty plea. But in elevating this general proposition to a *per se* rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." *Williams* v. *Taylor*, 529 U. S. 362, 391 (2000) (internal quotation marks omitted); *Strickland*, 466 U. S., at 695. And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill* v. *Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. See *Hill*, 474 U. S., at 59. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See *INS* v. *St. Cyr*, 533 U. S. 289, 322–323 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was *the* determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading

to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

The Government urges that, in such circumstances, the possibility of an acquittal after trial is "irrelevant to the prejudice inquiry," pointing to our statement in *Strickland* that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." 466 U. S., at 695. That statement, however, was made in the context of discussing the presumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether. *Flores-Ortega*, 528 U. S., at 483. In a presumptively reliable proceeding, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" must by definition be ignored. *Strickland*, 466 U. S., at 695. But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.[3]

C

"Surmounting *Strickland*'s high bar is never an easy task," *Padilla* v. *Kentucky*, 559 U. S. 356, 371 (2010), and the strong societal interest in finality has "special force with re-

[3] The dissent makes much of the fact that *Hill* v. *Lockhart*, 474 U. S. 52 (1985), also noted that courts should ignore the "idiosyncrasies of the particular decisionmaker." *Post*, at 377–378 (quoting *Hill*, 474 U. S., at 60; internal quotation marks omitted). But *Hill* made this statement in discussing how courts should analyze "predictions of the outcome at a possible trial." *Id.*, at 59–60. As we have explained, assessing the effect of some types of attorney errors on defendants' decisionmaking involves such predictions: Where an attorney error allegedly affects how a trial would have played out, we analyze that error's effects on a defendant's decisionmaking by making a prediction of the likely trial outcome. But, as *Hill* recognized, such predictions will not always be "necessary." *Id.*, at 60. Such a prediction is neither necessary nor appropriate where, as here, the error is one that is not alleged to be pertinent to a trial outcome, but is instead alleged to have affected a defendant's understanding of the consequences of his guilty plea.

spect to convictions based on guilty pleas," *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979). Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." Report and Recommendation, at 6–7; see also Order, at 14 (noting Government did not dispute testimony to this effect). Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences. See Report and Recommendation, at 12 (noting "the undisputed fact that had Lee at all been aware that deportation was possible as a result of his guilty plea, he would . . . not have pled guilty"), adopted in relevant part in Order, at 15.

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction "could result in your being deported," and asked "[d]oes that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." App. 103. When the judge inquired "[h]ow does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. *Ibid.* Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty. *Id.*, at 210.[4]

[4] Several courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice. See, *e. g.*, *United States* v. *Newman*, 805 F. 3d 1143, 1147

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always "a particularly severe penalty," *Padilla*, 559 U. S., at 365 (internal quotation marks omitted), and we have "recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,'" *id.*, at 368 (quoting *St. Cyr*, 533 U. S., at 322; alteration and some internal quotation marks omitted); see also *Padilla*, 559 U. S., at 364 ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that under *Padilla* v. *Kentucky*, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.*, at 372. The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence. See Brief for United States 13, 21–23.

(CADC 2015); *United States* v. *Kayode*, 777 F. 3d 719, 728–729 (CA5 2014); *United States* v. *Akinsade*, 686 F. 3d 248, 253 (CA4 2012); *Boyd* v. *Yukins*, 99 Fed. Appx. 699, 705 (CA6 2004). The present case involves a claim of ineffectiveness of counsel extending to advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel.

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. See *id.*, at 6. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U. S., at 59.

* * *

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.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE THOMAS, with whom JUSTICE ALITO joins except for Part I, dissenting.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a

defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the Sixth Amendment nor this Court's precedents support that conclusion. I respectfully dissent.

I

As an initial matter, I remain of the view that the Sixth Amendment to the Constitution does not "requir[e] counsel to provide accurate advice concerning the potential removal consequences of a guilty plea." *Padilla* v. *Kentucky*, 559 U. S. 356, 388 (2010) (Scalia, J., joined by THOMAS, J., dissenting). I would therefore affirm the Court of Appeals on the ground that the Sixth Amendment does not apply to the allegedly ineffective assistance in this case.

II

Because the Court today announces a novel standard for prejudice at the plea stage, I further dissent on the separate ground that its standard does not follow from our precedents.

A

The Court and both of the parties agree that the prejudice inquiry in this context is governed by *Strickland* v. *Washington*, 466 U. S. 668 (1984). See *ante*, at 363–364; Brief for Petitioner 16; Brief for United States 15. The Court in *Strickland* held that a defendant may establish a claim of ineffective assistance of counsel by showing that his "counsel's representation fell below an objective standard of reasonableness" and, as relevant here, that the representation prejudiced the defendant by "actually ha[ving] an adverse effect on the defense." 466 U. S., at 688, 693.

To establish prejudice under *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. *Strickland* made clear that the "result of the proceeding" refers to the outcome of the

defendant's criminal prosecution as a whole. It defined "reasonable probability" as "a probability sufficient to undermine confidence *in the outcome*." *Ibid.* (emphasis added). And it explained that "[a]n error by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect *on the judgment.*" *Id.*, at 691 (emphasis added).

The parties agree that this inquiry assumes an "objective" decisionmaker. Brief for Petitioner 17; Brief for United States 17. That conclusion also follows directly from *Strickland*. According to *Strickland*, the "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U. S., at 695. It does not depend on subjective factors such as "the idiosyncrasies of the particular decisionmaker," including the decisionmaker's "unusual propensities toward harshness or leniency." *Ibid.* These factors are flatly "irrelevant to the prejudice inquiry." *Ibid.* In other words, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Ibid.* Instead, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Ibid.*

When the Court extended the right to effective counsel to the plea stage, see *Hill* v. *Lockhart*, 474 U. S. 52 (1985), it held that "the same two-part standard" from *Strickland* applies. 474 U. S., at 57 (repeating *Strickland*'s teaching that even an unreasonable error by counsel "'does not warrant setting aside the judgment'" so long as the error "'had no effect on the judgment'" (quoting 466 U. S., at 691)). To be sure, the Court said—and the majority today emphasizes—that a defendant asserting an ineffectiveness claim at the plea stage "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S.,

at 59. But that requirement merely reflects the reality that a defendant cannot show that the outcome of his case would have been different if he would have accepted his current plea anyway.* In other words, the defendant's ability to show that he would have gone to trial is necessary, but not sufficient, to establish prejudice.

The *Hill* Court went on to explain that *Strickland*'s two-part test applies the same way in the plea context as in other contexts. In particular, the "assessment" will primarily turn on "a prediction whether," in the absence of counsel's error, "the evidence" of the defendant's innocence or guilt "likely would have changed the outcome" of the proceeding. 474 U. S., at 59. Thus, a defendant cannot show prejudice where it is "'inconceivable'" not only that he would have gone to trial, but also "'that *if he had done so* he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received.'" *Ibid.* (quoting *Evans* v. *Meyer*, 742 F. 2d 371, 375 (CA7 1984); emphasis added). In sum, the proper inquiry requires a defendant to show both that he would have rejected his plea and gone to trial *and* that he would likely have obtained a more favorable result in the end.

To the extent *Hill* was ambiguous about the standard, our precedents applying it confirm this interpretation. In *Premo* v. *Moore*, 562 U. S. 115 (2011), the Court emphasized that "strict adherence to the *Strickland* standard" is "essential" when reviewing claims about attorney error "at the plea bargain stage." *Id.*, at 125. In that case, the defendant argued that his counsel was constitutionally ineffective because he had failed to seek suppression of his confession

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*It is not enough for a defendant to show that he would have obtained a better plea agreement. "[A] defendant has no right to be offered a plea," *Missouri* v. *Frye*, 566 U. S. 134, 148 (2012); *Lafler* v. *Cooper*, 566 U. S. 156, 168 (2012), and this Court has never concluded that a defendant could show a "reasonable probability" of a different result based on a purely hypothetical plea offer subject to absolute executive discretion.

before he pleaded no contest. In analyzing the prejudice issue, the Court did not focus solely on whether the suppression hearing would have turned out differently, or whether the defendant would have chosen to go to trial. It focused as well on the weight of the evidence against the defendant and the fact that he likely would not have obtained a more favorable result at trial, regardless of whether he succeeded at the suppression hearing. See *id.*, at 129 (describing the State's case as "formidable" and observing that "[t]he bargain counsel struck" in the plea agreement was "a favorable one" to the defendant compared to what might have happened at trial).

The Court in *Missouri* v. *Frye*, 566 U. S. 134 (2012), took a similar approach. In that case, the Court extended *Hill* to hold that counsel could be constitutionally ineffective for failing to communicate a plea deal to a defendant. 566 U. S., at 145. The Court emphasized that, in addition to showing a reasonable probability that the defendant "would have accepted the earlier plea offer," it is also "necessary" to show a "reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*, at 147; see also *id.*, at 150 (the defendant "must show *not only* a reasonable probability that he would have accepted the lapsed plea *but also* a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court" (emphasis added)). In short, the Court did not focus solely on whether the defendant would have accepted the plea. It instead required the defendant to show that the ultimate outcome would have been different.

Finally, the Court's decision in *Lafler* v. *Cooper*, 566 U. S. 156 (2012), is to the same effect. In that case, the Court concluded that counsel may be constitutionally ineffective by causing a defendant to reject a plea deal he should have accepted. *Id.*, at 164. The Court again emphasized that the

prejudice inquiry requires a showing that the criminal prosecution would ultimately have ended differently for the defendant—not merely that the defendant would have accepted the deal. The Court stated that the defendant in those circumstances "must show" a reasonable probability that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Ibid.*

These precedents are consistent with our cases governing the right to effective assistance of counsel in other contexts. This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceedings." *Montejo* v. *Louisiana*, 556 U. S. 778, 786 (2009) (internal quotation marks omitted). Those stages include not only "the entry of a guilty plea," but also "arraignments, postindictment interrogations, [and] postindictment lineups." *Frye*, *supra*, at 140 (citing cases). In those circumstances, the Court has not held that the prejudice inquiry focuses on whether *that* stage of the proceeding would have ended differently. It instead has made clear that the prejudice inquiry is the same as in *Strickland*, which requires a defendant to establish that he would have been better off in the end had his counsel not erred. See 466 U. S., at 694.

B

The majority misapplies this Court's precedents when it concludes that a defendant may establish prejudice by showing only that "he would not have pleaded guilty and would have insisted on going to trial," without showing that "the result of that trial would have been different than the result of the plea bargain." *Ante*, at 364, 365 (internal quotation marks omitted). In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S.,

at 59. For the reasons explained above, that sentence prescribes the threshold showing a defendant must make to establish *Strickland* prejudice where a defendant has accepted a guilty plea. In *Hill*, the Court concluded that the defendant had not made that showing, so it rejected his claim. The Court did not, however, further hold that a defendant can establish prejudice by making that showing alone.

The majority also relies on a case that arises in a completely different context, *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000). There, the Court considered a defendant's claim that his attorney failed to file a notice of appeal. See *id.*, at 474. The Court observed that the lawyer's failure to file the notice of appeal "arguably led not to a judicial proceeding of disputed reliability," but instead to "the forfeiture of a proceeding itself." *Id.*, at 483. The Court today observes that petitioner's guilty plea meant that he did not go to trial. *Ante*, at 364. Because that trial "'never took place,'" the Court reasons, we cannot "'apply a strong presumption of reliability'" to it. *Ibid.* (quoting *Flores-Ortega*, *supra*, at 482–483). And because the presumption of reliability does not apply, we may not depend on *Strickland*'s statement "that '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'" *Ante*, at 368 (quoting 466 U. S., at 695). This point is key to the majority's conclusion that petitioner would have chosen to gamble on a trial even though he had no viable defense.

The majority's analysis, however, is directly contrary to *Hill*, which instructed a court undertaking a prejudice analysis to apply a presumption of reliability to the hypothetical trial that would have occurred had the defendant not pleaded guilty. After explaining that a court should engage in a predictive inquiry about the likelihood of a defendant securing a better result at trial, the Court said: "As we explained in *Strickland* v. *Washington*, *supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the par-

ticular decisionmaker.'" 474 U. S., at 59–60 (quoting 466 U. S., at 695). That quote comes from the same paragraph in *Strickland* as the discussion about the presumption of reliability that attaches to the trial. In other words, *Hill* instructs that the prejudice inquiry must presume that the foregone trial would have been reliable.

The majority responds that *Hill* made statements about presuming a reliable trial only in "discussing how courts should analyze 'predictions of the outcome at a possible trial,'" which "will not always be 'necessary.'" *Ante*, at 368, n. 3 (quoting *Hill*, 474 U. S., at 59–60). I agree that such an inquiry is not always necessary—it is not necessary where, as in *Hill*, the defendant cannot show at the threshold that he would have rejected his plea and chosen to go to trial. But that caveat says nothing about the application of the presumption of reliability when a defendant can make that threshold showing.

In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable. Guilty pleas "rarely" give rise to the "concern that unfair procedures may have resulted in the conviction of an innocent defendant." *Id.*, at 58 (internal quotation marks omitted). That is because "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U. S. 61, 62, n. 2 (1975) (*per curiam*) (emphasis deleted). Guilty pleas, like completed trials, are therefore entitled to the protections against collateral attack that the *Strickland* prejudice standard affords.

Finally, the majority does not dispute that the prejudice inquiry in *Frye* and *Lafler* focused on whether the defendant established a reasonable probability of a different outcome. The majority instead distinguishes those cases on the ground that they involved a defendant who did not accept a guilty plea. See *ante*, at 365–366, n. 1. According to the majority, those cases "articulated a *different* way to show prejudice,

suited to the context of pleas not accepted." *Ante*, at 366, n. 1. But the Court in *Frye* and *Lafler* (and *Hill*, for that matter) did not purport to establish a "*different*" test for prejudice. To the contrary, the Court repeatedly stated that it was applying the "*same* two-part standard" from *Strickland*. *Hill*, *supra*, at 57 (emphasis added); accord, *Frye*, 566 U. S., at 140 ("*Hill* established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*"); *Lafler*, 566 U. S., at 162–163 (applying *Strickland*).

The majority today abandons any pretense of applying *Strickland* to claims of ineffective assistance of counsel that arise at the plea stage. It instead concludes that one standard applies when a defendant goes to trial (*Strickland*); another standard applies when a defendant accepts a plea (*Hill*); and yet another standard applies when counsel does not apprise the defendant of an available plea or when the defendant rejects a plea (*Frye* and *Lafler*). That approach leaves little doubt that the Court has "open[ed] a whole new field of constitutionalized criminal procedure"—"plea-bargaining law"—despite its repeated assurances that it has been applying the same *Strickland* standard all along. *Lafler*, *supra*, at 175 (Scalia, J., dissenting). In my view, we should take the Court's precedents at their word and conclude that "[a]n error by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U. S., at 691.

III

Applying the ordinary *Strickland* standard in this case, I do not think a defendant in petitioner's circumstances could show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or that the Government had secured a witness who had purchased the drugs directly from

him. In light of this "overwhelming evidence of . . . guilt," 2014 WL 1260388, *15 (WD Tenn., Mar. 20, 2014), the Court of Appeals concluded that petitioner had "no *bona fide* defense, not even a weak one," 825 F. 3d 311, 316 (CA6 2016). His only chance of succeeding would have been to "thro[w] a 'Hail Mary' at trial." *Ante*, at 368. As I have explained, however, the Court in *Strickland* expressly foreclosed relying on the possibility of a "Hail Mary" to establish prejudice. See *supra*, at 372–373. *Strickland* made clear that the prejudice assessment should "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U. S., at 695.

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: Had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings "stability" and "certainty" to "the criminal justice system." *Premo*, 562 U. S., at 132. The Court has warned that "the prospect of collateral challenges" threatens to undermine these important values. *Ibid.* And we have explained that "[p]rosecutors must have assurance that a plea will not be

undone years later," lest they "forgo plea bargains that would benefit defendants," which would be "a result favorable to no one." *Id.*, at 125.

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final. For one thing, the Court's artificially cabined standard for prejudice in the plea context is likely to generate a high volume of challenges to existing and future plea agreements. Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice. Whereas a defendant asserting an ordinary claim of ineffective assistance of counsel must prove that the ultimate outcome of his case would have been different, the Court today holds that a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the "smallest chance of success at trial"—relying on nothing more than a "'Hail Mary'"—may be able to satisfy it. *Ante,* at 367, 368. For another, the Court does not limit its holding to immigration consequences. Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process that he considered of "paramount importance," *ante,* at 370, he could allege a plausible claim of ineffective assistance of counsel.

In addition to undermining finality, the Court's rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly fact-intensive, defendant-specific undertaking. Petitioner suggests that each claim will "at least" require a "hearing to get th[e] facts on the table." Tr. of Oral Arg. 7. Given that more than 90 percent of criminal convictions are the result of guilty pleas, *Frye*, 566 U. S., at 143, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted

his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

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MURR ET AL. *v.* WISCONSIN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

No. 15–214. Argued March 20, 2017—Decided June 23, 2017

The St. Croix River, which forms part of the boundary between Wisconsin and Minnesota, is protected under federal, state, and local law. Petitioners own two adjacent lots—Lot E and Lot F—along the lower portion of the river in the town of Troy, Wisconsin. For the area where petitioners' property is located, state and local regulations prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. A grandfather clause relaxes this restriction for substandard lots which were in separate ownership from adjacent lands on January 1, 1976, the regulation's effective date.

Petitioners' parents purchased Lots E and F separately in the 1960's, and maintained them under separate ownership until transferring Lot F to petitioners in 1994 and Lot E to petitioners in 1995. Both lots are over one acre in size, but because of their topography they each have less than one acre suitable for development. The unification of the lots under common ownership therefore implicated the rules barring their separate sale or development. Petitioners became interested in selling Lot E as part of an improvement plan for the lots, and sought variances from the St. Croix County Board of Adjustment. The Board denied the request, and the state courts affirmed in relevant part. In particular, the State Court of Appeals found that the local ordinance effectively merged the lots, so petitioners could only sell or build on the single combined lot.

Petitioners filed suit, alleging that the regulations worked a regulatory taking that deprived them of all, or practically all, of the use of Lot E. The County Circuit Court granted summary judgment to the State, explaining that petitioners had other options to enjoy and use their property, including eliminating the cabin and building a new residence on either lot or across both. The court also found that petitioners had not been deprived of all economic value of their property, because the decrease in market value of the unified lots was less than 10 percent. The State Court of Appeals affirmed, holding that the takings analysis properly focused on Lots E and F together and that, using that framework, the merger regulations did not effect a taking.

Held: The State Court of Appeals was correct to analyze petitioners' property as a single unit in assessing the effect of the challenged governmental action. Pp. 392–406.

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(a) The Court's Takings Clause jurisprudence informs the analysis of this issue. Pp. 392–397.

(1) Regulatory takings jurisprudence recognizes that if a "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415. This area of the law is characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322 (citation and internal quotation marks omitted).

The Court has, however, identified two guidelines relevant for determining when a government regulation constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015). Second, a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo*, *supra*, at 617 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124). Yet even the complete deprivation of use under *Lucas* will not require compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Lucas*, 505 U. S., at 1029.

A central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility. This is a means to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, cf. *id.*, at 1027, and the government's power to "adjus[t] rights for the public good," *Andrus* v. *Allard*, 444 U. S. 51, 65. Pp. 392–394.

(2) This case presents a critical question in determining whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? The Court has not set forth specific guidance on how to identify the relevant parcel. However, it has declined to artificially limit the parcel to the portion of property targeted by the challenged regulation, and has cautioned against viewing property rights under the Takings Clause as coextensive with those under state law. Pp. 395–397.

(b) Courts must consider a number of factors in determining the proper denominator of the takings inquiry. Pp. 397–402.

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(1) The inquiry is objective and should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or as separate tracts. First, courts should give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Second, courts must look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, topography, and the surrounding human and ecological environment. Third, courts should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Pp. 397–399.

(2) The formalistic rules for which the State of Wisconsin and petitioners advocate do not capture the central legal and factual principles informing reasonable expectations about property interests. Wisconsin would tie the definition of the parcel to state law, but it is also necessary to weigh whether the state enactments at issue accord with other indicia of reasonable expectations about property. Petitioners urge the Court to adopt a presumption that lot lines control, but lot lines are creatures of state law, which can be overridden by the State in the reasonable exercise of its power to regulate land. The merger provision here is such a legitimate exercise of state power, as reflected by its consistency with a long history of merger regulations and with the many merger provisions that exist nationwide today. Pp. 399–402.

(c) Under the appropriate multifactor standard, it follows that petitioners' property should be evaluated as a single parcel consisting of Lots E and F together. First, as to the property's treatment under state and local law, the valid merger of the lots under state law informs the reasonable expectation that the lots will be treated as a single property. Second, turning to the property's physical characteristics, the lots are contiguous. Their terrain and shape make it reasonable to expect their range of potential uses might be limited; and petitioners could have anticipated regulation of the property due to its location along the river, which was regulated by federal, state, and local law long before they acquired the land. Third, Lot E brings prospective value to Lot F. The restriction on using the individual lots is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus an optimal location for any improvements. This relationship is evident in the lots' combined valuation. The Court of Appeals was thus correct to treat the contiguous properties as one parcel.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking. They have not suffered a taking under *Lucas*, as they have not been

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deprived of all economically beneficial use of their property. See 505 U. S., at 1019. Nor have they suffered a taking under the more general test of *Penn Central*, *supra*, at 124. Pp. 402–405.

2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 406. THOMAS, J., filed a dissenting opinion, *post*, p. 419. GORSUCH, J., took no part in the consideration or decision of the case.

John M. Groen argued the cause for petitioners. With him on the briefs was *J. David Breemer*.

Misha Tseytlin, Solicitor General of Wisconsin, argued the cause for respondent State of Wisconsin. With him on the brief were *Brad D. Schimel*, Attorney General, and *Daniel P. Lennington* and *Luke N. Berg*, Deputy Solicitors General.

Richard J. Lazurus argued the cause for respondent St. Croix County. With him on the brief was *Remzy D. Bitar*.

Elizabeth B. Prelogar argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Cruden*, *Deputy Solicitor General Kneedler*, and *Matthew Littleton*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Nevada et al. by *Adam Paul Laxalt*, Attorney General of Nevada, *Lawrence VanDyke*, Solicitor General, *Jordan T. Smith*, Assistant Solicitor General, and *Ilya Somin*, and by the Attorneys General for their respective States as follows: *Craig W. Richards* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Derek Schmidt* of Kansas, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; for the California Cattlemen's Association et al. by *Kevin M. Fong*; for the Cato Institute et al. by *Michael H. Park*, *Thomas R. McCarthy*, *Bryan K. Weir*, *Ilya Shapiro*, and *Robert H. Thomas*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Chamber of Commerce of the United States of America by *Jeremy B. Rosen*, *Felix Shafir*, *Kate Comerford Todd*, and *Sheldon Gilbert*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the National Association of Home Builders et al. by

JUSTICE KENNEDY delivered the opinion of the Court.

The classic example of a property taking by the government is when the property has been occupied or otherwise seized. In the case now before the Court, petitioners contend that governmental entities took their real property—an undeveloped residential lot—not by some physical occupation but instead by enacting burdensome regulations that forbid its improvement or separate sale because it is classified as substandard in size. The relevant governmental entities are the respondents.

Against the background justifications for the challenged restrictions, respondents contend there is no regulatory taking because petitioners own an adjacent lot. The regulations, in effecting a merger of the property, permit the continued residential use of the property including for a single improvement to extend over both lots. This retained right

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Jerry Stouck; for the Southeastern Legal Foundation et al. by *John J. Park, Jr.*, and *Kimberly S. Hermann*; and for the Wisconsin Realtors Association by *Thomas D. Larson*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *John A. Saurenman*, Senior Assistant Attorney General, *Joshua A. Klein*, Deputy Solicitor General, and *Nicole U. Rinke*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Janet T. Mills* of Maine, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Ellen F. Rosenblum* of Oregon, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the National Association of Counties et al. by *Stuart Banner* and *Lisa E. Soronen*; for Property Law Professors by *David A. Dana*; for Walter F. Mondale et al. by *Hope M. Babcock*; and for Carlisle Ford Runge et al. by *John D. Echeverria*.

Briefs of *amici curiae* were filed for the American Planning Association et al. by *Nancy E. Stroud*; for the National Trust for Historic Preservation by *Ryan C. Morris*, *Tobias S. Loss-Eaton*, *Paul W. Edmondson*, and *Elizabeth S. Merritt*; for the New England Legal Foundation by *John Pagliaro* and *Martin J. Newhouse*; for the Reason Foundation by *Steven J. Eagle* and *Manuel S. Klausner*; and for the Wisconsin Counties Association et al. by *Jeffrey A. Mandell* and *Barbara A. Neider*.

of the landowner, respondents urge, is of sufficient offsetting value that the regulation is not severe enough to be a regulatory taking. To resolve the issue whether the landowners can insist on confining the analysis just to the lot in question, without regard to their ownership of the adjacent lot, it is necessary to discuss the background principles that define regulatory takings.

I

A

The St. Croix River originates in northwest Wisconsin and flows approximately 170 miles until it joins the Mississippi River, forming the boundary between Minnesota and Wisconsin for much of its length. The lower portion of the river slows and widens to create a natural water area known as Lake St. Croix. Tourists and residents of the region have long extolled the picturesque grandeur of the river and surrounding area. *E. g.*, E. Ellett, Summer Rambles in the West 136–137 (1853).

Under the Wild and Scenic Rivers Act, the river was designated, by 1972, for federal protection. § 3(a)(6), 82 Stat. 908, 16 U. S. C. § 1274(a)(6) (designating Upper St. Croix River); Lower Saint Croix River Act of 1972, § 2, 86 Stat. 1174, 16 U. S. C. § 1274(a)(9) (adding Lower St. Croix River). The law required the States of Wisconsin and Minnesota to develop "a management and development program" for the river area. 41 Fed. Reg. 26237 (1976). In compliance, Wisconsin authorized the State Department of Natural Resources to promulgate rules limiting development in order to "guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations." Wis. Stat. § 30.27(1) (1973).

Petitioners are two sisters and two brothers in the Murr family. Petitioners' parents arranged for them to receive ownership of two lots the family used for recreation along the Lower St. Croix River in the town of Troy, Wisconsin.

The lots are adjacent, but the parents purchased them separately, put the title of one in the name of the family business, and later arranged for transfer of the two lots, on different dates, to petitioners. The lots, which are referred to in this litigation as Lots E and F, are described in more detail below.

For the area where petitioners' property is located, the Wisconsin rules prevent the use of lots as separate building sites unless they have at least one acre of land suitable for development. Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017). A grandfather clause relaxes this restriction for substandard lots which were "in separate ownership from abutting lands" on January 1, 1976, the effective date of the regulation. § NR 118.08(4)(a)(1). The clause permits the use of qualifying lots as separate building sites. The rules also include a merger provision, however, which provides that adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet the size requirement. § NR 118.08(4)(a)(2). The Wisconsin rules require localities to adopt parallel provisions, see § NR 118.02(3), so the St. Croix County zoning ordinance contains identical restrictions, see St. Croix County, Wis., Ordinance § 17.36I.4.a (2005). The Wisconsin rules also authorize the local zoning authority to grant variances from the regulations where enforcement would create "unnecessary hardship." § NR 118.09(4)(b); St. Croix County Ordinance § 17.09.232.

B

Petitioners' parents purchased Lot F in 1960 and built a small recreational cabin on it. In 1961, they transferred title to Lot F to the family plumbing company. In 1963, they purchased neighboring Lot E, which they held in their own names.

The lots have the same topography. A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it. The

line dividing Lot E from Lot F runs from the riverfront to the far end of the property, crossing the blufftop along the way. Lot E has approximately 60 feet of river frontage, and Lot F has approximately 100 feet. Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots' buildable land area is only 0.98 acres due to the steep terrain.

The lots remained under separate ownership, with Lot F owned by the plumbing company and Lot E owned by petitioners' parents, until transfers to petitioners. Lot F was conveyed to them in 1994, and Lot E was conveyed to them in 1995. *Murr* v. *St. Croix County Bd. of Adjustment*, 2011 WI App 29, 332 Wis. 2d 172, 177–178, 184–185, 796 N. W. 2d 837, 841, 844 (2011); 2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–3, ¶¶4–5. (There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.)

A decade later, petitioners became interested in moving the cabin on Lot F to a different portion of the lot and selling Lot E to fund the project. The unification of the lots under common ownership, however, had implicated the state and local rules barring their separate sale or development. Petitioners then sought variances from the St. Croix County Board of Adjustment to enable their building and improvement plan, including a variance to allow the separate sale or use of the lots. The Board denied the requests, and the state courts affirmed in relevant part. In particular, the Wisconsin Court of Appeals agreed with the Board's interpretation that the local ordinance "effectively merged" Lots E and F, so petitioners "could only sell or build on the single larger lot." *Murr*, *supra*, at 184, 796 N. W. 2d, at 844.

Petitioners filed the present action in state court, alleging that the state and county regulations worked a regulatory taking by depriving them of "all, or practically all, of the use

of Lot E because the lot cannot be sold or developed as a separate lot." App. 9. The parties each submitted appraisal numbers to the trial court. Respondents' appraisal included values of $698,300 for the lots together as regulated; $771,000 for the lots as two distinct buildable properties; and $373,000 for Lot F as a single lot with improvements. Record 17–55, 17–56. Petitioners' appraisal included an unrebutted, estimated value of $40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property. *Id.*, at 22–188.

The Circuit Court of St. Croix County granted summary judgment to the State, explaining that petitioners retained "several available options for the use and enjoyment of their property." Case No. 12–CV–258 (Oct. 31, 2013), App. to Pet. for Cert. B–9. For example, they could preserve the existing cabin, relocate the cabin, or eliminate the cabin and build a new residence on Lot E, on Lot F, or across both lots. The court also found petitioners had not been deprived of all economic value of their property. Considering the valuation of the property as a single lot versus two separate lots, the court found the market value of the property was not significantly affected by the regulations because the decrease in value was less than 10 percent. *Ibid.*

The Wisconsin Court of Appeals affirmed. The court explained that the regulatory takings inquiry required it to "'first determine what, precisely, is the property at issue.'" *Id.*, at A–9, ¶17. Relying on Wisconsin Supreme Court precedent in *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528 (1996), the Court of Appeals rejected petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court held the takings analysis "properly focused" on the regulations' effect "on the Murrs' property as a whole"—that is, Lots E and F together. App. to Pet. for Cert. A–12, ¶22.

Using this framework, the Court of Appeals concluded the merger regulations did not effect a taking. In particular, the court explained that petitioners could not reasonably

have expected to use the lots separately because they were "'charged with knowledge of the existing zoning laws'" when they acquired the property. *Ibid.* (quoting *Murr*, *supra*, at 184, 796 N. W. 2d, at 844). Thus, "even if [petitioners] did intend to develop or sell Lot E separately, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994." App. to Pet. for Cert. A–17, ¶30. The court also discounted the severity of the economic impact on petitioners' property, recognizing the Circuit Court's conclusion that the regulations diminished the property's combined value by less than 10 percent. The Supreme Court of Wisconsin denied discretionary review. This Court granted certiorari, 577 U. S. 1098 (2016).

II

A

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897). As this Court has recognized, the plain language of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose," see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321 (2002), but it does not address in specific terms the imposition of regulatory burdens on private property. Indeed, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," like the permanent flooding of property. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citation, brackets, and internal quotation marks omit-

ted); accord, *Horne* v. *Department of Agriculture*, 576 U. S. 351, 360 (2015); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427 (1982). *Mahon*, however, initiated this Court's regulatory takings jurisprudence, declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. A regulation, then, can be so burdensome as to become a taking, yet the *Mahon* Court did not formulate more detailed guidance for determining when this limit is reached.

In the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules. This area of the law has been characterized by "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, *supra*, at 322 (citation and internal quotation marks omitted). The Court has, however, stated two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking. First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001) (quoting *Lucas*, *supra*, at 1015). Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo, supra*, at 617 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978)).

By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what it called a "categorical" rule. See 505 U. S., at 1015. Even in *Lucas*, however, the Court included a caveat recog-

nizing the relevance of state law and land-use customs: The complete deprivation of use will not require compensation if the challenged limitations "inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.*, at 1029; see also *id.*, at 1030–1031 (listing factors for courts to consider in making this determination).

A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual's right to retain the interests and exercise the freedoms at the core of private property ownership. Cf. *id.*, at 1028 ("[T]he notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture"). Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.

The other persisting interest is the government's well-established power to "adjus[t] rights for the public good." *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979). As Justice Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, *supra*, at 413. In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven "by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, *supra*, at 617–618 (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)).

B

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 497 (1987) (quoting Michelman, Property, Utility, and Fairness, 80 Harv. L. Rev. 1165, 1992 (1967)).

As commentators have noted, the answer to this question may be outcome determinative. See Eagle, The Four-Factor *Penn Central* Regulatory Takings Test, 118 Pa. St. L. Rev. 601, 631 (2014); see also Wright, A New Time for Denominators, 34 Env. L. 175, 180 (2004). This Court, too, has explained that the question is important to the regulatory takings inquiry. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 644 (1993).

Defining the property at the outset, however, should not necessarily preordain the outcome in every case. In some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value. This demonstrates the contrast between regulatory takings, where the goal is usually to determine how the challenged regulation affects the property's value to the owner, and physical takings, where the impact of physi-

cal appropriation or occupation of the property will be evident.

While the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry, there are two concepts which the Court has indicated can be unduly narrow.

First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central*, for example, the Court rejected a challenge to the denial of a permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against the "air rights" above the terminal, cautioning that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U. S., at 130.

In a similar way, in *Tahoe-Sierra*, the Court refused to "effectively sever" the 32 months during which petitioners' property was restricted by temporary moratoria on development "and then ask whether that segment ha[d] been taken in its entirety." 535 U. S., at 331. That was because "defining the property interest taken in terms of the very regulation being challenged is circular." *Ibid.* That approach would overstate the effect of regulation on property, turning "every delay" into a "total ban." *Ibid.*

The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. Although property interests have their foundations in state law, the *Palazzolo* Court reversed a state-court decision that rejected a takings challenge to regulations that predated the landowner's acquisition of title. 533 U. S., at 626–627. The Court explained that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations. *Id.*, at 626.

By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.

III

A

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. Cf. *Lucas*, 505 U. S., at 1035 (KENNEDY, J., concurring) ("The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the

property. See *Ballard* v. *Hunter*, 204 U. S. 241, 262 (1907) ("Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings"). A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. See *Palazzolo*, 533 U. S., at 627 (some "enactments are unreasonable and do not become less so through passage of time or title"). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See *ibid.* ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned"). In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.

Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. Cf. *Lucas*, *supra*, at 1035 (KENNEDY, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by in creasing privacy, expanding recreational space, or preserv-

ing surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.

State and federal courts have considerable experience in adjudicating regulatory takings claims that depart from these examples in various ways. The Court anticipates that in applying the test above they will continue to exercise care in this complex area.

B

The State of Wisconsin and petitioners each ask this Court to adopt a formalistic rule to guide the parcel inquiry. Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.

Wisconsin would tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulations. That approach, as already noted, simply assumes the answer to the question: May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations? It is, of course, unquestionable that the law must recognize those legitimate expectations in order to give proper weight to the

rights of owners and the right of the State to pass reasonable laws and regulations. See *Palazzolo*, *supra*, at 627.

Wisconsin bases its position on a footnote in *Lucas*, which suggests the answer to the denominator question "may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i. e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." 505 U. S., at 1017, n. 7. As an initial matter, *Lucas* referenced the parcel problem only in dicta, unnecessary to the announcement or application of the rule it established. See *ibid.* ("[W]e avoid th[e] difficulty" of determining the relevant parcel "in the present case"). In any event, the test the Court adopts today is consistent with the respect for state law described in *Lucas*. The test considers state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property.

Petitioners propose a different test that is also flawed. They urge the Court to adopt a presumption that lot lines define the relevant parcel in every instance, making Lot E the necessary denominator. Petitioners' argument, however, ignores the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power. In effect, petitioners ask this Court to credit the aspect of state law that favors their preferred result (lot lines) and ignore that which does not (merger provision).

This approach contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking. See *Palazzolo*, 533 U. S., at 627; *Mahon*, 260 U. S., at 413. Among other cases, *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), demonstrates the validity of this proposition because it upheld zoning regulations as a legitimate exercise of the government's police power. Of course, the Court's

later opinion in *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528 (2005), recognized that the test articulated in *Agins*—that regulation effects a taking if it "'does not substantially advance legitimate state interests'"—was improper because it invited courts to engage in heightened review of the effectiveness of government regulation. 544 U. S., at 540 (quoting *Agins*, *supra*, at 260). *Lingle* made clear, however, that the holding of *Agins* survived, even if its test was "imprecis[e]." See 544 U. S., at 545–546, 548.

The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. See Brief for National Association of Counties et al. as *Amici Curiae* 5–10. Merger provisions often form part of a regulatory scheme that establishes a minimum lot size in order to preserve open space while still allowing orderly development. See E. McQuillin, Law of Municipal Corporations § 25:24 (3d ed. 2010); see also *Agins*, *supra*, at 262 (challenged "zoning ordinances benefit[ed] the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas").

When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership. Also, as here, the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority for landowners in special circumstances. See 3 E. Ziegler, Rathkopf's Law of Zoning and Planning § 49:13 (39th ed. 2017).

Petitioners' insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners. Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today. See Brief for National Association of Counties et al. as *Amici Curiae* 12–31 (listing over 100 examples of merger provisions).

Petitioners' reliance on lot lines also is problematic for another reason. Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of the reasonable expectations of property owners. Indeed, in some jurisdictions, lot lines may be subject to informal adjustment by property owners, with minimal government oversight. See Brief for State of California et al. as *Amici Curiae* 17; 1 J. Kushner, Subdivision Law and Growth Management § 5:8 (2d ed. 2017) (lot line adjustments that create no new parcels are often exempt from subdivision review); see, *e. g.,* Cal. Govt. Code Ann. § 66412(d) (West 2016) (permitting adjustment of lot lines subject to limited conditions for government approval). The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.

IV

Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations

merged Lots E and F. *E. g.*, App. to Pet. for Cert. A–3, ¶6 ("The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]"). The decision to adopt the merger provision at issue here was for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case. See *supra*, at 401–402. Petitioners' land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted. As a result, the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.

Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. Cf. App. to Pet. for Cert. A–5, ¶8 ("[Petitioners] asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain"). The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. See Case No. 12–CV–258, App. to Pet. for Cert. B–9 ("They have an elevated level of privacy because they do not have

close neighbors and are able to swim and play volleyball at the property").

The special relationship of the lots is further shown by their combined valuation. Were Lot E separately saleable but still subject to the development restriction, petitioners' appraiser would value the property at only $40,000. We express no opinion on the validity of this figure. We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F. The point that is useful for these purposes is that the combined lots are valued at $698,300, which is far greater than the summed value of the separate regulated lots (Lot F with its cabin at $373,000, according to respondents' appraiser, and Lot E as an undevelopable plot at $40,000, according to petitioners' appraiser). The value added by the lots' combination shows their complementarity and supports their treatment as one parcel.

The State Court of Appeals was correct in analyzing petitioners' property as a single unit. Petitioners allege that in doing so, the state court applied a categorical rule that all contiguous, commonly owned holdings must be combined for Takings Clause analysis. See Brief for Petitioners i ("[D]oes the 'parcel as a whole' concept . . . establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes"). This does not appear to be the case, however, for the precedent relied on by the Court of Appeals addressed multiple factors before treating contiguous properties as one parcel. See App. to Pet. for Cert. A–9 to A–11, ¶¶17–19 (citing *Zealy* v. *Waukesha*, 201 Wis. 2d 365, 548 N. W. 2d 528); see *id.*, at 378, 548 N. W. 2d, at 533 (considering the property as a whole because it was "part of a single purchase" and all 10.4 acres were undeveloped). The judgment below, furthermore, may be affirmed on any ground permitted by the law and record. See *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984). To the ex-

tent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result.

Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property. See 505 U. S., at 1019. They can use the property for residential purposes, including an enhanced, larger residential improvement. See *Palazzolo*, 533 U. S., at 631 ("A regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle' "). The property has not lost all economic value, as its value has decreased by less than 10 percent. See *Lucas*, *supra*, at 1019, n. 8 (suggesting that even a landowner with 95 percent loss may not recover).

Petitioners furthermore have not suffered a taking under the more general test of *Penn Central*. See 438 U. S., at 124. The expert appraisal relied upon by the state courts refutes any claim that the economic impact of the regulation is severe. Petitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots. Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.

* * *

Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. See *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. Courts must strive for consistency with the central purpose

of the Takings Clause: to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U. S., at 49. Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here.

The judgment of the Wisconsin Court of Appeals is affirmed.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Murr family owns two adjacent lots along the Lower St. Croix River. Under a local regulation, those two properties may not be "sold or developed as separate lots" because neither contains a sufficiently large area of buildable land. Wis. Admin. Code § NR 118.08(4)(a)(2) (2017). The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." *Ante*, at 397. Our decisions have, time and again,

declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property"—adopted solely "for purposes of th[e] takings inquiry," *ante*, at 406—undermines that protection.

I would stick with our traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries should determine the "private property" at issue in regulatory takings cases. Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent.

I

A

The Takings Clause places a condition on the government's power to interfere with property rights, instructing that "private property [shall not] be taken for public use, without just compensation." Textually and logically, this Clause raises three basic questions that individuals, governments, and judges must consider when anticipating or deciding whether the government will have to provide reimbursement for its actions. The first is what "private property" the government's planned course of conduct will affect. The second, whether that property has been "taken" for "public use." And if "private property" has been "taken," the last item of business is to calculate the "just compensation" the owner is due.

Step one—identifying the property interest at stake—requires looking outside the Constitution. The word "property" in the Takings Clause means "the group of rights inhering in [a] citizen's relation to [a] . . . thing, as the right to

possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). The Clause does not, however, provide the definition of those rights in any particular case. Instead, "property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001 (1984) (alteration and internal quotation marks omitted). By protecting these established rights, the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large.

When government action interferes with property rights, the next question becomes whether that interference amounts to a "taking." "The paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 537 (2005). These types of actions give rise to "*per se* taking[s]" because they are "perhaps the most serious form[s] of invasion of an owner's property interests, depriving the owner of the rights to possess, use and dispose of the property." *Horne* v. *Department of Agriculture*, 576 U. S. 351, 360 (2015) (internal quotation marks omitted).

But not all takings are so direct: Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. If compensation were required for one but not the other, "the natural tendency of human nature" would be to extend regulations "until at last private property disappears." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.* This rule strikes a balance between property owners' rights and the government's authority to advance the common good. Owners can rest assured that they will be compensated for partic-

ularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.

Depending, of course, on how far is "too far." We have said often enough that the answer to this question generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: The inquiry "must be conducted with respect to specific property." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987) (internal quotation marks omitted). And if a "regulation denies all economically beneficial or productive use of land," the interference categorically amounts to a taking. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015 (1992). For the vast array of regulations that lack such an extreme effect, a flexible approach is more fitting. The factors to consider are wide ranging, and include the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. The ultimate question is whether the government's imposition on a property has forced the owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123 (1978) (internal quotation marks omitted).

Finally, if a taking has occurred, the remaining matter is tabulating the "just compensation" to which the property owner is entitled. "[J]ust compensation normally is to be measured by the market value of the property at the time of the taking." *Horne*, 576 U. S., at 368–369 (internal quotation marks omitted).

B

Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regula-

tory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co.* v. *New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." 438 U. S., at 130. In that case, the owner of Grand Central Terminal in New York City argued that a restriction on the owner's ability to add an office building atop the station amounted to a taking of its air rights. We rejected that narrow definition of the "property" at issue, concluding that the correct unit of analysis was the owner's "rights in the parcel as a whole." *Id.*, at 130–131. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); see *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 327 (2002).

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 397.

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant "private property." States create property rights with respect to particular "things." And in the context of real property, those "things" are horizontally bounded plots of land. *Tahoe-Sierra*, 535 U. S., at 331 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions"). States may define those plots differently—some using metes and bounds, others using government surveys, recorded plats, or subdivision maps. See 11 D. Thomas, Thompson on Real Property § 94.07(s) (2d ed. 2002); Powell on Real Property § 81A.05(2)(a) (M. Wolf ed. 2016). But the definition of property draws the basic line between, as P. G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue. See, *e. g.*, Wis. Stat. § 236.28 (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot and block . . . for all purposes, including those of assessment, taxation, devise, descent and conveyance").

Following state property lines is also entirely consistent with *Penn Central*. Requiring consideration of the "parcel as a whole" is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*—and claim a complete taking based on that strand alone. That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates . . . property" to avoid a successful takings claim. *Ante*, at 397, 402. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. We rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of "private property." Cf. *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. The owner's possession of such a nearby lot could, for instance, shed light on how the owner reasonably expected to use the parcel at issue before the regulation. If the court concludes that the government's action amounts to a taking, principles of "just compensation" may also allow the owner to recover damages "with regard to a separate parcel" that is contiguous and used in conjunction with the parcel at issue. 4A L. Smith & M. Hansen, Nichols' Law of Eminent Domain, ch. 14B, § 14B.02 (rev. 3d ed. 2010).

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with

owning those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." *Ante*, at 405. Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 397. Those factors, says the majority, show that Lots E and F of the Murrs' property constitute a single parcel and that the local ordinance requiring the Murrs to develop and sell those lots as a pair does not constitute a taking.

In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a "taking." Cramming them into the definition of "private property" undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking*' " under *Penn*

Central. *Ruckelshaus*, 467 U. S., at 1004 (emphasis added); see *Tahoe-Sierra*, 535 U. S., at 326 ("[W]e have generally eschewed any set formula for determining *how far is too far*" (emphasis added; internal quotation marks omitted)). And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. See *Tahoe-Sierra*, 535 U. S., at 331. Both of these inquiries presuppose that the relevant "private property" has already been identified. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 295 (1981) (explaining that "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property"). There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of "property" designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one "parcel," solely for purposes of resisting a particular claim. And under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.

Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an

economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government," *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 (1893), by considering the effect of a regulation on specific property rights as they are established at state law. But the majority's approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes "too far" even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner's possession of the other property, Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—based on all the circumstances and the nature of the regulation—Lots A and B should be considered one "parcel." If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

The majority assures that, under its test, "[d]efining the property . . . should not *necessarily* preordain the outcome

in *every* case." *Ante*, at 395 (emphasis added). The underscored language cheapens the assurance. The framework laid out today provides little guidance for identifying whether "expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante*, at 397. Instead, the majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.

Moreover, given its focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single "parcel" for one takings claim, but separate "parcels" for another. See *ante*, at 399. This is just another opportunity to gerrymander the definition of "private property" to defeat a takings claim. The majority also emphasizes that courts trying to identify the relevant parcel "must strive" to ensure that "some people alone [do not] bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Ante*, at 405–406 (internal quotation marks omitted). But this refrain is the traditional touchstone for spotting a taking, not for defining private property.

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

Staying with a state law approach to defining "private property" would make our job in this case fairly easy. The Murr siblings acquired Lot F in 1994 and Lot E a year later. Once the lots fell into common ownership, the challenged ordinance prevented them from being "sold or developed as separate lots" because neither contained a sufficiently large area of buildable land. Wis. Admin. Code § NR 118.08(4)(a)(2). The Murrs argued that the ordinance amounted to a taking of Lot E, but the State of Wisconsin and St. Croix County proposed that both lots together should count as the relevant "parcel."

The trial court sided with the State and county, and the Wisconsin Court of Appeals affirmed. Rather than considering whether Lots E and F are separate parcels under Wisconsin law, however, the Court of Appeals adopted a takings-specific approach to defining the relevant parcel. See 2015 WI App 13, 359 Wis. 2d 675, 859 N. W. 2d 628 (unpublished opinion), App. to Pet. for Cert. A–9, ¶17 (framing the issue as "whether contiguous property is analytically divisible for purposes of a regulatory takings claim"). Relying on what it called a "well-established rule" for "regulatory takings cases," the court explained "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Id.*, at A–11, ¶20. And because Lots E and F were side by side and owned by the Murrs, the case was straightforward: The two lots were one "parcel" for the regulatory takings analysis. The court therefore evaluated the effect of the ordinance on the two lots considered together.

As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. *Ante*, at 403. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. *Lucas*, 505 U. S., at 1015. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. *Ante*, at 403–404. These facts speak to "the economic impact of the regulation," interference with "investment-backed expectations," and the "character of the governmental action"—all things we traditionally consider in the *Penn Central* analysis. 438 U. S., at 124.

I would be careful, however, to confine these considerations to the question whether the regulation constitutes a taking. As Alexander Hamilton explained, "the security of Property" is one of the "great object[s] of government." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Takings Clause was adopted to ensure such security by protecting property rights as they exist under state law. Deciding whether a regulation has gone so far as to constitute a "taking" of one of those property rights is, properly enough, a fact-intensive task that relies "as much on the exercise of judgment as on the application of logic." *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 349 (1986) (alterations and internal quotation marks omitted). But basing the definition of "property" on a judgment call, too, allows the government's interests to warp the private rights that the Takings Clause is supposed to secure.

I respectfully dissent.

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent because it correctly applies this Court's regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), the Court announced a "general rule" that "if regulation goes too far it will be recognized as a taking." But we have since observed that, prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642 (1879)." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992). In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. See generally Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008) (describing the debate among scholars over those questions).

Syllabus

PERRY *v.* MERIT SYSTEMS PROTECTION BOARD

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

No. 16–399. Argued April 17, 2017—Decided June 23, 2017

Under the Civil Service Reform Act of 1978 (CSRA), the Merit Systems Protection Board (MSPB or Board) has the power to review certain serious personnel actions against federal employees. If an employee asserts rights under the CSRA only, MSPB decisions are subject to judicial review exclusively in the Federal Circuit. 5 U. S. C. § 7703(b)(1). If the employee invokes only federal antidiscrimination law, the proper forum for judicial review is federal district court. See *Kloeckner* v. *Solis*, 568 U. S. 41, 46.

An employee who complains of a serious adverse employment action and attributes the action, in whole or in part, to bias based on race, gender, age, or disability brings a "mixed case." When the MSPB dismisses a mixed case on the merits or on procedural grounds, review authority lies in district court, not the Federal Circuit. *Id.*, at 50, 56. This case concerns the proper forum for judicial review when the MSPB dismisses such a case for lack of jurisdiction.

Anthony Perry received notice that he would be terminated from his employment at the U. S. Census Bureau for spotty attendance. Perry and the Bureau reached a settlement in which Perry agreed to a 30-day suspension and early retirement. The settlement also required Perry to dismiss discrimination claims he had filed separately with the Equal Employment Opportunity Commission (EEOC). After retiring, Perry appealed his suspension and retirement to the MSPB, alleging discrimination based on race, age, and disability, as well as retaliation by the Bureau for his prior discrimination complaints. The settlement, he maintained, did not stand in the way, because the Bureau had coerced him into signing it. But an MSPB administrative law judge (ALJ) determined that Perry had failed to prove that the settlement was coerced. Presuming Perry's retirement to be voluntary, the ALJ dismissed his case. Because voluntary actions are not appealable to the MSPB, the ALJ observed, the Board lacked jurisdiction to entertain Perry's claims. The MSPB affirmed, deeming Perry's separation voluntary and therefore not subject to the Board's jurisdiction. If dissatisfied with the MSPB's ruling, the Board stated, Perry could seek judicial review in the Federal Circuit. Perry instead sought review in the D. C. Circuit, which, the parties later agreed, lacked jurisdiction. The D. C. Circuit held that the proper forum was the Federal Circuit and transferred the

case there. *Kloeckner* did not control, the court concluded, because it addressed dismissals on procedural grounds, not jurisdictional grounds.

Held: The proper review forum when the MSPB dismisses a mixed case on jurisdictional grounds is district court. Pp. 429–438.

(a) The Government argues that employees must split their mixed claims, appealing MSPB nonappealability rulings to the Federal Circuit while repairing to the district court to adjudicate their discrimination claims. Perry counters that the district court alone can resolve his entire complaint. Perry advances the more sensible reading of the statutory prescriptions.

Kloeckner announced a clear rule: "[M]ixed cases shall be filed in district court." 568 U. S., at 50; see *id.*, at 56. The key to district court review is the employee's "*clai[m]* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1)." *Ibid.* (emphasis added). Such a nonfrivolous allegation of jurisdiction suffices to establish district court jurisdiction. EEOC regulations are in accord, and several Courts of Appeals have similarly described mixed-case appeals as those *alleging* an adverse action subject to MSPB jurisdiction taken, in whole or in part, because of unlawful discrimination. Perry, who "complain[ed] of a personnel action serious enough to appeal to the MSPB" and "allege[d] that the [personnel] action was based on discrimination," brought a mixed case, and district court jurisdiction was therefore proper. Pp. 429–432.

(b) The Government's proposed distinction—between MSPB merits and procedural decisions, on the one hand, and the Board's jurisdictional rulings, on the other—has multiple infirmities. Had Congress wanted to bifurcate judicial review, sending merits and procedural decisions to district court and jurisdictional dismissals to the Federal Circuit, it could have said so. See *Kloeckner*, 568 U. S., at 52. The Government's newly devised attempt to distinguish jurisdictional dismissals from procedural dismissals is a departure from its position in *Kloeckner*. Such a distinction, as both parties recognized in *Kloeckner*, would be perplexing and elusive. The distinction between jurisdiction and the merits is also not inevitably sharp, for the two inquiries may overlap. And because the MSPB may issue rulings on alternate or multiple grounds, some "jurisdictional," others procedural or substantive, allocating judicial review authority based on a separate rule for jurisdictional rulings may prove unworkable in practice. Perry's comprehension of the complex statutory text, in contrast, serves "[t]he CSRA's objective of creating an integrated scheme of review[, which] would be seriously undermined" by "parallel litigation regarding the same agency action." *Elgin* v. *Department of Treasury*, 567 U. S. 1, 14. Pp. 432–437.

829 F. 3d 760, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 438.

Christopher Landau argued the cause and filed briefs for petitioner.

Brian H. Fletcher argued the cause for respondent. With him on the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Stewart*, *Eric J. Feigin*, *Marleigh D. Dover*, and *Stephanie R. Marcus.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the proper forum for judicial review when a federal employee complains of a serious adverse employment action taken against him, one falling within the compass of the Civil Service Reform Act of 1978 (CSRA), 5 U. S. C. § 1101 *et seq.*, and attributes the action, in whole or in part, to bias based on race, gender, age, or disability, in violation of federal antidiscrimination laws. We refer to complaints of that order, descriptively, as "mixed cases."

In the CSRA, Congress created the Merit Systems Protection Board (MSPB or Board) to review certain serious personnel actions against federal employees. If an employee asserts rights under the CSRA only, MSPB decisions, all agree, are subject to judicial review exclusively in the Federal Circuit. § 7703(b)(1). If the employee asserts no civil-service rights, invoking only federal antidiscrimination law, the proper forum for judicial review, again all agree, is a federal district court, see *Kloeckner* v. *Solis*, 568 U. S. 41, 46 (2012); the Federal Circuit, while empowered to review MSPB decisions on civil-service claims, § 7703(b)(1)(A), lacks

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**Michael L. Foreman*, *Joseph V. Kaplan*, and *Alan R. Kabat* filed a brief for the Metropolitan Washington Employment Lawyers Association as *amicus curiae* urging reversal.

authority over claims arising under antidiscrimination laws, see § 7703(c).

When a complaint presents a mixed case, and the MSPB dismisses it, must the employee resort to the Federal Circuit for review of any civil-service issue, reserving claims under federal antidiscrimination law for discrete district court adjudication? If the MSPB dismisses a mixed case on the merits, the parties agree, review authority lies in district court, not in the Federal Circuit. In *Kloeckner*, 568 U. S., at 50, 56, we held, the proper review forum is also the district court when the MSPB dismisses a mixed case on procedural grounds, in *Kloeckner* itself, failure to meet a deadline for Board review set by the MSPB. We hold today that the review route remains the same when the MSPB types its dismissal of a mixed case as "jurisdictional." As in *Kloeckner*, we are mindful that review rights should be read not to protract proceedings, increase costs, and stymie employees,[1] but to secure expeditious resolution of the claims employees present. See *Elgin* v. *Department of Treasury*, 567 U. S. 1, 15 (2012) (emphasizing need for "clear guidance about the proper forum for [an] employee's [CSRA] claims"). Cf. Fed. Rule Civ. Proc. l.

I

A

The CSRA "establishes a framework for evaluating personnel actions taken against federal employees." *Kloeckner* v. *Solis*, 568 U. S. 41, 44 (2012). For "particularly serious" actions, "for example, a removal from employment or a reduction in grade or pay," "the affected employee has a right to appeal the agency's decision to the MSPB." *Ibid.* (citing §§ 1204, 7512, 7701). Such an appeal may present a civil-service claim only. Typically, the employee may allege that

[1] Many CSRA claimants proceed *pro se*. See MSPB, Congressional Budget Justification FY 2017, p. 14 (2016) ("Generally, at least half or more of the appeals filed with the [MSPB] are from *pro se* appellants . . . .").

"the agency had insufficient cause for taking the action under the CSRA." *Id.*, at 44. An appeal to the MSPB, however, may also complain of adverse action taken, in whole or in part, because of discrimination prohibited by another federal statute, for example, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, or the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 *et seq.* See 5 U. S. C. § 7702(a)(1); *Kloeckner*, 568 U. S., at 44.

In *Kloeckner*, we explained, "[w]hen an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination, she is said (by pertinent regulation) to have brought a 'mixed case.'" *Ibid.* (quoting 29 CFR § 1614.302 (2012)). See also § 1614.302(a)(2) (2016) (defining "mixed case appeal" as one in which an employee "alleges that an appealable agency action was effected, in whole or in part, because of discrimination"). For mixed cases, "[t]he CSRA and regulations of the MSPB and Equal Employment Opportunity Commission (EEOC) set out special procedures . . . different from those used when the employee either challenges a serious personnel action under the CSRA alone or attacks a less serious action as discriminatory." *Kloeckner*, 568 U. S., at 44–45.

As *Kloeckner* detailed, the CSRA provides diverse procedural routes for an employee's pursuit of a mixed case. The employee "may first file a discrimination complaint with the agency itself," in the agency's equal employment opportunity (EEO) office, "much as an employee challenging a personnel practice not appealable to the MSPB could do." *Id.*, at 45 (citing 5 CFR § 1201.154(a) (2012); 29 CFR § 1614.302(b) (2012)); see § 7702(a)(2). "If the agency [EEO office] decides against her, the employee may then either take the matter to the MSPB or bypass further administrative review by suing the agency in district court." *Kloeckner*, 568 U. S., at 45 (citing 5 CFR § 1201.154(b); 29 CFR § 1614.302(d)(1)(i)); see § 7702(a)(2). "Alternatively, the employee may initiate

the process by bringing her case directly to the MSPB, forgoing the agency's own system for evaluating discrimination charges." *Kloeckner*, 568 U. S., at 45 (citing 5 CFR § 1201.154(a); 29 CFR § 1614.302(b)); see § 7702(a)(1).

Section 7702 prescribes appellate proceedings in actions involving discrimination. Defining the MSPB's jurisdiction in mixed-case appeals that bypass an agency's EEO office, § 7702(a)(1) states in relevant part:

> "[I]n the case of any employee . . . who—
>
> "(A) has been affected by an action which the employee . . . may appeal to the [MSPB], and
>
> "(B) alleges that a basis for the action was discrimination prohibited by [specified antidiscrimination statutes],
>
> "the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures . . . ."[2]

Section 7702(a)(2) similarly authorizes a mixed-case appeal to the MSPB from an agency EEO office's decision. Then, "[i]f the MSPB upholds the personnel action (whether in the first instance or after the agency has done so), the employee again has a choice: She may request additional administrative process, this time with the EEOC, or else she may seek judicial review." *Kloeckner*, 568 U. S., at 45 (citing § 7702(a)(3), (b); 5 CFR § 1201.161; 29 CFR § 1614.303).

Section 7703(b) designates the proper forum for judicial review of MSPB decisions. Section 7703(b)(1)(A) provides the general rule: "[A] petition to review a . . . final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." Section 7703(b)(2) states the

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[2] If the MSPB fails to render a "judicially reviewable action" within 120 days, an employee may, "at any time after . . . the 120th day," "file a civil action [in district court] to the same extent and in the same manner as provided in" the federal antidiscrimination laws invoked by the employee. § 7702(e)(1).

exception here relevant, governing "[c]ases of discrimination subject to the provisions of [§]7702." See *Kloeckner*, 568 U. S., at 46 ("The 'cases of discrimination' in § 7703(b)(2)'s exception . . . are mixed cases, in which an employee challenges as discriminatory a personnel action appealable to the MSPB."). Such cases "shall be filed under [the enforcement sections of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Fair Labor Standards Act of 1938, 29 U. S. C. § 201 *et seq.*], as applicable." § 7703(b)(2). Those enforcement provisions "all authorize suit in federal district court." *Kloeckner*, 568 U. S., at 46 (citing, *inter alia*, 42 U. S. C. §§ 2000e–16(c), 2000e–5(f); 29 U. S. C. § 633a(c); § 216(b)). Thus, if the MSPB decides against the employee on the merits of a mixed case, the statute instructs her to seek review in federal district court under the enforcement provision of the relevant antidiscrimination laws. § 7703(b)(2); see *Kloeckner*, 568 U. S., at 56, n. 4.[3]

Federal district court is also the proper forum for judicial review, we held in *Kloeckner*, when the MSPB dismisses a mixed case on procedural grounds. *Id.*, at 50, 56. We rested that conclusion on this syllogism: "Under § 7703(b)(2), 'cases of discrimination subject to [§ 7702]' shall be filed in district court." *Id.*, at 50 (alteration in original). Further, "[u]nder § 7702(a)(1), [mixed cases qualify as] 'cases of discrimination subject to [§ 7702].'" *Ibid.* (third alteration in

[3] Our decision in *Kloeckner* v. *Solis*, 568 U. S. 41 (2012), did not merely *assume* that the civil-service component of mixed cases travels to district court. See *id.*, at 56, n. 4 ("If the MSPB rejects on the merits a complaint alleging that an agency violated the CSRA as well as an antidiscrimination law, the suit *will* come to district court for a decision *on both questions*." (emphasis added)). But see *post*, at 445–446. Characteristic of "mixed cases," the employee in *Kloeckner* complained of adverse action taken, at least in part, because of discrimination. See 568 U. S., at 47. The Board dismissed that case, not for any flaw under antidiscrimination law, but because the employee missed a deadline set by the MSPB. See *id.*, at 47–48.

original). Thus, "mixed cases shall be filed in district court." *Ibid.* That syllogism, we held, holds true whether the dismissal rests on procedural grounds or on the merits, for "nowhere in the [CSRA's] provisions on judicial review" is a distinction drawn between MSPB merits decisions and procedural rulings. *Id.*, at 51.

The instant case presents this question: Where does an employee seek judicial review when the MSPB dismisses her civil-service case alleging discrimination neither on the merits nor on a procedural ground, but for lack of jurisdiction?

B

Anthony Perry worked at the U. S. Census Bureau until 2012. 829 F. 3d 760, 762 (CADC 2016). In 2011, Perry received notice that he would be terminated because of spotty attendance. *Ibid.* Later that year, Perry and the Bureau reached a settlement in which Perry agreed to a 30-day suspension and early retirement. *Ibid.* The agreement required Perry to dismiss discrimination claims he had separately filed with the EEOC. *Ibid.*

After retiring, Perry appealed his suspension and retirement to the MSPB. *Ibid.* He alleged discrimination on grounds of race, age, and disability, as well as retaliation by the Bureau for his prior discrimination complaints. *Ibid.* The settlement, he maintained, did not stand in the way, because the Bureau coerced him into signing it. *Ibid.*

An MSPB administrative law judge (ALJ) eventually determined that Perry had failed to prove that the settlement was coerced. *Perry* v. *Department of Commerce*, No. DC–0752–12–0486–B–1 etc. (Dec. 23, 2013) (initial decision), App. to Pet. for Cert. 32a, 47a. Presuming Perry's retirement to be voluntary, the ALJ dismissed his case. *Id.*, at 33a, 47a. Voluntary actions are not appealable to the MSPB, the ALJ observed, hence, the ALJ concluded, the Board lacked jurisdiction to entertain Perry's claims. *Id.*, at 51a.

The MSPB affirmed the ALJ's decision. See *Perry* v. *Department of Commerce*, 2014 WL 5358308, *1 (Aug. 6, 2014) (final order). The settlement agreement, the Board recounted, provided that Perry would waive his Board appeal rights with respect to his suspension and retirement. *Ibid.* Because Perry did not prove that the agreement was involuntary, the Board determined (in accord with the ALJ) that his separation should be deemed voluntary, hence not an adverse action subject to the Board's jurisdiction under § 7702(a)(1). *Id.*, at *3–*4. If dissatisfied with the MSPB's ruling, the Board stated in its decision, Perry could seek judicial review in the Federal Circuit. *Id.*, at *4.

Perry instead filed a *pro se* petition for review in the D. C. Circuit. 829 F. 3d, at 763. The court ordered jurisdictional briefing and appointed counsel to argue for Perry. *Ibid.* By the time the court heard argument, the parties had agreed that the D. C. Circuit lacked jurisdiction, but disagreed on whether the proper forum for judicial review was the Federal Circuit, as the Government contended, or federal district court, as Perry maintained. *Ibid.*

The D. C. Circuit held that the Federal Circuit had jurisdiction over Perry's petition and transferred his case to that court under 28 U. S. C. § 1631. 829 F. 3d, at 763. The court's disposition was precedent-bound: In a prior decision, *Powell* v. *Department of Defense*, 158 F. 3d 597, 598 (1998), the D. C. Circuit had held that the Federal Circuit is the proper forum for judicial review of MSPB decisions dismissing mixed cases "on procedural or threshold grounds." See 829 F. 3d, at 764, 767–768. Notably, *Powell* ranked as a "procedural or threshold matter" "the Board's view of its jurisdiction." 158 F. 3d, at 599 (internal quotation marks omitted).

The D. C. Circuit rejected Perry's argument that *Powell* was undermined by this Court's intervening decision in *Kloeckner*, which held MSPB procedural dispositions of mixed cases reviewable in district court. 829 F. 3d, at 764–

768. *Kloeckner*, the D. C. Circuit observed, repeatedly tied its decision to dismissals on "procedural grounds," 568 U. S., at 44, 46, 49, 52, 54, 55. See 829 F. 3d, at 765. Jurisdictional dismissals differ from procedural dismissals, the D. C. Circuit concluded, given the CSRA's reference to mixed cases as those "which the employee . . . *may appeal* to the [MSPB]." *Id.*, at 766–767 (quoting § 7702(a)(1)(A); emphasis added). A jurisdictional dismissal, the court said, rests on the Board's determination that the employee may *not* appeal his case to the MSPB. *Id.*, at 766–767. In contrast, a dismissal on procedural grounds, *e. g.*, untimely resort to the MSPB, leaves the employee still "affected by an action which [she] may appeal to the MSPB." *Ibid.* (quoting § 7702(a)(1)(A); alteration in original).

We granted certiorari to review the D. C. Circuit's decision, 580 U. S. 1089 (2017), which accords with the Federal Circuit's decision in *Conforto* v. *Merit Systems Protection Bd.*, 713 F. 3d 1111 (2013).

II

Federal employees, the Government acknowledges, have a right to pursue claims of discrimination in violation of federal law in federal district court. Nor is there any doubt that the Federal Circuit lacks authority to adjudicate such claims. See § 7703(c) (preserving "right to have the facts subject to trial de novo by the reviewing court" in any "case of discrimination" brought under § 7703(b)(2)). The sole question here disputed: What procedural route may an employee in Perry's situation take to gain judicial review of the MSPB's jurisdictional disposition of a complaint that alleges adverse action taken under the CSRA in whole or in part due to discrimination proscribed by federal law?

The Government argues, and the dissent agrees, that employees, situated as Perry is, must split their claims, appealing MSPB nonappealability rulings to the Federal Circuit while repairing to the district court for adjudication of their discrimination claims. As Perry sees it, one stop is all he

need make. Exclusively competent to adjudicate "[c]ases of discrimination," § 7703(b)(2), the district court alone can resolve his entire complaint, Perry urges; the CSRA, he maintains, forces no bifurcation of his case.

Section 7702(a)(1), the Government contends, marks a case as mixed only if the employee "has been affected by an action which the employee . . . may appeal to the [MSPB]." Brief for Respondent 15, 17–19, 21. An MSPB finding of nonappealability removes a case from that category, the Government asserts, and hence, from the purview of "[c]ases of discrimination" described in § 7703(b)(2). *Id.*, at 21. Only this reading of the CSRA's provisions on judicial review—one ordering Federal Circuit review of any and all MSPB appealability determinations—the Government maintains, can ensure nationwide uniformity in answering questions arising under the CSRA. *Id.*, at 26–32.

Perry emphasizes in response that § 7702(a)(1)(A)'s language, delineating cases in which an employee "has been affected by an action which the employee . . . may appeal to the [MSPB]," is not confined to cases an employee may *successfully* appeal to the Board. Brief for Petitioner 19. The MSPB's adverse ruling on the merits of his claim that the settlement was coerced, Perry argues, "did not retroactively divest the MSPB of jurisdiction to render that decision." *Id.*, at 21. The key consideration, according to Perry, is not what the MSPB determined about appealability; it is instead the nature of an employee's *claim* that he had been "affected by an action [appealable] to the [MSPB]" (here, suspension for more than 14 days and involuntary removal, see § 7512(1), (2)). See *id.*, at 11, 23–24. Perry draws support for this argument from our recognition that "a party [may] establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements," *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 537 (1995). See Brief for Petitioner 21–22.

Perry, we hold, advances the more sensible reading of the statutory prescriptions. The Government's procedure-

jurisdiction distinction, we conclude, is no more tenable than "the merits-procedure distinction" we rejected in *Kloeckner*, 568 U. S., at 51.

A

As just noted, a nonfrivolous allegation of jurisdiction generally suffices to establish jurisdiction upon initiation of a case. See *Jerome B. Grubart, Inc.*, 513 U. S., at 537. See also *Bell* v. *Hood*, 327 U. S. 678, 682–683 (1946) (To invoke federal-question jurisdiction, allegations in a complaint must simply be more than "insubstantial or frivolous," and "[i]f the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."). So too here: Whether an employee "has been affected by an action which [she] may appeal to the [MSPB]," § 7702(a)(1)(A), turns on her well-pleaded allegations. *Kloeckner*, EEOC regulations, and Courts of Appeals' decisions are corroborative.

We announced a clear rule in *Kloeckner*: "[M]ixed cases shall be filed in district court." 568 U. S., at 50. An employee brings a mixed case, we explained, when she "complains of a personnel action serious enough to appeal to the MSPB," *e. g.*, suspension for more than 14 days, § 7512(2), "and alleges that the action was based on discrimination," *id.*, at 44 (emphasis deleted). The key to district court review, we said, was the employee's "*clai[m]* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1)." *Id.*, at 56 (emphasis added).

EEOC regulations, see *supra*, at 424, are in accord: The defining feature of a "mixed case appeal," those regulations instruct, is the employee's "*alleg[ation]* that an appealable agency action was effected, in whole or in part, because of discrimination." 29 CFR § 1614.302(a)(2) (2016) (emphasis added). Several Courts of Appeals have similarly described mixed-case appeals as those *alleging* an adverse action sub-

ject to MSPB jurisdiction taken, in whole or in part, because of unlawful discrimination. See, *e. g.*, *Downey* v. *Runyon*, 160 F. 3d 139, 143 (CA2 1998) ("Mixed appeals to the MSPB are those appeals *alleging* an appealable action [e]ffected in whole or in part by prohibited discrimination." (emphasis added)); *Powell*, 158 F. 3d, at 597 (defining mixed-case appeal as "an appeal *alleging* both a Board-jurisdictional agency action and a claim of unlawful discrimination" (emphasis added)). See also *Conforto*, 713 F. 3d, at 1126–1127, n. 5 (Dyk, J., dissenting).[4]

Because Perry "complain[ed] of a personnel action serious enough to appeal to the MSPB" (in his case, a 30-day suspension and involuntary removal, see *supra*, at 427; § 7512(1), (2)) and "allege[d] that the [personnel] action was based on discrimination," he brought a mixed case. *Kloeckner*, 568 U. S., at 44.[5] Judicial review of such a case lies in district court. *Id.*, at 50, 56.

B

The Government rests heavily on a distinction between MSPB merits and procedural decisions, on the one hand, and

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[4] Our interpretation is also consistent with another CSRA provision, § 7513(d), which provides that "[a]n employee against whom an action is taken under this section is entitled to appeal to the . . . Board." Because the "entitle[ment] to appeal" conferred in § 7513(d) must be determined before an appeal is filed, such a right cannot depend on the outcome of the appeal.

[5] If, as the dissent and the Government argue, see *post*, at 445–446; Brief for Respondent 19–26, 33–35, Perry's case is not "mixed," one can only wonder what kind of case it is, surely not one asserting rights under the CSRA only, or one invoking only antidiscrimination law. See *supra*, at 422–423. This is, of course, a paradigm mixed case: Perry alleges serious personnel actions (suspension and forced retirement) caused in whole or in part by prohibited discrimination. So did the employee in *Kloeckner*. She alleged that her firing (a serious personnel action) was based on discrimination. See 568 U. S., at 47. Thus Perry, like Kloeckner, well understood what the term "mixed case" means.

the Board's jurisdictional rulings, on the other.[6] The distinction has multiple infirmities.

"If Congress had wanted to [bifurcate judicial review,] send[ing] merits decisions to district court and procedural dismissals to the Federal Circuit," we observed in *Kloeckner*, "it could just have said so." *Id.*, at 52. The same observation could be made about bifurcating judicial review here, sending the MSPB's merits and procedural decisions to district court, but its jurisdictional dismissals to the Federal Circuit.[7]

The Government's attempt to separate jurisdictional dismissals from procedural dismissals is newly devised. In *Kloeckner*, the Government agreed with the employee that there was "no basis" for a procedure-jurisdiction distinction. Brief for Respondent, O. T. 2012, No. 11–184, p. 25, n. 3; see Reply to Brief in Opposition, O. T. 2012, No. 11–184, pp. 1–2 (stating employee's agreement with the Government that procedural and jurisdictional dismissals should travel together). Issues of both kinds, the Government there urged, should go to the Federal Circuit. Drawing such a distinction, the Government observed, would be "difficult and unpredictable." Brief in Opposition in *Kloeckner*, O. T. 2012, No. 11–184, p. 15 (internal quotation marks omitted). Now,

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[6] Notably, the dissent ventures no support for the principal argument made by the Government, *i. e.*, that MSPB jurisdictional dispositions belong in the Federal Circuit, procedural and merits dispositions, in district court.

[7] As Judge Dyk, dissenting in *Conforto* v. *Merit Systems Protection Bd.*, 713 F. 3d 1111 (CA Fed. 2013), pointed out: "[W]here Congress intended to distinguish between different types of Board decisions, it did so expressly." *Id.*, at 1124, n. 1 (citing § 3330b(b) ("An election under this section may not be made . . . after the [MSPB] has issued a judicially reviewable decision *on the merits* of the appeal." (emphasis added)); § 7703(a)(2) ("The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee . . . seeks review of a final order or decision *on the merits* . . . ." (emphasis added))).

in light of our holding in *Kloeckner* that procedural dismissals should go to district court, the Government has changed course, contending that MSPB procedural and jurisdictional dismissals should travel different paths.[8]

A procedure-jurisdiction distinction for purposes of determining the court in which judicial review lies, as both parties recognized in *Kloeckner*, would be perplexing and elusive. If a 30-day suspension followed by termination becomes nonappealable to the MSPB when the Board credits a release signed by the employee, one may ask why a determination that the employee complained of such adverse actions (suspension and termination) too late, *i. e.*, after a Board-set deadline, does not similarly render the complaint nonappealable. In both situations, the Board disassociates itself from the case upon making a threshold determination. This Court, like others, we note, has sometimes wrestled over the proper characterization of timeliness questions. Compare *Bowles* v. *Russell*, 551 U. S. 205, 209–211, 215 (2007) (timely filing of notice of appeal in civil cases is "jurisdictional"), with *id.*, at 217–219 (Souter, J., dissenting) (timeliness of notice of appeal is a procedural issue).

Just as the proper characterization of a question as jurisdictional rather than procedural can be slippery, the distinc-

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[8] This is not the first time the Government has changed its position. Before the Federal Circuit in *Ballentine* v. *Merit Systems Protection Bd.*, 738 F. 2d 1244 (1984), the Government moved to transfer *to district court* an appeal challenging a jurisdictional dismissal by the MSPB. See *id.*, at 1245. The Government argued that "even a question of the Board's jurisdiction to hear an attempted mixed case appeal must be addressed by a district court." *Id.*, at 1247 (internal quotation marks omitted). Rejecting the Government's position, the Federal Circuit concluded that it could review MSPB decisions on "procedural or threshold matters, not related to the merits of a discrimination claim." *Ibid.* In *Kloeckner*, we disapproved the Federal Circuit's holding with respect to MSPB procedural dismissals. 568 U. S., at 50, 56. Today we disapprove *Ballentine*'s holding with respect to jurisdictional dismissals, thereby adopting precisely the position advanced by the Government in that case.

tion between jurisdictional and merits issues is not inevitably sharp, for the two inquiries may overlap. See *Shoaf* v. *Department of Agriculture*, 260 F. 3d 1336, 1341 (CA Fed. 2001) ("recogniz[ing] that the MSPB's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined" (internal quotation marks omitted)). This case fits that bill. The MSPB determined that it lacked jurisdiction over Perry's civil-service claims on the ground that he voluntarily released those claims by entering into a valid settlement with his employing agency, the Census Bureau. See App. to Pet. for Cert. 27a.[9] But the validity of the settlement is at the heart of the dispute on the *merits* of Perry's complaint. In essence, the MSPB ruled that it lacked jurisdiction because Perry's claims fail on the merits. See *Shoaf*, 260 F. 3d, at 1341 (If it is established that an employee's "resignation or retirement was involuntary and thus tantamount to forced removal," then "not only [does the Board] ha[ve] jurisdiction, but also the employee wins on the merits and is entitled to reinstatement." (internal quotation marks omitted)). See also *Conforto*, 713 F. 3d, at 1126 (Dyk, J., dissenting) ("[I]t cannot be that [the Federal Circuit] lack[s] jurisdiction to review the 'merits' of mixed cases but nevertheless may review 'jurisdictional' issues that are identical to the merits . . . .").[10]

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[9] In civil litigation, a release is an affirmative defense to a plaintiff's claim for relief, not something the plaintiff must anticipate and negate in her pleading. See Fed. Rule Civ. Proc. 8(c)(1) (listing among affirmative defenses "release" and "waiver"); *Newton* v. *Rumery*, 480 U. S. 386, 391 (1987). In that light, the MSPB's jurisdiction should be determined by the adverse actions Perry asserts, suspension and forced retirement; the settlement releasing Perry's claims would figure as a defense to his complaint, it would not enter into the determination whether the Board has jurisdiction over his claims.

[10] If a reviewing court "agree[d] with the Board's assessment," then Perry would indeed have "lost his chance to pursue his . . . discrimination claim[s]," *post*, at 440, for those claims would have been defeated had he voluntarily submitted to the agency's action.

Distinguishing between MSPB jurisdictional rulings and the Board's procedural or substantive rulings for purposes of allocating judicial review authority between district court and the Federal Circuit is problematic for a further reason: In practice, the distinction may be unworkable. The MSPB sometimes rules on alternate grounds, one typed "jurisdictional," another either procedural or substantive. See, *e. g.*, *Davenport* v. *Postal Service*, 97 MSPR 417 (2004) (dismissing "for lack of jurisdiction *and* as untimely filed" (emphasis added)). To which court does appeal lie? Or, suppose that the Board addresses a complaint that encompasses multiple claims, dismissing some for want of jurisdiction, others on procedural or substantive grounds. See, *e. g.*, *Donahue* v. *Postal Service*, 2006 WL 859448, *1, *3 (ED Pa., Mar. 31, 2006). Tellingly, the Government is silent on the proper channeling of appeals in such cases.

Desirable as national uniformity may be,[11] it should not override the expense, delay, and inconvenience of requiring employees to sever inextricably related claims, resorting to two discrete appellate forums, in order to safeguard their rights. Perry's comprehension of the complex statutory text, we are persuaded, best serves "[t]he CSRA's objective of creating an integrated scheme of review[, which] would be seriously undermined" by "parallel litigation regarding the same agency action." *Elgin* v. *Department of Treasury*, 567 U. S. 1, 14 (2012). See also *United States* v. *Fausto*, 484 U. S.

[11] In *Kloeckner*, we rejected the Government's national uniformity argument. See 568 U. S., at 55–56, n. 4. "When Congress passed the CSRA, the Federal Circuit did not exist," we observed, so uniformity did not then figure in Congress' calculus. *Id.*, at 56, n. 4. Moreover, even under the Government's reading, "many cases involving federal employment issues [would be resolved] in district court. If the MSPB rejects on the merits a complaint alleging that an agency violated the CSRA as well as an anti-discrimination law, the suit will come to district court for a decision on both questions." *Ibid.*

439, 444–445 (1988).[12] Perry asks us not to "tweak" the statute, see *post*, at 438, but to read it sensibly, *i. e.*, to refrain from reading into it the appeal-splitting bifurcation sought by the Government. Accordingly, we hold: (1) The Federal Circuit is the proper review forum when the MSPB disposes of complaints arising solely under the CSRA; and (2) in mixed cases, such as Perry's, in which the employee (or former employee) complains of serious adverse action prompted, in whole or in part, by the employing agency's violation of federal antidiscrimination laws, the district court is the proper forum for judicial review.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the District of Columbia Circuit is re-

[12] In both *Elgin* v. *Department of Treasury*, 567 U. S. 1 (2012), and *United States* v. *Fausto*, 484 U. S. 439 (1988), we rejected employees' attempts to divide particular issues or claims among review forums. In *Elgin*, a federal employee opted not to seek review of an MSPB ALJ's decision, either before the full Board or in the Federal Circuit; he instead brought in District Court, in the first instance, a constitutional challenge to an agency personnel action. 567 U. S., at 7–8. We concluded that an employee with civil-service claims must follow the CSRA's procedures and may not bring a standalone constitutional challenge in district court. *Id.*, at 8. In *Fausto*, a federal employee with CSRA claims filed an action in the United States Claims Court under the Back Pay Act of 1966. 484 U. S., at 443. We determined that the employee could not bring his action under the Back Pay Act because the CSRA provided "the comprehensive and integrated review scheme." See *id.*, at 454. Contrary to the dissent's suggestion, see *post*, at 447, neither case indicated that the Federal Circuit, as opposed to district court, is the preferred forum for judicial review of all CSRA claims. Rather, both decisions emphasized the benefits of an integrated review scheme and the problems associated with bifurcating consideration of a single matter in different forums. See 567 U. S., at 13–14; 484 U. S., at 444–445. It is the dissent's insistence on bifurcated review, therefore, that "*Elgin* and *Fausto* warned against," *post*, at 447.

versed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, dissenting.

Anthony Perry asks us to tweak a congressional statute—just a little—so that it might (he says) work a bit more efficiently. No doubt his invitation is well meaning. But it's one we should decline all the same. Not only is the business of enacting statutory fixes one that belongs to Congress and not this Court, but taking up Mr. Perry's invitation also seems sure to spell trouble. Look no further than the lower court decisions that have already ventured where Mr. Perry says we should follow. For every statutory "fix" they have offered, more problems have emerged, problems that have only led to more "fixes" still. New challenges come up just as fast as the old ones can be gaveled down. Respectfully, I would decline Mr. Perry's invitation and would instead just follow the words of the statute as written.

Our case concerns the right of federal employees to pursue their employment grievances under the Civil Service Reform Act. Really, it concerns but a small aspect of that right. Everyone agrees that employees may contest certain adverse employment actions—generally serious ones like dismissals—before the Merit Systems Protection Board. See 5 U. S. C. §§ 7701–7702, 7512–7513. Everyone agrees, too, that employees are generally entitled to seek judicial review of the Board's decisions. See § 7703. The only question we face today is where. And on that question, the Act provides clear directions.

First, the rule. The Act says that an employee's appeal usually "shall be filed in . . . the Federal Circuit," § 7703(b)(1)(A), which then applies a deferential, APA-style standard of review familiar to administrative law, § 7703(c). No doubt this makes sense, too, for Congress established the

Federal Circuit in no small part to ensure a uniform case law governs Executive Branch personnel actions and guarantees the equal treatment of civil servants without regard to geography. See *United States* v. *Fausto*, 484 U. S. 439, 449 (1988).

Second, the exception. Congress recognized that sometimes agencies taking adverse employment actions against employees violate not just federal civil service laws, but also federal antidiscrimination laws. Usually, of course, employees who wish to pursue discrimination claims in federal district court must first exhaust those claims in proceedings before their employing agency. See, *e. g.*, 42 U. S. C. § 2000e–16(c). But the Act provides another option. Employees affected by adverse employment actions that trigger the Act's jurisdiction may (but need not) elect to exhaust their discrimination claims before the Board. See 5 U. S. C. § 7702(a). They also may ask the Board to review discrimination claims already exhausted before their employing agencies, and in this way obtain an additional layer of administrative review. See *ibid.* In § 7702 of the Act, Congress proceeded to set forth the rules the Board must apply in reviewing these cases of discrimination. And it then said that "[c]ases of discrimination subject to the provisions of section 7702" are exempt from the default rule of Federal Circuit review and instead "shall be filed" in district court "under" specified antidiscrimination statutes like Title VII or the ADEA. § 7703(b)(2). At that point, district courts are instructed to engage in *de novo* factfinding, § 7703(c), not APA-style judicial review, just as they would in any other discrimination lawsuit.

Putting these directions together, the statutory scheme is plain. Disputes arising under the civil service laws head to the Federal Circuit for deferential review; discrimination cases go to district court for *de novo* review. Congress allowed employees an elective option to bring their discrimination claims to the Board, but didn't allow this option to de-

stroy the framework it established for the resolution of civil service questions. These rules provide straightforward direction to courts and guidance to federal employees who often proceed *pro se*.

These rules also tell us all we need to know to resolve our case. Construing his *pro se* filings liberally, Mr. Perry pursued civil service and discrimination claims before the Board without first exhausting his discrimination claim before his own agency. The Board held that it couldn't hear Mr. Perry's claims because he hadn't suffered an adverse employment action sufficient to trigger its jurisdiction under the Act. Mr. Perry now seeks to contest the Board's assessment of its jurisdiction and win a review there that so far he's been denied. See, *e. g.*, Brief for Petitioner 24. No doubt, too, he wants the chance to proceed on the merits before the Board for good reason: A victory there is largely unappealable by the government. See 5 U. S. C. §§ 7701, 7703(d); see also Brief for Respondent 34. And because the scope of the Board's jurisdiction is a question of civil service law, Mr. Perry must go to the Federal Circuit for his answer. If that court agrees with Mr. Perry about the scope of the Board's authority, he can return to the Board and argue the merits of his two claims. If instead the court agrees with the Board's assessment of its powers, then Mr. Perry still hasn't lost his chance to pursue his remaining discrimination claim, for he may seek to exhaust that claim in the normal agency channels and proceed to district court.

Mr. Perry, though, invites us to adopt a very different regime, one that would have the *district court* review the Board's ruling on the scope of its jurisdiction. Having to contest Board rulings on civil service and discrimination issues in different courts, he says, is a hassle. So, he submits, we should fix the problem by allowing civil service law questions to proceed to district court whenever an employee pursues a case of discrimination before the Board. In support of his proposal, he points us to a line of lower court cases

associated with *Williams* v. *Department of Army*, 715 F. 2d 1485 (CA Fed. 1983) (en banc). And there, indeed, the Federal Circuit adopted a fix much like what Mr. Perry now proposes: allowing civil service claims to tag along to district court with discrimination claims because, in its judgment, "[f]rom the standpoint of judicial economy, consideration of all issues by a single tribunal is clearly preferable." *Id.*, at 1490.

Mr. Perry's is an invitation I would run from fast. If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty. Besides, the law of unintended consequences being what it is, judicial tinkering with legislation is sure only to invite trouble. Just consider the line of lower court authority Mr. Perry asks us to begin replicating now in the U. S. Reports. Having said that district courts should *sometimes* adjudicate civil service disputes, these courts have quickly and necessarily faced questions about *how* and *when* they should do so. And without any guidance from Congress on these subjects, the lower courts' solutions have only wound up departing further and further from statutory text—and invited yet more and more questions still. A sort of rolling, case-by-case process of legislative amendment.

Take this one. Recall that the statute says that *de novo* standard of review applies to cases filed in district court. See 5 U. S. C. § 7703(c). But everyone agrees that standard is poorly adapted to the review of administrative civil service decisions. So what's to be done with civil service disputes that tag along to district court? Rather than see the problem as a clue things have gone awry, lower courts following *Williams* have suggested that maybe civil service claims should be assessed under deferential standards of review the

Act prescribes only for (yes) *Federal Circuit* cases. And today Mr. Perry encourages us to follow suit too. See Brief for Petitioner 17, n.; *Sher* v. *Department of Veterans Affairs*, 488 F. 3d 489, 499 (CA1 2007), cert. denied, 552 U. S. 1309 (2008).

But that's just the beginning. The statute allows only cases "filed under" certain specified federal antidiscrimination statutes to proceed to district court. Those laws (of course) prescribe remedies to vindicate harms associated with discrimination, including equitable relief and damages. See, *e. g.*, 29 U. S. C. § 633a(c). But what remedies can or should a district court afford a plaintiff in a run-of-the-mill civil service dispute that lands there? Might a plaintiff be forced to litigate in the district court only to be told at the end that no remedial authority exists? May a district court fashion some remedy in the absence of a statutory mandate to do so? Should it only adopt APA-style remedies prescribed by the Act for (again) the *Federal Circuit*? Who knows.

Answer all those questions and still more arise. What happens if the Board fully remedies an employee's discrimination claim, but rejects his simultaneously litigated civil service dispute? Should the employee go to district court with a stand-alone civil service complaint, to be nominally "filed" and adjudicated "under" a federal antidiscrimination statute? Or has by this point the case somehow transformed into one that should be sent to the Federal Circuit? *Williams* itself anticipated these particular problems but (notably) declined to take any stab at answering them. See 715 F. 2d, at 1491.

Still more and even curiouser questions follow. In some cases a district court will find the employee's discrimination claim meritless. When that happens, what should the district court do with a tag along civil service claim? Some lower courts after *Williams* have suggested that cases like these should be transferred back to the Federal Circuit in

the "interests of judicial economy." *Nater* v. *Riley*, 114 F. Supp. 2d 17, 29 (PR 2000). But isn't it more than a little strange that an employee (often proceeding *pro se*, no less) should be sent to district court only to be bounced back to the Federal Circuit—with each trip undertaken in the name of "judicial economy"?

And speaking of judicial economy, you might wonder what happened to the (no doubt efficient) policy Congress itself articulated when it declared that civil service issues should be decided by the Federal Circuit so they might be subject to a uniform body of appellate case law. See *Fausto*, 484 U. S., at 449; see also *Elgin* v. *Department of Treasury*, 567 U. S. 1, 13–14 (2012). In an effort to achieve a simulacrum of that statutory command, one Federal Circuit Judge has suggested that the regional circuits hearing tag along civil service issues should defer to Federal Circuit interpretations of civil service laws, much as federal courts defer to state courts on matters of state law when sitting in diversity. See *Williams*, *supra*, at 1492–1493 (Nichols, J., concurring). Call it a sort of *Erie* doctrine for the Federal Circuit—if, of course, one lacking any basis in federalism, not to mention the statutory text.

By this point, you might wonder too if accepting Mr. Perry's invitation will even wind up saving him (or those like him) any hassle at all. Not only because of all the complications that arise from accepting his invitation. But also because, regardless which court hears his case, Mr. Perry should wind up in the same place anyway. If the reviewing court (whichever court that may be) finds that the Board was wrong and it actually possessed jurisdiction over his civil service and discrimination claims, presumably the court will seek to send Mr. Perry back to the Board to adjudicate those claims. See Reply Brief 18 (agreeing with this point). Meanwhile, if the reviewing court concludes that the Board was right and it lacked jurisdiction over Mr. Perry's claims, presumably the court will require him to exhaust his remain-

ing discrimination claim in normal agency channels before litigating it in court. So even if we take up Mr. Perry's ambitious invitation to overhaul the statute, is it even clear that we would save him and those like him any hassle at all? Or might future courts respond to this development with a yet further statutory rewrite, suggesting next that claimants should be allowed to proceed in district court on the merits of both their civil service and discrimination claims? Even where (as here) the discrimination claim remains unexhausted before any agency and the civil service claim isn't one even the Board could hear?

Mr. Perry's proposal for us may be seriously atextual and practically unattractive, but perhaps it has one thing going for it, he says. While we of course owe no fealty to *Williams* or other lower court opinions, and are free to learn from, rather than repeat, their misadventures, Mr. Perry suggests our decision in *Kloeckner* v. *Solis*, 568 U. S. 41 (2012), requires us to rule for him. Whatever we think about the statute's plain terms, he says, we are bound by precedent to send him to district court all the same.

But I just don't see in *Kloeckner* what Mr. Perry would have us find there. This Court was not asked to decide—and did not decide—whether issues arising under the civil service laws go to district court. Rather, we were asked to answer the much more prosaic question where an employee seeking to pursue *only* a discrimination claim should proceed. See Pet. for Cert. in *Kloeckner* v. *Solis*, O. T. 2012, No. 11–184, p. i ("If the [Board] decides a mixed case without determining the merits of *the discrimination claim*, is the court with jurisdiction over *that claim* the Court of Appeals for the Federal Circuit or a district court?" (emphasis added)). And this Court simply (and quite rightly) responded to that question by holding that "[a] federal employee who *claims* that an agency action appealable to the [Board] *violates an antidiscrimination statute* . . . should seek judicial review in district court, not in the Federal Cir-

cuit . . . whether the [Board] decided her case on procedural grounds or instead on the merits." *Kloeckner*, 568 U. S., at 56 (emphasis added). Nothing about the question presented or holding suggests that a claimant wishing to challenge a Board ruling under the civil service laws may also proceed in district court.

Mr. Perry replies that *Kloeckner* endorsed the idea that something called "mixed cases" should go to district court. But that term does not mean what he thinks it means. The phrase "mixed case" appears nowhere in the statute. Instead, it is but "lingo [from] the applicable regulations." *Id.*, at 50. And even those regulations don't say that civil service questions may go to district court. Instead, the regulations use the term "mixed cases" to describe administrative challenges where the employee both "complains of a personnel action serious enough to appeal to [the Board] *and* alleges that the action *was based on discrimination.*" *Id.*, at 44 (second emphasis added); see also 29 CFR § 1614.302(a)(2) (2016). The regulations thus simply acknowledge that some administrative matters are both sufficient to trigger the Board's authority and raise questions addressed by federal antidiscrimination statutes. They say *nothing* about what goes to district court.

Neither did *Kloeckner* redefine the term "mixed case" in some novel way. After discussing the regulatory definition of "mixed cases," the decision proceeds to say just this:

> "Under § 7703(b)(2), 'cases of discrimination subject to [§ 7702]' shall be filed in district court. Under § 7702(a)(1), *the 'cases of discrimination subject to [§ 7702]' are mixed cases*—those appealable to the [Board] and alleging discrimination. Ergo, mixed cases shall be filed in district court." 568 U. S., at 50 (some brackets in original; emphasis added).

In context, it seems clear that this passage only seeks to restate the statute, using the term "mixed cases" as short-

hand for cases that go to district court under § 7703(b)(2). And from that statute we know that only "cases of discrimination . . . filed under" certain specified federal antidiscrimination statutes go to district court—no more, no less. Nothing in this passage suggests the Court meant to rewrite a regulatory term as a tool to undo a statute.

Now, admittedly, a footnote in *Kloeckner* did seem to go a step further and assume *Williams*' view that civil service claims may tag along with discrimination claims to district court. *Kloeckner*, 568 U. S., at 55–56, n. 4. But even by its terms such an assumption wouldn't help Mr. Perry, for he isn't seeking to pursue a discrimination claim in district court. By his own telling, he is seeking to overturn the Board's holding that it lacked jurisdiction to hear his administrative appeal so he might seek relief there in the first instance. And that, of course, raises only a question of civil service law. What's more, the footnote's discussion about *Williams* is no more than dicta. The footnote addressed only a policy argument from the government and said that argument failed both under *Williams* and for other reasons "[i]n any event." 568 U. S., at 56, n. 4. As near as I can tell, then, Mr. Perry would have us upend a carefully crafted statutory scheme on the strength of a comment in one sentence of one footnote offered in reply to a policy argument that failed for other reasons anyway. Full respect for *stare decisis* does not demand so much from us. To the contrary, this Court has long made clear that where, as here, we have not "squarely addressed [an] issue, and have at most assumed [one side of it to be correct], we are free to address the issue on the merits." *Brecht* v. *Abrahamson*, 507 U. S. 619, 631 (1993); see also *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed").

Notably, even the Court today doesn't read *Kloeckner* as holding that all civil service claims and issues must proceed

to district court after a discrimination claim is presented to the Board. Instead, the Court says that result is justified in large measure because it will "best serv[e]" the statute's "'objective of creating an integrated scheme of review[, which] would be seriously undermined' by 'parallel litigation.'" *Ante* at 436 (quoting *Elgin*, 567 U. S., at 14). Yet, the very case the Court quotes for its account about the statute's purpose (*Elgin* which, in turn, quotes *Fausto*) speaks of Congress' desire to provide an "'integrated scheme of administrative and judicial review'" for civil service disputes that "would be seriously undermined" if "employees [had] the right to challenge employing agency actions in district court across the country," and regional district courts and courts of appeals could pass on such matters. *Elgin*, *supra*, at 13–14 (quoting *Fausto*, 484 U. S., at 445). And, respectfully, the result *Elgin* and *Fausto* warned against is *exactly* the result the Court's opinion seems sure to guarantee. Rather than pursue the congressional policy discussed in those cases, the Court seems more nearly headed in the opposite direction.

Beyond its claim about the statute's purpose, the Court offers little in the way of a traditional statutory interpretation. It does not explain how the result it reaches squares with the statute's text and structure, or grapple with the arguments presented here on those counts. The Court does not explain, for example, how exactly a civil service dispute might be said to be "filed under" a federal antidiscrimination statute, what the standard of review might apply in such a matter (nowhere discussed in the statute), or what the remedial powers of the district court could be in these circumstances. And it remains far from obvious whether the Court's eventual answers to questions like these will wind up yielding a regime better for employees, or instead one just different or even a good deal worse.

Indeed, the only answer the Court supplies to any of the questions raised above lies in a footnote and seems telling.

There, the Court instructs that Mr. Perry will not be able to pursue his discrimination claim if the district court agrees with the Board that it lacked jurisdiction over his claim. *Ante*, at 435, n. 10. But this will surely come as a surprise to Mr. Perry, who tells us he wants to pursue a federal discrimination claim even if it isn't one the Board has jurisdiction to hear. And it comes as a surprise to me too, for as I've described and the government concedes, nothing in the statute would prevent Mr. Perry from trying to bring a discrimination claim in district court after seeking to exhaust it before his employing agency. See, *e. g.*, Brief for Petitioner 11, 16–17, 28; Brief for Respondent 25; Tr. of Oral Arg. 17.

At the end of a long day, I just cannot find anything preventing us from applying the statute as written—or heard any good reason for deviating from its terms. Indeed, it's not even clear how overhauling the statute as Mr. Perry wishes would advance the efficiency rationale he touts. The only thing that seems sure to follow from accepting his invitation is all the time and money litigants will spend, and all the ink courts will spill, as they work their way to a wholly remodeled statutory regime. Respectfully, Congress already wrote a perfectly good law. I would follow it.

Syllabus

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. *v.* COMER, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

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

No. 15–577. Argued April 19, 2017—Decided June 26, 2017

The Trinity Lutheran Church Child Learning Center is a Missouri preschool and daycare center. Originally established as a nonprofit organization, the Center later merged with Trinity Lutheran Church and now operates under its auspices on church property. Among the facilities at the Center is a playground, which has a coarse pea gravel surface beneath much of the play equipment. In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. The program, run by the State's Department of Natural Resources, offers reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. Pursuant to that policy, the Department denied the Center's application. In a letter rejecting that application, the Department explained that under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department ultimately awarded 14 grants as part of the 2012 program. Although the Center ranked fifth out of the 44 applicants, it did not receive a grant because it is a church.

Trinity Lutheran sued in Federal District Court, alleging that the Department's failure to approve its application violated the Free Exercise Clause of the First Amendment. The District Court dismissed the suit. The Free Exercise Clause, the court stated, prohibits the government from outlawing or restricting the exercise of a religious practice, but it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the case before it to *Locke* v. *Davey*, 540 U. S. 712, where this Court upheld against a free exercise challenge a State's decision not to fund degrees in devotional theology as part of a scholarship program. The District Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to Trinity Lutheran. A divided panel of the Eighth Circuit affirmed. The fact that the State

could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the Federal Constitution, the court ruled, did not mean that the Free Exercise Clause compelled the State to disregard the broader antiestablishment principle reflected in its own Constitution.

Held: The Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the Church an otherwise available public benefit on account of its religious status. Pp. 458–467.

(a) This Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion. Thus, in *McDaniel* v. *Paty*, 435 U. S. 618, the Court struck down a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. A plurality recognized that such a law discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" *Id.*, at 627. In recent years, when rejecting free exercise challenges to neutral laws of general applicability, the Court has been careful to distinguish such laws from those that single out the religious for disfavored treatment. See, *e. g.*, *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439; *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872; and *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520. It has remained a fundamental principle of this Court's free exercise jurisprudence that laws imposing "special disabilities on the basis of . . . religious status" trigger the strictest scrutiny. *Id.*, at 533. Pp. 458–462.

(b) The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. When the State conditions a benefit in this way, *McDaniel* says plainly that the State has imposed a penalty on the free exercise of religion that must withstand the most exacting scrutiny. 435 U. S., at 626, 628.

The Department contends that simply declining to allocate to Trinity Lutheran a subsidy the State had no obligation to provide does not meaningfully burden the Church's free exercise rights. Absent any such burden, the argument continues, the Department is free to follow the State's antiestablishment objection to providing funds directly to a church. But, as even the Department acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exer-

cise of religion, not just outright prohibitions." *Lyng*, 485 U. S., at 450. Trinity Lutheran is not claiming any entitlement to a subsidy. It is asserting a right to participate in a government benefit program without having to disavow its religious character. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Pp. 462–463.

(c) The Department tries to sidestep this Court's precedents by arguing that this case is instead controlled by *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. Scholarship recipients were free to use state funds at accredited religious and non-religious schools alike, but they could not use the funds to pursue a devotional theology degree. At the outset, the Court made clear that *Locke* was not like the cases in which the Court struck down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." 540 U. S., at 720–721. Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's restriction on the use of its funds was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy, an "essentially religious endeavor," *id.*, at 721. Here, nothing of the sort can be said about a program to use recycled tires to resurface playgrounds. At any rate, the Court took account of Washington's antiestablishment interest only after determining that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." *Id.*, at 720–721. There is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. Pp. 464–465.

(d) The Department's discriminatory policy does not survive the "most rigorous" scrutiny that this Court applies to laws imposing special disabilities on account of religious status. *Lukumi*, 508 U. S., at 546. That standard demands a state interest "of the highest order" to justify the policy at issue. *McDaniel*, 435 U. S., at 628 (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before the Court, that interest cannot qualify as compelling. P. 466.

788 F. 3d 779, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, except as to footnote 3. KENNEDY, ALITO, and KAGAN, JJ., joined that opinion in full, and THOMAS and GORSUCH, JJ., joined except as to footnote 3. THOMAS, J., filed an opinion concurring in part, in which GORSUCH, J., joined, *post*, p. 467. GORSUCH, J., filed an opinion concurring in part, in which THOMAS, J., joined, *post*, p. 468. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 470. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 471.

David A. Cortman argued the cause for petitioner. With him on the briefs were *Rory T. Gray*, *Jordan W. Lorence*, *Erik W. Stanley*, *Kevin H. Theriot*, *Michael K. Whitehead*, and *Jonathan R. Whitehead*.

James R. Layton, Solicitor General of Missouri, argued the cause for respondent. With him on the brief were *Chris Koster*, Attorney General, and *James B. Farnsworth*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado by *Cynthia H. Coffman*, Attorney General, *Frederick R. Yarger*, Solicitor General, *David Blake*, Chief Deputy Attorney General, and *Glenn E. Roper*, Deputy Solicitor General; for the State of Nevada et al. by *Adam Paul Laxalt*, Attorney General of Nevada, *Lawrence VanDyke*, Solicitor General, and *Joseph Tartakovsky*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Mark Brnovich* of Arizona, *Leslie Ruthledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, *Sean Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Brad D. Schimel* of Wisconsin; for the American Association for Christian Schools by *Matthew T. Martens*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the Association of Christian Schools International et al. by *Thomas G. Hungar* and *Russell B. Balikian*; for the Becket Fund for Religious Liberty by *Michael W. McConnell*, *Luke W. Goodrich*, and *Hannah C. Smith*; for Belmont Abbey College by *Joseph J. LoBue* and *Mark L. Rienzi*; for the Bronx Household of Faith by *Allison Jones Rushing*; for the Cato Institute by *Ilya Shapiro*; for the Christian Legal Society et al. by *Kimberlee Wood Colby*, *Thomas C. Berg*, and *Travis Weber*; for the Council for Christian Colleges and Universities et al. by *Gene*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity

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C. Schaerr and *S. Kyle Duncan*; for Douglas County School District et al. by *Paul D. Clement*, *George W. Hicks*, *James M. Lyons*, *L. Martin Nussbaum*, and *Eric V. Hall*; for the Ethics & Religious Liberty Commission by *Michael Lee Francisco*; for the Institute for Justice by *Michael E. Bindas*, *Richard D. Komer*, and *Timothy D. Keller*; for the Institutional Religious Freedom Alliance by *C. Kevin Marshall* and *Ryan J. Watson*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Law and Religion Practitioners by *David I. Schoen*; for Liberty Counsel et al. by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; for Members of Congress by *Aaron M. Streett*, *Benjamin A. Geslison*, and *Ryan L. Bangert*; for the National Association of Evangelicals by *Mark F. Hearne II* and *Stephen S. Davis*; for the Pacific Legal Foundation by *Meriem L. Hubbard* and *Wencong Fa*; for the Union of Orthodox Jewish Congregations of America by *Nathan J. Diament*; for the United States Conference of Catholic Bishops et al. by *Paul J. Zidlicky*, *Edward McNicholas*, *HL Rogers*, *Eric D. McArthur*, *Benjamin Beaton*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Michael F. Moses*, *Hillary E. Byrnes*, *Alexander Dushku*, and *R. Shawn Gunnarson*; and for WallBuilders, Inc., by *Steven W. Fitschen*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Jared O. Freedman*, *Steven R. Shapiro*, *Louise Melling*, *Daniel Mach*, *Heather L. Weaver*, and *Anthony E. Rothert*; for the Baptist Joint Committee for Religious Liberty et al. by *K. Hollyn Hollman* and *Jennifer L. Hawks*; for Legal and Religious Historians by *Douglas B. Mishkin* and *Steven K. Green*; for the National Education Association by *John M. West* and *Alice O'Brien*; and for Religious and Civil Rights Organizations by *Richard B. Katskee*, *Andrew J. Pincus*, *Alex J. Luchenitser*, *Eugene R. Fidell*, and *Jeffrey I. Pasek*.

Briefs of *amici curiae* were filed for the American Jewish Committee by *Marc D. Stern*, *Brian C. Walsh*, and *D. Bruce La Pierre*; for the General Council of the Assemblies of God by *Darryl P. Rains*, *Joshua D. Hawley*, and *Erin Morrow Hawley*; for the Lambda Legal Defense and Education Fund, Inc., by *Camilla B. Taylor*, *Susan L. Sommer*, and *Jennifer C. Pizer*; and for World Vision, Inc., by *Eugene Volokh*.

Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I

A

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills and dump sites, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." App. to Pet. for Cert. 131a. After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during nonschool hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center's application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.

The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

B

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause of the First Amendment. Trinity Lutheran sought declaratory and injunctive relief prohibiting the Department from discriminating against the Church on that basis in future grant applications.

The District Court granted the Department's motion to dismiss. The Free Exercise Clause, the District Court stated, prohibits the government from outlawing or restricting the exercise of a religious practice; it generally does not prohibit withholding an affirmative benefit on account of religion. The District Court likened the Department's denial of the scrap tire grant to the situation this Court encountered in *Locke* v. *Davey*, 540 U. S. 712 (2004). In that case, we upheld against a free exercise challenge the State of Washington's decision not to fund degrees in devotional theology as part of a state scholarship program. Finding the present case "nearly indistinguishable from *Locke*," the District Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran.

Trinity Lutheran Church of Columbia, Inc. v. *Pauley*, 976 F. Supp. 2d 1137, 1151 (WD Mo. 2013).

The Court of Appeals for the Eighth Circuit affirmed. The court recognized that it was "rather clear" that Missouri *could* award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause of the United States Constitution. *Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 788 F. 3d 779, 784 (2015). But, the Court of Appeals explained, that did not mean the Free Exercise Clause compelled the State to disregard the antiestablishment principle reflected in its own Constitution. Viewing a monetary grant to a religious institution as a "'hallmark[ ] of an established religion,'" the court concluded that the State could rely on an applicant's religious status to deny its application. *Id.*, at 785 (quoting *Locke*, 540 U. S., at 722; some internal quotation marks omitted).

Judge Gruender dissented. He distinguished *Locke* on the ground that it concerned the narrow issue of funding for the religious training of clergy, and "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." 788 F. 3d, at 791 (opinion concurring in part and dissenting in part).

Rehearing en banc was denied by an equally divided court.

We granted certiorari *sub nom. Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 577 U. S. 1098 (2016), and now reverse.[1]

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[1] In April 2017, the Governor of Missouri announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations. That announcement does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000) (internal quotation marks omitted). The Department has not carried the "heavy burden" of making "absolutely clear" that it could not revert to its policy of excluding religious organizations. *Ibid.* The

II

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke*, 540 U. S., at 718 (internal quotation marks omitted).

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533, 542 (1993) (internal quotation marks omitted). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel* v. *Paty*, 435 U. S. 618, 628 (1978) (plurality opinion) (quoting *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972)).

In *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947), for example, we upheld against an Establishment

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parties agree. See Letter from James R. Layton, Counsel for Respondent, to Scott S. Harris, Clerk of Court, p. 2 (Apr. 18, 2017) (adopting the position of the Missouri Attorney General's Office that "there is no clearly effective barrier that would prevent the [Department] from reinstating [its] policy in the future"); Letter from David A. Cortman, Counsel for Petitioner, to Scott S. Harris, Clerk of Court, pp. 2–3 (Apr. 18, 2017) ("[T]he policy change does nothing to remedy the source of the [Department's] original policy—the Missouri Supreme Court's interpretation of Article 1, § 7 of the Missouri Constitution").

Clause challenge a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools. In the course of ruling that the Establishment Clause allowed New Jersey to extend that public benefit to all its citizens regardless of their religious belief, we explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.*, at 16.

Three decades later, in *McDaniel* v. *Paty*, the Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention. Writing for the plurality, Chief Justice Burger acknowledged that Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and that a number of early States had also disqualified ministers from legislative office. This historical tradition, however, did not change the fact that the statute discriminated against McDaniel by denying him a benefit solely because of his "*status* as a 'minister.'" 435 U. S., at 627. McDaniel could not seek to participate in the convention while also maintaining his role as a minister; to pursue the one, he would have to give up the other. In this way, said Chief Justice Burger, the Tennessee law "effectively penalizes the free exercise of [McDaniel's] constitutional liberties." *Id.*, at 626 (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); internal quotation marks omitted). Joined by Justice Marshall in concurrence, Justice Brennan added that "because the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion." *McDaniel*, 435 U. S., at 634.

In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

For example, in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U. S. 439 (1988), we held that the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred. Accepting that "[t]he building of a road or the harvesting of timber . . . would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," we nonetheless found no free exercise violation, because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs." *Id.*, at 449. The Court specifically noted, however, that the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Ibid.*

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U. S. 872 (1990), we rejected a free exercise claim brought by two members of a Native American church denied unemployment benefits because they had violated Oregon's drug laws by ingesting peyote for sacramental purposes. Along the same lines as our decision in *Lyng*, we held that the Free Exercise Clause did not entitle the church members to a special dispensation from the general criminal laws on account of their religion. At the same time, we again made clear that the Free Exercise Clause *did* guard against the government's imposition of "special disabilities on the basis of religious views or

religious status." 494 U. S., at 877 (citing *McDaniel*, 435 U. S. 618).[2]

Finally, in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, we struck down three facially neutral city ordinances that outlawed certain forms of animal slaughter. Members of the Santeria religion challenged the ordinances under the Free Exercise Clause, alleging that despite their facial neutrality, the ordinances had a discriminatory purpose easy to ferret out: prohibiting sacrificial rituals integral to Santeria but distasteful to local residents. We agreed. Before explaining why the challenged ordinances were not, in fact, neutral or generally applicable, the Court recounted the fundamentals of our free exercise jurisprudence. A law, we said, may not discriminate against "some or all religious beliefs." 508 U. S., at 532. Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The Free Exercise Clause protects against laws that "'impose[] special disabilities on the basis of . . . religious status.'" 508 U. S., at 533 (quoting *Smith*, 494 U. S., at 877); see also *Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion) (noting "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity" (citing *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School*

[2] This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause. Recently, in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), this Court held that the Religion Clauses required a ministerial exception to the neutral prohibition on employment retaliation contained in the Americans with Disabilities Act. Distinguishing *Smith*, we explained that while that case concerned government regulation of physical acts, "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." 565 U. S., at 190.

Dist., 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981))).

III

A

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. *Lukumi*, 508 U. S., at 546. This conclusion is unremarkable in light of our prior decisions.

Like the disqualification statute in *McDaniel*, the Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church, just as McDaniel was free to continue being a minister. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion: "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." 435 U. S., at 626 (plurality opinion) (alterations omitted).

The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights. In this sense, says the Department, its policy is unlike the ordinances struck down in *Lukumi*, which outlawed rituals central to Santeria. Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's

free exercise rights. And absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church. Brief for Respondent 7–12, 14–16.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng*, 485 U. S., at 450. As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U. S., at 404; see also *McDaniel*, 435 U. S., at 633 (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent").

Trinity Lutheran is not claiming any entitlement to a subsidy. It instead asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*, 374 U. S., at 405. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"). Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.

B

The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. The scholarships were paid out of the State's general fund, and eligibility was based on criteria such as an applicant's score on college admission tests and family income. While scholarship recipients were free to use the money at accredited religious and non-religious schools alike, they were not permitted to use the funds to pursue a devotional theology degree—one "devotional in nature or designed to induce religious faith." 540 U. S., at 716 (internal quotation marks omitted). Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. He sued, arguing that the State's refusal to allow its scholarship money to go toward such degrees violated his free exercise rights.

This Court disagreed. It began by explaining what was *not* at issue. Washington's selective funding program was not comparable to the free exercise violations found in the "*Lukumi* line of cases," including those striking down laws requiring individuals to "choose between their religious beliefs and receiving a government benefit." *Id.*, at 720–721. At the outset, then, the Court made clear that *Locke* was not like the case now before us.

Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." *Id.*, at 721. Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.

The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." *Id.*, at 722. The claimant in *Locke* sought funding for an "essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit," and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses. *Id.*, at 721–722. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

Relying on *Locke*, the Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. Brief for Respondent 15–16. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit." 540 U. S., at 720–721 (citing *McDaniel*, 435 U. S. 618). As the Court put it, Washington's scholarship program went "a long way toward including religion in its benefits." *Locke*, 540 U. S., at 724. Students in the program were free to use their scholarships at "pervasively religious schools." *Ibid.* Davey could use his scholarship to pursue a secular degree at one institution while studying devotional theology at another. *Id.*, at 721, n. 4. He could also use his scholarship money to attend a religious college and take devotional theology courses there. *Id.*, at 725. The only thing he could not do was use the scholarship to pursue a degree in that subject.

In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.[3]

[3] This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

C

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny. *Lukumi*, 508 U. S., at 546.[4]

Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. *McDaniel*, 435 U. S., at 628 (internal quotation marks omitted). Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. Brief for Respondent 15–16. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Widmar*, 454 U. S., at 276.

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.[5]

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[4] We have held that "a law targeting religious beliefs as such is never permissible." *Lukumi*, 508 U. S., at 533; see also *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion). We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event.

[5] Based on this holding, we need not reach the Church's claim that the policy also violates the Equal Protection Clause.

* * *

Nearly 200 years ago, a legislator urged the Maryland Assembly to adopt a bill that would end the State's disqualification of Jews from public office:

> "If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man. . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." Speech by H. M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland 64 (1829).

The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

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 THOMAS, with whom JUSTICE GORSUCH joins, concurring in part.

The Court today reaffirms that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified," if at all, "only by a state interest 'of the highest order.'"

Ante, at 458. The Free Exercise Clause, which generally prohibits laws that facially discriminate against religion, compels this conclusion. See *Locke* v. *Davey*, 540 U. S. 712, 726–727 (2004) (Scalia, J., dissenting).

Despite this prohibition, the Court in *Locke* permitted a State to "disfavor . . . religion" by imposing what it deemed a "relatively minor" burden on religious exercise to advance the State's antiestablishment "interest in not funding the religious training of clergy." *Id.*, at 720, 722, n. 5, 725. The Court justified this law based on its view that there is "'play in the joints'" between the Free Exercise Clause and the Establishment Clause—that is, that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.*, at 719. Accordingly, *Locke* did not subject the law at issue to any form of heightened scrutiny. But it also did not suggest that discrimination against religion outside the limited context of support for ministerial training would be similarly exempt from exacting review.

This Court's endorsement in *Locke* of even a "mil[d] kind," *id.*, at 720, of discrimination against religion remains troubling. See generally *id.*, at 726–734 (Scalia, J., dissenting). But because the Court today appropriately construes *Locke* narrowly, see Part III–B, *ante*, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. I do not, however, join footnote 3, for the reasons expressed by JUSTICE GORSUCH, *post* this page (opinion concurring in part).

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part.

Missouri's law bars Trinity Lutheran from participating in a public benefits program only because it is a church. I agree this violates the First Amendment, and I am pleased to join nearly all of the Court's opinion. I offer only two modest qualifications.

First, the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*. See *ante*, at 464. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). See *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 296 (1990) (Scalia, J., dissenting). Often enough the same facts can be described both ways.

Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990). And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993). Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. See *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 716 (1981); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947). I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

For these reasons, reliance on the status-use distinction does not suffice for me to distinguish *Locke* v. *Davey*, 540 U. S. 712 (2004). See *ante*, at 464. In that case, this Court

upheld a funding restriction barring a student from using a scholarship to pursue a degree in devotional theology. But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here. *Ante*, at 465.

Second and for similar reasons, I am unable to join the footnoted observation, *ibid.*, n. 3, that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing." Of course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are "governed by general principles, rather than ad hoc improvisations." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 25 (2004) (Rehnquist, C. J., concurring in judgment). And the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

JUSTICE BREYER, concurring in the judgment.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue. Cf. *ante*, at 463 ("Trinity Lutheran . . . asserts a right to participate in a government benefit program"); *ante*, at 464 (referring to precedent "striking down laws requiring individuals to

choose between their religious beliefs and receiving a government benefit" (internal quotation marks omitted)); *ante*, at 462 (referring to Trinity Lutheran's "automatic and absolute exclusion from the benefits of a public program"); *ibid.* (the State's policy disqualifies "otherwise eligible recipients . . . from a public benefit solely because of their religious character"); *ante*, at 459 (quoting the statement in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947), that the State "cannot exclude" individuals "*because of their faith*" from "receiving the benefits of public welfare legislation").

The Court stated in *Everson* that "cutting off church schools from" such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment." *Id.*, at 17–18. Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly

changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

I

Founded in 1922, Trinity Lutheran Church (Church) "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." Our Story, http://www.trinity-lcms.org/story (all Internet materials as last visited June 22, 2017). The Church uses "preaching, teaching, worship, witness, service, and fellowship according to the Word of God" to carry out its mission "to 'make disciples.'" Mission, http://www.trinity-lcms.org/mission (quoting Matthew 28:18–20). The Church's religious beliefs include its desire to "associat[e] with the [Trinity Church Child] Learning Center." App. to Pet. for Cert. 101a. Located on Church property, the Learning Center provides daycare and preschool for about "90 children ages two to kindergarten." *Id.*, at 100a.

The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." *Id.*, at 101a. In this way, "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents" of the area. *Ibid.* These activities represent the Church's "sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Ibid.*

The Learning Center's facilities include a playground, the unlikely source of this dispute. The Church provides the playground and other "safe, clean, and attractive" facilities "in conjunction with an education program structured to

allow a child to grow spiritually, physically, socially, and cognitively." *Ibid.* This case began in 2012 when the Church applied for funding to upgrade the playground's pea gravel and grass surface through Missouri's Scrap Tire Program, which provides grants for the purchase and installation of recycled tire material to resurface playgrounds. The Church sought $20,000 for a $30,580 project to modernize the playground, part of its effort to gain state accreditation for the Learning Center as an early childhood education program. Missouri denied the Church funding based on Article I, § 7, of its State Constitution, which prohibits the use of public funds "in aid of any church, sect, or denomination of religion."

II

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. See, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 675 (1970); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 844 (1995); *Mitchell* v. *Helms*, 530 U. S. 793, 843–844 (2000) (O'Connor, J., concurring in judgment). So it is surprising that the Court mentions the Establishment Clause only to note the parties' agreement that it "does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." *Ante*, at 458. Constitutional questions are decided by this Court, not the parties' concessions. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.

A

The government may not directly fund religious exercise. See *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947); *Mitchell*, 530 U. S., at 840 (O'Connor, J., concurring in judgment) ("[O]ur decisions provide no precedent for the use of public funds to finance religious activities" (internal quotation marks omitted)). Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advanc[es] . . . religion."[1] *Agostini* v. *Felton*, 521 U. S. 203, 222–223 (1997).

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship.[2] A house of worship exists to foster and further religious exercise. There, a group of people, bound by common religious beliefs, comes together "to shape its own faith and mission." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012). Within its walls, worshippers gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group's beliefs. When a government funds a house of worship, it underwrites this religious exercise.

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[1] Government aid that has the "purpose" or "effect of advancing or inhibiting religion" violates the Establishment Clause. *Agostini* v. *Felton*, 521 U. S. 203, 222–223 (1997) (internal quotation marks omitted). Whether government aid has such an effect turns on whether it "result[s] in governmental indoctrination," "define[s] its recipients by reference to religion," or "create[s] an excessive entanglement" between the government and religion. *Id.*, at 234; see also *id.*, at 235 (same considerations speak to whether the aid can "reasonably be viewed as an endorsement of religion").

[2] Because Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions "only as a result of the genuine and independent choices of private individuals." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 649 (2002).

Tilton v. *Richardson*, 403 U. S. 672 (1971), held as much. The federal program at issue provided construction grants to colleges and universities but prohibited grantees from using the funds to construct facilities "'used for sectarian instruction or as a place for religious worship'" or "'used primarily in connection with any part of the program of a school or department of divinity.'" *Id.*, at 675 (plurality opinion) (quoting 20 U. S. C. § 751(a)(2) (1964 ed., Supp. V)). It allowed the Federal Government to recover the grant's value if a grantee violated this prohibition within 20 years of the grant. See 403 U. S., at 675. The Court unanimously agreed that this time limit on recovery violated the Establishment Clause. "[T]he original federal grant w[ould] in part have the effect of advancing religion," a plurality explained, if a grantee "converted [a facility] into a chapel or otherwise used [it] to promote religious interests" after 20 years. *Id.*, at 683; see also *id.*, at 692 (Douglas, J., concurring in part and dissenting in part); *Lemon* v. *Kurtzman*, 403 U. S. 602, 659–661 (1971) (Brennan, J., concurring); *id.*, at 665, n. 1 (opinion of White, J.). Accordingly, the Court severed the 20-year limit, ensuring that program funds would be put to secular use and thereby bringing the program in line with the Establishment Clause. See *Tilton*, 403 U. S., at 683 (plurality opinion).

This case is no different. The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Estab-

lishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. See, *e. g.*, *Rosenberger*, 515 U. S., at 875–876 (Souter, J., dissenting) (chronicling cases). The Church has not and cannot provide such assurances here.[3] See *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 774 (1973) ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions"). The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar.

B

The Court may simply disagree with this account of the facts and think that the Church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the State's funding would further religious activity and sees no Establishment Clause problem, then it must be implicitly applying a rule other than the one agreed to in our precedents.

When the Court last addressed direct funding of religious institutions, in *Mitchell*, it adhered to the rule that the Establishment Clause prohibits the direct funding of religious activities. At issue was a federal program that helped state and local agencies lend educational materials to public and

[3] The Scrap Tire Program requires an applicant to certify, among other things, that its mission and activities are secular and that it will put program funds to only a secular use. App. to Pet. for Cert. 127a–130a. From the record, it is unclear whether the Church provided any part of this certification. *Ibid.* In any case, the Church has not offered any such assurances to this Court.

private schools, including religious schools. See 530 U. S., at 801–803 (plurality opinion). The controlling concurrence assured itself that the program would not lead to the public funding of religious activity. It pointed out that the program allocated secular aid, that it did so "on the basis of neutral, secular criteria," that the aid would not "supplant non-[program] funds," that "no . . . funds ever reach the coffers of religious schools," that "evidence of actual diversion is *de minimis*," and that the program had "adequate safeguards" to police violations. *Id.*, at 867 (O'Connor, J., concurring in judgment). Those factors, it concluded, were "sufficient to find that the program [did] not have the impermissible effect of advancing religion." *Ibid.*

A plurality would have instead upheld the program based only on the secular nature of the aid and the program's "neutrality" as to the religious or secular nature of the recipient. See *id.*, at 809–814. The controlling concurrence rejected that approach. It viewed the plurality's test—"secular content and . . . distributed on the basis of wholly neutral criteria"—as constitutionally insufficient. *Id.*, at 839. This test, explained the concurrence, ignored whether the public funds subsidize religion, the touchstone of establishment jurisprudence. See *id.*, at 844 (noting that the plurality's logic would allow funding of "religious organizations (including churches)" where "the participating religious organizations (including churches) . . . use that aid to support religious indoctrination").

Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact irrelevant could support a conclusion of constitutionality. The problems of the "secular and neutral" approach have been aired before. See, *e. g.*, *id.*, at 900–902 (Souter, J., dissenting). It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct

subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well organized and well funded enough to do so successfully.[4]

Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "*not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious [worship], is at issue." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 722–723 (2002) (BREYER, J., dissenting).

III

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question here is thus whether those interests support the line drawn in Missouri's Article I, § 7, separating the State's treasury from those of houses of worship. They unquestionably do.

[4] This case highlights the weaknesses of the rule. The Scrap Tire Program ranks more highly those applicants who agree to generate media exposure for Missouri and its program and who receive the endorsement of local solid waste management entities. That is, it prefers applicants who agree to advertise that the government has funded it and who seek out the approval of government agencies. To ignore this result is to ignore the type of state entanglement with, and endorsement of, religion the Establishment Clause guards against.

A

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." U. S. Const., Amdt. 1. "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz*, 397 U. S., at 668–669. Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. And the government may sometimes act to accommodate those concerns, even when not required to do so by the Establishment Clause, without violating the Free Exercise Clause. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*, at 669. This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. It may instead "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions" and spare the government "the direct confrontations and conflicts that follow in the train of those legal processes" associated with taxation. *Id.*, at 673–674. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a "[f]ear of potential liability [that] might affect the way" it "carried out what it understood to be its religious mission" and on

the government the sensitive task of policing compliance. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 336 (1987); see also *id.*, at 343 (Brennan, J., concurring in judgment). But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion." *Cutter* v. *Wilkinson*, 544 U. S. 709, 714 (2005) (internal quotation marks omitted).

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders, those "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor*, 565 U. S., at 196. It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders." *Locke* v. *Davey*, 540 U. S. 712, 722 (2004).

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so.

B

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice and provides:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Art. I, § 7.

Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

1

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. Those Clauses guard against a return to the past, and so that past properly informs their meaning. See, *e. g.*, *Everson*, 330 U. S., at 14–15; *Torcaso* v. *Watkins*, 367 U. S. 488, 492 (1961). This case is no different.

This Nation's early experience with, and eventual rejection of, established religion—shorthand for "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz*, 397 U. S., at 668—defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. See T. Curry, The First Freedoms 19, 72–74, 76–77, 159–160 (1986) (Curry). In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and at different speeds. See T. Cobb, The Rise of Religious Liberty in America 510–511 (1970 ed.) (Cobb).

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.[5]

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[5] This Court did not hold that the Religion Clauses applied, through the Fourteenth Amendment, to the States until the 1940's. See *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) (Free Exercise Clause); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947) (Establishment Clause). When the States dismantled their religious establishments, as all had by the 1830's, they did so on their own accord, in response to the lessons taught by their experiences with religious establishments.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

Take Virginia. After the Revolution, Virginia debated and rejected a general religious assessment. The proposed bill would have allowed taxpayers to direct payments to a Christian church of their choice to support a minister, exempted "Quakers and Menonists," and sent undirected assessments to the public treasury for "seminaries of learning." A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson*, 330 U. S., at 74 (supplemental appendix to dissent of Rutledge, J.).

In opposing this proposal, James Madison authored his famous Memorial and Remonstrance, in which he condemned the bill as hostile to religious freedom. Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution 82–84 (P. Kurland & R. Lerner eds. 1987). Believing it "proper to take alarm," despite the bill's limits, he protested "that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." *Id.*, at 82. Religion had "flourished, not only without the support of human laws, but

in spite of every opposition from them." *Id.*, at 83. Compelled support for religion, he argued, would only weaken believers' "confidence in its innate excellence," strengthen others' "suspicion that its friends are too conscious of its fallacies to trust in its own merits," and harm the "purity and efficacy" of the supported religion. *Ibid.* He ended by deeming the bill incompatible with Virginia's guarantee of "'free exercise of . . . Religion according to the dictates of conscience.'" *Id.*, at 84.

Madison contributed one influential voice to a larger chorus of petitions opposed to the bill. Others included "the religious bodies of Baptists, Presbyterians, and Quakers." T. Buckley, Church and State in Revolutionary Virginia 1776–1787, p. 148 (1977). Their petitions raised similar points. See *id.*, at 137–140, 148–149. Like Madison, many viewed the bill as a step toward a dangerous church-state relationship. See *id.*, at 151. These voices against the bill won out, and Virginia soon prohibited religious assessments. See Virginia, Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 84–85.

This same debate played out in nearby Maryland, with the same result. In 1784, an assessment bill was proposed that would have allowed taxpayers to direct payments to ministers (of sufficiently large churches) or to the poor. Non-Christians were exempt. See Curry 155. Controversy over the bill "eclipse[d] in volume of writing and bitterness of invective every other political dispute since the debate over the question of independence." Rainbolt, The Struggle To Define "Religious Liberty" in Maryland, 1776–85, 17 J. Church & State 443, 449 (1975). Critics of the bill raised the same themes as those in Virginia: that religion "needs not the power of rules to establish, but only to protect it"; that financial support of religion leads toward an establishment; and that laws for such support are "oppressive." Curry 156, 157 (internal quotation marks omitted); see also Copy of Petition [to General Assembly], Maryland Gazette, Mar. 25,

1785, pp. 1, 2, col. 1 ("[W]hy should such as do not desire or make conscience of it, be forced by law"). When the legislature next met, most representatives "had been elected by anti-assessment voters," and the bill failed. Curry 157. In 1810, Maryland revoked the authority to levy religious assessments. See Md. Const., Amdt. XIII (1776), in 3 Federal and State Constitutions 1705 (F. Thorpe ed. 1909) (Thorpe).

In New England, which took longer to reach this conclusion, Vermont went first. Its religious assessment laws were accommodating. A person who was not a member of his town's church was, upon securing a certificate to that effect, exempt. See L. Levy, The Establishment Clause 50 (1994) (Levy). Even so, the laws were viewed by many as violating Vermont's constitutional prohibition against involuntary support of religion and guarantee of freedom of conscience. See, *e. g.*, Address of Council of Censors to the People of Vermont 5–8 (1800) ("[R]eligion is a concern personally and exclusively operative between the individual and his God"); Address of Council of Censors [Vermont] 3–7 (Dec. 1806) (the laws' "evils" included "violence done to the feelings of men" and "their property," "animosities," and "the dangerous lengths of which it is a foundation for us to go, in both civil and religious usurpation"). In 1807, Vermont "repealed all laws concerning taxation for religion." Levy 51.

The rest of New England heard the same arguments and reached the same conclusion. John Leland's sustained criticism of religious assessments over 20 years helped end the practice in Connecticut. See, *e. g.*, Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 B. Y. U. L. Rev. 1385, 1498, 1501–1511. The reasons he offered in urging opposition to the State's laws will by now be familiar. Religion "is a matter between God and individuals," which does not need, and would only be harmed by, government support. J. Leland, The Rights of Conscience Inalienable (1791), in The Sacred

Rights of Conscience 337–339 (D. Dreisbach & M. Hall eds. 2009). "[T]ruth gains honor; and men more firmly believe it," when religion is subjected to the "cool investigation and fair argument" that freedom of conscience produces. *Id.*, at 340. Religious assessments violated that freedom, he argued. See *id.*, at 342 ("If these people bind nobody but themselves, who is injured by their religious opinions? But if they bind an individual besides themselves, the bond is fraudulent and ought to be declared illegal"). Connecticut ended religious assessments first by statute in 1817, then by its State Constitution of 1818. See Cobb 513.

In New Hampshire, a steady campaign against religious assessments led to a bill that was subjected to "the scrutiny of the people." C. Kinney, Church & State: The Struggle for Separation in New Hampshire, 1630–1900, p. 101 (1955) (Kinney). It was nicknamed "Dr. Whipple's Act" after its strongest advocate in the State House. *Orford Union Congregational Soc.* v. *West Congregational Soc. of Orford*, 55 N. H. 463, 468–469, n. (1875). He defended the bill as a means "to take religion out of politics, to eliminate state support, to insure opportunity to worship with true freedom of conscience, [and] to put all sects and denominations of Christians upon a level." Kinney 103. The bill became law and provided "that no person shall be compelled to join or support, or be classed with, or associated to any congregation, church or religious society without his express consent first had and obtained." Act [of July 1, 1819,] Regulating Towns and Choice of Town Officers § 3, in 1 Laws of the State of New Hampshire Enacted Since June 1, 1815, p. 45 (1824). Massachusetts held on the longest of all the States, finally ending religious assessments in 1833. See Cobb 515.[6]

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[6] To this, some might point out that the Scrap Tire Program at issue here does not impose an assessment specifically for religious entities but rather directs funds raised through a general taxation scheme to the Church. That distinction makes no difference. The debates over religious assessment laws focused not on the means of those laws but on their

The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build.

2

In *Locke*, this Court expressed an understanding of, and respect for, this history. *Locke* involved a provision of the State of Washington's Constitution that, like Missouri's nearly identical Article I, § 7, barred the use of public funds for houses of worship or ministers. Consistent with this denial of funds to ministers, the State's college scholarship program did not allow funds to be used for devotional theology degrees. When asked whether this violated the would-be minister's free exercise rights, the Court invoked the play in the joints principle and answered no. The Establishment Clause did not require the prohibition because "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients." 540 U. S., at 719; see also n. 2, *supra*. Nonetheless, the denial did not violate the Free Exercise Clause because a "historic and substantial state interest" supported the constitutional provision. 540 U. S., at 725. The Court could "think of few areas in which a State's antiestablishment interests come more into play" than the "procuring [of] taxpayer funds to support church leaders." *Id.*, at 722.

The same is true of this case, about directing taxpayer funds to houses of worship, see *supra*, at 473. Like the use of public dollars for ministers at issue in *Locke*, turning over public funds to houses of worship implicates serious anties-

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ends: the turning over of public funds to religious entities. See, *e. g.*, *Locke* v. *Davey*, 540 U. S. 712, 723 (2004).

tablishment and free exercise interests. The history just discussed fully supports this conclusion. As States disestablished, they repealed laws allowing taxation to support religion because the practice threatened other forms of government support for, involved some government control over, and weakened supporters' control of religion. Common sense also supports this conclusion. Recall that a State may not fund religious activities without violating the Establishment Clause. See Part II–A, *supra*. A State can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." *Amos*, 483 U. S., at 345 (Brennan, J., concurring in judgment). Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any "'room for play in the joints' between" the Religion Clauses, it is here. *Locke*, 540 U. S., at 718 (quoting *Walz*, 397 U. S., at 669).

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. Almost all of the States that ratified the Religion Clauses operated under this rule. See 540 U. S., at 723. Seven had placed this rule in their State Constitutions.[7] Three en-

[7] See N. J. Const., Art. XVIII (1776), in 5 Thorpe 2597 ("[N]or shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliber-

forced it by statute or in practice.[8] Only one had not yet embraced the rule.[9] Today, 38 States have a counterpart to Missouri's Article I, § 7.[10] The provisions, as a general mat-

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ately or voluntarily engaged himself to perform"); N. C. Const., Art. XXXIV (1776), in *id.*, at 2793 ("[N]either shall any person, on any pretence whatsoever, . . . be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform"); Pa. Const., Art. IX, § 3 (1790), in *id.*, at 3100 ("[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent"); S. C. Const., Art. XXXVIII (1778), in 6 *id.*, at 3257 ("No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support"); Vt. Const., ch. 1, Art. III (1786), in *id.*, at 3752 ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

Delaware and New York's Constitutions did not directly address, but were understood to prohibit, public funding of religion. See Curry 76, 162; see also Del. Const., Art. I, § 1 (1792) ("[N]o man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent").

[8] See Virginia, Act for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987); Curry 211–212 (Rhode Island never publicly funded houses of worship); Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 B. Y. U. L. Rev. 1385, 1489–1490 (Maryland never invoked its constitutional authorization of religious assessments).

[9] See N. H. Const., pt. 1, Arts. I, VI (1784), in 4 Thorpe 2453, 2454.

[10] See Ala. Const., Art. I, § 3; Ariz. Const., Art. II, § 12, Art. IX, § 10; Ark. Const., Art. II, § 24; Cal. Const., Art. XVI, § 5; Colo. Const., Art. II, § 4, Art. IX, § 7; Conn. Const., Art. Seventh; Del. Const., Art. I, § 1; Fla. Const., Art. I, § 3; Ga. Const., Art. I, § 2, para. VII; Idaho Const., Art. IX, § 5; Ill. Const., Art. I, § 3, Art. X, § 3; Ind. Const., Art. 1, §§ 4, 6; Iowa Const., Art. 1, § 3; Ky. Const. § 5; Md. Const., Decl. of Rights Art. 36; Mass. Const. Amdt., Art. XVIII, § 2; Mich. Const., Art. I, § 4; Minn. Const., Art. I, § 16; Mo. Const., Art. I, §§ 6, 7, Art. IX, § 8; Mont. Const., Art. X, § 6; Neb. Const., Art. I, § 4; N. H. Const., pt. 2, Art. 83; N. J. Const., Art. I, § 3; N. M. Const., Art. II, § 11; Ohio Const., Art. I, § 7; Okla. Const., Art. II, § 5; Ore. Const., Art. I, § 5; Pa. Const., Art. I, § 3, Art. III, § 29; R. I. Const.,

ter, date back to or before these States' original Constitutions.[11] That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk." *Locke*, 540 U. S., at 723.

Art. I, § 3; S. D. Const., Art. VI, § 3; Tenn. Const., Art. I, § 3; Tex. Const., Art. I, §§ 6, 7; Utah Const., Art. I, § 4; Vt. Const., ch. I, Art. 3; Va. Const., Art. I, § 16, Art. IV, § 16; Wash. Const., Art. I, § 11; W. Va. Const., Art. III, § 15; Wis. Const., Art. I, § 18; Wyo. Const., Art. I, § 19, Art. III, § 36.

[11] See Ala. Const., Art. I, § 3 (1819), in 1 Thorpe 97; Ariz. Const., Art. II, § 12, Art. IX, § 10 (1912); Ark. Const., Art. II, § 3 (1836), in 1 Thorpe 269; Cal. Const., Art. IX, § 8 (1879), in *id.*, at 432; Colo. Const., Art. II, § 4, Art. V, § 34 (1876), in *id.*, at 475, 485; Conn. Const., Art. First, § 4, Art. Seventh, § 1 (1818), in *id.*, at 537, 544–545; Del. Const., Art. I, § 1 (1792); Fla. Const., Decl. of Rights § 6 (1885), in 2 Thorpe 733; Ga. Const., Art. I, § 1, para. XIV (1877), in *id.*, at 843; Idaho Const., Art. I, § 4, Art. IX, § 5 (1889), in *id.*, at 919, 936–937; Ill. Const., Art. VIII, § 3 (1818) and (1870), in *id.*, at 981, 1035; Ind. Const., Art. 1, § 3 (1816), Art. 1, § 6 (1851), in *id.*, at 1057, 1074; Iowa Const., Art. 1, § 3 (1846), in *id.*, at 1123; Ky. Const., Art. XIII, § 5 (1850), in 3 *id.*, at 1312; Md. Const., Decl. of Rights Art. 36 (1867), in *id.*, at 1782; Mass. Const. Amdt., Art. XVIII (1855), in *id.*, at 1918, 1922, n.; Mass. Const. Amdt., Art. XVIII (1974); Mich. Const., Art. 1, § 4 (1835), Art. IV, § 40 (1850), in 4 Thorpe 1931, 1950; Minn. Const., Art. I, § 16 (1857), in *id.*, at 1993; Enabling Act for Mo., § 4 (1820), Mo. Const., Art. I, § 10 (1865), Art. II, § 7 (1875), in *id.*, at 2146–2147, 2192, 2230; Mont. Const., Art. XI, § 8 (1889), in *id.*, at 2323–2324; Neb. Const., Art. I, § 16 (1866), in *id.*, at 2350; N. H. Const., pt. 2, Art. 83 (1877); N. J. Const., Art. XVIII (1776), in 5 Thorpe 2597; N. M. Const., Art. II, § 11 (1911); Ohio Const., Art. VIII, § 3 (1802), in 5 Thorpe 2910; Okla. Const., Art. II, § 5 (1907), in H. Snyder, The Constitution of Oklahoma 21 (1908); Ore. Const., Art. I, § 5 (1857), in 5 Thorpe 2998; Pa. Const., Art. IX, § 3 (1790), Art. III, § 18 (1873), in *id.*, at 3100, 3128; R. I. Const., Art. I, § 3 (1842), in 6 *id.*, at 3222–3223; S. D. Const., Art. VI, § 3 (1889), in *id.*, at 3370; Tenn. Const., Art. XI, § 3 (1796), in *id.*, at 3422; Tex. Const., Art. I, § 4 (1845), Art. I, § 7 (1876), in *id.*, at 3547–3548, 3622; Utah Const., Art. I, § 4 (1895), in *id.*, at 3702; Vt. Const., ch. I, Art. III (1777), in *id.*, at 3740; Va. Const., Art. III, § 11 (1830), Art. IV, § 67 (1902), in 7 *id.*, at 3824–3825, 3917; Wash. Const., Art. I, § 11 (1889), in *id.*, at 3974; W. Va. Const., Art. II, § 9 (1861–1863), in *id.*, at 4015; Wis. Const., Art. I, § 18 (1848), in *id.*, at 4078–4079; Wyo. Const., Art. I, § 19, Art. III, § 36 (1889), in *id.*, at 4119, 4124.

And as in *Locke*, Missouri's Article I, § 7, is closely tied to the state interests it protects. See 540 U. S., at 724 (describing the program at issue as "go[ing] a long way toward including religion in its benefits"). A straightforward reading of Article I, § 7, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions, or more broadly still, to prohibit the funding of religious believers. See, *e. g.*, *Saint Louis Univ.* v. *Masonic Temple Assn. of St. Louis*, 220 S. W. 3d 721, 726 (Mo. 2007) ("The university is not a religious institution simply because it is affiliated with the Jesuits or the Roman Catholic Church"). The Scrap Tire Program at issue here proves the point. Missouri will fund a religious organization not "owned or controlled by a church" if its "mission and activities are secular (separate from religion, not spiritual) in nature" and the funds "will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes." App. to Brief for Petitioner 3a; see also Tr. of Oral Arg. 33–35. Article I, § 7, thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

In the Court's view, none of this matters. It focuses on one aspect of Missouri's Article I, § 7, to the exclusion of all else: that it denies funding to a house of worship, here the Church, "simply because of what it [i]s—a church." *Ante*, at 464. The Court describes this as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents in this area, and wrong on its own terms.

The Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. See *Hosanna-Tabor*, 565 U. S., at 188–190. Other times, it merely permits the government to act. See Part III–A, *supra*. In all cases, the dispositive issue is not whether religious "status" matters—it does, or the Religion Clauses would not be at issue—but whether the government must, or may, act on that basis.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. See *Amos*, 483 U. S., at 339; *Walz*, 397 U. S., at 680; *Locke*, 540 U. S., at 721. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status. See *Amos*, 483 U. S., at 339 ("[W]e see no justification for applying strict scrutiny"); *Walz*, 397 U. S., at 679 (rejecting criticisms of a case-by-case approach as giving "too little weight to the fact that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Consti-

tution"); *Locke*, 540 U. S., at 725 (balancing the State's interests against the aspiring minister's).

The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." *Ante*, at 464. A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. 540 U. S., at 725. Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. *Ante*, at 463. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination.[12] To understand why, keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace* v. *Jaffree*, 472 U. S. 38, 52–53 (1985). If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea, see, *e. g.*, *Amos*, 483 U. S., at 338–339, and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.[13]

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[12] This explains, perhaps, the Court's reference to an Equal Protection Clause precedent, rather than a Free Exercise Clause precedent, for this point. See *ante*, at 463 (citing *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993)).

[13] No surprise then that, despite the Court's protests to the contrary, no case has applied its rigid rule. *McDaniel* v. *Paty*, 435 U. S. 618 (1978), on which the Court relies most heavily, mentioned "status" only to distinguish laws that deprived a person "of a civil right solely because of their religious beliefs." *Id.*, at 626–627 (plurality opinion). In *Torcaso* v. *Wat-*

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State "atheistic or antireligious." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 610 (1989). It means only that the State has "establishe[d] neither atheism nor religion as its official creed." *Ibid.* The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence." *Id.*, at 652, n. 11 (Stevens, J., concurring in part and dissenting in part).

At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion

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kins, 367 U. S. 488 (1961), the Court invalidated a law that barred persons who refused to state their belief in God from public office without "evaluat-[ing] the interests assertedly justifying it." *McDaniel*, 435 U. S., at 626 (plurality opinion). That approach did not control in *McDaniel*, which involved a state constitutional provision that barred ministers from serving as legislators, because "ministerial status" was defined "in terms of conduct and activity," not "belief." *Id.*, at 627. The Court thus asked whether the "anti-establishment interests" the State offered were strong enough to justify the denial of a constitutional right—to serve in public office—and concluded that they were not. *Id.*, at 627–629. Other references to "status" in our cases simply recount *McDaniel*. See, *e. g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990).

Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the Clauses protect not religion but "the individual's freedom of conscience," *Jaffree*, 472 U. S., at 50—that which allows him to choose religion, reject it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities. Cf. *Walz*, 397 U. S., at 674 (entanglement); *Amos*, 483 U. S., at 336 (influence on religious activities).

JUSTICE BREYER's concurrence offers a narrower rule that would limit the effects of today's decision, but that rule does not resolve this case. JUSTICE BREYER, like the Court, thinks that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order," *ante*, at 458 (majority opinion) (internal quotation marks omitted). See *ante*, at 470–471 (BREYER, J., concurring in judgment). Few would disagree with a literal interpretation of this statement. To fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause. Accord, *Rosenberger*, 515 U. S., at 879, n. 5 (Souter, J., dissenting). This explains why Missouri does not apply its constitutional provision in that manner. See Tr. of Oral Arg. 35–36. Nor has it done so here. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt. Cf. *Everson*, 330 U. S., at 61, n. 56 (Rutledge, J., dissenting) (The Religion Clauses "forbi[d] support, not protection from interference or destruction").

On top of all of this, the Court's application of its new rule here is mistaken. In concluding that Missouri's Article I, § 7, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." *Ante*, at 466. The constitutional provisions of 39 States—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.[14]

Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. Just three years ago, this Court claimed to understand that, in this area of law, to "sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece* v. *Galloway*, 572 U. S. 565, 577 (2014). It makes clear today that this principle applies only when preference suits.

IV

The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to "the free exercise" of religion, to choose for our-

[14] In the end, the soundness of today's decision may matter less than what it might enable tomorrow. The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use. See *ante*, at 469–470 (GORSUCH, J., concurring in part); see also *ante*, at 468 (THOMAS, J., concurring in part) (going further and suggesting that lines drawn on the basis of religious status amount to *per se* unconstitutional discrimination on the basis of religious belief). It is enough for today to explain why the Court's decision is wrong. The error of the concurrences' hoped-for decisions can be left for tomorrow. See, for now, *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 226 (1963) ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs").

selves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a "law respecting an establishment of religion," start us down the path to the past, when this right was routinely abridged.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others, see *ante*, at 465, n. 3—it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.

Syllabus

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM *v.* ANZ SECURITIES, INC., ET AL.

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

No. 16–373. Argued April 17, 2017—Decided June 26, 2017

Section 11 of the Securities Act of 1933 gives purchasers of securities "a right of action against an issuer or designated individuals," including securities underwriters, for any material misstatements or omissions in a registration statement. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. 175, 179; see 15 U. S. C. § 77k(a). Section 13 provides two time limits for § 11 suits. The first sentence states that an action "must be brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . ." The second sentence provides that "[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public . . . ." § 77m.

In 2007 and 2008, Lehman Brothers Holdings Inc. raised capital through several public securities offerings. Petitioner, the largest public pension fund in the country, purchased some of those securities; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. In 2008, a putative class action was filed against respondents in the Southern District of New York. The complaint raised § 11 claims, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. Because the complaint was filed on behalf of all persons who purchased the identified securities, petitioner was a member of the putative class.

In February 2011, more than three years after the relevant securities offerings, petitioner filed a separate complaint against respondents in the Northern District of California, alleging violations identical to those in the class action on petitioner's own behalf. Soon thereafter, a proposed settlement was reached in the putative class action, but petitioner opted out of the class. Respondents then moved to dismiss petitioner's individual suit, alleging that the § 11 violations were untimely under the 3-year bar in the second sentence of § 13. Petitioner countered that the 3-year period was tolled during the pendency of the class-action filing, relying on *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538. The trial court disagreed, and the Second Circuit affirmed, holding that

American Pipe's tolling principle is inapplicable to the 3-year bar. It also rejected petitioner's alternative argument that the timely filing of the class action made petitioner's individual claims timely as well.

Held: Petitioner's untimely filing of its individual complaint more than three years after the relevant securities offering is ground for dismissal. Pp. 504–516.

(a) Section 13's 3-year time limit is a statute of repose not subject to equitable tolling. Pp. 504–513.

(1) The two categories of statutory time bars—statutes of limitations and statutes of repose—each have "a distinct purpose." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 8. Statutes of limitations are designed to encourage plaintiffs "'to pursue diligent prosecution of known claims,'" *ibid.*, while statutes of repose "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time,'" *id.*, at 9. For this reason, statutes of limitations begin to run "when the cause of action accrues," while statutes of repose begin to run on "the date of the last culpable act or omission of the defendant." *Id.*, at 7–8.

From the structure of § 13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose. The instruction that "[i]n no event" shall an action be brought more than three years after the relevant securities offering admits of no exception. The statute also runs from the defendant's last culpable act (the securities offering), not from the accrual of the claim (the plaintiff's discovery of the defect).

This view is confirmed by § 13's two-sentence structure. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. See, *e. g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 453. Section 13's history also supports the classification. The 1933 Securities Act's original 2-year discovery period and 10-year outside limit were shortened a year later. The evident design of the shortened period was to protect defendants' financial security by reducing the open period for potential liability. Pp. 504–506.

(2) The determination that the 3-year period is a statute of repose is critical here, for the question whether a tolling rule applies to a given statutory time bar is one "of statutory intent." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10. In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances. A statute of repose implements a "'legislative decisio[n] that . . . there should be a specific time beyond which a defendant should no longer be

subjected to protracted liability.'" *CTS*, 573 U. S., at 9. The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. Thus, the Court repeatedly has stated that statutes of repose are not subject to equitable tolling. See, *e. g.*, *id.*, at 9–10. Pp. 506–508.

(3) The tolling decision in *American Pipe* derived from equity principles and therefore cannot alter the unconditional language and purpose of the 3-year statute of repose. The source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, not the power to interpret and enforce statutory provisions. Nothing in the decision suggests that its tolling rule was mandated by a statute or federal rule. Moreover, the Court relied on cases that are paradigm applications of equitable tolling principles, see 414 U. S., at 559. Thus, the Court has previously referred to *American Pipe* as "equitable tolling." See, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96, and n. 3. Pp. 508–510.

(4) Petitioner's counterarguments are unpersuasive. First, petitioner contends that this case is indistinguishable from *American Pipe*, but the statute there was one of limitations, which may be tolled by equitable considerations even where a statute of repose may not. Second, petitioner argues that the timely filing of a class-action complaint fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class. But by permitting a class action to splinter into individual suits, the application of *American Pipe* tolling here would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. Third, petitioner contends that dismissal of its individual suit as untimely would eviscerate its ability to opt out, but it does not follow from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits. Fourth, petitioner argues that declining to apply *American Pipe* tolling to statutes of repose will create inefficiencies, but this Court "lack[s] the authority to rewrite" the statute of repose or to ignore its plain import. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. 121, 134. And petitioner's practical concerns likely are overstated. Pp. 510–513.

(b) Also unpersuasive is petitioner's alternative argument: that § 13's requirement that an "action" be "brought" within three years of the relevant securities offering is met here because the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period. This argument presumes that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. The

term "action," however, refers to a judicial "proceeding," or perhaps a "suit"—not to the general content of claims. Taken to its logical limit, petitioner's argument would make an individual action timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed within the initial 3-year period. Congress would not have intended this result. This argument is also inconsistent with the reasoning in *American Pipe* itself. If the filing of a class action made all subsequent actions by putative class members timely, there would be no need for tolling at all. Pp. 513–515.

(c) The final analysis is straightforward. Because § 13's 3-year time bar is a statute of repose, it displaces the traditional power of courts to modify statutory time limits in the name of equity. And because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is thus ground for dismissal. Pp. 515–516.

655 Fed. Appx. 13, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, at 516.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Tejinder Singh*, *Darren J. Robbins*, *Joseph D. Daley*, and *Thomas E. Egler*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Jeffrey M. Harris*, *Victor L. Hou*, and *Jared Gerber*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Callie Anne Castillo*, Deputy Solicitor General, and *Mary Lobdell*, and by the Attorneys General for their respective States as follows: *Jahna Lindemuth* of Alaska, *Douglas S. Chin* of Hawaii, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Hector Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, and *Mark R. Herring* of Virginia; for Civil Procedure Professors et al. by *David Freeman Engstrom*, *pro se*; for Current and Former Directors of Publicly Traded Companies by *Ruthanne*

JUSTICE KENNEDY delivered the opinion of the Court.

The suit giving rise to the case before the Court was filed by a plaintiff who was a member of a putative class in a class action but who later elected to withdraw and proceed in this separate suit, seeking recovery for the same illegalities that were alleged in the class suit. The class-action suit had been filed within the time permitted by statute. Whether the later, separate suit was also timely is the controlling question.

I

A

The Securities Act of 1933 "protects investors by ensuring that companies issuing securities . . . make a 'full and fair disclosure of information' relevant to a public offering." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. 175, 178 (2015) (quoting *Pinter* v. *Dahl*, 486 U. S. 622, 646 (1988)); see 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* Companies may offer securities to the public only after filing a registration statement, which must contain information about the company and the security for sale. *Omnicare*, 575 U. S., at 178. Section 11 of

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M. Deutsch, *Hyland Hunt*, and *Frank J. Johnson*; for the DeKalb County Pension Fund by *David C. Frederick*, *George G. Rapawy*, *Jeremy S. Newman*, *David R. Scott*, *William C. Fredericks*, and *Geoffrey M. Johnson*; for Institutional Investors by *Max W. Berger* and *Robert D. Klausner*; for the North American Securities Administrators Association, Inc., by *Daniel S. Sommers* and *Michael Eisenkraft*; for Public Citizen, Inc., et al. by *Scott L. Nelson*, *Allison M. Zieve*, and *F. Paul Bland*; for Retired Federal Judges by *Andrew N. Goldfarb*, *Graeme W. Bush*, and *John J. Connolly*; and for SRM Global Master Fund Limited Partnership by *David Boies* and *Richard B. Drubel*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *William M. Jay*, *Stephen D. Poss*, *Brian E. Pastuszenski*, and *Kate Comerford Todd*; for the Securities Industry and Financial Markets Association et al. by *Mark A. Perry* and *Kevin Carroll*; and for the Washington Legal Foundation by *Lyle Roberts*, *George E. Anhang*, and *Matthew Ezer*.

the Securities Act "promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals," including securities underwriters, for any material misstatements or omissions in a registration statement. *Id.*, at 179; see 15 U. S. C. § 77k(a).

The Act provides time limits for § 11 suits. These time limits are set forth in a two-sentence section of the Act, § 13. It provides as follows:

> "No action shall be maintained to enforce any liability created under [§ 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [§ 11] more than three years after the security was bona fide offered to the public . . . ." 15 U. S. C. § 77m.

So there are two time bars in the quoted provision; and the second one, the 3-year bar, is central to this case.

B

Lehman Brothers Holdings Inc. formerly was one of the largest investment banks in the United States. In 2007 and 2008, Lehman raised capital through a number of public securities offerings. Petitioner, California Public Employees' Retirement System (sometimes called CalPERS), is the largest public pension fund in the country. Petitioner purchased securities in some of these Lehman offerings; and it is alleged that respondents, various financial firms, are liable under the Act for their participation as underwriters in the transactions. The separate respondents are listed in an appendix to this opinion.

In September 2008, Lehman filed for bankruptcy. Around the same time, a putative class action concerning Lehman securities was filed against respondents in the United States

District Court for the Southern District of New York. The operative complaint raised claims under § 11, alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions. The complaint was filed on behalf of all persons who purchased the identified securities, making petitioner a member of the putative class. Petitioner, however, was not one of the named plaintiffs in the suit. The class action was consolidated with other securities suits against Lehman in a single multidistrict litigation.

In February 2011, petitioner filed a separate complaint against respondents in the United States District Court for the Northern District of California. This suit was filed more than three years after the relevant transactions occurred. The complaint alleged identical securities-law violations as the class-action complaint, but the claims were on petitioner's own behalf. The suit was transferred and consolidated with the multidistrict litigation in the Southern District of New York. Soon thereafter, a proposed settlement was reached in the putative class action. Petitioner, apparently convinced it could obtain a more favorable recovery in its separate suit, opted out of the class.

Respondents then moved to dismiss petitioner's individual suit alleging § 11 violations as untimely under the 3-year bar in the second sentence of § 13. Petitioner countered that its individual suit was timely because that 3-year period was tolled during the pendency of the class-action filing. The principal authority cited to support petitioner's argument that the 3-year period was tolled was *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974).

The District Court disagreed with petitioner's argument, holding that the 3-year bar in § 13 is not subject to tolling. The Court of Appeals for the Second Circuit affirmed. In agreement with the District Court, the Court of Appeals held that the tolling principle discussed in *American Pipe* is inapplicable to the 3-year time bar. *In re Lehman Brothers*

Securities and ERISA Litigation, 655 Fed. Appx. 13, 15 (2016). As the Court of Appeals noted, there is disagreement about whether the tolling rule of *American Pipe* applies to the 3-year time bar in § 13. Compare *Joseph* v. *Wiles*, 223 F. 3d 1155, 1166–1168 (CA10 2000), with *Stein* v. *Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F. 3d 780, 792–795 (CA6 2016), and *Dusek* v. *JPMorgan Chase & Co.*, 832 F. 3d 1243, 1246–1249 (CA11 2016).

The Court of Appeals also rejected petitioner's alternative argument that its individual claims were "essentially 'filed' in the putative class complaint," so that the filing of the class action within three years made the individual claims timely. 655 Fed. Appx., at 15.

This Court granted certiorari. 580 U. S. 1089 (2017).

II

The question then is whether § 13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it. The answer turns on the nature and purpose of the 3-year bar and of the tolling rule that petitioner seeks to invoke. Each will be addressed in turn.

A

As the Court explained in *CTS Corp.* v. *Waldburger*, 573 U. S. 1 (2014), statutory time bars can be divided into two categories: statutes of limitations and statutes of repose. Both "are mechanisms used to limit the temporal extent or duration of liability for tortious acts," but "each has a distinct purpose." *Id.*, at 7–8.

Statutes of limitations are designed to encourage plaintiffs "to pursue diligent prosecution of known claims." *Id.*, at 8 (internal quotation marks omitted). In accord with that objective, limitations periods begin to run "when the cause

of action accrues—that is, when the plaintiff can file suit and obtain relief." *Id.*, at 7–8 (internal quotation marks omitted). In a personal-injury or property-damage action, for example, more often than not this will be "'when the injury occurred or was discovered.'" *Id.*, at 8.

In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Id.*, at 9 (internal quotation marks omitted). For this reason, statutes of repose begin to run on "the date of the last culpable act or omission of the defendant." *Id.*, at 8.

The 3-year time bar in § 13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period. From the structure of § 13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose. In fact, this Court has already described the provision as establishing "a period of repose," which "'impose[s] an outside limit'" on temporal liability. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 363 (1991).

The statute provides in clear terms that "[i]n no event" shall an action be brought more than three years after the securities offering on which it is based. 15 U. S. C. § 77m. This instruction admits of no exception and on its face creates a fixed bar against future liability. See *CTS*, *supra*, at 9–10; cf. *United States* v. *Brockamp*, 519 U. S. 347, 350 (1997) (noting that a statute that "sets forth its time limitations in unusually emphatic form . . . cannot easily be read as containing implicit exceptions"). The statute, furthermore, runs from the defendant's last culpable act (the offering of the securities), not from the accrual of the claim (the plaintiff's discovery of the defect in the registration statement). Under *CTS*, this point is close to a dispositive indication that the statute is one of repose.

This view is confirmed by the two-sentence structure of § 13. In addition to the 3-year time bar, § 13 contains a 1-year statute of limitations. The limitations statute runs from the time when the plaintiff discovers (or should have discovered) the securities-law violation. The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits. See, *e. g.*, *Gabelli* v. *SEC*, 568 U. S. 442, 453 (2013) ("[S]tatutes applying a discovery rule . . . often couple that rule with an absolute provision for repose"). The two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability. Cf. *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 650 (2010) (reasoning that 2-year discovery rule would not "subject defendants to liability for acts taken long ago," because the statute also included an "unqualified bar on actions instituted '5 years after such violation' ").

The history of the 3-year provision also supports its classification as a statute of repose. It is instructive to note that the statute was not enacted in its current form. The original version of the 1933 Securities Act featured a 2-year discovery period and a 10-year outside limit, see § 13, 48 Stat. 84, but Congress changed this framework just one year after its enactment. The discovery period was changed to one year and the outside limit to three years. See Securities Exchange Act of 1934, § 207, 48 Stat. 908. The evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability.

B

The determination that the 3-year period is a statute of repose is critical in this case, for the question whether a tolling rule applies to a given statutory time bar is one "of statutory intent." *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10

(2014). The purpose of a statute of repose is to create "an absolute bar on a defendant's temporal liability," *CTS*, 573 U. S., at 8 (alteration and internal quotation marks omitted); and that purpose informs the assessment of whether, and when, tolling rules may apply.

In light of the purpose of a statute of repose, the provision is in general not subject to tolling. Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances.

For example, if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period. See 1 C. Corman, Limitation of Actions § 1.1, pp. 4–5 (1991) (Corman); see, *e. g.*, 29 U. S. C. § 1113 (establishing a 6-year statute of repose, but stipulating that, in case of fraud, the 6-year period runs from the plaintiff's discovery of the violation). In contrast, where the legislature enacts a general tolling rule in a different part of the code—*e. g.*, a rule that suspends time limits until the plaintiff reaches the age of majority—courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls. See 2 Corman § 10.2.1, at 108. In keeping with the statute-specific nature of that analysis, courts have reached different conclusions about whether general tolling statutes govern particular periods of repose. *Ibid.*, n. 15.

Of course, not all tolling rules derive from legislative enactments. Some derive from the traditional power of the courts to " 'apply the principles . . . of equity jurisprudence.' " *Young* v. *United States*, 535 U. S. 43, 50 (2002) (alteration omitted). The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano*, 572 U. S., at 10. Tolling rules of

that kind often apply to statutes of limitations based on the presumption that Congress "'legislate[s] against a background of common-law adjudicatory principles.'" *Ibid.*

The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts. By establishing a fixed limit, a statute of repose implements a "'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *CTS*, 573 U. S., at 9. The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling. See, *e. g.*, *id.*, at 9–10; *Lampf, Pleva*, 501 U. S., at 363.

C

Petitioner contends that the 3-year provision is subject to tolling based on the rationale and holding in the Court's decision in *American Pipe*. The language of the 3-year statute does not refer to or impliedly authorize any exceptions for tolling. If *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period. If, however, the tolling decision in *American Pipe* derived from equity principles, it cannot alter the unconditional language and purpose of the 3-year statute of repose.

In *American Pipe*, a timely class-action complaint was filed asserting violations of federal antitrust law. 414 U. S., at 540. Class certification was denied because the class was not large enough, see Fed. Rule Civ. Proc. 23(a)(1), and individuals who otherwise would have been members of the class then filed motions to intervene as individual plaintiffs. The motions were denied on the grounds that the applicable 4-year time bar had expired. See 15 U. S. C. § 15b. The Court of Appeals reversed, permitting intervention.

This Court affirmed. It held the individual plaintiffs' motions to intervene were timely because "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *American Pipe*, 414 U. S., at 554. The Court reasoned that this result was consistent "both with the procedures of Rule 23 and with the proper function of the limitations statute" at issue. *Id.*, at 555. First, the tolling furthered "the purposes of litigative efficiency and economy" served by Rule 23. *Id.*, at 556. Without the tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," which would "breed needless duplication of motions." *Id.*, at 553–554. Second, the tolling was in accord with "the functional operation of a statute of limitations." *Id.*, at 554. By filing a class complaint within the statutory period, the named plaintiff "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.*, at 555.

As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

The Court's holding was instead grounded in the traditional equitable powers of the judiciary. The Court described its rule as authorized by the "judicial power to toll statutes of limitations." *Id.*, at 558; see also *id.*, at 555 ("the tolling rule *we establish here*" (emphasis added)). The Court also relied on cases that are paradigm applications of equitable tolling principles, explaining with approval that tolling in one such case was based on "considerations 'deeply

rooted in our jurisprudence.'" *Id.*, at 559 (quoting *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, 232 (1959); alteration omitted); see also 414 U. S., at 559 (citing *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946)). The Court noted too that "bad faith" was not the cause of the District Court's denial of class certification. 414 U. S., at 553 (internal quotation marks omitted).

Perhaps for these reasons, this Court has referred to *American Pipe* as "equitable tolling." See *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96, and n. 3 (1990); see also *Young*, 535 U. S., at 49; *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U. S. 322, 338, n. (1978) (Burger, C. J., concurring) (using *American Pipe* as an example of "[t]he authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds"). It is true, however, that the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner. It did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct. See *Holland* v. *Florida*, 560 U. S. 631, 649 (2010) (identifying these considerations); *Young*, 535 U. S., at 50 (same). The balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.

D

This analysis shows that the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13. As explained above, the 3-year limit is a statute of repose. See *supra*, at 505–507. And the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity. See *supra*, at 507–508. No feature of § 13 provides that deviation from its time limit

is permissible in a case such as this one. To the contrary, the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years.

Petitioner raises four counterarguments, but they are not persuasive. First, petitioner contends that this case is indistinguishable from *American Pipe* itself. If the 3-year bar here cannot be tolled, petitioner reasons, then there was no justification for the *American Pipe* Court's contrary decision to suspend the time bar in that case. *American Pipe*, however, is distinguishable. The statute in *American Pipe* was one of limitations, not of repose; it began to run when "'the cause of action accrued.'" 414 U. S., at 541, n. 2 (quoting 15 U. S. C. § 15b). The statute in the instant case, however, is a statute of repose. Consistent with the different purposes embodied in statutes of limitations and statutes of repose, it is reasonable that the former may be tolled by equitable considerations even though the latter in most circumstances may not. See *supra*, at 507–508.

Second, petitioner argues that the filing of a class-action complaint within three years fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class. That is because, according to petitioner, the class complaint puts a defendant on notice as to the content of the claims against it and the set of potential plaintiffs who might assert those claims. It is true that the *American Pipe* Court, in permitting tolling, suggested that generic notice satisfied the purposes of the statute of limitations in that case. See 414 U. S., at 554–555. While this was deemed sufficient in balancing the equities to allow tolling under the antitrust statute, it must be noted that here the analysis differs because the purpose of a statute of repose is to give the defendant full protection after a certain time.

If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are

unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision. The initiation of separate individual suits may thus increase a defendant's practical burdens. See, *e. g.*, Cottreau, Note, The Due Process Right To Opt Out of Class Actions, 73 N. Y. U. L. Rev. 480, 486, n. 29 (1998) ("A defendant's transaction costs are likely to be reduced by having to defend just one action"). The emergence of individual suits, furthermore, may increase a defendant's financial liability; for plaintiffs who opt out have considerable leverage and, as a result, may obtain outsized recoveries. See, *e. g.*, Coffee, Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice," 30 Cardozo L. Rev. 407, 417, 432–433 (2008); Perino, Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L. J. 85, 97 (1997). These uncertainties can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters. By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose. All this is not to suggest how best to further equity under these circumstances but simply to support the recognition that a statute of repose supersedes a court's equitable balancing powers by setting a fixed time period for claims to end.

Third, petitioner contends that dismissal of its individual suit as untimely would eviscerate its ability to opt out, an ability this Court has indicated should not be disregarded. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 363 (2011). It does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute.

Fourth, petitioner argues that declining to apply *American Pipe* tolling to statutes of repose will create inefficien-

cies. It contends that nonnamed class members will inundate district courts with protective filings. Even if petitioner were correct, of course, this Court "lack[s] the authority to rewrite" the statute of repose or to ignore its plain import. *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. 121, 134 (2015).

And petitioner's concerns likely are overstated. Petitioner has not offered evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013. This is not surprising. The very premise of class actions is that "'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997). Many individual class members may have no interest in protecting their right to litigate on an individual basis. Even assuming that they do, the process is unlikely to be as onerous as petitioner claims. A simple motion to intervene or request to be included as a named plaintiff in the class-action complaint may well suffice. See, *e. g.*, Brief for Washington Legal Foundation as *Amicus Curiae* 6–11 (describing procedures); Brief for Securities Industry and Financial Markets Association et al. as *Amici Curiae* 16, 19–20 (same). District courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion. Cf. *Dietz* v. *Bouldin*, 579 U. S. 40, 47 (2016) ("[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases").

III

Petitioner makes an alternative argument that does not depend on tolling. Petitioner submits its individual suit was timely in any event. Section 13 provides that an "action" must be "brought" within three years of the relevant securities offering. See 15 U. S. C. § 77m. Petitioner argues that

requirement is met here because the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period.

This argument rests on the premise that an "action" is "brought" when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court. The term "action," however, refers to a judicial "proceeding," or perhaps to a "suit"—not to the general content of claims. See Black's Law Dictionary 41 (3d ed. 1933) (defining "action" as, *inter alia*, "an ordinary proceeding in a court of justice"); see also *id.*, at 43 ("The terms 'action' and 'suit' are . . . nearly, if not entirely, synonymous"). Whether or not petitioner's individual complaint alleged the same securities-law violations as the class-action complaint, it defies ordinary understanding to suggest that its filing—in a separate forum, on a separate date, by a separate named party—was the same "action," "proceeding," or "suit."

The limitless nature of petitioner's argument, furthermore, reveals its implausibility. It appears that, in petitioner's view, the bringing of the class action would make any subsequent action raising the same claims timely. Taken to its logical limit, an individual action would be timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed at some point within the initial 3-year period. Congress would not have intended this result.

Petitioner's argument also fails because it is inconsistent with the reasoning in *American Pipe* itself. If the filing of a class action made all subsequent actions by putative class members timely, there would be no need for tolling at all. Yet this Court has described *American Pipe* as creating a tolling rule, necessary to permit the ensuing individual actions to proceed. See, *e. g.*, *American Pipe*, 414 U. S., at 555; *Irwin*, 498 U. S., at 96, n. 3; *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 350 (1983). Indeed, the *American Pipe* Court reasoned that the class-action complaint "was

filed with 11 days yet to run" in the statutory period, so the motions for intervention were timely only if filed within 11 days after the denial of class certification. 414 U. S., at 561. If the filing of the class action "brought" any included individual actions, it would have sufficed for the Court to note the date on which the class action was filed and deem all subsequent individual actions proper, regardless when filed.

* * *

Tolling may be of great value to allow injured persons to recover for injuries that, through no fault of their own, they did not discover because the injury or the perpetrator was not evident until the limitations period otherwise would have expired. This is of obvious utility in the securities market, where complex transactions and events can be obscure and difficult for a market participant to analyze or apprehend. In a similar way, tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.

The purpose of a statute of repose, on the other hand, is to allow more certainty and reliability. These ends, too, are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors. The statute in this case reconciles these different ends by its two-tier structure: a conventional statute of limitations in the first clause and a statute of repose in the second.

The statute of repose transforms the analysis. In a hypothetical case with a different statutory scheme, consisting of a single limitations period without an additional outer limit, a court's equitable power under *American Pipe* in many cases would authorize the relief petitioner seeks. Here, however, the Court need not consider how equitable considerations should be formulated or balanced, for the mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule.

The final analysis, then, is straightforward. The 3-year time bar in § 13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of courts to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is ground for dismissal.

The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

APPENDIX

Respondents are the following financial securities firms: ANZ Securities, Inc.; Bankia, S. A.; BBVA Securities Inc.; BMO Capital Markets Corp.; BNP Paribas FS, LLC; BNP Paribas S. A.; BNY Mellon Capital Markets, LLC; CIBC World Markets Corp.; Citigroup Global Markets Inc.; Daiwa Capital Markets Europe Limited; DZ Financial Markets LLC; HSBC Securities (USA) Inc.; HVB Capital Markets, Inc.; ING Financial Markets LLC; Mizuho Securities USA Inc.; M. R. Beal & Company; Muriel Siebert & Co. Inc.; nabSecurities LLC; Natixis Securities Americas LLC; RBC Capital Markets, LLC; RBS Securities, Inc.; RBS WCS Holding Company; Santander Investment Securities, Inc.; Scotia Capital (USA) Inc.; SG Americas Securities, LLC; Sovereign Securities Corporation, LLC; SunTrust Capital Markets Inc.; Utendahi Capital Partners, L. P.; Wells Fargo Advisors, LLC; and Wells Fargo Securities, LLC.

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

A class complaint was filed against respondents well within the three-year period of repose set out in § 13 of the

Securities Act of 1933, 15 U. S. C. § 77m. That complaint informed respondents of the substance of the claims asserted against them and the identities of potential claimants. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 554–555 (1974); *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 353 (1983). Respondents, in other words, received what § 13's repose period was designed to afford them: notice of their potential liability within a fixed time window.

The complaint also "commence[d] the action for all members of the class." *American Pipe*, 414 U. S., at 550. Thus, when petitioner California Public Employees' Retirement System (CalPERS) elected to exercise the right safeguarded by Federal Rule of Civil Procedure 23(c)(2)(B)(v), *i. e.*, the right to opt out of the class and proceed independently, CalPERS' claim remained timely. See *American Pipe*, 414 U. S., at 550 (demanding that class members "individually meet the timeliness requirements . . . is simply inconsistent with Rule 23"). Given the due process underpinning of the opt-out right, see *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 363 (2011), I resist rendering the right illusory for CalPERS and similarly situated class members. I would therefore reverse the judgment of the Second Circuit. Accordingly, I dissent from today's decision, under which opting out cuts off any chance for recovery.

I

CalPERS' claim against respondents was timely launched when the class representative filed a complaint pursuant to § 11 of the Securities Act, 15 U. S. C. § 77k, on behalf of all members of the described class, CalPERS among them. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 550 (1974) (under Federal Rule of Civil Procedure 23, "the filing of a timely class action complaint commences the action for all members of the class"). See also *ante*, at 503 (CalPERS was part of putative class). Filing the class complaint within three years of the date the securities specified in that

complaint were offered to the public also satisfied § 13's statute of repose. As the Court observes, *ante*, at 505, statutes of repose "effect a legislative judgment that a defendant should be free from [facing] liability after the legislatively determined period of time." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 9 (2014) (internal quotation marks omitted). A repose period assures a party who might be drawn into litigation that, if no action is brought within a specified time, he will be off the hook. But whether CalPERS stayed in the class or eventually filed separately, respondents would have known, within the repose period, of their potential liability to all putative class members.

A class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 353 (1983) (quoting *American Pipe*, 414 U. S., at 555). The class complaint filed against respondents provided that very notice: It identified "the essential information necessary to determine both the subject matter and size of the prospective litigation," *id.*, at 555—*i. e.*, the class of plaintiffs, the offering documents, and the alleged untrue statements and misleading omissions in those documents, see App. 50–66. "[A] defendant faced with [such] information about a potential liability to a class cannot be said to have reached a state of repose that should be protected." Developments in the Law: Class Actions, 89 Harv. L. Rev. 1318, 1451 (1976).

When CalPERS elected to pursue individually the claims already stated in the class complaint against the same defendants, it simply took control of the piece of the action that had always belonged to it. CalPERS' statement of the same allegations in an individual complaint could not disturb anyone's repose, for respondents could hardly be at rest once notified of the potential claimants and the precise false or misleading statements alleged to infect the registration

statements at issue.[1] CalPERS' decision to opt out did change two things: (1) CalPERS positioned itself to exercise its constitutional right to go it alone, cutting loose from a monetary settlement it deemed insufficient; and (2) respondents had to deal with CalPERS and its attorneys in addition to the named plaintiff and class counsel. Although those changes may affect how litigation subsequently plays out, see *ante*, at 511–512, they do not implicate the concerns that prompted § 13's repose period: The class complaint disclosed the same information respondents would have received had each class member instead filed an individual complaint on the day the class complaint was filed.

II

Today's decision disserves the investing public that § 11 was designed to protect. The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period. Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 363 (2011) ("In the context of a class action predominantly for money damages," the "absence of . . . opt out violates due process."). Because critical stages of securities class actions, including the class-certification decision, often occur years after the filing of a class complaint,[2]

[1] To rank as a continuation of an action timely brought and serving the purpose of repose, the individual complaint may raise only those claims stated in the class complaint and must be launched while the class suit is still pending.

[2] A recent study showed, for example, that the time from the filing of a securities class complaint to the class-certification decision exceeds two years in 66% of cases and exceeds three years in 36% of cases. See S. Boettrich & S. Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review, p. 23 (2017), available at http://www.nera.com/content/dam/nera/publications/

the risk is high that class members failing to file a protective claim will be saddled with inadequate representation or an inadequate judgment.

The majority's ruling will also gum up the works of class litigation. Defendants will have an incentive to slow walk discovery and other precertification proceedings so the clock will run on potential opt outs. Any class member with a material stake in a § 11 case, including every fiduciary who must safeguard investor assets, will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires. See Brief for Retired Federal Judges as *Amici Curiae* 9–14. Such filings, by increasing the costs and complexity of the litigation, "substantially burden the courts." *Id.*, at 13.

Today's decision impels courts and class counsel to take on a more active role in protecting class members' opt-out rights. See *id.*, at 11–13. As the repose period nears expiration, it should be incumbent on class counsel, guided by district courts, to notify class members about the consequences of failing to file a timely protective claim. "At minimum, when notice goes out to a class beyond [§ 13's limitations period], a district court will need to assess whether the notice [should] alert class members that opting out . . . would end [their] chance for recovery." *Id.*, at 20.

* * *

For the reasons stated, I would hold that the filing of the class complaint commenced CalPERS' action under § 11 of the Securities Act, thereby satisfying § 13's statute of repose. Accordingly, I would reverse the judgment of the Second Circuit.

2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf (as last visited June 19, 2017).

Syllabus

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

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

No. 16–6219. Argued April 24, 2017—Decided June 26, 2017

In petitioner's state capital murder trial, the trial court overruled counsel's objection to a proposed jury instruction and submitted the instruction to the jury, which convicted petitioner. Appellate counsel did not challenge the jury instruction, and petitioner's conviction and sentence were affirmed. Petitioner's state habeas counsel did not raise the instructional issue or challenge appellate counsel's failure to raise it on appeal, and the state habeas court denied relief. Petitioner then sought federal habeas relief. Invoking *Martinez* v. *Ryan*, 566 U. S. 1, and *Trevino* v. *Thaler*, 569 U. S. 413, petitioner argued that his state habeas counsel's ineffective assistance in failing to raise an ineffective-assistance-of-appellate-counsel claim provided cause to excuse the procedural default of that claim. The District Court denied relief, concluding that *Martinez* and *Trevino* apply exclusively to ineffective-assistance-of-trial-counsel claims. The Fifth Circuit denied a certificate of appealability.

Held: The ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims. Pp. 527–538.

(a) In *Coleman* v. *Thompson*, 501 U. S. 722, this Court held that attorney error committed in the course of state postconviction proceedings—for which the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings. *Id.*, at 755. In *Martinez*, the Court announced an "equitable . . . qualification" of *Coleman*'s rule that applies where state law requires a claim of ineffective assistance of trial counsel to be raised in an "initial-review collateral proceeding," rather than on direct appeal. 566 U. S., at 16, 17. In those situations, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if" the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding. *Id.*, at 17. The Court clarified in *Trevino* that *Martinez*'s exception also applies where the State's "procedural framework, by reason of its design and operation, makes it unlikely in a typical case that a defendant will have a

meaningful opportunity to raise" the claim on direct appeal. 569 U. S., at 429. Pp. 527–529.

(b) This Court declines to extend the *Martinez* exception to allow a federal court to hear a substantial, but procedurally defaulted, claim of appellate ineffectiveness when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise it. Pp. 529–538.

(1) *Martinez* itself does not support extending this exception to new categories of procedurally defaulted claims. The *Martinez* Court did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception," 566 U. S., at 9, and made clear that "[t]he rule of *Coleman* governs in all but th[ose] limited circumstances," *id.*, at 16. Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would do precisely what this Court disclaimed in that case. Pp. 529–530.

(2) *Martinez*'s underlying rationale does not support extending its exception to appellate ineffectiveness claims. Petitioner argues that his situation is analogous to *Martinez*, where the Court expressed concern that trial ineffectiveness claims might completely evade review. The Court in *Martinez* made clear, however, that it exercised its equitable discretion in view of the unique importance of protecting a defendant's trial rights, particularly the right to effective assistance of trial counsel. Declining to expand *Martinez* to the appellate ineffectiveness context does no more than respect that judgment. Nor is petitioner's rule required to ensure that meritorious claims of trial error receive review by at least one state or federal court—*Martinez*'s chief concern. See 566 U. S., at 10, 12. A claim of trial error, preserved by trial counsel but not raised by counsel on appeal, will have been addressed by the trial court. If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to raise it at trial. In that circumstance, the prisoner likely could invoke *Martinez* or *Coleman* to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then *Martinez* and *Coleman* again already provide a vehicle for obtaining review of that error in most circumstances. Pp. 530–533.

(3) The equitable concerns addressed in *Martinez* do not apply to appellate ineffectiveness claims. In *Martinez* and *Trevino*, the States deliberately chose to make postconviction process the only means for raising trial ineffectiveness claims. The Court determined that it would be inequitable to refuse to hear a defaulted claim when the State had channeled that claim to a forum where the prisoner might lack the

assistance of counsel in raising it. The States have not made a similar choice with respect to appellate ineffectiveness claims—nor could they, since such claims generally cannot be presented until after the termination of direct appeal. The fact that appellate ineffectiveness claims are considered in proceedings in which counsel is not constitutionally guaranteed is a function of the nature of the claim, not of the States' deliberate choices. Pp. 534–535.

(4) The *Martinez* decision was also grounded in part on the belief that its narrow exception was unlikely to impose significant systemic costs. See 566 U. S., at 15–16. But adopting petitioner's proposed extension could flood the federal courts with defaulted appellate ineffectiveness claims, and potentially serve as a gateway to federal review of a host of defaulted claims of trial error. It would also aggravate the harm to federalism that federal habeas review of state convictions necessarily causes. Not only would these burdens on the federal courts and federal system be severe, but the systemic benefit would be small, as claims heard in federal court solely by virtue of petitioner's proposed rule would likely be largely meritless. Pp. 535–538.

650 Fed. Appx. 860, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 538.

Seth Kretzer, by appointment of the Court, 580 U. S. 1158, argued the cause for petitioner. With him on the briefs was *William R. Peterson*.

Scott A. Keller, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Ken Paxton*, Attorney General, *J. Campbell Barker*, Deputy Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, and *Heather Gebelin Hacker* and *Jason R. LaFond*, Assistant Solicitors General.*

**Seth P. Waxman*, *Catherine M. A. Carroll*, *Barbara E. Bergman*, *David D. Cole*, *Brian W. Stull*, and *Cassandra Stubbs* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Nevada et al. by *Adam Paul Laxalt*, Attorney General of Nevada, *Joseph*

JUSTICE THOMAS delivered the opinion of the Court.

Federal habeas courts reviewing convictions from state courts will not consider claims that a state court refused to hear based on an adequate and independent state procedural ground. A state prisoner may be able to overcome this bar, however, if he can establish "cause" to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error. An attorney error does not qualify as "cause" to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel. Because a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default. See *Coleman* v. *Thompson*, 501 U. S. 722 (1991).

In *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and *Trevino* v. *Thaler*, 569 U. S. 413 (2013), this Court announced a narrow exception to *Coleman*'s general rule. That exception treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim—ineffective assistance of trial counsel—in a single context—

Tartakovsky, Deputy Solicitor General, and *Jeffrey M. Conner* and *Jordan T. Smith*, Assistant Solicitors General, and by the Attorneys General for their respective States as follows: *Steven T. Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Ruthledge* of Arkansas, *Cynthia Coffman* of Colorado, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean Reyes* of Utah, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*.

where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal. The question in this case is whether we should extend that exception to allow federal courts to consider a different kind of defaulted claim—ineffective assistance of appellate counsel. We decline to do so.

I

A

On April 6, 2008, a group of family and friends gathered at Annette Stevenson's home to celebrate her granddaughter's birthday. Petitioner Erick Daniel Davila, believing he had seen a member of a rival street gang at the celebration, fired a rifle at the group while they were eating cake and ice cream. He shot and killed Annette and her 5-year-old granddaughter Queshawn, and he wounded three other children and one woman.

After the police arrested petitioner, he confessed to the killings. He stated that he "wasn't aiming at the kids or the woman," but that he was trying to kill Annette's son (and Queshawn's father) Jerry Stevenson and the other "guys on the porch." App. 38. The other "guys on the porch" were, apparently, women.

The State indicted petitioner for capital murder under Tex. Penal Code Ann. §19.03(a)(7)(A) (West 2016), which makes it a capital crime to "murde[r] more than one person . . . during the same criminal transaction." In response to the jury's request for clarification during deliberations, the trial court proposed instructing the jury on transferred intent. Under that doctrine, the jury could find petitioner guilty of murder if it determined that he intended to kill one person but instead killed a different person. Petitioner's counsel objected to the additional instruction, arguing that the trial judge should "wait" to submit it "until the jury indicates that they can't reach . . . a resolution." App. 51. The trial court overruled the objection and submitted the in-

struction to the jury. The jury convicted petitioner of capital murder, and the trial court sentenced petitioner to death.

B

Petitioner appealed his conviction and sentence. Although his appellate counsel argued that the State presented insufficient evidence to show that he acted with the requisite intent, counsel did not challenge the instruction about transferred intent. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence. *Davila* v. *State*, 2011 WL 303265 (Jan. 26, 2011), cert. denied, 565 U. S. 885 (2011).

Petitioner next sought habeas relief in Texas state court. His counsel did not challenge the instruction about transferred intent, nor did he challenge the failure of his appellate counsel to raise the alleged instructional error on direct appeal. The Texas Court of Criminal Appeals denied relief. *Ex parte Davila*, 2013 WL 1655549 (Apr. 17, 2013), cert. denied, 571 U. S. 1096 (2013).

C

Petitioner then sought habeas relief in Federal District Court under 28 U. S. C. § 2254. As relevant here, he argued that his appellate counsel provided ineffective assistance by failing to challenge the jury instruction about transferred intent. Petitioner conceded that he had failed to raise his claim of ineffective assistance of appellate counsel in his state habeas petition, but argued that the failure was the result of his state habeas counsel's ineffective assistance. Petitioner invoked this Court's decisions in *Martinez* and *Trevino* to argue that his state habeas attorney's ineffective assistance provided cause to excuse the procedural default of his claim of ineffective assistance of appellate counsel.

The District Court denied petitioner's § 2254 petition. It concluded that *Martinez* and *Trevino* did not supply cause to excuse the procedural default of petitioner's claim of ineffective assistance of *appellate* counsel because those decisions applied exclusively to claims of ineffective assistance of *trial*

counsel. See *Davila* v. *Stephens*, 2015 WL 1808689, *20 (ND Tex., Apr. 21, 2015). The Court of Appeals for the Fifth Circuit denied a certificate of appealability on the same ground. 650 Fed. Appx. 860, 867–868 (2016). Petitioner then sought a writ of certiorari, asking us to reverse the Fifth Circuit on the ground that *Martinez* and *Trevino* should be extended to claims of ineffective assistance of appellate counsel. We granted certiorari, 580 U. S. 1090 (2017), and now affirm.

II

Our decision in this case is guided by two fundamental tenets of federal review of state convictions. First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. § 2254(b)(1)(A). The exhaustion requirement is designed to avoid the "unseemly" result of a federal court "upset[ting] a state court conviction without" first according the state courts an "opportunity to . . . correct a constitutional violation," *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982) (internal quotation marks omitted).

Second, a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. *E. g.*, *Beard* v. *Kindler*, 558 U. S. 53, 55 (2009). This is an important "corollary" to the exhaustion requirement. *Dretke* v. *Haley*, 541 U. S. 386, 392 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." *Coleman*, 501 U. S., at 731–732.[1] The proce-

[1] The Fifth Circuit treats unexhausted claims as procedurally defaulted if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Bagwell* v. *Dretke*, 372 F. 3d 748, 755 (2004) (internal quotation marks omitted); cf. *Coleman*, 501 U. S., at 735, n. Re-

dural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991).

A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show "cause" to excuse his failure to comply with the state procedural rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes*, 433 U. S. 72, 84 (1977); *Coleman*, *supra*, at 750. To establish "cause"—the element of the doctrine relevant in this case—the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). A factor is external to the defense if it "cannot fairly be attributed to" the prisoner. *Coleman*, *supra*, at 753.

It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel. See *Edwards* v. *Carpenter*, 529 U. S. 446, 451 (2000). An error amounting to constitutionally ineffective assistance is "imputed to the State" and is therefore external to the prisoner. *Murray*, *supra*, at 488. Attorney error that does not violate the Constitution, however, is attributed to the prisoner under "well-settled principles of agency law." *Coleman*, *supra*, at 754. It fol-

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lying on this doctrine, the District Court concluded that petitioner's federal claim was procedurally defaulted (even though a state court had never actually found it procedurally barred) because Texas law would likely bar a Texas court from deciding the claim on the merits if petitioner were to present it in a successive habeas petition. *Davila* v. *Stephens*, 2015 WL 1808689, *19–*20 (ND Tex., Apr. 21, 2015) (citing *Davila* v. *Stephens*, 2014 WL 5879879, *2 (ND Tex., Nov. 10, 2014)); see also *Davila* v. *Stephens*, 2014 WL 6057907, *2 (ND Tex., Nov. 10, 2014). Petitioner did not seek a certificate of appealability regarding that holding, and neither petitioner nor the State disputes in this Court that the claim was procedurally defaulted. Accordingly, we assume that it was procedurally defaulted for purposes of this case.

lows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default. Thus, in *Coleman*, this Court held that attorney error committed in the course of state postconviction proceedings—for which the Constitution does not guarantee the right to counsel, see *Murray* v. *Giarratano*, 492 U. S. 1 (1989) (plurality opinion)—cannot supply cause to excuse a procedural default that occurs in those proceedings. 501 U. S., at 755.

In *Martinez*, this Court announced a narrow, "equitable . . . qualification" of the rule in *Coleman* that applies where state law requires prisoners to raise claims of ineffective assistance of trial counsel "in an initial-review collateral proceeding," rather than on direct appeal. *Martinez*, 566 U. S., at 16, 17. It held that, in those situations, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if" the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding. *Id.*, at 17. In *Trevino*, the Court clarified that this exception applies both where state law explicitly prohibits prisoners from bringing claims of ineffective assistance of trial counsel on direct appeal and where the State's "procedural framework, by reason of its design and operation, makes it unlikely in a typical case that a defendant will have a meaningful opportunity to raise" that claim on direct appeal. 569 U. S., at 429.

III

Petitioner asks us to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim. We decline to do so.

A

On its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally de-

faulted claims. *Martinez* did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception" that applies only to claims of "ineffective assistance of counsel at trial" and only when, "under state law," those claims "must be raised in an initial-review collateral proceeding." *Martinez*, *supra*, at 9, 17. And *Trevino* merely clarified that the exception applies whether state law explicitly or effectively forecloses review of the claim on direct appeal. 569 U. S., at 417, 429. In all but those "limited circumstances," *Martinez* made clear that "[t]he rule of *Coleman* governs." 566 U. S., at 16. Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would thus do precisely what this Court disclaimed in *Martinez*: Replace the rule of *Coleman* with the exception of *Martinez*.

B

Petitioner also finds no support in the underlying rationale of *Martinez*. Petitioner's primary argument is that his claim of ineffective assistance of appellate counsel might never be reviewed by any court, state or federal, without expanding the exception to the rule in *Coleman*. He argues that this situation is analogous to *Martinez*, where the Court expressed that same concern about claims of ineffective assistance of trial counsel. But the Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel. Ineffective assistance of appellate counsel is not a trial error. Nor is petitioner's rule necessary to ensure that a meritorious trial error (of any kind) receives review.

1

Petitioner argues that allowing a claim of ineffective assistance of appellate counsel to evade review is just as concerning as allowing a claim of ineffective assistance of trial

counsel to evade review. Brief for Petitioner 12; see also *id.*, at 18–26. We do not agree.

The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. The Constitution twice guarantees the right to a criminal trial, see Art. III, § 2; Amdt. 6, but does not guarantee the right to an appeal at all, *Halbert* v. *Michigan*, 545 U. S. 605, 610 (2005). The trial "is the main event at which a defendant's rights are to be determined," *McFarland* v. *Scott*, 512 U. S. 849, 859 (1994) (internal quotation marks omitted), "and not simply a tryout on the road to appellate review," *Freytag* v. *Commissioner*, 501 U. S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted). And it is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, see *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974); *Wainwright*, 433 U. S., at 90, and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review, see *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979); see also *Cavazos* v. *Smith*, 565 U. S. 1, 2 (2011) (*per curiam*) (under deferential standard of review, "judges will sometimes encounter convictions that they believe to be mistaken, but that they must nevertheless uphold").

The Court in *Martinez* made clear that it exercised its equitable discretion in view of the unique importance of protecting a defendant's trial rights, particularly the right to effective assistance of trial counsel. As the Court explained, "the limited nature" of its holding "reflect[ed] the importance of the right to the effective assistance of *trial* counsel," which is "a bedrock principle in our justice system." 566 U. S., at 12, 16 (emphasis added). In declining to expand the *Martinez* exception to the distinct context of ineffective assistance of appellate counsel, we do no more than respect that judgment.

2

Petitioner's rule also is not required to ensure that meritorious claims of trial error receive review by at least one state or federal court—the chief concern identified by this Court in *Martinez*. See *id.*, at 10, 12. *Martinez* was concerned that a claim of trial error—specifically, ineffective assistance of trial counsel—might escape review in a State that required prisoners to bring the claim for the first time in state postconviction proceedings rather than on direct appeal. Because it is difficult to assess a trial attorney's performance until the trial has ended, a trial court ordinarily will not have the opportunity to rule on such a claim. And when the State requires a prisoner to wait until postconviction proceedings to raise the claim, the appellate court on direct appeal also will not have the opportunity to review it. If postconviction counsel then fails to raise the claim, no state court will ever review it. Finally, because attorney error in a state postconviction proceeding does not qualify as cause to excuse procedural default under *Coleman*, no federal court could consider the claim either.

Claims of ineffective assistance of appellate counsel, however, do not pose the same risk that a trial error—of any kind—will escape review altogether, at least in a way that could be remedied by petitioner's proposed rule. This is true regardless of whether trial counsel preserved the alleged error at trial. If trial counsel preserved the error by properly objecting, then that claim of trial error "will have been addressed by . . . the trial court." *Martinez*, 566 U. S., at 11. A claim of appellate ineffectiveness premised on a preserved trial error thus does not present the same concern that animated the *Martinez* exception because at least "one court" will have considered the claim on the merits. *Ibid.*; see also *Coleman*, 501 U. S., at 755–756.

If trial counsel failed to preserve the error at trial, then petitioner's proposed rule ordinarily would not give the pris-

oner access to federal review of the error, anyway. Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed. *Smith* v. *Murray*, 477 U. S. 527, 536 (1986); *Jones* v. *Barnes*, 463 U. S. 745, 751–753 (1983). Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court. See *Smith* v. *Robbins*, 528 U. S. 259, 288 (2000). In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors. See 2 B. Means, Postconviction Remedies § 35:19, p. 627, and n. 16 (2016). Thus, in most instances in which the trial court did not rule on the alleged trial error (because it was not preserved), the prisoner could not make out a substantial claim of ineffective assistance of appellate counsel and therefore could not avail himself of petitioner's expanded *Martinez* exception.

Adopting petitioner's proposed rule would be unnecessary to ensure review of a claim of trial error even when a prisoner has a legitimate claim of ineffective assistance of appellate counsel based on something other than a preserved trial error. If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to object to it in the first instance. In that circumstance, the prisoner likely could invoke *Martinez* or *Coleman* to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then *Martinez* and *Coleman* again already provide a vehicle for obtaining review of that error in most circumstances. Petitioner's proposed rule is thus unnecessary for ensuring that trial errors are reviewed by at least one court.

C

The Court in *Martinez* also was responding to an equitable consideration that is unique to claims of ineffective assistance of trial counsel and accordingly inapplicable to claims of ineffective assistance of appellate counsel. In *Martinez*, the State "deliberately cho[se] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," into the postconviction review process, where we have never held that the Constitution guarantees a right to counsel. 566 U. S., at 13; *id.*, at 9. By doing so, "the State significantly diminishe[d] prisoners' ability to file such claims." *Id.*, at 13. Similarly, in *Trevino*, the State had chosen a procedural framework pursuant to which collateral review was, "as a practical matter, the onl[y] method for raising an ineffective-assistance-of-trial-counsel claim." 569 U. S., at 427.

Although this Court acknowledged in *Martinez* that there was nothing inappropriate about the State's choice, it explained that the choice was "not without consequences for the State's ability to assert a procedural default" in subsequent federal habeas proceedings. 566 U. S., at 13. Specifically, the Court concluded that it would be inequitable to refuse to hear a defaulted claim of ineffective assistance of trial counsel when the State had channeled that claim to a forum where the prisoner might lack the assistance of counsel in raising it.

The States have not made a similar choice with respect to claims of ineffective assistance of appellate counsel—nor could they. By their very nature, such claims generally cannot be presented until *after* the termination of direct appeal. Put another way, they *necessarily* must be heard in collateral proceedings, where counsel is not constitutionally guaranteed. The fact that claims of appellate ineffectiveness are considered in proceedings in which counsel is not constitutionally guaranteed is a function of the nature of the claim, not of the State's "deliberat[e] cho[ice] to move . . . claims

outside of the direct-appeal process." *Ibid.* The equitable concerns raised in *Martinez* therefore do not apply.

D

Finally, the Court in *Martinez* grounded its decision in part on the belief that its narrow exception was unlikely to impose significant systemic costs. See *id.*, at 15–16. The same cannot be said of petitioner's proposed extension.

1

Adopting petitioner's argument could flood the federal courts with defaulted claims of appellate ineffectiveness. For one thing, every prisoner in the country could bring these claims. *Martinez* currently applies only to States that deliberately choose to channel claims of ineffective assistance of trial counsel into collateral proceedings. See, *e. g.*, *Lee* v. *Corsini*, 777 F. 3d 46, 60–61 (CA1 2015) (*Martinez* and *Trevino* do not apply to Massachusetts); *Henness* v. *Bagley*, 766 F. 3d 550, 557 (CA6 2014) (*Martinez* does not apply to Ohio). If we applied *Martinez* to claims of appellate ineffectiveness, however, we would bring every State within *Martinez*'s ambit, because claims of appellate ineffectiveness necessarily must be heard in collateral proceedings. See *supra*, at 534.

Extending *Martinez* to defaulted claims of ineffective assistance of appellate counsel would be especially troublesome because those claims could serve as the gateway to federal review of a host of trial errors, while *Martinez* covers only one trial error (ineffective assistance of trial counsel). If a prisoner can establish ineffective assistance of trial counsel under *Martinez*, he ordinarily is entitled to a new trial. See *United States* v. *Morrison*, 449 U. S. 361, 364–365 (1981); see also *Hagens* v. *State*, 979 S. W. 2d 788, 792 (Tex. App. 1998). But if he cannot, *Martinez* provides no avenue for litigating other defaulted trial errors.[2]

[2] The dissent argues that *Martinez* already provides a gateway to the review of underlying trial errors no differently than would petitioner's proposed rule. See *post*, at 544 (opinion of BREYER, J.). That is not so. If

An expanded *Martinez* exception, however, would mean that *any* defaulted trial error could result in a new trial. In *Carpenter*, this Court held that, when a prisoner can show cause to excuse a defaulted claim of ineffective assistance of appellate counsel, he can, in turn, rely on that claim as cause to litigate an underlying claim of trial error that was defaulted due to appellate counsel's ineffectiveness. 529 U. S., at 453. Expanding *Martinez* as petitioner suggests would thus produce a domino effect: Prisoners could assert their postconviction counsel's inadequacy as cause to excuse the default of their appellate ineffectiveness claims, and use those newly reviewable appellate ineffectiveness claims as cause to excuse the default of their underlying claims of trial error. Petitioner's rule thus could ultimately knock down the procedural barriers to federal habeas review of nearly any defaulted claim of trial error. The scope of that review would exceed anything the *Martinez* Court envisioned when it established its narrow exception to *Coleman*.

Petitioner insists that these concerns are overstated because many of the newly raised claims will be meritless. See Brief for Petitioner 28. But even if that were true, courts would still have to undertake the task of separating the wheat from the chaff. And we are not reassured by petitioner's suggestion that extending *Martinez* would increase only the number of claims in each petition rather than the number of federal habeas petitions themselves. Reply Brief 14. Each additional claim would require the district court to review the prisoner's trial record, appellate briefing, and state postconviction record to determine the claim's via-

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a prisoner succeeds on his claim of ineffective assistance of trial counsel under *Martinez*, the federal habeas court would not need to consider any other claim of trial error since the successful claim of trial ineffectiveness—unlike a successful claim of ineffective assistance of appellate counsel—entitles the prisoner to a new trial. See 7 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 28.4(d), p. 258, n. 75 (4th ed. 2015).

bility. This effort could be repeated at each level of federal review. We cannot "assume that these costs would be negligible," *Murray*, 477 U. S., at 487, and we are loath to further "burden . . . scarce federal judicial resources" in this way, *McCleskey*, 499 U. S., at 491.

2

Expanding *Martinez* would not only impose significant costs on the federal courts, but would also aggravate the harm to federalism that federal habeas review necessarily causes. Federal habeas review of state convictions "entails significant costs," *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982), "'and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority,'" *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011) (quoting *Harris* v. *Reed*, 489 U. S. 255, 282 (1989) (KENNEDY, J., dissenting)). It "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon* v. *Thompson*, 523 U. S. 538, 555–556 (1998) (internal quotation marks omitted). It "degrades the prominence of the [State] trial," *Engle*, *supra*, at 127, and it "disturbs the State's significant interest in repose for concluded litigation [and] denies society the right to punish some admitted offenders," *Harrington*, *supra*, at 103 (internal quotation marks omitted).

Apart from increasing the sheer frequency of federal intrusion into state criminal affairs, petitioner's proposed rule would also undermine the doctrine of procedural default and the values it serves. That doctrine, like the federal habeas statute generally, is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges to convictions in state court, thereby "promoting comity, finality, and federalism." *Cullen* v. *Pinholster*, 563 U. S. 170, 185 (2011); *McCleskey*, *supra*, at 493. Expanding the narrow exception announced in *Martinez* would unduly

aggravate the "special costs on our federal system" that federal habeas review already imposes. *Engle*, *supra*, at 128.

3

Not only would these burdens on the federal courts and our federal system be severe, but the benefit would—as a systemic matter—be small. To be sure, permitting a state prisoner to bring a meritorious constitutional claim that could not otherwise be heard is beneficial to that prisoner. Petitioner's counsel concedes, however, that relief is granted in, "[i]f any, a very minute number" of "post-conviction ineffective assistance of appellate counsel cases." Tr. of Oral Arg. 14. Indeed, he concedes that the number of meritorious cases is "infinitesimally small." *Ibid.* We think it is likely that the claims heard in federal court because of petitioner's proposed rule would also be largely meritless, given that the proposed rule would generally affect only those cases in which the trial court already adjudicated, and rejected, the prisoner's argument regarding the alleged underlying trial error. See *supra*, at 533. Given that petitioner's proposed rule would likely generate high systemic costs and low systemic benefits, and that the unique concerns of *Martinez* are not implicated in cases like his, we do not think equity requires an expansion of *Martinez*.

* * *

For the foregoing reasons, we affirm the judgment of the Court of Appeals.

It is so ordered.

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

As the Court explains, normally a federal habeas court cannot hear a state prisoner's claim that his trial lawyer was, constitutionally speaking, "ineffective" if the prisoner failed to assert that claim in state court at the appropriate time,

that is, if he procedurally defaulted the claim. See *ante,* at 524 (the prisoner's failure to raise his federal claim at the initial-review state collateral proceeding amounts to an "adequate and independent state procedural ground" for denying habeas relief).

But there are equitable exceptions. In *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and later in *Trevino* v. *Thaler*, 569 U. S. 413 (2013), we held that, despite the presence of a procedural default, a federal court can nonetheless hear a prisoner's claim that his trial counsel was ineffective, where (1) the framework of state procedural law "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," *id.,* at 429; (2) in the state "'initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective,'" *ibid.* (quoting *Martinez*, 566 U. S., at 17); and (3) "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," *id.,* at 14.

In my view, this same exception (with the same qualifications) should apply when a prisoner raises a constitutional claim of ineffective assistance of appellate counsel. See, *e. g.*, *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985) (Constitution guarantees a defendant an effective appellate counsel, just as it guarantees a defendant an effective trial counsel).

I

Two simple examples help make clear why I believe *Martinez* and *Trevino* should govern the outcome of this case.

Example One: Ineffective assistance of trial counsel. The prisoner claims that his trial lawyer was ineffective, say, because counsel failed to object to an obviously unfair jury selection, failed to point out that the prosecution had promised numerous benefits to its main witness in return for the witness' testimony, or failed to object to an erroneous jury

instruction that made conviction and imposition of the death penalty far more likely. Next suppose the prisoner appeals but, per state law, may not bring his ineffective-assistance claim until collateral review in state court (*i. e.*, state habeas corpus), where the prisoner will have a better opportunity to develop his claim and the attorney will be better able to explain his (perhaps strategic) reasons for his actions at trial. Suppose that, on collateral review, the prisoner fails to bring up his ineffective-assistance claim, perhaps because he is no longer represented by counsel or because his counsel there is ineffective. Under these circumstances, if his ineffective-assistance claim is a "substantial" one, *i. e.*, it has "some merit," then *Martinez* and *Trevino* hold that a federal court can hear the claim even though the state habeas court did not consider it. See *Trevino*, *supra*, at 429; *Martinez*, *supra*, at 14. The fact that the prisoner had no lawyer in the initial state habeas proceeding (or his lawyer in that proceeding was ineffective) constitutes grounds for excusing the procedural default.

Example Two: Ineffective assistance of appellate counsel. Now suppose that a prisoner claims that the trial court made an important error of law, say, improperly instructing the jury, or that the prosecution engaged in misconduct. He believes his lawyer on direct appeal should have raised those errors because they led to his conviction or (as here) a death sentence. The appellate lawyer's failure to do so, the prisoner might claim, amounts to ineffective assistance of appellate counsel. The prisoner cannot make this argument on direct appeal, for the direct appeal is the very proceeding in which he is represented by the lawyer he says was ineffective. Next suppose the prisoner fails to raise his appellate lawyer's ineffectiveness at the initial state habeas proceeding, either because he was not represented by counsel in that proceeding or because his counsel there also was ineffective. When he brings his case to the federal habeas court, the State contends that the prisoner's failure to present his claim

during the initial state habeas proceeding constitutes a procedural default that precludes federal review of his claim.

Given *Martinez* and *Trevino*, the prisoner in the first example who complains about his trial counsel can overcome the procedural default but, in the Court's view today, the prisoner in the second example who complains about his appellate counsel cannot. Why should the law treat the second prisoner differently? Why should the Court not apply the rules of *Martinez* and *Trevino* to claims of ineffective assistance of both trial and appellate counsel?

II

As I have said, the Constitution applies similarly to both prisoners: It guarantees them effective assistance of counsel at both trial and during an initial appeal. See *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984) (trial); *Evitts*, *supra*, at 396 (appeal). Moreover, the reasoning of *Martinez* and *Trevino* applies similarly to both situations.

Four features of the claim of ineffective assistance of trial counsel led the *Martinez* Court to its conclusion. Each equally applies here. First, the Court stressed the importance of the underlying constitutional right to effective assistance of trial counsel, describing it as "a bedrock principle in our justice system." 566 U. S., at 12. Our cases make clear that the constitutional right to effective assistance of appellate counsel is also critically important. The Court wrote in *Douglas* v. *California*, 372 U. S. 353, 357 (1963), that "where the merits of *the one and only appeal* . . . as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." The Court held in *Evitts* that "[a] first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." 469 U. S., at 396. The Court added that "the promise of *Gideon* [v. *Wainwright*, 372 U. S. 335 (1963),] that a criminal defendant has a right to counsel at trial . . . would be a

futile gesture unless it comprehended the right to the effective assistance of counsel" "on appeal." *Id.*, at 397. And we stated in *Martinez* itself that "if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process." 566 U. S., at 11 (citing *Coleman* v. *Thompson*, 501 U. S. 722, 754 (1991); *Evitts*, *supra*, at 396; *Douglas*, *supra*, at 357–358). The fact that, according to Department of Justice statistics, nearly a third of convictions or sentences in capital cases are overturned at some stage of review suggests the practical importance of the appeal right, particularly in a capital case such as this one. See Dept. of Justice, Bureau of Justice Statistics, Capital Punishment, 2013–Statistical Tables, p. 19 (rev. Dec. 2014) (Table 16); see also Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 10.

Second, we pointed out in *Martinez* that the "initial" state collateral review proceeding "is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial." 566 U. S., at 11. We added that it "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Ibid.* In *Trevino*, we applied *Martinez* despite the theoretical possibility that a prisoner might raise an ineffective-assistance-of-trial-counsel claim on direct appeal. We wrote that the State's procedural system denied prisoners a "meaningful opportunity" to bring ineffective-assistance claims on appeal; in effect, it required them to raise the claim for the first time in state collateral review proceedings. 569 U. S., at 429.

This consideration applies *a fortiori* where the constitutional claim at issue is ineffective assistance of appellate counsel. The prisoner cannot raise that kind of claim in the very appeal in which he claims his counsel was ineffective. See *Ha Van Nguyen* v. *Curry*, 736 F. 3d 1287, 1294–1295 (CA9 2013). It makes no difference that the nature of the claim, rather than the State's express rule, makes that so. See *Trevino*, *supra*, at 429 (extending *Martinez* where the

"state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" the claim on direct appeal); *Trevino*, *supra*, at 424 (referring to "the *inherent nature* of most ineffective assistance of trial counsel claims" (emphasis added; internal quotation marks omitted)); see also *Martinez*, 566 U. S., at 19–20, n. 1 (Scalia, J., dissenting) (There is no "relevant difference between cases in which the State *says* that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review").

Third, *Martinez* pointed out that, unless "counsel's errors in an initial-review collateral proceeding . . . establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.*, at 10–11 (majority opinion). The same is true when the prisoner claims ineffective assistance of appellate counsel.

The Court argues to the contrary. It says that at least one court—namely, the trial court—will have considered the underlying legal error. *Ante*, at 532. (If not, perhaps trial counsel was ineffective.) But I believe the Court here misses the point. The prisoner's complaint is about the ineffectiveness of his appellate counsel. That ineffectiveness could consist, for example, in counsel's failure to appeal 10 different erroneous decisions of the trial court. The fact that the trial court made those decisions (assuming they are erroneous) does not help the prisoner. To the contrary, it forms the basis of his ineffectiveness claim. In the absence of a *Martinez*-like rule, the prisoner here (and prisoners in similar cases) would receive no review of their ineffective-assistance claims. Moreover, there will be cases in which no court will consider the underlying trial error, either. Suppose that, during the pendency of the appeal, appellate counsel learns of a *Brady* violation, juror misconduct, judicial bias, or some similar violation whose basis was not known during the trial. See *Brady* v. *Maryland*, 373 U. S. 83

(1963). And suppose appellate counsel fails to pursue the claim in the manner prescribed by state law. Without the exception petitioner here seeks, no court will hear either the appellate-ineffective-assistance claim or the underlying *Brady*, misconduct, or bias claim.

Fourth, the *Martinez* Court believed that its decision would "not . . . put a significant strain on state resources." 566 U. S., at 15. That is because *Martinez* imposed limiting conditions: It excuses only those defaults that (1) occur at the initial-review collateral proceeding; (2) where prisoner had no counsel, or ineffective counsel, in that proceeding; and (3) where the underlying claim of ineffective assistance is "substantial," *i. e.*, has "some merit." *Id.*, at 14–16. Moreover, as the Court pointed out, because many States provide prisoners with counsel in initial-review collateral proceedings (or at least when the prisoner seems to have a meritorious claim), it is unlikely that prisoners will default substantial ineffective-assistance claims. See *id.*, at 14–15 (providing examples). Finally, there is no evidence before us that *Martinez* has produced a greater-than-expected increase in courts' workload, even though *Martinez* applies, as Texas concedes, "in most States." Tr. of Oral Arg. 38.

It therefore seems unlikely that applying *Martinez* to ineffective-assistance-of-appellate-counsel claims will "put a significant strain on" state or federal resources. As I have said, the same limitations as the Court placed upon the assertion of a *Martinez* claim would apply here. And the Court's fear of triggering federal second-guessing of many, if not all, trial errors is of no greater concern here than it was in *Martinez*, for both trial- and appellate-level ineffectiveness claims "could serve as the gateway to federal review of a host of trial errors." *Ante*, at 535. Given a natural judicial hesitation to second-guess counsels' decisions, it is not surprising that we have no significant evidence of defaulted claims of ineffective assistance with "some merit" flooding the federal courts, either in respect to trial counsel (as

in *Martinez*) or in respect to appellate counsel (as here). See *Strickland*, 466 U. S., at 690–691 (To prevail on an ineffective-assistance claim, the defendant must show that his attorney's actions "were outside the wide range of professionally competent assistance," rather than strategic decisions to which the court must defer, and that those actions had an "effect on the judgment").

In fact, Texas has supplied some empirical evidence, but that evidence suggests that courts can manage a *Martinez* exception expanded to include claims of ineffective assistance of appellate counsel. Texas says that in the Ninth Circuit, which has applied *Martinez* to ineffective-assistance-of-appellate-counsel claims since late 2013, petitioners have used the expanded version of *Martinez* "in dozens" of federal habeas cases. Brief for Respondent 37. (Texas specifically refers to 10 cases, in only 1 of which the petitioner prevailed. *Ibid.*, n. 13.) During that period, state prisoners filed at least 7,500 federal habeas petitions in the Ninth Circuit. See Ninth Circuit Ann. Rep. 71 (2015) (2,468 cases referred to magistrate judges in 2014; 2,693 in 2015). Hence, Texas' estimate of added workload comes down to an increase of "dozens" of cases out of 7,500 cases in total. That figure represents an increase, but not an increase significant enough to warrant depriving a prisoner of any forum to adjudicate a substantial claim that he was deprived of his constitutional right to effective assistance of appellate counsel.

III

In my view, the Court's effort to distinguish *Martinez* comes down to the following points: (1) *Martinez* concerned only claims of ineffective trial counsel; (2) *Martinez* involved trial errors that, at least sometimes, would have escaped review, while here at least one court (the trial court) may have reviewed the underlying legal error; (3) *Martinez* involved cases in which the State itself prevented its appellate courts from reviewing the claim of trial counsel's ineffectiveness,

whereas here it is the nature of the ineffectiveness claim that prevents the appellate courts from reviewing it; and (4) extending *Martinez* could flood the federal system with normally meritless claims.

I have explained why I believe the last mentioned empirical prediction does not distinguish *Martinez* and why, in any event, it is unlikely to prove correct. See *supra*, at 544–545. And I have explained why the second and third points do not successfully distinguish *Martinez*. The second fails to focus on the relevant claim: ineffective assistance of counsel. See *supra*, at 543–544. And it fails to acknowledge that there may be cases in which the trial court will not have considered the legal error underlying the ineffective-assistance claim. *Ibid.* The third has little to do with the matter. It overlooks the fact that there is no "'relevant difference'" between cases in which the State requires that certain claims be brought only on collateral review and "'cases in which those claims *by their nature* can only be brought on collateral review,'" such as claims of ineffective assistance of appellate counsel. *Supra*, at 543 (quoting *Martinez*, 566 U. S., at 19–20, n. 1 (Scalia, J., dissenting)). In both cases, the State's scheme deprives a prisoner from having his substantial constitutional claim heard, through no fault of his own.

As to the first point, the Court is of course right. *Martinez* had to do only with the ineffectiveness of trial counsel. But our cases make clear that due process requires a criminal defendant to have effective assistance of appellate counsel as well. *Supra*, at 541–542. Indeed, effective trial counsel and appellate counsel are inextricably connected elements of a fair trial.

The basic legal principle that should determine the outcome of this case is the principle that requires courts to treat like cases alike. To put the matter more familiarly, what is sauce for the goose is sauce for the gander. The dissent in *Martinez* wrote that there "is not a dime's worth of difference in principle between [ineffective-assistance-of-trial-

counsel] cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised," including "claims asserting ineffective assistance of appellate counsel." 566 U. S., at 19 (opinion of Scalia, J.). I agree.

With respect, I dissent.

Syllabus

HERNANDEZ ET AL. *v.* MESA ET AL.

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

No. 15–118. Argued February 21, 2017—Decided June 26, 2017

Respondent Jesus Mesa, Jr., a United States Border Patrol agent, was standing on U. S. soil when he fatally shot Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, who was standing on Mexican soil. Petitioners, Hernández's parents, sued Mesa under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, alleging that Mesa violated Hernández's Fourth and Fifth Amendment rights. The en banc Court of Appeals held that petitioners failed to state a claim for a Fourth Amendment violation since Hernández, who was a Mexican citizen with no voluntary connection to the United States and was on Mexican soil when he was shot, was not entitled to Fourth Amendment protection under those circumstances. The court also held that regardless of whether Mesa's conduct violated the Fifth Amendment, Mesa was entitled to qualified immunity since it had not been clearly established at the time of the incident that his actions were unconstitutional. Because the court resolved petitioners' claims on these grounds, it did not consider whether petitioners could even bring suit under *Bivens*.

Held: The Court of Appeals' judgment is vacated, and the case is remanded for further proceedings. A *Bivens* remedy is unavailable where there are "'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Carlson* v. *Green*, 446 U. S. 14, 18. This Court recently clarified what constitutes a "special facto[r] counselling hesitation" in *Ziglar* v. *Abbasi*, 582 U. S. 120, 136, and the Court of Appeals here has not had the opportunity to consider how *Abbasi*'s reasoning and analysis may bear on this case. With respect to petitioners' Fourth Amendment claim, while disposing of a *Bivens* claim by resolving the constitutional question is appropriate in many cases, the Fourth Amendment question here is sensitive and may have far-reaching consequences, and it would be imprudent for this Court to resolve that issue when, in light of *Abassi*'s intervening guidance, doing so may be unnecessary to resolve this particular case. With respect to petitioners' Fifth Amendment claim, because Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting, the court below erred in granting qualified immunity based on those facts.

785 F. 3d 117, vacated and remanded.

Counsel

Robert C. Hilliard argued the cause for petitioners. With him on the briefs were *Deepak Gupta*, *Steve D. Shadowen*, *Cristobal M. Galindo*, *Stephen I. Vladeck*, *Jonathan E. Taylor*, *Rachel Bloomekatz*, *Matthew W. H. Wessler*, *Matthew Spurlock*, and *Leah M. Litman*.

Randolph J. Ortega argued the cause for respondent Mesa. With him on the brief were *Gabriel Perez*, *Felix Valenzuela*, and *Louis Elias Lopez, Jr.*

Deputy Solicitor General Kneedler argued the cause for the United States under this Court's Rule 12.6 urging affirmance. With him on the brief were *Acting Solicitor General Gershengorn*, *Irving L. Gornstein*, *Brian H. Fletcher*, *Benjamin C. Mizer*, *Mark B. Stern*, *Mary Hampton Mason*, and *Henry C. Whitaker*.*

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*Briefs of *amici curiae* urging reversal were filed for the Government of the United Mexican States by *Donald Francis Donovan* and *Carl J. Micarelli*; for the American Immigration Council et al. by *Matthew E. Price*, *Mary A. Kenney*, *Trina Realmuto*, *Matt Adams*, and *Eugene Iredale*; for Amnesty International USA et al. by *Hope Metcalf* and *Brent M. Rosenthal*; for Constitutional Law Scholars by *Jeffrey L. Bleich* and *Joseph D. Lee*; for the Constitutional Accountability Center by *Brianne J. Gorod*, *Elizabeth B. Wydra*, and *David H. Gans*; for Former Officials of U. S. Customs and Border Protection Agency by *Rachel Wainer Apter*, *Kelsi Brown Corkran*, and *Thomas M. Bondy*; for Former Police Chiefs by *Peter Karanjia*; for Ten Law Professors by *Louis K. Fisher*; for Mexican Jurists et al. by *Carmine D. Boccuzzi, Jr.*, and *Howard S. Zelbo*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; and for James E. Pfander et al. by *Sarah O'Rourke Schrup*, *Jeffrey T. Green*, and *Mr. Pfander, pro se.*

Briefs of *amici curiae* urging affirmance were filed for APA Watch by *Lawrence J. Jospeh*; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton.*

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Andre I. Segura*, *Lee Gelernt*, *Cecillia D. Wang*, *Kathleen E. Brody*, *Daniel J. Pochoda*, *Elisabeth V. Bechtold*, and *Maria M. Sanchez*; for the Border Action Network et al. by *Nancy Winkelman*; for Border Scholars by *Ethan D. Dettmer* and *Joshua S. Lipshutz*; for Legal Historians by *Richard L. Aynes*; and for Gregory C. Sisk by *David Sapir Lesser* and *Ari J. Savitzky.*

PER CURIAM.

This case involves a tragic cross-border incident in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil. The three questions presented concern whether the parents of the victim of that shooting may assert claims for damages against the agent under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971); whether the shooting violated the victim's Fourth Amendment rights; and whether the agent is entitled to qualified immunity on a claim that the shooting violated the victim's Fifth Amendment rights.

Because this case was resolved on a motion to dismiss, the Court accepts the allegations in the complaint as true for purposes of this opinion. See *Wood* v. *Moss*, 572 U. S. 744, 757–758 (2014). On June 7, 2010, Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, was with a group of friends in the concrete culvert that separates El Paso, Texas, from Ciudad Juarez, Mexico. Now all but dry, the culvert once contained the waters of the Rio Grande River. The international boundary runs down the middle of the culvert, and at the top of the embankment on the United States side is a fence. According to the complaint, Hernández and his friends were playing a game in which they ran up the embankment on the United States side, touched the fence, and then ran back down. At some point, Border Patrol Agent Jesus Mesa, Jr., arrived on the scene by bicycle and detained one of Hernández's friends in United States territory as the friend ran down the embankment. Hernández ran across the international boundary into Mexican territory and stood by a pillar that supports a railroad bridge spanning the culvert. While in United States territory, Mesa then fired at least two shots across the border at Hernández. One shot struck Hernández in the face and killed him. According to the complaint, Hernández was unarmed and unthreatening at the time.

The Department of Justice investigated the incident. The Department concluded that the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a [Customs and Border Patrol] agent who was attempting to detain a suspect." Dept. of Justice, Office of Public Affairs, Federal Officials Close Investigation Into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), online at http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca (as last visited June 23, 2017). "[O]n these particular facts," the Department determined, "the agent did not act inconsistently with [Customs and Border Patrol] policy or training regarding use of force." *Ibid.* The Department also declined to bring federal civil rights charges against Mesa. In the Department's view, there was insufficient evidence that Mesa "acted willfully and with the deliberate and specific intent to do something the law forbids," and, in any event, Hernández "was neither within the borders of the United States nor present on U. S. property, as required for jurisdiction to exist under the applicable federal civil rights statute." *Ibid.* The Department expressed regret for the loss of life in the incident and pledged "to work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *Ibid.*

Petitioners—Hernández's parents—brought suit. Among other claims, petitioners brought claims against Mesa for damages under *Bivens*, alleging that Mesa violated Hernández's rights under the Fourth and Fifth Amendments. The United States District Court for the Western District of Texas granted Mesa's motion to dismiss. A panel of the Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. The panel held that Hernández lacked any Fourth Amendment rights under the circumstances, but that the shooting violated his Fifth Amendment rights. *Hernandez* v. *United States*, 757 F. 3d 249, 267, 272 (2014); *id.*, at 280–281 (Dennis, J., concurring in part and concurring in

judgment); *id.*, at 281 (DeMoss, J., concurring in part and dissenting in part). The panel also found "no reason to hesitate in extending *Bivens* to this new context." *Id.*, at 275. And the panel held that Mesa was not entitled to qualified immunity, concluding that "[n]o reasonable officer would have understood Agent Mesa's alleged conduct to be lawful." *Id.*, at 279. Judge DeMoss dissented in part, arguing that Hernández lacked any Fifth Amendment rights under the circumstances. *Id.*, at 281–282.

On rehearing en banc, the Court of Appeals unanimously affirmed the District Court's dismissal of petitioners' claims against Mesa. The en banc Court of Appeals first held that petitioners had failed to state a claim for a violation of the Fourth Amendment because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." *Hernandez* v. *United States*, 785 F. 3d 117, 119 (CA5 2015) (*per curiam*) (quoting *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990)). As to petitioners' claim under the Fifth Amendment, the en banc Court of Appeals was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," but was "unanimous" in concluding that Mesa was entitled to qualified immunity. 785 F. 3d, at 120. The en banc Court of Appeals explained that "[n]o case law in 2010, when this episode occurred, reasonably warned Agent Mesa" that "the general prohibition of excessive force applies where the person injured by a U. S. official standing on U. S. soil is an alien who had no significant voluntary connection to, and was not in, the United States when the incident occurred." *Ibid.* Because the en banc Court of Appeals resolved petitioners' claims on other grounds, it "did not consider whether, even if a constitutional claim had been stated, a tort remedy should be crafted under *Bivens*." *Id.*, at 121, n. 1 (Jones, J., concurring). Ten judges filed or joined five separate concurring opinions. *Id.*, at 121–143.

This Court granted certiorari. 580 U. S. 915 (2016). The Court now vacates the judgment of the Court of Appeals and remands for further proceedings.

The Court turns first to the *Bivens* question, which is "antecedent" to the other questions presented. *Wood*, 572 U. S., at 757. In *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 66 (2001). A *Bivens* remedy is not available, however, where there are "'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Carlson* v. *Green*, 446 U. S. 14, 18 (1980) (quoting *Bivens*, 403 U. S., at 396). In the decision recently announced in *Ziglar* v. *Abbasi*, 582 U. S. 120 (2017), this Court has clarified what constitutes a "special facto[r] counselling hesitation." See *id.*, at 136, 140–146. "[T]he inquiry," the Court explains, "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.*, at 136.

The Court of Appeals here, of course, has not had the opportunity to consider how the reasoning and analysis in *Abbasi* may bear on this case. And the parties have not had the opportunity to brief and argue its significance. In these circumstances, it is appropriate for the Court of Appeals, rather than this Court, to address the *Bivens* question in the first instance. This Court, after all, is one "'of review, not of first view.'" *Expressions Hair Design* v. *Schneiderman*, 581 U. S. 37, 48 (2017) (quoting *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U. S. 898, 913 (2014).

With respect to petitioners' Fourth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it concluded that Hernández lacked any Fourth Amendment rights under the circumstances. This approach—disposing of a *Bivens* claim by re-

solving the constitutional question, while assuming the existence of a *Bivens* remedy—is appropriate in many cases. This Court has taken that approach on occasion. See, *e. g.*, *Wood*, 572 U. S., at 757. The Fourth Amendment question in this case, however, is sensitive and may have consequences that are far reaching. It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case.

With respect to petitioners' Fifth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was "an alien who had no significant voluntary connection to . . . the United States." 785 F. 3d, at 120. It is undisputed, however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established . . . constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 577 U. S. 7, 11 (2015) (*per curiam*) (quoting *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009)). The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001). The qualified immunity analysis thus is limited to "the facts that were knowable to the defendant officers" at the time they engaged in the conduct in question. *White* v. *Pauly*, 580 U. S. 73, 77 (2017) (*per curiam*). Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.

Mesa and the Government contend that Mesa is entitled to qualified immunity even if Mesa was uncertain about Hernández's nationality and his ties to the United States at the time of the shooting. The Government also argues that, in any event, petitioners' claim is cognizable only under the Fourth Amendment, and not under the Fifth Amendment. This Court declines to address these arguments in the first instance. The Court of Appeals may address them, if necessary, on remand.

The facts alleged in the complaint depict a disturbing incident resulting in a heartbreaking loss of life. Whether petitioners may recover damages for that loss in this suit depends on questions that are best answered by the Court of Appeals in the first instance.

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

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE THOMAS, dissenting.

When we granted certiorari in this case, we directed the parties to address, in addition to the questions presented by petitioners, "[w]hether the claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)." 580 U. S. 915 (2016). I would answer that question, rather than remand for the Court of Appeals to do so. I continue to adhere to the view that "*Bivens* and its progeny" should be limited "to the precise circumstances that they involved." *Ziglar* v. *Abbasi*, 582 U. S. 120, 157 (2017) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted). This case arises in circumstances that are meaningfully different from those at issue in *Bivens* and its progeny. Most notably, this

case involves cross-border conduct, and those cases did not. I would decline to extend *Bivens* and would affirm the judgment of the Court of Appeals on that basis.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The parents of Sergio Adrián Hernández Güereca brought this constitutional tort action against a United States Border Patrol agent, Jesus Mesa, Jr. They claim that Mesa violated their son's constitutional rights when Mesa shot and killed him on June 7, 2010. Hernández and some of his friends had been running back and forth across a Rio Grande River culvert that straddles the border between the United States and Mexico. When Mesa shot him, Hernández had returned to, and was on, the Mexican side of the culvert.

The Court of Appeals, affirming the District Court, held (among other things) that Hernández had no Fourth Amendment rights because he was not a citizen of the United States, he was "on Mexican soil at the time he was shot," and he "had no 'significant voluntary connection' to the United States." *Hernandez* v. *United States*, 785 F. 3d 117, 119 (2015) (*per curiam*) (quoting *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990)). I would reverse the Court of Appeals' Fourth Amendment holding. And, in my view, that reversal would ordinarily bring with it the right to bring an action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). See *Wood* v. *Moss*, 572 U. S. 744, 754 (2014) (*Bivens* actions lie for Fourth Amendment violations); *Tennessee* v. *Garner*, 471 U. S. 1, 11 (1985) (officer's application of lethal force when there is no immediate threat to self or others violates the Fourth Amendment). See also *Ziglar* v. *Abbasi*, 582 U. S. 120, 160 (2017) (BREYER, J., dissenting).

I recognize that Hernández was on the Mexican side of the culvert when he was shot. But we have written in a case involving the suspension of habeas corpus that "*de jure* sov-

ereignty" is not and never has been "the only relevant consideration in determining the geographic reach of the Constitution." *Boumediene* v. *Bush*, 553 U. S. 723, 764 (2008). We have added that our precedents make clear that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Ibid.*; see also *id.*, at 759–762. Those factors and concerns here convince me that Hernández was protected by the Fourth Amendment.

First, the defendant is a federal officer. He knowingly shot from United States territory into the culvert. He did not know at the time whether he was shooting at a citizen of the United States or Mexico, nor has he asserted that he knew on which side of the boundary line the bullet would land.

Second, the culvert itself has special border-related physical features. It does not itself contain any physical features of a border. Rather, fences and border crossing posts are not in the culvert itself but lie on either side. Those of Mexico are on the southern side of the culvert; those of the United States are on the northern side. The culvert (where the shooting took place) lies between the two fences, and consists of a concrete-lined empty space that is typically 270 feet wide.

Third, history makes clear that nontechnically speaking, the culvert is the border; and more technically speaking, it is at the least a special border-related area (sometimes known as a "limitrophe" area, see *infra*, at 559). Originally, the 1848 Treaty of Guadalupe Hidalgo provided that the boundary should run "up the middle" of the Rio Grande River "following the deepest channel." See Art. V, July 4, 1848, 9 Stat. 926. It also provided that "navigation . . . shall be free . . . to the vessels and citizens of both countries." Art. VII, *id.*, at 928. Subsequently the river jumped its banks, setting a new course, and provoking serious disputes about the border's location. See S. Liss, A Century of Disagreement: The Chamizal Conflict 1864–1964, p. 15 (1965)

(the river's "ravages . . . irreparably destroyed any semblance of a discernable United States boundary line in the Ciudad Juarez-El Paso area"). In the 1960's, however, the United States and Mexico negotiated a new boundary. The two nations working together would "relocat[e]" the river channel. Convention for the Solution of the Problem of the Chamizal, Art. 2, Aug. 29, 1963, 15 U. S. T. 23, T. I. A. S. No. 5515 (Chamizal Convention). They would jointly bear the costs of doing so; and they would charge a bilateral commission with "relocation of the river channel . . . and the maintenance, preservation and improvement of the new channel." Art. 9, *id.*, at 26. When final construction of the new channel concluded, President Johnson visited the site to celebrate the "'channels between men, bridges between cultures'" created by the countries' joint effort. Kramer, A Border Crosses, The New Yorker, Sept. 20, 2014, online at http://www.newyorker.com/news/news-desk/moving-mexican-border (all Internet materials as last visited June 23, 2017); see also Appendix, fig. 2, *infra* (photograph of President and Mrs. Johnson touring the culvert). That "channel" is the culvert now before us.

Fourth, a jointly organized international boundary commission built, and now administers, the culvert. Once created, the Commission arranged for surveys, acquired rights of way, and built and paved the massive culvert structure. See Appendix, fig. 1, *infra* (typical cross-section of the proposed concrete "culvert"); see also International Boundary and Water Commission, United States and Mexico, Preliminary Plan (July 25, 1963), Annex to Chamizal Convention, 15 U. S. T., following p. 36. The United States contributed approximately $45 million of the total cost. See Compliance With Convention on the Chamizal, S. Rep. No. 868, 88th Cong., 2d Sess., 2 (1963); Act To Facilitate Compliance With the Convention Between United States and United Mexican States, § 8, 78 Stat. 186. The United States and Mexico have jointly agreed to maintain the Rio Grande and jointly to

maintain the "limitrophe" areas. Treaty To Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Art. IV, Nov. 23, 1970, 23 U. S. T. 390, T. I. A. S. No. 7313 (Rio Grande and Colorado River Treaty). Today an International Boundary and Water Commission, with representatives of both nations, exercises its "jurisdiction" over "limitrophe parts of the Rio Grande." Treaty of Feb. 3, 1944, Art. 2, 59 Stat. 1224.

Fifth, international law recognizes special duties and obligations that nations may have in respect to "limitrophe" areas. Traditionally, boundaries consisted of rivers, mountain ranges, and other areas that themselves had depth as well as length. Lord Curzon of Kedleston, Frontiers 12–13 (2d ed. 1908). It was not until the late 19th century that effective national boundaries came to consist of an engineer's "imaginary line," perhaps thousands of miles long, but having "no width." Reeves, International Boundaries, 38 Am. J. Int'l L. 533, 544 (1944); see also 1 Oppenheim's International Law 661, n. 1 (R. Jennings & A. Watts eds., 9th ed. 1992). Modern precision may help avoid conflicts among nations, see, *e. g.*, Rio Grande and Colorado River Treaty, preamble, 23 U. S. T., at 373, but it has also produced boundary areas—of the sort we have described—which are "'subject to a special legal, political and economic regime of internal and international law,'" Andrassy, Les Relations Internationales de Voisinage, in The Hague Academy of Int'l Law, 1951 Recuiel des Cours 131 (quoting P. de Lapradelle, La Frontiere 14 (1928)). Those areas are subject to a special obligation of cooperation and good neighborliness, V. Lowe, International Law 151 (2007) (describing the "regime of *voisinage*," which includes "jointly administered infrastructure facilities, . . . co-operation between neighboring police forces, . . . bilingual road signs, . . . shared access to common resources," and the like); cf. United Nations Convention on the Law of the Sea, Art. 111(8), Dec. 10, 1982, 1833 U. N. T. S. 396 (requiring compensation for loss arising from the erroneous

exercise of a sovereign's right of hot pursuit), as well as express duties of joint administration that adjoining states undertake by treaty.

Sixth, *not* to apply the Fourth Amendment to the culvert would produce serious anomalies. Cf. *Verdugo-Urquidez*, 494 U. S., at 278 (KENNEDY, J., concurring). The Court of Appeals' approach creates a protective difference depending upon whether Hernández had been hit just before or just after he crossed an imaginary mathematical borderline running through the culvert's middle. But nothing else would have changed. The behavior of the United States Border Patrol agent, along with every other relevant feature of this case, would have remained the same. Given the near irrelevance of that midculvert line (as compared with the rest of the culvert) for most border-related purposes, as well as almost any other purpose, that result would seem anomalous.

Moreover, the anomalies would multiply. Numerous bridges span the culvert, linking El Paso and Ciudad Juarez. See Chamizal Convention, Arts. 8–10, 15 U. S. T., at 25–26. "Across this boundary thousands of Americans and Mexicans pass daily, as casually as one living inland crosses a county line." Liss, *supra*, at 4; Semuels, Crossing the Mexican-American Border, Every Day, The Atlantic, Jan. 25, 2016, online at https://www.theatlantic.com/business/archive/2016/01/crossing-the-mexican-american-border-every-day/426678/; Brief for Border Scholars as *Amici Curiae* 21–22 (Fifty-five percent of households in the sister cities cross the border to comparison shop for everyday goods and Mexican shoppers spend $445 million each year in El Paso businesses). It does not make much sense to distinguish for Fourth Amendment purposes among these many thousands of individuals on the basis of an invisible line of which none of them is aware.

These six sets of considerations taken together provide more than enough reason for treating the entire culvert as having sufficient involvement with, and connection to, the United States to subject the culvert to Fourth Amendment

protections. I would consequently conclude that the Fourth Amendment applies.

Finally, I note that neither court below reached the question whether *Bivens* applies to this case, likely because Mesa did not move to dismiss on that basis. I would decide the Fourth Amendment question before us and remand the case for consideration of the *Bivens* and qualified immunity questions. See *Ziglar* v. *Abbasi*, 582 U. S. 120; but see *id.*, at 160 (BREYER, J., dissenting).

For these reasons, with respect, I dissent.

Appendix to opinion of BREYER, J.

APPENDIX

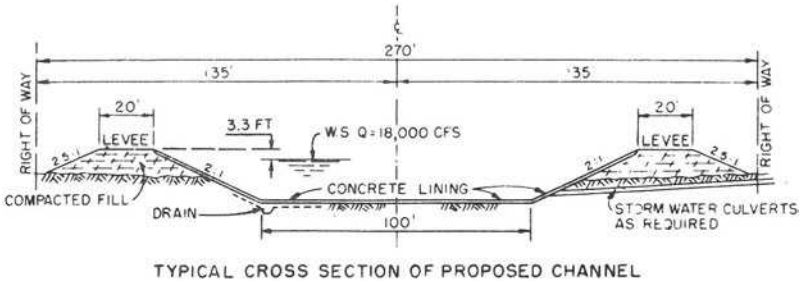

Figure 1. International Boundary and Water Commission, United States and Mexico, Relocation of Rio Grande, El Paso, Texas–Ciudad Juarez, Chihuahua, Preliminary Plan (July 25, 1963), Annex to Chamizal Convention, 15 U. S. T., following p. 36, T. I. A. S. No. 5515.

Figure 2. President Lyndon Johnson and Mrs. Lady Bird Johnson view the new channel. Associated Press, Dec. 13, 1968.

Syllabus

PAVAN ET AL. *v.* SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 16–992. Decided June 26, 2017

When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse, if she has one, to appear on the child's birth certificate regardless of the spouse's biological relationship to the child. See Ark. Code § 20–18–401. Petitioners are two married same-sex couples who conceived children through anonymous sperm donation. After their children were born, they sought birth certificates listing both spouses as parents. The Arkansas Department of Health issued birth certificates bearing only the birth mother's name. Petitioners sued seeking, among other things, a declaration that the State's birth-certificate law violates the Constitution. The trial court agreed, but the Arkansas Supreme Court reversed, holding that the Constitution did not require extending the law for listing the male spouses of women who give birth in the State to similarly situated female spouses.

Held: The Arkansas Supreme Court's decision denies married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage." *Obergefell* v. *Hodges*, 576 U. S. 644, 670. When a married woman in Arkansas conceives a child by means of artificial insemination, the State *must* list the name of the male spouse on the child's birth certificate. § 20–18–401(f)(1). Yet the same law, as interpreted by the court below, allows Arkansas officials to omit a married woman's female spouse from her child's birth certificate under the same circumstances. *Obergefell* proscribes such disparate treatment. The State contends that being named on a child's birth certificate is not a benefit that attends marriage but rather a device for recording biological parentage. That ignores that an Arkansas birth certificate must list a male spouse even when the use of artificial insemination means the male spouse is definitely not the biological father. The State's birth certificates are thus more than a mere marker of biological relationships: The State uses them to give married parents a form of legal recognition that is not available to unmarried parents. It cannot deny same-sex couples that recognition.

Certiorari granted; 2016 Ark. 437, 505 S. W. 3d 169, reversed and remanded.

PER CURIAM.

As this Court explained in *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), the Constitution entitles same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples." *Id.*, at 676. In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State's rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage," *id.*, at 670, we reverse the state court's judgment.

The petitioners here are two married same-sex couples who conceived children through anonymous sperm donation. Leigh and Jana Jacobs were married in Iowa in 2010, and Terrah and Marisa Pavan were married in New Hampshire in 2011. Leigh and Terrah each gave birth to a child in Arkansas in 2015. When it came time to secure birth certificates for the newborns, each couple filled out paperwork listing both spouses as parents—Leigh and Jana in one case, Terrah and Marisa in the other. Both times, however, the Arkansas Department of Health issued certificates bearing only the birth mother's name.

The department's decision rested on a provision of Arkansas law, Ark. Code §20–18–401 (2014), that specifies which individuals will appear as parents on a child's state-issued birth certificate. "For the purposes of birth registration," that statute says, "the mother is deemed to be the woman who gives birth to the child." §20–18–401(e). And "[i]f the mother was married at the time of either conception or

birth," the statute instructs that "the name of [her] husband shall be entered on the certificate as the father of the child." § 20–18–401(f)(1). There are some limited exceptions to the latter rule—for example, another man may appear on the birth certificate if the "mother" and "husband" and "putative father" all file affidavits vouching for the putative father's paternity. *Ibid.* But as all parties agree, the requirement that a married woman's husband appear on her child's birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor. See Pet. for Cert. 4; Brief in Opposition 3–4; see also Ark. Code § 9–10–201(a) (2015) ("Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination").

The Jacobses and Pavans brought this suit in Arkansas state court against the director of the Arkansas Department of Health—seeking, among other things, a declaration that the State's birth-certificate law violates the Constitution. The trial court agreed, holding that the relevant portions of § 20–18–401 are inconsistent with *Obergefell* because they "categorically prohibi[t] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple." App. to Pet. for Cert. 59a. But a divided Arkansas Supreme Court reversed that judgment, concluding that the statute "pass[es] constitutional muster." 2016 Ark. 437, 505 S. W. 3d 169, 177. In that court's view, "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and so it "does not run afoul of *Obergefell*." *Id.*, at 178. Two justices dissented from that view, maintaining that under *Obergefell* "a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple." 505 S. W. 3d, at 184 (Brill, C. J., concurring in part and dissenting in part); accord, *id.*, at 190 (Danielson, J., dissenting).

The Arkansas Supreme Court's decision, we conclude, denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage." *Obergefell*, 576 U. S., at 670. As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate. See § 20–18–401(f)(1); see also § 9–10–201; *supra*, at 565. And yet state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman's female spouse from her child's birth certificate. See 505 S. W. 3d, at 177–178. As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school. See Pet. for Cert. 5–7 (listing situations in which a parent might be required to present a child's birth certificate).

Obergefell proscribes such disparate treatment. As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 576 U. S., at 675–676. Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates." *Id.*, at 670. That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 398–399 (CA6 2014). In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. See 576 U. S., at 675–676. That holding applies with equal force to § 20–18–401.

Echoing the court below, the State defends its birth-certificate law on the ground that being named on a child's

birth certificate is not a benefit that attends marriage. Instead, the State insists, a birth certificate is simply a device for recording biological parentage—regardless of whether the child's parents are married. But Arkansas law makes birth certificates about more than just genetics. As already discussed, when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother's husband on the child's birth certificate. See *supra*, at 565. And that is so even though (as the State concedes) the husband "is definitively not the biological father" in those circumstances. Brief in Opposition 4.* Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.

The petition for a writ of certiorari and the pending motions for leave to file briefs as *amici curiae* are granted. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the

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*As the petitioners point out, other factual scenarios (beyond those present in this case) similarly show that the State's birth certificates are about more than genetic parentage. For example, when an Arkansas child is adopted, the State places the child's original birth certificate under seal and issues a new birth certificate—unidentifiable as an amended version—listing the child's (nonbiological) adoptive parents. See Ark. Code §§ 20–18–406(a)(1), (b) (2014); Ark. Admin. Code 007.12.1–5.5(a) (Apr. 2016).

decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting). Respectfully, I don't believe this case meets that standard.

To be sure, *Obergefell* v. *Hodges*, 576 U. S. 644 (2015), addressed the question whether a State must recognize same-sex marriages. But nothing in *Obergefell* spoke (let alone clearly) to the question whether § 20–18–401 of the Arkansas Code, or a state supreme court decision upholding it, must go. The statute in question establishes a set of rules designed to ensure that the biological parents of a child are listed on the child's birth certificate. Before the state supreme court, the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders. In an opinion that did not in any way seek to defy but rather earnestly engage *Obergefell*, the state supreme court agreed. And it is very hard to see what is wrong with this conclusion for, just as the state court recognized, nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution. To the contrary, to the extent they speak to the question at all, this Court's precedents suggest just the opposite conclusion. See, *e. g.*, *Michael H.* v. *Gerald D.*, 491 U. S. 110, 124–125 (1989); *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, 73 (2001). Neither does anything in today's opinion purport to identify any constitutional problem with a biology based birth registration regime. So whatever else we might do with this case, summary reversal would not exactly seem the obvious course.

What, then, is at work here? If there isn't a problem with a biology based birth registration regime, perhaps the concern lies in this particular regime's exceptions. For it turns out that Arkansas's general rule of registration based on bi-

ology does admit of certain more specific exceptions. Most importantly for our purposes, the State acknowledges that § 9–10–201 of the Arkansas Code controls how birth certificates are completed in cases of artificial insemination like the one before us. The State acknowledges, too, that this provision, written some time ago, indicates that the mother's husband generally shall be treated as the father—and in this way seemingly anticipates only opposite-sex marital unions.

But if the artificial insemination statute is the concern, it's still hard to see how summary reversal should follow for at least a few reasons. First, petitioners didn't actually challenge § 9–10–201 in their lawsuit. Instead, petitioners sought and the trial court granted relief eliminating the State's authority under § 20–18–401 to enforce a birth registration regime generally based on biology. On appeal, the state supreme court simply held that this overbroad remedy wasn't commanded by *Obergefell* or the Constitution. And, again, nothing in today's opinion for the Court identifies anything wrong, let alone clearly wrong, in that conclusion. Second, though petitioners' lawsuit didn't challenge § 9–10–201, the State has repeatedly conceded that the benefits afforded nonbiological parents under § 9–10–201 must be afforded equally to both same-sex and opposite-sex couples. So that in this particular case and all others of its kind, the State agrees, the female spouse of the birth mother must be listed on birth certificates too. Third, further proof still of the state of the law in Arkansas today is the fact that, when it comes to adoption (a situation not present in this case but another one in which Arkansas departs from biology based registration), the State tells us that adopting parents are eligible for placement on birth certificates without respect to sexual orientation.

Given all this, it seems far from clear what here warrants the strong medicine of summary reversal. Indeed, it is not even clear what the Court expects to happen on remand that hasn't happened already. The Court does not offer any re-

medial suggestion, and none leaps to mind. Perhaps the state supreme court could memorialize the State's concession on § 9–10–201, even though that law wasn't fairly challenged and such a chore is hardly the usual reward for seeking faithfully to apply, not evade, this Court's mandates.

I respectfully dissent.

Syllabus

TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL.

ON PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16–1436 (16A1190). Decided June 26, 2017*

Executive Order No. 13780 sets out a series of directives relating to the entry of foreign nationals into the United States. As relevant, the Order suspends the entry of nationals from six countries for 90 days, § 2(c); suspends "decisions on applications for refugee status" and "travel of refugees into the United States" under the United States Refugee Admissions Program for 120 days, § 6(a); and caps the entry of refugees into the United States in fiscal year 2017 at 50,000, § 6(b). Respondents claim that the Order both violates the First Amendment's Establishment Clause because it was motivated by animus toward Islam and fails to comply with certain Immigration and Nationality Act (INA) provisions.

In No. 16–1436, a District Court entered a nationwide preliminary injunction barring enforcement of § 2(c) against any foreign national seeking entry to the United States. The Fourth Circuit upheld the injunction, concluding that § 2(c)'s primary purpose was religious. In No. 16–1540, a District Court enjoined nationwide enforcement of all of §§ 2 and 6. The Ninth Circuit affirmed the injunction in part, concluding that portions of the Order likely exceeded the President's authority under the INA. The Government seeks certiorari and asks the Court to stay the injunctions entered below.

Held: The Government's petitions for certiorari are granted and its stay applications are granted in part. With respect to the preliminary injunctions barring enforcement of the § 2(c) entry suspension, the courts below took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens that would fall on respondents and similarly situated parties if § 2(c) were enforced. But those injunctions also bar enforcement of § 2(c) against foreign nationals abroad who have

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*Together with No. 16–1540 (16A1191), *Trump, President of the United States, et al.* v. *Hawaii et al.*, on Petition for Writ of Certiorari and Application for Stay to the United States Court of Appeals for the Ninth Circuit.

no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Accordingly, the § 2(c) injunctions are narrowed and remain in place only with respect to parties who have a credible claim of a bona fide relationship with a person or entity in the United States. The same equitable balance applies in the context of the injunction barring enforcement of § 6. Thus, § 6 may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States.

Certiorari granted; applications granted in part.

PER CURIAM.

These cases involve challenges to Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. The order alters practices concerning the entry of foreign nationals into the United States by, among other things, suspending entry of nationals from six designated countries for 90 days. Respondents challenged the order in two separate lawsuits. They obtained preliminary injunctions barring enforcement of several of its provisions, including the 90-day suspension of entry. The injunctions were upheld in large measure by the Courts of Appeals.

The Government filed separate petitions for certiorari, as well as applications to stay the preliminary injunctions entered by the lower courts. We grant the petitions for certiorari and grant the stay applications in part.

I

A

On January 27, 2017, President Donald J. Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (EO–1). EO–1 addressed policies and procedures relating to the entry of foreign nationals into this country. Among other directives, the order suspended entry of foreign nationals from seven countries identified as presenting

heightened terrorism risks—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days. § 3(c). Executive officials were instructed to review the adequacy of current practices relating to visa adjudications during this 90-day period. § 3(a). EO–1 also modified refugee policy, suspending the United States Refugee Admissions Program (USRAP) for 120 days and reducing the number of refugees eligible to be admitted to the United States during fiscal year 2017. §§ 5(a), (d).

EO–1 was immediately challenged in court. Just a week after the order was issued, a Federal District Court entered a nationwide temporary restraining order enjoining enforcement of several of its key provisions. *Washington* v. *Trump*, 2017 WL 462040 (WD Wash., Feb. 3, 2017). Six days later, the Court of Appeals for the Ninth Circuit denied the Government's emergency motion to stay the order pending appeal. *Washington* v. *Trump*, 847 F. 3d 1151 (2017). Rather than continue to litigate EO–1, the Government announced that it would revoke the order and issue a new one.

A second order followed on March 6, 2017. See Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO–2). EO–2 describes "conditions in six of the . . . countries" as to which EO–1 had suspended entry, stating that these conditions "demonstrate [that] nationals [of those countries] continue to present heightened risks to the security of the United States," § 1(e), and that "some of those who have entered the United States through our immigration system have proved to be threats to our national security," § 1(h).

Having identified these concerns, EO–2 sets out a series of directives patterned on those found in EO–1. Several are relevant here. First, EO–2 directs the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about nationals applying for United States visas. § 2(a). EO–2 directs the Secretary to report his findings to the

President within 20 days of the order's "effective date," after which time those nations identified as deficient will be given 50 days to alter their practices. §§ 2(b), (d)–(e).

Second, EO–2 directs that entry of nationals from six of the seven countries designated in EO–1—Iran, Libya, Somalia, Sudan, Syria, and Yemen—be "suspended for 90 days from the effective date" of the order. § 2(c). EO–2 explains that this pause is necessary to ensure that dangerous individuals do not enter the United States while the Executive is working to establish "adequate standards . . . to prevent infiltration by foreign terrorists"; in addition, suspending entry will "temporarily reduce investigative burdens on relevant agencies" during the Secretary's 20-day review. *Ibid.* A separate section provides for case-by-case waivers of the entry bar. § 3(c).

Third, EO–2 suspends "decisions on applications for refugee status" and "travel of refugees into the United States under the USRAP" for 120 days following its effective date. § 6(a). During that period, the Secretary of State is instructed to review the adequacy of USRAP application and adjudication procedures and implement whatever additional procedures are necessary "to ensure that individuals seeking admission as refugees do not pose a threat" to national security. *Ibid.*

Fourth, citing the President's determination that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States," EO–2 "suspend[s] any entries in excess of that number" for this fiscal year. § 6(b).

Finally, § 14 of EO–2 establishes the order's effective date: March 16, 2017.

B

Respondents in these cases filed separate lawsuits challenging EO–2. As relevant, they argued that the order violates the Establishment Clause of the First Amendment because it was motivated not by concerns pertaining to na-

tional security, but by animus toward Islam. They further argued that EO–2 does not comply with certain provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended.

In No. 16–1436, a Federal District Court concluded that respondents were likely to succeed on their Establishment Clause claim with respect to § 2(c) of EO–2—the provision temporarily suspending entry from six countries—and entered a nationwide preliminary injunction barring the Government from enforcing § 2(c) against any foreign national seeking entry to the United States. *International Refugee Assistance Project* v. *Trump*, 241 F. Supp. 3d 539 (Md. 2017) (*IRAP*). The District Court in No. 16–1540—likewise relying on the Establishment Clause—entered a broader preliminary injunction: The court enjoined nationwide enforcement of all of §§ 2 and 6. *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (Haw. 2017) (entering preliminary injunction); 241 F. Supp. 3d 1119 (Haw. 2017) (entering temporary restraining order). In addition to the § 2(c) suspension of entry, this injunction covered the § 6(a) suspension of refugee admissions, the § 6(b) reduction in the refugee cap, and the provisions in §§ 2 and 6 pertaining only to internal executive review.

These orders, entered before EO–2 went into effect, prevented the Government from initiating enforcement of the challenged provisions. The Government filed appeals in both cases.

The Court of Appeals for the Fourth Circuit ruled first. On May 25, over three dissenting votes, the en banc court issued a decision in *IRAP* that largely upheld the order enjoining enforcement of § 2(c). 857 F. 3d 554. The majority determined that respondent John Doe #1, a lawful permanent resident whose Iranian wife is seeking entry to the United States, was likely to succeed on the merits of his Establishment Clause claim. The majority concluded that the primary purpose of § 2(c) was religious, in violation of the First Amendment: A reasonable observer familiar with all the cir-

cumstances—including the predominantly Muslim character of the designated countries and statements made by President Trump during his Presidential campaign—would conclude that § 2(c) was motivated principally by a desire to exclude Muslims from the United States, not by considerations relating to national security. Having reached this conclusion, the court upheld the preliminary injunction prohibiting enforcement of § 2(c) against any foreign national seeking to enter this country.

On June 1, the Government filed a petition for certiorari seeking review of the Fourth Circuit's decision. It also filed applications seeking stays of both injunctions, including the *Hawaii* injunction still pending before the Ninth Circuit. In addition, the Government requested that this Court expedite the certiorari stage briefing. We accordingly directed respondents to file responses to the stay applications by June 12 and respondents in *IRAP* to file a brief in opposition to the Government's petition for certiorari by the same day.

Respondents' June 12 filings injected a new issue into the cases. In *IRAP*, respondents argued that the suspension of entry in § 2(c) would expire on June 14. Section 2(c), they reasoned, directs that entry "be suspended for 90 days from the effective date of" EO–2. The "effective date" of EO–2 was March 16. § 14. Although courts had enjoined portions of EO–2, they had not altered its effective date, nor so much as mentioned § 14. Thus, even though it had never been enforced, the entry suspension would expire 90 days from March 16: June 14. At that time, the dispute over § 2(c) would become moot. Brief in Opposition 13–14.

On the same day respondents filed, the Ninth Circuit ruled in *Hawaii*. 859 F. 3d 741 (2017) (*per curiam*). A unanimous panel held in favor of respondents the State of Hawaii and Dr. Ismail Elshikh, an American citizen and imam whose Syrian mother-in-law is seeking entry to this country. Rather than rely on the constitutional grounds supporting

the District Court's decision, the court held that portions of EO–2 likely exceeded the President's authority under the INA. On that basis it upheld the injunction as to the § 2(c) entry suspension, the § 6(a) suspension of refugee admissions, and the § 6(b) refugee cap. The Ninth Circuit, like the Fourth Circuit, concluded that the injunction should bar enforcement of these provisions across the board, because they would violate the INA "in all applications." *Id.*, at 788. The court did, however, narrow the injunction so that it would not bar the Government from undertaking the internal executive reviews directed by EO–2.

We granted the parties' requests for supplemental briefing addressed to the decision of the Ninth Circuit. Before those briefs were filed, however, the ground shifted again. On June 14, evidently in response to the argument that § 2(c) was about to expire, President Trump issued a memorandum to Executive Branch officials. The memorandum declared the effective date of each enjoined provision of EO–2 to be the date on which the injunctions in these cases "are lifted or stayed with respect to that provision." Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence (June 14, 2017). The memorandum further provided that, to the extent necessary, it "should be construed to amend the Executive Order." *Ibid.* The Government takes the view that, if any mootness problem existed previously, the President's memorandum has cured it.

The parties have since completed briefing, with the Government requesting that we construe its supplemental brief in *Hawaii* as a petition for certiorari. There is no objection from respondents, and we do so. Both petitions for certiorari and both stay applications are accordingly ripe for consideration.

II

The Government seeks review on several issues. In *IRAP*, the Government argues that respondent Doe lacks

standing to challenge § 2(c).* The Government also contends that Doe's Establishment Clause claim fails on the merits. In its view, the Fourth Circuit should not have asked whether § 2(c) has a primarily religious purpose. The court instead should have upheld EO–2 because it rests on the "facially legitimate and bona fide" justification of protecting national security. *Kleindienst* v. *Mandel*, 408 U. S. 753, 770 (1972). In addition, the Fourth Circuit erred by focusing on the President's campaign-trail comments to conclude that § 2(c)—religiously neutral on its face—nonetheless has a principally religious purpose. At the very least, the Government argues, the injunction is too broad.

In *Hawaii*, the Government likewise argues that respondents Hawaii and Dr. Elshikh lack standing and that (at a minimum) the injunction should be narrowed. The Government's principal merits contention pertains to a statutory provision authorizing the President to "suspend the entry of all aliens or any class of aliens" to this country "[w]henever [he] finds that the entry of any aliens or of any class of aliens . . . would be detrimental to the interests of the United States." 8 U. S. C. § 1182(f). The Ninth Circuit held that "[t]here is no sufficient finding in [EO–2] that the entry of the excluded classes would be detrimental to the interests of the United States." *Hawaii*, 859 F. 3d, at 770. This, the Government argues, constitutes impermissible judicial second-guessing of the President's judgment on a matter of national security.

In addition to seeking certiorari, the Government asks the Court to stay the injunctions entered below, thereby permitting the enjoined provisions to take effect. According to the Government, it is likely to suffer irreparable harm unless a

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*On June 24, 2017, this Court received a letter from counsel for Doe advising that Doe's wife received an immigrant visa on or about June 22, 2017. The parties may address the significance of that development at the merits stage. It does not affect our analysis of the stay issues in these cases.

stay issues. Focusing mostly on § 2(c), and pointing to the descriptions of conditions in the six designated nations, the Government argues that a 90-day pause on entry is necessary to prevent potentially dangerous individuals from entering the United States while the Executive reviews the adequacy of information provided by foreign governments in connection with visa adjudications. Additionally, the Government asserts, the temporary bar is needed to reduce the Executive's investigative burdens while this review proceeds.

A

To begin, we grant both of the Government's petitions for certiorari and consolidate the cases for argument. The Clerk is directed to set a briefing schedule that will permit the cases to be heard during the first session of October Term 2017. (The Government has not requested that we expedite consideration of the merits to a greater extent.) In addition to the issues identified in the petitions, the parties are directed to address the following question: "Whether the challenges to § 2(c) became moot on June 14, 2017."

B

We now turn to the preliminary injunctions barring enforcement of the § 2(c) entry suspension. We grant the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of § 2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. We leave the injunctions entered by the lower courts in place with respect to respondents and those similarly situated, as specified in this opinion. See *infra*, at 582.

Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20, 24 (2008); 11A C. Wright, A. Miller, &

M. Kane, Federal Practice and Procedure § 2948 (3d ed. 2013). The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, *University of Tex.* v. *Camenisch*, 451 U. S. 390, 395 (1981), but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also "conside[r] . . . the overall public interest." *Winter*, *supra*, at 26. In the course of doing so, a court "need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." Wright, *supra*, § 2947, at 115.

Here, of course, we are not asked to grant a preliminary injunction, but to stay one. In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own. *Nken* v. *Holder*, 556 U. S. 418, 433 (2009). Before issuing a stay, "[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted). This Court may, in its discretion, tailor a stay so that it operates with respect to only "some portion of the proceeding." *Nken*, *supra*, at 428.

The courts below took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens that would fall on Doe, Dr. Elshikh, and Hawaii if § 2(c) were enforced. They reasoned that § 2(c) would "directly affec[t]" Doe and Dr. Elshikh by delaying entry of their family members to the United States. *IRAP*, 857 F. 3d, at 585, n. 11; see *Hawaii*, 859 F. 3d, at 762–763, 768. The Ninth Circuit concluded that § 2(c) would harm the State by preventing students from the designated nations who had been admitted to the University of Hawaii from entering this country. These hardships, the courts reasoned, were sufficiently weighty and immediate to outweigh the Government's inter-

est in enforcing § 2(c). Having adopted this view of the equities, the courts approved injunctions that covered not just respondents, but parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded. See *Mandel*, 408 U. S., at 763–765 (permitting American plaintiffs to challenge the exclusion of a foreign national on the ground that the exclusion violated their own First Amendment rights).

But the injunctions reach much further than that: They also bar enforcement of § 2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself. See *id.*, at 762 ("[A]n unadmitted and nonresident alien . . . ha[s] no constitutional right of entry to this country"). So whatever burdens may result from enforcement of § 2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships identified by the courts below.

At the same time, the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States. Indeed, EO–2 itself distinguishes between foreign nationals who have some connection to this country and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category. See, *e. g.*, §§ 3(c)(i)–(vi). The interest in preserving national security is "an urgent objective of the highest order." *Holder* v. *Hu-*

manitarian Law Project, 561 U. S. 1, 28 (2010). To prevent the Government from pursuing that objective by enforcing § 2(c) against foreign nationals unconnected to the United States would appreciably injure its interests, without alleviating obvious hardship to anyone else.

We accordingly grant the Government's stay applications in part and narrow the scope of the injunctions as to § 2(c). The injunctions remain in place only with respect to parties similarly situated to Doe, Dr. Elshikh, and Hawaii. In practical terms, this means that § 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO–2.

The facts of these cases illustrate the sort of relationship that qualifies. For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid § 2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

In light of the June 12 decision of the Ninth Circuit vacating the injunction as to § 2(a), the executive review directed by that subsection may proceed promptly, if it is not already underway. EO–2 instructs the Secretary of Homeland Security to complete this review within 20 days, after which

time foreign governments will be given 50 days further to bring their practices into line with the Secretary's directives. §§ 2(a)–(b), (d). Given the Government's representations in this litigation concerning the resources required to complete the 20-day review, we fully expect that the relief we grant today will permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c).

C

The *Hawaii* injunction extends beyond § 2(c) to bar enforcement of the § 6(a) suspension of refugee admissions and the § 6(b) refugee cap. In our view, the equitable balance struck above applies in this context as well. An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favor of the Government's compelling need to provide for the Nation's security. See *supra*, at 579–582; *Haig* v. *Agee*, 453 U. S. 280, 307 (1981).

The Government's application to stay the injunction with respect to §§ 6(a) and (b) is accordingly granted in part. Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may § 6(b); that is, such a person may not be excluded pursuant to § 6(b), even if the 50,000-person cap has been reached or exceeded. As applied to all other individuals, the provisions may take effect.

* * *

Accordingly, the petitions for certiorari are granted, and the stay applications are granted in part.

It is so ordered.

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

I agree with the Court that the preliminary injunctions entered in these cases should be stayed, although I would stay them in full. The decision whether to stay the injunctions is committed to our discretion, *ante*, at 579–580, but our discretion must be "guided by sound legal principles," *Nken* v. *Holder*, 556 U. S. 418, 434 (2009) (internal quotation marks omitted). The two "most critical" factors we must consider in deciding whether to grant a stay are "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits" and "(2) whether the applicant will be irreparably injured absent a stay." *Ibid.* (internal quotation marks omitted). Where a party seeks a stay pending certiorari, as here, the applicant satisfies the first factor only if it can show both "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed." *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1302 (1991) (Scalia, J., in chambers). When we determine that those critical factors are satisfied, we must "balance the equities" by "explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*, at 1305 (internal quotation marks omitted); cf. *Nken*, *supra*, at 435 (noting that the factors of "assessing the harm to the opposing party and weighing the public interest" "merge when the Government is the opposing party").

The Government has satisfied the standard for issuing a stay pending certiorari. We have, of course, decided to grant certiorari. See *ante*, at 579. And I agree with the Court's implicit conclusion that the Government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed. The Government has also established that failure to stay the injunctions will cause irreparable harm by interfering with its "compelling need to provide for the Nation's security."

Ante, at 583. Finally, weighing the Government's interest in preserving national security against the hardships caused to respondents by temporary denials of entry into the country, the balance of the equities favors the Government. I would thus grant the Government's applications for a stay in their entirety.

Reasonable minds may disagree on where the balance of equities lies as between the Government and respondents in these cases. It would have been reasonable, perhaps, for the Court to have left the injunctions in place only as to respondents themselves. But the Court takes the additional step of keeping the injunctions in place with regard to an unidentified, unnamed group of foreign nationals abroad. No class has been certified, and neither party asks for the scope of relief that the Court today provides. "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*" in the case, *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) (emphasis added), because a court's role is "to provide relief" only "to claimants . . . who have suffered, or will imminently suffer, actual harm," *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). In contrast, it is the role of the "political branches" to "shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Ibid.*

Moreover, I fear that the Court's remedy will prove unworkable. Today's compromise will burden executive officials with the task of deciding—on peril of contempt—whether individuals from the six affected nations who wish to enter the United States have a sufficient connection to a person or entity in this country. See *ante*, at 581–582. The compromise also will invite a flood of litigation until these cases are finally resolved on the merits, as parties and courts struggle to determine what exactly constitutes a "bona fide relationship," who precisely has a "credible claim" to that relationship, and whether the claimed relationship was formed "simply to avoid § 2(c)" of Executive Order No. 13780,

ante, at 582. And litigation of the factual and legal issues that are likely to arise will presumably be directed to the two District Courts whose initial orders in these cases this Court has now—unanimously—found sufficiently questionable to be stayed as to the vast majority of the people potentially affected.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 586 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 12 THROUGH
SEPTEMBER 29, 2017

JUNE 12, 2017

Dismissal Under Rule 46

No. 16–1342. ANTHEM, INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 855 F. 3d 345.

Certiorari Granted—Vacated and Remanded

No. 16–1003. MCKNIGHT ET AL. *v.* PETERSEN, ON BEHALF OF L. P., A MINOR AND BENEFICIARY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PETERSEN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White* v. *Pauly*, 580 U. S. 73 (2017) (*per curiam*). Reported below: 663 Fed. Appx. 531.

No. 16–7234. MCINTOSH *v.* UNITED STATES. C. A. 4th Cir. Reported below: 660 Fed. Appx. 199; and

No. 16–7794. BROWN *v.* UNITED STATES. C. A. 3d Cir. Reported below: 661 Fed. Appx. 190. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Honeycutt* v. *United States*, 581 U. S. 443 (2017).

Certiorari Granted—Reversed. (See No. 16–1177, *ante*, p. 91.)

Certiorari Dismissed

No. 16–9107. MORROW *v.* BRENNAN, POSTMASTER GENERAL. 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. Reported below: 676 Fed. Appx. 582.

Miscellaneous Orders

No. D–2977. IN RE DISCIPLINE OF CLARK. Thomas Andrew Clark, of Perth Amboy, N. J., is suspended from the practice of

law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2978. IN RE DISCIPLINE OF SMITH. Allan Christopher Smith, of Morrisville, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2979. IN RE DISCIPLINE OF BAILEY. Kathy Dianne Bailey, of Alexandria, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2980. IN RE DISCIPLINE OF FERRELL. Ronald Tyson Ferrell, of Wilkesboro, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2981. IN RE DISCIPLINE OF WALTON. Elbert A. Walton, Jr., of St. Louis, Mo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2982. IN RE DISCIPLINE OF HESTERBERG. Gregory Xavier Hesterberg, of Garden City, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2983. IN RE DISCIPLINE OF WROBLEWSKI. David Raymond Wroblewski, of Mesa, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2984. IN RE DISCIPLINE OF THORNSBURY. Michael Thornsbury, of Lexington, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2985. In re Discipline of Longmeyer. Timothy Michael Longmeyer, of Louisville, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2986. In re Discipline of Kuchinsky. Neil Kuchinsky, of Colonial Heights, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2987. In re Discipline of Bello. Thomas F. Bello, of Staten Island, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2988. In re Discipline of Byrd. Charles Grant Byrd, Jr., of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2989. In re Discipline of Boisseau. Eldon L. Boisseau, of Wichita, Kan., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 16–9150. In re Bracken;
No. 16–9189. In re Cone;
No. 16–9226. In re Manning;
No. 16–9238. In re Lassinger; and
No. 16–9239. In re Lopez. Petitions for writs of habeas corpus denied.

No. 16–9256. In re Dowell. Petition for writ of habeas corpus denied. Justice Gorsuch took no part in the consideration or decision of this petition.

Certiorari Granted

No. 16–712. Oil States Energy Services, LLC *v.* Greene's Energy Group, LLC, et al. C. A. Fed. Cir. Certiorari

granted limited to Question 1 presented by the petition. Reported below: 639 Fed. Appx. 639.

Certiorari Denied

No. 16–1029. BALL ET AL. *v.* MILWARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 3d 1207.

No. 16–1060. KUTLAK *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 16–1062. JEFFERS *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 16–1074. CARAFFA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARAFFA *v.* CARNIVAL CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 208 So. 3d 172.

No. 16–1092. LOCKWOOD, ANDREWS & NEWMAN, P. C., ET AL. *v.* MASON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 3d 383.

No. 16–1201. SCHOCKNER *v.* CASH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–1209. RIEMER *v.* OREGON ET AL. Sup. Ct. Ore. Certiorari denied.

No. 16–1217. TICHICH ET AL. *v.* CITY OF BLOOMINGTON, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 835 F. 3d 856.

No. 16–1223. BLUE SPIKE, LLC *v.* GOOGLE INC. C. A. Fed. Cir. Certiorari denied. Reported below: 669 Fed. Appx. 575.

No. 16–1228. OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 879.

No. 16–1235. FRANKLIN *v.* LAUGHLIN, DBA BWD PROPERTIES 2, LLC, ET AL. Ct. App. Nev. Certiorari denied. Reported below: 132 Nev. 970.

No. 16–1247. BARTH *v.* MCNEELY ET AL. Sup. Ct. Fla. Certiorari denied.

No. 16–1249. D. E. *v.* DOE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 834 F. 3d 723.

No. 16–1266. DIVERSIFIED INGREDIENTS, INC. *v.* TESTA, TAX COMMISSIONER OF OHIO. C. A. 8th Cir. Certiorari denied. Reported below: 846 F. 3d 994.

No. 16–1270. POPE *v.* GUNS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 251.

No. 16–1282. ADAMS *v.* NILES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 956.

No. 16–1317. HERNANDEZ ET AL. *v.* AVERY. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 433.

No. 16–1325. AKHTAR-ZAIDI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 422.

No. 16–1333. NEASE ET UX. *v.* FORD MOTOR CO. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 3d 219.

No. 16–5895. ZEBBS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–7763. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 146.

No. 16–7775. CUEVAS CABRERA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 826 F. 3d 514.

No. 16–7776. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 16–7855. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 169.

No. 16–7857. RAMIREZ-QUINTANILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 304.

No. 16–7991. RODRIGUEZ-BERBAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 367.

No. 16–8212. GARRITY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 889.

No. 16–8244. RODRIGUEZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 273.

No. 16–8259. CARTER *v.* THOMAS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 176.

No. 16–8301. HAYWARD *v.* KELLY, SUPERINTENDENT, OREGON STATE PENITENTIARY. Ct. App. Ore. Certiorari denied. Reported below: 281 Ore. App. 113, 383 P. 3d 437.

No. 16–8459. MALDONADO-JAIMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 441.

No. 16–8519. WARDLOW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 861.

No. 16–8598. KULKARNI *v.* UPASANI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 937.

No. 16–8602. VEGA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 16–8615. RAMNATH *v.* WANG. Sup. Ct. Wash. Certiorari denied.

No. 16–8624. BELLAMY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 500 Mich. 881, 886 N. W. 2d 420.

No. 16–8626. CORREA-AYALA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 144 A. 3d 199.

No. 16–8631. BONILLA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 16–8632. LANGLEY *v.* UNKNOWN. C. A. 4th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 138.

No. 16–8642. ZEBBS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–8643. WOODSON *v.* WHITEHEAD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 931.

No. 16–8650. YANEY ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, SAN BERNARDINO COUNTY, ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 16–8655. SANCHO *v.* ANDERSON SCHOOL DISTRICT FOUR. C. A. 4th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 204.

No. 16–8664. MITCHELL *v.* WISCONSIN DEPARTMENT OF HEALTH SERVICES. Ct. App. Wis. Certiorari denied.

No. 16–8665. PINKSTON *v.* UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–8668. JONES *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 3d 1299.

No. 16–8670. COULSTON *v.* CAMERON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 651 Fed. Appx. 139.

No. 16–8673. ALEXANDER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2015–1879 (La. 10/28/16), 202 So. 3d 990.

No. 16–8674. PACK *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied.

No. 16–8754. EARL *v.* FOSTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–8759. CONTRERAS *v.* BUTLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–8763. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 679 Fed. Appx. 51.

No. 16–8799. SCHESSLER *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–8844. HARRIS *v.* BUTLER, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 16–8861. BEAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–8901. FIELDS *v.* HARRIS, CLERK, SUPREME COURT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 671 Fed. Appx. 808.

No. 16–8928. SMITH *v.* SESSIONS, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied.

No. 16–8951. FORTSON *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 16–8956. EVANS *v.* CUNNINGHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 157.

No. 16–8968. ABDUL-HAQQ *v.* KAISER FOUNDATION HOSPITALS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 462.

No. 16–8994. RAMIREZ TORRES *v.* SEIBEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–9026. COLTER *v.* CHAPMAN CHEVROLET. Ct. App. Ariz. Certiorari denied.

No. 16–9036. BLOODMAN *v.* LIGON, EXECUTIVE DIRECTOR, ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT. Sup. Ct. Ark. Certiorari denied.

No. 16–9045. MACKEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 369.

No. 16–9051. VANLAAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 269.

No. 16–9054. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 567.

No. 16–9057. MONTIEL-CORTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 3d 221.

No. 16–9068. MORENO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 474.

No. 16–9079. CURRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 781.

No. 16–9080. CLARK *v.* SPEER, ACTING SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 84.

No. 16–9083. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 16–9088. SHEFFIELD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–9090. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 330.

No. 16–9092. Woodard *v.* United States; and
No. 16–9154. Robinson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 662 Fed. Appx. 854.

No. 16–9095. White *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 3d 667.

No. 16–9097. Whoolery *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 16–9102. Rodriguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 914.

No. 16–9110. Siler *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 739.

No. 16–9111. Carter *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 675 Fed. Appx. 100.

No. 16–9114. Evans *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 3d 242.

No. 16–9119. Mendez-Bello *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 508.

No. 16–9121. Beamon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 883.

No. 16–9122. Pryor *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 842 F. 3d 441.

No. 16–9123. Lewis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 440.

No. 16–9127. Lasher *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 661 Fed. Appx. 25.

No. 16–9129. Kahre *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 16–9135. Jenkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 845.

No. 16–9136. Waller *v.* Colorado. Ct. App. Colo. Certiorari denied. Reported below: 412 P. 3d 866.

No. 16–9137. Taylor *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 848 F. 3d 476.

No. 16–9142. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 878.

No. 16–9143. FELIPE-DIEGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 496.

No. 16–9161. BUCZEK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 16–810. NACCHIO ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 824 F. 3d 1370.

No. 16–853. JOHNSON *v.* FORD MOTOR CO. ET AL. Ct. App. Ga. Certiorari denied. THE CHIEF JUSTICE and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 335 Ga. App. XXIX.

No. 16–950. JACOBS FIELD SERVICES NORTH AMERICA, INC. *v.* ACOSTA, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 659 Fed. Appx. 181.

No. 16–1216. DALY *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 669 Fed. Appx. 19.

No. 16–1280. TANNER SERVICES, LLC *v.* GUIDRY ET UX. Sup. Ct. La. Motion of Stallion Oilfield Construction, LLC, et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 2016–2013 (La. 1/23/17), 209 So. 3d 90.

No. 16–8948. GRIGSBY *v.* MARTEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 670 Fed. Appx. 982.

No. 16–9106. DARIO RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 846 F. 3d 615.

No. 16–9113. DERROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 675 Fed. Appx. 481.

Rehearing Denied

No. 16–7414. DAKER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 580 U. S. 1174;

No. 16–7418. TAYLOR *v.* UNITED STATES, 580 U. S. 1174;

No. 16–7580. WHITE *v.* EDS CARE MANAGEMENT LLC ET AL., 581 U. S. 941;

No. 16–7593. WHITE ET UX. *v.* ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN, 581 U. S. 941;

No. 16–7709. DAMJANOVIC *v.* CALIFORNIA, 581 U. S. 907;

No. 16–7713. PENDER *v.* MORRIS DUFFY ALONSO & FALEY, LLP, 581 U. S. 907;

No. 16–7765. SMITH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 581 U. S. 908;

No. 16–7783. HILL ET UX. *v.* DITECH FINANCIAL, LLC, ET AL., 581 U. S. 908;

No. 16–7880. RAMIREZ *v.* BAUSCH & LOMB, INC., 581 U. S. 922;

No. 16–7901. BENFORD *v.* CALIFORNIA, 581 U. S. 923;

No. 16–7957. CELESTINE *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL., 580 U. S. 1221;

No. 16–7960. IN RE MARIE ET UX., 581 U. S. 938;

No. 16–8107. SHEPPARD *v.* MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK, 581 U. S. 925;

No. 16–8145. COWAN *v.* OKLAHOMA, 581 U. S. 976;

No. 16–8168. OLMOS MUNOZ *v.* UNITED STATES, 581 U. S. 911;

No. 16–8252. CONROY *v.* WALTON, WARDEN, 581 U. S. 926;

No. 16–8253. CONRAD *v.* UNITED STATES, 581 U. S. 926; and

No. 16–8314. IN RE CLAYBORNE, 581 U. S. 917. Petitions for rehearing denied.

JUNE 15, 2017

Miscellaneous Orders

No. 16A1202 (16–649). NORTH CAROLINA ET AL. *v.* COVINGTON ET AL., 581 U. S. 1015. Application for issuance of the judgment

forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 16A1203 (16–1023). NORTH CAROLINA ET AL. *v.* COVINGTON ET AL., 581 U. S. 486. Application for issuance of judgment forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUNE 19, 2017

Certiorari Granted—Reversed and Remanded. (See No. 16–1116, *ante*, p. 280.)

Certiorari Granted—Vacated and Remanded

No. 15–734. MILBERG LLP ET AL. *v.* LABER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Microsoft Corp.* v. *Baker*, *ante*, p. 23. Reported below: 801 F. 3d 1066.

Certiorari Dismissed

No. 16–9191. HINES *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2948. IN RE DISBARMENT OF DAVIDSON. Disbarment entered. [For earlier order herein, see 580 U. S. 1110.]

No. D–2950. IN RE DISBARMENT OF THOMPSON. Disbarment entered. [For earlier order herein, see 580 U. S. 1110.]

No. D–2954. IN RE DISBARMENT OF HARRINGTON. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2955. IN RE DISBARMENT OF SULLIVAN. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2956. IN RE DISBARMENT OF GOLDTHORPE. Disbarment entered. [For earlier order herein, see 580 U. S. 1194.]

No. D–2990. IN RE DISCIPLINE OF MOENNING. Richard Carl Moenning, of Evanston, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2991. IN RE DISCIPLINE OF COYLE. Francis Joseph Coyle, Jr., of Rock Island, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2992. IN RE DISCIPLINE OF PADGETT. Squire Padgett, Jr., of Alexandria, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2993. IN RE DISCIPLINE OF CARTER. George R. Carter, of Las Vegas, Nev., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 16M139. CLINE *v.* BALL, SUPERINTENDENT, AVERY-MITCHELL CORRECTIONAL INSTITUTION; and

No. 16M140. WILLIAMS *v.* GROUNDS, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16–1215. LAMAR, ARCHER & COFRIN, LLP *v.* APPLING. C. A. 11th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 16–8842. HERNANDEZ-GONZALEZ *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir.; and

No. 16–9213. FRANCISCO *v.* UNITED STATES. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 10, 2017, 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. 16–1402. IN RE SINGLETON;

No. 16–9290. IN RE NEUMAN;

No. 16–9364. IN RE JOHNSON; and

No. 16–9386. IN RE BOSTON. Petitions for writs of habeas corpus denied.

No. 16–1281. IN RE TOBINICK ET AL.;

No. 16–8748. IN RE SOUTHGATE;

No. 16–8767. IN RE DAVIS; and

No. 16–8778. IN RE HOWELL. Petitions for writs of mandamus denied.

No. 16–8716. IN RE GLEIS. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Postponed

No. 16–1161. GILL ET AL. *v.* WHITFORD ET AL. Appeal from D. C. W. D. Wis. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 218 F. Supp. 3d 837.

Certiorari Denied

No. 16–217. LENZ *v.* UNIVERSAL MUSIC CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 3d 1145.

No. 16–837. LAUREL-ABARCA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 16–952. SINGH *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 3d 880.

No. 16–1016. MACY'S, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 3d 557.

No. 16–1063. WILCHCOMBE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 838 F. 3d 1179.

No. 16–1068. NORTHEAST OHIO COALITION FOR THE HOMELESS ET AL. *v.* HUSTED, OHIO SECRETARY OF STATE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 3d 612.

No. 16–1082. GARCIA ET AL. *v.* BLOOMBERG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 662 Fed. Appx. 50.

No. 16–1085. ULTRAFLO CORP. *v.* PELICAN TANK PARTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 3d 652.

No. 16–1089. NEW MIGHTY U. S. TRUST ET AL. *v.* YUEH-LAN WANG, BY AND THROUGH HER ATTORNEY-IN-FACT, WONG. C. A. D. C. Cir. Certiorari denied. Reported below: 843 F. 3d 487.

No. 16–1106. Cox Communications, Inc., et al. *v.* Sprint Communication Co. LP et al. C. A. Fed. Cir. Certiorari denied. Reported below: 838 F. 3d 1224.

No. 16–1110. Bloomingdale's, Inc. *v.* Vitolo. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 890.

No. 16–1113. Meyers *v.* Nicolet Restaurant of De Pere, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 843 F. 3d 724.

No. 16–1123. Poly-America, L. P. *v.* API Industries, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 839 F. 3d 1131.

No. 16–1151. Flock et al. *v.* Department of Transportation et al. C. A. 1st Cir. Certiorari denied. Reported below: 840 F. 3d 49.

No. 16–1155. Miller *v.* Stamm, Personal Representative of the Estate of Stamm. C. A. 6th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 492.

No. 16–1157. ActiveLAF, LLC, dba Sky Zone Lafayette, et al. *v.* Duhon; and ActiveLAF, LLC, *v.* Alicea et al. (Reported below: 2016–0708 (La. 10/19/16), 218 So. 3d 1001). Sup. Ct. La. Certiorari denied.

No. 16–1178. Donziger et al. *v.* Chevron Corp. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 3d 74.

No. 16–1214. Conover et al. *v.* Fisher et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 229 Md. App. 720 and 722.

No. 16–1218. Marquez et al. *v.* Superior Court of California, Tulare County, et al. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 16–1227. Robertson *v.* EMI Christian Music Group, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 844 F. 3d 79.

No. 16–1229. McKinley *v.* LeGrand, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 610.

No. 16–1232. BACH *v.* LABOR AND INDUSTRY REVIEW COMMISSION ET AL. Ct. App. Wis. Certiorari denied. Reported below: 2016 WI App 80, 372 Wis. 2d 184, 888 N. W. 2d 23.

No. 16–1234. DAVIS ET AL. *v.* JPMORGAN CHASE BANK N. A. App. Ct. Conn. Certiorari denied.

No. 16–1243. JONES *v.* ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND JUDICIARY. C. A. 4th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 160.

No. 16–1260. R. J. REYNOLDS TOBACCO CO., AS SUCCESSOR IN INTEREST TO LORILLARD TOBACCO CO. *v.* MICHIGAN DEPARTMENT OF TREASURY. Ct. App. Mich. Certiorari denied.

No. 16–1264. LUCAS, INDIVIDUALLY, AS WIDOW AND WRONGFUL DEATH BENEFICIARY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCAS, DECEASED, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 333.

No. 16–1267. NORBER *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 911.

No. 16–1269. ZIOBER *v.* BLB RESOURCES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 839 F. 3d 814.

No. 16–1272. RAPLEE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAPLEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 3d 328.

No. 16–1273. WIEST *v.* CINCINNATI BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 148 Ohio St. 3d 683, 2016-Ohio-8166, 72 N. E. 3d 621.

No. 16–1315. MELVIN *v.* NAYLOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 115.

No. 16–1326. BRIGHAM ET AL. *v.* PATLA, STRAUS, ROBINSON & MOORE, P. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 168.

No. 16–1358. DIETRICH *v.* SOO LINE RAILROAD, DBA CANADIAN PACIFIC. C. A. 8th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 403.

No. 16–1377. TRUSTEES OF THE UPSTATE NEW YORK ENGINEERS PENSION FUND *v.* IVY ASSET MANAGEMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 843 F. 3d 561.

No. 16–1383. SWECKER *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 16–7182. SULLIVAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 16–7662. PIPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 839 F. 3d 1261.

No. 16–7686. BREWTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 998.

No. 16–7689. HERNANDEZ-CIFUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 670 Fed. Appx. 233.

No. 16–7756. DURHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 990.

No. 16–7869. HERNANDEZ-ESPINOZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 210.

No. 16–7874. CANTU *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 384.

No. 16–7883. FRITTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 3d 937.

No. 16–8003. HUNNICUTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 521.

No. 16–8054. MCCANDLESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 841 F. 3d 819.

No. 16–8072. SEABROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 3d 1326.

No. 16–8186. CULBRETH *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 16–8192. CERVANTES-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 315.

No. 16–8336. PETERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 843 F. 3d 572.

No. 16–8357. BURGENER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 5th 461, 376 P. 3d 659.

No. 16–8448. GREENE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 132 Nev. 973.

No. 16–8536. SALDIERNA-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 447.

No. 16–8689. HOLMAN *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 888 N. W. 2d 902.

No. 16–8701. KOBE *v.* MCMASTER, GOVERNOR OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 281.

No. 16–8706. STEWART *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 141602–U.

No. 16–8711. SCOTT *v.* WRIGHT ET AL. Sup. Ct. Ga. Certiorari denied.

No. 16–8722. SCHOONOVER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–8727. R. M. *v.* COMMITTEE ON CHARACTER AND FITNESS. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 3d 950, 49 N. E. 3d 1205.

No. 16–8728. WILLIAMS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 499 S. W. 3d 498.

No. 16–8739. CAMICK *v.* WATTLEY ET AL. C. A. 10th Cir. Certiorari denied.

No. 16–8740. BOSTICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 948.

No. 16–8741. LEE *v.* MACOMBER. C. A. 9th Cir. Certiorari denied.

No. 16–8743. KEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 16–8750. SAMPSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 16–8753. CAISON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 16–8757. WHITNUM-BAKER *v.* BAKER. App. Ct. Conn. Certiorari denied. Reported below: 161 Conn. App. 227, 127 A. 3d 330.

No. 16–8779. HESS *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–8797. BYFORD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 132 Nev. 951, 385 P. 3d 35.

No. 16–8806. HARDY *v.* RIVARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–8818. STAMPS, AKA STAMPS BEY *v.* HAAS, WARDEN. Sup. Ct. Mich. Certiorari denied.

No. 16–8824. ARMSTRONG *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 16–8827. FLOYD *v.* HOFFNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–8830. LAMPKIN *v.* BROCK. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 16–8845. HART *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 16–8851. MCKENZIE *v.* SESSIONS, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 16–8859. M. B. *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Ashland County. Certiorari denied. Reported below: 2016-Ohio-4780.

No. 16–8860. C. B. *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Ashland County. Certiorari denied. Reported below: 2016-Ohio-4779.

No. 16–8890. LYNCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 665 Fed. Appx. 607.

No. 16–8903. NUSHAWN W., AKA JOHNSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 139 App. Div. 3d 1375, 31 N. Y. S. 3d 362.

No. 16–8932. GILLILAND *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 16–8938. MALDONADO *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–8939. ODUESO *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 369 N. C. 486, 795 S. E. 2d 367.

No. 16–8958. COACH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 16–9004. SIMPSON *v.* ECKSTEIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–9020. TOWNSEND *v.* RICHARDSON, WARDEN. Ct. App. Wis. Certiorari denied.

No. 16–9060. OWEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 659 Fed. Appx. 652.

No. 16–9117. ESTRADA-JIMENEZ *v.* ECKSTEIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–9118. SCHAEFER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2017 WI App 1, 372 Wis. 2d 833, 890 N. W. 2d 49.

No. 16–9131. CLARDY *v.* NIKE, INC., ET AL. Ct. App. Ore. Certiorari denied. Reported below: 279 Ore. App. 811, 381 P. 3d 1100.

No. 16–9133. JONES *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 490.

No. 16–9134. JONES *v.* SKOLNIK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 560.

No. 16–9144. BARNETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 300 Ga. 551, 796 S. E. 2d 653.

No. 16–9148. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 3d 759.

No. 16–9152. ROGERS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 16–9163. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 469.

No. 16–9164. SCARLETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 3d 524 and 677 Fed. Appx. 21.

No. 16–9166. JENKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 849 F. 3d 390.

No. 16–9172. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 661.

No. 16–9174. WILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9176. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 16–9183. BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 394.

No. 16–9184. BLACKMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9185. ROSALES-ACOSTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 860.

No. 16–9192. HARRINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 3d 896.

No. 16–9195. NEMAN, AKA DAVATGARZADEH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 649.

No. 16–9197. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9204. BEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 3d 981.

No. 16–9206. ANDRADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 397.

No. 16–9209. HELMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–9210. FERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 Fed. Appx. 71.

No. 16–9211. GODFREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 201.

No. 16–9212. FRANCISCO HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 16–9223. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 16–9225. KRASNIQI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 16–9227. MONSHIZADEH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 359.

No. 16–9229. GARCIA-MARTINEZ *v.* UNITED STATES (Reported below: 680 Fed. Appx. 278); and RIOS-OJEDA *v.* UNITED STATES (677 Fed. Appx. 168). C. A. 5th Cir. Certiorari denied.

No. 16–866. CONNECTICUT *v.* DICKSON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 322 Conn. 410, 141 A. 3d 810.

No. 16–1084. FREDERICKSEN *v.* OLSEN ET AL. Ct. App. Iowa. Motion of Concerned United Birthparents, Inc., for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 888 N. W. 2d 682.

No. 16–1224. FLORIDA *v.* K. C., A CHILD. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 207 So. 3d 951.

No. 16–1230. CUNNINGHAM ET VIR *v.* JACKSON HOLE MOUNTAIN RESORT CORP. C. A. 10th Cir. Certiorari denied. JUS-

TICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 673 Fed. Appx. 841.

No. 16–1236. QUINN ET AL. *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Motion of Ad Hoc Committee of Allied Nevada, Inc., Shareholders for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 838 F. 3d 792.

No. 16–1252. FLORIDA *v.* JOHNSON. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 205 So. 3d 1285.

No. 16–1304. NTCH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 841 F. 3d 497.

No. 16–1376. WHISENANT *v.* SHERIDAN PRODUCTION CO., LLC. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

No. 16–6786. VERDIN-GARCIA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 824 F. 3d 1218.

No. 16–7953. GILMORE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 841 F. 3d 909.

No. 16–9214. GARCIA *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. 16–1091. HILL *v.* SUWANNEE RIVER WATER MANAGEMENT DISTRICT, 581 U. S. 960;

No. 16–7610. MINARD *v.* WAL-MART STORES, INC., 580 U. S. 1206;

No. 16–7914. JOHNSON *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL., 581 U. S. 923;

No. 16–8010. BYERS *v.* UNITED STATES, 580 U. S. 1222;

No. 16–8144. DUNLAP *v.* HORTON, WARDEN, 581 U. S. 925;
No. 16–8175. WILLIAMS *v.* PFISTER, WARDEN, 581 U. S. 925;
No. 16–8221. ANDREWS *v.* CASSADY, WARDEN, 581 U. S. 963;
No. 16–8274. JORDAN *v.* UNITED STATES, 581 U. S. 927;
No. 16–8397. MITCHELL *v.* NEW YORK UNIVERSITY ET AL., 581 U. S. 964; and
No. 16–8556. IN RE RAY, 581 U. S. 937. Petitions for rehearing denied.

JUNE 26, 2017

Certiorari Granted—Reversed and Remanded. No. 16–992, *ante*, p. 563.

Certiorari Granted—Vacated and Remanded

No. 16–7806. HICKS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed on May 1, 2017. Reported below: 669 Fed. Appx. 213.

JUSTICE GORSUCH, concurring.

Everyone agrees that Mr. Hicks was wrongly sentenced to a 20-year mandatory minimum sentence under a now-defunct statute. True, Mr. Hicks didn't argue the point in the court of appeals. But before us the government admits his sentence is plainly wrong as a matter of law, and it's simple enough to see the government is right. Of course, to undo and revise a sentence under the plain error standard, a court must not only (1) discern an error, that error must (2) be plain, (3) affect the defendant's substantial rights, and (4) implicate the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Olano*, 507 U. S. 725, 732 (1993). And while the government concedes the first two legal elements of the plain error test, it asks us to remand the case to the court of appeals for it to resolve the latter two questions in the first instance.

I cannot think of a good reason to say no. When this Court identifies a legal error, it routinely remands the case so the court of appeals may resolve whether the error was harmless in light of other proof in the case—and so decide if the judgment must be revised under Federal Rule of Criminal Procedure 52(a). After

identifying an unpreserved but plain legal error, this Court likewise routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings—and so (again) determine if the judgment must be revised, this time under Rule 52(b). We remand in cases like these not only when we are certain that curing the error will yield a different outcome, but also in cases where we think there's a reasonable probability that will happen. See, *e. g.*, *Skilling* v. *United States*, 561 U. S. 358, 414 (2010) (harmless error); *Tapia* v. *United States*, 564 U. S. 319, 335 (2011) (plain error); *United States* v. *Marcus*, 560 U. S. 258, 266–267 (2010) (plain error).

To know this much is to know what should be done in our current case. A plain legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute. No doubt, too, there's a reasonable probability that cleansing this error will yield a different outcome. Of course, Mr. Hicks's conviction won't be undone, but the sentencing component of the district court's judgment is likely to change, and change substantially. For experience surely teaches that a defendant entitled to a sentence consistent with 18 U. S. C. § 3553(a)'s parsimony provision, rather than pursuant to the rigors of a statutory mandatory minimum, will often receive a much lower sentence. So there can be little doubt Mr. Hicks's substantial rights are, indeed, implicated. Cf. *Molina-Martinez* v. *United States*, 578 U. S. 189, 204 (2016). When it comes to the fourth prong of plain error review, it's clear Mr. Hicks also enjoys a reasonable probability of success. For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes? Cf. *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1333 (CA10 2014).

Now this Court has no obligation to rove about looking for errors to correct in every case in this large country, and I agree with much in Justice Scalia's dissent in *Nunez* v. *United States*, 554 U. S. 911, 911–913 (2008), suggesting caution. For example, it rightly counsels against vacating a judgment when we harbor doubts about a confession of error or when the confession bears the marks of gamesmanship. Nor should we take the government's word for it and vacate a judgment when we cannot with ease determine the existence of an error of federal law. Or when

independent and untainted legal grounds appear to exist that would support the judgment anyway. Or when lightly accepting a confession of error could lead to a circuit conflict or interfere with the administration of state law. No doubt other reasons too will often counsel against intervening. But, respectfully, I am unaware of any such reason here. Besides, if the only remaining objection to vacating the judgment here is that, despite our precedent routinely permitting the practice, we should be wary of remanding a case without first deciding for ourselves the latter elements of the plain error test, that task is so easily done in this case that I cannot think why it should not be done. Indeed, the lone peril in the present case seems to me the possibility that we might permit the government to deny someone his liberty longer than the law permits only because we refuse to correct an obvious judicial error.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS joins, dissenting.

Petitioner Marcus Deshaw Hicks pleaded guilty to conspiracy to possess with intent to distribute crack cocaine in violation of federal law. Between the time Hicks was sentenced for that crime and his direct appeal, this Court decided *Dorsey* v. *United States*, 567 U. S. 260 (2012), holding that the Fair Sentencing Act applies to defendants like Hicks whose crimes predated the effective date of the Act but who were sentenced after that date. On direct appeal Hicks failed to argue that *Dorsey* entitled him to a reduced sentence. Presented with no such claim, the Fifth Circuit affirmed. Hicks now seeks certiorari.

The Government's response is not to concede that the Fifth Circuit's judgment was wrong. Rather it is to request that this Court vacate that judgment and send the case back to the Fifth Circuit so that the Court of Appeals may conduct plain error review. My colleague concurring in this Court's order "cannot think of a good reason to say no." *Ante*, at 924 (opinion of GORSUCH, J.). After all, Hicks was "wrongly sentenced to a 20-year mandatory minimum sentence under a now-defunct statute." *Ibid.* But, as the Government itself acknowledges, that gets us past only the first two prongs of this Court's four-prong test for plain error: There was an error and the error was plain in light of *Dorsey*. See *Puckett* v. *United States*, 556 U. S. 129, 134–135 (2009). The Government does not contend that Hicks also satis-

fies prongs three and four of the test for plain error and that the judgment below rejecting Hicks's claim was therefore wrong. Brief in Opposition 12–13. No matter, says my colleague, because the outcome on remand is a no-brainer. But without a determination from this Court that the judgment below was wrong or at least a concession from the Government to that effect, we should not, in my view, vacate the Fifth Circuit's judgment. See *Nunez* v. *United States*, 554 U. S. 911 (2008) (Scalia, J., dissenting).

No. 16–7835. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by respondent in its brief filed on May 10, 2017.

THE CHIEF JUSTICE, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH join, dissenting.

The Court vacates the judgment below in light of the position asserted by respondent in its brief. That position is that the Court should vacate a state court judgment for further consideration in light of *Ex parte Beckworth*, 190 So. 3d 571 (Ala. 2013). *Beckworth* is a state court decision that turns entirely on state procedural law. It was expressly called to the attention of the state courts, which declined to upset the decision below in light of it. Reply to Brief in Opposition 2, n. 1. The question presented concerns state collateral review—purely a creature of state law that need not be provided at all. Whatever one's view on the propriety of our practice of vacating judgments based on positions of the parties, see *Hicks* v. *United States*, *supra*, p. 924, the Court's decision to vacate this state court judgment is truly extraordinary. I respectfully dissent.

Certiorari Dismissed

No. 16–8825. HOPKINS *v.* ILLINOIS WORKERS' COMPENSATION COMMISSION 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. 16–8834. WILSON *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 16–9085. AZEEZ *v.* WEST VIRGINIA ET AL. Sup. Ct. App. W. Va. Motion of petitioner for leave to proceed *in forma pau-*

peris denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 16–9305. ELLIS *v.* UNITED STATES. 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. D–2959. IN RE DISBARMENT OF SAFAVIAN. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. 16M141. ANGHEL *v.* ELIA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF EDUCATION, ET AL.;

No. 16M142. SWART *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.; and

No. 16M143. COBBERT *v.* STEVENSON, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 16M144. STANCU *v.* STARWOOD HOTELS & RESORTS WORLDWIDE, INC., ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record denied.

No. 147, Orig. NEW MEXICO *v.* COLORADO. Motion for leave to file bill of complaint denied. JUSTICE THOMAS and JUSTICE ALITO would grant the motion for the reasons stated in *Nebraska* v. *Colorado*, 577 U. S. 1211 (2016) (THOMAS, J., dissenting). [For earlier order herein, see 580 U. S. 995.]

No. 16–1071. SOKOLOW ET AL. *v.* PALESTINE LIBERATION ORGANIZATION ET AL. C. A. 2d Cir.;

No. 16–1102. SAMSUNG ELECTRONICS CO., LTD., ET AL. *v.* APPLE INC. C. A. Fed. Cir.;

No. 16–1180. BREWER, FORMER GOVERNOR OF ARIZONA, ET AL. *v.* ARIZONA DREAM ACT COALITION ET AL. C. A. 9th Cir.; and

No. 16–1220. ANIMAL SCIENCE PRODUCTS, INC., ET AL. *v.* HEBEI WELCOME PHARMACEUTICAL CO. LTD. ET AL. C. A. 2d Cir. The Acting Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 16–1422. IN RE ARPAIO. Motion of petitioner to expedite consideration of petition for writ of mandamus denied.

No. 16–8508. In re Koh. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [581 U. S. 958] denied.

No. 16–9003. Carlos Diaz *v.* Sessions, Attorney General. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 17, 2017, 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. 16–9399. In re Hartman. Petition for writ of habeas corpus denied.

Certiorari Granted. (See also Nos. 16–1436 and 16–1540, *ante*, p. 571.)

No. 16–1276. Digital Realty Trust, Inc. *v.* Somers. C. A. 9th Cir. Certiorari granted. Reported below: 850 F. 3d 1045.

No. 16–111. Masterpiece Cakeshop, Ltd., et al. *v.* Colorado Civil Rights Commission et al. Ct. App. Colo. Motion of Foundation for Moral Law for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 370 P. 3d 272.

Certiorari Denied

No. 15–888. Garcia de la Paz et al. *v.* Coy et al. C. A. 5th Cir. Certiorari denied. Reported below: 786 F. 3d 367.

No. 15–1305. BeavEx, Inc. *v.* Costello et al. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 3d 1045.

No. 15–1345. Ali *v.* Warfaa; and
No. 15–1464. Warfaa *v.* Ali. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 3d 653.

No. 16–481. TV Azteca, S. A. B. de C. V., et al. *v.* Trevino Ruiz, Individually and on Behalf of Her Minor Child, A. G. J. T., et al. Sup. Ct. Tex. Certiorari denied. Reported below: 490 S. W. 3d 29.

No. 16–789. Hinrichs *v.* General Motors of Canada, Ltd. Sup. Ct. Ala. Certiorari denied. Reported below: 222 So. 3d 1114.

No. 16–879. ALVAREZ *v.* SKINNER, FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 3d 1194.

No. 16–971. VILLARREAL *v.* R. J. REYNOLDS TOBACCO CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 839 F. 3d 958.

No. 16–975. MIDWEST FENCE CORP. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 932.

No. 16–988. SILVER *v.* CHEEKTOWAGA CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 670 Fed. Appx. 21.

No. 16–999. NEGRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 837 F. 3d 91.

No. 16–1010. BOMBARDIER AEROSPACE CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 3d 268.

No. 16–1013. FLORIDA DEPARTMENT OF REVENUE *v.* LAZARO GONZALEZ. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 3d 1251.

No. 16–1056. BLACK *v.* DIXIE CONSUMER PRODUCTS LLC ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 835 F. 3d 579.

No. 16–1075. COUTTS *v.* WATSON. C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 3d 417.

No. 16–1095. GRANADOS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 677 Fed. Appx. 813.

No. 16–1130. SANTANDER HOLDINGS USA, INC., AND SUBSIDIARIES, FKA SOVEREIGN BANCORP, INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 844 F. 3d 15.

No. 16–1141. PAYNE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 239 W. Va. 247, 800 S. E. 2d 833.

No. 16–1172. HOFFMAN *v.* NORDIC NATURALS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 837 F. 3d 272.

No. 16–1198. PATRIOTIC VETERANS, INC. *v.* HILL, ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 845 F. 3d 303.

No. 16–1208. BOURNE VALLEY COURT TRUST *v.* WELLS FARGO BANK, N. A. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 3d 1154.

No. 16–1225. HEAVEN *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 16–1237. WYATT *v.* GILMARTIN ET AL. Sup. Ct. N. H. Certiorari denied.

No. 16–1245. MUNOZ *v.* GOLDEN EAGLE INSURANCE CORP. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 16–1248. BHARDWAJ *v.* PATHAK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 763.

No. 16–1254. JONES *v.* GROSS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 266.

No. 16–1261. SWITZER, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SWITZER *v.* VAUGHAN. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 16–1262. SCHAFFER ET AL. *v.* BERINGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 842 F. 3d 585.

No. 16–1289. DCV IMPORTS, LLC *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES. C. A. 7th Cir. Certiorari denied. Reported below: 838 F. 3d 914.

No. 16–1291. SILVER *v.* QUORA, INC. C. A. 10th Cir. Certiorari denied. Reported below: 666 Fed. Appx. 727.

No. 16–1292. TRITZ *v.* BRENNAN, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 669 Fed. Appx. 446.

No. 16–1295. GRUMAZESCU *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 318.

No. 16–1297. CHINNIAH ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (Reported below: 670 Fed. Appx. 59); and CHINNIAH ET UX. *v.* EAST PENNSBORO TOWNSHIP, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–1313. SEASIDE FARM, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 3d 853.

No. 16–1319. PADMANABHAN *v.* KASSLER ET AL. C. A. 1st Cir. Certiorari denied.

No. 16–1328. BECK ET AL. *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 848 F. 3d 262.

No. 16–1331. HAMPTON *v.* MCCABE, ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 16–1338. FORD *v.* ARTIGA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 657 Fed. Appx. 710.

No. 16–1345. COATY *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 787.

No. 16–1346. STRAW *v.* INDIANA SUPREME COURT. Sup. Ct. Ind. Certiorari denied. Reported below: 68 N. E. 3d 1070.

No. 16–1347. CALHOUN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 845 F. 3d 1176.

No. 16–1353. KORMAN ET AL. *v.* UNITED STATES. Sup. Ct. Mont. Certiorari denied. Reported below: 386 Mont. 397, 386 P. 3d 618.

No. 16–1368. APPISTRY, LLC *v.* AMAZON.COM, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 676 Fed. Appx. 1008.

No. 16–1375. BARRETT *v.* GREENUP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 525.

No. 16–1379. LONG ET AL. *v.* COUNTY OF ARMSTRONG, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 679 Fed. Appx. 221.

No. 16–1388. EUGSTER *v.* WASHINGTON STATE BAR ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 618.

No. 16–1396. BORDA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 848 F. 3d 1044.

No. 16–1404. INTERMEC, INC., ET AL. *v.* ALIEN TECHNOLOGY, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 664 Fed. Appx. 962.

No. 16–1412. ALTOMARE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 956.

No. 16–6387. LOOMIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2016 WI 68, 371 Wis. 2d 235, 881 N. W. 2d 749.

No. 16–6725. JEFFERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 816 F. 3d 1016.

No. 16–6925. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 829 F. 3d 519.

No. 16–7346. MCFADDEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2016 IL 117424, 61 N. E. 3d 74.

No. 16–7503. SIMMONDS, AKA PARKER *v.* SESSIONS, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 649 Fed. Appx. 44.

No. 16–7716. JACKSON *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 299 Ga. 751, 791 S. E. 2d 43.

No. 16–7762. MARION *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 663 Fed. Appx. 378.

No. 16–7986. MATLACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 674 Fed. Appx. 869.

No. 16–7994. JENKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 659 Fed. Appx. 1.

No. 16–8037. SCOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 664 Fed. Appx. 232.

No. 16–8043. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2016 IL App (3d) 120840, 65 N. E. 3d 848.

No. 16–8052. MINNIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2016 IL 119563, 67 N. E. 3d 272.

No. 16–8053. PERKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 150889, 63 N. E. 3d 207.

No. 16–8482. MCCLOUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–8526. BELTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 149 Ohio St. 3d 165, 2016-Ohio-1581, 74 N. E. 3d 319.

No. 16–8699. FERRER ET AL. *v.* YELLEN, CHAIR, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 659 Fed. Appx. 982.

No. 16–8710. AMODEO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–8733. THARPE *v.* SELLERS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 3d 1323.

No. 16–8752. DAMPIER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 131971–U.

No. 16–8766. CORDOVANO *v.* PETERSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–8771. YABLONSKY *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–8774. MUNOZ *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 16–8781. FULLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 16–8791. SHREVES *v.* PIRANIAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 740.

No. 16–8792. WILLIAMS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 16–8793. DAVIES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 16–8802. EDWARDS *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–8804. CARPENTER *v.* STRAHOTA, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 3d 867.

No. 16–8807. LOVINGS *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 16–8812. CUMMINGS *v.* INTERNATIONAL UNION SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA), LOCAL 555, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 103.

No. 16–8813. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 5th 1166, 384 P. 3d 1162.

No. 16–8817. CARRASQUILLO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 212 So. 3d 364.

No. 16–8821. BELL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 236 So. 3d 155.

No. 16–8822. CROWDER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2016 IL App (3d) 140030–U.

No. 16–8823. BLAND *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 16–8829. GABLE *v.* BLADES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 16–8831. MACK *v.* LAUGHLIN, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–8832. WHITE *v.* BETHESDA PROJECT INC. C. A. 3d Cir. Certiorari denied. Reported below: 672 Fed. Appx. 218.

No. 16–8835. YANEY *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 16–8836. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 209 So. 3d 543.

No. 16–8837. THOMAS *v.* PARKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 328.

No. 16–8841. GREEN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 16–8843. GUERRERO *v.* OFFICE OF ADMINISTRATIVE HEARINGS. Ct. App. Ariz. Certiorari denied.

No. 16–8852. FARQUHARSON ET AL. *v.* CITIBANK, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 793.

No. 16–8853. ENCALADO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 132671–U.

No. 16–8864. BEY *v.* WINGARD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–8865. BROWN *v.* THOMAS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 16–8866. ARUANNO *v.* DAVIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 679 Fed. Appx. 213.

No. 16–8869. HETTINGA *v.* CANTIL-SAKAUYE ET AL. C. A. 9th Cir. Certiorari denied.

No. 16–8872. GARCIA GOMEZ *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. 8th Cir. Certiorari denied.

No. 16–8876. FULMORE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 204 So. 3d 462.

No. 16–8882. BROWN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 16–8883. BROWN *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–8886. GONZALEZ ORDUNO *v.* LACKNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 16–8891. Won Il Kim *v.* Harrell et al. C. A. 8th Cir. Certiorari denied.

No. 16–8892. Martin *v.* Paramo, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 16–8905. Veney *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 16–8912. Newell *v.* Lackner, Warden. C. A. 9th Cir. Certiorari denied.

No. 16–8935. Carpio *v.* California. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 16–8936. Elzey *v.* Kent, Warden. C. A. 5th Cir. Certiorari denied.

No. 16–8940. Parker *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 141597, 70 N. E. 3d 734.

No. 16–8946. Scott *v.* Naylor et al. C. A. 8th Cir. Certiorari denied.

No. 16–8963. Williams *v.* Steele, Superintendent, Potosi Correctional Center. Sup. Ct. Mo. Certiorari denied.

No. 16–8975. Campbell *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 16–9010. Hawley *v.* Clackamas County Circuit Court et al. C. A. 9th Cir. Certiorari denied.

No. 16–9032. Fields *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 16–9042. Adesanya *v.* Sessions, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 581.

No. 16–9044. Charlton *v.* Oregon Department of Corrections et al. C. A. 9th Cir. Certiorari denied. Reported below: 668 Fed. Appx. 692.

No. 16–9049. Wells *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 133349–UB.

No. 16–9065. DARDEN *v.* TEGELS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 16–9067. MITCHELL *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 16–9074. CHI *v.* JONES. C. A. 5th Cir. Certiorari denied.

No. 16–9084. ARRIAGA *v.* DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 16–9089. CURRIE *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 679 Fed. Appx. 995.

No. 16–9091. TASKOV *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 16–9105. RADILLA-ESQUIVEL *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 16–9116. RIVERA *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 139.

No. 16–9141. WYNTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 3d 1002, 80 N. E. 3d 416.

No. 16–9147. THOMPSON *v.* SPEER, ACTING SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 980.

No. 16–9149. PETERMAN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 52 Kan. App. 2d xxxvii, 362 P. 3d 1123.

No. 16–9156. SILVA-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 686 Fed. Appx. 12.

No. 16–9171. NUNN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 16–9190. IOANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 16–9201. COVARRUBIAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 556.

No. 16–9208. GERIDEAU-WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–9221. SCHENCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 212.

No. 16–9222. CAMPILLO-RESTREPO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 948.

No. 16–9231. HINCKLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 673 Fed. Appx. 308.

No. 16–9232. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 652 Fed. Appx. 835.

No. 16–9233. GOMEZ-OLIVAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 672 Fed. Appx. 887.

No. 16–9234. EDGAR F. *v.* BALLARD, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 16–9237. FIELDS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 142763–U.

No. 16–9243. SIGILLITO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 16–9247. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 443.

No. 16–9249. CAMPANA MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 686 Fed. Appx. 470.

No. 16–9252. POPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 180.

No. 16–9253. BITSINNIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 680 Fed. Appx. 574.

No. 16–9257. BUCKLEY *v.* RAY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 848 F. 3d 855.

No. 16–9264. VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9277. DICKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 609.

No. 16–9281. LABELLE *v.* MERLAK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 16–9283. SPENCER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 16–9286. MCDANIELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 680 Fed. Appx. 274.

No. 16–9298. VIERRA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 193.

No. 16–9307. ROSADO-TORO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 16–9311. REYNA-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 379.

No. 16–9312. ROMERO *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 16–9314. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 679 Fed. Appx. 259.

No. 16–9316. PONCE-GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 147.

No. 16–9320. KELLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 633.

No. 16–9322. MCGREW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 846 F. 3d 277.

No. 16–9324. CUADRA-NUNEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 349.

No. 16–9330. CASBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 16–9340. ORANGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9343. COFFEE *v.* UNITED STATES; and
No. 16–9367. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 841 F. 3d 1253.

No. 16–9366. CALDERON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 16–9381. TORRES SANTIAGO *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 16–26. BULK JULIANA, LTD., ET AL. *v.* WORLD FUEL SERVICES (SINGAPORE) PTE, LTD. C. A. 5th Cir. Motion of Star Trident II, LLC, et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 822 F. 3d 766.

No. 16–673. GORDON *v.* CONSUMER FINANCIAL PROTECTION BUREAU. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 819 F. 3d 1179.

No. 16–677. MATHIS *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 643 Fed. Appx. 968.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

This petition raises important questions about how the Government carries out its obligations to our veterans. The Board of Veterans' Appeals (Board) applies a rebuttable presumption when reviewing veterans' disability claims: The medical examiner whose opinion the Department of Veterans Affairs (VA) relied on to deny a veteran's claim is presumed competent, absent a specific objection by the veteran. To raise an objection, a veteran needs to know the medical examiner's credentials. And yet, the VA does not provide veterans with that information as a matter of course. Nor does it always provide veterans with that information upon request. The only road to guaranteed access to an examiner's credentials runs through a Board order. The Board, however, has sometimes required the veteran to have already raised a specific objection to an examiner's competence before ordering the VA to provide the credentials. This places a veteran in a "catch-22" where she "must make a specific objection to an examiner's competence before she can learn the examiner's qualifications." *Mathis* v. *McDonald*, 834 F. 3d 1347, 1357 (CA Fed. 2016) (Reyna, J., dissenting from denial of rehearing en banc). As JUSTICE GORSUCH explains, see *post*, at 942, the Board's presumption is questionable. But the presumption is not the only problem. A decision by the VA to deny benefits in reliance on an examiner's opinion, while denying the veteran access to that

examiner's credentials, ensures that the presumption will work to the veteran's disadvantage. The petitioner here did not ask the VA to provide the examiner's credentials, and so this petition does not allow review of both the VA's practice and the Board's presumption. Full review would require a petition arising from a case in which the VA denied a veteran benefits after declining to provide the medical examiner's credentials. Until such a petition presents itself, staying our hand allows the Federal Circuit and the VA to continue their dialogue over whether the current system for adjudicating veterans' disability claims can be squared with the VA's statutory obligations to assist veterans in the development of their disability claims.

JUSTICE GORSUCH, dissenting.

Lower courts often presume that Department of Veterans Affairs medical examiners are competent to render expert opinions against veterans seeking compensation for disabilities they have suffered during military service. The VA appears to apply the same presumption in its own administrative proceedings.

But where does this presumption come from? It enjoys no apparent provenance in the relevant statutes. There Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims. See 38 U. S. C. § 5103A(a)(1). And consider how the presumption works in practice. The VA usually refuses to supply information that might allow a veteran to challenge the presumption without an order from the Board of Veterans' Appeals. And that Board often won't issue an order unless the veteran can first supply a specific reason for thinking the examiner incompetent. No doubt this arrangement makes the VA's job easier. But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?

Now, you might wonder if our intervention is needed to remedy the problem. After all, a number of thoughtful colleagues on the Federal Circuit have begun to question the presumption's propriety. See *Mathis* v. *McDonald*, 834 F. 3d 1347 (2016). And this may well mean the presumption's days are numbered. But I would not wait in hope. The issue is of much significance to many today and, respectfully, it is worthy of this Court's attention.

No. 16–847. SESSIONS, ATTORNEY GENERAL, ET AL. *v.* BINDERUP ET AL.; and

No. 16–983. BINDERUP ET AL. *v.* SESSIONS, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the petitions for writs of certiorari. Reported below: 836 F. 3d 336.

No. 16–894. PERUTA ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 824 F. 3d 919.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

The Second Amendment to the Constitution guarantees that "the right of the people to keep and bear Arm[s] shall not be infringed." At issue in this case is whether that guarantee protects the right to carry firearms in public for self-defense. Neither party disputes that the issue is one of national importance or that the courts of appeals have already weighed in extensively. I would therefore grant the petition for a writ of certiorari.

I

California generally prohibits the average citizen from carrying a firearm in public spaces, either openly or concealed. With a few limited exceptions, the State prohibits open carry altogether. Cal. Penal Code Ann. §§ 25850, 26350 (West 2012). It proscribes concealed carry unless a resident obtains a license by showing "good cause," among other criteria, §§ 26150, 26155, and it authorizes counties to set rules for when an applicant has shown good cause, § 26160.

In the county where petitioners reside, the sheriff has interpreted "good cause" to require an applicant to show that he has a particularized need, substantiated by documentary evidence, to carry a firearm for self-defense. The sheriff's policy specifies that "concern for one's personal safety" does not "alone" satisfy this requirement. *Peruta* v. *County of San Diego*, 742 F. 3d 1144, 1148 (CA9 2014) (internal quotation marks omitted). Instead, an applicant must show "a set of circumstances that distinguish him from the mainstream and cause him to be placed in harm's way." *Id.*, at 1169 (internal quotation marks and alterations omitted). "[A] typical citizen fearing for his personal safety—by definition—cannot distinguish himself from the mainstream." *Ibid.* (emphasis deleted; internal quotation marks and alterations omitted).

As a result, ordinary, "law-abiding, responsible citizens," *District of Columbia* v. *Heller*, 554 U. S. 570, 635 (2008), may not obtain a permit for concealed carry of a firearm in public spaces.

Petitioners are residents of San Diego County (plus an association with numerous county residents as members) who are unable to obtain a license for concealed carry due to the county's policy and, because the State generally bans open carry, are thus unable to bear firearms in public in any manner. They sued under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that this near-total prohibition on public carry violates their Second Amendment right to bear arms. They requested declaratory and injunctive relief to prevent the sheriff from denying licenses based on his restrictive interpretation of "good cause," as well as other "relief as the Court deems just and proper." First Amended Complaint in No. 3:09–cv–02371 (SD Cal.), ¶¶149, 150, 152. The District Court granted respondents' motion for summary judgment, and petitioners appealed to the Ninth Circuit.

In a thorough opinion, a panel of the Ninth Circuit reversed. 742 F. 3d 1144. The panel examined the constitutional text and this Court's precedents, as well as historical sources from before the founding era through the end of the 19th century. *Id.*, at 1150–1166. Based on these sources, the court concluded that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense . . . constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." *Id.*, at 1166. It thus reversed the District Court and held that the sheriff's interpretation of "good cause" in combination with the other aspects of the State's regime violated the Second Amendment's command that a State "permit *some form* of carry for self-defense outside the home." *Id.*, at 1172.

The Ninth Circuit *sua sponte* granted rehearing en banc and, by a divided court, reversed the panel decision. In the en banc court's view, because petitioners specifically asked for the invalidation of the sheriff's "good cause" interpretation, their legal challenge was limited to that aspect of the applicable regulatory scheme. The court thus declined to "answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public." *Peruta* v. *County of San Diego*, 824 F. 3d 919, 942 (2016). It instead held only that "the Second Amendment does not preserve or protect a right of a member of

the general public to carry *concealed* firearms in public." *Id.*, at 924 (emphasis added).

II

We should have granted certiorari in this case. The approach taken by the en banc court is indefensible, and the petition raises important questions that this Court should address. I see no reason to await another case.

A

The en banc court's decision to limit its review to whether the Second Amendment protects the right to concealed carry—as opposed to the more general right to public carry—was untenable. Most fundamentally, it was not justified by the terms of the complaint, which called into question the State's regulatory scheme as a whole. See First Amended Complaint ¶63 ("Because California does not permit the open carriage of loaded firearms, concealed carriage with a [concealed carry] permit is the only means by which an individual can bear arms in public places"); *id.*, ¶74 ("States may not completely ban the carrying of handguns for self-defense"). And although the complaint specified the remedy that intruded least on the State's overall regulatory regime—declaratory relief and an injunction against the sheriff's restrictive interpretation of "good cause"—it also requested "[a]ny further relief as the Court deems just and proper." *Id.*, ¶152.

Nor was the Ninth Circuit's approach justified by the history of this litigation. The District Court emphasized that "the heart of the parties' dispute" is whether the Second Amendment protects "the right to carry a loaded handgun in public, either openly or in a concealed manner." *Peruta* v. *County of San Diego*, 758 F. Supp. 2d 1106, 1109 (SD Cal. 2010). As the Ninth Circuit panel pointed out, "[petitioners] argue that the San Diego County policy in light of the California licensing scheme *as a whole* violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in *any* manner." 742 F. 3d, at 1171. The panel further observed that although petitioners "focu[s]" their challenge on the "licensing scheme for concealed carry," this is "for good reason: acquiring such a license is the only practical avenue by which [they] may come lawfully to carry a gun for self-defense in San Diego County." *Ibid.* Even the en banc court acknowledged that petitioners "base their argument on the en-

tirety of California's statutory scheme" and "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms." 824 F. 3d, at 927.

B

Had the en banc Ninth Circuit answered the question actually at issue in this case, it likely would have been compelled to reach the opposite result. This Court has already suggested that the Second Amendment protects the right to carry firearms in public in some fashion. As we explained in *Heller*, to "bear arms" means to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" 554 U. S., at 584 (quoting *Muscarello* v. *United States*, 524 U. S. 125, 143 (1998) (GINSBURG, J., dissenting); alterations and some internal quotation marks omitted). The most natural reading of this definition encompasses public carry. I find it extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen. See *Drake* v. *Filko*, 724 F. 3d 426, 444 (CA3 2013) (Hardiman, J., dissenting) ("To speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of the [*Heller*] Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court"); *Moore* v. *Madigan*, 702 F. 3d 933, 936 (CA7 2012) (similar).

The relevant history appears to support this understanding. The panel opinion below pointed to a wealth of cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction, which together strongly suggest that the right to bear arms includes the right to bear arms in public in some manner. See 742 F. 3d, at 1153–1166 (canvassing the relevant history in detail); Brief for National Rifle Association as *Amicus Curiae* 6–16. For example, in *Nunn* v. *State*, 1 Ga. 243 (1846)—a decision the *Heller* Court discussed extensively as illustrative of the proper understanding of the right, 554 U. S., at 612—the Georgia Supreme Court struck down a ban on open carry although it upheld a ban on concealed carry. 1 Ga., at 251. Other cases similarly suggest that, although some regulation of public carry is permissible, an effective ban on all forms of public carry is not. See, *e. g.*, *State* v. *Reid*, 1 Ala. 612, 616–617 (1840)

("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

Finally, the Second Amendment's core purpose further supports the conclusion that the right to bear arms extends to public carry. The Court in *Heller* emphasized that "self-defense" is "the *central component* of the [Second Amendment] right itself." 554 U. S., at 599. This purpose is not limited only to the home, even though the need for self-defense may be "most acute" there. *Id.*, at 628. "Self-defense has to take place wherever the person happens to be," and in some circumstances a person may be more vulnerable in a public place than in his own house. Volokh, Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1515 (2009).

C

Even if other Members of the Court do not agree that the Second Amendment likely protects a right to public carry, the time has come for the Court to answer this important question definitively. Twenty-six States have asked us to resolve the question presented, see Brief for Alabama et al. as *Amici Curiae*, and the lower courts have fully vetted the issue. At least four other Courts of Appeals and three state courts of last resort have decided cases regarding the ability of States to regulate the public carry of firearms. Those decisions (plus the one below) have produced thorough opinions on both sides of the issue. See *Drake*, 724 F. 3d 426, cert. denied *sub nom. Drake* v. *Jerejian*, 572 U. S. 1100 (2014); 724 F. 3d, at 440 (Hardiman, J., dissenting); *Woollard* v. *Gallagher*, 712 F. 3d 865 (CA4), cert. denied, 571 U. S. 952 (2013); *Kachalsky* v. *County of Westchester*, 701 F. 3d 81 (CA2 2012), cert. denied *sub nom. Kachalsky* v. *Cacace*, 569 U. S. 918 (2013); *Madigan*, 702 F. 3d 933; *id.*, at 943 (Williams, J., dissenting); *Commonwealth* v. *Gouse*, 461 Mass. 787, 800–802, 965 N. E. 2d 774, 785–786 (2012); *Williams* v. *State*, 417 Md. 479, 496, 10 A. 3d 1167, 1177 (2011); *Mack* v. *United States*, 6 A. 3d 1224, 1236 (D. C. 2010). Hence, I do not see much value in waiting for additional courts to weigh in, especially when constitutional rights are at stake.

The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as

a disfavored right. See *Friedman* v. *Highland Park*, 577 U. S. 1039, 1043 (2015) (THOMAS, J., dissenting from denial of certiorari) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions"); *Jackson* v. *City and County of San Francisco*, 576 U. S. 1013, 1017 (2015) (same). The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights. *Id.*, at 1014 ("Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document"). The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in *McDonald* v. *Chicago*, 561 U. S. 742. Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.

* * *

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. I respectfully dissent.

No. 16–964. MAGLUTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 660 Fed. Appx. 803.

No. 16–1006. DICKEY *v.* ALLBAUGH, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 664 Fed. Appx. 690.

No. 16–1070. TOWN OF EAST HAMPTON, NEW YORK *v.* FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ET AL. C. A.

2d Cir. Motion of Committee to Stop Airport Expansion et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 841 F. 3d 133.

No. 16–1077. Bay Point Properties, Inc., fka BP Properties, Inc. *v.* Mississippi Transportation Commission et al. Sup. Ct. Miss. Motions of Cato Institute et al., Pacific Legal Foundation, and Virginia Institute for Public Policy et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 201 So. 3d 1046.

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

When a State negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that. But this decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution. See *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327 (1893). Tension appears to exist, too, between the decision here and decisions of the Federal Circuit. See, *e. g.*, *Toews* v. *United States*, 376 F. 3d 1371, 1376 (2004). And the matter is one of general importance as well, for many States have adopted statutes like Mississippi's and the question presented implicates a fundamental feature of the compact between citizen and State. Given all this, these are questions the Court ought take up at its next opportunity.

No. 16–1126. South Carolina *v.* Hunsberger. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 16–1142. South Carolina *v.* Hunsberger. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 418 S. C. 335, 794 S. E. 2d 368.

No. 16–1168. American Municipal Power, Inc., et al. *v.* Environmental Protection Agency et al. C. A. D. C. Cir. Motions of Southeastern Legal Foundation and Washington Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 830 F. 3d 579.

No. 16–1253. VENCIL *v.* PENNSYLVANIA STATE POLICE ET AL. Sup. Ct. Pa. Motion of Autistic Self Advocacy Network et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 638 Pa. 1, 152 A. 3d 235.

No. 16–1255. LOCKETT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOCKETT *v.* FALLIN, GOVERNOR OF OKLAHOMA, ET AL. C. A. 10th Cir. Motion of Austin Sarat et al. for leave to file brief as *amici curiae* granted. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 841 F. 3d 1098.

No. 16–1355. PRATHER *v.* AT&T, INC., ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 847 F. 3d 1097.

Rehearing Denied

No. 16–587. UNARA *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., 580 U. S. 1053;

No. 16–6651. HORTON *v.* GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL., 580 U. S. 1066;

No. 16–7966. NELSON *v.* MV TRANSPORTATION, INC., ET AL., 581 U. S. 924;

No. 16–7987. LANDIS *v.* BUNCOMBE COUNTY, NORTH CAROLINA, ET AL., 581 U. S. 924;

No. 16–8007. ORR *v.* TATUM, WARDEN, 580 U. S. 1222;

No. 16–8110. MONTE *v.* MINGO, WARDEN, ET AL., 581 U. S. 962; and

No. 16–8663. IN RE MONTE, 581 U. S. 958. Petitions for rehearing denied.

No. 16–642. GROSSMAN *v.* WEHRLE, 580 U. S. 1099 and 1212. Motion of petitioner for leave to file petition for rehearing denied.

No. 16–8625. MAEHR *v.* COMMISSIONER OF INTERNAL REVENUE ET AL., 581 U. S. 987. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

JUNE 27, 2017

Certiorari Granted—Vacated and Remanded

No. 15–556. DOYLE ET VIR, INDIVIDUALLY AND AS NEXT FRIENDS OF A. D. ET AL., ET AL. *v.* TAXPAYERS FOR PUBLIC

EDUCATION ET AL. Sup. Ct. Colo. Reported below: 351 P. 3d 461;

No. 15–557. DOUGLAS COUNTY SCHOOL DISTRICT ET AL. *v.* TAXPAYERS FOR PUBLIC EDUCATION ET AL. Sup. Ct. Colo. Reported below: 351 P. 3d 461;

No. 15–558. COLORADO STATE BOARD OF EDUCATION ET AL. *v.* TAXPAYERS FOR PUBLIC EDUCATION ET AL. Sup. Ct. Colo. Reported below: 351 P. 3d 461; and

No. 15–1409. NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS *v.* MOSES ET AL. Sup. Ct. N. M. Reported below: 2015–NMSC–036, 367 P. 3d 838. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, *ante*, p. 449.

*Miscellaneous Orders**

No. 16–1436. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 571.] Motions of Immigration Reform Law Institute, Citizens United et al., State of New York et al., Constitutional Law Scholars, and Becket Fund for Religious Liberty for leave to file briefs as *amici curiae* granted.

Certiorari Granted

No. 15–1439. CYAN, INC., ET AL. *v.* BEAVER COUNTY EMPLOYEES RETIREMENT FUND ET AL. Ct. App. Cal., 1st App. Dist., Div. 4. Certiorari granted.

No. 16–492. PEM ENTITIES LLC *v.* LEVIN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 655 Fed. Appx. 971.

No. 16–1144. MARINELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 839 F. 3d 209.

No. 16–476. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL.; and

No. 16–477. NEW JERSEY THOROUGHBRED HORSEMEN'S ASSN., INC. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total

*For the Court's order making allotment of Justices, see *ante*, p. IV.

of one hour is allotted for oral argument. Reported below: 832 F. 3d 389.

No. 16–534. RUBIN ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 830 F. 3d 470.

Certiorari Denied

No. 15–1192. UNITED STATES *v.* LOST TREE VILLAGE CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 787 F. 3d 1111.

No. 15–1461. MESHAL *v.* HIGGENBOTHAM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 804 F. 3d 417.

No. 16–206. DEKALB COUNTY PENSION FUND *v.* TRANSOCEAN LTD. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 3d 393.

No. 16–372. SRM GLOBAL MASTER FUND L. P. *v.* BEAR STEARNS COS. LLC ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 829 F. 3d 173.

No. 16–389. DUSEK ET AL. *v.* JPMORGAN CHASE & CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 3d 1243.

No. 16–1194. KINDERACE, LLC *v.* CITY OF SAMMAMISH, WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 194 Wash. App. 835, 379 P. 3d 135.

No. 16–6796. HOUR *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

JULY 3, 2017

Dismissal Under Rule 46

No. 16–868. MYTON CITY, UTAH *v.* UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 835 F. 3d 1255.

JULY 7, 2017

Miscellaneous Order

No. 16A1224. ANDERSON ET AL. *v.* LOERTSCHER. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted. The injunction issued by the United States District Court for the Western District of Wisconsin, case No. 3:14–cv–00870–jdp, on April 28, 2017, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Seventh Circuit. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would deny the application for stay.

JULY 17, 2017

Dismissal Under Rule 46

No. 16–1175. MACPHERSON, EXECUTOR OF THE ESTATE OF MACPHERSON, DECEASED *v.* MANORCARE OF YEADON PA, LLC, DBA MANORCARE HEALTH SERVICES-YEADON, ET AL. Super. Ct. Pa. Certiorari dismissed under this Court's Rule 46. Reported below: 128 A. 3d 1209.

Miscellaneous Order

No. D–2982. IN RE HESTERBERG. Gregory Xavier Hesterberg, of Garden City, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 12, 2017, [*ante*, p. 902] is discharged.

Rehearing Denied

No. 15–1139. MERRILL *v.* MERRILL, 581 U. S. 989;
No. 16–1069. SHIPP *v.* ESTATE OF KING ET AL., 581 U. S. 973;
No. 16–1122. BELL ET UX. *v.* DYCK-O'NEAL, INC., 581 U. S. 974;
No. 16–1184. ARUNACHALAM *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, 581 U. S. 1018;
No. 16–1226. HUBBARD *v.* MISSOURI DEPARTMENT OF MENTAL HEALTH ET AL., 581 U. S. 1007;
No. 16–7576. ZAGORSKI *v.* TENNESSEE, 581 U. S. 941;
No. 16–7908. AYER *v.* ZENK, WARDEN, 581 U. S. 923;
No. 16–7929. IN RE ROGERS, 581 U. S. 917;

No. 16–7941. LINDSAY *v.* CASTELLOE, 581 U. S. 924;

No. 16–7989. BROCATTO *v.* FRAUENHEIM, WARDEN, 581 U. S. 942;

No. 16–7998. MORGAN *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, 581 U. S. 924;

No. 16–8036. ABDULHADI *v.* SMITH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL., 581 U. S. 910;

No. 16–8080. BYNUM *v.* FLORIDA GAS TRANSMISSION CO., LLC, 581 U. S. 961;

No. 16–8099. BRINSON *v.* DOZIER, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 581 U. S. 962;

No. 16–8103. DAMANI *v.* SIMER SP, INC., ET AL., 581 U. S. 962;

No. 16–8115. TULLIS *v.* BARRETT, WARDEN, ET AL., 581 U. S. 943;

No. 16–8131. PENTECOST *v.* SOUTH DAKOTA, 581 U. S. 962;

No. 16–8166. VERDI *v.* WILKINSON COUNTY, GEORGIA, ET AL., 581 U. S. 977;

No. 16–8238. MCCOY *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 581 U. S. 963;

No. 16–8243. REYES *v.* ARTUS, 581 U. S. 944;

No. 16–8312. ST. CLAIRE *v.* UNITED STATES, 581 U. S. 928;

No. 16–8330. BALTIMORE *v.* NELSON ET AL., 581 U. S. 980;

No. 16–8362. HOWARD *v.* FLORIDA, 581 U. S. 995;

No. 16–8587. IN RE THOMAS-BEY, 581 U. S. 938;

No. 16–8601. VILLALTA *v.* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ET AL., 581 U. S. 1009;

No. 16–8608. HAMPTON *v.* VANNOY, WARDEN, ET AL., 581 U. S. 982;

No. 16–8680. DULAURENCE *v.* TELEGEN ET AL., 581 U. S. 983;

No. 16–8692. LEGG *v.* NATIONSTAR MORTGAGE LLC, 581 U. S. 998;

No. 16–8725. RAFIDI *v.* UNITED STATES, 581 U. S. 985; and

No. 16–8809. JONES *v.* UNITED STATES, 581 U. S. 1011. Petitions for rehearing denied.

No. 16–760. ENGLISH *v.* BANK OF AMERICA, N. A., ET AL., 580 U. S. 1117. Motion for leave to file petition for rehearing denied.

No. 16–7906. LEWIS *v.* NISSAN NORTH AMERICA, INC., ET AL., 581 U. S. 931. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JULY 19, 2017

Dismissal Under Rule 46

No. 16–538. WAYNE COUNTY, MICHIGAN, ET AL. *v.* RICHKO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HORVATH. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 819 F. 3d 907.

Miscellaneous Order

No. 16–1540 (16A1191). TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* HAWAII ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 571.] The Government's motion seeking clarification of our order of June 26, 2017, is denied. The District Court order modifying the preliminary injunction with respect to refugees covered by a formal assurance is stayed pending resolution of the Government's appeal to the Court of Appeals for the Ninth Circuit. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would have stayed the District Court order in its entirety.

JULY 25, 2017

Certiorari Denied

No. 16–9725 (17A83). PHILLIPS *v.* OHIO. Ct. App. Ohio, 9th App. Dist., Summit County. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied. Certiorari denied. Reported below: 2016-Ohio-1198.

No. 17–5198 (17A78). OTTE ET AL. *v.* MORGAN ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied. Certiorari denied. Reported below: 860 F. 3d 881.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The question before this Court, as appropriately summarized by Judge Moore in dissent, is narrow: "Should Gary Otte, Ronald Phillips, and Raymond Tibbetts have a trial on their claim that Ohio's execution protocol is a cruel and unusual punishment, or should Ohio execute them without such a trial?" *In re Ohio Execution Protocol*, 860 F. 3d 881, 892 (CA6 2017). The District Court, after extensive review of the evidence, held that a trial

was warranted and granted a preliminary injunction. It did so after a 5-day evidentiary hearing, issuing a 119-page opinion finding that petitioners had presented enough evidence to demonstrate that they were likely to prevail on their claim that the Ohio execution protocol posed a substantial risk of severe pain and that an alternative method of execution was sufficiently available. Although a panel of the Sixth Circuit initially affirmed those findings, a divided en banc court later reversed over the dissent of six of its members.

In reversing, the Sixth Circuit en banc court failed to afford the District Court due deference. See *Glossip* v. *Gross*, 576 U. S. 863, 878–879, 881 (2015) (reviewing findings by the District Court regarding both risk of pain and available alternatives for clear error). As Judge Moore carefully detailed in her dissent, the District Court thoroughly reviewed the evidence firsthand and found that the petitioners demonstrated a likelihood of success on their claim that they will be unconstitutionally executed. The Court of Appeals and this Court should not so lightly disregard those findings.

For this reason, and others set forth in *McGehee* v. *Hutchinson*, 581 U. S. 933, 935 (2017) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari), I dissent again from this Court's failure to step in when significant issues of life and death are present.

No. 17–5310 (17A105). Phillips *v.* Jenkins, Warden. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to Justice Kagan, and by her referred to the Court, denied. Certiorari denied.

July 27, 2017

Certiorari Denied

No. 17–5393 (17A130). Preyor *v.* Davis, 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 Alito, and by him referred to the Court, denied. Certiorari denied. Reported below: 704 Fed. Appx. 331.

AUGUST 7, 2017

Miscellaneous Orders

No. D–2958. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2960. IN RE DISBARMENT OF SKELOS. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2961. IN RE DISBARMENT OF CONSTANTOPES. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2962. IN RE DISBARMENT OF WALKER. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2963. IN RE DISBARMENT OF LOCKLAIR. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2965. IN RE DISBARMENT OF MEI. Disbarment entered. [For earlier order herein, see 581 U. S. 915.]

No. D–2966. IN RE DISBARMENT OF HARTKE. Disbarment entered. [For earlier order herein, see 581 U. S. 915.]

Rehearing Denied

No. 16–1173. IKO *v.* IKO, 581 U. S. 1017;
No. 16–1177. VIRGINIA ET AL. *v.* LEBLANC, *ante*, p. 91;
No. 16–1279. SOLONICHNYY *v.* UNITED STATES, 581 U. S. 1007;
No. 16–8040. WHITNUM *v.* TOWN OF GREENWICH, CONNECTICUT, ET AL., 581 U. S. 942;
No. 16–8052. MINNIS *v.* ILLINOIS, *ante*, p. 934;
No. 16–8264. VALENTINE *v.* CITY OF AUSTIN, TEXAS, ET AL., 581 U. S. 979;
No. 16–8265. SMITH *v.* TAYLOR, WARDEN, 581 U. S. 979;
No. 16–8310. ROBINSON *v.* REGIONAL MEDICAL CENTER AT MEMPHIS ET AL., 581 U. S. 980;
No. 16–8332. AVILA *v.* CALIFORNIA, 581 U. S. 980;
No. 16–8347. MORALES *v.* CUOMO ET AL., 581 U. S. 995;
No. 16–8388. GALAN *v.* GEGENHEIMER ET AL., 581 U. S. 996;
No. 16–8430. REYNOLDS *v.* HODGES, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL., 581 U. S. 981;

No. 16–8446. JOHNSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 581 U. S. 1008;

No. 16–8458. JOHNSON *v.* WOODS, WARDEN, 581 U. S. 1008;

No. 16–8525. ALLEN *v.* ILLINOIS, 581 U. S. 981;

No. 16–8553. PAYNE *v.* OHIO, 581 U. S. 1009;

No. 16–8566. TOWNSEND *v.* VANNOY, WARDEN, 581 U. S. 997;

No. 16–8614. HAWRELAK *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 581 U. S. 1010;

No. 16–8655. SANCHO *v.* ANDERSON SCHOOL DISTRICT FOUR, *ante*, p. 906;

No. 16–8726. STEWART *v.* PERRY, 581 U. S. 1011;

No. 16–8748. IN RE SOUTHGATE, *ante*, p. 913;

No. 16–8767. IN RE DAVIS, *ante*, p. 914;

No. 16–8785. IN RE GADSDEN, 581 U. S. 1005;

No. 16–8796. IN RE BOOKER-EL, 581 U. S. 971;

No. 16–8812. CUMMINGS *v.* INTERNATIONAL UNION SECURITY POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA), LOCAL 555, ET AL., *ante*, p. 935;

No. 16–8969. IN RE CABRERA, 581 U. S. 1017;

No. 16–8985. DESAI *v.* SECURITIES AND EXCHANGE COMMISSION, 581 U. S. 1024;

No. 16–9026. COLTER *v.* CHAPMAN CHEVROLET, *ante*, p. 908;

No. 16–9039. EDWARDS *v.* UNITED STATES, 581 U. S. 1025;

No. 16–9069. IN RE ROBINSON, 581 U. S. 1005;

No. 16–9127. LASHER *v.* UNITED STATES, *ante*, p. 909;

No. 16–9150. IN RE BRACKEN, *ante*, p. 903;

No. 16–9161. BUCZEK *v.* UNITED STATES, *ante*, p. 910; and

No. 16–9226. IN RE MANNING, *ante*, p. 903. Petitions for rehearing denied.

No. 16–8976. GRIGSBY *v.* UNITED STATES, 581 U. S. 1026; and

No. 16–8977. GRIGSBY *v.* UNITED STATES, 581 U. S. 1026. Petitions for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of these petitions.

No. 16–8982. RICHMOND *v.* UNITED STATES, 581 U. S. 1026. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

August 10, 2017

Certiorari Dismissed

No. 16–492. PEM Entities LLC *v.* Levin et al. C. A. 4th Cir. [Certiorari granted, *ante*, p. 951.] Writ of certiorari dismissed as improvidently granted. Joint motion of PEM Entities LLC and Province Grande Olde Liberty, LLC, to confirm party status is dismissed as moot.

August 16, 2017

Dismissal Under Rule 46

No. 16–1500. City of Bowling Green, Kentucky, et al. *v.* Woodcock, as Administratrix of the Estate of Harrison, Deceased. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 679 Fed. Appx. 419.

August 22, 2017

Dismissal Under Rule 46

No. 16–744. FireEye, Inc., et al. *v.* Superior Court of California, Santa Clara County. Ct. App. Cal., 6th App. Dist. Certiorari dismissed under this Court's Rule 46.1.

August 24, 2017

Miscellaneous Order

No. 16–1436. Trump, President of the United States, et al. *v.* International Refugee Assistance Project et al. C. A. 4th Cir.; and

No. 16–1540. Trump, President of the United States, et al. *v.* Hawaii et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 571.] Further consideration of motion of respondent Hawaii et al. to add John Doe as a party to No. 16–1540 deferred to hearing of the case on the merits.

Certiorari Denied

No. 16–9033 (17A191). Asay *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 210 So. 3d 1.

August 25, 2017

Miscellaneous Orders

No. D–2957. In re Disbarment of McMullen. Disbarment entered. [For earlier order herein, see 581 U. S. 914.]

No. D–2964. In re Disbarment of Saxon. Disbarment entered. [For earlier order herein, see 581 U. S. 915.]

No. D–2968. In re Disbarment of Vega. Disbarment entered. [For earlier order herein, see 581 U. S. 915.]

No. D–2969. In re Disbarment of Corbett. Disbarment entered. [For earlier order herein, see 581 U. S. 970.]

No. D–2974. In re Disbarment of Sampson. Disbarment entered. [For earlier order herein, see 581 U. S. 970.]

No. D–2976. In re Disbarment of Reid. Disbarment entered. [For earlier order herein, see 581 U. S. 970.]

No. D–2978. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2979. In re Disbarment of Bailey. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2980. In re Disbarment of Ferrell. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2983. In re Disbarment of Wroblewski. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2984. In re Disbarment of Thornsbury. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–2985. In re Disbarment of Longmeyer. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. D–2986. In re Disbarment of Kuchinsky. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. D–2987. In re Disbarment of Bello. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. D–2989. In re Disbarment of Boisseau. Disbarment entered. [For earlier order herein, see *ante*, p. 903.]

No. D–2990. In re Disbarment of Moenning. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. D–2991. In re Disbarment of Coyle. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2992. In re Disbarment of Padgett. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. D–2993. In re Disbarment of Carter. Disbarment entered. [For earlier order herein, see *ante*, p. 913.]

No. 15–1485. District of Columbia et al. *v.* Wesby et al. C. A. D. C. Cir. [Certiorari granted, 580 U. S. 1097.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–285. Epic Systems Corp. *v.* Lewis. C. A. 7th Cir. [Certiorari granted, 580 U. S. 1089.] Motion of petitioner to dispense with printing joint appendix granted.

No. 16–299. National Association of Manufacturers *v.* Department of Defense et al. C. A. 6th Cir. [Certiorari granted, 580 U. S. 1088.] Motion of respondent Ohio et al. for divided argument granted.

No. 16–980. Husted, Ohio Secretary of State *v.* A. Philip Randolph Institute et al. C. A. 6th Cir. [Certiorari granted, 581 U. S. 1006.] Joint motion of the parties to dispense with printing joint appendix granted.

No. 16–1276. Digital Realty Trust, Inc. *v.* Somers. C. A. 9th Cir. [Certiorari granted, *ante*, p. 929.] Motion of petitioner to dispense with printing joint appendix granted.

Certiorari Granted

No. 16–1067. Murphy *v.* Smith et al. C. A. 7th Cir. Certiorari granted. Reported below: 844 F. 3d 653.

Rehearing Denied

No. 16–1116. Jenkins, Warden *v.* Hutton, *ante*, p. 280;

No. 16–1227. Robertson *v.* EMI Christian Music Group, Inc., et al., *ante*, p. 915;

No. 16–1245. MUNOZ *v.* GOLDEN EAGLE INSURANCE CORP., *ante*, p. 931;

No. 16–1250. BARTH *v.* ISLAMIC SOCIETY OF BASKING RIDGE ET AL., 581 U. S. 1007;

No. 16–1270. POPE *v.* GUNS ET AL., *ante*, p. 905;

No. 16–1289. DCV IMPORTS, LLC *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *ante*, p. 931;

No. 16–1319. PADMANABHAN *v.* KASSLER ET AL., *ante*, p. 932;

No. 16–1353. KORMAN ET AL. *v.* UNITED STATES, *ante*, p. 932;

No. 16–8442. MOORE *v.* UNITED STATES, 581 U. S. 964;

No. 16–8449. TIPTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 581 U. S. 997;

No. 16–8469. SALDANA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 581 U. S. 1008;

No. 16–8497. OKEOWO *v.* HARLEQUIN BOOKS S. A. ET AL., 581 U. S. 981;

No. 16–8620. SMITH *v.* SOCIAL SECURITY ADMINISTRATION, 581 U. S. 1010;

No. 16–8657. ROCKEFELLER *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 581 U. S. 983;

No. 16–8670. COULSTON *v.* CAMERON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL., *ante*, p. 907;

No. 16–8683. COLEMAN *v.* STARBUCKS COFFEE CO., 581 U. S. 1010;

No. 16–8720. PARKER *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 581 U. S. 1021;

No. 16–8730. WHITE *v.* UNITED STATES, 581 U. S. 998;

No. 16–8771. YABLONSKY *v.* PARAMO, WARDEN, *ante*, p. 934;

No. 16–8937. KRAEMER *v.* ILLINOIS, 581 U. S. 1023;

No. 16–9050. THOMPSON *v.* UNITED STATES, 581 U. S. 1025;

No. 16–9129. KAHRE *v.* UNITED STATES, *ante*, p. 909; and

No. 16–9206. ANDRADE *v.* UNITED STATES, *ante*, p. 922. Petitions for rehearing denied.

No. 15–7350. BUTLER *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 578 U. S. 925 and 580 U. S. 911. Motion for leave to file petition for rehearing denied.

No. 16–9113. DERROW *v.* UNITED STATES, *ante*, p. 911. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

SEPTEMBER 12, 2017

Miscellaneous Orders

No. 17A225. ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, granted, and it is ordered that the order of the United States District Court for the Western District of Texas, case No. SA–11–CV–360, entered August 15, 2017, is stayed pending the timely filing and disposition of an appeal to this Court. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

No. 17A245. ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, granted, and it is ordered that the order of the United States District Court for the Western District of Texas, case No. SA–11–CV–360, entered August 24, 2017, is stayed pending the timely filing and disposition of an appeal to this Court. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

No. 17A275 (16–1540). TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* HAWAII ET AL. Application for stay of mandate, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Ninth Circuit in case No. 17–16426 is stayed with respect to refugees covered by a formal assurance, pending further order of this Court.

Certiorari Denied

No. 16–9317 (17A136). OTTE *v.* OHIO. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied. Certiorari denied. Reported below: 148 Ohio St. 3d 1407, 2017-Ohio-573, 69 N. E. 3d 748.

SEPTEMBER 13, 2017

Miscellaneous Order

No. 17–333. BENISEK ET AL. *v.* LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, ET AL. Appeal from

D. C. Md. Motion of appellants to expedite consideration of jurisdictional statement denied.

SEPTEMBER 14, 2017

Dismissal Under Rule 46

No. 17–115. UNION PACIFIC RAILROAD CO. *v.* BARKER. Ct. App. Iowa. Certiorari dismissed under this Court's Rule 46.1. Reported below: 889 N. W. 2d 243.

SEPTEMBER 20, 2017

Dismissal Under Rule 46

No. 16–8987. ROBINSON *v.* LEWIS, WARDEN, ET AL. Sup. Ct. S. C. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 25, 2017

Miscellaneous Orders

No. 17A225. ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL. Respondents' letter to the Clerk, dated September 15, 2017, is construed as a motion and denied.

No. 17A245. ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL. Respondents' letter to the Clerk, dated September 15, 2017, is construed as a motion and denied.

No. 15–1509. U. S. BANK N. A., TRUSTEE, BY AND THROUGH CWCAPITAL ASSET MANAGEMENT LLC *v.* VILLAGE AT LAKERIDGE, LLC. C. A. 9th Cir. [Certiorari granted, 580 U. S. 1216.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–285. EPIC SYSTEMS CORP. *v.* LEWIS. C. A. 7th Cir.;
No. 16–300. ERNST & YOUNG LLP ET AL. *v.* MORRIS ET AL. C. A. 9th Cir.; and
No. 16–307. NATIONAL LABOR RELATIONS BOARD *v.* MURPHY OIL USA, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 580 U. S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of National Labor Relations Board for divided argument granted.

No. 16–460. ARTIS *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. [Certiorari granted, 580 U. S. 1159.] Motion of Wisconsin et al.

for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 16–499. JESNER ET AL. *v.* ARAB BANK, PLC. C. A. 2d Cir. [Certiorari granted, 581 U. S. 904.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–534. RUBIN ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 952.] Motion of petitioners to dispense with printing joint appendix granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 16–1144. MARINELLO *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante*, p. 951.] Motion of petitioner to dispense with printing joint appendix granted.

No. 16–1161. GILL ET AL. *v.* WHITFORD ET AL. [Probable jurisdiction postponed, *ante*, p. 914.] D. C. W. D. Wis. Motion of Wisconsin State Senate et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 16–1436. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. C. A. 4th Cir.; and

No. 16–1540. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* HAWAII ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 571.] The parties are directed to file letter briefs addressing whether, or to what extent, the Proclamation issued on September 24, 2017, may render cases No. 16–1436 and No. 16–1540 moot. The parties should also address whether, or to what extent, scheduled expiration of §§ 6(a) and 6(b) of Executive Order No. 13780 may render those aspects of case No. 16–1540 moot. Briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before noon, Thursday, October 5, 2017. The cases are removed from oral argument calendar, pending further order of the Court.

SEPTEMBER 26, 2017

Miscellaneous Order

No. 17A330 (17–6075). THARPE *v.* SELLERS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death,

presented to JUSTICE THOMAS, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would deny the application.

SEPTEMBER 27, 2017

Dismissal Under Rule 46

No. 16–1283. PEYTON ET AL. *v.* BURWELL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 670 Fed. Appx. 734.

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see *post,* p. 970.)

SEPTEMBER 28, 2017

Certiorari Granted

No. 16–1027. COLLINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari granted. Reported below: 292 Va. 486, 790 S. E. 2d 611.

No. 16–1150. HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST *v.* HALL ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 679 Fed. Appx. 142.

No. 16–1362. ENCINO MOTORCARS, LLC *v.* NAVARRO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 845 F. 3d 925.

No. 16–1371. BYRD *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 679 Fed. Appx. 146.

No. 16–1466. JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 851 F. 3d 746.

No. 16–961. DALMAZZI *v.* UNITED STATES. Reported below: 76 M. J. 1;

No. 16–1017. COX *v.* UNITED STATES (Reported below: 76 M. J. 64); CRAIG *v.* UNITED STATES (76 M. J. 64); LEWIS *v.* UNITED STATES (76 M. J. 54); MILLER *v.* UNITED STATES (76 M. J. 64);

MORCHINEK *v.* UNITED STATES (76 M. J. 54); O'SHAUGHNESSY *v.* UNITED STATES (76 M. J. 54); and

No. 16–1423. ORTIZ *v.* UNITED STATES. Reported below: 76 M. J. 125 and 189. C. A. Armed Forces. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: "Whether this Court has jurisdiction to review the cases in Nos. 16–961 and 16–1017 under 28 U. S. C. § 1259(3)."

No. 16–1495. CITY OF HAYS, KANSAS *v.* VOGT. C. A. 10th Cir. Certiorari granted. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 844 F. 3d 1235.

No. 16–8255. MCCOY *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 2014–1449 (La. 10/19/16), 218 So. 3d 535.

No. 16–9493. ROSALES-MIRELES *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 850 F. 3d 246.

SEPTEMBER 29, 2017

Dismissal Under Rule 46

No. 17–6130. THARPE *v.* SELLERS, WARDEN. Sup. Ct. Ga. Certiorari dismissed under this Court's Rule 46.1.

REVISIONS TO RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED SEPTEMBER 27, 2017

EFFECTIVE NOVEMBER 13, 2017

The following are revisions to the Rules of the Supreme Court of the United States as adopted on September 27, 2017. See *post*, p. 970. The amended Rules became effective November 13, 2017, as provided in Rule 48, *post*, p. 975.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, 493 U. S. 1099, 515 U. S. 1197, 519 U. S. 1161, 525 U. S. 1191, 537 U. S. 1249, 544 U. S. 1073, 551 U. S. 1195, and 558 U. S. 1161.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 27, 2017

IT IS ORDERED that the revised Rules of this Court, approved by the Court and lodged with the Clerk, shall be effective November 13, 2017, and that the amended provisions shall be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated April 19, 2013, see 569 U. S. 1041, shall be rescinded as of November 12, 2017, and that the revised Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending.

REVISIONS TO RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED SEPTEMBER 27, 2017—EFFECTIVE NOVEMBER 13, 2017

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

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Rule 25. Briefs on the Merits: Number of Copies and Time to File

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9. [Abrogated.]

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Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

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7. In addition to the filing requirements set forth in this Rule, all filers who are represented by counsel must submit documents to the Court's electronic filing system in conform-

ity with the "Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System" issued by the Clerk.

Rule 30. Computation and Extension of Time

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2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application or motion seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

. . . . .

4. A motion to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The motion may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the motion be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* . . . .

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(f) Forty copies of a booklet-format document shall be filed, and one unbound copy of the document on 8½- by 11-inch paper shall also be submitted.

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Rule 34. Document Preparation: General Requirements

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6. A case in which privacy protection was governed by Federal Rule of Appellate Procedure 25(a)(5), Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same Rule in this Court. In any other case, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to the redaction Rules set forth above.

Rule 37. Brief for an *Amicus Curiae*

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2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its inten-

tion to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

. . . . .

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk

a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

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Rule 48. Effective Date of Rules

1. These Rules, adopted September 27, 2017, will be effective November 13, 2017.

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STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2014, 2015, AND 2016

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2014	**2015**	**2016**	**2014**	**2015**	**2016**	**2014**	**2015**	**2016**	**2014**	**2015**	**2016**
Number of cases on dockets	6	8	7	1,845	1,839	1,850	6,215	5,688	5,477	8,066	7,535	7,334
Number of cases disposed of during term	1	1	1	1,552	1,539	1,505	5,453	4,966	4,752	7,006	6,506	6,257
Number remaining on dockets	5	7	6	293	300	315	762	722	723	1,060	1,029	1,076

	TERMS		
	2014	**2015**	**2016**
Cases argued during term	75	82	71
Number disposed of by full opinions	75	70	68
Number disposed of by per curiam opinions	0	12	1
Number set for reargument	1	0	2
Cases granted review this term	71	81	75
Cases reviewed and decided without oral argument	109	145	66
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JUNE 28, 2017

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