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OFFICIAL REPORTS

OF

THE SUPREME COURT

APRIL 20 THROUGH MAY 29, 2020

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

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

For the First Circuit, STEPHEN BREYER, Associate Justice.

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

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

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

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

For the Sixth Circuit, SONIA SOTOMAYOR, Associate Justice.

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For the Eighth Circuit, NEIL M. GORSUCH, Associate Justice.

For the Ninth Circuit, ELENA KAGAN, Associate Justice.

For the Tenth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

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

October 19, 2018.

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

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NOTES:

This volume provides the permanent United States Reports citation for all reported cases. Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Although the Table of Cases Reported does not list orders denying a petition for writ of certiorari, such orders are included chronologically in this volume.

The syllabus in a case constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906).

A list of counsel who argued or filed briefs in a reported case, and who were members of the Court's Bar at the time the case was argued, are included in the United States Reports along with the Court's opinion in the case.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2019

ATLANTIC RICHFIELD CO. *v.* CHRISTIAN ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 17–1498. Argued December 3, 2019—Decided April 20, 2020

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U. S. C. § 9601 *et seq.*, also known as the Superfund statute, promotes "the timely cleanup of hazardous waste sites and [ensures] that the costs of such cleanup efforts [are] borne by those responsible for the contamination," *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 4 (internal quotation marks omitted). The Act directs the Environmental Protection Agency to compile and annually revise a prioritized list of contaminated sites for cleanup, known as Superfund sites, and makes responsible parties liable for the cost of the cleanup. Before a cleanup plan is selected, a remedial investigation and feasibility study is conducted to assess the contamination and evaluate cleanup options. Once that study begins, § 122(e)(6) of the Act provides, "no potentially responsible party may undertake any remedial action" at the site without EPA approval. To insulate cleanup plans from collateral attack, § 113(b) provides federal district courts with "exclusive original jurisdiction over all controversies arising under" the Act, and § 113(h) then strips those courts of jurisdiction "to review any challenges to removal or remedial action," except in five limited circumstances.

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. Over the past 35 years, EPA has worked with the current owner of the now-closed smelter, Atlantic Richfield Company, to implement a cleanup plan for a remediation expected to continue through 2025. A group of

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98 landowners sued Atlantic Richfield in Montana state court for common law nuisance, trespass, and strict liability, seeking restoration damages, which Montana law requires to be spent on property rehabilitation. The landowners' proposed plan exceeds the measures found necessary to protect human health and the environment by EPA. The trial court granted summary judgment to the landowners on the issue of whether the Act precluded their restoration damages claim and allowed the lawsuit to continue. After granting a writ of supervisory control, the Montana Supreme Court affirmed, rejecting Atlantic Richfield's argument that § 113 stripped the Montana courts of jurisdiction over the landowners' claim and concluding that the landowners were not potentially responsible parties (or PRPs) prohibited from taking remedial action without EPA approval under § 122(e)(6).

Held:

1. This Court has jurisdiction to review the Montana Supreme Court's decision. To qualify as a final judgment subject to review under 28 U. S. C. § 1257(a), a state court judgment must be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson* v. *City of Tarrant*, 522 U. S. 75, 81. Under Montana law, a supervisory writ proceeding is a self-contained case, not an interlocutory appeal. Mont. Const., Art. VII, §§ 2(1)–(2); Mont. Rules App. Proc. 6(6), 14(1), 14(3). Thus, the writ issued in this case is a "final judgment" within this Court's jurisdiction. *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 385, n. 7. Pp. 11–12.

2. The Act does not strip the Montana courts of jurisdiction over this lawsuit. Section 113(b) of the Act provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter," so state courts lack jurisdiction over such actions. The use of "arising under" in § 113(b) echoes Congress's more familiar use of that phrase in granting federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. In the mine run of cases, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260. The landowners' common law nuisance, trespass, and strict liability claims arise under Montana law and not under the Act.

Atlantic Richfield mistakenly argues that § 113(h)—which states that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action" selected under the Act—implicitly broadens the scope of actions precluded from state court jurisdiction under § 113(b). But § 113(h) speaks of "Federal court[s]," not state courts. There is no textual basis for Atlantic Richfield's argu-

ment that Congress precluded *state* courts from hearing a category of cases in § 113(b) by stripping *federal* courts of jurisdiction over those cases in § 113(h). Often the simplest explanation is the best: Section 113(b) deprives state courts of jurisdiction over cases "arising under" the Act—just as it says—while § 113(h) deprives federal courts of jurisdiction over certain "challenges" to Superfund remedial actions—just as it says. Pp. 12–17.

3. The Montana Supreme Court erred by holding that the landowners were not potentially responsible parties under the Act and thus did not need EPA approval to take remedial action. To determine who is a potentially responsible party, the Court looks to the list of "covered persons" in § 107, the Act's liability section, which includes any "owner" of "a facility." "Facility" in turn is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U. S. C. § 9601(9)(B). Because arsenic and lead are hazardous substances that have "come to be located" on the landowners' properties, the landowners are potentially responsible parties.

The landowners argue they are no longer potentially responsible parties because the Act's six-year limitations period for recovery of remedial costs has run, and thus they could not be held liable in a hypothetical lawsuit. But even "'innocent' . . . landowner[s] whose land has been contaminated by another," and who are thus shielded from liability by § 107(b)(3)'s so-called "innocent landowner" or "third party" defense, "may fall within the broad definitions of PRPs in §§ 107(a)(1)–(4)." *United States* v. *Atlantic Research Corp.*, 551 U. S. 128, 136. The same principle holds true for parties facing no liability because of the Act's limitations period.

Interpreting "potentially responsible parties" to include owners of polluted property reflects the Act's objective to develop a "Comprehensive Environmental Response" to hazardous waste pollution. Section 122(e)(6) is one of several tools in the Act that ensures the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones.

Yet under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup. Congress did not provide such a fragile remedy for such a serious problem.

The landowners alternatively argue that they are not potentially responsible parties because they did not receive the notice of settlement

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negotiations required by § 122(e)(1). EPA has a policy of not suing innocent homeowners for pollution they did not cause, so it did not include the landowners in settlement negotiations. But EPA's nonenforcement policy does not alter the landowners' status as potentially responsible parties. Section 107(a) unambiguously defines potentially responsible parties, and EPA does not have authority to alter that definition.

The landowners also argue that § 122(e)(6) cannot carry the weight ascribed to it because it is located in the section on settlement negotiations. Settlements, however, are the heart of the Superfund statute. Section 122(a) of the Act commands EPA to proceed by settlement "[w]henever practicable and in the public interest . . . in order to expedite effective remedial actions and minimize litigation." And EPA's efforts to negotiate settlement agreements and issue orders for cleanups account for approximately 69% of all cleanup work currently underway. Pp. 17–26.

390 Mont. 76, 408 P. 3d 515, affirmed in part, vacated in part, and remanded.

ROBERTS, C. J., delivered the opinion of the Court, Parts I and II–A of which were unanimous, Part II–B of which was joined by THOMAS, GINSBURG, BREYER, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., and Part III of which was joined by GINSBURG, BREYER, ALITO, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ. ALITO, J., filed an opinion concurring in part and dissenting in part, *post*, p. 26. GORSUCH, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 34.

Lisa S. Blatt argued the cause for petitioner. With her on the briefs were *John S. Williams*, *Sarah M. Harris*, *Charles L. McCloud*, *Robert J. Katerberg*, *Elisabeth S. Theodore*, *Stephen K. Wirth*, *Jonathan W. Rauchway*, and *Shannon W. Stevenson*.

Christopher G. Michel argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Deputy Assistant Attorney General Grant*, and *Deputy Solicitor General Stewart*.

Joseph R. Palmore argued the cause for respondents. With him on the brief were *Deanne E. Maynard*, *Dustin C.*

Elliott, *James R. Sigel*, *Monte D. Beck*, *Justin P. Stalpes*, *J. David Slovak*, and *Mark M. Kovacich*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. Over the past 35 years, the Environmental Protection Agency has worked with the current owner of the smelter, Atlantic Richfield Company, to implement a cleanup plan under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. EPA projects that the cleanup will continue through 2025.

A group of 98 landowners sued Atlantic Richfield in Montana state court for common law nuisance, trespass, and

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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 *Aaron M. Streett*, *J. Mark Little*, *Matthew A. Haynie*, *Duke K. McCall*, *Martha S. Thomsen*, *Peter C. Tolsdorf*, and *Leland P. Frost*; for the Treasure State Resources Association of Montana et al. by *Kyle Anne Gray* and *William W. Mercer*; and for the Washington Legal Foundation by *Corbin K. Barthold* and *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Virginia et al. by *Mark R. Herring*, Attorney General of Virginia, *Toby J. Heytens*, Solicitor General, *Michelle S. Kallen* and *Martine E. Cicconi*, Deputy Solicitors General, *Donald D. Anderson*, Deputy Attorney General, and *Jessica Merry Samuels*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Clare E. Connors* of Hawaii, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Jim Hood* of Mississippi, *Gurbir S. Grewal* of New Jersey, *Letitia James* of New York, *Ellen F. Rosenblum* of Oregon, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Bob Ferguson* of Washington, and *Joshua L. Kaul* of Wisconsin; for the Clark Fork Coalition et al. by *Cale Jaffe* and *Roger Sullivan*; for the Pacific Legal Foundation et al. by *Jonathan Wood*; and for Public Citizen by *Scott L. Nelson* and *Allison M. Zieve*.

strict liability. Among other remedies, the landowners sought restoration damages, which under Montana law must be spent on rehabilitation of the property. The landowners' proposed restoration plan includes measures beyond those the agency found necessary to protect human health and the environment.

We consider whether the Act strips the Montana courts of jurisdiction over the landowners' claim for restoration damages and, if not, whether the Act requires the landowners to seek EPA approval for their restoration plan.

I

A

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 94 Stat. 2767, as amended, 42 U. S. C. § 9601 *et seq.*, also known as the Superfund statute, to address "the serious environmental and health risks posed by industrial pollution," *Burlington N. & S. F. R. Co.* v. *United States*, 556 U. S. 599, 602 (2009). The Act seeks "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *CTS Corp.* v. *Waldburger*, 573 U. S. 1, 4 (2014) (internal quotation marks omitted).

The Act directs EPA to compile and annually revise a prioritized list of contaminated sites for cleanup, commonly known as Superfund sites. 42 U. S. C. § 9605.[1] EPA may clean those sites itself or compel responsible parties to perform the cleanup. §§ 9604, 9606, 9615. If the Government performs the cleanup, it may recover its costs from responsible parties. § 9607(a)(4)(A). Responsible parties are jointly and severally liable for the full cost of the cleanup,

[1] The Act vests powers and duties in the President, who has delegated the responsibilities relevant here to the EPA Administrator. See 42 U. S. C. § 9615; Exec. Order No. 12580, 3 CFR § 193 (1988).

but may seek contribution from other responsible parties. § 9613(f)(1).

Prior to selecting a cleanup plan, EPA conducts (or orders a private party to conduct) a remedial investigation and feasibility study to assess the contamination and evaluate cleanup options. 40 CFR § 300.430 (2019). Section 122(e)(6) of the Act provides that, once the study begins, "no potentially responsible party may undertake any remedial action" at the site without EPA approval. 42 U. S. C. § 9622(e)(6).

The Act prescribes extensive public consultation while a cleanup plan is being developed. It requires an opportunity for public notice and comment on proposed cleanup plans. §§ 9613(k), 9617. It requires "substantial and meaningful involvement by each State in initiation, development, and selection" of cleanup actions in that State. § 9621(f)(1). And, in most instances, it requires that remedial action comply with "legally applicable or relevant and appropriate" requirements of state environmental law. § 9621(d)(2)(A).

But once a plan is selected, the time for debate ends and the time for action begins. To insulate cleanup plans from collateral attack, § 113(b) of the Act provides federal district courts with "exclusive original jurisdiction over all controversies arising under" the Act, and § 113(h) then strips such courts of jurisdiction "to review any challenges to removal or remedial action," except in five limited circumstances. §§ 9613(b), (h).

B

Between 1884 and 1902, the Anaconda Copper Mining Company built three copper smelters 26 miles west of the mining town of Butte, Montana. The largest one, the Washoe Smelter, featured a 585-foot smoke stack, taller than the Washington Monument. The structure still towers over the area today, as part of the Anaconda Smoke Stack State Park. Together, the three smelters refined tens of millions of pounds of copper ore mined in Butte, the "Richest Hill on

Earth," to feed burgeoning demand for telephone wires and power lines. M. Malone, The Battle for Butte 34 (1981). "It was hot. It was dirty. It was dangerous. But it was a job for thousands." Dunlap, A Dangerous Job That Gave Life to a Town: A Look Back at the Anaconda Smelter, Montana Standard (Aug. 8, 2018). From 1912 to 1973, Anaconda Company payrolls totaled over $2.5 billion, compensating around three-quarters of Montana's work force.

Bust followed boom. By the 1970s, the falling price of copper, an ongoing energy crisis, and the nationalization of Anaconda's copper mines in Chile and Mexico squeezed Anaconda. But what others saw as an ailing relic, Atlantic Richfield saw as a turnaround opportunity, purchasing the Anaconda Company for the discount price of $700 million. Unfortunately, Atlantic Richfield was unable to revive Anaconda's fortunes. By 1980 Atlantic Richfield had closed the facility for good, and by 1984 Fortune had dubbed the purchase one of the "Decade's Worst Mergers." Fisher, The Decade's Worst Mergers, Fortune, Apr. 30, 1984, p. 262.

Atlantic Richfield's troubles were just beginning. After Congress passed the Superfund statute in 1980, Atlantic Richfield faced strict and retroactive liability for the many tons of arsenic and lead that Anaconda had spewed across the area over the previous century. In 1983, EPA designated an area of more than 300 square miles around the smelters as one of the inaugural Superfund sites. 48 Fed. Reg. 40667. In the 35 years since, EPA has managed an extensive cleanup at the site, working with Atlantic Richfield to remediate more than 800 residential and commercial properties; remove 10 million cubic yards of tailings, mine waste, and contaminated soil; cap in place 500 million cubic yards of waste over 5,000 acres; and reclaim 12,500 acres of land. EPA, Superfund Priority "Anaconda" 9 (Apr. 2018), https://semspub.epa.gov/work/08/100003986.pdf. To date, Atlantic Richfield estimates that it has spent roughly $450 million implementing EPA's orders.

More work remains. As of 2015, EPA's plan anticipated cleanup of more than 1,000 additional residential yards, revegetation of 7,000 acres of uplands, removal of several waste areas, and closure of contaminated stream banks and railroad beds. Brief for United States as *Amicus Curiae* 7–8 (citing EPA, Fifth Five-Year Review Report: Anaconda Smelter Superfund Site, Anaconda-Deer Lodge County, Montana, Table 10–1 (Sept. 25, 2015), https://semspub.epa.gov/work/08/1549381.pdf). EPA projects that remedial work will continue through 2025. *Id.*, Table 10–7; Tr. of Oral Arg. 30.

C

In 2008, a group of 98 owners of property within the Superfund site filed this lawsuit against Atlantic Richfield in Montana state court, asserting trespass, nuisance, and strict liability claims under state common law. The landowners sought restoration damages, among other forms of relief.

Under Montana law, property damages are generally measured by the "difference between the value of the property before and after the injury, or the diminution in value." *Sunburst School Dist. No. 2* v. *Texaco, Inc.*, 338 Mont. 259, 269, 165 P. 3d 1079, 1086 (2007). But "when the damaged property serves as a private residence and the plaintiff has an interest in having the property restored, diminution in value will not return the plaintiff to the same position as before the tort." *Id.*, at 270, 165 P. 3d, at 1087. In that circumstance, the plaintiff may seek restoration damages, even if they exceed the property's diminution in value. See *ibid.*; Restatement (Second) of Torts § 929, and Comment *b* (1977).

To collect restoration damages, a plaintiff must demonstrate that he has "reasons personal" for restoring the property and that his injury is temporary and abatable, meaning "[t]he ability to repair [the] injury must be more than a theoretical possibility." *Sunburst School Dist. No. 2*, 338 Mont., at 269, 165 P. 3d, at 1086–1087. The injured party must "establish that the award actually will be used for restoration."

Lampi v. *Speed*, 362 Mont. 122, 130, 261 P. 3d 1000, 1006 (2011).

The landowners here propose a restoration plan that goes beyond EPA's own cleanup plan, which the agency had found "protective of human health and the environment." EPA, Community Soils Operable Unit, Record of Decision (1996), App. 62. See also 42 U. S. C. § 9621(d)(1). For example, the landowners propose a maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA. And the landowners seek to excavate offending soil within residential yards to a depth of two feet rather than EPA's chosen depth of one. The landowners also seek to capture and treat shallow groundwater through an 8,000-foot long, 15-foot deep, and 3-foot wide underground permeable barrier, a plan the agency rejected as costly and unnecessary to secure safe drinking water.

The landowners estimate that their cleanup would cost Atlantic Richfield $50 to $58 million. Atlantic Richfield would place that amount in a trust and the trustee would release funds only for restoration work.

In the trial court, Atlantic Richfield and the landowners filed competing motions for summary judgment on whether the Act precluded the landowners' claim for restoration damages.[2] The court granted judgment for the landowners on that issue and allowed the lawsuit to continue. After granting a writ of supervisory control, the Montana Supreme Court affirmed. *Atlantic Richfield Co.* v. *Montana Second Jud. Dist. Ct.*, 390 Mont. 76, 408 P. 3d 515 (2017).

The Montana Supreme Court rejected Atlantic Richfield's argument that § 113 stripped the Montana courts of jurisdic-

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[2] Atlantic Richfield concedes that the Act preserves the landowners' claims for other types of compensatory damages under Montana law, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort. See *Atlantic Richfield Co.* v. *Montana Second Jud. Dist. Ct.*, 390 Mont. 76, 79, 408 P. 3d 515, 518 (2017). We therefore consider only the landowners' claim for restoration damages.

tion over the landowners' claim for restoration damages. The court recognized that § 113 strips federal courts (and, it was willing to assume, state courts) of jurisdiction to review challenges to EPA cleanup plans. But the Montana Supreme Court reasoned that the landowners' plan was not such a challenge because it would not "stop, delay, or change the work EPA is doing." *Id.*, at 83, 408 P. 3d, at 520. The landowners were "simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan." *Id.*, at 84, 408 P. 3d, at 521.

The Montana Supreme Court also rejected Atlantic Richfield's argument that the landowners were potentially responsible parties (sometimes called PRPs) prohibited from taking remedial action without EPA approval under § 122(e)(6) of the Act. The Court observed that the landowners had "never been treated as PRPs for any purpose—by either EPA or [Atlantic Richfield]—during the entire thirty-plus years" since the designation of the Superfund site, and that the statute of limitations for a claim against the landowners had run. *Id.*, at 86, 408 P. 3d, at 522. "Put simply, the PRP horse left the barn decades ago." *Ibid.*

Justice Baker concurred, stressing that on remand Atlantic Richfield could potentially defeat the request for restoration damages on the merits by proving that the restoration plan conflicted with EPA's cleanup plan. *Id.*, at 87–90, 408 P. 3d, at 523–525. Justice McKinnon dissented. She argued that the landowners' restoration plan did conflict with the Superfund cleanup and thus constituted a challenge under § 113(h) of the Act, over which Montana courts lacked jurisdiction. *Id.*, at 90–101, 408 P. 3d, at 525–532.

We granted certiorari. 587 U. S. 1050 (2019).

II

We begin with two threshold questions: whether this Court has jurisdiction to review the decision of the Montana Supreme Court and, if so, whether the Montana courts

have jurisdiction over the landowners' claim for restoration damages.

A

Congress has authorized this Court to review "[f]inal judgments or decrees rendered by the highest court of a State." 28 U. S. C. § 1257(a). To qualify as final, a state court judgment must be "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson* v. *City of Tarrant*, 522 U. S. 75, 81 (1997). The landowners contend that, because the Montana Supreme Court allowed the case to proceed to trial, its judgment was not final and we lack jurisdiction.

But the Montana Supreme Court exercised review in this case through a writ of supervisory control. Under Montana law, a supervisory writ proceeding is a self-contained case, not an interlocutory appeal. Mont. Const., Art. VII, §§ 2(1)–(2); Mont. Rules App. Proc. 6(6), 14(1), 14(3) (2019). Thus we have held that a "writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction." *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 385, n. 7 (1976) (*per curiam*).

The landowners protest that our precedents only support reviewing supervisory writ proceedings that are limited to jurisdictional questions. But the scope of our jurisdiction to review supervisory writ proceedings is not so restricted. When the Montana Supreme Court issues a writ of supervisory control, it initiates a separate lawsuit. It is the nature of the Montana proceeding, not the issues the state court reviewed, that establishes our jurisdiction.

B

We likewise find that the Act does not strip the Montana courts of jurisdiction over this lawsuit. It deprives state courts of jurisdiction over claims brought under the Act.

But it does not displace state court jurisdiction over claims brought under other sources of law.[3]

Section 113(b) of the Act provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter," so state courts lack jurisdiction over such actions. 42 U. S. C. § 9613(b). This case, however, does not "arise under" the Act. The use of "arising under" in § 113(b) echoes Congress's more familiar use of that phrase in granting federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. In the mine run of cases, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916).[4] The landowners' common law claims for nuisance, trespass, and strict liability therefore arise under Montana law and not under the Act. As a result, the Montana courts retain jurisdiction over this

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[3] JUSTICE ALITO argues that this jurisdictional question "may turn out not to matter in this case" because we remand for further proceedings that may end the litigation. *Post*, at 27 (opinion concurring in part and dissenting in part). But Atlantic Richfield seeks more than a remand. It contends that the lawsuit should be *dismissed* because the Montana courts lack jurisdiction, and the Federal Government agrees. The difference between outright dismissal and further proceedings matters. We granted review of this issue and both parties have fully briefed and argued it. Simply leaving the question unanswered at this point would leave the parties in a state of uncertainty as to whether the litigation is proceeding in the proper forum. We therefore find it both "necessary" and "prudent" to decide the issue. *Post*, at 26.

[4] There is a "special and small category of cases" that originate in state law yet still arise under federal law for purposes of federal question jurisdiction. *Gunn* v. *Minton*, 568 U. S. 251, 258 (2013) (internal quotation marks omitted). To qualify for this narrow exception, a state law claim must "necessarily raise[ ]" a federal issue, among other requirements. *Ibid.* No element of the landowners' state common law claims necessarily raises a federal issue. Atlantic Richfield raises the Act as an affirmative defense, but "[f]ederal jurisdiction cannot be predicated on an actual or anticipated defense." *Vaden* v. *Discover Bank*, 556 U. S. 49, 60 (2009).

lawsuit, notwithstanding the channeling of Superfund claims to federal courts in § 113(b).[5]

Atlantic Richfield takes a different view, arguing that § 113(h) implicitly broadens the scope of actions precluded from state court jurisdiction under § 113(b). Section 113(h) states that "[n]o Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) . . . to review any challenges to removal or remedial action" selected under the Act. 42 U. S. C. § 9613(h).

The company's argument proceeds in five steps. Step one: Section 113(h) removes federal court jurisdiction over all cleanup challenges, regardless of whether they originate in federal or state law (except for when the court is sitting in diversity). Step two: Section 113(h) can only remove jurisdiction that § 113(b) provides in the first place. Step three: Section 113(b) thus provides federal courts jurisdiction over all cleanup challenges, whether brought under federal or state law. Step four: The grant of jurisdiction to federal courts in § 113(b) is exclusive to federal courts. Step five: State courts thus do not have jurisdiction over cleanup challenges.

This interpretation faces several insurmountable obstacles. First, by its own terms, § 113(h) speaks of "Federal court[s]," not state courts. There is no textual basis for Atlantic Richfield's argument that Congress precluded *state* courts from hearing a category of cases in § 113(b) by strip-

[5] Section 113(b) specifies that federal courts have exclusive jurisdiction "without regard to the citizenship of the parties or the amount in controversy." 42 U. S. C. § 9613(b). This is somewhat redundant because all actions that "arise under" the Act necessarily satisfy federal question jurisdiction. But "[s]ometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U. S. 334, 346 (2019). We find it much more likely that Congress employed a belt and suspenders approach to make sure that *all* CERCLA lawsuits are routed to federal court than that Congress intended the reference to federal courts in § 113(h) to affect state courts.

ping *federal* courts of jurisdiction over those cases in § 113(h). And if that were Congress's goal, it would be hard to imagine a more oblique way of achieving it. Often the simplest explanation is the best: Section 113(b) deprives state courts of jurisdiction over cases "arising under" the Act—just as it says—while § 113(h) deprives federal courts of jurisdiction over certain "challenges" to Superfund remedial actions—just as it says.

Second, the company's argument does not account for the exception in § 113(h) for federal courts sitting in diversity. Section 113(h) permits federal courts in diversity cases to entertain state law claims regardless of whether they are challenges to cleanup plans. See *DePue* v. *Exxon Mobil Corp.*, 537 F. 3d 775, 784 (CA7 2008). But Atlantic Richfield does not even try to explain why the Act would permit such state law claims to proceed in federal court, but not in state court. The Act permits federal courts and state courts alike to entertain state law claims, including challenges to cleanups.

That leads us to the third difficulty with Atlantic Richfield's argument. We have recognized a "deeply rooted presumption in favor of concurrent state court jurisdiction" over federal claims. *Tafflin* v. *Levitt*, 493 U. S. 455, 458–459 (1990). Only an "explicit statutory directive," an "unmistakable implication from legislative history," or "a clear incompatibility between state-court jurisdiction and federal interests" can displace this presumption. *Id.*, at 460. Explicit, unmistakable, and clear are not words that describe Atlantic Richfield's knotty interpretation of §§ 113(b) and (h).

It would be one thing for Atlantic Richfield to try to surmount the clear statement rule that applies to the uncommon, but not unprecedented, step of stripping state courts of jurisdiction over *federal* claims. But Atlantic Richfield's position requires a more ambitious step: Congress stripping state courts of jurisdiction to hear their own *state* claims. We would not expect Congress to take such an extraordinary

step by implication. Yet the only provision Atlantic Richfield invokes addresses "[f]ederal court[s]" without even mentioning state courts, let alone stripping those courts of jurisdiction to hear state law claims. 42 U. S. C. § 9613(h).

Finally, the Government, supporting Atlantic Richfield, emphasizes that the opening clause of § 113(b) excepts § 113(h) from its application. See 42 U. S. C. § 9613(b) ("Except as provided in subsections (a) and (h) of this section . . . ."). According to the Government, because "exceptions must by definition be narrower than the corresponding rule," all challenges to remedial plans under § 113(h)—whether based in federal or state law—must "arise under" the Act for purposes of § 113(b). Brief for United States as *Amicus Curiae* 25.

We reject the premise and with it the conclusion. "Thousands of statutory provisions use the phrase 'except as provided in . . . ' followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict." *Cyan, Inc.* v. *Beaver County Employees Retirement Fund*, 583 U. S. 416, 428 (2018). Such clauses explain what happens in the case of a clash, but they do not otherwise expand or contract the scope of either provision by implication. Cf. *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 302 (2017) (explaining the same principle for "notwithstanding" clauses).

The actions referred to in § 113(h) do not fall entirely within § 113(b). Challenges to remedial actions under federal statutes other than the Act, for example, are precluded by § 113(h) but do not fall within § 113(b). To cite another example, § 113(h) addresses state law challenges to cleanup plans in federal court, although those actions also do not fall within § 113(b).[6] At the same time, § 113(b) is not subsumed

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[6] JUSTICE ALITO argues that our interpretation leaves no meaning for the exceptions in § 113(h) for federal courts hearing state law actions while sitting in diversity and federal courts hearing actions invoking state law

by § 113(h). Many claims brought under the Act, such as those to recover cleanup costs under § 107, are not challenges to cleanup plans.

Sections 113(b) and 113(h) thus each do work independent of one another. The two provisions overlap in a particular type of case: challenges to cleanup plans in federal court that arise under the Act. In such cases, the exceptions clause in § 113(b) instructs that the limitation of § 113(h) prevails. It does nothing more.

III

Although the Montana Supreme Court answered the jurisdictional question correctly, the Court erred by holding that the landowners were not potentially responsible parties under the Act and therefore did not need EPA approval to take remedial action. Section 122(e)(6), titled "Inconsistent response action," provides that "[w]hen either the President, or a potentially responsible party . . . , has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U. S. C. § 9622(e)(6). Both parties agree that this provision would require the landowners to obtain EPA approval for their restoration plan if the landowners qualify as potentially responsible parties.

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standards deemed "applicable or relevant and appropriate" by the Act. 42 U. S. C. § 9613(h). Because we read § 113(b) to cover only federal law claims, JUSTICE ALITO assumes that these exceptions in § 113(h) would never apply. But as we explained, § 113(h) applies to all "challenges to removal or remedial action" that make their way into "[f]ederal court," whether through § 113(b) or some other route. § 9613(h). That includes state law challenges arising by way of diversity jurisdiction or supplemental jurisdiction as well as federal law challenges arising under sources of law other than the Act. The exceptions in § 113(h) are thus necessary to delineate which of these challenges may proceed in federal court and which may not.

To determine who is a potentially responsible party, we look to the list of "covered persons" in § 107, the liability section of the Act. § 9607(a). "Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they 'shall be liable' for, among other things, 'all costs of removal or remedial action incurred by the United States Government.'" *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 161 (2004) (quoting § 9607(a)(4)(A)). The first category under § 107(a) includes any "owner" of "a facility." § 9607(a)(1). "Facility" is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." § 9601(9)(B). Arsenic and lead are hazardous substances. 40 CFR § 302.4, Table 302.4. Because those pollutants have "come to be located" on the landowners' properties, the landowners are potentially responsible parties.

The landowners and JUSTICE GORSUCH argue that even if the landowners were once potentially responsible parties, they are no longer because the Act's six-year limitations period for recovery of remedial costs has run, and thus they could not be held liable in a hypothetical lawsuit. 42 U. S. C. § 9613(g)(2)(B).

This argument collapses status as a potentially responsible party with liability for the payment of response costs. A property owner can be a potentially responsible party even if he is no longer subject to suit in court. As we have said, "[E]ven parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)–(4)." *United States* v. *Atlantic Research Corp.*, 551 U. S. 128, 136 (2007). That includes "'innocent' . . . landowner[s] whose land has been contaminated by another," who would be shielded from liability by the Act's so-called "innocent landowner" or "third party" defense in § 107(b)(3). *Ibid.* See also 42 U. S. C. § 9607(b)(3). The same principle holds true for parties that face no liability because of the Act's limitations period.

Interpreting "potentially responsible parties" to include owners of polluted property reflects the Act's objective to develop, as its name suggests, a "Comprehensive Environmental Response" to hazardous waste pollution. Section 122(e)(6) is one of several tools in the Act that ensures the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones.

Yet under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup.[7] We doubt Congress provided such a fragile remedy for such a serious problem. And we suspect most other landowners would not be too pleased if Congress required EPA to sue each and every one of them just to ensure an orderly cleanup of toxic waste in their neighborhood. A straightforward reading of the text avoids such anomalies.

JUSTICE GORSUCH argues that equating "potentially responsible parties" with "covered persons" overlooks the fact that the terms "use different language, appear in different statutory sections, and address different matters." *Post*, at 40 (opinion concurring in part and dissenting in part). He contends that "potentially responsible party" as used in § 122(e)(6) should be read as limited to the settlement con-

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[7] EPA does have other tools to address serious environmental harm. Under § 106, for example, EPA can initiate an injunctive abatement action if it finds an "imminent and substantial endangerment to the public health or welfare or the environment." 42 U. S. C. § 9606(a). But EPA may have good reasons to preserve the status quo of a cleanup site even absent an imminent threat. More importantly, the landowners' interpretation would require EPA to monitor tens of thousands of properties across 1,335 Superfund sites nationwide to ensure landowners do not derail an EPA cleanup. EPA, Superfund: National Priorities List (NPL) (Apr. 13, 2020), https://www.epa.gov/superfund/superfund-national-priorities-list-npl. Congress provided a far more effective and efficient solution in § 122(e)(6): Landowners at Superfund sites containing hazardous waste must seek EPA approval before initiating their own bespoke cleanups.

text, and that if Congress intended the phrase to have broader reach—to refer more generally to those potentially liable under § 107(a)—then Congress would have used the term "covered person." *Post*, at 40.

But there is no reason to think Congress used these phrases to refer to two distinct groups of persons. Neither phrase appears among the Act's list of over 50 defined terms. 42 U. S. C. § 9601. "Covered persons," in fact, appears in the caption to § 107(a) and nowhere else. Meanwhile, "potentially responsible parties" are referenced not just in the section on settlements, but also in the Act's sections regarding EPA response authority, cleanup standards and procedures, cleanup contractors, Superfund moneys, Federal Government cleanup sites, and civil proceedings. §§ 9604, 9605, 9611, 9613, 9619, 9620, 9622. Across the statute "potentially responsible parties" refers to what it says: parties that may be held accountable for hazardous waste in particular circumstances. The only place in the Act that identifies such persons is the list of "Covered persons" in § 107(a). Congress therefore must have intended "potentially responsible party" in § 122(e)(6) (as elsewhere in the Act) to refer to "Covered persons" in § 107(a).

Turning from text to consequences, the landowners warn that our interpretation of § 122(e)(6) creates a permanent easement on their land, forever requiring them "to get permission from EPA in Washington if they want to dig out part of their backyard to put in a sandbox for their grandchildren." Tr. of Oral Arg. 62. The grandchildren of Montana can rest easy: The Act does nothing of the sort.

Section 122(e)(6) refers only to "remedial action," a defined term in the Act encompassing technical actions like "storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials," and so forth. 42 U. S. C. § 9601(24). While broad, the Act's definition of remedial action does not reach so far as to cover

planting a garden, installing a lawn sprinkler, or digging a sandbox. In addition, § 122(e)(6) applies only to sites on the Superfund list. The Act requires EPA to annually review and reissue that list. § 9605(a)(8)(B). EPA delists Superfund sites once responsible parties have taken all appropriate remedial action and the pollutant no longer poses a significant threat to public health or the environment. See 40 CFR § 300.425(e).

The landowners and JUSTICE GORSUCH alternatively argue that the landowners are not potentially responsible parties because they did not receive the notice of settlement negotiations required by § 122(e)(1). Under a policy dating back to 1991, EPA does not seek to recover costs from residential landowners who are not responsible for contamination and do not interfere with the agency's remedy. EPA, Policy Towards Owners of Residential Property at Superfund Sites, OSWER Directive #9834.6 (July 3, 1991), https://www.epa.gov/sites/production/files/documents/policy-owner-rpt.pdf. EPA views this policy as an exercise of its "enforcement discretion in pursuing potentially responsible parties." *Id.*, at 3. Because EPA has a policy of not suing innocent homeowners for pollution they did not cause, it did not include the landowners in settlement negotiations.

But EPA's nonenforcement policy does not alter the landowners' status as potentially responsible parties. Section 107(a) unambiguously defines potentially responsible parties and EPA does not have authority to alter that definition. See, *e. g.*, *Sturgeon* v. *Frost*, 587 U. S. 28, 46, n. 3 (2019). Section 122(e)(1) requires notification of settlement negotiations to all potentially responsible parties. To say that provision determines who is a potentially responsible party in the first instance would render the Act circular. Even the Government does not claim that its decisions whether to send notices of settlement negotiations carry such authority.

In short, even if EPA ran afoul of § 122(e)(1) by not providing the landowners notice of settlement negotiations, that

does not change the landowners' status as potentially responsible parties.

The landowners relatedly argue that the limitation in § 122(e)(6) on remedial action by potentially responsible parties cannot carry the weight we assign to it because it is located in the Act's section on settlement negotiations. Congress, we are reminded, does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

We take no issue with characterizing § 122(e)(6) as an elephant. It is, after all, one of the Act's crucial tools for ensuring an orderly cleanup of toxic waste. But § 122 of the Act is, at the risk of the tired metaphor spinning out of control, less a mousehole and more a watering hole—exactly the sort of place we would expect to find this elephant.

Settlements are the heart of the Superfund statute. EPA's efforts to negotiate settlement agreements and issue orders for cleanups account for approximately 69% of all cleanup work currently underway. EPA, Superfund Site Cleanup Work Through Enforcement Agreements and Orders, https://www.epa.gov/enforcement/superfund-site-cleanup-work-through-enforcement-agreements-and-orders. The Act commands EPA to proceed by settlement "[w]henever practicable and in the public interest . . . in order to expedite effective remedial actions and minimize litigation." 42 U. S. C. § 9622(a). EPA, for its part, "prefers to reach an agreement with a potentially responsible party (PRP) to clean up a Superfund site instead of issuing an order or paying for it and recovering the cleanup costs later." EPA, Negotiating Superfund Settlements, https://www.epa.gov/enforcement/negotiating-superfund-settlements.

The Act encourages potentially responsible parties to enter into such agreements by authorizing EPA to include a "covenant not to sue," which caps the parties' liability to the Government. § 9622(c)(1). The Act also protects settling parties from contribution claims by other potentially respon-

sible parties. § 9613(f)(2). Once finalized, the terms of a settlement become legally binding administrative orders, subject to civil penalties of up to $25,000 a day. §§ 9609(a)(1)(E), 9622(*l*).

Moreover, subsection (e) is an important component of § 122. It establishes a reticulated scheme of notices, proposals, and counterproposals for the settlement negotiation process. § 9622(e). And the subsection places a moratorium on EPA remedial actions while negotiations are under way. § 9622(e)(2)(A). It is far from surprising to find an analogous provision restricting potentially responsible parties from taking remedial actions in the same subsection.

JUSTICE GORSUCH also contends that our interpretation violates the Act's "saving clauses," which provide that the Act does not preempt liability or requirements under state law. *Post*, at 36–37. But we have long rejected interpretations of sweeping saving clauses that prove "absolutely inconsistent with the provisions of the act" in which they are found. *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 228 (1998) (quoting *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446 (1907)). Interpreting the Act's saving clauses to erase the clear mandate of § 122(e)(6) would allow the Act "to destroy itself." *Ibid.*

What is more, Atlantic Richfield remains potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort. The damages issue before the Court is whether Atlantic Richfield is also liable for the landowners' own remediation beyond that required under the Act. Even then, the answer is yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out.

We likewise resist JUSTICE GORSUCH's evocative claim that our reading of the Act endorses "paternalistic central

planning" and turns a cold shoulder to "state law efforts to restore state lands." *Post*, at 43. Such a charge fails to appreciate that cleanup plans generally must comply with "legally applicable or relevant and appropriate" standards of state environmental law. 42 U. S. C. § 9621(d)(2)(A). Or that States must be afforded opportunities for "substantial and meaningful involvement" in initiating, developing, and selecting cleanup plans. § 9621(f)(1). Or that EPA usually must defer initiating a cleanup at a contaminated site that a State is already remediating. § 9605(h). It is not "paternalistic central planning" but instead the "spirit of cooperative federalism [that] run[s] throughout CERCLA and its regulations." *New Mexico* v. *General Elec. Co.*, 467 F. 3d 1223, 1244 (CA10 2006).

As a last ditch effort, the landowners contend that, even if § 107(a) defines potentially responsible parties, they qualify as contiguous property owners under § 107(q), which would pull them outside the scope of § 107(a). The landowners are correct that contiguous property owners are not potentially responsible parties. Section 107(q)(1)(A) provides that "[a] person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered" an owner of a facility under § 107(a). § 9607(q)(1)(A). The problem for the landowners is that there are eight further requirements to qualify as a contiguous property owner. §§ 9607(q)(1)(A)(i)–(viii). Each landowner individually must "establish by a preponderance of the evidence" that he satisfies the criteria. § 9607(q)(1)(B).

The landowners cannot clear this high bar. One of the eight requirements is that, at the time the person acquired the property, the person "did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous

substances." § 9607(q)(1)(A)(viii)(II). All of the landowners here purchased their property after the Anaconda Company built the Washington Monument sized smelter. Indeed "evidence of public knowledge" of contamination was "almost overwhelming." *Christian* v. *Atlantic Richfield Co.*, 380 Mont. 495, 529, 358 P. 3d 131, 155 (2015). In the early 1900s, the Anaconda Company actually obtained smoke and tailing easements authorizing the disposition of smelter waste onto many properties now owned by the landowners. *Id.*, at 500–501, 358 P. 3d, at 137–138. The landowners had reason to know their property "could be contaminated by a release or threatened release" of a hazardous substance. 42 U. S. C. § 9607(q)(1)(A)(viii)(II).

At any rate, contiguous landowners must provide "full cooperation, assistance, and access" to EPA and those carrying out Superfund cleanups in order to maintain that status. § 9607(q)(1)(A)(iv). But the Government has represented that the landowners' restoration plan, if implemented, would interfere with its cleanup by, for example, digging up contaminated soil that has been deliberately capped in place. See Brief for United States as *Amicus Curiae* 20–21. If that is true, the landowners' plan would soon trigger a lack of cooperation between EPA and the landowners. At that point, the landowners would no longer qualify as contiguous landowners and we would be back to square one.

* * *

The Montana Supreme Court erred in holding that the landowners were not potentially responsible parties under § 122(e)(6) and therefore did not need to seek EPA approval. Montana law requires that "an award of restoration damages actually . . . be used to repair the damaged property." *Sunburst School Dist. No. 2*, 338 Mont., at 273, 165 P. 3d, at 1089. But such action cannot be taken in the absence of EPA approval. That approval process, if pursued, could ameliorate any conflict between the landowners' restoration plan and

EPA's Superfund cleanup, just as Congress envisioned. In the absence of EPA approval of the current restoration plan, we have no occasion to entertain Atlantic Richfield's claim that the Act otherwise preempts the plan.

The judgment of the Montana Supreme Court is affirmed in part and vacated in part. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in part and dissenting in part.

I agree with the Court that the judgment below must be reversed, and I join all of the Court's opinion except Part II–B. I thus agree with the Court that we possess jurisdiction to decide this case. See *ante*, at 12. I also agree that the landowners are potentially responsible parties under § 122(e)(6) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and, as a result, cannot bring their Montana restoration damages claim without the consent of the Environmental Protection Agency (EPA). See *ante*, at 17–25. At this point, however, I am not willing to endorse the Court's holding in Part II–B that state courts have jurisdiction to entertain "challenges" to EPA-approved CERCLA plans.

I

I would not decide that question because it is neither necessary nor prudent for us to do so. As I understand the Court's opinion, the Montana Supreme Court has two options on remand: (1) enter a stay to allow the landowners to seek EPA approval or (2) enter judgment against the landowners on their restoration damages claim without prejudice to their ability to refile if they obtain EPA approval. Either way, the case cannot proceed without the EPA's blessing. And because the EPA has submitted multiple filings indicating that it believes that the landowners' plan presents serious

environmental risks, it is likely that the EPA will not approve that plan, and the case will then die. If that happens, the question of the state courts' jurisdiction will be academic.

Alternatively, if the EPA approves the landowners' plan, either in full or to a degree that they find satisfactory, they may not wish to press this litigation. And if they do choose to go forward, the question of state-court jurisdiction can be decided at that time.

For these reasons, there is no need to reach out and decide the question now,[1] and there are good reasons not to do so. While the question of state-court jurisdiction may turn out not to matter in this case, that question may have important implications in other cases. Specifically, if the fears expressed by the Government materialize, state courts and juries, eager to serve local interests, may disregard the EPA's expert judgment regarding the best plan for a CERCLA site and may mandate relief that exacerbates environmental problems. See Brief for United States as *Amicus Curiae* 20–22, 29–30; App. to Pet. for Cert. 72a–74a. Thus, much is potentially at stake, and the question whether CERCLA allows state courts to entertain suits like the one in this case depends on the interpretation of devilishly difficult statutory provisions, CERCLA §§ 113(b) and (h), 42 U. S. C. §§ 9613(b) and (h).

With much at stake, we should be confident that our answer is correct, and we have no basis for such confidence here. The question of state-court jurisdiction is only one of many in this case, and the briefing and argument on that issue left important questions without fully satisfactory an-

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[1] We may not decide the merits of a case without assuring ourselves that we have jurisdiction, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998), but nothing requires us to decide whether the Montana courts have jurisdiction before remanding, see S. Shapiro et al., Supreme Court Practice § 3.26, p. 3–94 (11th ed. 2019); cf. *Andresen* v. *Maryland*, 427 U. S. 463, 469, n. 4 (1976) (declining to address question presented "does not, of course, affect our jurisdiction").

swers. The Court tries to clear up what § 113 means, but as I will attempt to show, the Court's interpretation presents serious problems. Under these circumstances, the better course is not to decide this perplexing question at this juncture.

II

A

CERCLA § 113 is like a puzzle with pieces that are exceedingly difficult, if not impossible, to fit together. Here is what these provisions say, with language that is not pertinent for present purposes omitted:

> "(b) Jurisdiction; venue
>
> "Except as provided in subsectio[n] . . . (h) of this section [and another provision not relevant for present purposes], the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. . . .
>
> . . . . .
>
> "(h) Timing of review
>
> "No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title [CERCLA § 121, 42 U. S. C. § 9621] (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title [concerning emergency measures ordered by the President], in any action except one of [a list of specific CERCLA provisions]." 42 U. S. C. § 9613.

For present purposes, the pertinent parts are as follows:

- First, § 113(b) sets out a general rule conferring on the federal district courts exclusive jurisdiction over claims "arising under" CERCLA. And it does so "without regard to the citizenship of the parties or the amount in controversy."
- Second, §§ 113(b) and (h), taken together, reduce this grant of jurisdiction by taking away jurisdiction over *most* claims that "challeng[e]" a "removal or remedial action."
- Third, this reduction does not apply to a challenge to removal or remedial action if it is brought under the diversity jurisdiction statute, 28 U. S. C. § 1332.
- Fourth, this reduction also does not apply to a challenge to removal or remedial action if it is brought in federal court "under State law which is applicable or relevant and appropriate under [§ 121] (relating to cleanup standards)." Under § 121, cleanup standards must comply with certain state-law requirements, and thus the thrust of this last provision seems to be that a removal or remedial action may be challenged in federal court for noncompliance with such requirements.

With these pieces laid out, we may consider how the Court and respondents, on the one hand, and the Government and petitioner, on the other, try to fit them together.

B

The logical first step in any effort to understand how §§ 113(b) and (h) apply to the landowners' state-law restoration damages claim is to determine whether the claim falls within the scope of the exclusive jurisdiction that § 113(b) confers on the federal district courts—in other words, whether such a claim is one that "aris[es] under" CERCLA. If it does not, then that ends the inquiry. And that is what the Court holds. *Ante*, at 12–14.

The Court interprets the phrase "arising under" in § 113(b) to mean the same thing as that phrase means in the federal-question jurisdiction statute, 28 U. S. C. § 1331. Under that provision, as the Court puts it, "[i]n the mine run of cases, '[a] suit arises under the law that creates the cause of action.'" *Ante*, at 13 (quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916)). Thus, the Court concludes, a claim arises under CERCLA only if it is based on CERCLA, and since the landowners' restoration damages claim is based on Montana law, it is obviously not based on CERCLA and does not fall within the exclusive jurisdiction conferred on the district courts by § 113(b). This makes short work of the question of state-court jurisdiction, but it presents serious problems.

First, it cannot explain why § 113(b) says that the jurisdiction it confers is "without regard to the citizenship of the parties or the amount in controversy." If that jurisdiction is limited to claims that are based on CERCLA, district courts have jurisdiction to entertain all those claims under 28 U. S. C. § 1331, which does not require either diversity or any minimum amount in controversy. So why go out of the way to say that § 113(b) jurisdiction does not require diversity or any minimum amount in controversy? The only logical reason is to ensure that the provision covers suits that *could not be brought under 28 U. S. C. § 1331*. Thus, § 113(b) jurisdiction must be broader than general federal-question jurisdiction. By denying this, the Court's interpretation turns the phrase "without regard to the citizenship of the parties or the amount in controversy" into a meaningless and useless appendage.

Second, under the Court's interpretation, there is no reason why § 113(h) should specify that its reduction of the scope of the jurisdiction conferred by § 113(b) does not affect a district court's jurisdiction in diversity cases. If the jurisdiction granted by § 113(b) is limited to claims based on

CERCLA, why would anyone think that it had any impact on state-law claims?[2]

Third, if the jurisdiction conferred by § 113(b) is limited to claims based on CERCLA, it is unclear how a district court could entertain a claim "under State law which is applicable or relevant and appropriate under [§ 121] (relating to cleanup standards)." Yet § 113(h) exempts such a claim from its general withdrawal of jurisdiction over challenges to removal or remedial action. It seems clear that Congress did not regard these claims as claims under CERCLA itself, since it describes them as "under State law" and did not include them on the list of claims under CERCLA that it likewise exempted from § 113(h)'s general withdrawal of jurisdiction over challenges to removal or remedial action. §§ 113(h)(1)–(5). These three problems raise serious doubt about the correctness of the Court's interpretation.[3]

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[2] The Court answers that §§ 113(b) and (h), though partially overlapping, are "independent" of each other. *Ante*, at 16–17, and n. 6. But this conclusion rests on an uneasy premise: that § 113(b) pertains only to causes of action based on CERCLA. There is reason to doubt that this is the best reading of the statute. See *supra*, at 30 and this page.

[3] The Court chalks up § 113(b)'s references to amount in controversy and party citizenship to a "belt and suspenders" approach. *Ante*, at 14, n. 5. As the Court sees it, Congress must have wanted to make especially clear that "*all* CERCLA lawsuits," no matter the amount in dispute or the citizenship of the parties, would be welcome in (and limited to) those courts. *Ibid.*

It is true that "instances of surplusage are not unknown" in federal statutes. *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006). But it is also the case that the Court usually seeks to "avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 574 (1995). In interpreting § 113, one way to avoid redundancy is to acknowledge the interlocking relationship between §§ 113(b) and (h). Section 113(b) refers to the hallmarks of diversity jurisdiction (amount in controversy and diversity), and § 113(h) makes clear that its clawback of jurisdiction over some "challenges" to EPA plans does not affect state-law claims that satisfy 28 U. S. C. § 1332.

C

The Government and petitioner advance a different interpretation of §§ 113(b) and (h), and although this interpretation solves the problems noted above, it has problems of its own. The Court, as noted, runs into trouble by interpreting the phrase "arising under" CERCLA in § 113(b) to mean what "arising under" means in 28 U. S. C. § 1331. The Government obviates this difficulty by arguing that "arising under" in § 113(b) has a broader meaning, such as the meaning of the same phrase in Article III of the Constitution. See Brief for United States as *Amicus Curiae* 23–24. The Government suggests that "arising under" in § 113(b) may reach "'any case or controversy that might call for the application of federal law.'" *Id.*, at 24 (quoting *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 492 (1983)). If § 113(b) uses the phrase in something like this sense, the jurisdiction it confers can reach some claims under state law, and that would explain § 113(b)'s specification that this jurisdiction is not dependent on either diversity or amount in controversy. In other words, this language makes clear that federal district courts have jurisdiction to hear these state-law claims without the restrictions that usually apply when federal courts entertain such claims.

Up to this point, the interpretation favored by the Government and petitioner proceeds smoothly, but it stumbles when it moves from § 113(b) to § 113(h). That provision reduces the grant of jurisdiction in § 113(b) by taking away jurisdiction over challenges to removal and remedial action unless, among other things, those claims are brought in a diversity action. The upshot is that federal district courts are left with jurisdiction over most state-law claims that challenge removal and remedial action only where the parties are diverse.[4] If it turns out that diversity is lacking, the district

[4] They also retain jurisdiction over claims "under State law which is applicable or relevant and appropriate under [§ 121] (relating to cleanup standards)." § 113(h).

courts cannot entertain the same claims. And not only that. Because § 113(b)'s grant of jurisdiction to the federal district courts is exclusive, the state courts cannot entertain those claims either.

It is hard to fathom why Congress might have wanted such a scheme. Congress might have wanted all the state-law claims covered by § 113(b) to be heard exclusively in federal court in order to prevent state courts and juries from unduly favoring home-state interests. But having granted the federal district courts jurisdiction to hear these claims in § 113(b), why would Congress take away that jurisdiction in cases where the parties happen not to be diverse? And why would Congress go further and prevent the state courts from hearing these claims? The Government and petitioner provide no answer, and none is apparent.

III

The Court gives three reasons for resolving the question of state-court jurisdiction. See *ante*, at 13, n. 3. None is compelling.

First, the Court explains that "Atlantic Richfield seeks more than a remand," namely, it seeks a remand with instructions to dismiss on jurisdictional grounds. *Ibid.* But Atlantic Richfield presented its § 122(e)(6) theory as an alternate ground for reversal, and has prevailed on that basis. As Atlantic Richfield's counsel stated at argument, the § 122(e)(6) ruling is "sufficient to resolve the case." Tr. of Oral Arg. 17–18.

Second, the Court says, "leaving the [§ 113] question unanswered . . . would leave the parties in a state of uncertainty." *Ante*, at 13, n. 3. But, as described above, there appears to be a slim chance that this case will, at least in its current state, "procee[d]" in the Montana courts. *Ibid.*

Third, the Court suggests that the grant of review, briefing, and argument on § 113 may warrant resolving the question of state-court jurisdiction. *Ibid.* But that presen-

tation has not cleared up serious issues surrounding §§ 113(b) and (h). And sunk costs cannot justify a departure from our usual practice of "deciding only what is necessary to the disposition of the immediate case." *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373 (1955).

* * *

Section 113 may simply be a piece of very bad draftsmanship, with pieces that cannot be made to fit together. Or it may be a puzzle with a solution that neither the parties, the Court, nor I have been able to solve. In a later case, briefing and argument may provide answers that have thus far eluded us. Since we are not required to attempt an answer in this case, the prudent course is to hold back.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

For nearly a century, Atlantic Richfield's predecessor operated a smelter near the town of Opportunity, Montana. At one time, the smelter produced much of the Nation's copper supply and served as the State's largest employer. App. 311. Eventually, though, it became apparent the smelter was producing more than just copper and jobs. Studies showed that the plant emitted up to 62 tons of arsenic and 10 tons of lead each day. Brief for Respondents 7. Thanks to what was once the world's tallest brick smokestack, these heavy metals blanketed the town and the whole of the Deer Lodge Valley—contaminating hundreds of square miles. Today, the smokestack is all that is left of the once massive operation. It stands alone in a state park, much of which remains dangerously contaminated and closed to the public. Visitors may view the stack, but only from a distance, through fences and between huge slag piles. *Id.*, at 9.

This case involves nearly 100 nearby residents. Some have lived in their homes for decades, some long before the environmental consequences of the smelter were fully ap-

preciated. They say they have thought about moving, but for many their property values aren't what they once were. Besides, as one homeowner put it, "I couldn't find a kitchen door that's got all my kids' heights on it." *Id.*, at 8.

The federal government has tried to help in its own way. In 1983, the government designated the 300-square-mile area surrounding the smelter a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U. S. C. § 9601 *et seq.* After years of study and negotiation, the government ordered Atlantic Richfield to remove up to 18 inches of soil in residential yards with arsenic levels exceeding 250 parts per million (ppm). App. 94–95. For so-called "pasture land"—that is, nearly everything else—the government set the threshold for soil removal at 1,000 ppm. Brief for Respondents 8. By way of reference, even 100 ppm is sometimes considered too toxic for local landfills, and the federal government itself has elsewhere set a threshold of 25 ppm. *Ibid.* Some States set residential cleanup levels as low as 0.04 ppm. *Ibid.*

The cleanup work that followed left much to be desired. By 2016, Atlantic Richfield claimed that it had virtually finished work on the landowners' properties. Yet, only 24 of their 77 properties had been remediated, and only about 5 percent of the total acreage had been touched. *Id.*, at 9. Soil near Tammy Peters's daycare playground, for example, still shows an arsenic level of 292 ppm. But because the "weighted average" for her yard is below 250 ppm, Atlantic Richfield performed no cleanup of the playground at all. *Id.*, at 10.

So the landowners here proceeded as landowners historically have: They sought remedies for the pollution on their lands in state court under state law. Their choice can come as no surprise. The federal government enjoys no general power to regulate private lands; it may intervene only consistent with the Commerce Clause or some other constitu-

tionally enumerated power. Nor does the federal government always intervene as fully as it might even when it can. Meanwhile, the regulation of real property and the protection of natural resources is a traditional and central responsibility of state governments. And States have long allowed landowners to seek redress for the pollution of their lands through ancient common law causes of action like nuisance and trespass. The landowners employed exactly these theories when they brought suit in state court seeking restoration damages from Atlantic Richfield—money that could be used only to remove arsenic, lead, and other toxins from their properties. The Montana Supreme Court has held that the landowners' case states a viable claim for relief and warrants trial.

Now, however, Atlantic Richfield wants us to call a halt to the proceedings. The company insists that CERCLA preempts and prohibits common law tort suits like this one. On Atlantic Richfield's telling, CERCLA even prevents private landowners from voluntarily remediating their own properties at their own expense. No one may do anything in 300 square miles of Montana, the company insists, without first securing the federal government's permission.

But what in the law commands that result? Everything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land. Congress hardly could have been clearer. It stated that, "[n]othing in this [Act] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U. S. C. § 9614(a). It added that "[n]othing in this [Act] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." § 9652(d). And it said again that "[t]his [Act] does not affect or other-

wise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided" elsewhere in provisions that even the Court today does not invoke as limits on recovery here. § 9659(h). Three times Congress made its point as plainly as anyone might.

So how does Atlantic Richfield seek to transform CERCLA from a tool to aid cleanups into a ban on them? The company has to point to *something* in the statutory text that trumps these many provisions and preempts the landowners' right to use state law to restore their lands. After all, merely "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law"; instead, a party like Atlantic Richfield seeking to displace state law must identify " 'a constitutional text or a federal statute' that does the displacing." *Virginia Uranium, Inc.* v. *Warren*, 587 U. S. 761, 767 (2019) (opinion of GORSUCH, J.) (quoting *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988)).

In answer, Atlantic Richfield directs our attention to § 122(e)(6). It's a provision buried in a section captioned "Settlements." The section outlines the process private parties must follow to negotiate a settlement and release of CERCLA liability with the federal government. Subsection (e)(6) bears the title "Inconsistent response action" and states that, "[w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U. S. C. § 9622(e)(6). So even read for all its worth, this provision only bars those "potentially responsible" to the federal government from initiating cleanup efforts without prior ap-

proval. To get where it needs to go, Atlantic Richfield must find some way to label the innocent landowners here "potentially responsible part[ies]" on the hook for cleanup duties with the federal government.

They are hardly that. When interpreting a statute, this Court applies the law's ordinary public meaning at the time of the statute's adoption, here 1980. See *Wisconsin Central Ltd.* v. *United States*, 585 U. S. 274, 284 (2018). To be "potentially responsible" for something meant then, as it does today, that a person could *possibly* be held accountable for it; the outcome is *capable of* happening. American Heritage Dictionary 1025 (1981); Webster's New Collegiate Dictionary 893 (1980). And there is simply no way the landowners here are potentially, possibly, or capable of being held liable by the federal government for anything. In the first place, the federal government never notified the landowners that they might be responsible parties, as it must under § 122(e)(1). Additionally, everyone admits that the period allowed for bringing a CERCLA claim against them has long since passed under § 113(g)(2)(B). On any reasonable account, the landowners are potentially responsible to the government for exactly nothing.

Statutory context is of a piece with the narrow text. Nothing in § 122 affects the rights of strangers to the federal government's settlement process. Everything in the section speaks to the details of that process. The section requires the government to provide all potentially responsible parties with notice that they might be held responsible for remedial measures. § 9622(e)(1). It instructs the government to give a potentially responsible party a list of everyone else so designated. *Ibid.* It specifies procedures for sharing proposals and counterproposals among this group. §§ 9622(e)(2)–(3). It allows the government to release from federal liability those who agree to settle and clean up hazardous sites. See §§ 9622(a)–(c). And because parties who settle with the federal government may seek cleanup costs

they incurred prior to settlement from other potentially responsible parties, subsection (e)(6) bars a potentially responsible party from taking unauthorized remedial measures. See §§ 9622(e)(1)–(3), (h). This ensures the government can control the shape of any final settlement and no private party can unilaterally incur costs that it might then foist on others. At the end of it all, the section does just what its title suggests. It governs the *settlement* process among those who have *something to settle.* It says nothing about the rights and duties of individuals who, like the landowners here, have nothing to settle because they face no potential liability.

Then there's what the rest of the statute tells us. As we've seen, CERCLA says again and again that it does not impair the rights of individuals under state law. That instruction makes perfect sense and does plenty of work if § 122 only requires those potentially liable to the federal government to secure permission before engaging in cleanup efforts. By contrast, reading § 122 to bar nearly everyone from undertaking remedial efforts without federal permission renders CERCLA's many and emphatic promises about protecting existing state law rights practically dead letters. Sure, the federal government would still have to "involv[e]" state officials and comply with state laws—or at least those laws federal agency employees deem "relevant and appropriate." §§ 9621(f)(1), (d)(2)(A). But CERCLA would promise nothing more than observer status for state law and those who wish to rely on it. States and private landowners alike who lack any potential federal liability could be barred even from undertaking remedial efforts on their own lands at their own expense, required instead to host toxic wastes involuntarily and indefinitely. Rather than supplementing state remedial efforts, CERCLA would rule them all.

Reading CERCLA this way would raise uneasy constitutional questions too. If CERCLA really did allow the federal government to order innocent landowners to house another party's pollutants involuntarily, it would invite weighty

takings arguments under the Fifth Amendment. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 421 (1982). And if the statute really did grant the federal government the power to regulate virtually each shovelful of dirt homeowners may dig on their own properties, it would sorely test the reaches of Congress's power under the Commerce Clause. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 551–553 (2012).

Atlantic Richfield's replies do nothing to address these problems. Instead of making some helpful textual or contextual rejoinder about § 122, the company asks us look somewhere else entirely. Now, Atlantic Richfield says, we should direct our attention to § 107, a provision that lists four classes of "[c]overed persons" the federal government is authorized to sue under CERCLA. One of these classes encompasses any person who owns a "facility" where hazardous waste has "come to be located." §§ 9607, 9601(9). Because the landowners' properties qualify as "facilit[ies]" where Atlantic Richfield's waste has come to be located, everyone admits the landowners themselves are "[c]overed persons." And, according to Atlantic Richfield, this necessarily means they are *also* "potentially responsible part[ies]" subject to § 122(e)(6)'s requirement that they seek federal permission before proceeding with any cleanup.

But notice the linguistic contortion and logical leap. Linguistically, § 107 identifies the "[c]overed persons" the government is authorized to sue. Section 122 requires a "potentially responsible party" seeking settlement with and discharge of liability from the federal government to obtain its permission before engaging in a cleanup. The terms use different language, appear in different statutory sections, and address different matters. Nor are these two sections the only ones like them. CERCLA differentiates between covered persons and potentially responsible parties in many places: Some sections apply to all persons covered by § 107 (see, *e. g.*, 42 U. S. C. §§ 9619(d), 9624(b)), while others extend

their mandates only to potentially responsible parties (see, *e. g.*, §§ 9604, 9605, 9611). Logically, too, the concepts are distinct. Yes, a potentially responsible party must be a covered person the government is authorized to sue. But the inverse does not follow. It is possible to be a person the government is authorized to sue without also being a person the government has chosen to single out for potential responsibility. Atlantic Richfield's argument, thus, essentially proceeds like this: Disregard the differences in language; then assume Congress chose its terms randomly throughout the law; and, finally, conflate logically distinct concepts.

Our case illustrates the significance of the distinction Congress drew and Atlantic Richfield would have us ignore. Maybe the federal government was once authorized by § 107 to include the innocent landowners here in a CERCLA suit. But few statutes pursue their purpose single-mindedly or require their full enforcement. And as we've seen, at least two things happened that preclude these landowners from being held responsible for anything: The government chose not to notify them of potential liability under § 122(e)(3), and it declined to bring suit within the period prescribed by § 113(g)(2)(B). Under the plain and ordinary meaning of the statutory terms before us, these landowners are not potentially responsible parties and CERCLA doesn't require them to seek permission from federal officials before cleaning their own lands. If Congress had wished to extend its ask-before-cleaning rule to every covered person—including those the government chooses not to pursue for potential liability—all it had to do was say so. Congress displayed no trouble using the term "[c]overed persons" elsewhere in the statute. See, *e. g.*, §§ 9619(d), 9624(b)(2). Conspicuously, it made a different choice here.

Without any plausible foundation in the statute to support its position, Atlantic Richfield resorts to this odd argument. Maybe the terms "[c]overed persons" and "potentially responsible party" are different and the statute uses them in

different places to do different things. But, the company insists, we must conflate them now because this Court has conflated them before. In particular, Atlantic Richfield points to language in *United States* v. *Atlantic Research Corp.*, 551 U. S. 128 (2007), where the Court spoke of "Section 107(a) [as] defin[ing] four categories of PRPs [potentially responsible parties]." *Id.*, at 131–132.

That may be so but it does not make it so. The relationship between the terms "[c]overed persons" under § 107 and "potentially responsible part[ies]" under § 122 is of critical importance in this case, but it was not briefed, argued, or decided in *Atlantic Research*. Instead, the only question there concerned the meaning of the term "[c]overed persons" under § 107. Though the Court employed the term "PRP" to describe "[c]overed persons," nothing turned on the use or meaning of the acronym: Replace every reference to "PRP" with "[c]overed person" and the Court's holding and reasoning remains the same. This Court has long warned that matters "'lurk[ing] in the record, neither brought to the attention of the court nor ruled upon,'" should not be read as having decided anything. *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 170 (2004) (quoting *Webster* v. *Fall*, 266 U. S. 507, 511 (1925)). We have warned, too, against reading our judicial opinions as if they were some sort of legislative code because, otherwise, innocent and inconsequential judicial remarks might mistakenly come to trump democratically adopted laws. See *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979). Atlantic Richfield would have us ignore these teachings and confuse a stray remark with a rule of law.

In the end, the company's case cannot help but be seen for what it really is: an appeal to policy. On its view, things would be so much more orderly if the federal government ran everything. And, let's be honest, the implication here is that property owners cannot be trusted to clean up their lands without causing trouble (especially for Atlantic Rich-

field). Nor, we are told, should Montanans worry so much: The restrictions Atlantic Richfield proposes aren't really *that* draconian because homeowners would still be free to do things like build sandboxes for their grandchildren (provided, of course, they don't scoop out too much arsenic in the process).

But, as in so many cases that come before this Court, the policy arguments here cut both ways. Maybe paternalistic central planning cannot tolerate parallel state law efforts to restore state lands. But maybe, too, good government and environmental protection would be better served if state law remedies proceeded alongside federal efforts. State and federal law enforcement usually work in just this way, complementing rather than displacing one another. And, anyway, how long would Atlantic Richfield have us enforce what amounts to a federal easement requiring landowners to house toxic waste on their lands? The government has been on site since 1983; work supposedly finished around the landowners' homes in 2016; the completion of "primary" cleanup efforts is "estimated" to happen by 2025. So, yes, once a Superfund site is "delisted," the restrictions on potentially responsible parties fade away. But this project is well on its way to the half-century mark and still only a "preliminary" deadline lies on the horizon. No one before us will even hazard a guess when the work will finish and a "delisting" might come. On Atlantic Richfield's view, generations have come and gone and more may follow before the plaintiffs can clean their land.

The real problem, of course, is that Congress, not this Court, is supposed to make judgments between competing policy arguments like these. And, as we've seen, Congress has offered its judgment repeatedly and clearly. CERCLA sought to add to, not detract from, state law remedial efforts. It endorsed a federalized, not a centralized, approach to environmental protection. What if private or state cleanup efforts really do somehow interfere with federal interests?

Congress didn't neglect the possibility. But instead of requiring state officials and local landowners to beg Washington for permission, Congress authorized the federal government to seek injunctive relief in court. See § 9606(a). Atlantic Richfield would have us turn this system upside down, recasting the statute's presumption in favor of cooperative federalism into a presumption of federal absolutism.

While I agree with the Court's assessment in Parts I and II of its opinion that we have jurisdiction to hear this case, I cannot agree with its ruling on the merits in Part III. Departing from CERCLA's terms in this way transforms it from a law that supplements state environmental restoration efforts into one that prohibits them. Along the way, it strips away ancient common law rights from innocent landowners and forces them to suffer toxic waste in their backyards, playgrounds, and farms. Respectfully, that is not what the law was written to do; that is what it was written to prevent.

Syllabus

THRYV, INC., FKA DEX MEDIA, INC. *v.* CLICK-TO-CALL TECHNOLOGIES, LP, ET AL.

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

No. 18–916. Argued December 9, 2019—Decided April 20, 2020

Inter partes review is an administrative process that permits a patent challenger to ask the U. S. Patent and Trademark Office to reconsider the validity of earlier granted patent claims. For inter partes review to proceed, the agency must agree to institute review. See 35 U. S. C. § 314. Among other conditions set by statute, if a request comes more than a year after suit against the requesting party for patent infringement, "[a]n inter partes review may not be instituted." § 315(b). The agency's "determination . . . whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d).

Entities associated with petitioner Thryv, Inc., sought inter partes review of a patent owned by respondent Click-to-Call Technologies, LP. Click-to-Call countered that the petition was untimely under § 315(b). The Patent Trial and Appeal Board (Board) disagreed and instituted review. After proceedings on the merits, the Board issued a final written decision reiterating its § 315(b) decision and canceling 13 of the patent's claims as obvious or lacking novelty. Click-to-Call appealed the Board's § 315(b) determination. Treating the Board's application of § 315(b) as judicially reviewable, the Court of Appeals concluded that the petition was untimely, vacated the Board's decision, and remanded with instructions to dismiss.

Held: Section 314(d) precludes judicial review of the agency's application of § 315(b)'s time prescription. Pp. 52–60.

(a) A party generally cannot contend on appeal that the agency should have refused "to institute an inter partes review." § 314(d). That follows from § 314(d)'s text and *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261. In *Cuozzo*, this Court explained that § 314(d) "preclud[es] review of the Patent Office's institution decisions"—at least "where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." *Id.*, at 274–275. Pp. 52–53.

(b) The question here is whether a challenge based on § 315(b) ranks as an appeal of the agency's decision "to institute an inter partes review." § 314(d). There is no need to venture beyond *Cuozzo*'s holding

that § 314(d) bars review at least of matters "closely tied to the application and interpretation of statutes related to" the institution decision, 579 U. S., at 275. A § 315(b) challenge easily meets that measurement. Section 315(b), setting forth a circumstance in which "[a]n inter partes review may not be instituted," expressly governs institution and nothing more. Pp. 53–54.

(c) This conclusion is strongly reinforced by the statute's purpose and design. Congress designed inter partes review to weed out bad patent claims efficiently. Allowing § 315(b) appeals, however, would unwind agency proceedings determining patentability and leave bad patents enforceable. Pp. 54–56.

(d) In Click-to-Call's view, § 314(d)'s bar on judicial review is limited to the agency's threshold determination under § 314(a) of the question whether the petitioner has a reasonable likelihood of prevailing. *Cuozzo* is fatal to that interpretation, for the Court in that case held unreviewable the agency's application of a provision other than § 314(a). Contrary to Click-to-Call's contention, § 314(d)'s text does not limit the review bar to § 314(a). Rather than borrowing language from related provisions that would have achieved Click-to-Call's preferred meaning, Congress used broader language in § 314(d). Click-to-Call also insists that Congress intended judicial supervision of the agency's application of § 315(b), but the statute instead reflects a choice to entrust that issue to the agency. Finally, *SAS Institute Inc.* v. *Iancu*, 584 U. S. 357, offers Click-to-Call no assistance. Unlike the appeal held reviewable in *SAS Institute*, Click-to-Call's appeal challenges not the manner in which the agency's review proceeds once instituted, but whether the agency should have instituted review at all. Pp. 56–59.

(e) Click-to-Call argues in the alternative that its § 315(b) objection is authorized as an appeal from the Board's final written decision, which addressed the § 315(b) issue. Even labeled that way, Click-to-Call's appeal is still barred by § 314(d) because Click-to-Call's contention remains, essentially, that the agency should have refused to institute inter partes review. P. 60.

899 F. 3d 1321, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, KAGAN, and KAVANAUGH, JJ., joined, and in which THOMAS and ALITO, JJ., joined except as to Part III–C. GORSUCH, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined as to Parts I, II, III, and IV, *post*, p. 61.

Adam H. Charnes argued the cause for petitioner. With him on the briefs were *Jason P. Sneed*, *Mitchell G. Stockwell*, and *Thurston Webb*.

Jonathan Y. Ellis argued the cause for the federal respondent urging reversal under this Court's Rule 12.6. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark F. Freeman*, *Edward Himmelfarb*, *Melissa N. Patterson*, *Sarah T. Harris*, *Thomas W. Krause*, *Farheena Y. Rasheed*, and *Molly R. Silfen*.

Daniel L. Geyser argued the cause for respondent Click-to-Call Technologies, LP. With him on the brief were *Peter J. Ayers* and *Craig J. Yudell*.*

JUSTICE GINSBURG delivered the opinion of the Court.†

Inter partes review is an administrative process in which a patent challenger may ask the U. S. Patent and Trademark Office (PTO) to reconsider the validity of earlier granted patent claims. This case concerns a statutorily prescribed limi-

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Barbara A. Jones* and *William Alvarado Rivera*; for the Atlanta Gas Light Co. by *Jeffrey S. Bucholtz* and *Russell E. Blythe*; for Intel Corp. by *Donald B. Verrilli, Jr.*, and *Ginger D. Anders*; for ON Semiconductor Corp. et al. by *Kathleen M. Sullivan* and *Michael Hawes*; and for Superior Communications, Inc., by *Sydney Leach* and *Andrew M. Jacobs*.

Briefs of *amici curiae* urging affirmance were filed for the Biotechnology Innovation Organization by *Amy Mason Saharia*, *Hans Sauer*, and *Melissa Brand*; for the New York Intellectual Property Law Association by *Irena Royzman*, *Colman B. Ragan*, *Robert J. Rando*, and *Matthew Kaufman*; for Pharmaceutical Research and Manufacturers of America by *Scott E. Kamholz*, *James C. Stansel*, and *David E. Korn*; for Power Integrations, Inc., by *Alexandra A. E. Shapiro*, *John W. Thornburgh*, and *Frank E. Scherkenbach*; for Professors of Patent Law et al. by *Jonathan A. Herstoff* and *Saurabh Vishnubhakat*, *pro se*; and for Stephen I. Vladeck by *J. Carl Cecere*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Erick J. Palmer* and *Sheldon H. Klein*; for the Federal Circuit Bar Association by *Naresh Kilaru*; and for the PTAB Bar Association by *Adam G. Unikowski*, *Aaron A. Barlow*, *Michael G. Babbitt*, *Gabriel K. Gillett*, and *Naveen Modi*.

†JUSTICE THOMAS and JUSTICE ALITO join all but Part III–C of this opinion.

tation of the issues a party may raise on appeal from an inter partes review proceeding.

When presented with a request for inter partes review, the agency must decide whether to institute review. 35 U. S. C. § 314. Among other conditions set by statute, if the request comes more than a year after suit against the requesting party for patent infringement, "[a]n inter partes review may not be instituted." § 315(b). "The determination by the [PTO] Director whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d).‡

In this case, the agency instituted inter partes review in response to a petition from Thryv, Inc., resulting in the cancellation of several patent claims. Patent owner Click-to-Call Technologies, LP, appealed, contending that Thryv's petition was untimely under § 315(b).

The question before us: Does § 314(d)'s bar on judicial review of the agency's decision to institute inter partes review preclude Click-to-Call's appeal? Our answer is yes. The agency's application of § 315(b)'s time limit, we hold, is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable by § 314(d).

I

The Patent and Trademark Office has several ways "to reexamine—and perhaps cancel—a patent claim that it had previously allowed." *Cuozzo Speed Technologies*, *LLC* v. *Lee*, 579 U. S. 261, 267 (2016). Congress established the procedure at issue here, inter partes review, in the Leahy-Smith America Invents Act (AIA), 125 Stat. 284, enacted in 2011. See 35 U. S. C. § 311 *et seq.* Inter partes review allows third parties to challenge patent claims on grounds of invalidity specified by statute. § 311(b).

For inter partes review to proceed, the agency must agree to institute review. § 314. Any person who is not the pat-

‡Key statutory provisions are reproduced in an appendix to this opinion.

ent's owner may file a petition requesting inter partes review. § 311(a). The patent owner may oppose institution of inter partes review, asserting the petition's "failure . . . to meet any requirement of this chapter." § 313.

The AIA sets out prerequisites for institution. Among them, "[t]he Director may not authorize an inter partes review to be instituted unless the Director determines . . . that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." § 314(a). Most pertinent to this case, "[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent." § 315(b).

After receiving the petition and any response, the PTO "Director shall determine whether to institute an inter partes review under this chapter." § 314(b). The Director has delegated institution authority to the Patent Trial and Appeal Board (Board). 37 CFR § 42.4(a) (2019). As just noted, the federal agency's "determination . . . whether to institute an inter partes review under this section" is "final and nonappealable." 35 U. S. C. § 314(d).

Upon electing to institute inter partes review, the Board conducts a proceeding to evaluate the challenged claims' validity. See § 316. At the conclusion of the proceeding—if review "is instituted and not dismissed"—the Board "issue[s] a final written decision with respect to the patentability of" the challenged claims. § 318(a). "A party dissatisfied with the final written decision . . . may appeal the decision" to the Court of Appeals for the Federal Circuit. § 319.

II

Respondent Click-to-Call owns a patent relating to a technology for anonymous telephone calls, U. S. Patent No. 5,818,836 ('836 patent). In 2013, petitioner Thryv sought

inter partes review, challenging several of the patent's claims.[1]

In opposition, Click-to-Call urged that § 315(b) barred institution of inter partes review because Thryv filed its petition too late. Click-to-Call pointed to an infringement suit filed in 2001, which ended in a voluntary dismissal without prejudice.[2] In Click-to-Call's view, that 2001 suit started § 315(b)'s one-year clock, making the 2013 petition untimely.

The Board disagreed. Section 315(b) did not bar the institution of inter partes review, the Board concluded, because a complaint dismissed without prejudice does not trigger § 315(b)'s one-year limit. Finding no other barrier to institution, the Board decided to institute review. After proceedings on the merits, the Board issued a final written decision reiterating its rejection of Click-to-Call's § 315(b) argument and canceling 13 of the patent's claims as obvious or lacking novelty.

Click-to-Call appealed, challenging only the Board's determination that § 315(b) did not preclude inter partes review. The Court of Appeals dismissed the appeal for lack of jurisdiction, agreeing with Thryv and the Director (who intervened on appeal) that § 314(d)'s bar on appeal of the institution decision precludes judicial review of the agency's application of § 315(b). Citing our intervening decision in *Cuozzo*, 579 U. S., at 274–275, we granted certiorari, vacated the judgment, and remanded. *Click-to-Call Technologies, LP* v.

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[1] More precisely, the petition was filed by four companies, including YellowPages.com, LLC, and Ingenio, LLC. Through "a series of mergers, sales, and name changes," both became Thryv. Brief for Petitioner 8. For simplicity, we refer to Thryv and its predecessor entities as "Thryv."

[2] The 2001 suit was brought by Inforocket.Com, Inc.—then the exclusive licensee of the '836 patent—against Keen, Inc. See *Inforocket.Com, Inc.* v. *Keen, Inc.*, No. 1:01–cv–05130 (SDNY). While the suit was pending, Keen acquired Inforocket and the District Court dismissed the suit without prejudice. By the time of the inter partes review petition, Keen had become Ingenio (now Thryv).

Oracle Corp., 579 U. S. 925 (2016). On remand, the Court of Appeals again dismissed the appeal on the same ground.

Thereafter, in another case, the en banc Federal Circuit held that "time-bar determinations under § 315(b) are appealable" notwithstanding § 314(d). *Wi-Fi One, LLC* v. *Broadcom Corp.*, 878 F. 3d 1364, 1367 (2018). The majority opinion construed § 314(d)'s reference to the determination whether to institute inter partes review "under this section" as trained on the likelihood-of-success requirement stated in § 314(a). *Id.*, at 1372. The § 315(b) timeliness determination, the majority concluded, "is not 'closely related' to the institution decision addressed in § 314(a)." *Id.*, at 1374 (quoting *Cuozzo*, 579 U. S., at 276). The majority therefore held that for § 315(b) appeals, § 314(d) does not displace the usual presumption favoring judicial review of agency action. *Wi-Fi One*, 878 F. 3d, at 1374–1375. In a concurring opinion, Judge O'Malley emphasized a "simpler" basis for the same conclusion. *Id.*, at 1375. In her view, § 314(d) shields from review only the agency's assessment of a petition's "substantive adequacy," not questions about the agency's "authority to act." *Id.*, at 1376.

Judge Hughes, joined by Judges Lourie, Bryson, and Dyk, dissented, expressing a position that today's dissent characterizes as "extraordinary." *Post*, at 66. Those judges concluded that § 314(d) conveys Congress' "clear and unmistakable" "intent to prohibit judicial review of the Board's [inter partes review] institution decision." *Wi-Fi One*, 878 F. 3d, at 1378. That prohibition applies to § 315(b) issues, the Federal Circuit dissenters maintained, because § 315(b) "describes when an [inter partes review] may be 'instituted.'" *Id.*, at 1377, 1378–1379 (quoting § 315(b)).

In light of its en banc decision in *Wi-Fi One*, the Court of Appeals granted panel rehearing in this case. Treating the Board's application of § 315(b) as judicially reviewable, the panel's revised opinion held that the Board erred by instituting review. The petition for inter partes review here was

untimely, the Court of Appeals held, because the 2001 infringement complaint, though dismissed without prejudice, started the one-year clock under § 315(b).[3] The court therefore vacated the Board's final written decision, which had invalidated 13 of Click-to-Call's claims for want of the requisite novelty and nonobviousness, and remanded with instructions to dismiss.

We granted certiorari to resolve the reviewability issue, 588 U. S. 905 (2019), and now vacate the Federal Circuit's judgment and remand with instructions to dismiss the appeal for lack of appellate jurisdiction.

III

A

To determine whether § 314(d) precludes judicial review of the agency's application of § 315(b)'s time prescription, we begin by defining § 314(d)'s scope. Section 314(d)'s text renders "final and nonappealable" the "determination by the Director whether *to institute an inter partes review* under this section." § 314(d) (emphasis added). That language indicates that a party generally cannot contend on appeal that the agency should have refused "to institute an inter partes review."

We held as much in *Cuozzo*. There, a party contended on appeal that the agency should have refused to institute inter partes review because the petition failed § 312(a)(3)'s requirement that the grounds for challenging patent claims must be identified "with particularity." 579 U. S., at 270 (internal

[3] A footnote in the panel's opinion noted that the Court of Appeals sitting en banc had considered and agreed with the panel majority's conclusion that a complaint voluntarily dismissed without prejudice can trigger § 315(b)'s time bar. *Click-to-Call Technologies, LP* v. *Ingenio, Inc.*, 899 F. 3d 1321, 1328, n. 3 (CA Fed. 2018). On that issue, Judge Taranto issued a concurring opinion, *id.*, at 1343–1347, and Judge Dyk, joined by Judge Lourie, issued a dissenting opinion, *id.*, at 1350–1355. That question is outside the scope of our review.

quotation marks omitted). This "contention that the Patent Office unlawfully initiated its agency review is not appealable," we held, for "that is what § 314(d) says." *Id.*, at 271. Section 314(d), we explained, "preclud[es] review of the Patent Office's institution decisions" with sufficient clarity to overcome the "'strong presumption' in favor of judicial review." *Id.*, at 273–274 (quoting *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015)). See *Cuozzo*, 579 U. S., at 273 (finding "'clear and convincing' indications . . . that Congress intended to bar review" (quoting *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349–350 (1984))).

We reserved judgment in *Cuozzo*, however, on whether § 314(d) would bar appeals reaching well beyond the decision to institute inter partes review. 579 U. S., at 275. We declined to "decide the precise effect of § 314(d) on," for example, "appeals that implicate constitutional questions." *Ibid.* Instead, we defined the bounds of our holding this way: "[O]ur interpretation applies where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." *Id.*, at 274–275.

B

We therefore ask whether a challenge based on § 315(b) ranks as an appeal of the agency's decision "to institute an inter partes review." § 314(d). We need not venture beyond *Cuozzo*'s holding that § 314(d) bars review at least of matters "closely tied to the application and interpretation of statutes related to" the institution decision, *id.*, at 275, for a § 315(b) challenge easily meets that measurement.

Section 315(b)'s time limitation is integral to, indeed a condition on, institution. After all, § 315(b) sets forth a circumstance in which "[a]n inter partes review may not be instituted." Even Click-to-Call and the Court of Appeals

recognize that § 315(b) governs institution. See Brief for Respondent Click-to-Call 1 (§ 315(b) is "a clear limit on the Board's institution authority"); *Wi-Fi One*, 878 F. 3d, at 1373 ("§ 315(b) controls the Director's authority to institute [inter partes review]").

Because § 315(b) expressly governs institution and nothing more, a contention that a petition fails under § 315(b) is a contention that the agency should have refused "to institute an inter partes review." § 314(d). A challenge to a petition's timeliness under § 315(b) thus raises "an ordinary dispute about the application of" an institution-related statute. *Cuozzo*, 579 U. S., at 271. In this case as in *Cuozzo*, therefore, § 314(d) overcomes the presumption favoring judicial review.[4]

C

The AIA's purpose and design strongly reinforce our conclusion. By providing for inter partes review, Congress, concerned about overpatenting and its diminishment of competition, sought to weed out bad patent claims efficiently. See *id.*, at 272; H. R. Rep. No. 112–98, pt. 1, p. 40 (2011) ("The legislation is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.").[5]

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[4] We do not decide whether mandamus would be available in an extraordinary case. Cf. *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 291, n. 5 (2016) (ALITO, J., concurring in part and dissenting in part).

[5] The dissent acknowledges that "Congress authorized inter partes review to encourage further scrutiny of already issued patents." *Post*, at 74. Yet the dissent, despite the Court's decision upholding the constitutionality of such review in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325 (2018), appears ultimately to urge that Congress lacks authority to permit second looks. Patents are property, the dissent several times repeats, and Congress has no prerogative to allow "property-taking-by-bureaucracy." *Post*, at 62, 78–81. But see *Oil States*, 584 U. S., at 335 ("patents are public franchises" (internal quotation

Allowing § 315(b) appeals would tug against that objective, wasting the resources spent resolving patentability and leaving bad patents enforceable. A successful § 315(b) appeal would terminate in vacatur of the agency's decision; in lieu of enabling judicial review of patentability, vacatur would unwind the agency's merits decision. See *Cuozzo*, 579 U. S., at 272. And because a patent owner would need to appeal on § 315(b) untimeliness grounds only if she could not prevail on patentability, § 315(b) appeals would operate to save bad patent claims. This case illustrates the dynamic. The agency held Click-to-Call's patent claims invalid, and Click-to-Call does not contest that holding. It resists only the agency's institution decision, mindful that if the institution decision is reversed, then the agency's work will be undone and the canceled patent claims resurrected.

Other features of the statutory design confirm that Congress prioritized patentability over § 315(b)'s timeliness requirement. A petitioner's failure to satisfy § 315(b) does not prevent the agency from conducting inter partes review of the challenged patent claims; the agency can do so at another petitioner's request. § 311(a). Nor does failure to satisfy § 315(b) prevent the original initiator from participating on the merits; the § 315(b)-barred party can join a proceeding initiated by another petitioner. § 315(b), (c). And once inter partes review is instituted, the agency may issue a final written decision even "[i]f no petitioner remains in the inter partes review." § 317(a). It is unsurprising that a statutory scheme so consistently elevating resolution of patentability above a petitioner's compliance with § 315(b) would exclude § 315(b) appeals, thereby preserving the Board's adjudication of the merits.

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marks omitted)). The second look Congress put in place is assigned to the very same bureaucracy that granted the patent in the first place. Why should that bureaucracy be trusted to give an honest count on first view, but a jaundiced one on second look? See *post*, at 79–80.

Judicial review of § 315(b) rulings, moreover, would do little to serve other statutory goals. The purpose of § 315(b), all agree, is to minimize burdensome overlap between inter partes review and patent-infringement litigation. Brief for Petitioner 24; Brief for Federal Respondent 36; Brief for Respondent Click-to-Call 37. Judicial review *after* the agency proceedings cannot undo the burdens already occasioned. Nor are § 315(b) appeals necessary to protect patent claims from wrongful invalidation, for patent owners remain free to appeal final decisions on the merits. § 319.

IV

Click-to-Call advances a narrower reading of § 314(d). In Click-to-Call's view, which the dissent embraces, *post*, at 66–78, the bar on judicial review applies only to the agency's threshold determination under § 314(a) of the question whether the petitioner has a reasonable likelihood of prevailing. Section 314(d) addresses the "determination by the Director whether to institute inter partes review *under this section*" (emphasis added), and, Click-to-Call maintains, § 314(a) contains "the only substantive determination referenced in" the same section as § 314(d). Brief for Respondent Click-to-Call 16. This interpretation, Click-to-Call argues, supplies a clear rule consonant with the presumption favoring judicial review. Cf. *supra*, at 51 (Federal Circuit's en banc *Wi-Fi One* decision).

Cuozzo is fatal to Click-to-Call's interpretation. Section 314(d)'s review bar is not confined to the agency's application of § 314(a), for in *Cuozzo* we held unreviewable the agency's application of § 312(a)(3). 579 U. S., at 275. Far from limiting the appeal bar to § 314(a) and "nothing else" as Click-to-Call urges, Brief for Respondent 29, the Court's opinion in *Cuozzo* explained that the bar extends to challenges grounded in "statutes related to" the institution decision. 579 U. S., at 275.

The text of § 314(d) offers Click-to-Call no support. The provision sweeps more broadly than the determination about whether "there is a reasonable likelihood that the petitioner would prevail." § 314(a). Rather, it encompasses the entire determination "whether to institute an inter partes review." § 314(d).

And § 314(d) refers not to a determination under subsection (a), but to the determination "under this section." That phrase indicates that § 314 governs the Director's institution of inter partes review. Titled "Institution of inter partes review," § 314 is the section housing the command to the Director to "determine whether to institute an inter partes review," § 314(b). Thus, every decision to institute is made "under" § 314 but must take account of specifications in other provisions—such as the § 312(a)(3) particularity requirement at issue in *Cuozzo* and the § 315(b) timeliness requirement at issue here. Similar clarifying language recurs throughout the AIA. See, *e. g.*, § 315(c) (referring to the Director's determination regarding "the institution of an inter partes review *under section 314*" (emphasis added)); § 314(b) (referring to "a petition filed *under section 311*," the section authorizing the filing of petitions (emphasis added)); § 314(b)(1) (referring to "a preliminary response to the petition *under section 313*," the section authorizing the filing of preliminary responses to petitions (emphasis added)).

If Congress had intended Click-to-Call's meaning, it had at hand readymade language from a precursor to § 314(d): "A determination by the Director under *subsection (a)* shall be final and non-appealable." 35 U. S. C. § 312(c) (2006 ed.) (emphasis added) (governing inter partes reexamination). Or Congress might have borrowed from a related provision: "A determination by the Director pursuant to *subsection (a) of this section that no substantial new question of patentability has been raised* will be final and nonappealable." 35 U. S. C. § 303(c) (emphasis added) (governing ex parte reex-

amination). Instead, Congress chose to shield from appellate review the determination "whether *to institute an inter partes review* under *this section*." § 314(d) (emphasis added). That departure in language suggests a departure in meaning. See *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 86 (2017).

Click-to-Call doubts that Congress would have limited the agency's institution authority in § 315(b) without ensuring judicial supervision. Congress entrusted the institution decision to the agency, however, to avoid the significant costs, already recounted, of nullifying a thoroughgoing determination about a patent's validity. See *supra*, at 54–55. That goal—preventing appeals that would frustrate efficient resolution of patentability—extends beyond § 314(a) appeals.

Click-to-Call also contends that we adopted its interpretation of § 314(d) in *SAS Institute Inc.* v. *Iancu*, 584 U. S. 357 (2018). Neither of our holdings in that case assists Click-to-Call, and both holdings remain governing law. *SAS Institute* first held that once the agency institutes an inter partes review, it must "resolve *all* of the claims in the case." *Id.*, at 359. *SAS Institute* located that rule in § 318(a), which requires the agency to decide "the patentability of *any* patent claim challenged by the petitioner." *Ibid.* (emphasis in original; internal quotation marks omitted). *SAS Institute* next held that § 314(d) did not bar judicial review of § 318(a)'s application. *Id.*, at 370–371. Our decision explained that "nothing in § 314(d) or *Cuozzo* withdraws our power to ensure that an inter partes review proceeds in accordance with the law's demands." *Id.*, at 371. That reviewability holding is inapplicable here, for Click-to-Call's appeal challenges not the manner in which the agency's review "proceeds" once instituted, but whether the agency should have instituted review at all.

Click-to-Call homes in on a single sentence from *SAS Institute*'s reviewability discussion: "*Cuozzo* concluded that § 314(d) precludes judicial review only of the Director's 'ini-

tial determination' under § 314(a) that 'there is a "reasonable likelihood" that the claims are unpatentable on the grounds asserted' and review is therefore justified." *Id.*, at 370–371 (quoting *Cuozzo*, 579 U. S., at 273). But that sentence's account of *Cuozzo* is incomplete. Recall that *Cuozzo* itself applied § 314(d)'s appeal bar to a challenge on grounds other than § 314(a). See *supra*, at 56. To understand how far beyond § 314(a) the bar on judicial review extends, we look to the statute and *Cuozzo*; for the reasons stated above, they establish that § 314(d) bars challenges resting on § 315(b).[6]

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[6] Defending Click-to-Call's interpretation, the dissent takes a view of our precedent that neither Click-to-Call nor the Federal Circuit advances. See *post*, at 75–78. The dissent does not consider itself bound by *Cuozzo*'s conclusion that § 314(d) bars appeal of "questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review," 579 U. S., at 275. According to the dissent, that statement is dicta later repudiated in *SAS Institute Inc.* v. *Iancu*, 584 U. S. 357 (2018).

But *Cuozzo* concerned an appeal resting on a "related statutory section": § 312(a)(3). 579 U. S., at 271. That § 312(a)(3) challenge was tied to institution, the Court explained, for two reasons: first, because it "attack[ed] a 'determination . . . whether to institute' review," *id.*, at 272; second, because the § 312(a)(3) challenge was related to invoking § 314(a)'s condition on institution, *id.*, at 275–276. *Cuozzo*'s recognition that § 314(d) can bar challenges rooted in provisions other than § 314(a) was hardly "dicta," *post*, at 76–77—it was the Court's holding. And *SAS Institute* purported to adhere to *Cuozzo*, not to overrule it. 584 U. S., at 370–371. The Court in *SAS Institute* said, specifically, that it discerned "nothing in . . . *Cuozzo*" inconsistent with its conclusion. *Id.*, at 371.

We do not so lightly treat our determinations as dicta and our decisions as overruling others *sub silentio*. Nor can we countenance the dissent's dangerous insinuation that today's decision is not "really" binding precedent. *Post*, at 77–78 ("[W]ho can say?"); *post*, at 78 ("Litigants and lower courts alike will just have to wait and see."). Lest any "confusion" remain, *post*, at 77, we reaffirm today our holding in *Cuozzo*: Section 314(d) generally precludes appeals of the agency's institution decision, including, beyond genuine debate, appeals "consist[ing] of questions that are closely tied to the application and interpretation of statutes related to" the insti-

V

Click-to-Call presses an alternative reason why the Board's ruling on its § 315(b) objection is appealable. The Board's final written decision addressed the § 315(b) issue, so Click-to-Call argues that it may appeal under § 319, which authorizes appeal from the final written decision. But even labeled as an appeal from the final written decision, Click-to-Call's attempt to overturn the Board's § 315(b) ruling is still barred by § 314(d). Because § 315(b)'s sole office is to govern institution, Click-to-Call's contention remains, essentially, that the agency should have refused to institute inter partes review. As explained, § 314(d) makes that contention unreviewable.

* * *

For the reasons stated, we vacate the judgment of the United States Court of Appeals for the Federal Circuit and remand the case with instructions to dismiss for lack of appellate jurisdiction.

It is so ordered.

APPENDIX OF KEY STATUTORY PROVISIONS

35 U. S. C. § 314:

"**Institution of inter partes review**

"(a) THRESHOLD.—The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

"(b) TIMING.—The Director shall determine whether to institute an inter partes review under this chapter

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tution decision. 579 U. S., at 271, 275. The appeal bar, we therefore reiterate, is not limited to the agency's application of § 314(a).

pursuant to a petition filed under section 311 within 3 months after—

"(1) receiving a preliminary response to the petition under section 313; or

"(2) if no such preliminary response is filed, the last date on which such response may be filed.

"(c) NOTICE.—The Director shall notify the petitioner and patent owner, in writing, of the Director's determination under subsection (a), and shall make such notice available to the public as soon as is practicable. Such notice shall include the date on which the review shall commence.

"(d) NO APPEAL.—The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable."

35 U. S. C. § 315(b):

"PATENT OWNER'S ACTION.—An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c)."

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR joins as to Parts I, II, III, and IV, dissenting.

Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review. Worse, the Court closes the courthouse not in a case where the patent owner is merely unhappy with the merits of the agency's decision but where the owner

claims the agency's proceedings were unlawful from the start. Most remarkably, the Court denies judicial review even though the government now concedes that the patent owner is *right* and this entire exercise in property-taking-by-bureaucracy was forbidden by law.

It might be one thing if Congress clearly ordained this strange result. But it did not. The relevant statute, the presumption of judicial review, and our precedent all point toward allowing, not forbidding, inventors their day in court. Yet, the Court brushes past these warning signs and, in the process, carries us another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights and liberties to bureaucratic mercy.

I

Our story stretches back to the 1990s, when Stephen DuVal invented a system for anonymizing telephone calls. Believing in the promise of his idea, Mr. DuVal hired an attorney to secure a patent and sought avenues to bring his invention to market. Initially, both efforts met with success. In 1998, Mr. DuVal was awarded a U. S. Patent, which he licensed to a company called InfoRocket.com, Inc.

But problems soon emerged. In 2001, InfoRocket accused Ingenio, Inc., a predecessor of today's petitioner Thryv, Inc., of infringing Mr. DuVal's patent. The case carried on in federal district court for more than a year before InfoRocket and Ingenio decided to merge. The companies then jointly persuaded the court to dismiss InfoRocket's lawsuit without prejudice.

Still, the quiet did not last long. Following the merger, the surviving entity—for simplicity, call it Thryv—sought to turn the tables on Mr. DuVal by asking the Patent Office to reconsider the validity of his patent in an ex parte reexamination. That agency-led process dragged on for four more years, and ended with a mixed verdict: The Patent Office

canceled a few claims, but amended others and permitted Mr. DuVal to add some new ones too.

Even the ex parte reexamination wasn't enough to put the parties' disputes to rest. During the reexamination, Thryv terminated its license with Mr. DuVal and stopped paying him royalties. But it seems that Thryv continued using the patented technology all the same. So Mr. Duval transferred his patent to respondent Click-to-Call Technologies LP (CTC), which swiftly took the patent back to court. CTC noted that Thryv couldn't exactly plead ignorance about this patent, given that the company or its predecessors had previously licensed the patent, been sued for infringing it, and asked the Patent Office to reexamine it. When it came to Mr. DuVal's patent, CTC alleged, Thryv had done just about everything one can do to a patent except invent it.

Thryv responded by opening another new litigation front of its own. One year after CTC filed its federal lawsuit, Thryv lodged another administrative petition with the Patent Office, this time seeking inter partes review. Echoing some of the same arguments that led to its push for an ex parte administrative reexamination nine years earlier, and adding other arguments too, Thryv (again) asked the agency to cancel Mr. DuVal's patent on the grounds that it lacked novelty and was obvious. At the same time, Thryv sought to stay proceedings in CTC's infringement suit. Thryv argued that the district court should defer to the newly initiated inter partes review. Like many district courts facing the prospect of parallel administrative proceedings, this one obliged.

Why at this late hour did Thryv prefer to litigate before the agency rather than a federal district court? The agency's ex parte reexamination years earlier hadn't helped Thryv much. But since then, Congress had adopted the Leahy-Smith America Invents Act (AIA), 35 U. S. C. § 100 *et seq.* That law created the inter partes review process,

which provides a number of benefits to accused infringers such as Thryv. Like federal court litigation, inter partes review holds the advantage of allowing a private party attacking a patent's validity to participate in adversarial proceedings, rather than rely on the agency to direct its own investigation as it does in ex parte reexamination. Compare 35 U. S. C. §316 with §§302, 304, 305. Inter partes review also allows a party challenging a patent all manner of discovery, including depositions and the presentation of expert testimony. §316; 37 CFR §§42.51–42.65 (2019). At the same time, the burden of proof is lower—requiring challengers like Thryv to prove unpatentability only by a preponderance of the evidence, §316(e), rather than under the clear and convincing standard that usually applies in court. *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91 (2011). Perhaps most appealing, proceedings take place before the Patent Trial and Appeal Board, rather than in an Article III court, so there is no jury trial before a tenure-protected judge, only a hearing before a panel of agency employees.

Some say the new regime represents a particularly efficient new way to "kill" patents. Certainly, the numbers tell an inviting story for petitioners like Thryv. In approximately 80% of cases reaching a final decision, the Board cancels some or all of the challenged claims. Patent Trial and Appeal Board, Trial Statistics 10 (Feb. 2020), https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2020_02_29.pdf. The Board has been busy, too, instituting more than 800 of these new proceedings every year. See *id.*, at 6.

Still, Thryv faced a hurdle. Inter partes review "may not be instituted" based on an administrative petition filed more than a year after "the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent" in federal court. 35 U. S. C. §315(b). So, while Congress sought to move many cases out of court and into its new administrative process, it thought

patent owners who have already endured long challenges in court shouldn't have to face another layer of administrative review. After all, *some* repose is due inventors. Patents typically last 20 years; what happens to the incentive to invent if litigation over them lasts even longer (as it has for Mr. DuVal)? By anyone's estimation, too, § 315(b)'s time bar was sure to pose a special problem for Thryv. Yes, Thryv had petitioned for inter partes review one year after being served with CTC's complaint. But nearly *12 years* had passed since Thryv's predecessor and privy first found itself on the business end of a lawsuit alleging that it had infringed Mr. DuVal's patent.

Despite this apparently fatal defect, the Board plowed ahead anyway. No one could dispute that Thryv's predecessor and privy had been "served with a complaint alleging infringement of the patent" more than a decade earlier. But that complaint didn't count, the Board declared, because it was dismissed without prejudice. The Board cited nothing in § 315(b) suggesting this distinction makes a difference under the statute's plain terms. Instead, the Board tiptoed past the problem and proceeded to invalidate almost all of the patent claims before it, even those the Patent Office itself had affirmed in its own ex parte proceeding years before. No doubt this was exactly what Thryv hoped for in its second bite at the administrative apple.

Thryv's victory may have taken years to achieve, but it didn't seem calculated to last long. Predictably, CTC appealed the Board's interpretation of § 315(b) to the Federal Circuit. And just as unsurprisingly, the court held that dismissed complaints *do* count as complaints, so Thryv's inter partes administrative challenge was time barred from the start. Mr. DuVal's patent had already survived one ex parte reexamination Thryv instigated. The patent had been the subject of long and repeated litigation in federal courts. The agency had no business opening yet another new inquiry into this very old patent.

But Thryv had one maneuver left. It sought review in this Court, insisting that Article III courts lack authority even to say what the law demands. According to Thryv, a different provision, § 314(d), renders the agency's interpretations and applications of § 315(b) immune from judicial review. So the Board can err; it can even act in defiance of plain congressional limits on its authority. But, in Thryv's view, a court can do nothing about it. Enforcement of § 315(b)'s time bar falls only to the very Patent Office officials whose authority it seeks to restrain. Inventors like Mr. DuVal just have to hope that the bureaucracy revoking their property rights will take the extra trouble of doing so in accordance with law.

That's the strange place we now find ourselves. Thryv managed to persuade the Court to grant its petition for certiorari to consider its extraordinary argument. And today the Court vindicates its last and most remarkable maneuver.

II

A

How could § 314(d) insulate from judicial review the agency's—admittedly mistaken—interpretation of an entirely different provision, § 315(b)? The answer is that it doesn't.

To see why, look no further than § 314(d). The statute tells us that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." So the *only* thing § 314(d) insulates from judicial review is "[t]he determination" made "by the Director" "under this section"—that is, a determination discussed *within* § 314. Nothing in the statute insulates agency interpretations of other provisions *outside* § 314, including those involving § 315(b).

This arrangement makes sense. Given that § 314(d) speaks of "[t]he" determination by the Director "under this section," it comes as no surprise that the section mentions

just *one* such "determination." It is found in § 314(a), where the Director "determines" whether the parties' initial pleadings suggest "a reasonable likelihood" the petitioner will prevail in defeating at least some aspect of the challenged patent. And it is easy to see why Congress might make a preliminary merits assessment like that exempt from further view: If the Director institutes a meritless petition, the Board can summarily affirm the patent's validity. See § 318(a); 37 CFR §§ 42.71–42.73. In any event, the Board is obligated to render a final—and judicially reviewable—decision within a year. 35 U. S. C. §§ 141(c), 316(a)(11), 318(a), 319. So judicial review of the Director's initial appraisal of the merits isn't really *eliminated* as much as it is *channeled* toward the Board's final decision on those merits. That process finds a ready analogue elsewhere in our law. Much as here, an indicted criminal defendant unhappy with a grand jury's finding of probable cause isn't permitted to challenge that preliminary assessment, but may instead move the court for acquittal after the government has presented all its evidence. See *Costello* v. *United States*, 350 U. S. 359, 363 (1956); Fed. Rule Crim. Proc. 29(a).

Matters *outside* § 314 are different. Take the provision before us, § 315(b). It promises that an inter partes review "may not be instituted" more than a year after the initiation of litigation. This stands as an affirmative limit on the agency's authority. Much like a statute of limitations, this provision supplies an argument a party can continue to press throughout the life of the administrative proceeding and on appeal. Nothing in § 315(b) speaks of a "determination by the Director," let alone suggests that the agency's initial ruling on a petition's timeliness is "final and nonappealable."

To pretend otherwise would invite a linguistic nonsense. We would have to read § 314's language speaking of "[t]he" "determination" "under this section" to include not one determination but two—and to include not only the determination actually made under "this section" but also a second

assessment made about the effect of an entirely different section.

To pretend otherwise would invite a practical nonsense as well. Because the Director's initial "reasonable likelihood" determination under § 314(a) relates to the merits, it will be effectively reviewed both by the Board and courts as the case progresses. But when does the Director's application of § 315(b)'s time bar get another look? Under Thryv's interpretation, a provision that reads like an affirmative limit on the agency's authority reduces to a mere suggestion. No matter how wrong or even purposefully evasive, the Director's assessment of a petition's timeliness is always immune from review. And even that's not the end of it. In other cases, the Board has claimed *it* has the right to review these initial timeliness decisions, and Thryv seems content with those rulings. See, *e. g.*, *Medtronic, Inc.* v. *Robert Bosch Healthcare Systems, Inc.*, 839 F. 3d 1382 (CA Fed. 2016). So it turns out the company doesn't really want to make an initial administrative timeliness decisions *final*; it just wants to make them *unreviewable in court*, defying once more § 314's plain language and any rational explanation, except maybe as an expedient to win the day's case.

B

Confronting so many problems in the statute's text, Thryv seeks a way around them by offering a competing account of the law's operation. While § 314 empowers the Director to make an institution decision, Thryv asserts that various provisions scattered throughout the chapter—such as §§ 314(a), 315(a)(1), and 315(b)—help guide the decision. And on Thryv's interpretation, *all* questions related to the Director's institution decision should be insulated from review, no matter where those rules are found. What about the fact § 314 speaks of insulating only "[t]he" "determination" "under this section"? Thryv says this language serves merely to indicate *which* institution authority is unreviewable—namely,

the Director's authority to institute an inter partes proceeding pursuant to § 314, rather than pursuant to some other provision.

This interpretation, however, makes a nullity of the very language it purports to explain. Section 314 is the *only* section that authorizes the Director to institute inter partes review, making it pointless for Congress to tell us that we're talking about the Director's § 314 inter partes review institution authority as opposed to *some other* inter partes review institution authority. In fact, you can strike "under this section" from § 314(d) and Thryv's interpretation remains unchanged. That's a pretty good clue something has gone wrong.

Faced with this problem of surplusage, Thryv alludes to the possibility that Congress included redundant language to be "double sure." But double sure of what? Thryv does not identify any confusion that the phrase "under this section" might help avoid. Given the lack of *any* other provision, *anywhere* in the U. S. Code, authorizing *anyone* to institute inter partes review, even the most obtuse reader would never have any use for the clarification supposedly provided by "under this section" on Thryv's account.

Maybe so, Thryv replies, but we shouldn't worry about the surplusage here because the AIA contains surplusage elsewhere. The other putative examples of surplusage Thryv identifies, however, have no bearing on the provision now before us. And even a passing glance reveals no surplusage in them either. Consider § 315(c). It says that "the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition *under section 311* that the Director, after receiving a preliminary response *under section 313* . . . , determines warrants the institution of an inter partes review *under section 314*." (Emphasis added.) Thryv argues that all these cross-references are unnecessary. But look closely: Each of § 315(c)'s cross-references does important work to establish

the rules for joinder. Strike the first and the requirements of a joinder petition become undefined. Strike the second and it's a mystery what kind of response the patent owner is entitled to file. Strike the third and the Director's determination whether to grant joinder becomes standardless. All of this language has a point to it—just as "under this section" does under a faithful interpretation of § 314(d).

That leaves Thryv only one more tenuous textual lifeline left to toss. If Congress had wanted to insulate from review only "[t]he" "determination" that a petition has a "reasonable likelihood" of success, the company suggests, Congress could have spoken of insulating "the determination under subsection (a)" rather than "the determination under this section." And Thryv reminds us that Congress used that latter formulation in nearby and predecessor statutes. See, *e. g.*, § 303(c) ("A determination by the Director pursuant to subsection (a) of this section . . . will be final and nonappealable"); § 312(c) (2006 ed.; repealed 2011) ("A determination by the Director under subsection (a) shall be final and nonappealable").

But so what? One could replace the phrase "my next-door neighbor to the west" with "my neighbor at 123 Main Street" (assuming that is her address) and the meaning would be the same. Likewise, it hardly matters whether Congress spoke of the "determination" "under this section" or "under subsection (a)." Either way, our attention is directed within, not beyond, § 314. And what's Thryv's alternative? It would have us read language speaking of the Director's determination "under this section" to encompass any decision related to the initiation of inter partes review found anywhere in the AIA—an entire chapter of the U. S. Code. That's sort of like reading "my next-door neighbor to the west" to include "anyone in town." Nor do things get better for Thryv with a careful assessment of nearby and predecessor statutes. They reveal that Congress knew exactly how to give broader directions like the one Thryv imagines when

it wished to do so. See, *e. g.*, § 314(b) (directing our attention to the Director's decision whether to institute inter partes review "under this chapter" rather than "under this section").

Without any plausible textual or contextual hook for its position, Thryv finishes by advancing a parade of policy horribles. It notes that the AIA imposes lots of *other* constraints on inter partes review besides the § 315(b) timing provision now before us. For example, the law bars petitioners who have filed declaratory judgment actions from challenging the same patent in inter partes review proceedings, § 315(a)(1), and it estops petitioners from seeking other forms of review once an inter partes proceeding finishes, § 315(e). If courts are going to review the agency's application of § 315(b), Thryv wonders, are they going to have to review the agency's application of these other provisions too?

But we could just as easily march this parade in the opposite direction. Even assuming (without deciding) that Thryv is right and the reviewability of all these provisions stands or falls together, that seems at least as good an argument for as against judicial review. If so much more is at stake, if many more kinds of agency errors could be insulated from correction, isn't that a greater reason to pay assiduous attention to the statute's terms? Surely, Thryv's professed concern for judicial economy supplies no license to ignore our duty to decide the cases properly put to us in accord with the statute's terms.

III

This last point leads to another reason why we should reject Thryv's reading of the statute. Even if the company could muster some doubt about the reach of § 314(d), it wouldn't be enough to overcome the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991). As this Court has long explained, "we will . . . find an intent to preclude such

review only if presented with clear and convincing evidence." *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 64 (1993) (internal quotation marks omitted).

The presumption of judicial review is deeply rooted in our history and separation of powers. To guard against arbitrary government, our founders knew, elections are not enough: "An elective despotism was not the government we fought for." The Federalist No. 48, p. 311 (C. Rossiter ed. 1961) (emphasis deleted). In a government "founded on free principles," no one person, group, or branch may hold all the keys of power over a private person's liberty or property. *Ibid.* Instead, power must be set against power, "divided and balanced among several bodies . . . checked and restrained by the others." *Ibid.* As Chief Justice Marshall put it: "It would excite some surprise if, in a government of laws and of principle, . . . a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals," a statute might leave that individual with "no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust." *United States* v. *Nourse*, 9 Pet. 8, 28–29 (1835).

It should come as an equal surprise to think Congress might have imposed an express limit on an executive bureaucracy's authority to decide the rights of individuals, and then entrusted that agency with the sole power to enforce the limits of its own authority. Yet on Thryv's account, § 315(b)'s command that "inter partes review *may not* be instituted" would be left entrusted to the good faith of the very executive officials it is meant to constrain. (Emphasis added.) We do not normally rush to a conclusion that Congress has issued such "'blank checks drawn to the credit of some administrative officer.'" *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 671 (1986) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

That usually may be the case, Thryv counters, but this statute's unusually modest purpose makes it plausible to think Congress meant to shield its application from judicial review. After all, the company submits, § 315(b) is not really a firm limit on the agency's authority, only a claim processing rule. For proof, the company reminds us that § 315(b) bars challengers who have already spent a year litigating in court from petitioning the agency, but leaves open the possibility that the agency might still institute inter partes review if a different, eligible petitioner happens to come along. And this theoretical possibility, Thryv tells us, suggests that the agency was meant to be allowed to act as it wants.

But Thryv's reply here is like saying Article III's "case or controversy" requirement isn't really a limit on the power of federal courts, because it's always possible that *some* litigant with a live dispute will come forward and require the court to settle a particular legal question. The implacable fact is that nothing in the AIA gives the Director or the Board freewheeling authority to conduct inter partes review. The statute demands the participation of a real party in interest, a petitioner who is not barred by prior litigation and who is willing to face estoppel should he lose. §§ 311(a), 315. And if, as seems likely in our case and many others, no one is willing and able to meet those conditions, the law does not permit inter partes review. So rather than a claim processing rule, § 315 is both a constraint on the agency's power and a valuable guarantee that a patent owner must battle the same foe only once.

Realizing that its textual arguments are too strained to demonstrate clearly and convincingly that Congress meant to displace judicial review, Thryv asks us to draw "inferences" from the AIA "as a whole." Brief for Petitioner 16 (internal quotation marks omitted). In particular, the company tells us that Congress's "overriding purpose" in creat-

ing inter partes review was to "weed out poor quality patents" and that judicial enforcement of § 315(b) would slow this progress. *Id.*, at 24 (quotation altered). But to support its thematic account of the law's goals, Thryv rests on one thin reed after another—a House Report here, a floor statement there, and a few quotations from *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261 (2016), that summarize these same sources. All the rest is generously filled in by the company's own account about how inter partes review *ought* to work.

That's far from enough. The historic presumption of judicial review has never before folded before a couple stray pieces of legislative history and naked policy appeals. Besides, Thryv's submissions cannot withstand the mildest inspection even on their own terms. No one doubts that Congress authorized inter partes review to encourage further scrutiny of already issued patents. But lost in Thryv's telling about the purposes of the AIA is plenty of evidence that Congress *also* included provisions to preserve the value of patents and protect the rights of patent owners. For example, Congress sharply limited the legal grounds that might be pursued in inter partes review, § 311(b); afforded patent owners an opportunity to respond to petitions prior to institution, § 313; and, most relevant today, protected patent owners from the need to fight a two-front war before both the Board and federal district court, § 315. Legislating involves compromise, and it would be naive to think that, as the price for their zealous new procedures for canceling patents, those who proposed the AIA didn't have to accept *some* protections like these for patent holders. Yet, Thryv glides past all these provisions without comment. Worse, taking the company's argument to its logical conclusion could render these protections into "'merely advisory'" features of the law. *Bowen*, 476 U. S., at 671. If adopted, Thryv's vision of an administrative regime singularly focused on the efficient canceling of patents could become self-fulfilling.

A case decided just weeks ago supplies a telling point of comparison. In *Guerrero-Lasprilla* v. *Barr*, 589 U. S. 221 (2020), Congress sought to expedite the removal of aliens convicted of certain aggravated felonies by foreclosing judicial review of their cases unless they raised "questions of law." See 8 U. S. C. §§ 1252(a)(2)(C), (D). But the statute there was ambiguous about mixed questions of law and fact: Were these (reviewable) questions of law, or (unreviewable) determinations of fact? Because the statute could be interpreted either way, this Court held, the presumption of reviewability preserved the aliens' ability to argue mixed questions on appeal. Today, the textual arguments for shielding the agency's decision from review are even weaker, and the same presumption that preserved judicial review for felons seeking discretionary relief from removal should do no less work for patent holders seeking to defend their inventions.

IV

Even if the statute's plain language and the presumption in favor of review dictate a ruling against it, Thryv finishes by suggesting we must ignore all that and rule for it anyway because precedent commands it. Maybe our precedent is wrong, the company says, but it binds us all the same.

In particular, Thryv points us to *Cuozzo*. There, the Court suggested that § 314(d) could preclude review in cases: (1) where a litigant challenges the Director's reasonable likelihood of success determination under § 314(a), or (2) where a litigant "grounds its claim in a statute closely related to that decision to institute inter partes review." 579 U. S., at 275–276. That first path is faithful to the plain language of § 314(d). The second appears nowhere in the statute but is, instead, a product of the judicial imagination. Still, Thryv says, we must follow that path wherever it leads and, because § 315(b) decisions are "closely related" to § 314(a) decisions, we shouldn't review them.

But *Cuozzo* hardly held so much. In fact, *Cuozzo* had no need to explore the second path it imagined, for it quickly concluded that the argument before it was "little more than a challenge to the Patent Office's conclusion . . . under § 314(a)," a decision shielded from judicial review under any interpretation of § 314(d). *Id.*, at 276. So all the discussion about the reviewability of decisions outside § 314(a) turned out to be nothing more than dicta entirely unnecessary to the decision. Nor did anything in *Cuozzo* directly address § 315(b) decisions, let alone declare them to be "close enough" to § 314(a) decisions to preclude judicial review.

That's just the beginning of Thryv's precedent problems, too. In *SAS Institute Inc.* v. *Iancu*, 584 U. S. 357 (2018), an inter partes review petitioner challenged the Director's practice of instituting review of some, but not all, of the claims challenged in a single petition. The government argued there—much as Thryv argues today—that § 314(d) shielded this unlawful practice from judicial review. In advancing this argument, the government seized on the same language in *Cuozzo* that Thryv now embraces, claiming that its opponent's "grounds for attacking the decision . . . are closely tied" to the § 314(a) institution decision. Brief for Federal Respondent in *SAS Institute Inc.* v. *Iancu*, O. T. 2017, No. 16–969, p. 13. Because no one could say that the petitioner's argument in *SAS Institute* was "little more than a challenge to the Patent Office's conclusion . . . under § 314(a)," 584 U. S., at 371, we were forced to confront whether *Cuozzo* and the relevant statutes actually barred not just institution decisions under § 314(a) but things "closely related" to them.

We held they did not. We began, as we did in *Cuozzo*, by noting the "strong presumption in favor of judicial review." *SAS Institute*, 584 U. S., at 370 (internal quotation marks omitted). We then put an end to any doubt about what the dicta in that case might mean: "Given the strength of this presumption and the statute's text, *Cuozzo* concluded that § 314(d) precludes judicial review *only* of the Director's 'ini-

tial determination' under §314(a)." *Ibid.* (quoting *Cuozzo*, 579 U. S., at 273; emphasis added). We did not need to overrule *Cuozzo*, because the language the government seized upon from that opinion was dicta from the start. Still, we made it clear that dicta's day had come: To read *Cuozzo* as "foreclosing judicial review of any legal question bearing on the institution [decision]," we explained, would "overrea[d] both the statute and our precedent." *SAS Institute*, 584 U. S., at 370. The petitioner's challenge to the Director's partial institution practice could go forward exactly because it was something other than a disagreement about the Director's initial determination under §314(a). *Id.*, at 370–371.

It's not surprising that litigants would invite us to overread dicta or overlook an unfavorable precedent. What is surprising is that the Court would accept the invitation. In "cases involving property," after all, "considerations favoring *stare decisis* are at their acme." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 457 (2015) (internal quotation marks omitted). And we are often reminded that "*stare decisis* carries enhanced force when a decision . . . interprets a statute." *Id.*, at 456. But rather than searching for the kind of "superspecial justification," *id.*, at 458, this Court supposedly requires to overrule a precedent like *SAS Institute*, today's majority quibbles with a few sentences and quietly walks away. If, as some have worried, "[e]ach time the Court overrules a case, the Court . . . cause[s] the public to become increasingly uncertain about which cases the Court will overrule," *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 260–261 (2019), (BREYER, J., dissenting), one can only imagine what a judicial shrug of the shoulders like this might yield.

Litigants and lower courts will also have to be forgiven for the confusion to come about the meaning of §314(d)'s review bar. Whether it is limited to the §314(a) determination (as *SAS Institute* held and parts of *Cuozzo* suggested)

or also reaches to challenges grounded in "closely related" statutes (as other parts of *Cuozzo* suggested and the Court insists today)—who can say? And even supposing that "closely related to institution" really is the test we'll apply next time, does anyone know what this judicially concocted formulation even means? Despite three opinions interpreting the same provision in under five years, only one thing is clear: Neither the statute nor our precedent can be counted upon to give the answer. Litigants and lower courts alike will just have to wait and see.

V

It's a rough day when a decision manages to defy the plain language of a statute, our interpretative presumptions, *and* our precedent. But today that's not the worst of it. The Court's expansive reading of § 314(d) takes us further down the road of handing over judicial powers involving the disposition of individual rights to executive agency officials.

We started the wrong turn in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325 (2018). There, a majority of this Court acquiesced to the AIA's provisions allowing agency officials to withdraw already-issued patents subject to very limited judicial review. As the majority saw it, patents are merely another public franchise that can be withdrawn more or less by executive grace. So what if patents were, for centuries, regarded as a form of personal property that, like any other, could be taken only by a judgment of a court of law. So what if our separation of powers and history frown on unfettered executive power over individuals, their liberty, and their property. What the government gives, the government may take away—with or without the involvement of the independent Judiciary. Today, a majority compounds that error by abandoning a good part of what little judicial review even the AIA left behind.

Just try to imagine this Court treating other individual liberties or forms of private property this way. Major por-

tions of this country were settled by homesteaders who moved west on the promise of land patents from the federal government. Much like an inventor seeking a patent for his invention, settlers seeking these governmental grants had to satisfy a number of conditions. But once a patent issued, the granted lands became the recipient's private property, a vested right that could be withdrawn only in a court of law. No one thinks we would allow a bureaucracy in Washington to "cancel" a citizen's right to his farm, and do so despite the government's admission that it acted in violation of the very statute that gave it this supposed authority. For most of this Nation's history it was thought an invention patent holder "holds a property in his invention by as good a title as the farmer holds his farm and flock." *Hovey* v. *Henry*, 12 F. Cas. 603, 604 (No. 6,742) (CC Mass. 1846) (Woodbury, J., for the court). Yet now inventors hold nothing for long without executive grace. An issued patent becomes nothing more than a transfer slip from one agency window to another.

Some seek to dismiss this concern by noting that the bureaucracy the AIA empowers to revoke patents is the same one that grants them. But what comfort is that when the Constitution promises an independent judge in any case involving the deprivation of life, liberty, or property? Would it make things any better if we assigned the Department of the Interior the task of canceling land patents because that agency initially allocated many of them? The relevant constitutional fact is not which agency granted a property right, but that a property right was granted.

The abdication of our judicial duty comes with a price. The Director of the Patent and Trademark Office is a political appointee. The AIA vests him with unreviewable authority to institute (or not) inter partes review. Nothing would prevent him, it seems, from insulating his favorite firms and industries from this process entirely. Those who are not so fortunate proceed to an administrative "trial" before a panel of agency employees that the Director also

has the means to control. The AIA gives the Director the power to select which employees, and how many of them, will hear any particular inter partes challenge. It also gives him the power to decide how much they are paid. And if a panel reaches a result he doesn't like, the Director claims he may order rehearing before a new panel, of any size, and including even himself.

No one can doubt that this regime favors those with political clout, the powerful, and the popular. But what about those who lack the resources or means to influence and maybe even capture a politically guided agency? Consider Mr. DuVal, who 25 years ago came up with something the Patent Office agreed was novel and useful. His patent survived not only that initial review but a subsequent administrative ex parte review, a lawsuit, and the initiation of another. Yet, now, after the patent has expired, it is challenged in still another administrative proceeding and retroactively expunged by an agency that has, by its own admission, acted unlawfully. *That* is what happens when power is not balanced against power and executive action goes unchecked by judicial review. Rather than securing incentives to invent, the regime creates incentives to curry favor with officials in Washington.

Nor is it hard to imagine what might lie around the corner. Despite repeated lawsuits, no court ever ruled definitively on Mr. DuVal's patents. But suppose one had—and suppose he had prevailed. According to the agency, even that judgment might not matter much. In other cases, the Board has claimed the power through inter partes review to overrule final judicial judgments affirming patent rights. In the Director's estimation, it appears, even this Court's decisions must bow to the Board's will. See *XY, LLC* v. *Trans Ova Genetics, L. C.*, 890 F. 3d 1282, 1285–1286, 1294–1295 (CA Fed. 2018); *Fresenius USA, Inc.* v. *Baxter Int'l, Inc.*, 721 F. 3d 1330, 1340–1344 (CA Fed. 2013). It's no wonder, then, that district courts sometimes throw up their hands and let

the Board take over whenever inter partes review and patent litigation begin to overlap. Why bother with a trial if "[t]he finality of any judgment rendered by [a] Court will be dubious"? Order Granting Stay in *Click-to-Call Technologies LP* v. *Ingenio, Inc.*, No. 12–cv–00465 (WD Tex.), Doc. No. 147, p. 4.

It's understandable, too, why the agency might think so much is up for grabs. Not only did this Court give away much of its Article III authority in *Oil States* on a mistaken assessment that patents were historically treated as public franchises rather than private rights. Some would have had the Court go even further. Rather than looking to history to determine how patents were treated, as both the majority and dissent sought to do, these Members of the Court suggested that agencies should be allowed to withdraw even private rights if "a number of factors"—taken together, of course—suggest it's a good idea. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 851 (1986); see also *Oil States*, 584 U. S., at 345 (BREYER, J., concurring). These "factors" turn out to include such definitive and easily balanced considerations as the "nature of the claim," the "nature of the non-Article III tribunal," and the "nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections." *Stern* v. *Marshall*, 564 U. S. 462, 513 (2011) (BREYER, J., dissenting). In other words, Article III promises that a person's private rights may be taken only in proceedings before an independent judge, *unless* the government's goals would be better served by a judge who isn't so independent.

Thryv seeks to assure us that affected parties can still file writs of mandamus in courts if the Patent Office gets *really* out of hand. But the Court today will not say whether mandamus is available where the § 314(d) bar applies, and the Federal Circuit has cast doubt on that possibility. *In re Power Integrations, Inc.*, 899 F. 3d 1316, 1319 (2018) ("We

have held that the statutory prohibition on appeals from decisions not to institute inter partes review cannot be sidestepped simply by styling the request for review as a petition for mandamus"); *In re Procter & Gamble Co.*, 749 F. 3d 1376 (2014); *In re Dominion Dealer Solutions, LLC.*, 749 F. 3d 1379 (2014). Even assuming mandamus *is* available, it is a "drastic [remedy], to be invoked only in extraordinary situations." *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 402 (1976). To be eligible for this discretionary relief, a petitioner must first show a "clear and indisputable" right. *Id.*, at 403 (internal quotation marks omitted). But how often could a litigant show such a "clear and indisputable" right in an area where courts shirk their duty to say what the law is in the first place? And how would a court find the will to call a situation "extraordinary" once the agency has been free for so long to ignore the limits on its power? If the case before us doesn't qualify as "extraordinary," and if the Board's admitted flouting of § 315(b) isn't "clear and indisputable," then what extralegal act wouldn't be just another day at the office?

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Two years ago, this Court sanctioned a departure from the constitutional plan, one in which the Executive Branch assumed responsibilities long reserved to the Judiciary. In so doing, we denied inventors the right to have their claims tried before independent judges and juries. Today we compound that error, not only requiring patent owners to try their disputes before employees of a political branch but limiting their ability to obtain judicial review when those same employees fail or refuse to comply with the law. Nothing in the statute commands this result, and nothing in the Constitution permits it. Respectfully, I dissent.

Syllabus

RAMOS *v.* LOUISIANA

CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

No. 18–5924. Argued October 7, 2019—Decided April 20, 2020

In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But two States, Louisiana and Oregon, have long punished people based on 10-to-2 verdicts. In this case, petitioner Evangelisto Ramos was convicted of a serious crime in a Louisiana court by a 10-to-2 jury verdict. Instead of the mistrial he would have received almost anywhere else, Ramos was sentenced to life without parole. He contests his conviction by a nonunanimous jury as an unconstitutional denial of the Sixth Amendment right to a jury trial.

Held: The judgment is reversed.

2016–1199 (La. App. 4 Cir. 11/2/17), 231 So. 3d 44, reversed.

JUSTICE GORSUCH delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, concluding that the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. Pp. 89–95, 96–100, 105–109.

(a) The Constitution's text and structure clearly indicate that the Sixth Amendment term "trial by an impartial jury" carries with it *some* meaning about the content and requirements of a jury trial. One such requirement is that a jury must reach a unanimous verdict in order to convict. Juror unanimity emerged as a vital common law right in 14th-century England, appeared in the early American state constitutions, and provided the backdrop against which the Sixth Amendment was drafted and ratified. Postadoption treatises and 19th-century American legal treatises confirm this understanding. This Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years, see, *e. g.*, *Thompson* v. *Utah*, 170 U. S. 343, 351; *Patton* v. *United States*, 281 U. S. 276, 288, and has also explained that the Sixth Amendment right to a jury trial is incorporated against the States under the Fourteenth Amendment, *Duncan* v. *Louisiana*, 391 U. S. 145, 148–150. Thus, if the jury trial right requires a unanimous verdict in federal court, it requires no less in state court. Pp. 89–93.

(b) Louisiana's and Oregon's unconventional schemes were first confronted in *Apodaca* v. *Oregon*, 406 U. S. 404, and *Johnson* v. *Louisiana*,

406 U. S. 356, in a badly fractured set of opinions. A four-Justice plurality, questioning whether unanimity serves an important "function" in "contemporary society," concluded that unanimity's costs outweighed its benefits. *Apodaca*, 406 U. S., at 410. Four dissenting Justices recognized that the Sixth Amendment requires unanimity, and that the guarantee is fully applicable against the States under the Fourteenth Amendment. The remaining Justice, Justice Powell, adopted a "dual-track" incorporation approach. He agreed that the Sixth Amendment requires unanimity but believed that the Fourteenth Amendment does not render this guarantee fully applicable against the States—even though the dual-track incorporation approach had been rejected by the Court nearly a decade earlier, see *Malloy* v. *Hogan*, 378 U. S. 1, 10–11. Pp. 93–95.

(c) The best Louisiana can suggest is that all of the Court's prior statements that the Sixth Amendment *does* require unanimity are dicta. But the State offers no hint as to why the Court would walk away from those statements now and does not dispute the fact that the common law required unanimity. Instead, it argues that the Sixth Amendment's drafting history—in particular, that the original House version's explicit unanimity references were removed in the Senate version—reveals the framer's intent to leave this particular feature of the common law behind. But that piece of drafting history could just as easily support the inference that the language was removed as surplusage because the right was so plainly understood to be included in the right to trial by jury. Finally, the State invites the Court to perform a cost-benefit analysis on the historic features of common law jury trials and to conclude that unanimity does not make the cut. The dangers of that approach, however, can be seen in *Apodaca*, where the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment. Pp. 96–100.

(d) Factors traditionally considered by the Court when determining whether to preserve precedent on *stare decisis* grounds do not favor upholding *Apodaca*. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248. Starting with the quality of *Apodaca*'s reasoning, the plurality opinion and separate concurring opinion were gravely mistaken. And *Apodaca* sits uneasily with 120 years of preceding case law. When it comes to reliance interests, neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. The fact that Louisiana and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal will surely impose a cost, but new rules of criminal procedure usually

Syllabus

do, see, *e. g.*, *United States* v. *Booker*, 543 U. S. 220, and prior convictions in only two States are potentially affected here. Pp. 105–109.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG and JUSTICE BREYER, concluded in Part IV–A that *Apodaca* lacks precedential force. Treating that case as precedential would require embracing the dubious proposition that a single Justice writing only for himself has the authority to bind this Court to already rejected propositions. No prior case has made such a suggestion. Pp. 101–105.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts IV–B–2 and V that Louisiana's and Oregon's reliance interests in the security of their final criminal judgments do not favor upholding *Apodaca*. Worries that defendants whose appeals are already complete might seek to challenge their nonunanimous convictions through collateral review are overstated. Cf. *Teague* v. *Lane*, 489 U. S. 288. *Apodaca*'s reliance interests are not boosted by Louisiana's recent decision to bar the use of nonunanimous jury verdicts. A ruling for Louisiana would invite other States to relax their own unanimity requirements, and Louisiana continues to allow nonunanimous verdicts for crimes committed before 2019. Pp. 109–111.

JUSTICE THOMAS concluded that Ramos' felony conviction by a nonunanimous jury is unconstitutional because the Sixth Amendment's protection against nonunanimous felony guilty verdicts applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause. Pp. 132–140.

GORSUCH, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which GINSBURG, BREYER, SOTOMAYOR, and KAVANAUGH, JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and an opinion with respect to Part IV–A, in which GINSBURG and BREYER, JJ., joined. SOTOMAYOR, J., filed an opinion concurring as to all but Part IV–A, *post*, p. 111. KAVANAUGH, J., filed an opinion concurring in part, *post*, p. 115. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 132. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, and in which KAGAN, J., joined as to all but Part III–D, *post*, p. 140.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *G. Ben Cohen*, *Brian H. Fletcher*, *Pamela S. Karlan*, and *Yaira Dubin*.

Elizabeth B. Murrill, Solicitor General of Louisiana, argued the cause for respondent. With her on the brief were

Counsel

Jeff Landry, Attorney General, *Michelle Ghetti*, Deputy Solicitor General, *Colin Clark*, Assistant Attorney General, *Donna Andrieu*, *William S. Consovoy*, and *Jeffrey M. Harris*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, and *Ester Murdukhayeva*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Karl A. Racine* of the District of Columbia, *Kwame Raoul* of Illinois, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Thomas J. Donovan, Jr.*, of Vermont, and *Mark R. Herring* of Virginia; for the American Bar Association by *Robert M. Carlson*, *Paul R. Q. Wolfson*, and *Eric L. Hawkins*; for the American Civil Liberties Union et al. by *David D. Cole*, *Brian W. Stull*, *Cassandra Stubbs*, *Katie Schwartzmann*, and *Bruce Hamilton*; for Innocence Project New Orleans et al. by *Emily Maw*; for the Institute for Justice by *Wesley P. Hottot* and *Michael E. Bindas*; for Law Professors et al. by *Elizabeth B. Wydra* and *Brianne J. Gorod*; for the NAACP Legal Defense & Educational Fund, Inc., by *Daniel S. Harawa*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, and *Kristen A. Johnson*; for the National Association of Criminal Defense Lawyers by *Timothy P. O'Toole* and *Barbara E. Bergman*; for Prominent Current and Former State Executive and Judicial Officers et al. by *Shaun S. McCrea* and *Jeff Ellis*; and for The Rutherford Institute by *Michael J. Lockerby*, *David A. Hickerson*, *Jay N. Varon*, and *John W. Whitehead*.

Briefs of *amici curiae* urging affirmance were filed for the State of Oregon by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Doug M. Petrina* and *Christopher A. Perdue*, Assistant Attorneys General; and for the State of Utah et al. by *Sean D. Reyes*, Attorney General of Utah, *Tyler R. Green*, Solicitor General, *Thomas B. Brunker*, Deputy Solicitor General, and *John J. Nielsen* and *Nathan H. Jack*, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Derek Schmidt* of Kansas, *Doug Peterson* of Nebraska, *Mike Hunter* of Oklahoma, *Isaias Sanchez-Baez* of Puerto Rico, *Jason Ravnsborg* of South Dakota, *Herbert Slatery III* of Tennessee, *Ken Paxton* of Texas, and *Patrick Morrisey* of West Virginia.

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, an opinion with respect to Parts II–B, IV–B–2, and V, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, and an opinion with respect to Part IV–A, in which JUSTICE GINSBURG and JUSTICE BREYER join.

Accused of a serious crime, Evangelisto Ramos insisted on his innocence and invoked his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in Louisiana. Along with Oregon, Louisiana has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. Ramos was sentenced to life in prison without the possibility of parole.

Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.[1]

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[1] Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 374 (H. Hearsey ed. 1898); Eaton, The Suffrage Clause in the New Constitution of Louisiana, 13 Harv. L. Rev. 279, 286–287 (1899); *Louisiana* v. *United States*, 380 U. S. 145, 151–153 (1965).

Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U. S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries.[2] Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment,[3] the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."[4]

Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries."[5] In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.[6]

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.[7] Louisiana insists that this Court has never definitively passed on

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[2] See 31 Cong. Rec. 1019 (1898).

[3] *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880).

[4] *State* v. *Maxie*, No. 13–CR–72522 (La. 11th Jud. Dist., Oct. 11, 2018), App. 56–57; see also Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593 (2018).

[5] *State* v. *Williams*, No. 15–CR–58698 (C. C. Ore., Dec. 15, 2016), App. 104.

[6] *Maxie*, App. 82; *Williams*, App. 104.

[7] Under existing precedent and consistent with a common law tradition not at issue here, a defendant may be tried for certain "petty offenses" without a jury. *Cheff* v. *Schnackenberg*, 384 U. S. 373, 379 (1966).

the question and urges us to find its practice consistent with the Sixth Amendment. By contrast, the dissent doesn't try to defend Louisiana's law on Sixth or Fourteenth Amendment grounds; tacitly, it seems to admit that the Constitution forbids States from using nonunanimous juries. Yet, unprompted by Louisiana, the dissent suggests our precedent requires us to rule for the State anyway. What explains all this? To answer the puzzle, it's necessary to say a bit more about the merits of the question presented, the relevant precedent, and, at last, the consequences that follow from saying what we know to be true.

I

The Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a "trial by an impartial jury" entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a "jury trial" to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district "previously ascertained by law." And if that's not enough, imagine a constitution that included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III.[8] No: The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it *some* meaning about the content and requirements of a jury trial.

[8] See Art. III, §2.

One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury" meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th-century England and was soon accepted as a vital right protected by the common law.[9] As Blackstone explained, no person could be found guilty of a serious crime unless "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion."[10] A "'verdict, taken from eleven, was no verdict'" at all.[11]

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity.[12] Another four preserved the right to a jury trial in more general terms.[13] But the variations did not matter much; consistent

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[9] See J. Thayer, Evidence at the Common Law 86–90 (1898) (Thayer); W. Forsyth, History of Trial by Jury 200 (J. Morgan ed., 2d ed. 1875); 1 W. Holdsworth, A History of English Law 318 (rev. 7th ed. 1956); Smith, The Historical and Constitutional Contexts of Jury Reform, 25 Hofstra L. Rev. 377, 397 (1996).

[10] 4 W. Blackstone, Commentaries on the Laws of England 343 (1769).

[11] Thayer 88–89, n. 4 (quoting *Anonymous Case*, 41 Lib. Assisarum 11 (1367)); see also 1 M. Hale, History of the Pleas of the Crown 33 (1736).

[12] See Del. Declaration of Rights § 14 (1776), in 1 The Bill of Rights: A Documentary History 278 (1971); Md. Declaration of Rights § XIX, in 3 Federal and State Constitutions 1688 (F. Thorpe ed. 1909) (Thorpe); N. C. Declaration of Rights § IX (1776), in 5 *id.*, at 2787; Pa. Declaration of Rights § IX (1776), in 5 *id.*, at 3083; Vt. Declaration of Rights, ch. I, § XI (1786), in 6 *id.*, at 3753; Va. Declaration of Rights § 8 (1776), in 7 *id.*, at 3813.

[13] See Ga. Const., Art. IV, § 3 (1789), in 2 *id.*, at 789; N. J. Const., Art. XXII (1776), in 5 *id.*, at 2598; N. Y. Const., Art. XLI (1777), in 5 *id.*, at 2637; S. C. Const., Art. IX, § 6 (1790), in 6 *id.*, at 3264.

with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.[14]

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years.[15] If the term "trial by an impartial jury" carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.

Influential, postadoption treatises confirm this understanding. For example, in 1824, Nathan Dane reported as fact that the U. S. Constitution required unanimity in criminal jury trials for serious offenses.[16] A few years later, Justice Story explained in his Commentaries on the Constitution that "in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable."[17] Similar statements can

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[14] See, *e. g.*, *Commonwealth* v. *Bowden*, 9 Mass. 494, 495 (1813); *People* v. *Denton*, 2 Johns. Cas. 275, 277 (N. Y. 1801) (*per curiam*); *Commonwealth* v. *Fells*, 36 Va. 613, 614–615 (1838); *State* v. *Doon & Dimond*, 1 R. Charlton 1, 2 (Ga. Super. Ct. 1811); see also *Respublica* v. *Oswald*, 1 Dall. 319, 323 (Pa. 1788) (reporting Chief Justice McKean's observations that unanimity would have been required even if the Pennsylvania Constitution had not said so explicitly).

[15] To be sure, a few of the Colonies had relaxed (and then restored) the unanimity requirement well before the founding. For example, during a two decade period in the late 17th century, the Carolinas experimented with a non-common law system designed to encourage a feudal social structure; this "reactionary" constitution permitted conviction by majority vote. See Carolina Const., Art. 69 (1669), in 5 Thorpe 2781; Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 367, 407 (1907). But, as Louisiana admits, by the time of the Sixth Amendment's adoption, unanimity had again become the accepted rule. See Brief for Respondent 17.

[16] 6 N. Dane, Digest of American Law, ch. LXXXII, Art. 2, § 1, p. 226 (1824).

[17] 2 J. Story, Commentaries on the Constitution of the United States § 777, p. 248 (1833).

be found in American legal treatises throughout the 19th century.[18]

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."[19] A few decades later, the Court elaborated that the Sixth Amendment affords a right to "a trial by jury as understood and applied at common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted."[20] And, the Court observed, this includes a requirement "that the verdict should be unanimous."[21] In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years.[22]

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[18] See, *e. g.,* J. Pomeroy, An Introduction to Municipal Law § 135, p. 78 (1864); J. Tiffany, Government and Constitutional Law § 549, p. 367 (1867); T. Cooley, Constitutional Limitations 319–320 (1868); 1 J. Bishop, Criminal Procedure, ch. LXII § 897 (rev. 2d ed. 1872).

[19] *Thompson* v. *Utah*, 170 U. S. 343, 351 (1898). See also *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900).

[20] *Patton* v. *United States*, 281 U. S. 276, 288 (1930).

[21] *Ibid.* See also *Andres* v. *United States*, 333 U. S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply").

[22] In addition to *Thompson*, *Maxwell*, *Patton*, and *Andres*, see *Johnson* v. *Louisiana*, 406 U. S. 356, 369 (1972) (Powell, J., concurring); *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995); *Richardson* v. *United States*, 526 U. S. 813, 817 (1999); *Apprendi* v. *New Jersey*, 530 U. S. 466, 477 (2000); *Southern Union Co.* v. *United States*, 567 U. S. 343, 356 (2012); *Blakely* v. *Washington*, 542 U. S. 296, 301–302 (2004); *United States* v. *Booker*, 543 U. S. 220, 233–239 (2005); *Descamps* v. *United States*, 570 U. S. 254, 269 (2013); *United States* v. *Haymond*, 588 U. S. 634, 642 (2019) (plurality opinion).

There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment.[23] This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.[24] So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

II

A

How, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for so long? It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States' unconventional schemes for the first time—in *Apodaca* v. *Oregon*[25] and a companion case, *Johnson* v. *Louisiana*.[26] Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States' laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment.[27] But a four-

[23] *Duncan* v. *Louisiana*, 391 U. S. 145, 148–150 (1968).

[24] *Malloy* v. *Hogan*, 378 U. S. 1, 10–11 (1964).

[25] 406 U. S. 404 (plurality opinion).

[26] 406 U. S. 356.

[27] See *Apodaca*, 406 U. S., at 414–415 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents"); *Johnson*, 406 U. S., at 382–383, 391–393 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting).

Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important "function" in "contemporary society."[28] Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of Louisiana or Oregon.

The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of "history and precedent, . . . the Sixth Amendment requires a unanimous jury verdict to convict."[29] But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in "dual-track" incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.

Justice Powell acknowledged that his argument for dual-track incorporation came "late in the day."[30] Late it was. The Court had already, nearly a decade earlier, "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[31] It's a point we've restated many times since, too, including as recently as last year.[32] Still, Justice Powell frankly explained, he was "unwillin[g]" to follow the Court's precedents.[33] So he

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[28] *Apodaca*, 406 U. S., at 410.

[29] *Johnson*, 406 U. S., at 371 (concurring opinion).

[30] *Id.*, at 375.

[31] *Id.*, at 384 (Douglas, J., dissenting) (quoting *Malloy*, 378 U. S., at 10–11); *Johnson*, 406 U. S., at 395–396 (Brennan, J., dissenting) (collecting cases).

[32] See, *e. g., Timbs* v. *Indiana*, 586 U. S. 146, 150 (2019) (unanimously rejecting arguments for dual-track incorporation).

[33] *Johnson*, 406 U. S., at 375–376, and n. 15 (concurring opinion).

offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent.

B

In the years following *Apodaca*, both Louisiana and Oregon chose to continue allowing nonunanimous verdicts. But their practices have always stood on shaky ground. After all, while Justice Powell's vote secured a favorable judgment for the States in *Apodaca*, it's never been clear what rationale could support a similar result in future cases. Only two possibilities exist: Either the Sixth Amendment allows nonunanimous verdicts, or the Sixth Amendment's guarantee of a jury trial applies with less force to the States under the Fourteenth Amendment. Yet, as we've seen, both bear their problems. In *Apodaca* itself, a majority of Justices—including Justice Powell—recognized that the Sixth Amendment demands unanimity, just as our cases have long said. And this Court's precedents, both then and now, prevent the Court from applying the Sixth Amendment to the States in some mutated and diminished form under the Fourteenth Amendment. So what could we possibly describe as the "holding" of *Apodaca*?

Really, no one has found a way to make sense of it. In later cases, this Court has labeled *Apodaca* an "exception," "unusual," and in any event "not an endorsement" of Justice Powell's view of incorporation.[34] At the same time, we have continued to recognize the historical need for unanimity.[35] We've been studiously ambiguous, even inconsistent, about

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[34] *McDonald* v. *Chicago*, 561 U. S. 742, 766, n. 14 (2010); see also *Timbs*, 586 U. S., at 150, n. 1 (quoting *McDonald*, 561 U. S., at 766, n. 14).

[35] *Gaudin*, 515 U. S., at 510; *Richardson*, 526 U. S., at 817; *Apprendi*, 530 U. S., at 477; *Southern Union Co.*, 567 U. S., at 356; *Blakely*, 542 U. S., at 301–302; *Booker*, 543 U. S., at 238; *Descamps*, 570 U. S., at 269; *Haymond*, 588 U. S., at 642 (plurality opinion).

what *Apodaca* might mean.[36] To its credit, Louisiana acknowledges the problem. The State expressly tells us it is not "asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force."[37] Instead, in an effort to win today's case, Louisiana embraces the idea that everything is up for grabs. It contends that this Court has never definitively ruled on the propriety of nonunanimous juries under the Sixth Amendment—and that we should use this case to hold for the first time that nonunanimous juries are permissible in state and federal courts alike.

III

Louisiana's approach may not be quite as tough as trying to defend Justice Powell's dual-track theory of incorporation, but it's pretty close. How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity? Or the fact that five Justices in *Apodaca* said the same? The best the State can offer is to suggest that all these statements came in dicta.[38]

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[36] See, *e. g.*, *Burch* v. *Louisiana*, 441 U. S. 130, 136, and n. 9 (1979) (describing both plurality opinion and Justice Powell's separate writing); *Brown* v. *Louisiana*, 447 U. S. 323, 331 (1980) (plurality opinion) (describing neither); see also *McKoy* v. *North Carolina*, 494 U. S. 433, 468 (1990) (Scalia, J., dissenting) (same). On a few occasions we've suggested that perhaps *Apodaca* means the Sixth Amendment does not require unanimity at all. See *Ludwig* v. *Massachusetts*, 427 U. S. 618, 625 (1976) (quoting *Apodaca* plurality); *Gaudin*, 515 U. S., at 510–511, n. 2 (same); see also *Holland* v. *Illinois*, 493 U. S. 474, 511 (1990) (Stevens, J., dissenting) (same). But on another occasion, we suggested that it could make a difference whether a particular right was rooted in the Sixth Amendment's jury trial guarantee or Fourteenth Amendment due process guarantee. See *Schad* v. *Arizona*, 501 U. S. 624, 634, n. 5 (1991) (plurality opinion). The dissent contends that these cases have "reiterated time and again what *Apodaca* had established." *Post*, at 145 (opinion of Alito, J.). More accurately, these "reiterations" have suggested different things at different times.

[37] See Brief for Respondent 47; Tr. of Oral Arg. 37–38.

[38] In at least some of these cases, that may be a fair characterization. For example, while *Thompson* was quick to say that the U. S. Constitution requires "the unanimous verdict of a jury of twelve persons," the question

But even supposing (without granting) that Louisiana is right and it's dicta all the way down, why would the Court now walk away from many of its own statements about the Constitution's meaning? And what about the prior 400 years of English and American cases requiring unanimity—should we dismiss all those as dicta too?

Sensibly, Louisiana doesn't dispute that the common law required unanimity. Instead, it argues that the drafting history of the Sixth Amendment reveals an intent by the framers to leave this particular feature behind. The State points to the fact that Madison's proposal for the Sixth Amendment originally read: "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . ."[39] Louisiana notes that the House of Representatives approved this text with minor modifications. Yet, the State stresses, the Senate replaced "impartial jury of freeholders of the vicinage" with "impartial jury of the State and district wherein the crime shall have been committed" and also removed the explicit references to unanimity, the right of challenge, and "other accustomed requisites." In light of these revisions, Louisiana would have us infer an intent to abandon the common law's traditional unanimity requirement.

But this snippet of drafting history could just as easily support the opposite inference. Maybe the Senate deleted the language about unanimity, the right of challenge, and "other accustomed requisites" because all this was so plainly included in the promise of a "trial by an impartial jury" that Senators considered the language surplusage.

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before the Court was whether, in the circumstances of the defendant's case, a trial by eight jurors in a Utah state court would violate the *Ex Post Facto* Clause. 170 U. S., at 351. The Sixth Amendment's unanimity requirement was unnecessary to the outcome, and the Utah Constitution required unanimity either way. *Id.*, at 345.

[39] 1 Annals of Cong. 435 (1789).

The truth is that we have little contemporaneous evidence shedding light on why the Senate acted as it did.[40] So rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified. And, as we've seen, at the time of the Amendment's adoption, the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict.

Further undermining Louisiana's inference about the drafting history is the fact it proves too much. If the Senate's deletion of the word "unanimity" changed the meaning of the text that remains, then the same would seemingly have to follow for the other deleted words as well. So it's not just unanimity that died in the Senate, but all the "other accustomed requisites" associated with the common law jury trial right—*i. e.*, *everything* history might have taught us about what it means to have a jury trial. Taking the State's argument from drafting history to its logical conclusion would thus leave the right to a "trial by jury" devoid of meaning. A right mentioned twice in the Constitution would be reduced to an empty promise. That can't be right.

Faced with this hard fact, Louisiana's only remaining option is to invite us to distinguish between the historic features of common law jury trials that (we think) serve "important enough" functions to migrate silently into the Sixth Amendment and those that don't. And, on the State's account, we should conclude that unanimity isn't worthy enough to make the trip.

But to see the dangers of Louisiana's overwise approach, there's no need to look any further than *Apodaca* itself. There, four Justices, pursuing the functionalist approach

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[40] In private writings, Madison did explain some of the Senate's objections with his original phrasing of the vicinage requirement. See 5 Writings of James Madison 420–424 (G. Hunt ed. 1904) (letters to E. Pendleton, Sept. 14 and 23, 1789). But this is little help in explaining the other changes made in the Senate.

Louisiana espouses, began by describing the "'essential'" benefit of a jury trial as "'the interposition . . . of the commonsense judgment of a group of laymen'" between the defendant and the possibility of an "'overzealous prosecutor.'"[41] And measured against that muddy yardstick, they quickly concluded that requiring 12 rather than 10 votes to convict offers no meaningful improvement.[42] Meanwhile, these Justices argued, States have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries.[43]

Who can profess confidence in a breezy cost-benefit analysis like that? Lost in the accounting are the racially discriminatory *reasons* that Louisiana and Oregon adopted their peculiar rules in the first place.[44] What's more, the plurality never explained why the promised benefit of abandoning unanimity—reducing the rate of hung juries—always scores as a credit, not a cost. But who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous

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[41] 406 U. S., at 410 (plurality opinion) (quoting *Williams* v. *Florida*, 399 U. S. 78, 100 (1970), and *Duncan*, 391 U. S., at 156).

[42] 406 U. S., at 410–411.

[43] *Id.*, at 411.

[44] The dissent chides us for acknowledging the racist history of Louisiana's and Oregon's laws, and commends the *Apodaca* plurality's decision to disregard these facts. *Post*, at 141–144, 153. But if the Sixth Amendment calls on judges to assess the functional benefits of jury rules, as the *Apodaca* plurality suggested, how can that analysis proceed to ignore the very functions those rules were adopted to serve? The dissent answers that Louisiana and Oregon eventually recodified their nonunanimous jury laws in new proceedings untainted by racism. See *post*, at 142–143, n. 3. But that cannot explain *Apodaca*'s omission: The States' proceedings took place only *after* the Court's decision. Nor can our shared respect for "rational and civil discourse," *post*, at 144, supply an excuse for leaving an uncomfortable past unexamined. Still, the dissent is right about one thing—a jurisdiction adopting a nonunanimous jury rule even for benign reasons would still violate the Sixth Amendment.

prosecutions? And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries?[45] Or the fact that others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations?[46] It seems the *Apodaca* plurality never even conceived of such possibilities.

Our real objection here isn't that the *Apodaca* plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place. And Louisiana asks us to repeat the error today, just replacing *Apodaca*'s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.[47]

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[45] See H. Kalven & H. Zeisel, The American Jury 461 (1966); Diamond, Rose, & Murphy, Revisiting the Unanimity Requirement: The Behavior of the Non-unanimous Civil Jury, 100 Nw. U. L. Rev. 201, 207–208 (2006).

[46] Devine et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 Psych. Pub. Pol'y & L. 622, 669 (2001); R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 115, 164–165 (1983); Hans, The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making, 4 Del. L. Rev. 1, 24–25 (2001).

[47] The dissent seems to suggest that we must abandon the Sixth Amendment's historical meaning in favor of *Apodaca*'s functionalism because a parade of horribles would follow otherwise. In particular, the dissent re-

IV

A

If Louisiana's path to an affirmance is a difficult one, the dissent's is trickier still. The dissent doesn't dispute that the Sixth Amendment protects the right to a unanimous jury verdict, or that the Fourteenth Amendment extends this right to state-court trials. But, it insists, we must affirm Mr. Ramos's conviction anyway. Why? Because the doctrine of *stare decisis* supposedly commands it. There are two independent reasons why that answer falls short.

In the first place and as we've seen, not even Louisiana tries to suggest that *Apodaca* supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today.

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minds us that, at points and places in our history, women were not permitted to sit on juries. See *post*, at 153–154. But we hardly need *Apodaca*'s functionalism to avoid repeating that wrong. Unlike the rule of unanimity, rules about who qualified as a defendant's "peer" varied considerably at common law at the time of the Sixth Amendment's adoption. Reflecting that fact, the Judiciary Act of 1789—adopted by the same Congress that passed the Sixth Amendment—initially pegged the qualifications for federal jury service to the relevant state jury qualification requirements. 1 Stat. 88. As a result, for much of this Nation's early history the composition of federal juries varied both geographically and over time. See Hickey, Federal Legislation: Improvement of the Jury System in Federal Courts, 35 Geo. L. J. 500, 506–507 (1947); *Taylor* v. *Louisiana*, 419 U. S. 522, 536 (1975). Ultimately, however, the people themselves adopted further constitutional amendments that prohibit invidious discrimination. So today the Sixth Amendment's promise of a jury of one's peers means a jury selected from a representative cross-section of the entire community. See *Strauder*, 100 U. S., at 307–308; *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Taylor*, 419 U. S., at 527.

Relatedly, the dissent suggests that, before doing anything here, we should survey all changes in jury practices since 1791. See *post*, at 154–155, n. 26. It sounds like an interesting study—but not one that could alter the plain meaning of the Constitution or obliviate its undisputed unanimity requirement.

Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject). And to accept *that* reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.

This is not the rule, and for good reason—it would do more to destabilize than honor precedent. To see how, consider a hypothetical. Suppose we face a question of first impression under the Fourth Amendment: whether a State must obtain a warrant before reading a citizen's email in the hands of an Internet provider and using that email as evidence in a criminal trial. Imagine this question splits the Court, with four Justices finding the Fourth Amendment requires a warrant and four Justices finding no such requirement. The ninth Justice agrees that the Fourth Amendment requires a warrant, but takes an idiosyncratic view of the consequences of violating that right. In her view, the exclusionary rule has gone too far, and should only apply when the defendant is prosecuted for a felony. Because the case before her happens to involve only a misdemeanor, she provides the ninth vote to affirm a conviction based on evidence secured by a warrantless search. Of course, this Court has longstanding precedent requiring the suppression of all evidence obtained in unconstitutional searches and seizures. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). But like Justice Powell, our hypothetical ninth Justice sticks to her view and expressly rejects this Court's precedent. Like Justice Powell, this Justice's vote would be essential to the judgment. So if, as the dissent suggests, *that* is enough to displace precedent, would *Mapp*'s exclusionary rule now be limited to felony prosecutions?

Admittedly, this example comes from our imagination. It has to, because no case has before suggested that a single Justice may overrule precedent. But if the Court were to embrace the dissent's view of *stare decisis*, it would not stay

imaginary for long. Every occasion on which the Court is evenly split would present an opportunity for single Justices to overturn precedent to bind future majorities. Rather than advancing the goals of predictability and reliance lying behind the doctrine of *stare decisis*, such an approach would impair them.

The dissent contends that, in saying this much, we risk defying *Marks* v. *United States*.[48] According to *Marks*, when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[49] But notice that the dissent never actually gets around to telling us which opinion in *Apodaca* it considers to be the narrowest and controlling one under *Marks*—or why. So while the dissent worries that we defy a *Marks* precedent, it is oddly coy about where exactly that precedent might be found.

The parties recognize what the dissent does not: *Marks* has nothing to do with this case. Unlike a *Marks* dispute where the litigants duel over which opinion represents the narrowest and controlling one, the parties before us accept that *Apodaca* yielded no controlling opinion at all. In particular, both sides admit that Justice Powell's opinion cannot bind us—precisely because he relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after *Apodaca* has rejected. Still, the dissent presses the issue, suggesting that a single Justice's opinion *can* overrule prior precedents under "the logic" of *Marks*.[50] But, as the dissent itself implicitly acknowledges, *Marks* never sought to offer or defend such a rule. And, as we have seen, too, a rule like that would do more to harm than advance *stare decisis*.

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[48] 430 U. S. 188 (1977).

[49] *Id.*, at 193.

[50] *Post*, at 149.

The dissent's backup argument fares no better. In the end, even the dissent is forced to concede that Justice Powell's *reasoning* in *Apodaca* lacks controlling force.[51] So far, so good. But then the dissent suggests *Apodaca* somehow still manages to supply a controlling precedent as to its *result*.[52] Look closely, though. The dissent's account of *Apodaca*'s *result* looks suspiciously like the *reasoning* of Justice Powell's opinion: "In *Apodaca*, this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails."[53] Where does the convenient "state court" qualification come from? Neither the *Apodaca* plurality nor the dissent included any limitation like that—their opinions turned on the meaning of the Sixth Amendment. What the dissent characterizes as *Apodaca*'s result turns out to be nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof.

All of this does no more than highlight an old truth. It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.[54] As this Court has repeatedly explained in the

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[51] *Post*, at 150.

[52] *Post*, at 147.

[53] *Ibid.* See also *post*, at 125, n. 6 (KAVANAUGH, J., concurring in part) (offering the same argument by contending that "[t]he result of *Apodaca*" means "state criminal juries need not be unanimous").

[54] See J. Salmond, Jurisprudence § 62, p. 191 (G. Williams ed., 10th ed. 1947) ("The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large"); F. Schauer, Precedent, in Routledge Companion to Philosophy of Law 129 (A. Marmor ed. 2012) ("[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case"); N. Duxbury, The Nature and Authority of Precedent 65–66 (2008).

context of summary affirmances, "'unexplicated'" decisions may "'settl[e] the issues for the parties, [but they are] not to be read as a renunciation by this Court of doctrines previously announced in our opinions.'"[55] Much the same may be said here. *Apodaca*'s judgment line resolved that case for the parties in that case. It is binding in that sense. But stripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments.[56]

B

1

There's another obstacle the dissent must overcome. Even if we accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true.[57] Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as "an inexorable command."[58] And the doctrine is "at its weakest when we interpret the Constitution"[59] be-

[55] *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) (*per curiam*) (quoting *Fusari* v. *Steinberg*, 419 U. S. 379, 392 (1975) (Burger, C. J., concurring); see also *Bush* v. *Vera*, 517 U. S. 952, 1001–1002 (1996) (THOMAS, J., concurring in judgment).

[56] The dissent floats a different theory when it suggests this Court's denials of certiorari in cases seeking to clarify *Apodaca* is evidence of *Apodaca*'s precedential force. *Post*, at 145–146. But "[t]he significance of a denial of a petition for certiorari ought no longer . . . require discussion. This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim." *Darr* v. *Burford*, 339 U. S. 200, 226 (1950) (Frankfurter, J., dissenting).

[57] R. Cross & J. Harris, Precedent in English Law 1 (4th ed. 1991) (attributing this aphorism to Jeremy Bentham).

[58] *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (internal quotation marks omitted).

[59] *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997).

cause a mistaken judicial interpretation of that supreme law is often "practically impossible" to correct through other means.[60] To balance these considerations, when it revisits a precedent this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[61] In this case, each factor points in the same direction.

Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken; again, no Member of the Court today defends either as rightly decided. Without repeating what we've already explained in detail, it's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws. Instead, the plurality subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph. And, of course, five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity. Meanwhile, Justice Powell refused to follow this Court's incorporation precedents. Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.

Looking to *Apodaca*'s consistency with related decisions and recent legal developments compounds the reasons for concern. *Apodaca* sits uneasily with 120 years of preceding case law. Given how unmoored it was from the start, it might seem unlikely that later developments could have done more to undermine the decision. Yet they have. While

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[60] *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) (internal quotation marks omitted).

[61] *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248 (2019).

Justice Powell's dual-track theory of incorporation was already foreclosed in 1972, some at that time still argued that it might have a role to play outside the realm of criminal procedure. Since then, the Court has held otherwise.[62] Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it.[63] Nor has the plurality's rejection of the Sixth Amendment's historical unanimity requirement aged more gracefully. As we've seen, in the years since *Apodaca*, this Court has spoken inconsistently about its meaning—but nonetheless referred to the traditional unanimity requirement on at least eight occasions.[64] In light of all this, calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.

When it comes to reliance interests, it's notable that neither Louisiana nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict.[65] Nor does anyone suggest that nonunanimous verdicts have "become part of our national culture."[66] It would be quite surprising if they had, given that nonunani-

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[62] *McDonald*, 561 U. S., at 765–766.

[63] *Timbs*, 586 U. S., at 150. Contrary to the dissent's suggestion, this Court's longstanding rejection of dual-track incorporation does not necessarily imply that the Fourteenth Amendment renders the entire Bill of Rights applicable to the States. See *post*, at 156–157. The scope of an incorporated right and whether a right is incorporated at all are two different questions. See *Timbs*, 586 U. S., at 150 ("[I]f a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires").

[64] See n. 35, *supra*.

[65] Cf. *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 925–926 (2007) (BREYER, J., dissenting).

[66] *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000).

mous verdicts are insufficient to convict in 48 States and federal court.

Instead, the only reliance interests that might be asserted here fall into two categories. The first concerns the fact Louisiana and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal. The dissent claims that this fact supplies the winning argument for retaining *Apodaca* because it has generated "enormous reliance interests" and overturning the case would provoke a "crushing" "tsunami" of follow-on litigation.[67]

The overstatement may be forgiven as intended for dramatic effect, but prior convictions in only two States are potentially affected by our judgment. Those States credibly claim that the number of nonunanimous felony convictions still on direct appeal are somewhere in the hundreds,[68] and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. For example, after *United States* v. *Booker* held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when *Crawford* v. *Washington* overturned prior interpretations of the Confrontation Clause[69] or *Arizona* v. *Gant* changed the law for searches incident to arrests.[70] Our decision here promises to cause less, and certainly nothing before us supports the dissent's

[67] *Post*, at 140, 158.

[68] Brief for State of Oregon as *Amicus Curiae* 13 ("In 2018 alone . . . there were 673 felony jury trials in Oregon, and studies suggest that as many as two-thirds of those cases would have had a non-unanimous verdict"). At most, Oregon says the number of cases remaining on direct appeal and affected by today's decision "easily may eclipse a thousand." *Id.*, at 12.

[69] 541 U. S. 36, 60–63 (2004).

[70] 556 U. S. 332, 345–347 (2009).

surmise that it will cause wildly more, disruption than these other decisions.

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The second and related reliance interest the dissent seizes upon involves the interest Louisiana and Oregon have in the security of their final criminal judgments. In light of our decision today, the dissent worries that defendants whose appeals are already complete might seek to challenge their nonunanimous convictions through collateral (*i. e.*, habeas) review.

But again the worries outstrip the facts. Under *Teague* v. *Lane*, newly recognized rules of criminal procedure do not normally apply in collateral review.[71] True, *Teague* left open the possibility of an exception for "watershed rules" "implicat[ing] the fundamental fairness [and accuracy] of the trial."[72] But, as this language suggests, *Teague*'s test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it.[73] And the test is demanding by design, expressly calibrated to address the reliance interests States have in the finality of their criminal judgments.[74]

Nor is the *Teague* question even before us. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation. That litigation is sure to come, and will rightly take into account the States' interest in the finality of their criminal convictions. In this way, *Teague* frees us to say what we know to be true about the rights of the accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings crafted to account for

[71] 489 U. S. 288, 311–312 (1989) (plurality opinion).

[72] *Ibid.*

[73] See *Whorton* v. *Bockting*, 549 U. S. 406, 417–418 (2007).

[74] See *Stringer* v. *Black*, 503 U. S. 222, 227–228 (1992).

them. It would hardly make sense to ignore that two-step process and count the State's reliance interests in final judgments both here and again there. Certainly the dissent cites no authority for such double counting.

Instead, the dissent suggests that the feeble reliance interests it identifies should get a boost because the right to a unanimous jury trial has "little practical importance going forward."[75] In the dissent's telling, Louisiana has "abolished" nonunanimous verdicts and Oregon "seemed on the verge of doing the same until the Court intervened."[76] But, as the dissent itself concedes, a ruling for Louisiana would invite other States to relax their own unanimity requirements.[77] In fact, 14 jurisdictions have already told us that they would value the right to "experiment" with nonunanimous juries.[78] Besides, Louisiana's law bears only prospective effect, so the State continues to allow nonunanimous verdicts for crimes committed before 2019.[79] And while the dissent speculates that our grant of certiorari contributed to the failure of legal reform efforts in Oregon, its citation does not support its surmise. No doubt, too, those who risk being subjected to nonunanimous juries in Louisiana and Oregon today, and elsewhere tomorrow, would dispute the dissent's suggestion that their Sixth Amendment rights are of "little practical importance."

That point suggests another. In its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people. Taken at its word, the dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the

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[75] *Post*, at 141.
[76] *Ibid.*
[77] *Post*, at 142.
[78] Brief for State of Utah et al. as *Amici Curiae* 1.
[79] See 2018 La. Reg. Sess., Act 722.

interest we all share in the preservation of our constitutionally promised liberties. Indeed, the dissent can cite no case in which the one-time need to retry defendants has *ever* been sufficient to inter a constitutional right forever.

In the final accounting, the dissent's *stare decisis* arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. In arguing otherwise, the dissent must elide the reliance the American people place in their constitutionally protected liberties, overplay the competing interests of two States, count some of those interests twice, and make no small amount of new precedent all its own.

V

On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is

Reversed.

JUSTICE SOTOMAYOR, concurring as to all but Part IV–A.

I agree with most of the Court's rationale, and so I join all but Part IV–A of its opinion. I write separately, however, to underscore three points. First, overruling precedent

here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the Louisiana and Oregon laws uniquely matter here.

I

Both the majority and the dissent rightly emphasize that *stare decisis* "has been a fundamental part of our jurisprudence since the founding." *Post*, at 150 (opinion of ALITO, J.); see *ante*, at 105. Indeed, "[w]e generally adhere to our prior decisions, even if we question their soundness, because doing so 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Alleyne* v. *United States*, 570 U. S. 99, 118 (2013) (SOTOMAYOR, J., concurring) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991)).

But put simply, this is not a case where we cast aside precedent "simply because a majority of this Court now disagrees with" it. *Alleyne*, 570 U. S., at 133 (ALITO, J., dissenting). Rather, *Apodaca* v. *Oregon*, 406 U. S. 404 (1972), was on shaky ground from the start. That was not because of the functionalist analysis of that Court's plurality: Reasonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation. That the plurality in *Apodaca* used different interpretive tools from the majority here is not a reason on its own to discard precedent.

What matters instead is that, as the majority rightly stresses, *Apodaca* is a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity. *Ante*, at 96, 106–108. Five Justices in *Apodaca* itself disagreed with that plurality's contrary view of the Sixth Amendment. Justice Powell's the-

ory of dual-track incorporation also fared no better: He recognized that his argument on that score came "late in the day." *Johnson* v. *Louisiana*, 406 U. S. 356, 375 (1972) (concurring opinion).

Moreover, "[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections." *Alleyne*, 570 U. S., at 116, n. 5. And the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment. See *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 515–516 (1974) ("The Sixth Amendment represents a deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement" (internal quotation marks omitted)). Where the State's power to imprison those like Ramos rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its precedents.

II

In contrast to the criminal-procedure context, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Despite that fact, the Court has recently overruled precedent where the Court's shift threatened vast regulatory and economic consequences. *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878 (2018); *id.*, at 952 (KAGAN, J., dissenting) (noting that the Court's opinion called into question "thousands of . . . contracts covering millions of workers"); see *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018) (noting the "legitimate" burdens that the Court's overruling of precedent would place on vendors who had started businesses in reliance on a previous decision).

This case, by contrast, threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs

in reliance on our decisions, the States' interests here in avoiding a modest number of retrials—emphasized at such length by the dissent—are much less weighty. They are certainly not new: Opinions that force changes in a State's criminal procedure typically impose such costs. And were this Court to take the dissent's approach—defending criminal-procedure opinions as wrong as *Apodaca* simply to avoid burdening criminal justice systems—it would never correct its criminal jurisprudence at all.

To pick up on the majority's point, *ante*, at 108, in that alternate universe, a trial judge alone could still decide the critical facts necessary to sentence a defendant to death. *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled by *Ring* v. *Arizona*, 536 U. S. 584 (2002). An officer would still be able to search a car upon the arrest of any one of its recent occupants. *New York* v. *Belton*, 453 U. S. 454 (1981), holding limited by *Arizona* v. *Gant*, 556 U. S. 332 (2009). And States could still deprive a defendant of the right to confront her accuser so long as the incriminating statement was "reliable." *Ohio* v. *Roberts*, 448 U. S. 56 (1980), abrogated by *Crawford* v. *Washington*, 541 U. S. 36 (2004). The Constitution demands more than the continued use of flawed criminal procedures—all because the Court fears the consequences of changing course.

III

Finally, the majority vividly describes the legacy of racism that generated Louisiana's and Oregon's laws. *Ante*, at 87–88, 99–100, and n. 44. Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention. That is not simply because that legacy existed in the first place—unfortunately, many laws and policies in this country have had some history of racial animus—but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them. See generally *United States* v. *Fordice*, 505 U. S. 717, 729 (1992) (policies that are "traceable" to a State's *de jure* racial segregation

and that still "have discriminatory effects" offend the Equal Protection Clause).

Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here. While the dissent points to the "legitimate" reasons for Louisiana's reenactment, *post*, at 142, Louisiana's perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether.

Today, Louisiana's and Oregon's laws are fully—and rightly—relegated to the dustbin of history. And so, too, is *Apodaca*. While overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance.

JUSTICE KAVANAUGH, concurring in part.

In *Apodaca* v. *Oregon*, this Court held that state juries need not be unanimous in order to convict a criminal defendant. 406 U. S. 404 (1972). Two States, Louisiana and Oregon, have continued to use non-unanimous juries in criminal cases. Today, the Court overrules *Apodaca* and holds that state juries must be unanimous in order to convict a criminal defendant.

I agree with the Court that the time has come to overrule *Apodaca*. I therefore join the introduction and Parts I, II–A, III, and IV–B–1 of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

I

The legal doctrine of *stare decisis* derives from the Latin maxim "*stare decisis et non quieta movere*," which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of

judges who have previously tried to solve the same problem. In 1765, Blackstone—"the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—wrote that "it is an established rule to abide by former precedents," to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the "judicial Power" and rooted in Article III of the Constitution. Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis*: To "avoid an arbitrary discretion in the courts, it is indispensable" that federal judges "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 529 (J. Cooke ed. 1961). In the words of THE CHIEF JUSTICE, *stare decisis*' "greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 378 (2010) (concurring opinion).

This Court has repeatedly explained that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986).

The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of

this Court has voted to overrule multiple constitutional precedents. See, *e. g.*, *Knick* v. *Township of Scott*, 588 U. S. 180 (2019); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230 (2019); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878 (2018); *Hurst* v. *Florida*, 577 U. S. 92 (2016); *Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Johnson* v. *United States*, 576 U. S. 591 (2015); *Alleyne* v. *United States*, 570 U. S. 99 (2013); see also Baude, Precedent and Discretion, 2020 S. Ct. Rev. 1, 4 (forthcoming) ("Nobody on the Court believes in absolute stare decisis").

Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent. See, *e. g.*, *Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010); *Montejo* v. *Louisiana*, 556 U. S. 778 (2009); *Crawford* v. *Washington*, 541 U. S. 36 (2004); *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *Ring* v. *Arizona*, 536 U. S. 584 (2002); *Agostini* v. *Felton*, 521 U. S. 203 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992);[1] *Payne* v. *Tennessee*, 501 U. S. 808 (1991); *Batson* v. *Kentucky*, 476 U. S. 79 (1986); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985); *Illinois* v. *Gates*, 462 U. S. 213 (1983); *United States* v. *Scott*, 437 U. S. 82 (1978); *Craig* v. *Boren*, 429 U. S. 190 (1976); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*); *Katz* v. *United States*, 389 U. S. 347 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Gideon* v. *Wain-*

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[1] In *Casey*, the Court reaffirmed what it described as the "central holding" of *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court expressly rejected *Roe*'s trimester framework, and the Court expressly overruled two other important abortion precedents, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986). See *Casey*, 505 U. S., at 861; *id.*, at 870, 873 (plurality opinion).

wright, 372 U. S. 335 (1963); *Baker* v. *Carr*, 369 U. S. 186 (1962); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *United States* v. *Darby*, 312 U. S. 100 (1941); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown* v. *Board of Education*, which repudiated the separate but equal doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an "inexorable command." *E. g.*, *ante*, at 105.

On the other hand, as Justice Jackson explained, just "because one should avoid Scylla is no reason for crashing into Charybdis." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). So no one advocates that the Court should *always* overrule erroneous precedent.

Rather, applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent, but *sometimes* overrules precedent. The difficult question, then, is when to overrule an erroneous precedent.

To begin with, the Court's precedents on precedent distinguish statutory cases and constitutional cases.

In statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation. To be sure, enacting new legislation requires finding room in a crowded legislative docket and securing the agreement of the House, the Senate (in effect, 60 Senators), and the President. Both by design and as a matter of fact, enacting new legislation is difficult—

and far more difficult than the Court's cases sometimes seem to assume. Nonetheless, the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process. See, *e. g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456–457 (2015); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989); *Flood* v. *Kuhn*, 407 U. S. 258, 283–284 (1972). The principle that "it is more important that the applicable rule of law be settled than that it be settled right" is "commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation*." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added).[2]

In constitutional cases, by contrast, the Court has repeatedly said—and says again today—that the doctrine of *stare decisis* is not as "inflexible." *Burnet*, 285 U. S., at 406 (Brandeis, J., dissenting); see also *ante*, at 105–106; *Payne*, 501 U. S., at 828; *Scott*, 437 U. S., at 101. The reason is straightforward: As Justice O'Connor once wrote for the Court, *stare decisis* is not as strict "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U. S., at 235. The Court therefore "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." *Citizens United*, 558 U. S., at 378 (ROBERTS, C. J., concurring). It follows "that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent." *Ibid.* In his canonical

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[2] The Court's precedents applying common-law statutes and pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*. See *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 899–907 (2007); *Kisor* v. *Wilkie*, 588 U. S. 558, 623–626 (2019) (GORSUCH, J., concurring in judgment).

opinion in *Burnet*, Justice Brandeis described the Court's practice with respect to *stare decisis* in constitutional cases in a way that was accurate then and remains accurate now: In "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." 285 U. S., at 406–407 (dissenting opinion).

That said, in constitutional as in statutory cases, to "overrule an important precedent is serious business." Jackson, 30 A. B. A. J., at 334. In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a "special justification," *Allen* v. *Cooper*, 589 U. S. 248, 259–260 (2020) (internal quotation marks omitted); *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), or otherwise stated, "strong grounds," *Janus*, 585 U. S., at 917.

In particular, to overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided." *Allen*, 589 U. S., at 259–260 (internal quotation marks omitted). As Justice Scalia put it, the doctrine of *stare decisis* always requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." *Hubbard* v. *United States*, 514 U. S. 695, 716 (1995) (opinion concurring in part and concurring in judgment). To overrule, the Court demands a special justification or strong grounds.

But the "special justification" or "strong grounds" formulation elides a key question: What constitutes a special justification or strong grounds?[3] In other words, in deciding

[3] The Court first used the term "special justification" in the *stare decisis* context in 1984, without explaining what the term might entail. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212. In employing that term, the Court did not suggest that it was imposing a new *stare decisis* requirement as opposed to merely describing the Court's historical practice with respect to *stare decisis*.

whether to overrule an erroneous constitutional decision, how does the Court know when to overrule and when to stand pat?

As the Court has exercised the "judicial Power" over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the Article III "judicial Power" with respect to precedent. The Federalist No. 37, at 236.

The *stare decisis* factors identified by the Court in its past cases include:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a "special justification" or "strong grounds" to overrule a prior constitutional decision.

First, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagree-

ment does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors. A case may be egregiously wrong when decided, see, *e. g.*, *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, see, *e. g.*, *Nevada* v. *Hall*, 440 U. S. 410 (1979), or both, *ibid.*

Second, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S., at 494–495; *Barnette*, 319 U. S., at 630–642; see also *Payne*, 501 U. S., at 825–827.

Third, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of

practical effects of one against the other." Jackson, 30 A. B. A. J., at 334.

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is "manifestly absurd or unjust." 1 Blackstone, Commentaries on the Laws of England, at 70.

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law.[4] Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis* factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent, as the Court does in this case. To begin with, judges may disagree about whether a prior decision is wrong in the first place—and importantly, that disagreement is sometimes the *real* dispute when judges joust over *stare decisis*. But even when judges agree that a prior decision is wrong, they may

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[4] Another important factor that limits the number of overrulings is that the Court typically does not overrule a precedent unless a party requests overruling, or at least unless the Court receives briefing and argument on the *stare decisis* question.

disagree about whether the decision is so egregiously wrong as to justify an overruling. Judges may likewise disagree about the severity of the jurisprudential or real-world consequences caused by the erroneous decision and, therefore, whether the decision is worth overruling. In that regard, some judges may think that the negative consequences can be addressed by narrowing the precedent (or just living with it) rather than outright overruling it. Judges may also disagree about how to measure the relevant reliance interests that might be affected by an overruling. And on top of all of that, judges may also disagree about how to weigh and balance all of those competing considerations in a given case.[5]

This case illustrates that point. No Member of the Court contends that the result in *Apodaca* is correct. But the Members of the Court vehemently disagree about whether to overrule *Apodaca*.

II

Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule *Apodaca*.

First, *Apodaca* is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. *Ante*, at 92; see, *e. g.*, *Patton* v. *United States*, 281 U. S. 276, 288 (1930); *Thompson* v. *Utah*, 170 U. S. 343, 351 (1898). And the original meaning and this Court's precedents establish that the

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[5] To be clear, the *stare decisis* issue in this case is one of horizontal *stare decisis*—that is, the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent. By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with "one supreme Court." U. S. Const., Art. III, § 1. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989).

Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States. See *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968); *id.*, at 166 (Black, J., concurring); see also *Malloy*, 378 U. S., at 10–11; see generally *Timbs* v. *Indiana*, 586 U. S. 146 (2019); *McDonald* v. *Chicago*, 561 U. S. 742 (2010). When *Apodaca* was decided, it was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier. As the Court today persuasively explains, the original meaning of the Sixth and Fourteenth Amendments and this Court's two lines of decisions—the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases—overwhelmingly demonstrate that *Apodaca*'s holding is egregiously wrong.[6]

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[6] Notwithstanding the splintered 4–1–4 decision in *Apodaca*, its bottom-line result carried precedential force. In the American system of *stare decisis*, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996); *Randall* v. *Sorrell*, 548 U. S. 230, 243 (2006) (opinion of BREYER, J.); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 668 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). The result of *Apodaca* was that state criminal juries need not be unanimous. That precedential result has been followed by this Court and the other federal and state courts for the last 48 years. To be sure, *Apodaca* had no majority opinion. When the Court's decision is splintered, courts follow the result, and they also follow the reasoning or standards set forth in the opinion constituting the "narrowest grounds" of the Justices in the majority. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). That *Marks* rule is ordinarily commonsensical to apply and usually means that courts in essence heed the opinion that occupies the middle-ground position between (i) the broadest opinion among the Justices in the majority and (ii) the dissenting opinion. See *United States* v. *Duvall*, 740 F. 3d 604, 610–611 (CADC 2013) (Kavanaugh, J., concurring in denial of rehearing en banc). On very rare occasions, as in *Apodaca*, it can be difficult to discern which opinion's reasoning has precedential effect under *Marks*. See also *Nichols* v. *United States*, 511 U. S. 738, 745–746 (1994) (analyzing *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) (*per curiam*)). But even when that happens,

Second, *Apodaca* causes significant negative consequences. It is true that *Apodaca* is workable. But *Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable). That consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent. See generally *Malloy*, 378 U. S. 1.

In addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca*. Louisiana achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, Louisiana enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. See *Strauder* v. *West Virginia*, 100 U. S. 303, 308–310 (1880); T. Aiello, Jim Crow's Last Stand: Non-unanimous Criminal Jury Verdicts in Louisiana 16, 19 (2015). Coming on the heels of the State's 1896 victory in *Plessy* v. *Ferguson*, 163 U. S. 537, the 1898 constitutional convention expressly sought to "establish the supremacy of the white race." Semmes, Chairman of the Committee on the Judiciary, Address at the Louisiana Constitutional Convention in 1898, in Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 375 (H. Hearsey ed. 1898). And the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of

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the *result* of the decision still constitutes a binding precedent for the federal and state courts, and for this Court, unless and until it is overruled by this Court. As I read the Court's various opinions today, six Justices treat the result in *Apodaca* as a precedent for purposes of *stare decisis* analysis. A different group of six Justices concludes that *Apodaca* should be and is overruled.

racist Jim Crow measures against African-Americans, especially in voting and jury service. See Aiello, *supra*, at 16–26; Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593, 1620 (2018).[7]

In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." *Johnson* v. *Louisiana*, 406 U. S. 356, 397 (1972) (Stewart, J., dissenting). That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors.

In its 1986 decision in *Batson* v. *Kentucky*, the Court recognized the pervasive racial discrimination woven into the traditional system of unfettered peremptory challenges. See 476 U. S., at 85–89, 91. The Court therefore overruled a prior decision, *Swain* v. *Alabama*, 380 U. S. 202 (1965), that

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[7] Oregon adopted the non-unanimous jury practice in 1934—one manifestation of the extensive 19th- and early 20th-century history of racist and anti-Semitic sentiment in that State. See Kaplan & Saack, Overturning *Apodaca v. Oregon* Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System, 95 Ore. L. Rev. 1, 3, 43–51 (2016); Mooney, Remembering 1857, 87 Ore. L. Rev. 731, 778, n. 174 (2008).

had allowed those challenges. See generally *Flowers* v. *Mississippi*, 588 U. S. 284 (2019).

In my view, *Apodaca* warrants the same fate as *Swain*. After all, the "requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury." *Johnson*, 406 U. S., at 398 (Stewart, J., dissenting). And as Justice Thurgood Marshall forcefully explained in dissent in *Apodaca*, to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests." *Johnson*, 406 U. S., at 402 (Marshall, J., dissenting in both *Johnson* and *Apodaca*).

To be clear, one could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles. England has employed non-unanimous juries, and various legal organizations in the United States have at times championed non-unanimous juries. See, *e. g.*, Juries Act 1974, ch. 23, § 17 (Eng.); ABA Project on Standards for Criminal Justice, Trial By Jury § 1.1, p. 7 (App. Draft 1968); ALI, Code of Criminal Procedure § 355, p. 99 (1930). And Louisiana's modern policy decision to retain non-unanimous juries—as distinct from its original decision in the late 1800s to adopt non-unanimous juries—may have been motivated by neutral principles (or just by inertia).

But the question at this point is not whether the Constitution prohibits non-unanimous juries. It does. Rather, the disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view. After all, the non-unanimous jury "is today the last of Louisiana's Jim Crow laws." Aiello, *supra*, at 63. And this Court has empha-

sized time and again the "imperative to purge racial prejudice from the administration of justice" generally and from the jury system in particular. *Pena-Rodriguez* v. *Colorado*, 580 U. S. 206, 221–223 (2017) (collecting cases).

To state the point in simple terms: Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?

Third, overruling *Apodaca* would not unduly upset reliance interests. Only Louisiana and Oregon employ non-unanimous juries in criminal cases. To be sure, in those two States, the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review. But that consequence almost always ensues when a criminal-procedure precedent that favors the government is overruled. See *Ring*, 536 U. S. 584; *Batson*, 476 U. S. 79. And here, at least, I would "count that a small price to pay for the uprooting of this weed." *Hubbard*, 514 U. S., at 717 (Scalia, J., concurring in part and concurring in judgment).

Except for the effects on that limited class of direct-review cases, it will be relatively easy going forward for Louisiana and Oregon to transition to the unanimous jury rule that the other 48 States and the federal courts use. Indeed, in 2018, Louisiana amended its constitution to require jury unanimity in criminal trials for crimes committed on or after January 1, 2019, meaning that the transition is already well under way in Louisiana.

Importantly, moreover, this Court applies a separate non-retroactivity doctrine to mitigate the disruptive effects of overrulings in criminal cases. Under the Court's precedents, new constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review.

See *Teague* v. *Lane*, 489 U. S. 288, 311 (1989) (plurality opinion); *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). *Teague* recognizes only two exceptions to that general habeas nonretroactivity principle: "if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton* v. *Bockting*, 549 U. S. 406, 416 (2007) (internal quotation marks omitted). The new rule announced today—namely, that state criminal juries must be unanimous—does not fall within either of those two narrow *Teague* exceptions and therefore, as a matter of federal law, should not apply retroactively on habeas corpus review.

The first *Teague* exception does not apply because today's new rule is procedural, not substantive: It affects "only the *manner of determining* the defendant's culpability." *Schriro* v. *Summerlin*, 542 U. S. 348, 353 (2004).

The second *Teague* exception does not apply because today's new rule, while undoubtedly important, is not a "watershed" procedural rule. This Court has flatly stated that "it is unlikely that any such rules" have "yet to emerge." *Whorton*, 549 U. S., at 417 (internal quotation marks omitted). In "the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status." *Id.*, at 418, 421 (rejecting retroactivity for *Crawford* v. *Washington*, 541 U. S. 36 (2004)); see, *e. g.*, *Beard* v. *Banks*, 542 U. S. 406, 420 (2004) (rejecting retroactivity for *Mills* v. *Maryland*, 486 U. S. 367 (1988)); *Summerlin*, 542 U. S., at 358 (rejecting retroactivity for *Ring* v. *Arizona*, 536 U. S. 584 (2002)); *O'Dell* v. *Netherland*, 521 U. S. 151, 167–168 (1997) (rejecting retroactivity for *Simmons* v. *South Carolina*, 512 U. S. 154 (1994)); *Lambrix* v. *Singletary*, 520 U. S. 518, 539–540 (1997) (rejecting retroactivity for *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) (*per curiam*)); *Sawyer* v. *Smith*, 497 U. S. 227, 241–245 (1990) (rejecting retroactivity for *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985)); see also *Allen* v. *Hardy*, 478 U. S. 255, 261 (1986) (*per curiam*) (reject-

ing retroactivity for *Batson* v. *Kentucky*, 476 U. S. 79 (1986)); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968) (*per curiam*) (rejecting retroactivity for *Duncan*, 391 U. S. 145).

So assuming that the Court faithfully applies *Teague*, today's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final.[8]

In addition, as to ineffective-assistance-of-counsel claims, an attorney presumably would not have been deficient for failing to raise a constitutional jury-unanimity argument before today's decision—or at the very least, before the Court granted certiorari in this case. Before today, after all, this Court's precedents had repeatedly allowed non-unanimous juries in state criminal cases. In that situation, the Courts of Appeals have consistently held that an attorney is not ineffective for failing to anticipate or advocate for the overruling of a constitutional precedent of this Court. See, *e. g.*, *Walker* v. *United States*, 810 F. 3d 568, 577 (CA8 2016); *United States* v. *Smith*, 241 F. 3d 546, 548 (CA7 2001); *Honeycutt* v. *Mahoney*, 698 F. 2d 213, 216–217 (CA4 1983); see also *Steiner* v. *United States*, 940 F. 3d 1282, 1293 (CA11 2019) (*per curiam*); *Snider* v. *United States*, 908 F. 3d 183, 192 (CA6 2018); *Green* v. *Johnson*, 116 F. 3d 1115, 1125 (CA5 1997).

For those reasons, the reliance interests at stake in this case are not especially substantial, and they do not mandate adherence to *Apodaca*.[9]

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[8] In *Allen* v. *Hardy*, 478 U. S. 255 (1986) (*per curiam*), this Court concluded—without briefing or oral argument—that *Batson* would not apply retroactively. Under the well-settled *Teague* principles, there should be no doubt that today's decision likewise will not apply retroactively on collateral review.

[9] JUSTICE ALITO's characteristically incisive dissent rests largely on his view of the States' reliance interests. My respectful disagreement with JUSTICE ALITO primarily boils down to our different assessments of those reliance interests—in particular, our different evaluations of how readily Louisiana and Oregon can adjust to an overruling of *Apodaca*.

* * *

In sum, *Apodaca* is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests. I therefore agree with the Court's decision to overrule *Apodaca*.[10]

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that petitioner Evangelisto Ramos' felony conviction by a nonunanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of "trial . . . by an impartial jury." I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.

I

I begin with the parties' dispute as to whether the Sixth Amendment right to a trial by jury includes a protection against nonunanimous felony guilty verdicts. On this question, I do not write on a blank slate. As the Court acknowledges, our decisions have long recognized that unanimity is required. See *ante*, at 92. Because this interpretation is not demonstrably erroneous, I would resolve the Sixth Amendment question on that basis.

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[10] As noted above, I join the introduction and Parts I, II–A, III, and IV–B–1 of JUSTICE GORSUCH's opinion for the Court. The remainder of JUSTICE GORSUCH's opinion does not command a majority. That point is important with respect to Part IV–A, which only three Justices have joined. It appears that six Justices of the Court treat the result in *Apodaca* as a precedent and therefore do not subscribe to the analysis in Part IV–A of JUSTICE GORSUCH's opinion.

A

This Court first decided that the Sixth Amendment protected a right to unanimity in *Thompson* v. *Utah*, 170 U. S. 343 (1898). The Court reasoned that Thompson, a Utah prisoner, was protected by the Sixth Amendment when Utah was still a Territory because "the right of trial by jury in suits at common law appl[ied] to the Territories of the United States." *Id.*, at 346. The Court then stated that this right "made it impossible to deprive him of his liberty except by [a] unanimous verdict." *Id.*, at 355; see also *id.*, at 351, 353.

The Court has repeatedly reaffirmed the Sixth Amendment's unanimity requirement. In *Patton* v. *United States*, 281 U. S. 276 (1930), the Court stated that the Sixth Amendment protects the right "that the verdict should be unanimous," *id.*, at 288. In *Andres* v. *United States*, 333 U. S. 740 (1948), the Court repeated that "[u]nanimity in jury verdicts is required" by the Sixth Amendment, *id.*, at 748. And in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972), five Justices agreed that "the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous," *id.*, at 414 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); see also *Johnson* v. *Louisiana*, 406 U. S. 356, 371 (1972) (Powell, J., concurring) (explaining views in *Apodaca* and its companion case); *id.*, at 382–383 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (same). We have accepted this interpretation of the Sixth Amendment in recent cases. See *Southern Union Co.* v. *United States*, 567 U. S. 343, 356 (2012); *Blakely* v. *Washington*, 542 U. S. 296, 301 (2004); *Apprendi* v. *New Jersey*, 530 U. S. 466, 477 (2000).

B

The question then becomes whether these decisions are entitled to *stare decisis* effect. As I have previously explained, "the Court's typical formulation of the *stare decisis*

standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law." *Gamble* v. *United States*, 587 U. S. 678, 711 (2019) (concurring opinion). There is considerable evidence that the phrase "trial . . . by . . . jury" in the Sixth Amendment was understood since the founding to require that a felony guilty verdict be unanimous. Because our precedents are thus not outside the realm of permissible interpretation, I will apply them.

1

Blackstone—"the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)—wrote that no subject can "be affected either in his property, his liberty, or his person, but by the unanimous consent" of a jury, 3 W. Blackstone, Commentaries on the Laws of England 379 (1772); see also 4 *id.*, at 343. Another influential treatise author, Hale, wrote that "the law of England hath afforded the best method of trial, that is possible, . . . namely by a jury . . . all concurring in the same judgment." 1 M. Hale, Pleas of the Crown 33 (1736) (emphasis deleted). Such views continued in scholarly works throughout the early Republic. See, *e. g.*, 2 J. Story, Commentaries on the Constitution of the United States § 777, p. 248 (1833); 6 N. Dane, Digest of American Law, ch. LXXXII, Art. 2, § 1, p. 226 (1824); 2 J. Wilson, Works of the Honourable James Wilson 349–350 (1804).

The uniform practice among the States was in accord. Despite isolated 17th-century colonial practices allowing non-unanimous juries, "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." *Apodaca*, *supra*, at 408, n. 3 (plurality opinion). In the founding era,

six States explicitly mentioned unanimity in their constitutions. See Del. Declaration of Rights § 14 (1776); Md. Declaration of Rights, Art. XIX (1776); N. C. Declaration of Rights § IX (1776); Pa. Declaration of Rights, Art. IX (1776); Vt. Const., Art. XI (1786); Va. Declaration of Rights § 8 (1776). Four more States clearly referred to the common-law jury right, which included unanimity. Ky. Const., Art. XII, § 6 (1792); N. J. Const., Art. XXII (1776); N. Y. Const., Art. XLI (1777); S. C. Const., Art. IX, § 6 (1790). Some States did not explicitly refer to either the common law or unanimity. See, *e. g.*, Ga. Const., Art. LXI (1777); Mass. Declaration of Rights, Art. XII (1780). But there is reason to believe that they nevertheless understood unanimity to be required. See, *e. g.*, *Rouse* v. *State*, 4 Ga. 136, 147 (1848).

In light of the express language used in some State Constitutions, respondent Louisiana argues that the omission of an express unanimity requirement in the Sixth Amendment reflects a deliberate choice. This argument fails to establish that the Court's decisions are demonstrably erroneous. The House of Representatives passed a version of the amendment providing that "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites," 1 Annals of Cong. 435 (1789), but the final Amendment contained no reference to vicinage or unanimity. See Amdt. 6. I agree with Justice Harlan and the Court that "the meaning of this change is wholly speculative" and that there is "no concrete evidence" that the Senate rejected the requirement of unanimity. *Baldwin* v. *New York*, 399 U. S. 66, 123, n. 9 (1970) (Harlan, J., dissenting); see also *ante*, at 97–98; Letter from J. Madison to E. Pendleton (Sept. 14, 1789), in 1 Letters and Other Writings of James Madison 491 (1867). There is thus sufficient evidence to support this Court's prior interpretation that the Sixth Amendment right to a trial by jury requires unanimity.

2

There is also considerable evidence that this understanding persisted up to the time of the Fourteenth Amendment's ratification. State courts, for example, continued to interpret the phrase "trial by jury" to require unanimity in felony guilty verdicts. The New Hampshire Superior Court of Judicature expounded on the point:

> "The terms 'jury,' and 'trial by jury,' are, and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.
>
> "A jury for the trial of a cause . . . must return their unanimous verdict upon the issue submitted to them.
>
> "All the books of the law describe a trial jury substantially as we have stated it. And a 'trial by jury' is a trial by such a body, so constituted and conducted. So far as our knowledge extends, these expressions were used at the adoption of the constitution and always before, in these senses alone by all classes of writers and speakers." *Opinion of Justices*, 41 N. H. 550, 551–552 (1860).

Other state courts held the same view. The Missouri Supreme Court in 1860 called unanimity one of the "essential requisites in a jury trial," *Vaughn* v. *Scade*, 30 Mo. 600, 603, and the Ohio Supreme Court in 1853 called it one of "the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country," *Work* v. *State*, 2 Ohio St. 297, 306.

Treatises from the Reconstruction era likewise adopted this position. A leading work on criminal procedure explained that if a "statute authorizes [a jury] to find a verdict upon anything short of . . . unanimous consent," it "is void." 1 J. Bishop, Criminal Procedure § 761, p. 532 (1866). A widely read treatise on constitutional law reiterated that

"'by a jury' is generally understood to mean" a body that "must *unanimously* concur in the guilt of the accused before a conviction can be had." G. Paschal, The Constitution of the United States 210 (1876) (capitalization omitted). And a volume on the jury trial was in agreement. See J. Proffatt, Trial by Jury § 77, p. 112 (1877).

* * *

Based on this evidence, the Court's prior interpretation of the Sixth Amendment's guarantee is not demonstrably erroneous. It is within the realm of permissible interpretations to say that "trial . . . by . . . jury" in that Amendment includes a protection against nonunanimous felony guilty verdicts.

II

The remaining question is whether that right is protected against the States. In my view, the Privileges or Immunities Clause provides this protection. I do not adhere to this Court's decisions applying due process incorporation, including *Apodaca* and—it seems—the Court's opinion in this case.

The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amdt. 14, § 1. At the time of the Fourteenth Amendment's ratification, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" *McDonald* v. *Chicago*, 561 U. S. 742, 813 (2010) (THOMAS, J., concurring in part and concurring in judgment). "[T]he ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against abridgment by the States. *Id.*, at 837. The Sixth Amendment right to a trial by jury is certainly a constitutionally enumerated right. See *Maxwell* v. *Dow*, 176 U. S. 581, 606–608 (1900) (Harlan, J., dissenting).

The Court, however, has made the Due Process Clause serve the function that the Privileges or Immunities Clause

should serve. Although the Privileges or Immunities Clause grants "United States citizens a certain collection of rights—*i. e.*, privileges or immunities—attributable to that status," the Court has interpreted the Clause "quite narrowly." *McDonald*, 561 U. S., at 808 (opinion of THOMAS, J.). Perhaps to compensate for this limited view of the Privileges or Immunities Clause, it has incorporated individual rights against the States through the Due Process Clause. *Id.*, at 809.

Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment. As I have explained before, "[t]he notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *Id.*, at 811. The unreasonableness of this interpretation is underscored by the Court's struggle to find a "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not," *ibid.*, as well as its many incorrect decisions based on this theory, see *Obergefell* v. *Hodges*, 576 U. S. 644 (2015); *Roe* v. *Wade*, 410 U. S. 113 (1973); *Dred Scott* v. *Sandford*, 19 How. 393 (1857).

I "decline to apply the legal fiction" of due process incorporation. *Timbs* v. *Indiana*, 586 U. S. 146, 159 (2019) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). As a result, I part ways with the Court on both its affirmative argument about the Fourteenth Amendment and its treatment of *Apodaca*, in which five Justices agreed the Sixth Amendment included a right to unanimity but a different majority concluded that the right did not apply to the States. See *ante*, at 93–96.

I would accept petitioner's invitation to decide this case under the Privileges or Immunities Clause. The Court conspicuously avoids saying which Clause it analyzes. See, *e. g.*, *ante*, at 88–89, 93. But one assumes from its silence that the Court is either following our due process incorporation precedents or believes that "nothing in this case turns on"

which Clause applies, *Timbs*, *supra*, at 157 (GORSUCH, J., concurring).

I have already rejected our due process incorporation cases as demonstrably erroneous, and I fundamentally disagree with applying that theory of incorporation simply because it reaches the same result in the case before us. Close enough is for horseshoes and hand grenades, not constitutional interpretation. The textual difference between protecting "citizens" (in the Privileges or Immunities Clause) and "person[s]" (in the Due Process Clause) will surely be relevant in another case. And our judicial duty—not to mention the candor we owe to our fellow citizens—requires us to put an end to this Court's due process prestidigitation, which no one is willing to defend on the merits.

I would simply hold that, because all of the opinions in *Apodaca* addressed the Due Process Clause, its Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause. I cannot understand why the Court, having decided to abandon *Apodaca*, refuses to correctly root its holding in the Privileges or Immunities Clause.[1]

III

There is no need to prove the original meaning of the Sixth Amendment right to a trial by jury in this case.[2] The evi-

[1] I also note that, under my approach to *stare decisis*, there is no need to decide which reliance interests are important enough to save an incorrect precedent. I doubt that this question is susceptible of principled resolution in this case, compare *ante*, at 107–111 (principal opinion), with *ante*, at 113–114 (SOTOMAYOR, J., concurring); *ante*, at 129–131 (KAVANAUGH, J., concurring); and *post*, at 158–164 (ALITO, J., dissenting), or in any other case for that matter, see, *e. g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 457–458 (2015); *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003); *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 855–856 (1992).

[2] Similarly, I express no view on how fundamental the right to unanimity is, what other attributes of a criminal jury are protected by the Privileges or Immunities Clause, what rights are protected in misdemeanor cases, or what rights are protected in civil trials.

dence that I have recounted is enough to establish that our previous interpretations of the Sixth Amendment are not demonstrably erroneous. What is necessary, however, is a clear understanding of the means by which the Sixth Amendment right applies against the States. We should rely on the Privileges or Immunities Clause, not the Due Process Clause or the Fourteenth Amendment in some vague sense. Accordingly, I concur only in the judgment.

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE KAGAN joins as to all but Part III–D, dissenting.

The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn.

Nearly a half century ago in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972), the Court held that the Sixth Amendment permits non-unanimous verdicts in state criminal trials, and in all the years since then, no Justice has even hinted that *Apodaca* should be reconsidered. Understandably thinking that *Apodaca* was good law, the state courts in Louisiana and Oregon have tried thousands of cases under rules that permit such verdicts. But today, the Court does away with *Apodaca* and, in so doing, imposes a potentially crushing burden on the courts and criminal justice systems of those States. The Court, however, brushes aside these consequences and even suggests that the States should have known better than to count on our decision.

To add insult to injury, the Court tars Louisiana and Oregon with the charge of racism for permitting non-unanimous verdicts—even though this Court found such verdicts to be

constitutional and even though there are entirely legitimate arguments for allowing them.

I would not overrule *Apodaca*. Whatever one may think about the correctness of the decision, it has elicited enormous and entirely reasonable reliance. And before this Court decided to intervene, the decision appeared to have little practical importance going forward. Louisiana has now abolished non-unanimous verdicts, and Oregon seemed on the verge of doing the same until the Court intervened.[1]

In Part II of this opinion, I will address the surprising argument, advanced by three Justices in the majority, that *Apodaca* was never a precedent at all, and in Part III, I will explain why *stare decisis* supports retention of that precedent. But before reaching those issues, I must say something about the rhetoric with which the majority has seen fit to begin its opinion.

I

Too much public discourse today is sullied by *ad hominem* rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents. The majority regrettably succumbs to this trend. At the start of its opinion, the majority asks this rhetorical question: "Why do Louisiana and Oregon allow nonunanimous convictions?" *Ante*, at 87. And the answer it suggests? Racism, white supremacy, the Ku Klux Klan. *Ante*, at 87–88. Non-unanimous verdicts, the Court implies, are of a piece with Jim Crow laws, the poll tax, and other devices once used to disfranchise African-Americans. *Ibid.*

If Louisiana and Oregon originally adopted their laws allowing non-unanimous verdicts for these reasons,[2] that is

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[1] See Brief for State of Oregon as *Amicus Curiae* 1–2.

[2] Both States resist this suggestion. See Brief for Respondent 36–39; Brief for State of Oregon as *Amicus Curiae* 6–8.

deplorable, but what does that have to do with the broad constitutional question before us? The answer is: nothing.

For one thing, whatever the reasons why Louisiana and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years. Louisiana's constitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was "judicial efficiency." *State* v. *Hankton*, 2012–0375, p. 19 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1038. "In that debate no mention was made of race." *Ibid.*; 7 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1184–1189 (La. Constitutional Convention Records Comm'n 1977). The people of Louisiana ratified the new Constitution. The majority makes no effort to show either that the delegates to the constitutional convention retained the rule for discriminatory purposes or that proponents of the new Constitution made racial appeals when approval was submitted to the people. The same is true for Oregon's revisions and reenactments. Ore. Const., Art. I, § 11 (amended May 18, 1934); Ore. Rev. Stat. § 136.450 (1997); § 136.610 (1971).

The more important point, however, is that today's decision is not limited to anything particular about Louisiana or Oregon. The Court holds that the Sixth Amendment requires jury unanimity in *all* state criminal trials. If at some future time another State wanted to allow non-unanimous verdicts, today's decision would rule that out—even if all that State's lawmakers were angels.

For this reason, the origins of the Louisiana and Oregon rules have no bearing on the broad constitutional question that the Court decides. That history would be relevant if there were no legitimate reasons why anyone might think that allowing non-unanimous verdicts is good policy. But that is undeniably false.[3]

[3] Among other things, allowing non-unanimous verdicts prevents mistrials caused by a single rogue juror, that is, a juror who refuses to pay attention at trial, expressly defies the law, or spurns deliberation. When

Some years ago the British Parliament enacted a law allowing non-unanimous verdicts.[4] Was Parliament under the sway of the Klan? The Constitution of Puerto Rico permits non-unanimous verdicts.[5] Were the framers of that Constitution racists? Non-unanimous verdicts were once advocated by the American Law Institute and the American Bar Association.[6] Was their aim to promote white supremacy? And how about the prominent scholars who have taken the same position?[7] Racists all? Of course not. So all the talk about the Klan, etc., is entirely out of place.[8] We

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unanimity is demanded, the work of preventing this must be done in large measure by more intensive *voir dire* and more aggressive use of challenges for cause and peremptory challenges. See Amar, Reinventing Juries: Ten Suggested Reforms, 28 U. C. D. L. Rev. 1169, 1189–1191 (1995).

[4] Juries Act 1974, ch. 23, § 17 (replacing Criminal Justice Act 1967, ch. 80, § 13). See Lloyd-Bostock & Thomas, Decline of the "Little Parliament": Juries and Jury Reform in England and Wales, 62 Law & Contemp. Prob. 7, 36 (Spring 1999); see also Leib, A Comparison of Criminal Jury Decision Rules in Democratic Countries, 5 Ohio St. J. Crim. L. 629, 642 (2008).

[5] P. R. Const., Art. II, § 11 (establishing "verdict by a majority vote" of at least 9 of 12 jurors).

[6] ALI, Code of Criminal Procedure § 355 (1930); *id.*, Comment, at 1027; ABA Project on Standards for Criminal Justice Compilation, Trial by Jury 318 (1974).

[7] See, *e. g.*, Amar, *supra*, at 1189–1191; Holland, Improving Criminal Jury Verdicts: Learning From the Court-Martial, 97 J. Crim. L. & C. 101, 125–141 (2006); Leib, Supermajoritarianism and the American Criminal Jury, 33 Hastings Const. L. Q. 141, 142 (2006).

[8] The majority's defense of its reliance on the original reasons for the adoption of the Louisiana and Oregon rules is incoherent. On the one hand, it asks: "[I]f the Sixth Amendment calls on judges to assess the functional benefits of jury rules, as the *Apodaca* plurality suggested, how can that analysis proceed to ignore the very functions those rules were adopted to serve?" *Ante*, at 99, n. 44. But three sentences later it answers its own question when it observes that "a jurisdiction adopting a nonunanimous jury rule for benign reasons would still violate the Sixth Amendment." *Ibid.*

JUSTICE KAVANAUGH's defense, see *ante*, at 127–129 (opinion concurring in part), is essentially the same. After reiterating the history recounted by the majority, he eventually acknowledges that there are "neutral and

should set an example of rational and civil discourse instead of contributing to the worst current trends.

II

Now to what matters.

A

I begin with the question whether *Apodaca* was a precedent at all. It is remarkable that it is even necessary to address this question, but in Part IV–A of the principal opinion, three Justices take the position that *Apodaca* was never a precedent. The only truly fitting response to this argument is: "Really?"

Consider what it would mean if *Apodaca* was never a precedent. It would mean that the entire legal profession was fooled for the past 48 years. Believing that *Apodaca* was a precedent, the courts of Louisiana and Oregon tried thousands of cases under rules allowing conviction by a vote of 11 to 1 or 10 to 2, and appellate courts in those States upheld these convictions based on *Apodaca*.[9] But according to three Justices in the majority, these courts were deluded.

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legitimate" reasons for allowing non-unanimous verdicts and that Louisiana may have retained a version of its old rule for such reasons. He also agrees with the majority that a rule allowing non-unanimous verdicts would be unconstitutional no matter what the State's reasons. So what is the relevance of the original motivations for the Louisiana and Oregon rules? He offers no explanation. He does opine that allowing such verdicts works to the disadvantage of African-American defendants, but the effect of various jury decision rules is a complex question that has been the subject of much social-science research, none of which the opinion even acknowledges.

[9] For Oregon, see, *e. g.*, *State* v. *Bowen*, 215 Ore. App. 199, 168 P. 3d 1208 (2007), rev. denied, 345 Ore. 415, 197 P. 3d 1104 (2008), cert. denied, 558 U. S. 815 (2009); *State* v. *Mayo*, 13 Ore. App. 582, 511 P. 2d 456 (1973). For Louisiana, see, *e. g.*, *State* v. *Hodges*, 349 So. 2d 250, 260 (La. 1977), cert. denied, 434 U. S. 1074 (1978); see also *State* v. *Miller*, 2010–718, pp. 42–43 (La. App. 5 Cir. 12/28/11), 83 So. 3d 178, 204, writ denied, 2012–0282 (La. 5/18/12), 89 So. 3d 119, cert. denied, 568 U. S. 1157 (2013); *State* v. *McElveen*, 2010–0172, pp. 95–96 (La. App. 4 Cir. 9/28/11), 73 So. 3d 1033, 1092, writ denied, 2011–2567 (La. 4/19/12), 85 So. 3d 692, cert. denied, 568 U. S. 1163 (2013).

This Court, for its part, apparently helped to perpetuate the illusion, since it reiterated time and again what *Apodaca* had established. See *Timbs* v. *Indiana*, 586 U. S. 146, 150, n. 1 (2019) (*Apodaca* held "that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings"); *McDonald* v. *Chicago*, 561 U. S. 742, 766, n. 14 (2010) (Sixth Amendment "does not require a unanimous jury verdict in state criminal trials"); *United States* v. *Gaudin*, 515 U. S. 506, 511, n. 2 (1995) (*Apodaca* "conclude[d] that jury unanimity is not constitutionally required"); *Schad* v. *Arizona*, 501 U. S. 624, 634, n. 5 (1991) (plurality opinion) ("[A] state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict"); *Brown* v. *Louisiana*, 447 U. S. 323, 330–331 (1980) (plurality opinion) ("[T]he constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict"); *Burch* v. *Louisiana*, 441 U. S. 130, 136 (1979) (*Apodaca* "conclude[d] . . . that a jury's verdict need not be unanimous to satisfy constitutional requirements"); *Ludwig* v. *Massachusetts*, 427 U. S. 618, 625 (1976) ("holding" in *Apodaca* was that "the jury's verdict need not be unanimous"); see also *Holland* v. *Illinois*, 493 U. S. 474, 511 (1990) (Stevens, J., dissenting) ("we have permitted nonunanimous verdicts," citing *Apodaca*); *McKoy* v. *North Carolina*, 494 U. S. 433, 468 (1990) (Scalia, J., dissenting) (the Court has "approved verdicts by less than a unanimous jury," citing *Apodaca*).

Consistent with these statements of the governing law, whenever defendants convicted by non-unanimous verdicts sought review in this Court and asked that *Apodaca* be overruled, the Court denied those requests—without a single registered dissent.[10] Even the legal academy, never shy

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[10] See, *e. g.*, *Magee* v. *Louisiana*, 585 U. S. 1024 (2018); *Sims* v. *Louisiana*, 584 U. S. 951 (2018); *Baumberger* v. *Louisiana*, 583 U. S. 950 (2017); *Jackson* v. *Louisiana*, 572 U. S. 1088 (2014); *McElveen* v. *Louisiana*, 568 U. S. 1163 (2013); *Miller* v. *Louisiana*, 568 U. S. 1157 (2013); *Bowen* v. *Oregon*, 558 U. S. 815 (2009); *Lee* v. *Louisiana*, 555 U. S. 823 (2008); *McIntyre* v.

about puncturing misconceptions, was taken in.[11] Everybody thought *Apodaca* was a precedent. But, according to three of the Justices in the majority, everybody was fooled. *Apodaca*, the precedent, was a mirage. Can this be true?

No, it cannot. The idea that *Apodaca* was a phantom precedent defies belief. And it certainly disserves important objectives that *stare decisis* exists to promote, including evenhandedness, predictability, and the protection of legitimate reliance. See, *e.g.*, *Gamble* v. *United States*, 587 U. S. 678, 691 (2019); *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455–456 (2015); *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991).

B

Under any reasonable understanding of the concept, *Apodaca* was a precedent, that is, "a decided case that furnishes a basis for determining later cases involving similar facts or issues." Black's Law Dictionary 1366 (10th ed. 2014); see also J. Salmond, Jurisprudence 191 (10th ed. 1947); M. Gerhardt, The Power of Precedent 3 (2008); Landes & Posner,

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Louisiana, 449 U. S. 871 (1980); *Hodges* v. *Louisiana*, 434 U. S. 1074 (1978). On June 7, 1972, shortly after *Apodaca* was handed down, the Court denied certiorari in a number of cases asking the Court to recognize a right to unanimity in state jury trials. *Blevins* v. *Oregon*, 406 U. S. 972; *Martinka* v. *Oregon*, 406 U. S. 973; *Andrews* v. *Oregon*, 406 U. S. 973; *Planck* v. *Oregon*, 406 U. S. 973; *Riddell* v. *Oregon*, 406 U. S. 973; *Mitchell* v. *Oregon*, 406 U. S. 973; *Atkison* v. *Oregon*, 406 U. S. 973; *Temple* v. *Oregon*, 406 U. S. 973; *Davis* v. *Oregon*, 406 U. S. 974; *O'Dell* v. *Oregon*, 406 U. S. 974; *Miller* v. *Oregon*, 406 U. S. 974.

Contrary to the majority opinion, I am not arguing that the denial of certiorari is precedential. See *ante*, at 105, n. 56. My point, instead, is that the Court's pattern of denying review in cases presenting the question whether unanimity is required in state trials is evidence that this Court regarded *Apodaca* as a precedent.

[11] D. Rudstein, C. Erlinder, & D. Thomas, 3 Criminal Constitutional Law § 14.03[3] (2019); W. LaFave, J. Israel, N. King, & O. Kerr, 6 Criminal Procedure § 22.1(e) (2015); W. Rich, 2 Modern Constitutional Law § 30:27 (3d ed. 2011).

Legal Precedent: A Theoretical and Empirical Analysis, 19 J. Law & Econ. 249, 250 (1976).

Even though there was no opinion of the Court, the decision satisfies even the narrowest understanding of a precedent as this Court has understood the concept: The decision prescribes a particular outcome when all the conditions in a clearly defined set are met. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996) (explaining that, at the very least, we are bound by the "result" in a prior case). In *Apodaca*, this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails. A majority of the Justices in *Apodaca* expressly agreed on that result, and that result is a precedent that had to be followed in subsequent cases until *Apodaca* was overruled.

That this result constituted a precedent follows *a fortiori* from our cases holding that even our summary affirmances of lower court decisions are precedents for "the precise issues presented and necessarily decided" by the judgment below. *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) (*per curiam*). If the *Apodaca* Court had summarily affirmed a state-court decision holding that a jury vote of 10 to 2 did not violate the Sixth Amendment, that summary disposition would be a precedent. Accordingly, it is impossible to see how a full-blown decision of this Court reaching the same result can be regarded as a non-precedent.[12]

C

What do our three colleagues say in response? They begin by suggesting that Louisiana conceded that *Apodaca*

[12] It is true, of course, that a summary affirmance has less precedential value than a decision on the merits, see, *e. g.*, *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 560–561 (2015), but we have never said the same about decisions on the merits that were reached without an opinion of the Court.

is not a precedent. See *ante*, at 101–102. This interpretation of the State's position is questionable,[13] but even if Louisiana made that concession, how could that settle the matter? What about Oregon, the only State that still permits nonunanimous verdicts? Oregon certainly did not make such a concession. On the contrary, it submitted an *amicus* brief arguing strenuously that *Apodaca* is a precedent and that it should be retained. Brief for State of Oregon as *Amicus Curiae* 6–32. And what about any other State that might want to allow such verdicts in the future? So the majority's reliance on Louisiana's purported concession simply will not do.

Our three colleagues' next try is to argue that *Apodaca* is not binding because a case has no *ratio decidendi* when a majority does not agree on the reason for the result. *Ante*, at 104, and n. 54. This argument, made in passing, constitutes an attack on the rule that the Court adopted in *Marks* v. *United States*, 430 U. S. 188 (1977), for determining the holding of a decision when there is no majority opinion. Under the *Marks* rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.*, at 193 (internal quotation marks omitted). This rule ascribes precedential status to decisions made without majority agreement on the underlying rationale, and it is therefore squarely contrary to the argument of the three Justices who regard *Apodaca* as non-precedential.

The *Marks* rule is controversial, and two Terms ago, we granted review in a case that implicated its meaning. See *Hughes* v. *United States*, 584 U. S. 675 (2018). But we ultimately decided the case on another ground and left the

[13] What the State appears to have meant is that Justice Powell's reasoning was not binding. See Brief for Respondent 47; Tr. of Oral Arg. 37–38.

Marks rule intact. As long as that rule stands, it refutes the argument that *Apodaca* is not binding because a majority did not agree on a common rationale.

Finally, our three colleagues contend that treating *Apodaca* as a precedent would require the Court "to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected." *Ante*, at 102. This argument appears to weave together three separate questions relating to the precedential effect of decisions in which there is no majority opinion. I will therefore attempt to untangle these questions and address each in turn.

An initial question is whether, in a case where there is no opinion of the Court, the position taken by a single Justice in the majority can constitute the binding rule for which the decision stands. Under *Marks*, the clear answer to this question is yes. The logic of *Marks* applies equally no matter what the division of the Justices in the majority, and I am aware of no case holding that the *Marks* rule is inapplicable when the narrowest ground is supported by only one Justice. Certainly the lower courts have understood *Marks* to apply in that situation.[14]

The next question is whether the *Marks* rule applies any differently when the precedent that would be established by a fractured decision would overrule a prior precedent. Again, the logic of *Marks* dictates an affirmative answer, and I am aware of no case holding that the *Marks* rule applies

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[14] See *Grutter* v. *Bollinger*, 539 U. S. 306, 321 (2003) (discussing lower court's treatment of Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978)); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 947 F. 2d 682, 694–698 (CA3 1991) (noting that "[t]he binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion," and concluding based on opinions of Justice O'Connor that the test for the constitutionality of abortion regulations is undue burden), aff'd in part and rev'd in part, 505 U. S. 833 (1992); *Blum* v. *Witco Chemical Corp.*, 888 F. 2d 975, 981 (CA3 1989); see also *United States* v. *Duvall*, 705 F. 3d 479, 483, n. 1 (CADC 2013) (Kavanaugh, J., for the court).

any differently in this situation. But as far as the present case is concerned, this question is academic because *Apodaca* did not overrule any prior decision of this Court. At most, what the Court had "recognized," *ante*, at 92, in prior cases is that the Sixth Amendment guaranteed the right to a unanimous jury verdict *in trials in federal and territorial courts*.[15] Whether the same rule applied in state prosecutions had not been decided, and indeed, until *Duncan* v. *Louisiana*, 391 U. S. 145, 154–158 (1968), was handed down just four years before *Apodaca*, the Sixth Amendment had not been held to apply to the States.

The final question is whether Justice Powell's reasoning in *Apodaca*—namely, his view that the Fourteenth Amendment did not incorporate every aspect of the Sixth Amendment jury-trial right—is a binding precedent, and the answer to that question is no. When, in the years after *Apodaca*, new questions arose about the scope of the jury-trial right in state court—as they did in cases like *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely* v. *Washington*, 542 U. S. 296 (2004)—nobody thought for a second that *Apodaca* committed the Court to Justice Powell's view that the right has different dimensions in state and federal cases. And no one on this Court or on a lower court had any trouble locating the narrow common ground between Justice Powell and the plurality in *Apodaca*: The States need not require unanimity to comply with the Constitution.

For all these reasons, *Apodaca* clearly was a precedent, and if the Court wishes to be done with it, it must explain why overruling *Apodaca* is consistent with the doctrine of *stare decisis*.

III

A

Stare decisis has been a fundamental part of our jurisprudence since the founding, and it is an important doctrine.

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[15] See, *e. g.*, *Andres* v. *United States*, 333 U. S. 740, 748 (1948); *Thompson* v. *Utah*, 170 U. S. 343, 351 (1898).

But, as we have said many times, it is not an "inexorable command." *Payne*, 501 U. S., at 828; *Gamble*, 587 U. S., at 690–691. There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision.

This is imperative because the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine should not be transformed into a tool that favors particular outcomes.[16]

B

What is the majority's justification for overruling *Apodaca*? With no apparent appreciation of the irony, today's majority, which is divided into four separate camps,[17] criticizes the *Apodaca* majority as "badly fractured." *Ante*, at 93. But many important decisions currently regarded as precedents were decided without an opinion of the Court.[18]

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[16] It is also important that the Court as a whole adhere to its "precedent[s] about precedent." *Alleyne* v. *United States*, 570 U. S. 99, 134 (2013) (ALITO, J., dissenting). If individual Justices apply different standards for overruling past decisions, the overall effects of the doctrine will not be neutral.

[17] Three Justices join the principal opinion in its entirety. Two Justices do not join Part IV–A, but each of these Justices takes a position not embraced by portions of the principal opinion that they join. See *ante*, at 112 (SOTOMAYOR, J., concurring in part) (disavowing principal opinion's criticism of Justice White's *Apodaca* opinion as "functionalist"); *ante*, at 129–131 (KAVANAUGH, J., concurring in part) (opining that the decision in this case does not apply on collateral review). And JUSTICE THOMAS would decide the case on entirely different grounds and thus concurs only in the judgment. See *ante*, at 132.

[18] See, *e. g.*, *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519 (2012); *Williams* v. *Illinois*, 567 U. S. 50 (2012); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U. S. 873 (2011); *McDonald* v. *Chicago*, 561 U. S. 742 (2010); *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010); *Baze* v. *Rees*, 553 U. S. 35 (2008); *Crawford* v. *Marion County Election Bd.*, 553 U. S. 181 (2008); *Hamdan* v. *Rumsfeld*, 548 U. S. 557 (2006); *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470 (1996);

Does the majority mean to suggest that all such precedents are fair game?

The majority's primary reason for overruling *Apodaca* is the supposedly poor "quality" of Justice White's plurality opinion and Justice Powell's separate opinion. *Ante*, at 105–106. The majority indicts Justice White's opinion on five grounds: (1) it "spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right,"[19] (2) it did not give due weight to the "Court's long-repeated statements that [the right] demands unanimity,"[20] (3) it did not take into account "the racist origins of [the] Louisian[a] and Orego[n] laws,"[21] (4) it looked to the function of the jury-trial right,[22] and (5) it engaged in "a breezy cost-benefit analysis" that, in any event, did not properly weigh the costs and benefits.[23] All these charges are overblown.

First, it is quite unfair to criticize Justice White for not engaging in a detailed discussion of the original meaning of the Sixth Amendment jury-trial right since he had already done that just two years before in his opinion for the Court in *Williams* v. *Florida*, 399 U. S. 78, 92–100 (1970). In *Williams*, after examining that history, he concluded that the Sixth Amendment did not incorporate every feature of the common-law right (a conclusion that the majority, by the way, does not dispute). And in *Apodaca*, he built on the analysis in *Williams*. Accordingly, there was no need to repeat what had been said before.

Second, it is similarly unfair to criticize Justice White for not discussing the prior decisions that commented on jury

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Richmond v. *J. A. Croson Co.*, 488 U. S. 469 (1989); *Bakke*, 438 U. S. 265; *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

[19] *Ante*, at 106.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

[23] *Ante*, at 99.

unanimity. None of those decisions went beyond saying that this was a feature of the common-law right or cursorily stating that unanimity was required.[24] And as noted, *Williams* had already held that the Sixth Amendment did not preserve all aspects of the common-law right.

Third, the failure of Justice White (and Justice Powell) to take into account the supposedly racist origins of the Louisiana and Oregon laws should not be counted as a defect for the reasons already discussed. See *supra*, at 142.

Fourth, it is hard to know what to make of the functionalist charge. One Member of the majority explicitly disavows this criticism, see *ante*, at 112 (SOTOMAYOR, J., concurring in part), and it is most unlikely that all the Justices in the majority are ready to label all functionalist decisions as poorly reasoned. Most of the landmark criminal procedure decisions from roughly *Apodaca*'s time fall into that category. See *Mapp* v. *Ohio*, 367 U. S. 643, 654 (1961) (Fourth Amendment); *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966) (Fifth Amendment); *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963) (Sixth Amendment); *Furman* v. *Georgia*, 408 U. S. 238, 239 (1972) (*per curiam*) (Eighth Amendment).[25] Are they all now up for grabs?

The functionalist criticism dodges the knotty problem that led Justice White to look to the underlying purpose of the jury-trial right. Here is the problem. No one questions that the Sixth Amendment incorporated *the core* of the common-law jury-trial right, but did it incorporate *every feature* of the right? Did it constitutionalize the requirement that there be 12 jurors even though nobody can say why 12 is the magic number? And did it incorporate features that

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[24] See, *e. g.*, *Andres*, 333 U. S., at 748; *Thompson*, 170 U. S., at 351.

[25] Five Justices in *Furman* found that the Eighth Amendment imposes an evolving standard of decency, 408 U. S., at 255–257 (Douglas, J., concurring); *id.*, at 265–269 (Brennan, J., concurring); *id.*, at 309–310 (Stewart, J., concurring); *id.*, at 312–314 (White, J., concurring); *id.*, at 316, 322–333 (Marshall, J., concurring), and our subsequent cases have done the same.

we now find highly objectionable, such as the exclusion of women from jury service? At the time of the adoption of the Sixth Amendment (and for many years thereafter), women were not regarded as fit to serve as a defendant's peers. Unless one is willing to freeze in place late 18th-century practice, it is necessary to find a principle to distinguish between the features that were incorporated and those that were not. To do this, Justice White's opinion for the Court in *Williams* looked to the underlying purpose of the jury-trial right, which it identified as interposing a jury of the defendant's peers to protect against oppression by a "'corrupt or overzealous prosecutor'" or a "'compliant, biased, or eccentric judge.'" 399 U. S., at 100 (quoting *Duncan*, 391 U. S., at 156).

The majority decries this "functionalist" approach but provides no alternative. It does not claim that the Sixth Amendment incorporated every feature of common-law practice, but it fails to identify any principle for identifying the features that were absorbed. On the question of jury service by women, the majority's only answer, buried in a footnote, is that the exclusion of women was outlawed by "further constitutional amendments," *ante*, at 101, n. 47, presumably the Fourteenth Amendment. Does that mean that the majority disagrees with the holding in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975)—another opinion by Justice White—that the exclusion of women from jury service violates *the Sixth Amendment*? *Id.*, at 531, 533–536.[26]

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[26] The majority also notes that the Judiciary Act of 1789 pegged the qualifications for service on federal juries to those used in the State in which a case was tried, *ante*, at 100–101, n. 47, but since all States barred women, see *Taylor*, 419 U. S., at 536, it is hard to see how the 1789 Act can provide a ground for distinguishing the common law's requirement of unanimity from its insistence that women were not fit to serve.

Jury practice at the time of the founding differed from current practice in other important respects. Jurors were not selected at random. "[P]ublic officials called selectmen, supervisors, trustees, or 'sheriffs of the parish' exercised what Tocqueville called 'very extensive and very arbitrary'

Fifth, it is not accurate to say that Justice White based his conclusion on a cost-benefit analysis of requiring jury unanimity. His point, rather, was that what the Court had already identified as the fundamental purpose of the jury-trial right was not undermined by allowing a verdict of 11 to 1 or 10 to 2.

I cannot say that I would have agreed either with Justice White's analysis or his bottom line in *Apodaca* if I had sat on the Court at that time, but the majority's harsh criticism of his opinion is unwarranted.

What about Justice Powell's concurrence? The majority treats Justice Powell's view as idiosyncratic, but it does not merit that derision. Justice Powell's belief that the Constitution allows the States a degree of flexibility in the interpretation of certain constitutional rights, although not our dominant approach in recent years, *McDonald*, 561 U. S., at 759–766, has old and respectable roots. For a long time, that was the Court's approach. See *id.*, at 759–761. Only gradually did the Court abandon this "two-tier" system, see *id.*, at 762–767, and it was not until *Duncan*, *supra*, at 154–158, decided just four years before *Apodaca*, that the Sixth Amendment jury-trial right was held to apply to the States at all. Justice Powell's approach is also not without recent proponents, including, at least with respect to the Second Amendment, Justices now in the majority.[27]

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powers in summoning jurors." Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 879–880 (1994). And "American trial judges . . . routinely summarized the evidence for jurors and often told jurors which witnesses they found most credible, and why." Sklansky, Evidentiary Instructions and the Jury as Other, 65 Stan. L. Rev. 407, 454 (2013). Any attempt to identify the aspects of late 18th-century practice that were incorporated into the Sixth Amendment should take the full picture into account and provide a principle for the distinction.

[27] As recently as 2010, prominent advocates urged us to hold that a provision of the Bill of Rights applies differently to the Federal Government and the States. In *McDonald*, 561 U. S. 742, the city of Chicago and some

Even now, our cases do not hold that *every* provision of the Bill of Rights applies in the same way to the Federal Government and the States. A notable exception is the Grand Jury Clause of the Fifth Amendment, a provision that, like the Sixth Amendment jury-trial right, reflects the importance that the founding generation attached to juries as safeguards against oppression. In *Hurtado* v. *California*, 110 U. S. 516, 538 (1884), the Court held that the Grand Jury Clause does not bind the States and that they may substitute preliminary hearings at which the decision to allow a prosecution to go forward is made by a judge rather than a defendant's peers. That decision was based on reasoning that is not easy to distinguish from Justice Powell's in *Apodaca*. *Hurtado* remains good law and is critically important to the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment.[28] If we took the same ap-

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of its *amici* argued that, despite our decision in *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), States and cities should be given leeway to regulate the possession of a firearm in the home for self-defense in accordance with the particular needs and desires of their citizens. 561 U. S., at 753. Although this argument did not prevail, four Justices, some now in the majority, appeared to take that view. See *id.*, at 927 (BREYER, J., joined by GINSBURG and SOTOMAYOR, JJ., dissenting) (observing that "gun violence . . . varies as between rural communities and cities" and arguing that States and cities should be free to adopt rules that meet local needs and preferences); *id.*, at 866 (Stevens, J., dissenting) ("The rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights").

[28] See Ariz. Const., Art. 2, § 30; Ark. Const., Amdt. 21, § 1; Cal. Const., Art. I, § 14; Colo. Rev. Stat. § 16–5–205 (2019); Conn. Gen. Stat. § 54–46 (2017); Haw. Const., Art. I, § 10; Idaho Const., Art. I, § 8; Ill. Comp. Stat., ch. 725, § 5/111–2(a) (West 2018); Ind. Code § 35–34–1–1(a) (2019); Iowa Ct. Rule 2.5 (2020); Kan. Stat. Ann. § 22–3201 (2007); Md. Crim. Proc. Code Ann. §§ 4–102, 4–103 (2018); Mich. Comp. Laws § 767.1 (1979); Mo. Const., Art. I, § 17; Mont. Const., Art. II, § 20(1); Neb. Rev. Stat. § 29–1601 (2016); Nev. Const., Art. I, § 8; N. M. Const., Art. II, § 14; N. D. Rule Crim. Proc. 7(a) (2018–2019); Okla. Const., Art. II, § 17; Ore. Const. (amended),

proach to the *Hurtado* question that the majority takes in this case, the holding in that case could be called into question.

The majority's only other reason for overruling *Apodaca* is that it is inconsistent with related decisions and recent legal developments. *Ante*, at 106–107; *ante*, at 112 (SOTOMAYOR, J., concurring in part). I agree that Justice Powell's view on incorporation is not in harmony with the bulk of our case law, but the majority's point about "recent legal developments" is an exaggeration. No subsequent Sixth Amendment decision has undercut the plurality. And while Justice Powell's view on incorporation has been further isolated by later cases holding that two additional provisions of the Bill of Rights apply with full force to the States, see *Timbs*, 586 U. S., at 149 (Eighth Amendment's Excessive Fines Clause); *McDonald*, *supra*, at 791 (plurality opinion) (Second Amendment), the project of complete incorporation was nearly done when *Apodaca* was handed down. See *McDonald*, *supra*, at 765, n. 13.

While the majority worries that *Apodaca* is inconsistent with our cases on incorporation, the majority ignores something far more important: the way in which *Apodaca* is intertwined with the body of our Sixth Amendment case law. As I have explained, see *supra*, at 152, the *Apodaca* plurality's reasoning was based on the same fundamental mode of analysis as that in *Williams*, 399 U. S. 78, which had held just two years earlier that the Sixth Amendment did not constitutionalize the common law's requirement that a jury have 12 members. Although only one State, Oregon, now permits

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Art. VII, §§ 5(3)–(5); Pa. Const., Art. I, § 10 (providing that "[e]ach of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information"—a condition that has now been met in all counties); see also 42 Pa. Cons. Stat. § 8931 (2015); S. D. Const., Art. VI, § 10; Utah Const., Art. I, § 13; Vt. Rule Crim. Proc. 7(a) (2018); Wash. Rev. Code § 10.37.015 (2019); Wis. Stat. § 967.05 (2015–2016); Wyo. Stat. Ann. § 7–1–106(a) (2019).

non-unanimous verdicts, many more allow six-person juries.[29] Repudiating the reasoning of *Apodaca* will almost certainly prompt calls to overrule *Williams*.

C

Up to this point, I have discussed the majority's reasons for overruling *Apodaca*, but that is only half the picture. What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon. For 48 years, Louisiana and Oregon, trusting that *Apodaca* is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue.

At a minimum, all defendants whose cases are still on direct appeal will presumably be entitled to a new trial if they were convicted by a less-than-unanimous verdict and preserved the issue in the trial court. And at least in Oregon, even if no objection was voiced at trial, defendants may be able to challenge their convictions based on plain error. See Ore. Rule App. Proc. 5.45(1), and n. 1 (2019); *State* v. *Serrano*, 355 Ore. 172, 179, 324 P. 3d 1274, 1280 (2014). Oregon asserts that more than a thousand defendants whose cases are still on direct appeal may be able to challenge their convictions if *Apodaca* is overruled. Brief for State of Oregon as *Amicus Curiae* 12–13.[30] The State also reports that "[d]efendants are arguing that an instruction allowing for non-unanimous verdicts is a structural error that requires reversal for *all* convictions, even for those for which the jury was

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[29] See Ariz. Rev. Stat. Ann. § 21–102 (2013); Conn. Gen. Stat. § 54–82; Fla. Rule Crim. Proc. § 3.270 (2019); Ind. Code § 35–37–1–1(b)(2); Utah Code § 78B–1–104 (2019).

[30] The majority arrives at a different figure based on the number of felony jury trials in Oregon in 2018, see *ante*, at 108, and n. 68, but it does not take 2019 into account. And since we do not know how many cases remain on direct appeal, such calculations are unreliable.

not polled or those for which the jury *was* unanimous." *Id.*, at 14.

Unimpressed by these potential consequences, the majority notes that we "vacated and remanded nearly 800 decisions" for resentencing after *United States* v. *Booker*, 543 U. S. 220 (2005), held that the Federal Sentencing Guidelines are not mandatory. *Ante*, at 108. But the burden of resentencing cannot be compared with the burden of retrying cases. And while resentencing was possible in all the cases affected by *Booker*, there is no guarantee that all the cases affected by today's ruling can be retried. In some cases, key witnesses may not be available, and it remains to be seen whether the criminal justice systems of Oregon and Louisiana have the resources to handle the volume of cases in which convictions will be reversed.

These cases on direct review are only the beginning. Prisoners whose direct appeals have ended will argue that today's decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed.

The majority's response to this possibility is evasive. It begins by hinting that today's decision will not apply on collateral review under the framework adopted in *Teague* v. *Lane*, 489 U. S. 288, 315 (1989) (plurality opinion). Under *Teague*, "an old rule applies both on direct and collateral review," but if today's decision constitutes a new procedural rule, prisoners will be able to rely on it in a collateral proceeding only if it is what we have termed a "watershed rule" that implicates "the fundamental fairness and accuracy of the criminal proceeding." *Whorton* v. *Bockting*, 549 U. S. 406, 416 (2007). Noting that we have never found a new rule of criminal procedure to qualify as "watershed," the Court hints that the decision in this case is likely to meet the same fate.

But having feinted in this direction, the Court quickly changes course and says that the application of today's deci-

sion to prisoners whose appeals have ended should not concern us. *Ante*, at 109. That question, we are told, will be decided in a later case. *Ibid.*

The majority cannot have it both ways. As long as retroactive application on collateral review remains a real possibility, the crushing burden that this would entail cannot be ignored. And while it is true that this Court has been chary in recognizing new watershed rules, it is by no means clear that *Teague* will preclude the application of today's decision on collateral review.

Teague applies only to a "new rule," and the positions taken by some in the majority may lead to the conclusion that the rule announced today is an old rule. Take the proposition, adopted by three Members of the majority, that *Apodaca* was never a precedent. Those Justices, along with the rest of the majority, take the position that our cases established well before *Apodaca* both that the Sixth Amendment requires unanimity, *ante*, at 92, and that it applies in the same way in state and federal court, *ante*, at 94. Thus, if *Apodaca* was never a precedent and did not disturb what had previously been established, it may be argued that today's decision does not impose a new rule but instead merely recognizes what the correct rule has been for many years.

Two other Justices in the majority acknowledge that *Apodaca* was a precedent and thus would presumably regard today's decision as a "new rule," but the question remains whether today's decision qualifies as a "watershed rule." JUSTICE KAVANAUGH concludes that it does not and all but decides—without briefing or argument—that the decision will not apply retroactively on federal collateral review and similarly that there will be no successful claims of ineffective assistance of counsel for failing to challenge *Apodaca*. See *ante,* at 129–131 (opinion concurring in part).

The remaining Justices in the majority, and those of us in dissent, express no view on this question, but the majority's depiction of the unanimity requirement as a hallowed right

that Louisiana and Oregon flouted for ignominious reasons certainly provides fuel for the argument that the rule announced today meets the test. And in Oregon, the State most severely impacted by today's decision, watershed status may not matter since the State Supreme Court has reserved decision on whether state law gives prisoners a greater opportunity to invoke new precedents in state collateral proceedings. See *Verduzco* v. *State*, 357 Ore. 553, 574, 355 P. 3d 902, 914 (2015).[31]

Whatever the ultimate resolution of the retroactivity question, the reliance here is not only massive; it is concrete. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (reliance weighed heavily in favor of precedent simply because the warnings in *Miranda* v. *Arizona*, 384 U. S. 436, had become "part of our national culture"). In my view, it weighs decisively against overruling *Apodaca*.

In reaching this conclusion, I do not disregard the interests of petitioner and others who were convicted by a less-than-unanimous vote. It is not accurate to imply that these defendants would have been spared conviction if unanimity had been required. In many cases, if a unanimous vote had been needed, the jury would have continued to deliberate and the one or two holdouts might well have ultimately voted to convict.[32] This is almost certainly the situation in Oregon, where it is estimated that as many as two-thirds of all criminal trials have ended with a non-unanimous verdict. See Brief for State of Oregon as *Amicus Curiae* 12. It is

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[31] Under our case law, a State must give retroactive effect to any constitutional decision that is retroactive under the standard in *Teague* v. *Lane*, 489 U. S. 288 (1989), but it may adopt a broader retroactivity rule. *Montgomery* v. *Louisiana*, 577 U. S. 190, 199 (2016); *Danforth* v. *Minnesota*, 552 U. S. 264, 275 (2008).

[32] Studies show that when a supermajority votes for a verdict near the beginning of deliberations, a unanimous verdict is usually reached. See generally Devine, Clayton, Dunford, Seying, & Pryce, Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 Psychology, Pub. Pol'y & L. 622, 690–707 (2001).

impossible to believe that all these cases would have resulted in mistrials if unanimity had been demanded. Instead, after a vote of 11 to 1 or 10 to 2, it is likely that deliberations would have continued and unanimity would have been achieved.

Nevertheless, the plight of defendants convicted by non-unanimous votes is important and cannot be overlooked, but that alone cannot be dispositive of the *stare decisis* question. Otherwise, *stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to conviction.

D

The reliance in this case far outstrips that asserted in recent cases in which past precedents were overruled. Last Term, when we overturned two past decisions, there were strenuous dissents voicing fears about the future of *stare decisis*. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 258–261 (2019) (BREYER, J., dissenting); *Knick* v. *Township of Scott*, 588 U. S. 180, 221–224 (2019) (KAGAN, J., dissenting). Yet in neither of those cases was there reliance like that present here.

In *Franchise Tax Board*, the dissent claimed only the airiest sort of reliance, the public's expectation that past decisions would remain on the books. 587 U. S., at 260–261 (opinion of BREYER, J.). And in *Knick*, the dissent disclaimed any reliance at all. 588 U. S., at 223–224 (opinion of KAGAN, J.). The same was true the year before in *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162 (2018), where the dissent did not contend that any legitimate reliance interests weighed in favor of preserving the decision that the Court overruled. *Id.*, at 191 (opinion of ROBERTS, C. J.). And our unanimous decision in *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009), found that no reliance interests were involved.

In other cases overruling prior decisions, the dissents claimed that reliance interests were at stake, but whatever

one may think about the weight of those interests, no one can argue that they are comparable to those in this case.

In *Montejo* v. *Louisiana*, 556 U. S. 778, 793–797 (2009), the Court abrogated a prophylactic rule that had been adopted in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), to protect a defendant's right to counsel during post-arraignment interrogation. The dissent did not claim that any defendants had relied on this rule, arguing instead that the public at large had an interest "in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State." *Montejo*, *supra*, at 809 (opinion of Stevens, J.). This abstract interest, if it can be called reliance in any proper sense of the term, is a far cry from what is at stake here.

In *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), where we overruled precedent allowing laws that prohibited corporations' election-related speech, we found that "[n]o serious reliance interests" were implicated, *id.*, at 365, since the only reliance asserted by the dissent was the time and effort put in by federal and state lawmakers in adopting the provisions at issue, *id.*, at 411–412 (Stevens, J., concurring in part and dissenting in part). In this case, by contrast, what is at stake is not the time and effort of Louisiana and Oregon lawmakers but a monumental litigation burden and the potential inability to retry cases that might well have ended with a unanimous verdict if that had been required.

Finally, in *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878 (2018), where we overruled *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), we carefully considered and addressed the question of reliance, and whatever one may think about the extent of the legitimate reliance in that case, it is not in the same league as that present here. *Abood* had held that a public sector employer may require non-union members to pay a portion of the dues collected from union members. 431 U. S., at 235–236. In overruling

that decision, we acknowledged that existing labor contracts might have been negotiated in reliance on *Abood*, but we noted that most labor contracts are of short duration, that unions had been on notice for some time that the Court had serious misgivings about *Abood*, and that unions could have insisted on contractual provisions to protect their interests if *Abood* later fell. *Janus*, *supra*, at 926–928.[33]

By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.

* * *

Under the approach to *stare decisis* that we have taken in recent years, *Apodaca* should not be overruled. I would therefore affirm the judgment below, and I respectfully dissent.

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[33] The reliance in this case also far exceeds that in *Arizona* v. *Gant*, 556 U. S. 332 (2009), where the Court effectively overruled a decision, *New York* v. *Belton*, 453 U. S. 454 (1981), that allowed a police officer to search the entire passenger compartment of a car if the officer had probable cause to arrest the driver or a passenger. 556 U. S., at 335. Police departments had trained officers in reliance on the *Belton* rule, see *Gant*, *supra*, at 358–360 (ALITO, J., dissenting), but the burden of retraining cannot compare with conducting a large number of retrials and potentially releasing defendants who cannot be retried due to post-trial events.

Syllabus

COUNTY OF MAUI, HAWAII *v.* HAWAII WILDLIFE FUND ET AL.

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

No. 18–260. Argued November 6, 2019—Decided April 23, 2020

The Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without an appropriate permit from the Environmental Protection Agency (EPA). §§ 301(a), 502(12), 86 Stat. 844, 886. The Act defines "pollutant" broadly, § 502(6); defines a "point source" as "'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,'" including, *e. g.*, any "'container,'" "'pipe, ditch, channel, tunnel, conduit,'" or "'well,'" § 502(14); and defines the term "discharge of a pollutant" as "'any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source,'" § 502(12). It then uses those terms in making "unlawful" "'the discharge of any pollutant by any person'" without an appropriate permit. § 301.

Petitioner County of Maui's wastewater reclamation facility collects sewage from the surrounding area, partially treats it, and each day pumps around 4 million gallons of treated water into the ground through four wells. This effluent then travels about a half mile, through groundwater, to the Pacific Ocean. Respondent environmental groups brought a citizens' Clean Water Act suit, alleging that Maui was "discharg[ing]" a "pollutant" to "navigable waters" without the required permit. The District Court found that the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water," 24 F. Supp. 3d 980, 998, and granted summary judgment to the environmental groups. The Ninth Circuit affirmed, stating that a permit is required when "pollutants are fairly traceable from the point source to a navigable water." 886 F. 3d 737, 749.

Held: The statutory provisions at issue require a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.* Pp. 172–186.

(a) Statutory context limits the reach of the phrase "from any point source" to a range of circumstances narrower than that which the Ninth Circuit's "fairly traceable" interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater, as urged by Maui and by the Solicitor General as *amicus curiae.* Pp. 172–173.

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(b) The Ninth Circuit's "fairly traceable" limitation could allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release. But Congress did not intend to provide EPA with such broad authority. First, to interpret "from" so broadly might require a permit in unexpected circumstances, such as, *e. g.*, the 100-year migration of pollutants through 250 miles of groundwater to a river. Second, the statute's structure indicates that, as to groundwater pollution and nonpoint source pollution, Congress left substantial responsibility and autonomy to the States and did not give EPA authority that could seriously interfere with this state responsibility. Third, the Act's legislative history strongly supports the conclusion that the permitting provision does not extend so far. Finally, longstanding regulatory practice shows that EPA has successfully applied the permitting provision to pollution discharges from point sources that reached navigable waters through groundwater using a narrower interpretation than that of the Ninth Circuit. Pp. 173–178.

(c) Maui, the Government, and the two dissents argue for interpretations that, in light of the statute's language, structure, and purposes, are also too extreme. Pp. 178–183.

(1) Maui and the Solicitor General argue that the statute's permitting requirement does not apply if a pollutant, having emerged from a "point source," must travel through any amount of groundwater before reaching navigable waters. That narrow interpretation would risk serious interference with EPA's ability to regulate point source discharges, and Congress would not have intended to create such a large and obvious loophole in one of the Clean Water Act's key regulatory innovations. Pp. 178–179.

(2) Reading "from" in the phrase "*from any point source*" together with "conveyance" in the point source definition "any . . . *conveyance*," Maui argues that the meaning of "from any point source" is not about *where* the pollution originated, but about *how* it got there. Thus, Maui claims, a permit is required only if a point source ultimately delivers the pollutant to navigable waters. By contrast, if a pollutant travels through groundwater, then the groundwater is the conveyance and no permit is required. But Maui's definition of "from" as connoting a means does not fit in context. Coupling "from" with "to" is strong evidence that Congress was referring to a destination ("navigable waters") and an origin ("any point source"). That Maui's reading would create a serious loophole in the permitting regime also indicates that it is unreasonable. P. 179.

(3) The Solicitor General argues that the proper interpretation of the statute is the one reflected in EPA's recent Interpretive Statement, namely, that "*all* releases of pollutants to groundwater" are excluded

from the scope of the permitting program, "even where pollutants are conveyed to jurisdictional surface waters via groundwater." 84 Fed. Reg. 16810, 16811. That reading, which would open a loophole allowing easy evasion of the statutory provision's basic purposes, is neither persuasive nor reasonable. EPA is correct that Congress did not require a permit for *all* discharges to groundwater, and it did authorize study and funding related to groundwater pollution. But the most that the study and funding provisions show is that Congress thought that the problem of pollution *in groundwater* would primarily be addressed by the States or perhaps by other federal statutes. EPA's new interpretation is also difficult to reconcile with the statute's reference to "*any* addition" of a pollutant to navigable waters; with the statute's inclusion of "wells" in the "point source" definition, since wells would ordinarily discharge pollutants through groundwater; and with statutory provisions that allow EPA to delegate its permitting authority to a State only if the State, *inter alia*, provides "'adequate authority'" to "'control the disposal of pollutants into wells,'" § 402(b). Pp. 179–181.

(4) Perhaps, as the dissents suggest, the statute's language could be narrowed by reading the statute to refer only to the pollutant's immediate origin, but there is no linguistic basis for this limitation. Pp. 181–183.

(d) The statute's words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater. The reading of the statute that best captures Congress' meaning, reflected in the statute's words, structure, and purposes, is that a permit is required when there is a discharge from a point source directly into navigable waters or when there is the *functional equivalent of a direct discharge.* Many factors may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable waters. Time and distance will be the most important factors in most cases, but other relevant factors may include, *e. g.*, the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels. Courts will provide additional guidance through decisions in individual cases. The underlying statutory objectives can also provide guidance, and EPA can provide administrative guidance. Although this interpretation does not present as clear a line as the other interpretations proffered, the EPA has applied the permitting provision to some discharges through groundwater for over 30 years, with no evidence of inadministrability or an unmanageable expansion in the statute's scope. Pp. 183–186.

886 F. 3d 737, vacated and remanded.

Syllabus

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a concurring opinion, *post*, p. 187. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined, *post*, p. 188. ALITO, J., filed a dissenting opinion, *post*, p. 195.

Elbert Lin argued the cause for petitioner. With him on the briefs were *Michael R. Shebelskie*, *Colleen P. Doyle*, *Moana M. Lutey*, and *Richelle M. Thomson*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Deputy Assistant Attorney General Grant*, *Allon Kedem*, and *Matthew Z. Leopold*.

David L. Henkin argued the cause for respondents. With him on the brief were *Janette K. Brimmer*, *Scott L. Nelson*, and *Amanda C. Leiter*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Lindsay S. See*, Solicitor General, and *Zachary A. Viglianco*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Ashley Moody* 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, *Eric Schmitt* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Sean Reyes* of Utah, and *Bridget Hill* of Wyoming; for Agricultural Business Organizations by *Timothy S. Bishop*, *Michael B. Kimberly*, *Ellen B. Steen*, *Travis Cushman*, *Michael C. Formica*, *Scott Yager*, *Rachel Lattimore*, and *Kyle Liske*; for the Chamber of Commerce of the United States of America by *Aaron M. Streett* and *J. Mark Little*; for the Edison Electric Institute et al. by *Thomas A. Lorenzen*, *David Y. Chung*, *Amanda Shafer Berman*, *Richard Moskowitz*, *Stacy R. Linden*, *Peter C. Tolsdorf*, and *Rae Cronmiller*; for Energy Transfer Partners, L. P., by *Miguel A. Estrada*, *William S. Scherman*, *David Debold*, and *Matthew S. Rozen*; for the Federal Water Quality Coalition by *A. Bruce White*; for the Florida Water Environment Association-Utility Council et al. by *Gary V. Perko*, *Mohammad O. Jazil*, and *Kristen C. Diot*; for Kinder Morgan Energy Partners, L. P., et al. by

JUSTICE BREYER delivered the opinion of the Court.

The Clean Water Act forbids the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the Environmental Protection Agency (EPA). Federal Water Pollution Control Act,

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Paul D. Clement, *Erin E. Murphy*, and *C. Harker Rhodes IV*; for the National Association of Clean Water Agencies et al. by *Richard S. Davis*, *Andrew C. Silton*, *Timothy M. Sullivan*, *Zachary W. Carter*, and *Dennis J. Herrera*; for the National Association of Home Builders of the United States by *Thomas J. Ward* and *Jeffrey B. Augello*; for the National Conference of State Legislatures et al. by *J. G. Andre Monette*, *Lisa Soronen*, and *Steven W. Strack*; for the National Federation of Independent Business Small Business Legal Center et al. by *Robert Henneke*, *Theodore Hadzi-Antich*, and *Ryan D. Walters*; for the Pacific Legal Foundation by *Glenn E. Roper* and *Damien M. Schiff*; for United States Senators by *Sean Marotta* and *Heather A. Briggs*; for the Washington Legal Foundation et al. by *Richard A. Samp;* for Water Systems Council et al. by *Jesse J. Richardson, Jr.*; and for Wychmere Shores Condominium Trust et al. by *Kevin M. McGinty.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland by *Brian E. Frosh*, Attorney General of Maryland, and *Joshua M. Segal* and *Steven J. Goldstein*, Special Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *William Tong* of Connecticut, *Karl A. Racine* of the District of Columbia, *Kwame Raoul* of Illinois, *Aaron M. Frey* of Maine, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Bob Ferguson* of Washington; for Anderson County, South Carolina, et al. by *Cale Jaffe*; for Aquatic Scientists et al. by *Royal C. Gardner*, *Erin Okuno*, *Kathleen E. Gardner*, *Steph Tai*, and *Christopher W. Greer*; for the Constitutional Accountability Center by *Elizabeth B. Wydra* and *Brianne J. Gorod*; for Craft Brewers by *Richard B. Kendall*; for Fond du Lac Band of Lake Superior Chippewa by *Elise L. Larson* and *Kevin S. Reuther*; for Former Administrators of the U. S. Environmental Protection Agency by *Sarah E. Harrington* and *Erica Oleszczuk Evans*; for Former EPA Officials by *Shaun A. Goho*; for Law Professors by *Stephen E. Roady*, *Michelle B. Nowlin*, and *Shannon M. Arata*; for Trout Unlimited by *Roy T. Englert, Jr.*, and *Jennifer S. Windom*; and for Upstate Forever et al. by *Michael K. Kellogg*, *Sean A. Lev*, *Frank S. Holleman III*, *Nicholas S. Torrey*, and *Leslie Griffith.*

§§ 301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 2, 86 Stat. 844, 886, 33 U. S. C. §§ 1311(a), 1362(12)(A). The question presented here is whether the Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," here, "groundwater." Pet. for Cert. i. Suppose, for example, that a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river, or perhaps the ocean. Must the plant's owner seek an EPA permit before emitting the pollutant? We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

I

A

Congress' purpose as reflected in the language of the Clean Water Act is to "'restore and maintain the . . . integrity of the Nation's waters,'" § 101(a), 86 Stat. 816. Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. See *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 202–203 (1976). The Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so. See *id.*, at 203–205; *Milwaukee* v. *Illinois*, 451 U. S. 304, 310–311 (1981).

The Act's provisions use specific definitional language to achieve this result. First, the Act defines "pollutant" broadly, including in its definition, for example, any solid waste, incinerator residue, "'heat,'" "'discarded equipment,'" or sand (among many other things). § 502(6), 86 Stat. 886. Second, the Act defines a "point source" as "'any discernible, confined and discrete conveyance . . . from which

pollutants are or may be discharged,'" including, for example, any "'container,'" "'pipe, ditch, channel, tunnel, conduit,'" or "'well.'" § 502(14), *id.*, at 887. Third, it defines the term "discharge of a pollutant" as "'any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source.'" § 502(12), *id.*, at 886.

The Act then sets forth a statutory provision that, using these terms, broadly states that (with certain exceptions) "'the discharge of any pollutant by any person'" without an appropriate permit "'shall be unlawful.'" § 301, *id.*, at 844. The question here, as we have said, is whether, or how, this statutory language applies to a pollutant that reaches navigable waters only after it leaves a "point source" and then travels through groundwater before reaching navigable waters. In such an instance, has there been a "discharge of a pollutant," that is, has there been "any addition of any pollutant to navigable waters from any point source?"

B

The petitioner, the County of Maui, operates a wastewater reclamation facility on the island of Maui, Hawaii. The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through four wells hundreds of feet underground. This effluent, amounting to about 4 million gallons each day, then travels a further half mile or so, through groundwater, to the ocean.

In 2012, several environmental groups, the respondents here, brought this citizens' Clean Water Act lawsuit against Maui. See § 505(a), *id.*, at 888. They claimed that Maui was "discharg[ing]" a "pollutant" to "navigable waters," namely, the Pacific Ocean, without the permit required by the Clean Water Act. The District Court, relying in part upon a detailed study of the discharges, found that a considerable amount of effluent from the wells ended up in the ocean (a navigable water). It wrote that, because the "path to the

ocean is clearly ascertainable," the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water." 24 F. Supp. 3d 980, 998 (Haw. 2014). And it granted summary judgment in favor of the environmental groups. See *id.*, at 1005.

The Ninth Circuit affirmed the District Court, but it described the relevant statutory standard somewhat differently. The appeals court wrote that a permit is required when "the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." 886 F. 3d 737, 749 (2018) (emphasis added). The court left "for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability . . . ." *Ibid.*

Maui petitioned for certiorari. In light of the differences in the standards adopted by the different Courts of Appeals, we granted the petition. Compare, *e. g.*, 886 F. 3d, at 749 ("fairly traceable"), with *Upstate Forever* v. *Kinder Morgan Energy Partners, L. P.*, 887 F. 3d 637, 651 (CA4 2018) ("direct hydrological connection"), and *Kentucky Waterways Alliance* v. *Kentucky Util. Co.*, 905 F. 3d 925, 932–938 (CA6 2018) (discharges through groundwater are excluded from the Act's permitting requirements).

II

The linguistic question here concerns the statutory word "from." Is pollution that reaches navigable waters only through groundwater pollution that is "from" a point source, as the statute uses the word? The word "from" is broad in scope, but context often imposes limitations. "Finland," for example, is often not the right kind of answer to the question, "Where have you come from?" even if long ago you were born there.

The parties here disagree dramatically about the scope of the word "from" in the present context. The environmental

groups, the respondents, basically adopt the Ninth Circuit's view—that the permitting requirement applies so long as the pollutant is "fairly traceable" to a point source even if it traveled long and far (through groundwater) before it reached navigable waters. They add that the release from the point source must be "a proximate cause of the addition of pollutants to navigable waters." Brief for Respondents 20.

Maui, on the other hand, argues that the statute creates a "bright-line test." Brief for Petitioner 27–28. A point source or series of point sources must be "the *means of delivering* pollutants to navigable waters." *Id.*, at 28. They add that, if "at least one nonpoint source (*e. g.*, unconfined rainwater runoff or groundwater)" lies "between the point source and the navigable water," then the permit requirement "does not apply." *Id.*, at 54. A pollutant is "from" a point source only if a point source is the last "conveyance" that conducted the pollutant to navigable waters.

The Solicitor General, as *amicus curiae*, supports Maui, at least in respect to groundwater. Reiterating the position taken in a recent EPA "Interpretive Statement," see 84 Fed. Reg. 16810 (2019), he argues that, given the Act's structure and history, "a release of pollutants to groundwater is not subject to" the Act's permitting requirement "even if the pollutants subsequently migrate to jurisdictional surface waters," such as the ocean. Brief for United States as *Amicus Curiae* 12 (capitalization omitted).

We agree that statutory context limits the reach of the statutory phrase "from any point source" to a range of circumstances narrower than that which the Ninth Circuit's interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General.

III

Virtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for ground-

water. See generally 2 Van Nostrand's Scientific Encyclopedia 2600 (10th ed. 2008) (defining "Hydrology"). Given the power of modern science, the Ninth Circuit's limitation, "fairly traceable," may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms. See, *e. g.*, Brief for Aquatic Scientists et al. as *Amici Curiae* 13–28.

The respondents suggest that the standard can be narrowed by adding a "proximate cause" requirement. That is, to fall within the permitting provision, the discharge from a point source must "proximately cause" the pollutants' eventual addition to navigable waters. But the term "proximate cause" derives from general tort law, and it takes on its specific content based primarily on "policy" considerations. See *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 701 (2011) (plurality opinion). In the context of water pollution, we do not see how it significantly narrows the statute beyond the words "fairly traceable" themselves.

Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit's narrow focus on traceability would allow. First, to interpret the word "from" in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.

Second, and perhaps most important, the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States. See, *e. g.*, § 101(b), 86 Stat. 816 (stating Congress' purpose in this regard). Much water pollution does not come from a readily identifiable source. See 3 Van Nostrand's Scientific Encyclopedia, at 5801 (defining "Water Pollution"). Rainwater, for

example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution. Over many decades, and with federal encouragement, the States have developed methods of regulating nonpoint source pollution through water quality standards, and otherwise. See, *e. g.*, Nonpoint Source Program, Annual Report (California) 6 (2016–2017) (discussing state timberland management programs to address addition of sediment-pollutants to navigable waters); *id.*, at 10–11 (discussing regulations of vineyards to control water pollution); *id.*, at 17–19 (discussing livestock grazing management, including utilization ratios and time restrictions); Nonpoint Source Management Program, Annual Report (Maine) 8–10 (2018) (discussing installation of livestock fencing and planting of vegetation to reduce nonpoint source pollution); Oklahoma's Nonpoint Source Management Program, Annual Report 5, 14 (2017) (discussing program to encourage voluntary no-till farming to reduce sediment pollution).

The Act envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants. See §§ 105, 208, 86 Stat. 825, 839; see also Water Quality Act of 1987, § 316, 101 Stat. 52 (establishing Nonpoint Source Management Programs). Although the Act grants EPA specific authority to regulate certain point source pollution (it can also delegate some of this authority to the States acting under EPA supervision, see § 402(b), 86 Stat. 880), these permitting provisions refer to "point sources" and "navigable waters," and say nothing at all about nonpoint source regulation or groundwater regulation. We must doubt that Congress intended to give EPA the authority to apply the word "from" in a way that could interfere as seriously with States' traditional regulatory authority—authority the Act pre-

serves and promotes—as the Ninth Circuit's "fairly traceable" test would.

Third, those who look to legislative history to help interpret a statute will find that this Act's history strongly supports our conclusion that the permitting provision does not extend so far. Fifty years ago, when Congress was considering the bills that became the Clean Water Act, William Ruckelshaus, the first EPA Administrator, asked Congress to grant EPA authority over "ground waters" to "assure that we have control over the water table . . . so we can . . . maintai[n] a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table." Water Pollution Control Legislation–1971 (Proposed Amendments to Existing Legislation): Hearings before the House Committee on Public Works, 92d Cong., 1st Sess., 230 (1971). Representative Les Aspin similarly pointed out that there were "conspicuou[s]" references to groundwater in all sections of the bill *except* the permitting section at issue here. Water Pollution Control Legislation–1971: Hearings before the House Committee on Public Works on H. R. 11896 and H. R. 11895, 92d Cong., 1st Sess., 727 (1971). The Senate Committee on Public Works "recognize[d] the essential link between ground and surface waters." S. Rep. No. 92–414, p. 73 (1971).

But Congress did not accept these requests for general EPA authority over groundwater. It rejected Representative Aspin's amendment that would have extended the permitting provision to groundwater. Instead, Congress provided a set of more specific groundwater-related measures such as those requiring *States* to maintain "affirmative controls over the injection or placement in wells" of "any pollutants that may affect ground water." *Ibid.* These *specific* state-related programs were, in the words of the Senate Public Works Committee, "designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control." *Ibid.* The up-

shot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.

Finally, longstanding regulatory practice undermines the Ninth Circuit's broad interpretation of the statute. EPA itself for many years has applied the permitting provision to pollution discharges from point sources that reached navigable waters only after traveling through groundwater. See, *e. g.*, *United States Steel Corp.* v. *Train*, 556 F. 2d 822, 832 (CA7 1977) (permit for "deep waste-injection well" on the shore of navigable waters). But, in doing so, EPA followed a narrower interpretation than that of the Ninth Circuit. See, *e. g.*, *In re Bethlehem Steel Corp.*, 2 E. A. D. 715, 718 (EAB 1989) (Act's permitting requirement applies only to injection wells "that inject into ground water with a physically and temporally direct hydrologic connection to surface water"). EPA has opposed applying the Act's permitting requirements to discharges that reach groundwater only after lengthy periods. See *McClellan Ecological Seepage Situation (MESS)* v. *Cheney*, 763 F. Supp. 431, 437 (ED Cal. 1989) (United States argued that permitting provisions do not apply when it would take "literally dozens, and perhaps hundreds, of years for any pollutants" to reach navigable waters); *Greater Yellowstone Coalition* v. *Larson*, 641 F. Supp. 2d 1120, 1139 (Idaho 2009) (same in respect to instances where it would take "between 60 and 420 years" for pollutants to travel "one to four miles" through groundwater before reaching navigable waters). Indeed, in this very case (prior to its recent Interpretive Statement, see *infra*, at 180–181), EPA asked the Ninth Circuit to apply a more limited "direct hydrological connection" test. See Brief for United States as *Amicus Curiae* in No. 15–17447 (CA9), pp. 13–20. The Ninth Circuit did not accept this suggestion.

We do not defer here to EPA's interpretation of the statute embodied in this practice. Indeed, EPA itself has changed its mind about the meaning of the statutory provision. See *infra*, at 180–181. But this history, by showing that a comparatively narrow view of the statute is administratively workable, offers some additional support for the view that Congress did not intend as broad a delegation of regulatory authority as the Ninth Circuit test would allow.

As we have said, the specific meaning of the word "from" necessarily draws its meaning from context. The apparent breadth of the Ninth Circuit's "fairly traceable" approach is inconsistent with the context we have just described.

IV

A

Maui and the Solicitor General argue that the statute's permitting requirement does not apply if a pollutant, having emerged from a "point source," must travel through any amount of groundwater before reaching navigable waters. That interpretation is too narrow, for it would risk serious interference with EPA's ability to regulate ordinary point source discharges.

Consider a pipe that spews pollution directly into coastal waters. There is an "addition of" a "pollutant to navigable waters from [a] point source." Hence, a permit is required. But Maui and the Government read the permitting requirement *not* to apply if there is *any* amount of groundwater between the end of the pipe and the edge of the navigable water. See Tr. of Oral Arg. 5–6, 24–25. If that is the correct interpretation of the statute, then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea? Cf. Brief for State of Maryland et al. as *Amici Curiae* 9, n. 4. We do not see how Congress could have intended to create such a large and obvious loop-

hole in one of the key regulatory innovations of the Clean Water Act. Cf. *California ex rel. State Water Resources Control Bd.*, 426 U. S., at 202–204 (basic purpose of Clean Water Act is to regulate pollution at its source); *The Emily*, 9 Wheat. 381, 390 (1824) (rejecting an interpretation that would facilitate "evasion of the law").

B

Maui argues that the statute's language requires its reading. That language requires a permit for a "discharge." A "discharge" is "any addition" of a pollutant to navigable waters "*from any point source.*" And a "point source" is "any discernible, confined and discrete *conveyance*" (such as a pipe, ditch, well, etc.). Reading "from" and "conveyance" together, Maui argues that the statutory meaning of "from any point source" is not about *where* the pollution originated, but about *how* it got there. Under what Maui calls the means-of-delivery test, a permit is required only if a point source itself ultimately delivers the pollutant to navigable waters. Under this view, if the pollutant must travel through groundwater to reach navigable waters, then it is the groundwater, not the pipe, that is the conveyance.

Congress sometimes adopts less common meanings of common words, but this esoteric definition of "from," as connoting a means, does not remotely fit in this context. The statute couples the word "from" with the word "to"—strong evidence that Congress was referring to a destination ("navigable waters") and an origin ("any point source"). Further underscoring that Congress intended this everyday meaning is that the object of "from" is a "point *source*"—a source, again, connoting an origin. That Maui's proffered interpretation would also create a serious loophole in the permitting regime also indicates it is an unreasonable one.

C

The Solicitor General agrees that, as a general matter, the permitting requirement applies to at least some additions of

pollutants to navigable waters that come indirectly from point sources. See Brief for United States as *Amicus Curiae* 33–35. But the Solicitor General argues that the proper interpretation of the statute is the one reflected in EPA's recent Interpretive Statement. After receiving more than 50,000 comments from the public, and after the Ninth Circuit released its opinion in this case, EPA wrote that "the best, if not the only, reading" of the statutory provisions is that "*all* releases of pollutants to groundwater" are excluded from the scope of the permitting program, "even where pollutants are conveyed to jurisdictional surface waters via groundwater." 84 Fed. Reg. 16810, 16811.

Neither the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). Even so, we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need. See *United States* v. *Mead Corp.*, 533 U. S. 218, 234–235 (2001); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). But here, as we have explained, to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable.

EPA correctly points out that Congress did not require a permit for *all* discharges to groundwater; rather, Congress authorized study and funding related to groundwater pollution. See Brief for United States as *Amicus Curiae* 15–19. But there is quite a gap between "not all" and "none." The statutory text itself alludes to no exception for discharges through groundwater. These separate provisions for study and funding that EPA points to would be a "surprisingly indirect route" to convey "an important and easily expressed message"—that the permit requirement simply does not

apply if the pollutants travel through groundwater. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 262 (1994). In truth, the most these provisions show is that Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes.

EPA's new interpretation is also difficult to reconcile with the statute's reference to "*any* addition" of a pollutant to navigable waters. Cf. *Milwaukee*, 451 U. S., at 318 ("*Every* point source discharge is prohibited unless covered by a permit" (footnote omitted)). It is difficult to reconcile EPA's interpretation with the statute's inclusion of "wells" in the definition of "point source," for wells most ordinarily would discharge pollutants through groundwater. And it is difficult to reconcile EPA's interpretation with the statutory provisions that allow EPA to delegate its permitting authority to a State *only if* the State (among other things) provides "'adequate authority'" to "'control the disposal of pollutants into wells.'" § 402(b), 86 Stat. 881. What need would there be for such a proviso if the federal permitting program the State replaces did not include such discharges (from wells through groundwater) in the first place?

In short, EPA's oblique argument about the statute's references to groundwater cannot overcome the statute's structure, its purposes, or the text of the provisions that actually govern.

D

Perhaps, as the two dissents suggest, the language could be narrowed to similar effect by reading the statute to refer only to the pollutant's immediate origin. See *post*, at 190 (opinion of THOMAS, J.); *post*, at 202 (opinion of ALITO, J.). But there is no linguistic basis here to so limit the statute in that way. Again, whether that is the correct reading turns on context. JUSTICE THOMAS insists that in the case of a discharge through groundwater, the pollutants are added "from the groundwater." *Post*, at 190. Indeed, but that does not

mean they are not also "from the point source." *Ibid.* When John comes to the hotel, John might have come from the train station, from Baltimore, from Europe, from any two of those three places, or from all three. A sign that asks all persons who arrive *from* Baltimore to speak to the desk clerk includes those who took a taxi *from* the train station. There is nothing unnatural about such a construction. As the plurality correctly noted in *Rapanos* v. *United States*, 547 U. S. 715 (2006), the statute here does not say "directly" from or "immediately" from. *Id.*, at 743 (opinion of Scalia, J.). Indeed, the expansive language of the provision—*any* addition from *any* point source—strongly suggests its scope is not so limited.

JUSTICE ALITO appears to believe that there are only two possible ways to read "from": as referring either to the *immediate* source, or else to the *original* source. *Post*, at 199, 202. Because he agrees that the statute cannot reasonably be read always to reach the original source, he concludes the statute must refer only to the immediate origin. But as the foregoing example illustrates, context may indicate that "from" includes an intermediate stop—Baltimore, not Europe or the train station.

JUSTICE THOMAS relies on the word "addition," but we fail to see how that word limits the statute to discharges directly to navigable waters. Ordinary language abounds in counter examples: A recipe might instruct to "add the drippings from the meat to the gravy"; that instruction does not become incomprehensible, or even peculiar, simply because the drippings will have first collected in a pan or on a cutting board. And while it would be an unusual phrasing (as statutory phrasings often are), we do not see how the recipe's meaning would transform if it instead said to "add the drippings to the gravy from the meat." To take another example: If Timmy is told to "add water to the bath from the well" he will know just what it means—even though he will have to use a bucket to complete the task.

And although JUSTICE THOMAS resists the inevitable implications of his reading of the statute, *post*, at 193, that reading would create the same loopholes as those offered by the petitioner and the Government, and more. It would necessarily exclude a pipe that drains onto the beach next to navigable waters, even if the pollutants then flow to those waters. It also seems to exclude a pipe that hangs out over the water and adds pollutants to the air, through which the pollutants fall to navigable waters. The absurdity of such an interpretation is obvious enough.

We therefore reject this reading as well: Like Maui's and the Government's, it is inconsistent with the statutory text and simultaneously creates a massive loophole in the permitting scheme that Congress established.

E

For the reasons set forth in Part III and in this Part, we conclude that, in light of the statute's language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.

V

Over the years, courts and EPA have tried to find general language that will reflect a middle ground between these extremes. The statute's words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.* We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into

navigable waters, or when the discharge reaches the same result through roughly similar means.

Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve. As we have said (repeatedly), the word "from" seeks a "point source" origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether pollutants that arrive at navigable waters after traveling through groundwater are "from" a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.

The difficulty with this approach, we recognize, is that it does not, on its own, clearly explain how to deal with middle instances. But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,

(6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

At the same time, courts can provide guidance through decisions in individual cases. The Circuits have tried to do so, often using general language somewhat similar to the language we have used. And the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes.

The underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.

EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules. Indeed, over the years, EPA and the States have often considered the Act's application to discharges through groundwater.

Both Maui and the Government object that to subject discharges to navigable waters through groundwater to the statute's permitting requirements, as our interpretation will sometimes do, would vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes. Brief for Petitioner 44–48; Brief for United States as *Amicus Curiae* 24–25. Cf. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014).

But EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30

years. See *supra*, at 177. In that time we have seen no evidence of unmanageable expansion. EPA and the States also have tools to mitigate those harms, should they arise, by (for example) developing general permits for recurring situations or by issuing permits based on best practices where appropriate. See, *e. g.*, 40 CFR § 122.44(k) (2019). Judges, too, can mitigate any hardship or injustice when they apply the statute's penalty provision. That provision vests courts with broad discretion to set a penalty that takes account of many factors, including "any good-faith efforts to comply" with the Act, the "seriousness of the violation," the "economic impact of the penalty on the violator," and "such other matters as justice may require." See 33 U. S. C. § 1319(d). We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required.

In sum, we recognize that a more absolute position, such as the means-of-delivery test or that of the Government or that of the Ninth Circuit, may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes. We consequently understand the permitting requirement, § 301, as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.

VI

Because the Ninth Circuit applied a different standard, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. I write separately to emphasize three points.

First, the Court's interpretation of the Clean Water Act regarding pollution "from" point sources adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U. S. 715 (2006). The Clean Water Act requires a permit for "any addition of any pollutant to navigable waters from any point source." 33 U. S. C. § 1362(12)(A); see §§ 1311(a), 1342(a). The key word is "from." The question in this case is whether the County of Maui needs a permit for its Lahaina Wastewater Reclamation Facility. No one disputes that pollutants originated at Maui's wastewater facility (a point source), and no one disputes that the pollutants ended up in the Pacific Ocean (a navigable water). Maui contends, however, that it does not need a permit. Maui says that the pollutants did not come "from" the Lahaina facility because the pollutants traveled through groundwater before reaching the ocean.

Justice Scalia's plurality opinion in *Rapanos* explained why Maui's interpretation of the Clean Water Act is incorrect. In that case, Justice Scalia stated that polluters could not "evade the permitting requirement of § 1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." 547 U. S., at 742–743. Justice Scalia reasoned that the Clean Water Act does not merely "forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.' Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.*, at 743 (citations omitted).

In other words, under Justice Scalia's interpretation in *Rapanos*, the fact that the pollutants from Maui's wastewater facility reach the ocean via an indirect route does not itself exempt Maui's facility from the Clean Water Act's permitting requirement for point sources. The Court today adheres to Justice Scalia's analysis in *Rapanos* on that issue.

Second, as Justice Scalia's opinion in *Rapanos* pointed out and as the Court's opinion today explains, the statute does not establish a bright-line test regarding when a pollutant may be considered to have come "from" a point source. The source of the vagueness is Congress' statutory text, not the Court's opinion. The Court's opinion seeks to translate the vague statutory text into more concrete guidance.

Third, JUSTICE THOMAS' dissent states that "the Court does not commit" to "which factors are the most important" in determining whether pollutants that enter navigable waters come "from" a point source. *Post*, at 192. That critique is not accurate, as I read the Court's opinion. The Court identifies relevant factors to consider and emphasizes that "[t]ime and distance are obviously important." *Ante*, at 184. And the Court expressly adds that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case." *Ante*, at 185. Although the statutory text does not supply a bright-line test, the Court's emphasis on time and distance will help guide application of the statutory standard going forward.

With those additional comments, I join the Court's opinion in full.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

The Clean Water Act (CWA) requires a federal permit for "the discharge of any pollutant by any person." 33 U. S. C. §1311(a); see §1342. The CWA defines a "discharge" as "any addition of any pollutant to navigable waters from any

point source." § 1362(12).[1] Based on the statutory text and structure, I would hold that a permit is required only when a point source discharges pollutants directly into navigable waters. The Court adopts this interpretation in part, concluding that a permit is required for "a direct discharge." *Ante*, at 183. But the Court then departs from the statutory text by requiring a permit for "the *functional equivalent of a direct discharge*," *ibid.*, which it defines through an open-ended inquiry into congressional intent and practical considerations. Because I would adhere to the text, I respectfully dissent.

I

A

In interpreting the statutory definition of "discharge," the Court focuses on the word "from," but the most helpful word is "addition." That word, together with "to" and "from," limits the meaning of "discharge" to the augmentation of navigable waters.

Dictionary definitions of "addition" denote an augmentation or increase. Webster's Third New International Dictionary defines "addition" as "the act or process of adding: the joining or uniting of one thing to another." Webster's Third New International Dictionary 24 (1961); see also *ibid.* (listing "increase" and "augmentation" as synonyms for "addition"). Other dictionary definitions from around the time of the statute's enactment are in accord. See, *e. g.*, American Heritage Dictionary 14, 15 (1981) (defining "addition" as "[t]he act or process of adding" and defining "add" as "[t]o

[1] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." § 1362(7). It defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," excluding "agricultural stormwater discharges and return flows from irrigated agriculture." § 1362(14).

join or unite so as to increase in size, quantity, or scope"); see also Webster's New International Dictionary 29, 30 (2d ed. 1957) (defining "addition" as the "[a]ct, process, or instance of adding," and defining "add" as to "join or unite, as one thing to another, or as several particulars, so as to increase the number, augment the quantity, enlarge the magnitude, or so as to form into one aggregate").

The inclusion of the term "addition" in the CWA indicates that the statute excludes anything other than a direct discharge. When a point source releases pollutants to groundwater, one would naturally say that the groundwater has been augmented with pollutants from the point source. If the pollutants eventually reach navigable waters, one would not naturally say that the navigable waters have been augmented with pollutants from the point source. The augmentation instead occurs with pollutants from the groundwater.

The prepositions "from" and "to" reinforce this reading. When pollutants are released from a point source to another point source or groundwater, they are added *to* the second *from* the first. If the pollutants are later released to navigable waters, they are added *to* the navigable waters *from* the second point source or the groundwater. One would not naturally say that the pollutants are added to the navigable waters from the original point source.

Interpreting "discharge" to mean a direct discharge makes sense of other parts of the definition as well. It respects the statutory definition of a point source as a "conveyance," see § 1362(14), because a point source that releases pollutants directly into navigable waters is a means of conveyance. And it makes sense of the word "any" before "point source," because that term clarifies that any kind of point source may require a permit.

The structure of the CWA confirms this interpretation. It authorizes the Environmental Protection Agency (EPA) to regulate discharges from point sources, including through the permitting process, but it reserves to the States the pri-

mary responsibility for regulating other sources of pollution, including groundwater. With respect to these sources, the EPA merely collects information, coordinates with the States, and provides funding. See 33 U. S. C. §§ 1252(a), 1254(a)(5), 1282(b)(2), 1288, 1314(a), 1329; *ante*, at 175. In the CWA, Congress expressly stated its "policy . . . to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." § 1251(b). Thus, construing the EPA's power to regulate point sources to allow the agency to regulate nonpoint sources and groundwater is in serious tension with Congress' design.

My reading is also consistent with our decision in *South Fla. Water Management Dist.* v. *Miccosukee Tribe*, 541 U. S. 95 (2004). The petitioner in that case argued that no permit was required when a point source was not the original source of the pollutant but instead conveyed the pollutant from further up a chain of sources. *Id.*, at 104. We rejected that argument because "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Id.*, at 105. Although that case did not involve the exact question presented here, the direct-discharge interpretation comports well with that previous decision.

B

The Court's main textual argument reads the word "from" in isolation. But as the Court recognizes, "the word 'from' necessarily draws its meaning from context." *Ante*, at 178. The Court's example using "arrive" instead of "addition" is thus unpersuasive, *ante*, at 181–182, because "from" takes different meanings with different verbs. The Court's culinary example also misses the mark, *ante*, at 182, because if the drippings from the meat collect in the pan before the chef adds them to the gravy, the drippings are added to the gravy from the pan, not from the meat. This point becomes clear if we reorder the majority's recipe to match the statute; the

chef has not added the drippings to the gravy from the meat. The Court's bathwater example, *ibid.*, suffers from the same problem; if the well water is put in a bucket before it is put in the bathtub, it is added to the bathtub from the bucket. Only by reading the phrase in its entirety can we interpret the definition of "discharge." See *Deal* v. *United States*, 508 U. S. 129, 132 (1993).

The Court also asserts that a narrower reading than the one it adopts would create a "massive loophole" in the statute. *Ante*, at 183. Far from creating a loophole, my reading is the most logical because it is consonant with the scope of Congress' power. The CWA presumably was passed as an exercise of Congress' authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. My interpretation ties the statute more closely to navigable waters, on the theory that they are at least a channel of these kinds of commerce.

Further, the Court's interpretation creates practical problems of its own. As the Court acknowledges, its opinion gives almost no guidance, save for a list of seven factors. But the Court does not commit to whether those factors are the only relevant ones, whether those factors are always relevant, or which factors are the most important. See *ante*, at 183–185. It ultimately does little to explain how functionally equivalent an indirect discharge must be to require a permit.[2]

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[2]JUSTICE KAVANAUGH believes that the Court's opinion provides enough guidance when it states that "[t]ime and distance will be the most important factors in most cases, *but not necessarily every case*," *ante*, at 185 (majority opinion) (emphasis added). See *ante*, at 188 (concurring opinion). His hope for guidance appears misplaced. For all we know, these factors may not be the most important in 49 percent of cases. The majority's nonexhaustive seven-factor test "may aid in identifying relevant facts for analysis, but—like most multifactor tests—it leaves courts adrift once those facts have been identified." *Dietz* v. *Bouldin*, 579 U. S. 40, 57 (2016) (THOMAS, J., dissenting); see also Scalia, The Rule of Law as a Law

The Court suggests that the EPA could clarify matters through "administrative guidance," *ante*, at 185, but so far the EPA has provided only limited advice and recently shifted its position, see 84 Fed. Reg. 16810 (2019); *ante*, at 173. In any event, the sort of "'general rules'" that the Court hopes the EPA will promulgate are constitutionally suspect. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 67–87 (2015) (THOMAS, J., concurring in judgment).

Despite giving minimal guidance as to how this case should be decided on remand, the majority speculates about whether a permit would be required in other factual circumstances. It poses the examples of a pipe that releases pollutants over navigable waters and a pipe that releases pollutants onto land near navigable waters. As an initial matter, I am not as sure as the majority that a "pollutant," as defined by the CWA, may be added to the air.[3] Even if the majority is correct that a permit is not required in these hypothetical cases, drawing the line at discharges to water is not so absurd as to undermine the most natural reading of the statute. In any event, it is unnecessary to decide these hypothetical cases today.

Finally, the Court speculates as to "those circumstances in which Congress intended to require a federal permit." *Ante*, at 183. But we are not a superlegislature (or super-EPA) tasked with making good policy—assuming that is

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of Rules, 56 U. Chi. L. Rev. 1175, 1186–1187 (1989) (noting that "when balancing is the mode of analysis, not much general guidance may be drawn from the opinion" and arguing that "totality of the circumstances tests and balancing modes of analysis" should "be avoided where possible").

[3] The CWA defines a "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water," with certain exceptions. § 1362(6).

even what the Court accomplishes today. "Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts L. L. P.* v. *ASARCO LLC*, 576 U. S. 121, 135 (2015) (internal quotation marks omitted).

II

I do agree with the Court on several points. First, the interpretation adopted by respondents and the Ninth Circuit is unsupportable. That interpretation—which would require permits for discharges that are " 'fairly traceable' " to, and proximately caused by, a point source—is atextual and unsettles the CWA's careful balance between federal regulation of point-source pollution and state regulation of nonpoint-source pollution. *Ante*, at 174–178.

Second, I agree that the interpretation adopted by petitioner and JUSTICE ALITO reads the word "any" unnaturally, *ante*, at 179, although the majority appears to deploy that argument itself in another part of the opinion, *ante*, at 182. Petitioner's and JUSTICE ALITO's interpretation also gives insufficient weight to the meaning of "addition," see *supra*, at 189–190.

Third, I agree that the EPA's interpretation is not entitled to deference for at least two reasons: No party requests it, and the EPA's reading is not the best one. *Ante*, at 180–181. I add only that deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), likely conflicts with the Vesting Clauses of the Constitution. See *Baldwin* v. *United States*, 589 U. S. 1237, 1238–1245 (2020) (THOMAS, J., dissenting from denial of certiorari); *Michigan* v. *EPA*, 576 U. S. 743, 761–764 (2015) (THOMAS, J., concurring); see also *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 115–126 (2015) (THOMAS, J., concurring in judgment).

Finally, I agree with the Court's implicit conclusion that *Rapanos* v. *United States*, 547 U. S. 715 (2006), does not re-

solve this case. That plurality opinion, which I joined, observed that lower courts have required a permit when pollutants pass through a chain of point sources. *Id.*, at 743–744. But we expressly said in *Rapanos* that "we [did] not decide this issue." *Id.*, at 743. We are not bound by dictum in a plurality opinion or by the lower court opinions it cited.

III

The best reading of the statute is that a "discharge" is the release of pollutants directly from a point source to navigable waters. The application of this interpretation to the undisputed facts of this case makes a remand unnecessary. Petitioner operates a wastewater treatment facility and injects treated wastewater into four underground injection control wells. All parties agree that the wastewater enters groundwater from the wells and does not directly enter navigable waters. Based on these undisputed facts, there is no "discharge," so I would reverse the judgment of the Ninth Circuit. I respectfully dissent.

JUSTICE ALITO, dissenting.

If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied with a modicum of consistency. Here, however, the Court makes up a rule that provides no clear guidance and invites arbitrary and inconsistent application.

The text of the Clean Water Act generally requires a permit when a discharge "from" a "point source" (such as a pipe) "add[s]" a pollutant "to" navigable waters (such as the Pacific Ocean). 33 U. S. C. § 1362(12). There are two ways to read this text. A pollutant that reaches the ocean could be understood to have been added "from" a pipe if the pipe originally discharged the pollutant and the pollutant eventually made its way to the ocean by flowing over or under the sur-

face of the ground. Or a pollutant that reaches the ocean could be understood to have come "from" a pipe if the pollutant is discharged from the pipe directly into the ocean.

There is no comprehensible alternative to these two interpretations, but the Court refuses to accept either. Both alternatives, it believes, lead to unacceptable results, and it therefore tries to find a middle way. It holds that a permit is required "when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." *Ante*, at 183. This is not a plausible interpretation of the statutory text and, to make matters worse, the Court's test has no clear meaning.

Just what is the "functional equivalent" of a "direct discharge"? The Court provides no real answer. All it will say is that the distance a pollutant travels and the time this trip entails are the most important factors, but *at least five other factors* may have a bearing on the question, and even this list is not exhaustive. *Ante*, at 184–185. Entities like water treatment authorities that need to know whether they must get a permit are left to guess how this nebulous standard will be applied. Regulators are given the discretion, at least in the first instance, to make of this standard what they will. And the lower courts? The Court's advice, in essence, is: "That's your problem. Muddle through as best you can."

I

Petitioner, the County of Maui (County), built the Lahaina Wastewater Reclamation Facility in the 1970s. Excerpts of Record 304. The facility receives sewage and then discharges treated wastewater into wells (essentially long pipes) that extend 200 feet or more below ground level. *Id.*, at 694–695. Some of this discharge enters an aquifer below the facility. *Id.*, at 696.

In all the years of its operation, the facility has never had a National Pollution Discharge Elimination System (NPDES) permit for discharges from the wells, a fact that has been

well known to both the EPA and the Hawaii Department of Health (HDOH). The EPA helped to finance the construction of the facility with a Clean Water Act grant. *Id.*, at 141. In 1973, before breaking ground on the facility, the County prepared an environmental impact report and shared it with the EPA and the HDOH. *Id.*, at 140, 342. The report predicted that effluent injected into groundwater from the wells would "eventually reach the ocean some distance from the shore." *Id.*, at 342. Both the EPA and the HDOH received and submitted comments on the report without any mention of a need for permitting discharges from the wells. *Id.*, at 140. Six years later, the HDOH issued an NPDES permit to the facility—but not for the wells. (The permit covered separate discharges to the Honokowai Stream.) *Id.*, at 141, 223–224. And in a May 1985 NPDES Compliance Monitoring Report, the EPA concluded that the County was operating in compliance with the permit, because all effluent was entering the injection wells—and was thus destined for groundwater rather than for navigable waters or for use in irrigation. *Id.*, at 141, 222. In 1994, the HDOH again informed the EPA that "all experts agree that the wastewater does enter the ocean." *Id.*, at 369. And again—nothing from the federal authorities.

Thus, despite nearly five decades of notice that effluent from the facility would make, or was making, its way via groundwater to the ocean, neither the EPA nor the HDOH required NPDES permitting for the Lahaina wells. App. to Pet. for Cert. 138, 143. Indeed, none of the more than 6,600 underground injection wells in Hawaii currently has an NPDES permit.[1]

In 2012, however, as the Court recounts, respondents filed a citizen suit claiming that the Lahaina facility was violating

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[1] EPA, FY 2018 State Underground Injection Control Inventory, https://www.epa.gov/uic/uic-injection-well-inventory; EPA, Hawaii NPDES Permits: Draft and Final NPDES Permits, https://www.epa.gov/npdes-permits/hawaii-npdes-permits.

the Clean Water Act by discharging pollutants into the ocean without a permit. The District Court granted summary judgment against the County on the issue of liability because pollutants "can be directly traced from the injection wells to the ocean." 24 F. Supp. 3d 980, 998 (Haw. 2014) (emphasis deleted).

The parties then entered into a conditional settlement that would take effect if the County were unsuccessful on appeal. Under that agreement, the County must: make good-faith efforts to obtain and comply with an NPDES permit; pay $100,000 in civil penalties; spend $2.5 million on a "supplemental environmental project" in the western part of the island of Maui; and pay nearly $1 million for respondents' attorney's fees and other costs of litigation.[2]

On appeal, the Ninth Circuit affirmed on the ground that pollutants that eventually reached the ocean were "fairly traceable" to the wells. 886 F. 3d 737, 749 (2018). We granted review and must now decide whether the Court of Appeals erred in holding that the discharge of effluent from the wells into groundwater requires a permit.

II

The Clean Water Act generally makes it unlawful to "discharge" a "pollutant"[3] without a permit. 33 U. S. C. § 1311(a). The Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters[4] from

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[2] Settlement Agreement and Order re: Remedies in No. 1:12–cv–198, Doc. 259 (Haw.); Stipulated Settlement Agreement Regarding Award of Plaintiffs' Costs of Litigation, *ibid.*, Doc. 267 (Haw.).

[3] The Act defines a "pollutant" as:

"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water . . . ." § 1362(6).

[4] The Act defines "navigable waters" as "waters of the United States, including the territorial seas." § 1362(7). The term "navigable waters" has a well-known meaning, but the broader term "waters of the United

any point source." § 1362(12). And a "point source" is broadly defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." § 1362(14). The Act includes a non-exhaustive list of conveyances that fall within this definition, and included on that list are such things as "pipe[s]," "ditch[es]," "channel[s]," and "well[s]." *Ibid.*

Putting all these statutory terms together, the rule can be stated as follows: A permit is required when a pollutant is "add[ed]" to navigable waters "from" a "point source." In this case, the parties and the EPA agree that *most* of the elements of this rule are met. Specifically, they agree that: The effluent emitted by the wells is a "pollutant"; this effluent reaches navigable waters (the Pacific Ocean); and the wells are "point source[s]." The disputed question is whether the emission of effluent from those wells qualifies as a "discharge," that is, the addition of a pollutant "*from*" *a point source.* § 1362(12) (emphasis added).

There are two possible interpretations of this phrase. The first is that pollutants are added to navigable waters from a point source whenever they originally came from the point source. The second is that pollutants are added to navigable waters only if they were discharged from a point source directly into navigable waters.

Dissatisfied with those options, the Court tries to find a third, but its interpretation is very hard to fit into the statutory text. Under the Court's interpretation, it appears that a pollutant that leaves a point source and heads toward navigable waters via some non-point source (such as by flowing over the ground or by means of groundwater) is "from" the point source for some portion of its journey, but once it has

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States" is not defined by the Clean Water Act and has presented a difficult issue for this Court. See *Rapanos* v. *United States*, 547 U. S. 715 (2006). The EPA's definition of "waters of the United States" expressly excludes groundwater, see 40 CFR § 122.2 (2019); 84 Fed. Reg. 4190 (2019), and no party in this case disputes that interpretation.

travelled a certain distance or once a certain amount of time has elapsed, it is no longer "from" the point source and is instead "from" a non-point source.

This is an implausible reading of the statute. The Court has many inventive examples of the different meanings that can be conveyed by the simple statement that A comes from B, but one of the Court's examples—the traveler who flies from Europe to Baltimore—illustrates the problem. If we apply the Court's interpretation of § 1362 to this traveler's journey, he would be "from" Europe for the first part of the flight, but at some point he might cease to be "from" Europe and would then be from someplace else, maybe Greenland or geographical coordinates in the middle of the Atlantic. This is a very strange notion, and therefore, I think the statutory text compels us to choose between the two alternatives set out above.

The Court rejects both of these because it thinks they lead to unacceptably extreme results. "Originally from" would impose liability even if pollutants discharged into ground water had to travel 250 miles over the course of 100 years before reaching navigable waters. See *ante*, at 174. And " 'immediately' " or " 'directly' from," the Court thinks, would mean that a polluter could evade the permit requirement by discharging pollutants from a pipe located just a few feet from navigable waters. *Ante*, at 182.

To escape these possibilities, the Court devises its own test: A permit is required, the Court holds, "when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge.*" *Ante*, at 183 (emphasis in original). The Clean Water Act, however, says nothing about "the functional equivalent" of a direct discharge. That is the Court's own concoction, and the Court provides no clear explanation of its meaning.

The term "functional equivalent" may have a quasi-technical ring, but what does it mean? "Equivalent" means

"equal" in some respect, and "functional" signifies a relationship to a function. The function of a direct discharge from a point source into navigable waters is to convey the entirety of the discharge into navigable waters without any delay. Therefore, the "functional equivalent" of a direct discharge of a pollutant into navigable waters would seem to be a discharge that is equal to a direct discharge in these respects.

If that is what the Court meant by "the functional equivalent of a direct discharge," the test would apply at best to only a small set of situations not involving a direct discharge. The Court's example of a pipe that emits pollutants a few feet from the ocean would presumably qualify on *de minimis* grounds, but if the pipe were moved back any significant distance, the discharge would not be exactly equal to a direct discharge. There would be some lag from the time of the discharge to the time when the pollutant reaches navigable waters; some of the pollutant might not reach that destination; and the pollutant might have changed somewhat in composition by the time it reached the navigable waters.

For these reasons, the Court's reference to "the functional equivalent of a direct discharge," if taken literally, would be of little importance, but the Court's understanding of this concept is very different from the literal meaning of the phrase. As used by the Court, "the functional equivalent of a direct discharge" means a discharge that is sufficiently similar to a direct discharge to warrant a permit in light of the Clean Water Act's "language, structure, and purposes." See *ante*, at 186. But what, in concrete terms, does this mean? How similar is sufficiently similar?

The Court provides this guidance. It explains that time and distance are the most important factors, *ante*, at 184, but it does not set any time or distance limits except to observe that a permit is needed where the discharge is a few feet away from navigable waters and that a permit is not required where the discharge is far away and it takes "many years" for the pollutants to complete the journey. *Ibid.*

Beyond this, the Court provides a list (and a non-exhaustive one at that!) of five other factors that *may* be relevant: "the nature of the material through which the pollutant travels," "the extent to which the pollutant is diluted or chemically changed as it travels," "the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source," "the manner by or area in which the pollutant enters the navigable waters," and "the degree to which the pollution (at that point) has maintained its specific identity." *Ante*, at 184–185.

The Court admits that its rule "does not, on its own, clearly explain how to deal with middle instances," *ante*, at 184, but that admission does not go far enough. How the rule applies to "middle instances" is anybody's guess. Except in extreme cases, dischargers will be able to argue that the Court's multifactor test does not require a permit. Opponents will be able to make the opposite argument. Regulators will be able to justify whatever result they prefer in a particular case. And judges will be left at sea.

III

A

Instead of concocting our own rule, I would interpret the words of the statute, and in my view, the better of the two possible interpretations is that a permit is required when a pollutant is discharged directly from a point source to navigable waters. This interpretation is consistent with the statutory language and better fits the overall scheme of the Clean Water Act. And properly understood, it does not have the sort of extreme consequences that the Court finds unacceptable.

Take the Court's example of a pipe that discharges pollutants a short distance from the ocean. *Ante*, at 178. This pipe qualifies as a point source. 33 U. S. C. § 1362(14). If

its discharge goes directly into another point source and that point source discharges directly into navigable waters, there is a direct discharge into navigable waters, and a permit is needed. See *Rapanos* v. *United States*, 547 U. S. 715, 743–744 (2006) (plurality opinion).[5]

[5] JUSTICE THOMAS describes his preferred holding in similar terms: "[A] permit is required only when a point source discharges pollutants directly into navigable waters." *Ante*, at 189 (dissenting opinion). But I take JUSTICE THOMAS's opinion to foreclose liability in one situation where I believe a permit would be required: a discharge from multiple, linked point sources. In my view, a permit is required in that instance because a pollutant would ultimately be added to navigable waters directly from a point source.

Justice Scalia's opinion in *Rapanos*, 547 U. S., at 743–744 (plurality opinion), supports this conclusion. *Rapanos* addressed the meaning of the term "waters of the United States," and Justice Scalia's opinion concluded that this term does not apply to "[w]etlands with only an intermittent, physically remote hydrologic connection to [such waters]." *Id.*, at 742. At one point in his opinion, Justice Scalia responded to the argument that this interpretation would allow polluters to evade the permit requirement "simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." *Id.*, at 743. Arguing that this was not likely to occur, he identified two lines of lower court authority that would prevent such evasion, but he did not endorse either. *Ibid.*

One of these lines was based on exactly the interpretation set out in this opinion, namely, that "such upstream, intermittently flowing channels themselves constitute 'point sources' " under the Act's broad definition of that term. *Ibid.* The other line, as described in Justice Scalia's opinion, "held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely [requires a permit] even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Ibid.* (emphasis in original). To the extent these lower court cases are understood as holding that a permit is required whenever a pollutant "naturally" reaches waters of the United States, their reasoning would conflict with the Court's rejection of the theory that a permit is required whenever a pollutant that originated from a point source ultimately reaches covered waters. But as Justice Scalia noted, in the two cases he cited, the pollutants were discharged from point sources into "conveyances" that, in turn, brought

That a permit is required in this situation is important because the Clean Water Act's definition of a "point source" is very broad, and as a result, many discharges onto the surface of land are likely to be covered. As noted, "point source[s]" include "ditch[es]" and "channel[s]," as well as "any discernible, confined and discrete conveyance . . . from which pollutants . . . may be discharged." § 1362(14). Therefore if water discharged on the surface of the land finds or creates a passage leading to navigable waters, a permit may be required if the course that the discharge takes is (1) a "conveyance" that is (2) "discernible" and (3) "confined."

Those three requirements are rather easily satisfied. When a liquid flows over the surface of land to navigable waters, the surface is a conveyance, *i. e.*, a "means of carrying or transporting something" from one place to another. Webster's Third New International Dictionary 499 (1971) (Webster's Third); Random House Dictionary of the English Language 320 (1967) (Random House).[6] This conveyance

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the pollutants to covered waters. *Ibid.* And the conveyances in both cases, a sewer system and tunnel, *ibid.*, could easily fall within the broad definition of a point source.

In short, at least one and perhaps both of the lines of lower court cases to which Justice Scalia referred are fully consistent with the interpretation set out in this opinion. The same is true of his statement, discussed by JUSTICE KAVANAUGH, *ante*, at 187–188 (concurring opinion), that the Clean Water Act "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source.'" 547 U. S., at 743. As noted, Justice Scalia's opinion is open to the possibility that a permit is required if point source A discharges into point source B, and point source B then discharges into covered waters. Thus, his opinion apparently regards that situation as involving an indirect discharge. I would describe that discharge as direct because point source B discharges directly into covered waters, but the difference is purely semantic.

[6] As we have said, the Act's point-source "definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" *South Fla. Water Management Dist.* v. *Miccosukee Tribe*, 541 U. S. 95, 105 (2004). The label is a bit of a misnomer: Although labeled "point sources," "[t]ellingly, the examples . . . listed

would be "discernible," *i. e.*, capable of being seen. Webster's Third 644; Random House 409. And it would be "confined," *i. e.*, held within bounds, see Webster's Third 476; Random House 308, if the topography of the land in question imposes some boundaries on its flow.

If the term "point source" is read in this way, it would have a broad reach and would cover many of the cases that trouble the Court. Moreover—and I find this point particularly important—even if this interpretation fails to capture every case that seems to call out for regulation, that would not mean that these cases would necessarily remain unchecked. The States have the authority to regulate the discharge of pollutants by non-point sources. See 33 U. S. C. §§ 1285(j), 1314(f), 1329(i), 1329(b)(1), (h). They are entrusted with a vital role under the Clean Water Act, and there is no reason to believe that they would tolerate cases of abuse.

The interpretation I have outlined is not only consistent with the statutory language; it is strongly supported by the Clean Water Act's regulatory scheme for at least two reasons. First, it respects Congress' decision to treat point-source pollution differently from non-point-source pollution, including pollution conveyed by groundwater. See 84 Fed. Reg. 16832.[7] The Court itself recognizes this:

> "[T]he structure of the statute indicates that, as to groundwater pollution and non[-]point source pollution,

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by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them." *Ibid.* (citing § 1362(14)).

[7] The Act contains a number of references to groundwater (a non-point source) outside the NPDES context. The Act textually distinguishes groundwater from surface water and navigable waters, § 1252(a), provides funding for state regulation of groundwater pollution, and suggests that groundwater is a non-point source. See § 1329(h)(5)(D) (authorizing EPA to prioritize grants to States that have implemented or proposed "carry-[ing] out ground water quality protection activities which [EPA] determines are part of a comprehensive non[-]point source pollution control program").

> Congress intended to leave substantial responsibility and autonomy to the States." *Ante*, at 174.
>
> "Over many decades, and with federal encouragement, the States have developed methods of regulating non-point source pollution through water quality standards, and otherwise." *Ante*, at 175.
>
> "The Act envisions EPA's role in managing non[-]point source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants." *Ibid.*

Point sources are readily identifiable and therefore more susceptible to uniform nationwide regulation. Non-point-source pollution, on the other hand, often presents more complicated issues that are better suited to individualized local solutions. See *Shanty Town Assoc. L. P.* v. *EPA*, 843 F. 2d 782, 791 (CA4 1988) ("[T]he control of non[-]point source pollution was so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation was virtually impossible"); *Natural Resources Defense Council* v. *EPA*, 915 F. 2d 1314, 1316 (CA9 1990) ("The Act focused on point source polluters presumably because they could be identified and regulated more easily than non[-]point source polluters"); Brief for State of West Virginia et al. as *Amici Curiae* 14–18.

Second, this bright-line rule is consistent with the Act's remedial scheme. The Clean Water Act imposes a regime of strict liability, §§ 1311, 1342, 1344, backed by criminal penalties and steep civil fines, § 1319. Thus, "the consequences to landowners even for inadvertent violations can be crushing." *Army Corps of Engineers* v. *Hawkes Co.*, 578 U. S. 590, 602 (2016) (Kennedy, J., concurring). The Act authorizes as much as $54,833 in fines per day (or more than $20 million per year), 40 CFR § 19.4; 84 Fed. Reg. 2059, and contains a 5-year statute of limitations, 28 U. S. C. § 2462. And

the availability of citizen suits only exacerbates the danger to ordinary landowners. Even when the EPA and the relevant state agency conclude that a permit is not needed, there is always the possibility that a citizen suit will result in a very costly judgment. The interpretation set out above, by providing a relatively straightforward rule, provides a measure of fair notice and promotes good-faith compliance.

B

The alternative way in which the statutory language could be interpreted—reading "from" to mean "originally from"—would lead to extreme results, as the Court recognizes. And while state regulation could fill any unwarranted gaps left by the interpretation I have outlined, there would be no apparent remedy for the overreach that would result from interpreting "from" to mean "originally from."

The extreme consequences of that interpretation are shown most dramatically by its potential application to ordinary homeowners with septic tanks, a problem that the EPA highlighted in a recent Interpretive Statement. See Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16824 (2019). Septic systems—used by 26 million American homes—generally operate by "discharging liquid effluent into perforated pipes buried in a leach field, chambers, or other special units designed to slowly release the effluent into the soil." *Id.*, at 16812. That effluent then percolates through the soil and "can in certain circumstances ultimately enter groundwater." *Ibid.*[8] Congress most certainly did not intend that ordinary

[8] According to the EPA, numerous other conveyances that deposit pollutants into groundwater could now require NPDES permits. "Activities listed by commentators included aquifer recharge, leaks from sewage collection systems, . . . treatment systems such as constructed wetlands, spills and accidental releases, manure management, and coal ash impoundment seepage." 84 Fed. Reg. 16812. The County and *amici* also assert that

homeowners with septic systems obtain NPDES permits—or that they face severe penalties for failing to do so. That, however, is where this alternative interpretation would lead.

And the same is true for the test adopted by the Ninth Circuit. The Ninth Circuit held that a permit is required if a pollutant that reaches navigable waters is "fairly traceable," but there is no real difference between "fairly traceable" and "originally from." Unless a pollutant is "traceable" to a point source, how could that point source be required to get a permit? And the addition of the qualifier "fairly" does not seem to add anything. What would it mean for a pollutant to be "unfairly traceable" to a point source? Traceable only as a result of a method that is scientifically unsound? In that situation, why would a court consider the pollutant to be traceable to the source in question at all? So if a pollutant can be reliably determined to have originally come from a point source, a permit would appear to be required under the Ninth Circuit's test.

Respondents, instead of defending the Ninth Circuit's interpretation, argue that a discharge from a point source must be the "proximate cause" of a pollutant's reaching navigable waters. Brief for Respondents 12. But as the Court concludes, *ante*, at 174, there is no basis for transplanting this concept from the law of torts into the Clean Water Act, and it is unclear what it would mean in that context.

For these reasons, of the two possible interpretations of the statutory terms, the better is the interpretation that reads "from" to mean "directly from."

C

Even if the Court were to find § 1362(12) ambiguous, applicable clear-statement rules foreclose the "functional equivalent" standard and favor the test just described. The Court

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respondents' theory would require permits for green infrastructure, water reuse, and groundwater discharge. See, *e. g.*, Brief for National Association of Clean Water Agencies et al. as *Amici Curiae* 20–26.

has required a clear statement of congressional intent when an administrative agency seeks to interpret a statute in a way that entails "a significant impingement of the States' traditional and primary power over land and water use," *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 174 (2001) (*SWANCC*), and when it adopts a new and expanded interpretation of a statute, *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302 (2014) (*UARG*). The same rules should apply here where what is at issue is a new theory propounded by private plaintiffs.

First, the Court's "functional equivalent" test unquestionably impinges on the States' traditional authority. In *SWANCC*, the Court struck down the Army Corps of Engineers' "Migratory Bird Rule" as inconsistent with the Clean Water Act because the rule effectively displaced state authority over land and water use. In this case, the federalism interest is even stronger because the Clean Water Act itself assigns non-point-source-pollution regulation to the States and explicitly recognizes and protects the state role in environmental protection. 33 U. S. C. § 1251(b). The "functional equivalent" standard expands federal point-source regulation at the expense of state non-point-source regulation. And as a practical matter, States would be saddled with the costs of increased NPDES permitting (because States generally award permits in place of the EPA), while exercising diminished control over non-point-source pollution within their territory. See Brief for State of West Virginia et al. as *Amici Curiae* 27–34.

Second, the Court's test offends the clear-statement rule recognized in *UARG* by expanding the authority of the EPA. Congress must speak clearly if it "wishes to assign to an agency decisions of vast 'economic and political significance.'" 573 U. S., at 324 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000)). In *UARG*, the EPA had promulgated greenhouse-gas emission standards for stationary sources that "constitute[d] an 'un-

precedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.'" 573 U. S., at 310–311 (quoting 73 Fed. Reg. 44355 (2008)). The statutory scheme, designed for large stationary sources like factories, would have been extended to smaller sources like hotels and retail establishments. The number of permits (and associated expenses) would have skyrocketed.

Here, as the EPA explained in a recent Interpretive Statement, the Fourth and Ninth Circuit "discharge" tests—which I struggle to distinguish from the "functional equivalent" formulation—broaden the Act's coverage to "potentially swee[p] into the scope of the statute commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems." 84 Fed. Reg. 16823.

IV

The Court does little to justify its newfound standard, other than to point to certain past EPA enforcement actions, see *ante*, at 177, 185, but the EPA's position on the regulation of groundwater has been anything but consistent. It is true, as the Court recounts, that the EPA has required NPDES permits for the discharge of some pollutants that migrate through groundwater before reaching navigable waters. See *ante*, at 177. But the EPA has contradicted itself on this important question multiple times. See Brief for Edison Electric Institute et al. as *Amici Curiae* 21–32 (reviewing EPA NPDES interpretations and permitting practices).

In the Act's earliest years, the EPA deputy general counsel wrote in a formal memorandum that "[d]ischarges into ground waters" do not require NPDES permits. Memorandum to EPA Region IX Regional Counsel 2–3 (Dec. 13, 1973).[9] More recently, the EPA recognized "conflicting legal

[9] This early understanding, as the Court describes, is consistent with the legislative history, which shows that Congress intentionally left regulation of groundwater pollution to the States. See *ante*, at 176–177.

precedents" on this question. Compare NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7216 (2003), with 66 Fed. Reg. 3018 (2001).

Similarly, in its 2019 Interpretive Statement, the EPA acknowledged its "[l]ack of consistent and comprehensive direction" on this issue. See 84 Fed. Reg. 16820; see also Brief for Edison Electric Institute et al. as *Amici Curiae* 21–32 (recounting EPA historical approach to NPDES permitting). But it added that "the best, if not the only, reading of the [Act] is that all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater." 84 Fed. Reg. 16814.

In short, the EPA's inconsistent position on the groundwater issue does not provide a sufficient basis for the Court's new "functional equivalent" test.

* * *

The Court adopts a nebulous standard, enumerates a nonexhaustive list of potentially relevant factors, and washes its hands of the problem. We should not require regulated parties to "feel their way on a case-by-case basis" where the costs of uncertainty are so great. *Rapanos*, 547 U. S., at 758 (ROBERTS, C. J., concurring). The Court's decision invites "arbitrary and inconsistent decisionmaking." *UARG*, 573 U. S., at 350 (ALITO, J., concurring in part and dissenting in part). And "[t]hat is not what the Clean [Water] Act contemplates." *Ibid.*

I would reverse the judgment below and instruct the lower courts to apply the test set out above. I therefore respectfully dissent.

Syllabus

ROMAG FASTENERS, INC. *v.* FOSSIL GROUP, INC., FKA FOSSIL, INC., ET AL.

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

No. 18–1233. Argued January 14, 2020—Decided April 23, 2020

Romag Fasteners, Inc., and Fossil, Inc., signed an agreement to use Romag's fasteners in Fossil's leather goods. Romag eventually discovered that factories in China making Fossil products were using counterfeit Romag fasteners. Romag sued Fossil and certain retailers of Fossil products (collectively, Fossil) for trademark infringement pursuant to 15 U. S. C. § 1125(a). Relying on Second Circuit precedent, the district court rejected Romag's request for an award of profits, because the jury, while finding that Fossil had acted callously, rejected Romag's accusation that Fossil had acted willfully.

Held: A plaintiff in a trademark infringement suit is not required to show that a defendant willfully infringed the plaintiff's trademark as a precondition to a profits award. The Lanham Act provision governing remedies for trademark violations, § 1117(a), makes a showing of willfulness a precondition to a profits award in a suit under § 1125(c) for trademark dilution, but § 1125(a) has never required such a showing. Reading words into a statute should be avoided, especially when they are included elsewhere in the very same statute. That absence seems all the more telling here, where the Act speaks often, expressly, and with considerable care about mental states. See, *e. g.*, §§ 1117(b), (c), 1118. Pointing to § 1117(a)'s language indicating that a violation under § 1125(a) can trigger an award of the defendant's profits "subject to the principles of equity," Fossil argues that equity courts historically required a showing of willfulness before authorizing a profits remedy in trademark disputes. But this suggestion relies on the curious assumption that Congress intended to incorporate a willfulness requirement here obliquely while it prescribed *mens rea* conditions expressly elsewhere throughout the Act. Nor is it likely that Congress meant to direct "principles of equity"—a term more naturally suggesting fundamental rules that apply more systematically across claims and practice areas—to a narrow rule about a profits remedy within trademark law. Even crediting Fossil's assumption, all that can be said with certainty is that pre-Lanham Act case law supports the ordinary principle that a defendant's mental state is relevant to assigning an appropriate remedy. The place for reconciling the competing and incommensurable policy goals advanced by the parties is before policymakers. Pp. 214–220.

Vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, BREYER, ALITO, KAGAN, and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion, in which BREYER and KAGAN, JJ., joined, *post*, p. 220. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 220.

Lisa S. Blatt argued the cause for petitioner. With her on the briefs were *Amy Mason Saharia*, *A. Joshua Podoll*, *Jonathan Freiman*, and *Jody P. Ellant*.

Neal Kumar Katyal argued the cause for respondents. With him on the brief were *Kirti Datla*, *Jeffrey E. Dupler*, *Lawrence Brocchini*, *Lauren S. Albert*, and *Thomas P. Schmidt*.*

JUSTICE GORSUCH delivered the opinion of the Court.

When it comes to remedies for trademark infringement, the Lanham Act authorizes many. A district court may award a winning plaintiff injunctive relief, damages, or the defendant's ill-gotten profits. Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. But some circuits have gone further. These courts hold a plaintiff can win a profits remedy, in particular, only after showing the defendant *willfully* infringed its trademark. The question before us is whether that categorical rule can be reconciled with the statute's plain language.

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Judy Perry Martinez* and *Travis R. Wimberly*; and for the Intellectual Property Law Association of Chicago by *Patrick G. Burns*, *Amy C. Ziegler*, *Charles W. Shifley*, and *Robert H. Resis*.

Mark A. Lemley and *Phillip R. Malone* filed a brief for Intellectual Property Law Professors as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Sheldon H. Klein*, *Dean C. Eyler*, and *Kirsten E. Donaldson*; for the Intellectual Property Owners Association by *Kevin H. Rhodes*, *Paul H. Berghoff*, *Eric R. Moran*, and *Nicole E. Grimm*; and for the International Trademark Association by *Lawrence K. Nodine*.

The question comes to us in a case involving handbag fasteners. Romag sells magnetic snap fasteners for use in leather goods. Fossil designs, markets, and distributes a wide range of fashion accessories. Years ago, the pair signed an agreement allowing Fossil to use Romag's fasteners in Fossil's handbags and other products. Initially, both sides seemed content with the arrangement. But in time Romag discovered that the factories Fossil hired in China to make its products were using counterfeit Romag fasteners—and that Fossil was doing little to guard against the practice. Unable to resolve its concerns amicably, Romag sued. The company alleged that Fossil had infringed its trademark and falsely represented that its fasteners came from Romag. After trial, a jury agreed with Romag, and found that Fossil had acted "in callous disregard" of Romag's rights. At the same time, however, the jury rejected Romag's accusation that Fossil had acted willfully, as that term was defined by the district court.

For our purposes, the last finding is the important one. By way of relief for Fossil's trademark violation, Romag sought (among other things) an order requiring Fossil to hand over the profits it had earned thanks to its trademark violation. But the district court refused this request. The court pointed out that controlling Second Circuit precedent requires a plaintiff seeking a profits award to prove that the defendant's violation was willful. Not all circuits, however, agree with the Second Circuit's rule. We took this case to resolve that dispute over the law's demands. 588 U. S. 919 (2019).

Where does Fossil's proposed willfulness rule come from? The relevant section of the Lanham Act governing remedies for trademark violations, § 35, 60 Stat. 439–440, as amended, 15 U. S. C. § 1117(a), says this:

> "When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a

> willful violation under section 1125(c) of this title, shall have been established . . . , the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."

Immediately, this language spells trouble for Fossil and the circuit precedent on which it relies. The statute does make a showing of willfulness a precondition to a profits award when the plaintiff proceeds under § 1125(c). That section, added to the Lanham Act some years after its initial adoption, creates a cause of action for trademark dilution—conduct that lessens the association consumers have with a trademark. But Romag alleged and proved a violation of § 1125(a), a provision establishing a cause of action for the false or misleading use of trademarks. And in cases like that, the statutory language has *never* required a showing of willfulness to win a defendant's profits. Yes, the law tells us that a profits award is subject to limitations found in §§ 1111 and 1114. But no one suggests those cross-referenced sections contain the rule Fossil seeks. Nor does this Court usually read into statutes words that aren't there. It's a temptation we are doubly careful to avoid when Congress has (as here) included the term in question elsewhere in the very same statutory provision.

A wider look at the statute's structure gives us even more reason for pause. The Lanham Act speaks often and expressly about mental states. Section 1117(b) requires courts to treble profits or damages and award attorney's fees when a defendant engages in certain acts *intentionally* and with specified *knowledge*. Section 1117(c) increases the cap on statutory damages from $200,000 to $2,000,000 for certain *willful* violations. Section 1118 permits courts to order the infringing items be destroyed if a plaintiff proves any violation of § 1125(a) or a *willful* violation of § 1125(c). Section 1114 makes certain *innocent* infringers subject only to in-

junctions. Elsewhere, the statute specifies certain *mens rea* standards needed to establish liability, before even getting to the question of remedies. See, *e. g.*, §§ 1125(d)(1)(A)(i), (B)(i) (prohibiting certain conduct only if undertaken with "bad faith intent" and listing nine factors relevant to ascertaining bad faith intent). Without doubt, the Lanham Act exhibits considerable care with *mens rea* standards. The absence of any such standard in the provision before us, thus, seems all the more telling.

So how exactly does Fossil seek to conjure a willfulness requirement out of § 1117(a)? Lacking any more obvious statutory hook, the company points to the language indicating that a violation under § 1125(a) can trigger an award of the defendant's profits "subject to the principles of equity." § 1117(a). In Fossil's telling, equity courts historically required a showing of willfulness before authorizing a profits remedy in trademark disputes. Admittedly, equity courts didn't require so much in patent infringement cases and other arguably analogous suits. See, *e. g.*, *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, 644, 650–651 (1915). But, Fossil says, trademark is different. There alone, a willfulness requirement was so long and universally recognized that today it rises to the level of a "principle of equity" the Lanham Act carries forward.

It's a curious suggestion. Fossil's contention that the term "principles of equity" includes a willfulness requirement would not directly contradict the statute's other, express *mens rea* provisions or render them wholly superfluous. But it would require us to assume that Congress intended to incorporate a willfulness requirement here obliquely while it prescribed *mens rea* conditions expressly elsewhere throughout the Lanham Act. That might be possible, but on first blush it isn't exactly an obvious construction of the statute.

Nor do matters improve with a second look. The phrase "principles of equity" doesn't readily bring to mind a sub-

stantive rule about *mens rea* from a discrete domain like trademark law. In the context of this statute, it more naturally suggests fundamental rules that apply more systematically across claims and practice areas. A principle is a "fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others." Black's Law Dictionary 1417 (3d ed. 1933); Black's Law Dictionary 1357 (4th ed. 1951). And treatises and handbooks on the "principles of equity" generally contain transsubstantive guidance on broad and fundamental questions about matters like parties, modes of proof, defenses, and remedies. See, *e. g.*, E. Merwin, Principles of Equity and Equity Pleading (1895); J. Indermaur & C. Thwaites, Manual of the Principles of Equity (7th ed. 1913); H. Smith, Practical Exposition of the Principles of Equity (5th ed. 1914); R. Megarry, Snell's Principles of Equity (23d ed. 1947). Our precedent, too, has used the term "principles of equity" to refer to just such transsubstantive topics. See, *e. g.*, *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 391, 393 (2006); *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946). Congress itself has elsewhere used "equitable principles" in just this way: An amendment to a different section of the Lanham Act lists "laches, estoppel, and acquiescence" as examples of "equitable principles." 15 U. S. C. § 1069. Given all this, it seems a little unlikely Congress meant "principles of equity" to direct us to a narrow rule about a profits remedy within trademark law.

But even if we were to spot Fossil that first essential premise of its argument, the next has problems too. From the record the parties have put before us, it's far from clear whether trademark law historically required a showing of willfulness before allowing a profits remedy. The Trademark Act of 1905—the Lanham Act's statutory predecessor which many earlier cases interpreted and applied—did not mention such a requirement. It's true, as Fossil notes, that some courts proceeding before the 1905 Act, and even some

later cases following that Act, did treat willfulness or something like it as a prerequisite for a profits award and rarely authorized profits for purely good-faith infringement. See, *e. g.*, *Horlick's Malted Milk Corp.* v. *Horluck's, Inc.*, 51 F. 2d 357, 359 (WD Wash. 1931) (explaining that the plaintiff "cannot recover defendant's profits unless it has been shown beyond a reasonable doubt that defendant was guilty of willful fraud in the use of the enjoined trade-name"); see also *Saxlehner* v. *Siegel-Cooper Co.*, 179 U. S. 42, 42–43 (1900) (holding that one defendant "should not be required to account for gains and profits" when it "appear[ed] to have acted in good faith"). But Romag cites other cases that expressly rejected any such rule. See, *e. g.*, *Oakes* v. *Tonsmierre*, 49 F. 447, 453 (CC SD Ala. 1883); see also *Stonebraker* v. *Stonebraker*, 33 Md. 252, 268 (1870); *Lawrence-Williams Co.* v. *Societe Enfants Gombault et Cie*, 52 F. 2d 774, 778 (CA6 1931).

The confusion doesn't end there. Other authorities advanced still different understandings about the relationship between *mens rea* and profits awards in trademark cases. See, *e. g.*, H. Nims, Law of Unfair Competition and Trade-Marks § 424 (2d ed. 1917) ("An accounting will not be ordered where the infringing party acted innocently and in ignorance of the plaintiff's rights"); N. Hesseltine, Digest of the Law of Trade-Marks and Unfair Trade 305 (1906) (contrasting a case holding "[n]o account as to profits allowed except as to user after *knowledge* of plaintiff's right to trade-mark" and one permitting profits "although defendant did not know of infringement" (emphasis added)). And the vast majority of the cases both Romag and Fossil cite simply failed to speak clearly to the issue one way or another. See, *e. g.*, *Hostetter* v. *Vowinkle*, 12 F. Cas. 546, 547 (No. 6,714) (CC Neb. 1871); *Graham* v. *Plate*, 40 Cal. 593, 597–599 (1871); *Hemmeter Cigar Co.* v. *Congress Cigar Co.*, 118 F. 2d 64, 71–72 (CA6 1941).

At the end of it all, the most we can say with certainty is this. *Mens rea* figured as an important consideration in

awarding profits in pre-Lanham Act cases. This reflects the ordinary, transsubstantive principle that a defendant's mental state is relevant to assigning an appropriate remedy. That principle arises not only in equity, but across many legal contexts. See, *e. g.*, *Smith* v. *Wade*, 461 U. S. 30, 38–51 (1983) (42 U. S. C. § 1983); *Morissette* v. *United States*, 342 U. S. 246, 250–263 (1952) (criminal law); *Wooden-Ware Co.* v. *United States*, 106 U. S. 432, 434–435 (1882) (common law trespass). It's a principle reflected in the Lanham Act's text, too, which permits greater statutory damages for certain willful violations than for other violations. 15 U. S. C. § 1117(c). And it is a principle long reflected in equity practice where district courts have often considered a defendant's mental state, among other factors, when exercising their discretion in choosing a fitting remedy. See, *e. g.*, *L. P. Larson, Jr., Co.* v. *Wm. Wrigley, Jr., Co.*, 277 U. S. 97, 99–100 (1928); *Lander* v. *Lujan*, 888 F. 2d 153, 155–156 (CADC 1989); *United States* v. *Klimek*, 952 F. Supp. 1100, 1117 (ED Pa. 1997). Given these traditional principles, we do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances.

With little to work with in the statute's language, structure, and history, Fossil ultimately rests on an appeal to policy. The company tells us that stouter restraints on profits awards are needed to deter "baseless" trademark suits. Meanwhile, Romag insists that its reading of the statute will promote greater respect for trademarks in the "modern global economy." As these things go, *amici* amplify both sides' policy arguments. Maybe, too, each side has a point. But the place for reconciling competing and incommensurable policy goals like these is before policymakers. This Court's limited role is to read and apply the law those policymakers have ordained, and here our task is clear. The judg-

ment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring.

We took this case to decide whether willful infringement is a prerequisite to an award of profits under 15 U. S. C. § 1117(a). The Federal Circuit held that willfulness is such a prerequisite. *Romag Fasteners, Inc.* v. *Fossil, Inc.*, 817 F. 3d 782, 791 (2016). That is incorrect. The relevant authorities, particularly pre-Lanham Act case law, show that willfulness is a highly important consideration in awarding profits under § 1117(a), but not an absolute precondition. I would so hold and concur on that ground.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree that 15 U. S. C. § 1117(a) does not impose a "willfulness" prerequisite for awarding profits in trademark infringement actions. Courts of equity, however, defined "willfulness" to encompass a range of culpable mental states—including the equivalent of recklessness, but excluding "good faith" or negligence. See 5 McCarthy on Trademarks and Unfair Competition § 30:62 (5th ed. 2019) (explaining that "willfulness" ranged from fraudulent and knowing to reckless and indifferent behavior); see also, *e. g.*, *Lawrence-Williams Co.* v. *Societe Enfants Gombault et Cie*, 52 F. 2d 774, 778 (CA6 1931); *Regis* v. *Jaynes*, 191 Mass. 245, 248–249, 77 N. E. 774, 776 (1906).

The majority suggests that courts of equity were just as likely to award profits for such "willful" infringement as they were for "innocent" infringement. *Ante*, at 218. But that does not reflect the weight of authority, which indicates that profits were hardly, if ever, awarded for innocent infringement. See, *e. g.*, *Wood* v. *Peffer*, 55 Cal. App. 2d 116, 125 (1942) (explaining that "equity constantly refuses, for want of fraudulent intent, the prayer for an accounting of profits");

Globe-Wernicke Co. v. *Safe-Cabinet Co.*, 110 Ohio St. 609, 617, 144 N. E. 711, 713 (1924) ("By the great weight of authority, particularly where the infringement . . . was deliberate and willful, it is held that the wrongdoer is required to account for all profits realized by him as a result of his wrongful acts"); *Dickey* v. *Mutual Film Corp.*, 186 App. Div. 701, 702, 174 N. Y. S. 784 (1919) (declining to award profits because there was "no proof of any fraudulent intent upon the part of the defendant"); *Standard Cigar Co.* v. *Goldsmith*, 58 Pa. Super. 33, 37 (1914) (reasoning that a defendant "should be compelled to account for . . . profits" where "the infringement complained of was not the result of mistake or ignorance of the plaintiff's right"). Nor would doing so seem to be consistent with longstanding equitable principles which, after all, seek to deprive only wrongdoers of their gains from misconduct. Cf. *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448, 456–457 (1936). Thus, a district court's award of profits for innocent or good-faith trademark infringement would not be consonant with the "principles of equity" referenced in § 1117(a) and reflected in the cases the majority cites. *Ante*, at 218–219.

Because the majority is agnostic about awarding profits for both "willful" and innocent infringement as those terms have been understood, I concur in the judgment only.

Syllabus

BARTON *v.* BARR, ATTORNEY GENERAL

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

No. 18–725. Argued November 4, 2019—Decided April 23, 2020

When a lawful permanent resident commits certain serious crimes, the Government may initiate removal proceedings before an immigration judge. 8 U. S. C. § 1229a. If the lawful permanent resident is found removable, the immigration judge may cancel removal, but only if the lawful permanent resident meets strict statutory eligibility requirements. §§ 1229b(a), 1229b(d)(1)(B).

Over the span of 12 years, lawful permanent resident Andre Barton was convicted of state crimes, including a firearms offense, drug offenses, and aggravated assault offenses. An Immigration Judge found him removable based on his state firearms and drug offenses. Barton applied for cancellation of removal. Among the eligibility requirements, a lawful permanent resident must have "resided in the United States continuously for 7 years after having been admitted in any status." § 1229b(a)(2). Another provision, the so-called stop-time rule, provides that a continuous period of residence "shall be deemed to end" when the lawful permanent resident commits "an offense referred to in section 1182(a)(2) . . . that renders the alien inadmissible to the United States under section 1182(a)(2)." § 1229b(d)(1)(B). Because Barton's aggravated assault offenses were committed within his first seven years of admission and were covered by § 1182(a)(2), the Immigration Judge concluded that Barton was not eligible for cancellation of removal. The Board of Immigration Appeals and the Eleventh Circuit agreed.

Held: For purposes of cancellation-of-removal eligibility, a § 1182(a)(2) offense committed during the initial seven years of residence does not need to be one of the offenses of removal. Pp. 229–240.

(a) The cancellation-of-removal statute functions like a traditional recidivist sentencing statute, making a noncitizen's prior crimes relevant to eligibility for cancellation of removal. The statute's text clarifies two points relevant here. First, cancellation of removal is precluded when, during the initial seven years of residence, the noncitizen "committed an offense referred to in section 1182(a)(2)," even if (as in Barton's case) the *conviction* occurred after the seven years elapsed. Second, the offense must "rende[r] the alien inadmissible" as a result. For crimes involving moral turpitude, the relevant category here, § 1182(a)(2) provides that a noncitizen is rendered "inadmissible" when he is convicted of or admits the offense. § 1182(a)(2)(A)(i).

Syllabus

As a matter of statutory text and structure, the analysis here is straightforward. Barton's aggravated assault offenses were crimes involving moral turpitude and therefore "referred to in section 1182(a)(2)." He committed the offenses during his initial seven years of residence and was later convicted of the offenses, thereby rendering him "inadmissible." Barton was, therefore, ineligible for cancellation of removal. Pp. 229–233.

(b) Barton's counterarguments are unpersuasive. First, he claims that the statute's structure supports an "offense of removal" approach. But § 1227(a)(2) offenses—not § 1182(a)(2) offenses—are ordinarily the basis for removal of lawful permanent residents. Therefore, Barton's structural argument falls apart. If he were correct, the statute presumably would specify offenses "referred to in section 1182(a)(2) *or section 1227(a)(2)*." By contrast, some other immigration law provisions do focus only on the offense of removal, and their statutory text and context support that limitation. See, *e. g.*, §§ 1226(a), (c)(1)(A), 1252(a)(2)(C).

Second, seizing on the statutory phrase "committed an offense referred to in section 1182(a)(2) . . . that renders the alien inadmissible to the United States under section 1182(a)(2)," § 1229b(d)(1)(B), Barton argues that a noncitizen is rendered "inadmissible" when actually adjudicated as inadmissible and denied admission to the United States, something that usually cannot happen to a lawfully admitted noncitizen. But the statutory text employs the term "inadmissibility" as a status that can result from, *e. g.*, a noncitizen's (including a lawfully admitted noncitizen's) commission of certain offenses listed in § 1182(a)(2). See, *e. g.*, §§ 1182(a)(2)(A)(i), (B). And Congress has made that status relevant in several statutory contexts that apply to lawfully admitted noncitizens such as Barton. In those contexts, a noncitizen faces immigration consequences from being convicted of a § 1182(a)(2) offense even though the noncitizen is lawfully admitted and is not necessarily removable solely because of that offense. See, *e. g.*, §§ 1160(a)(1)(C), (a)(3)(B)(ii). Such examples pose a major hurdle for Barton's textual argument, and Barton has no persuasive answer.

Third, Barton argues that the Government's interpretation treats as surplusage the phrase "or removable from the United States under section 1227(a)(2) or 1227(a)(4)." But redundancies are common in statutory drafting. The Court has often recognized that sometimes the better overall reading of a statute contains some redundancy. And redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text.

Finally, Barton argues alternatively that, even if inadmissibility is a status, and even if the offense that precludes cancellation of removal need not be one of the offenses of removal, a noncitizen must at least

have been *capable of* being charged with a § 1182(a)(2) inadmissibility offense as the basis for removal. Because the cancellation-of-removal statute is a recidivist statute, however, whether the offense that precludes cancellation of removal was charged or could have been charged as one of the offenses of removal is irrelevant. Pp. 233–240.

904 F. 3d 1294, affirmed.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 240.

Adam G. Unikowsky argued the cause for petitioner. With him on the briefs were *Lauren J. Hartz* and *H. Glenn Fogle, Jr.*

Frederick Liu argued the cause for respondent. With him on the brief were *Solicitor General Francisco, Assistant Attorney General Hunt, Deputy Solicitor General Kneedler, Donald E. Keener, John W. Blakeley, Patrick J. Glen*, and *Timothy G. Hayes*.*

JUSTICE KAVANAUGH delivered the opinion of the Court.

Under the immigration laws, a noncitizen who is authorized to live permanently in the United States is a lawful permanent resident—also commonly known as a green-card holder. But unlike a U. S. citizen, a lawful permanent resident who commits a serious crime may be removed from the United States.

Andre Barton is a Jamaican national and a longtime lawful permanent resident of the United States. During his time

*Briefs of *amici curiae* urging reversal were filed for the Capital Area Immigrants' Rights Coalition by *Susan Baker Manning*; for Former United States Immigration Judges by *David G. Keyko*, *Robert L. Sills*, and *Eric Epstein*; for the National Immigrant Justice Center et al. by *Jean-Claude André* and *Charles Roth*; and for Momodoulamin Jobe et al. by *Ari Holtzblatt* and *Noah A. Levine*.

Nancy Morawetz filed a brief for Immigration Law Professors as *amici curiae*.

in the United States, Barton has been convicted of state crimes on three separate occasions spanning 12 years. The crimes include a firearms offense, drug offenses, and aggravated assault offenses. By law, the firearms offense and the drug offenses each independently rendered Barton eligible for removal from the United States. In September 2016, the U. S. Government sought to remove Barton, and a U. S. Immigration Judge determined that Barton was removable.

Barton applied for cancellation of removal, a form of relief that allows a noncitizen to remain in the United States despite being found removable. The immigration laws authorize an immigration judge to cancel removal, but Congress has established strict eligibility requirements. See 8 U. S. C. §§ 1229b(a), (d)(1)(B). For a lawful permanent resident such as Barton, the applicant for cancellation of removal (1) must have been a lawful permanent resident for at least five years; (2) must have continuously resided in the United States for at least seven years after lawful admission; (3) must not have been convicted of an aggravated felony as defined in the immigration laws; and (4) during the initial seven years of continuous residence, must not have committed certain other offenses listed in 8 U. S. C. § 1182(a)(2). If a lawful permanent resident meets those eligibility requirements, the immigration judge has discretion to (but is not required to) cancel removal and allow the lawful permanent resident to remain in the United States.

Under the cancellation-of-removal statute, the immigration judge examines the applicant's prior crimes, as well as the offense that triggered his removal. If a lawful permanent resident has ever been convicted of an aggravated felony, or has committed an offense listed in § 1182(a)(2) during the initial seven years of residence, that criminal record will preclude cancellation of removal.[1] In that way, the statute

[1] As the statute makes clear, and as we discuss below, *committing* a § 1182(a)(2) offense precludes cancellation of removal only if the offense also "renders" the noncitizen inadmissible. See *infra*, at 233. Section

operates like traditional criminal recidivist laws, which ordinarily authorize or impose greater sanctions on offenders who have committed prior crimes.

In this case, after finding Barton removable based on his state firearms and drug offenses, the Immigration Judge and the Board of Immigration Appeals (BIA) concluded that Barton was not eligible for cancellation of removal. Barton had committed offenses listed in § 1182(a)(2) during his initial seven years of residence—namely, his state aggravated assault offenses in 1996. Barton's 1996 aggravated assault offenses were not the offenses that triggered his removal. But according to the BIA, and contrary to Barton's argument, the offense that precludes cancellation of removal need not be one of the offenses of removal. *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 31 (BIA 2006). The U. S. Court of Appeals for the Eleventh Circuit agreed with the BIA's reading of the statute and concluded that Barton was not eligible for cancellation of removal. The Second, Third, and Fifth Circuits have similarly construed the statute; only the Ninth Circuit has disagreed.

Barton argues that the BIA and the Eleventh Circuit misinterpreted the statute. He contends that the § 1182(a)(2) offense that precludes cancellation of removal must be one of the offenses of removal. We disagree with Barton, and we affirm the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

I

Federal immigration law governs the admission of noncitizens to the United States and the deportation of noncitizens previously admitted. See 8 U. S. C. §§ 1182(a), 1227(a), 1229a.[2] The umbrella statutory term for being inadmissible or deportable is "removable." § 1229a(e)(2).

1182(a)(2) specifies what that means for each of its enumerated offenses. For the offense at issue in this case, the noncitizen must also have been convicted of or admitted the offense.

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

A noncitizen who is authorized to live permanently in the United States is a lawful permanent resident, often known as a green-card holder. When a lawful permanent resident commits a crime and is determined by an immigration judge to be removable because of that crime, the Attorney General (usually acting through an immigration judge) may cancel removal. § 1229b(a). But the comprehensive immigration law that Congress passed and President Clinton signed in 1996 tightly cabins eligibility for cancellation of removal. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546, 8 U. S. C. § 1101 note.

For a lawful permanent resident, the cancellation-of-removal statute provides that an immigration judge "may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." § 1229b(a).[3]

The statute imposes one other requirement known as the "stop-time rule." As relevant here, the statute provides that a lawful permanent resident, during the initial seven years of residence, also cannot have committed "an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." § 1229b(d)(1)(B).

Andre Barton is a Jamaican national and a lawful permanent resident of the United States. In 1996, he was convicted in a Georgia court of a firearms offense stemming from an incident where Barton and a friend shot up the house of Barton's ex-girlfriend. In separate proceedings in 2007

[3] The immigration laws impose a similar but even stricter set of eligibility requirements for noncitizens who are not lawful permanent residents. § 1229b(b).

and 2008, he was convicted in Georgia courts of state drug offenses. One case involved methamphetamine, and the other involved cocaine and marijuana.

In 2016, the U. S. Government charged Barton with deportability under 8 U. S. C. § 1227(a)(2) based on the 1996 firearms offense and the 2007 and 2008 drug crimes. See §§ 1227(a)(2)(B)(i), (C). Barton conceded that he was removable based on his criminal convictions for the firearms offense and drug offenses, and an Immigration Judge found him removable.

Barton applied for cancellation of removal. All agree that Barton meets two of the eligibility requirements for cancellation of removal. He has been a lawful permanent resident for more than five years. And he has not been convicted of an "aggravated felony," as defined by the immigration laws.

The Immigration Judge concluded, however, that Barton had committed an offense listed in § 1182(a)(2) during his initial seven years of residence. In 1996, 6½ years after his admission to this country, Barton committed aggravated assault offenses for which he was later convicted in a Georgia court. The Immigration Judge concluded that those aggravated assault offenses were covered by § 1182(a)(2) and that Barton was therefore not eligible for cancellation of removal.

The Board of Immigration Appeals and the U. S. Court of Appeals for the Eleventh Circuit likewise concluded that Barton was not eligible for cancellation of removal. *Barton* v. *United States Atty. Gen.*, 904 F. 3d 1294, 1302 (2018). The key question was whether the offense that precludes cancellation of removal (here, Barton's 1996 aggravated assault offenses) must also be one of the offenses of removal.[4] The Board of Immigration Appeals has long interpreted the stat-

[4] The term "offense of removal" describes the offense that was the ground on which the immigration judge, at the removal proceeding, found the noncitizen removable.

ute to mean that "an alien need not actually be charged and found inadmissible or removable on the applicable ground in order for the criminal conduct in question to terminate continuous residence in this country" and preclude cancellation of removal. *Jurado-Delgado*, 24 I. & N. Dec., at 31. In this case, the Eleventh Circuit likewise indicated that the § 1182(a)(2) offense that precludes cancellation of removal need not be one of the offenses of removal. 904 F. 3d, at 1299–1300. And the Second, Third, and Fifth Circuits have similarly construed the statute. See *Heredia* v. *Sessions*, 865 F. 3d 60, 68 (CA2 2017); *Ardon* v. *Attorney General of United States*, 449 Fed. Appx. 116, 118 (CA3 2011); *Calix* v. *Lynch*, 784 F. 3d 1000, 1011 (CA5 2015).

But in 2018, the Ninth Circuit disagreed with those courts and with the BIA. The Ninth Circuit ruled that a lawful permanent resident's commission of an offense listed in § 1182(a)(2) makes the noncitizen ineligible for cancellation of removal only if that offense was one of the offenses of removal. *Nguyen* v. *Sessions*, 901 F. 3d 1093, 1097 (2018). Under the Ninth Circuit's approach, Barton would have been eligible for cancellation of removal because his § 1182(a)(2) offenses (his 1996 aggravated assault offenses) were not among the offenses of removal (his 1996 firearms offense and his 2007 and 2008 drug crimes).

In light of the division in the Courts of Appeals over how to interpret this statute, we granted certiorari. 587 U. S. 960 (2019).

II

A

Under the immigration laws, when a noncitizen has committed a serious crime, the U. S. Government may seek to remove that noncitizen by initiating removal proceedings before an immigration judge. If the immigration judge determines that the noncitizen is removable, the immigration judge nonetheless has discretion to cancel removal. But the

immigration laws impose strict eligibility requirements for cancellation of removal. To reiterate, a lawful permanent resident such as Barton who has been found removable because of criminal activity is eligible for cancellation of removal "if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." § 1229b(a).

To be eligible for cancellation of removal, the lawful permanent resident, during the initial seven years of residence after admission, also must not have committed "an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." § 1229b(d)(1)(B).

The law therefore fashions two distinct ways in which a lawful permanent resident's prior crimes may preclude cancellation of removal.

The law precludes cancellation of removal if the lawful permanent resident has been convicted of an "aggravated felony" *at any time*. The statutory list of aggravated felonies is long: murder, rape, drug trafficking, firearms trafficking, obstruction of justice, treason, gambling, human trafficking, and tax evasion, among many other crimes. §§ 1101(a)(43)(A)–(U).

In addition, the law precludes cancellation of removal if the lawful permanent resident committed certain other serious crimes *during the initial seven years of residence*. The law defines those offenses by cross-referencing § 1182(a)(2), which specifies the offenses that can render a noncitizen "inadmissible" to the United States. Section 1182(a)(2) includes "crime[s] involving moral turpitude," which is a general category that covers a wide variety of crimes. Section 1182(a)(2) also expressly encompasses various violations of

drug laws, prostitution, money laundering, and certain DUIs involving personal injury, among other crimes. §§ 1182(a)(2)(A)(i), (C), (D), (E), (I); see § 1101(h).

In specifying when cancellation of removal would be precluded because of prior criminal activity, Congress struck a balance that considers both the nature of the prior crime and the length of time that the noncitizen has resided in the United States. If a lawful permanent resident has been convicted at any time of certain crimes (what the immigration laws refer to as an "aggravated felony"), then the noncitizen is not eligible for cancellation of removal. If during the initial 7-year period of residence, a lawful permanent resident committed certain other offenses referred to in § 1182(a)(2), then the noncitizen likewise is not eligible for cancellation of removal.

In providing that a noncitizen's prior crimes (in addition to the offense of removal) can render him ineligible for cancellation of removal, the cancellation-of-removal statute functions like a traditional recidivist sentencing statute. In an ordinary criminal case, a defendant may be convicted of a particular criminal offense. And at sentencing, the defendant's other criminal offenses may be relevant. So too in the immigration removal context. A noncitizen may be found removable based on a certain criminal offense. In applying for cancellation of removal, the noncitizen must detail his entire criminal record on Form EOIR–42A. An immigration judge then must determine whether the noncitizen has been convicted of an aggravated felony at any time or has committed a § 1182(a)(2) offense during the initial seven years of residence. It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is likewise entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration cases.[5]

[5] If the offense of removal itself was an aggravated felony or was an offense listed in § 1182(a)(2) that was committed during the initial seven years of residence, then the offense of removal alone precludes cancellation

It is not surprising, moreover, that Congress required immigration judges considering cancellation of removal to look in part at whether the noncitizen has committed any offenses listed in § 1182(a)(2). The offenses listed in § 1182(a)(2) help determine whether a noncitizen should be admitted to the United States. Under the cancellation-of-removal statute, immigration judges must look at that same category of offenses to determine whether, after a previously admitted noncitizen has been determined to be deportable, the noncitizen should nonetheless be allowed to remain in the United States. If a crime is serious enough to deny admission to a noncitizen, the crime can also be serious enough to preclude cancellation of removal, at least if committed during the initial seven years of residence.

Importantly, the text of the cancellation-of-removal statute does not simply say that cancellation of removal is precluded when, during the initial seven years of residence, the noncitizen was *convicted* of an offense referred to in § 1182(a)(2). Rather, the text says that cancellation of removal is precluded when, during the initial seven years of residence, the noncitizen "committed an offense referred to in section 1182(a)(2) . . . that renders the alien inadmissible." § 1229b(d)(1)(B). That language clarifies two points of relevance here.

First, cancellation of removal is precluded if a noncitizen *committed* a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton's case) the *conviction* occurred after the seven years elapsed. In other words, as Congress specified in the statute and as the BIA and the Courts of Appeals have recognized, the date of *commission* of the offense is the key date for purposes of calculating whether the noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence. See *In re Perez*, 22 I. & N. Dec. 689, 693–694 (BIA 1999) (date of com-

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of removal, regardless of whether the noncitizen has an additional record of prior crimes.

mission is controlling date); see also *Heredia*, 865 F. 3d, at 70–71 ("the date of the *commission* of the offense governs the computation of a lawful permanent resident's continuous residency in the United States"); *Calix*, 784 F. 3d, at 1012 ("Once he was convicted of the offense" referred to in § 1182(a)(2), "he was rendered inadmissible to the United States. His accrual of continuous residence was halted as of the date he committed that offense").

Second, the text of the law requires that the noncitizen be rendered "inadmissible" as a result of the offense. For crimes involving moral turpitude, which is the relevant category of § 1182(a)(2) offenses here, § 1182(a)(2) provides that a noncitizen is rendered "inadmissible" when he is convicted of or admits the offense. § 1182(a)(2)(A)(i). As the Eleventh Circuit explained, "while only commission is required at step one, conviction (or admission) is required at step two." 904 F. 3d, at 1301.

In this case, Barton's 1996 state aggravated assault offenses were crimes involving moral turpitude and therefore "referred to in section 1182(a)(2)." Barton committed those offenses during his initial seven years of residence. He was later convicted of the offenses in a Georgia court and thereby rendered "inadmissible." Therefore, Barton was ineligible for cancellation of removal.

As a matter of statutory text and structure, that analysis is straightforward. The Board of Immigration Appeals has long interpreted the statute that way. See *Jurado-Delgado*, 24 I. & N. Dec., at 31. And except for the Ninth Circuit, all of the Courts of Appeals to consider the question have interpreted the statute that way.

B

Barton pushes back on that straightforward statutory interpretation and the longstanding position of the Board of Immigration Appeals. Barton says that he may not be denied cancellation of removal based on his 1996 aggravated

assault offenses because those offenses were not among the offenses of removal found by the Immigration Judge in Barton's removal proceeding. Rather, his 1996 firearms offense and his 2007 and 2008 drug offenses were the offenses of removal.

To succinctly summarize the parties' different positions (with the difference highlighted in italics below): The Government would preclude cancellation of removal under this provision if the lawful permanent resident committed a § 1182(a)(2) offense during the initial seven years of residence. Barton would preclude cancellation of removal under this provision if the lawful permanent resident committed a § 1182(a)(2) offense during the initial seven years of residence *and if that § 1182(a)(2) offense was one of the offenses of removal in the noncitizen's removal proceeding.*

To support his "offense of removal" approach, Barton advances three different arguments. A caution to the reader: These arguments are not easy to unpack.

First, according to Barton, the statute's overall structure with respect to removal proceedings demonstrates that a § 1182(a)(2) offense may preclude cancellation of removal only if that § 1182(a)(2) offense was one of the offenses of removal. We disagree. In removal proceedings, a lawful permanent resident (such as Barton) may be found "deportable" based on deportability offenses listed in § 1227(a)(2). A noncitizen who has not previously been admitted may be found "inadmissible" based on inadmissibility offenses listed in § 1182(a)(2). See §§ 1182(a), 1227(a), 1229a(e)(2). Importantly, then, § 1227(a)(2) offenses—not § 1182(a)(2) offenses—are typically the basis for removal of lawful permanent residents.

Because the offense of removal for lawful permanent residents is ordinarily a § 1227(a)(2) offense, Barton's structural argument falls apart. If Barton were correct that this aspect of the cancellation-of-removal statute focused only on the offense of removal, the statute presumably would specify

offenses "referred to in section 1182(a)(2) *or section 1227(a)(2)*." So why does the statute identify only offenses "referred to in section 1182(a)(2)"? Barton has no good answer. At oral argument, when directly asked that question, Barton's able counsel forthrightly acknowledged: "It's a little hard to explain." Tr. of Oral Arg. 27.

This point is the Achilles' heel of Barton's structural argument. As we see it, Barton cannot explain the omission of § 1227(a)(2) offenses in the "referred to" clause for a simple reason: Barton's interpretation of the statute is incorrect. Properly read, this is not simply an "offense of removal" statute that looks only at whether the offense of removal was committed during the initial seven years of residence. Rather, this is a recidivist statute that uses § 1182(a)(2) offenses as a shorthand cross-reference for a category of offenses that will preclude cancellation of removal if committed during the initial seven years of residence.

By contrast to this cancellation-of-removal provision, some other provisions of the immigration laws do focus only on the offense of removal—for example, provisions governing mandatory detention and jurisdiction. See §§ 1226(a), (c)(1)(A), (B), 1252(a)(2)(C). But the statutory text and context of those provisions support that limitation. Those provisions use the phrase "inadmissible by reason of" a § 1182(a)(2) offense, "deportable by reason of" a § 1227(a)(2) offense, or "removable by reason of" a § 1182(a)(2) or § 1227(a)(2) offense. And the provisions make contextual sense only if the offense justifying detention or denying jurisdiction is one of the offenses of removal. The cancellation-of-removal statute does not employ similar language.

Second, moving from overall structure to precise text, Barton seizes on the statutory phrase "committed an offense referred to in section 1182(a)(2) . . . *that renders the alien inadmissible to the United States under section 1182(a)(2)*." § 1229b(d)(1)(B) (emphasis added). According to Barton,

conviction of an offense listed in § 1182(a)(2)—for example, conviction in state court of a crime involving moral turpitude—does not itself render the noncitizen "inadmissible." He argues that a noncitizen is not rendered "inadmissible" unless and until the noncitizen is actually adjudicated as inadmissible and denied admission to the United States. And he further contends that a lawfully admitted noncitizen usually cannot be removed from the United States on the basis of inadmissibility. As Barton puts it (and the dissent echoes the point), how can a lawfully admitted noncitizen be found inadmissible when he has already been lawfully admitted?

As a matter of common parlance alone, that argument would of course carry some force. But the argument fails because it disregards the statutory text, which employs the term "inadmissibility" as a status that can result from, for example, a noncitizen's (including a lawfully admitted noncitizen's) commission of certain offenses listed in § 1182(a)(2).

For example, as relevant here, § 1182(a)(2) flatly says that a noncitizen such as Barton who commits a crime involving moral turpitude and is convicted of that offense "is inadmissible." § 1182(a)(2)(A)(i). Full stop. Similarly, a noncitizen who has two or more convictions, together resulting in aggregate sentences of at least five years, "is inadmissible." § 1182(a)(2)(B). A noncitizen who a consular officer or the Attorney General knows or has reason to believe is a drug trafficker "is inadmissible." § 1182(a)(2)(C)(i). A noncitizen who receives the proceeds of prostitution within 10 years of applying for admission "is inadmissible." § 1182(a)(2)(D)(ii). The list goes on. See, *e. g.*, §§ 1182(a)(2)(C)(ii)–(E), (G)–(I). Those provisions do not say that a noncitizen will *become* inadmissible if the noncitizen is found inadmissible in a subsequent immigration removal proceeding. Instead, those provisions say that the noncitizen "*is inadmissible.*"

Congress has in turn made that status—inadmissibility because of conviction or other proof of commission of § 1182(a)(2) offenses—relevant in several statutory contexts

that apply to lawfully admitted noncitizens such as Barton. Those contexts include adjustment to permanent resident status; protection from removal because of temporary protected status; termination of temporary resident status; and here cancellation of removal. See, *e. g.*, §§ 1160(a)(1)(C), (a)(3)(B)(ii), 1254a(a)(1)(A), (c)(1)(A)(iii), 1255(a), (*l*)(2). In those contexts, the noncitizen faces immigration consequences from being convicted of a § 1182(a)(2) offense even though the noncitizen is lawfully admitted and is not necessarily removable solely because of that offense.

Consider how those other proceedings work. A lawfully admitted noncitizen who is convicted of an offense listed in § 1182(a)(2) is typically not removable from the United States on that basis (recall that a lawfully admitted noncitizen is ordinarily removable only for commission of a § 1227(a)(2) offense). But the noncitizen is "inadmissible" because of the § 1182(a)(2) offense and for that reason may not be able to obtain adjustment to permanent resident status. §§ 1255(a), (*l*)(2). So too, a lawfully admitted noncitizen who is convicted of an offense listed in § 1182(a)(2) is "inadmissible" and for that reason may not be able to obtain temporary protected status. §§ 1254a(a)(1)(A), (c)(1)(A)(iii). A lawfully admitted noncitizen who is a temporary resident and is convicted of a § 1182(a)(2) offense is "inadmissible" and for that reason may lose temporary resident status. §§ 1160(a)(1)(C), (a)(3)(B)(ii).

Those statutory examples pose a major hurdle for Barton's textual argument. The examples demonstrate that Congress has employed the concept of "inadmissibility" as a status in a variety of statutes similar to the cancellation-of-removal statute, including for lawfully admitted noncitizens. Barton has no persuasive answer to those examples. Barton tries to say that some of those other statutes involve a noncitizen who, although already admitted to the United States, is nonetheless seeking "constructive admission." Reply Brief 12; Tr. of Oral Arg. 11. But that ginned-up label

does not avoid the problem. Put simply, those other statutes show that lawfully admitted noncitizens who are, for example, convicted of § 1182(a)(2) crimes are "inadmissible" and in turn may suffer certain immigration consequences, even though those lawfully admitted noncitizens cannot necessarily be removed solely because of those § 1182(a)(2) offenses.

The same is true here. A lawfully admitted noncitizen who was convicted of a crime involving moral turpitude during his initial seven years of residence is "inadmissible" and for that reason is ineligible for cancellation of removal.

In advancing his structural and textual arguments, Barton insists that his interpretation of the statute reflects congressional intent regarding cancellation of removal. But if Congress intended that only the offense of removal would preclude cancellation of removal under the 7-year residence provision, it is unlikely that Congress would have employed such a convoluted way to express that intent. Barton cannot explain why, if his view of Congress' intent is correct, the statute does not simply say something like: "The alien is not eligible for cancellation of removal if the offense of removal was committed during the alien's initial seven years of residence."

Third, on a different textual tack, Barton argues that the Government's interpretation cannot be correct because the Government would treat as surplusage the phrase "or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." Recall that the statute, as relevant here, provides that a lawful permanent resident is not eligible for cancellation of removal if, during the initial seven years of residence, he committed "an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title *or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title.*" § 1229b(d)(1)(B) (emphasis added).

To begin with, all agree that under either side's interpretation, the reference to § 1227(a)(4)—as distinct from § 1227(a)(2)—is redundant surplusage. See § 1229b(c)(4); Brief for Petitioner 32–33, and n. 7. Under the Government's interpretation, it is true that the reference to § 1227(a)(2) also appears to be redundant surplusage. Any offense that is both referred to in § 1182(a)(2) and an offense that would render the noncitizen deportable under § 1227(a)(2) would also render the noncitizen inadmissible under § 1182(a)(2). But redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication. The Court has often recognized: "Sometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U. S. 334, 346 (2019); see *Wisconsin Central Ltd.* v. *United States*, 585 U. S. 274, 282 (2018); *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385 (2013); *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004). So it is here. Most importantly for present purposes, we do not see why the redundant statutory reference to § 1227(a)(2) should cause us to entirely rewrite § 1229b so that a noncitizen's commission of an offense referred to in § 1182(a)(2) would preclude cancellation of removal only if it is also the offense of removal. Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text, as Barton would have us do.

One final point: Barton argues in the alternative that even if inadmissibility is a status, and even if the offense that precludes cancellation of removal need not be one of the offenses of removal, the noncitizen must at least have been *capable of* being charged with a § 1182(a)(2) inadmissibility offense as the basis for removal. The dissent seizes on this argument as well. But as we have explained, this cancellation-of-removal statute is a recidivist statute that precludes cancel-

lation of removal if the noncitizen has committed an offense listed in § 1182(a)(2) during the initial seven years of residence. Whether the offense that precludes cancellation of removal was charged or could have been charged as one of the offenses of removal is irrelevant to that analysis.

* * *

Removal of a lawful permanent resident from the United States is a wrenching process, especially in light of the consequences for family members. Removal is particularly difficult when it involves someone such as Barton who has spent most of his life in the United States. Congress made a choice, however, to authorize removal of noncitizens—even lawful permanent residents—who have committed certain serious crimes. And Congress also made a choice to categorically preclude cancellation of removal for noncitizens who have substantial criminal records. Congress may of course amend the law at any time. In the meantime, the Court is constrained to apply the law as enacted by Congress. Here, as the BIA explained in its 2006 *Jurado-Delgado* decision, and as the Second, Third, Fifth, and Eleventh Circuits have indicated, the immigration laws enacted by Congress do not allow cancellation of removal when a lawful permanent resident has amassed a criminal record of this kind.

We affirm the judgment of the U. S. Court of Appeals for the Eleventh Circuit.

It is so ordered.

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

The stop-time rule ends a noncitizen's period of continuous residence, making him or her ineligible for certain relief from removal. But to trigger the rule, it takes more than commission of a specified criminal offense: The offense must also render a noncitizen either "inadmissible" or "deportable."

In applying these important limitations, the rule directly references the two-track nature of the Immigration and Nationality Act (INA), a statute that has long distinguished between noncitizens seeking admission and those already admitted. Inadmissibility, of course, pertains to noncitizens seeking admission; deportability relates to noncitizens already admitted but removable.

The majority errs by conflating these two terms. It concludes that the term "inadmissible," for the purposes of the stop-time rule, refers to a status that a noncitizen could acquire even if he or she is not seeking admission. Under this logic, petitioner Andre Barton is inadmissible yet, at the same time, lawfully admitted. Neither the express language of the statute nor any interpretative canons support this paradox; Barton cannot and should not be considered inadmissible for purposes of the stop-time rule because he has already been admitted to the country. Thus, for the stop-time rule to render Barton ineligible for relief from removal, the Government must show that he committed an offense that made him deportable. Because the Government cannot meet that burden, Barton should prevail.

I respectfully dissent.

I

A

Cancellation of removal is a form of immigration relief available to lawful permanent residents (LPRs) and other noncitizens, including those who have never been lawfully admitted. 8 U. S. C. § 1229b. To obtain this relief, both groups must continuously reside in the United States for a certain amount of time. § 1229b(a)(2) (seven years for LPRs); § 1229b(b)(1)(A) (10 years for non-LPR noncitizens).

The stop-time rule ends a noncitizen's period of continuous residence (1) when the noncitizen "has committed an offense referred to in section 1182(a)(2) of this title" that either (2) "renders" the noncitizen "inadmissible to the United States

under section 1182(a)(2) of this title" or (3) renders the noncitizen "removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." § 1229b(d)(1). The second clause directly invokes grounds of inadmissibility; the third clause, although using the term "removable," directly invokes grounds of deportability. See § 1227(a) (specifying "[c]lasses of deportable aliens").[1] Both the second and the third clauses are cabined by the first: In addition to rendering a noncitizen either inadmissible or deportable, the offense must also be one "referred to" in § 1182(a)(2). That provision includes some—but not all—of the grounds of deportability in § 1227.

This distinction between "inadmissible" and "deportable" matters. Indeed, both are terms of art, so it is critical to understand their histories and their attached meaning over time. See *INS* v. *St. Cyr*, 533 U. S. 289, 312, n. 35 (2001) (noting that "'[w]here Congress borrows terms of art,'" with settled meaning, it "'presumably knows and adopts the cluster of ideas that were attached to each borrowed word'" (quoting *Morissette* v. *United States*, 342 U. S. 246, 263 (1952))).

Until Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), noncitizens seeking physical entry were placed in "'exclusion proceeding[s],'" while those already physically present were placed in "'deportation proceeding[s].'" *Judulang* v. *Holder*, 565 U. S. 42, 45 (2011). Although the grounds for exclusion and deportation—and the procedures applying to each—evolved over time, the immigration laws retained a two-track system; different procedures and processes applied to noncitizens who were deportable and noncitizens who were excludable. Brief for Immigration Law Professors as *Amici Curiae* 3–8.

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[1] Because the third clause refers to grounds of deportability, the Government appears to agree that the terms "removable" and "deportable" are interchangeable. See Brief for Respondent 21–22.

IIRIRA changed the proceedings and some of the language. All noncitizens are now channeled into "'removal proceeding[s],'" and noncitizens previously labeled "excludable" are now labeled "'inadmissible.'" *Judulang*, 565 U. S., at 46. IIRIRA also altered when a noncitizen faces grounds of inadmissibility, formerly exclusion: Rather than focusing on whether a noncitizen had physically entered the country, the statute now asks whether the noncitizen had been lawfully admitted, in any status, to the country. See §§ 1101(a)(13)(A), 1182(a).

Still, the immigration laws have retained their two-track structure. Inadmissibility and deportability remain separate concepts, triggered by different grounds. With few exceptions, the grounds for inadmissibility are broader than those for deportability. Compare § 1182(a)(2)(A)(i)(I) with § 1227(a)(2)(A)(i) (reflecting different treatment for crimes involving moral turpitude). Further, while a noncitizen charged with inadmissibility bears the ultimate burden to show that he is admissible, the Government bears the burden of demonstrating that a noncitizen is deportable. §§ 1229a(c)(2), (c)(3).

Whether a noncitizen is charged with inadmissibility or deportability also affects what the noncitizen or the Government must show to carry their respective burdens. A criminal ground for inadmissibility can be made out by showing either that the noncitizen admitted to conduct meeting the elements of a crime or that she was actually convicted of an offense. See, *e. g.*, *Pazcoguin* v. *Radcliffe*, 292 F. 3d 1209, 1213–1215 (CA9 2002) (noncitizen inadmissible because he admitted to health officer that he smoked marijuana in his youth); see also § 1182(a)(2)(A). By contrast, most criminal grounds for deportability can be established only through convictions. See §§ 1227(a)(2)(A)(i)–(v), (a)(2)(B)(i).

Finally, the substantive standards for cancellation of removal are also less stringent for a subset of deportable noncitizens: LPRs like Barton. Among other things, while an

otherwise-eligible LPR must merely demonstrate that he or she deserves the relief as a matter of discretion, see *In re C-V-T-*, 22 I. & N. Dec. 7, 10–11 (BIA 1998), non-LPRs must demonstrate exceptional and extremely unusual hardship to an LPR or citizen parent, spouse, or child, § 1229b(b)(1)(D).

These separate categories and procedures—treating deportable noncitizens more generously than inadmissible noncitizens, and treating one group of deportable noncitizens (LPRs) the most generously of all—stem from one animating principle. All noncitizens in this country are entitled to certain rights and protections, but the protections afforded to previously admitted noncitizens and LPRs are particularly strong. See *Demore* v. *Kim*, 538 U. S. 510, 543–544 (2003) (Souter, J., concurring in part and dissenting in part). Indeed, "[t]he immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen." *Id.*, at 544. Because those already admitted, like Barton, are often presumed to have greater connections to the country, the immigration laws use separate terms and create separate procedures for noncitizens seeking admission to the country on the one hand, and those who were previously admitted on the other.

The stop-time rule carries that distinction forward. The rule specifies how a period of continuous residence ends for noncitizens who are seeking admission and thus are inadmissible, as well as noncitizens who are already admitted and thus are deportable. By using separate terms and grounds for two groups of people, the stop-time rule thus reflects the two-track dichotomy for inadmissible or deportable noncitizens that pervades the INA.

B

Barton is a longtime lawfully admitted resident of the United States. He and his mother moved to the United

States from Jamaica when he was about 10 years old. They both entered legally and, through Barton's stepfather, soon adjusted their status to LPRs. When Barton was placed in removal proceedings, all of his immediate family—his mother, his children, his fiancee—were living in the United States. He had not returned to Jamaica in 25 years.

Barton was first arrested in 1996, when he was 17 or 18, after a friend shot at his ex-girlfriend's house while he was present. Both he and his friend were convicted of, among other things, aggravated assault and possession of a firearm. Barton later testified before an immigration judge that he was unaware that his friend had a gun or was planning to shoot it.

After attending a boot camp and obtaining his GED, Barton led a law-abiding life for several years. But in the mid-2000s, Barton developed a drug problem and was convicted twice on possession charges. After attending two drug rehabilitation programs, Barton was never arrested again. He graduated from college, began running an automobile repair shop, and became a father to four young children.

Just a few years ago—nearly 10 years after his last arrest—the Government detained Barton and placed him in removal proceedings. Because he had been lawfully admitted to the country, the Government could not charge him with any grounds of inadmissibility. Rather, the Government charged, and Barton conceded, that he was deportable based on prior firearms and drug convictions. (All agree that Barton's aggravated-assault offense did not qualify as a deportable offense under § 1227.) Barton then sought cancellation of removal.

Perhaps recognizing that Barton had a strong case for cancellation of removal on the merits, see *C-V-T-*, 22 I. & N. Dec., at 11 (factors such as "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young

age)," and "business ties" all favor a noncitizen seeking cancellation), the Government contended that Barton was categorically ineligible for that relief. It reasoned that Barton's prior offenses triggered the stop-time rule and that Barton therefore could not meet the continuous-residence requirement.

The problem (for the Government) was finding a prior offense that actually triggered the stop-time rule. None of the offenses that had made Barton deportable—his firearms and drug convictions—satisfied the stop-time rule's first clause because § 1182(a)(2) does not "refe[r] to" those offenses. The Government therefore could not argue that Barton's firearms and drug offenses ended Barton's period of continuous residence under the stop-time rule. As for Barton's aggravated-assault offense, it was not a ground for deportability under § 1227(a) and therefore did not render him deportable under the third clause of the stop-time rule.

So the Government took a different tack: It argued that, even though Barton had already been admitted (and was not seeking readmission), his aggravated-assault offense "render[ed him] inadmissible" under the second clause of the stop-time rule. That is, although the Government could not charge Barton with inadmissibility, it relied upon a ground of inadmissibility to assert that Barton was not entitled to relief from removal.

The Immigration Judge agreed with the Government. The judge made clear, however, that she would have granted Barton's cancellation application had he satisfied the continuous-residence requirement. The judge cited, among other things, Barton's strong family ties, including his four young children who were all U. S. citizens. The judge concluded that because "his last arrest was over 10 years ago," Barton "is clearly rehabilitated." The judge also concluded that Barton's family "relies on him and would suffer hardship if he were to be deported to Jamaica." App. to Pet. for Cert. 36a.

II

Barton makes two arguments to this Court. The Court focuses on the first—that the stop-time rule will "rende[r]" a noncitizen inadmissible only if the person is actually adjudicated inadmissible based on the given offense. But whether Barton is right on that score is irrelevant because Barton's second argument—which the Court fails to grapple with meaningfully—is surely correct: At the very least, an offense cannot "rende[r]" someone inadmissible unless the Government can legally charge that noncitizen with a ground of inadmissibility. That is, the stop-time rule is consistent with basic immigration law: A noncitizen who has already been admitted, and is not seeking readmission, cannot be charged with any ground of inadmissibility and thus cannot be deemed inadmissible.

Because the stop-time rule uses the terms "removable" (*i. e.*, deportable) and "inadmissible" in the disjunctive, the Court must analyze the rule against the INA's historic two-track backdrop. That context confirms that the term "inadmissible" cannot refer to a noncitizen who, like Barton, has already been admitted and is not seeking readmission. Indeed, the terms "inadmissible" and "deportable" are mutually exclusive in removal proceedings: A noncitizen can be deemed either inadmissible or deportable, not both. § 1229a(e) (for the purposes of removal statute and § 1229b—governing cancellation of removal—a noncitizen is "inadmissible under section 1182" if "not admitted to the United States," and "deportable under section 1227" if "admitted to the United States"). For the purposes of the stop-time rule, a person is not "inadmissible" unless that person actually seeks admission, and thus is subject to charges of inadmissibility.

After all, if the provision applied to those who could hypothetically be rendered inadmissible, it could have said so. For example, the statute would have said that it applied when "the alien has committed an offense referred to in

section 1182(a)(2) of this title" that either (2) "*could render* the alien inadmissible to the United States under section 1182(a)(2) of this title" or (3) *could render* the noncitizen "removable [*i. e.*, deportable] from the United States under section 1227(a)(2) or 1227(a)(4) of this title."[2]

The Government's reading—that a noncitizen can be inadmissible under the stop-time rule without seeking admission at all—flouts basic statutory-interpretation principles. Among "the most basic interpretive canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U. S. 303, 314 (2009) (internal quotation marks and alteration omitted). Were the stop-time rule agnostic to whether the noncitizen actually seeks admission, then the rule's third clause—regarding deportability—would be meaningless. When a noncitizen is "removable"—*i. e.*, deportable—under § 1227 for an offense "referred to" in § 1182(a)(2), he or she is also "inadmissible" for an offense "referred to" in § 1182(a)(2). The third clause has meaning only if inadmissibility and deportability apply, as they always have, to separate groups of noncitizens—noncitizens seeking admission on the one hand, and noncitizens already admitted on the other.

To be sure, there are limited exceptions to the general rule that questions of admissibility apply only to noncitizens

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[2] The Court seems to suggest that the stop-time rule's tense simply mirrors § 1182(a)(2). See *ante*, at 236. It is true that § 1182(a)(2) speaks in the present tense, stating that a noncitizen "is inadmissible" if she has been "convicted of" or "admits having committed" certain offenses. § 1182(a)(2)(A)(i). But the Court's argument does not follow. Section 1182, by its terms, applies only to "[c]lasses of aliens ineligible for visas or admission." § 1182(a). Because the provision applies only to noncitizens seeking admission, it is only natural that the clause uses the present tense to describe when such a noncitizen "is inadmissible." By contrast, the stop-time rule, under the Government's and Court's reading, purports to apply to noncitizens not seeking admission at all—and who therefore could not possibly be adjudicated inadmissible.

seeking formal admission. Noncitizens applying for adjustment of status must establish admissibility. §§ 1255(a), (*l*)(2). But that is because adjustment of status is an express proxy for admission: "Congress created the [process] to enable an alien physically present in the United States to become an LPR without incurring the expense and inconvenience of traveling abroad to obtain an immigrant visa" and then presumably demonstrating admissibility on return. DHS, U. S. Citizenship and Immigration Services Policy Manual, vol. 7, pt. A, ch. 1 (2020), https://www.uscis.gov/policy-manual. Far from a "ginned-up label," *ante*, at 237, the term "constructive admission" expresses precisely how the INA conceives of adjustment of status: an admissions process that occurs inside the United States as opposed to outside of it.

Alternatively, the Government also relies on two narrow provisions of the INA applicable to "[s]pecial agricultural workers," 8 U. S. C. § 1160(a)(3)(B)(ii), and "certain entrants before January 1, 1982," § 1255a(b)(2)(B). These provisions, it argues, demonstrate that throughout the INA, inadmissibility is a status untethered to admission. But these provisions, too, refer to noncitizens seeking adjustment of status. § 1160(a)(1) (setting procedures for adjustment of status of certain noncitizens); § 1255a(a) (same).[3] Even if the Government were correct that these statutes deem a noncitizen inadmissible outside of an application for admission, its argument would rise and fall on a few provisions within the expansive INA.[4] In any event, neither of these provisions

[3] Indeed, one of the provisions suggests that, outside the context in which a noncitizen seeks adjustment of status (and thus seeks constructive admission), a noncitizen's status can be terminated "only upon a determination . . . that the alien is deportable." § 1160(a)(3)(A).

[4] The Government also notes that a noncitizen would be deportable were she inadmissible at entry (or during adjustment of status) but erroneously admitted (or allowed to adjust status). Brief for Respondent 18–19 (citing § 1227(a)(1)(A)). But this provision directly undermines the Government's reading of the statute. Were inadmissibility a status untethered

is similar in structure and purpose to the stop-time rule. Neither refers to grounds of inadmissibility and grounds of deportability in tandem. What is more, neither appears to confer or deny relief exclusively in removal proceedings—where the dichotomy between inadmissibility and deportability is most important.

By contrast, the Government concedes that the term "inadmissible" in the mandatory-detention statute—a provision structurally similar to the stop-time rule—applies only to noncitizens capable of being charged with inadmissibility. Brief for Respondent 30. That provision specifies, in relevant part, that the Government "shall take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2)" or "(C) is deportable under section 1227(a)(2)(A)(i) . . . on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year." § 1226(c)(1) (footnote omitted).

Although the term "inadmissible" in this context does not refer to an actual adjudication of inadmissibility, see *Demore*, 538 U. S., at 513, 531, the Government accepts that it must at least refer to a possible charge on a noncitizen seeking admission. Brief for Respondent 30. Otherwise, the statute would subject already-admitted noncitizens—even those who are not deportable for any criminal offense—to mandatory detention, simply because they occupy the "status" of inadmissibility. This provision's structure is virtually the same as the stop-time rule: It refers to grounds of inadmissibility and grounds of deportability separately and applies to a noncitizen in removal proceedings.

Given the similar structure, the stop-time rule should be read the same as the mandatory-detention provision: to refer

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to admission, a noncitizen inadmissible at the time of entry would always be inadmissible. But because a noncitizen who was already admitted cannot be adjudicated inadmissible, Congress made erroneous admission a ground of deportability, not inadmissibility.

to adjudications that are possible rather than impossible. If a noncitizen seeking admission has committed a crime under § 1182(a)(2) and is convicted of or admits to the offense, that offense "renders" the noncitizen "inadmissible" because the noncitizen can be charged and found inadmissible based on that crime. But such an offense does not render a noncitizen inadmissible if, like Barton, he or she was admitted years earlier and does not seek readmission. For a noncitizen who has already been admitted, Congress carved out a separate category of offenses in both the stop-time rule and the mandatory-detention provision: here, those referred to in § 1182(a)(2) that render a noncitizen deportable under §§ 1227(a)(2) and (a)(4).

III

The Court reaches a different result only by contorting the statutory language and by breezily waving away applicable canons of construction. At various points the Court seems to ignore the rule's second and third clauses entirely—clauses that, as mentioned above, distinguish between grounds of inadmissibility and grounds of deportability. The Court insists that the statute "operates like traditional criminal recidivist laws" because it precludes cancellation of removal for a noncitizen who "has committed an offense listed in § 1182(a)(2) during the initial seven years of residence." *Ante*, at 225–226; see also *ante*, at 230, 231, n. 5, 240.

Had Congress intended for commission of a crime in § 1182(a)(2) alone to trigger the stop-time rule, it would have said so. In fact, it would have stopped at the rule's first clause, which (without more) states the Court's rule: that the time of continuous residence stops whenever a noncitizen "has committed an offense referred to in section 1182(a)(2) of this title." § 1229b(d)(1).

But that reading ignores the rest of what Congress wrote. Congress specified that it is not enough for a noncitizen to commit a crime listed in § 1182(a)(2); that crime must also "rende[r] the alien inadmissible to the United States under

section 1182(a)(2) of this title" or "removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title." § 1229b(d)(1). Those words have meaning—invoking the two-track structure of the INA and the distinction between grounds of inadmissibility and grounds of deportability—and the Court cannot simply will them out of existence.

Even when the Court finally discusses the second clause, "renders the alien inadmissible," the Court raises more questions than it answers—and answers questions that it need not address at all. First, the Court claims, the clause makes clear that "cancellation of removal is precluded if a noncitizen *committed* a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton's case) the *conviction* occurred after the seven years elapsed." *Ante*, at 232. Despite the emphasis the Court lays on this point, it is irrelevant to this case: Barton does not dispute that the stop-time rule is triggered by the date of commission of a crime rather than a later date of conviction. Brief for Petitioner 9, n. 4. The question in this case is whether certain offenses can possibly render Barton inadmissible when he does not seek admission and has already been admitted—regardless of whether one looks to the date of commission or the date of conviction of those offenses.[5]

Even if this question mattered and were properly before us, Congress could have made the same point—that the stop-time rule is triggered by commission of a crime—by omitting the second and third clauses entirely. It again could have written what the Court, at various points, seems to wish it had written: The stop-time rule is triggered whenever a noncitizen "has committed an offense referred to in section

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[5] Courts have split over what event triggers the stop-time rule—commission of the offense or a second, later point at which the offense "render[s]" the noncitizen inadmissible. Brief for Momodoulamin Jobe et al. as *Amici Curiae* 12–13. Because this point about the trigger date is neither disputed here nor briefed by either party, the Court's opinion should not be read to resolve a Circuit split that is not before this Court.

1182(a)(2) of this title." The second and third clauses—which refer to later events, when a noncitizen is actually "render[ed]" inadmissible or deportable—make the Court's aside less plausible, not more.

The Court next insists that the second clause makes clear that the crime must "rende[r]" the noncitizen "inadmissible"—which, in the Court's view, requires only that a noncitizen admit the crime or be convicted of it. *Ante,* at 233. But given the INA's historic two-track structure, a noncitizen is not "render[ed]" inadmissible when convicted of an offense that cannot serve as a ground of removal at all. The Court also fails to clarify why, if conviction or admission alone renders any noncitizen inadmissible regardless of admission status, Congress chose to add a third clause referring to grounds of deportability.

Indeed, what does the Court do about the canon against surplusage? The Court does not dispute that its reading makes the entire third clause of the stop-time rule meaningless. It offers only two rejoinders: (1) that the reference to subsection (a)(4) in the third clause is superfluous under either party's reading, and (2) that a bit of surplusage makes no difference in any event. *Ante,* at 238–239. To be sure, "[s]ometimes the better overall reading of the statute contains some redundancy." *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U. S. 334, 346 (2019). But the Court relies on more than just "some redundancy." It dismisses out of hand one of only three clauses in the stop-time rule—without regard for the clause's pedigree or the core difference between deportability and inadmissibility.

It remains this Court's "'duty "to give effect, if possible, to every clause and word of a statute."'" *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955)). It must therefore be "'reluctan[t] to treat statutory terms as surplusage' in any setting," 533 U. S., at 174 (quoting *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687,

698 (1995))—especially in this context, where each word could dictate categorical ineligibility for relief from removal. It also does not matter that, as the Government points out, § 1227(a)(4) did not initially refer to any crimes cross-referenced in § 1182(a)(2). Brief for Respondent 32–33.[6] Congress' decision to make a noncitizen ineligible for cancellation based on a to-be-determined class of crimes is far different from excising and giving no meaning to an entire clause.

* * *

At bottom, the Court's interpretation is at odds with the express words of the statute, with the statute's overall structure, and with pertinent canons of statutory construction. It is also at odds with common sense. With virtually every other provision of the INA, Congress granted preferential treatment to lawfully admitted noncitizens—and most of all to LPRs like Barton. But because of the Court's opinion today, noncitizens who were already admitted to the country are treated, for the purposes of the stop-time rule, identically to those who were not—despite Congress' express references to inadmissibility and deportability. The result is that, under the Court's interpretation, an immigration judge may not even consider whether Barton is entitled to cancellation of removal—because of an offense that Congress deemed too trivial to allow for Barton's removal in the first instance. Because the Court's opinion does no justice to the INA, let alone to longtime LPRs like Barton, I respectfully dissent.

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[6] Barton acknowledges that, even now, the reference to § 1227(a)(4) "does little or no work" for a separate reason: Noncitizens who are deportable under that subsection are ineligible for cancellation of removal. Brief for Petitioner 33, n. 7. But, according to Barton, there are scenarios in which the reference to § 1227(a)(4) nevertheless "'may . . . not be a redundancy,'" *ibid.*, and perhaps for this reason, the Government does not focus on this argument in its brief.

Syllabus

GEORGIA ET AL. *v.* PUBLIC.RESOURCE.ORG, INC.

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

No. 18–1150. Argued December 2, 2019—Decided April 27, 2020

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The State of Georgia has one official code—the Official Code of Georgia Annotated (OCGA). That Code includes the text of every Georgia statute currently in force, as well as a set of non-binding annotations that appear beneath each statutory provision. The annotations typically include summaries of judicial opinions construing each provision, summaries of pertinent opinions of the state attorney general, and a list of related law review articles and other reference materials. The OCGA is assembled by the Code Revision Commission, a state entity composed mostly of legislators, funded through legislative branch appropriations, and staffed by the Office of Legislative Counsel.

The annotations in the current OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. Under the agreement, Lexis drafts the annotations under the supervision of the Commission, which specifies what the annotations must include in exacting detail. The agreement also states that any copyright in the OCGA vests in the State of Georgia, acting through the Commission.

Respondent Public.Resource.Org (PRO), a nonprofit dedicated to facilitating public access to government records and legal materials, posted the OCGA online and distributed copies to various organizations and Georgia officials. After sending PRO several cease-and-desist letters, the Commission sued PRO for infringing its copyright in the OCGA annotations. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain. The District Court sided with the Commission, holding that the annotations were eligible for copyright protection because they had not been enacted into law. The Eleventh Circuit reversed, rejecting the Commission's copyright assertion under the government edicts doctrine.

Held: The OCGA annotations are ineligible for copyright protection. Pp. 263–276.

Syllabus

(a) The government edicts doctrine developed from a trio of 19th-century cases. In *Wheaton* v. *Peters*, 8 Pet. 591, the Court held that no reporter can have a copyright in the Court's opinions and that the Justices cannot confer such a right on any reporter. In *Banks* v. *Manchester*, 128 U. S. 244, the Court held that judges could not assert copyright in "whatever work they perform in their capacity as judges"—be it "the opinion or decision, the statement of the case and the syllabus or the head note." *Id.*, at 253. Finally, in *Callaghan* v. *Myers*, 128 U. S. 617, the Court reiterated that an official reporter cannot hold a copyright interest in opinions created by judges. But, confronting an issue not addressed in *Wheaton* or *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself because they came from an author who had no authority to speak with the force of law.

The animating principle behind the government edicts doctrine is that no one can own the law. The doctrine gives effect to that principle in the copyright context through construction of the statutory term "author." For purposes of the Copyright Act, judges cannot be the "author[s]" of "whatever work they perform in their capacity" as lawmakers. *Banks*, 128 U. S., at 253. Because legislators, like judges, have the authority to make law, it follows that they, too, cannot be "authors." And, as with judges, the doctrine applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties. Pp. 263–266.

(b) Applying that framework, Georgia's annotations are not copyrightable. First, the author of the annotations qualifies as a legislator. Under the Copyright Act, the sole "author" of the annotations is the Commission, 17 U. S. C. § 201(b), which functions as an arm of the Georgia Legislature in producing the annotations. Second, the Commission creates the annotations in the discharge of its legislative duties. Pp. 267–269.

(c) Georgia argues that excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. First, it notes that § 101 lists "annotations" among the kinds of works eligible for copyright protection. That provision, however, refers only to "annotations . . . which . . . represent an original work of *authorship*." (Emphasis added.) Georgia's annotations do not fit that description because they are prepared by a legislative body that cannot be deemed the "author" of the works it creates in its official capacity. Second, Georgia draws a negative inference from the fact that the Act excludes

Syllabus

from copyright protection works prepared by Federal Government officials, without establishing a similar rule for State officials. §§ 101, 105. That rule, however, applies to all federal officials, regardless of the nature and scope of their duties. It does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States.

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices. The Compendium, however, is a nonbinding administrative manual and is largely consistent with this Court's position. Georgia also appeals to copyright policy, but such requests should be addressed to Congress, not the courts.

Georgia attempts to frame the government edicts doctrine to focus exclusively on whether a particular work has the force of law. But that understanding cannot be squared with precedent—especially *Banks*. Moreover, Georgia's conception of the doctrine as distinguishing between different categories of content with different effects has less of a textual footing than the traditional formulation, which focuses on the identity of the author. Georgia's characterization of the OCGA annotations as non-binding and non-authoritative undersells the practical significance of the annotations to litigants and citizens. And its approach would logically permit States to hide all non-binding judicial and legislative work product—including dissents and legislative history—behind a paywall. Pp. 269–276.

906 F. 3d 1229, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which BREYER, J., joined as to all but Part II–A and footnote 6, *post*, p. 276. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 292.

Joshua S. Johnson argued the cause for petitioners. With him on the briefs were *Jeremy C. Marwell*, *Matthew X. Etchemendy*, *John P. Elwood*, *Anthony B. Askew*, *Warren J. Thomas*, and *Daniel R. Ortiz*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Daniel Tenny*,

Counsel

Dana Kaersvang, *Regan A. Smith*, *Kevin R. Amer*, *Sarah T. Harris*, and *Thomas W. Krause*.

Eric F. Citron argued the cause for respondent. With him on the brief were *Thomas C. Goldstein*, *Erica Oleszczuk Evans*, and *Elizabeth H. Rader*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arkansas et al. by *Leslie Rutledge*, Attorney General of Arkansas, *Nicholas J. Bronni*, Solicitor General, *Vincent M. Wagner*, Deputy Solicitor General, and *Dylan L. Jacobs* and *Asher Steinberg*, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Karl A. Racine* of the District of Columbia; *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jim Hood* of Mississippi, *Douglas J. Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, and *Mark R. Herring* of Virginia; for the Copyright Alliance by *Nancy E. Wolff*; for the International Code Council, Inc., et al. by *James Hamilton*, *J. Kevin Fee*, *Raechel Keay Kummer*, and *Michael E. Kenneally*; for Matthew Bender & Co., Inc., by *Misha Tseytlin*, *Michael D. Hobbs*, *John M. Bowler*, and *Austin D. Padgett*; and for the Software & Information Industry Association by *Andrew J. Pincus*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David D. Cole*, *Esha Bhandari*, *Ben Wizner*, *Cecillia D. Wang*, *Sean Young*, and *Jason Schultz*; for the American Intellectual Property Association by *Brian D. Wassom* and *Sheldon H. Klein*; for the American Library Association et al. by *Jennifer M. Urban* and *Erik Stallman*; for the Caselaw Access Project by *Christopher Bavitz*; for the Center for Democracy and Technology et al. by *Marta F. Belcher*, *Lisa A. Hayes*, *Leslie M. Spencer*, and *Ilya Shapiro*; for Current and Former Government Officials by *Sarang Vijay Damle*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for the Internet Association by *Joseph C. Gratz*; for Print Disability Advocates by *Jessica P. Weber* and *Brian Wolfman*; for the R Street Institute et al. by *Charles Duan*; for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Kevin M. Goldberg*, *Bruce D. Collins*, *Marcia Hofmann*, *Barbara W. Wall*, *Kurt Wimmer*, *Marshall W. Anstandig*, *James Cregan*, *Tonda F. Rush*, *Mickey H. Osterreicher*, *Laura R. Handman*, *Thomas R. Burke*, *Bruce E. H. Johnson*, and *Bruce W. Sanford*; for the Tennessee Coalition for Open Government et al. by *G. S. Hans*; for Shyamkrishna Balganesh et al. by *Peter S. Menell*, *pro se*; for Brendan Keefe by *Paul Koster*; for Nina Mendelson et al. by *Allison*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Copyright Act grants potent, decades-long monopoly protection for "original works of authorship." 17 U. S. C. § 102(a). The question in this case is whether that protection extends to the annotations contained in Georgia's official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act's "authorship" requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.

We have previously applied that doctrine to hold that nonbinding, explanatory legal materials are not copyrightable when created *by judges* who possess the authority to make and interpret the law. See *Banks* v. *Manchester*, 128 U. S. 244 (1888). We now recognize that the same logic applies to non-binding, explanatory legal materials created *by a legislative body* vested with the authority to make law. Because Georgia's annotations are authored by an arm of the legislature in the course of its legislative duties, the government edicts doctrine puts them outside the reach of copyright protection.

M. Zieve, *Adina H. Rosenbaum*, and *Ms. Mendelson*, *pro se*; for 36 Computational Law Scholars by *Michael A. Livermore*, *pro se*; for 39 Law Students et al. by *Jef Pearlman*; and for 116 Law Librarians et al. by *Kyle K. Courtney*.

Briefs of *amici curiae* were filed for the American Society for Testing and Materials et al. by *Donald B. Verrilli, Jr.*, *Rachel G. Miller-Ziegler*, *Kelly M. Klaus*, *Anjan Choudhury*, *J. Kevin Fee*, *Jane Wise*, and *Clark Silcox*; for the National Association of Home Builders of the United States by *Amy C. Chai* and *Thomas J. Ward*; and for Next-Generation Legal Research Platforms and Databases by *Phillip R. Malone*.

I

A

The State of Georgia has one official code—the "Official Code of Georgia Annotated," or OCGA. The first page of each volume of the OCGA boasts the State's official seal and announces to readers that it is "Published Under Authority of the State."

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor's notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts. See, *e. g.*, OCGA §§ 51–1–1, 53–4–2 (2019).

The OCGA is assembled by a state entity called the Code Revision Commission. In 1977, the Georgia Legislature established the Commission to recodify Georgia law for the first time in decades. The Commission was (and remains) tasked with consolidating disparate bills into a single Code for reenactment by the legislature and contracting with a third party to produce the annotations. A majority of the Commission's 15 members must be members of the Georgia Senate or House of Representatives. The Commission receives funding through appropriations "provided for the legislative branch of state government." OCGA § 28–9–2(c) (2018). And it is staffed by the Office of Legislative Counsel, which is obligated by statute to provide services "for the legislative branch of government." §§ 28–4–3(c)(4), 28–9–4. Under the Georgia Constitution, the Commission's role in

compiling the statutory text and accompanying annotations falls "within the sphere of legislative authority." *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979).

Each year, the Commission submits its proposed statutory text and accompanying annotations to the legislature for approval. The legislature then votes to do three things: (1) "enact[ ]" the "statutory portion of the codification of Georgia laws"; (2) "merge[ ]" the statutory portion "with [the] annotations"; and (3) "publish[ ]" the final merged product "by authority of the state" as "the 'Official Code of Georgia Annotated.'" OCGA § 1–1–1 (2019); see *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1245, 1255 (CA11 2018); Tr. of Oral Arg. 8.

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Commission. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in "the State of Georgia, acting through the Commission." App. 567. Lexis and its army of researchers perform the lion's share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. See 906 F. 3d, at 1243–1244; App. 269–278, 286–427 (Commission specifications). Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated version of the statutory text available to the public online for free. A hard copy of the complete OCGA currently retails for $412.00.

B

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital

version of the OCGA on various websites, where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

In response, the Commission sent PRO several cease-and-desist letters asserting that PRO's actions constituted unlawful copyright infringement. When PRO refused to halt its distribution activities, the Commission sued PRO on behalf of the Georgia Legislature and the State of Georgia for copyright infringement. The Commission limited its assertion of copyright to the annotations described above; it did not claim copyright in the statutory text or numbering. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain.

The District Court sided with the Commission. The court acknowledged that the annotations in the OCGA presented "an unusual case because most official codes are not annotated and most annotated codes are not official." *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). But, ultimately, the court concluded that the annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law." *Ibid.* In light of that conclusion, the court granted partial summary judgment to the Commission and entered a permanent injunction requiring PRO to cease its distribution activities and to remove the digital copies of the OCGA from the internet.

The Eleventh Circuit reversed. 906 F. 3d 1229. The court began by reviewing the three 19th-century cases in which we articulated the government edicts doctrine. See *Wheaton* v. *Peters*, 8 Pet. 591 (1834); *Banks* v. *Manchester*, 128 U. S. 244 (1888); *Callaghan* v. *Myers*, 128 U. S. 617 (1888). The court understood those cases to establish a "rule" based on an interpretation of the statutory term "author" that "works created by courts in the performance of their official duties did not belong to the judges" but instead fell "in the

public domain." 906 F. 3d, at 1239. In the court's view, that rule "derive[s] from first principles about the nature of law in our democracy." *Ibid.* In a democracy, the court reasoned, "the People" are "the constructive authors" of the law, and judges and legislators are merely "draftsmen . . . exercising delegated authority." *Ibid.* The court therefore deemed the "ultimate inquiry" to be whether a work is "attributable to the constructive authorship of the People." *Id.*, at 1242. The court identified three factors to guide that inquiry: "the identity of the public official who created the work; the nature of the work; and the process by which the work was produced." *Id.*, at 1254. The court found that each of those factors cut in favor of treating the OCGA annotations as government edicts authored by the People. It therefore rejected the Commission's assertion of copyright, vacated the injunction against PRO, and directed that judgment be entered for PRO.

We granted certiorari. 588 U. S. 904 (2019).

II

We hold that the annotations in Georgia's Official Code are ineligible for copyright protection, though for reasons distinct from those relied on by the Court of Appeals. A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the "authors" of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

A

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th cen-

tury. In this Court's first copyright case, *Wheaton* v. *Peters*, 8 Pet. 591 (1834), the Court's third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices' opinions. *Id.*, at 617 (argument). In Wheaton's view, the opinions "must have belonged to some one" because "they were new, original," and much more "elaborate" than law or custom required. *Id.*, at 615. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit "gift." *Id.*, at 614. The Court unanimously rejected that argument, concluding that "no reporter has or can have any copyright in the written opinions delivered by this court" and that "the judges thereof cannot confer on any reporter any such right." *Id.*, at 668 (opinion).

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks* v. *Manchester*, 128 U. S. 244 (1888). That case concerned whether Wheaton's state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges' opinions and several non-binding explanatory materials prepared by the judges. *Id.*, at 249–251. The Court concluded that he did not, explaining that "the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note" cannot "be regarded as their author or their proprietor, in the sense of [the Copyright Act]." *Id.*, at 253. Pursuant to "a judicial *consensus*" dating back to *Wheaton*, judges could not assert copyright in "whatever work they perform in their capacity as judges." *Banks*, 128 U. S., at 253 (emphasis in original). Rather, "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." *Ibid.* (citing *Nash* v. *Lathrop*, 142 Mass. 29, 6 N. E. 559 (1886)).

In a companion case decided later that Term, *Callaghan* v. *Myers*, 128 U. S. 617 (1888), the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court re-

jected the claim that an official reporter held a copyright interest in the judges' opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. *Callaghan*, 128 U. S., at 645, 647. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to "obtain[ ] a copyright" for the materials that were "the result of his [own] intellectual labor." 128 U. S., at 647.

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the "author" of the works they prepare "in the discharge of their judicial duties." *Banks*, 128 U. S., at 253. This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi). *Ibid.* It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters. Compare *ibid.* with *Callaghan*, 128 U. S., at 647.

The animating principle behind this rule is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. *Nash*, 142 Mass., at 35, 6 N. E., at 560 (cited by *Banks*, 128 U. S., at 253–254). Our cases give effect to that principle in the copyright context through construction of the statutory term "author." *Id.*, at 253.[1] Rather than attempting to catalog the materials that consti-

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[1] The Copyright Act of 1790 granted copyright protection to "the author and authors" of qualifying works. Act of May 31, 1790, § 1, 1 Stat. 124. This author requirement appears in the current Copyright Act at § 102(a), which limits protection to "original works of *authorship*." 17 U. S. C. § 102(a) (emphasis added); see also § 201(a) (copyright "vests initially in the author or authors of the work").

tute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "*whatever work* they perform in their capacity" as lawmakers. *Ibid.* (emphasis added). Because these officials are generally empowered to make and interpret law, their "whole work" is deemed part of the "authentic exposition and interpretation of the law" and must be "free for publication to all." *Ibid.*

If judges, acting as judges, cannot be "authors" because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials. See, *e. g.*, *Nash*, 142 Mass., at 35, 6 N. E., at 560 (judicial opinions and statutes stand "on substantially the same footing" for purposes of the government edicts doctrine); *Howell* v. *Miller*, 91 F. 129, 130–131, 137–138 (CA6 1898) (Harlan, Circuit Justice, joined by then-Circuit Judge Taft) (analyzing statutes and supplementary materials under *Banks* and *Callaghan* and concluding that the materials were copyrightable because they were prepared by a private compiler).

Moreover, just as the doctrine applies to "whatever work [judges] perform in their capacity as judges," *Banks*, 128 U. S., at 253, it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the "whole work done by [legislators]," so they must be "free for publication to all." *Ibid.*

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

B

1

Applying that framework, Georgia's annotations are not copyrightable. The first step is to examine whether their purported author qualifies as a legislator.

As we have explained, the annotations were prepared in the first instance by a private company (Lexis) pursuant to a work-for-hire agreement with Georgia's Code Revision Commission. The Copyright Act therefore deems the Commission the sole "author" of the work. 17 U. S. C. § 201(b). Although Lexis expends considerable effort preparing the annotations, for purposes of copyright that labor redounds to the Commission as the statutory author. Georgia agrees that the author is the Commission. Brief for Petitioners 25.

The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being "merged" with the statutory text and published in the official code alongside that text at the legislature's direction. OCGA § 1–1–1; see 906 F. 3d, at 1245, 1255; Tr. of Oral Arg. 8.

If there were any doubt about the link between the Commission and the legislature, the Georgia Supreme Court has dispelled it by holding that, under the Georgia Constitution, "the work of the Commission; *i. e.*, selecting a publisher and contracting for and supervising the codification of the laws enacted by the General Assembly, including court interpretations thereof, *is within the sphere of legislative authority.*" *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34 (emphasis added). That holding is not limited to the Commission's role in codifying the statutory text. The

Commission's "legislative authority" specifically includes its "codification of . . . court interpretations" of the State's laws. *Ibid.* Thus, as a matter of state law, the Commission wields the legislature's authority when it works with Lexis to produce the annotations. All of this shows that the Commission serves as an extension of the Georgia Legislature in preparing and publishing the annotations. And it helps explain why the Commission brought this suit asserting copyright in the annotations "on behalf of and for the benefit of" the Georgia Legislature and the State of Georgia. App. 20.[2]

2

The second step is to determine whether the Commission creates the annotations in the "discharge" of its legislative "duties." *Banks*, 128 U. S., at 253. It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the annotations is under Georgia law an act of "legislative authority," *Harrison Co.*, 244 Ga., at 330, 260 S. E. 2d, at 34, and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and JUSTICE GINSBURG emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. See *post*, at 294–295 (dissenting opinion). But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the "statement of the case and the syllabus or head note" prepared by judges fall within the "work they perform in their capacity as judges," *Banks*, 128 U. S., at 253, so too annotations published by legislators

[2] JUSTICE THOMAS does not dispute that the Commission is an extension of the legislature; he instead faults us for highlighting the multiple features of the Commission that make clear that this is so. See *post*, at 291 (dissenting opinion).

alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission's role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia's Official Code fall within the government edicts doctrine and are not copyrightable.

III

Georgia resists this conclusion on several grounds. At the outset, Georgia advances two arguments for why, in its view, excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright Act. Both are unavailing.

First, Georgia notes that § 101 of the Act specifically lists "annotations" among the kinds of works eligible for copyright protection. But that provision refers only to "annotations . . . which . . . represent an original work of *authorship*." 17 U. S. C. § 101 (emphasis added). The whole point of the government edicts doctrine is that judges and legislators cannot serve as authors when they produce works in their official capacity. While the reference to "annotations" in § 101 may help explain why supplemental, explanatory materials are copyrightable when prepared by a private party, or a non-lawmaking official like the reporter in *Callaghan*, it does not speak to whether those same materials are copyrightable when prepared by a judge or a legislator. In the same way that judicial materials are ineligible for protection even though they plainly qualify as "[l]iterary works . . . expressed in words," *ibid.*, legislative materials are ineligible for protection even if they happen to fit the description of otherwise copyrightable "annotations."

Second, Georgia draws a negative inference from the fact that the Act excludes from copyright protection "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties" and does not

establish a similar rule for the States. § 101; see also § 105. But the bar on copyright protection for federal works sweeps much more broadly than the government edicts doctrine does. That bar applies to works created by all federal "officer[s] or employee[s]," without regard for the nature of their position or scope of their authority. Whatever policy reasons might justify the Federal Government's decision to forfeit copyright protection for its own proprietary works, that federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States. That doctrine does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on.

More generally, Georgia suggests that we should resist applying our government edicts precedents to the OCGA annotations because our 19th-century forebears interpreted the statutory term author by reference to "public policy"—an approach that Georgia believes is incongruous with the "modern era" of statutory interpretation. Brief for Petitioners 21 (internal quotation marks omitted). But we are particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted. As we explained last Term in *Helsinn Healthcare S. A.* v. *Teva Pharmaceuticals USA, Inc.*, 586 U. S. 123 (2019), when Congress "adopt[s] the language used in [an] earlier act," we presume that Congress "adopted also the construction given by this Court to such language, and made it a part of the enactment." *Id.*, at 131 (quoting *Shapiro* v. *United States*, 335 U. S. 1, 16 (1948)). A century of cases have rooted the government edicts doctrine in the word "author," and Congress has repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning, and "critics of our ruling can take their objections across the street, [where]

Congress can correct any mistake it sees." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015).[3]

Moving on from the text, Georgia invokes what it views as the official position of the Copyright Office, as reflected in the Compendium of U. S. Copyright Office Practices (Compendium). But, as Georgia concedes, the Compendium is a non-binding administrative manual that at most merits deference under *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). That means we must follow it only to the extent it has the "power to persuade." *Id.*, at 140. Because our precedents answer the question before us, we find any competing guidance in the Compendium unpersuasive.

In any event, the Compendium is largely consistent with our decision. Drawing on *Banks*, it states that, "[a]s a matter of longstanding public policy, the U. S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, *or similar types of official legal materials*." Compendium § 313.6(C)(2) (rev. 3d ed. 2017) (emphasis added). And, under *Banks*, what counts as a "similar" ma-

[3] JUSTICE THOMAS disputes the applicability of the *Helsinn Healthcare* presumption because States have asserted copyright in statutory annotations over the years notwithstanding our government edicts precedents. *Post*, at 286–287. In JUSTICE THOMAS's view, those assertions prove that our precedents could not have provided clear enough guidance for Congress to incorporate. But that inference from state behavior proves too much. The same study cited by JUSTICE THOMAS to support a practice of claiming copyright in non-binding *annotations* also reports that "many states claim copyright interest in their *primary* law materials," including statutes and regulations. Dmitrieva, State Ownership of Copyrights in Primary Law Materials, 23 Hastings Com. & Entertainment L. J. 81, 109 (2000) (emphasis added). JUSTICE THOMAS concedes that such assertions are plainly foreclosed by our government edicts precedents. *Post*, at 279. That interested parties have pursued ambitious readings of our precedents does not mean those precedents are incapable of providing meaningful guidance to us or to Congress.

terial depends on what kind of officer created the material (*i. e.*, a judge) and whether the officer created it in the course of official (*i. e.*, judicial) duties. See Compendium § 313.6(C)(2) (quoting *Banks*, 128 U. S., at 253, for the proposition that copyright cannot vest "in the products of the labor done by judicial officers in the discharge of their judicial duties").

The Compendium goes on to observe that "the Office may register annotations that summarize or comment upon legal materials . . . unless the annotations themselves have the force of law." § 313.6(C)(2). But that broad statement—true of annotations created by officials such as court reporters that lack the authority to make or interpret the law—does not engage with the critical issue of annotations created *by judges or legislators* in their official capacities. Because the Compendium does not address that question and otherwise echoes our government edicts precedents, it is of little relevance here.

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred* v. *Ashcroft*, 537 U. S. 186, 212 (2003). And that principle requires adherence to precedent when, as here, we have construed the statutory text and "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at 456.

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has "the force of law." Brief for Petitioners 32 (capitalization deleted). JUSTICE THOMAS

appears to endorse the same view. See *post*, at 279. But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases—especially *Banks*. *Banks*, following *Wheaton* and the "judicial consensus" it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. 128 U. S., at 253 (emphasis deleted). As every judge learns the hard way, "comments in [a] dissenting opinion" about legal principles and precedents "are just that: comments in a dissenting opinion." *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 177, n. 10 (1980). Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law.

Indeed, *Banks* went even further and withheld copyright protection from headnotes and syllabi produced by judges. 128 U. S., at 253. Surely these supplementary materials do not have the force of law, yet they are covered by the doctrine. The simplest explanation is the one *Banks* provided: These non-binding works are not copyrightable because of who creates them—judges acting in their judicial capacity. See *ibid.*

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee reports. Under the logic of Georgia's "force of law" test, States would own such materials and could charge the public for access to them.

Furthermore, despite Georgia's and JUSTICE THOMAS's purported concern for the text of the Copyright Act, their conception of the government edicts doctrine has *less* of a textual footing than the traditional formulation. The textual basis for the doctrine is the Act's "authorship" requirement, which unsurprisingly focuses on—the author. JUSTICE THOMAS urges us to dig deeper to "the root" of our

government edicts precedents. *Post*, at 280. But, in our view, the text *is* the root. The Court long ago interpreted the word "author" to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act. This textual foundation explains why the doctrine distinguishes between some authors (who are empowered to speak with the force of law) and others (who are not). Compare *Callaghan*, 128 U. S., at 647, with *Banks*, 128 U. S., at 253. But the Act's reference to "authorship" provides no basis for Georgia's rule distinguishing between different categories of content with different effects.[4]

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia

[4] Instead of accepting our predecessors' textual reasoning at face value, JUSTICE THOMAS conjures a trinity of alternative "origin[s] and justification[s]" for the government edicts doctrine that the Court *might* have had in mind. See *post*, at 280–282. Without committing to one or all of these possibilities, JUSTICE THOMAS suggests that each would yield a rule that requires federal courts to pick out the subset of judicial and legislative materials that independently carry the force of law. But a Court motivated by JUSTICE THOMAS's three-fold concerns might just as easily have read them as supporting a rule that prevents the officials responsible for creating binding materials from qualifying as an "author." Regardless, it is more "[ ]consistent with the judicial role" to apply the reasoning and results the Court voted on and committed to writing than to speculate about what practical considerations our predecessors "may have had . . . in mind," what history "may [have] suggest[ed]," or what constitutional concerns "may have animated" our government edicts precedents. *Ibid.*

Supreme Court. See OCGA §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at www.legis.ga.gov). Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal. See §§21–2–131, 16–6–2, 16–6–18, 16–15–9 (available at https://store.lexisnexis.com/products/official-code-of-georgia-annotated-skuSKU-6647 for $412.00).

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today's digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century. 17 U. S. C. §§102, 106, 302. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges' and legislators' non-binding legal works would be copyrighted. And citizens, attorneys, nonprofits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. §§501–506. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. Cf. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 552, 560–561 (1985). The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns—the one we are already on. Instead of examining whether given material carries "the force of law," we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

* * *

For the foregoing reasons, we affirm the judgment of the Eleventh Circuit.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, and with whom JUSTICE BREYER joins as to all but Part II–A and footnote 6, dissenting.

According to the majority, this Court's 19th-century "government edicts" precedents clearly stand for the proposition that "judges and legislators cannot serve as authors [for copyright purposes] when they produce works in their official capacity." *Ante*, at 269. And, after straining to conclude that the Georgia Code Revision Commission (Commission) is an arm of the Georgia Legislature, *ante*, at 267–268, the majority concludes that Georgia cannot hold a copyright in the annotations that are included as part of the Official Code of Georgia Annotated (OCGA). This ruling will likely come as a shock to the 25 other jurisdictions—22 States, 2 Territories, and the District of Columbia—that rely on arrangements similar to Georgia's to produce annotated codes. See Brief for State of Arkansas et al. as *Amici Curiae* 15, and App. to *id.*, at 1. Perhaps these jurisdictions all overlooked this Court's purportedly clear guidance. Or perhaps the widespread use of these arrangements indicates that today's decision extends the government edicts doctrine to a new context, rather than simply "confirm[ing]" what the prece-

dents have always held. See *ante*, at 263. Because I believe we should "leave to Congress the task of deciding whether the Copyright Act needs an upgrade," *American Broadcasting Cos.* v. *Aereo, Inc.*, 573 U. S. 431, 463 (2014) (Scalia, J., dissenting), I respectfully dissent.

I

Like the majority, I begin with the three 19th-century precedents that the parties agree provide the foundation for the government edicts doctrine.

In *Wheaton* v. *Peters*, 8 Pet. 591 (1834), the Court first regarded it as self-evident that judicial opinions cannot be copyrighted either by the judges who signed them or by a reporter under whose auspices they are published. Congress provided that, in return for a salary of $1,000, the Reporter of Decisions for this Court would prepare reports consisting of judicial opinions and additional materials summarizing the cases. *Id.*, at 614, 617 (argument). Wheaton, one of this Court's earliest Reporters, argued that he owned a copyright for the entirety of his reports. He contended that he had "acquired the right to the opinions by judges' gift" once they became a part of his volume. *Id.*, at 614 (same). The Court ultimately remanded on the question whether Wheaton had complied with the Copyright Act's procedural requirements. *Id.*, at 667–668. In doing so, it observed in dicta that "the court [was] unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.*, at 668.

Fifty-four years later, the Court returned to the same subject, suggesting a doctrinal basis for the rule that judicial opinions and certain closely related materials cannot be copyrighted. In *Banks* v. *Manchester*, 128 U. S. 244 (1888), the state-authorized publisher of the Ohio Supreme Court's decisions, Banks & Brothers, sued a competing publisher for

copyright infringement. The competing publisher reproduced portions from Banks' reports, including Ohio Supreme Court decisions, statements of the cases, and syllabi, all of which were originally prepared by the opinion's authoring judge. This Court held that these materials were not the proper subject of copyright. In reaching that conclusion, the Court grounded its analysis in its interpretation of the word "author" in the Copyright Act. It anchored this interpretation in the "public policy" that "the judge who, in his judicial capacity, prepares the opinion or decision [and other materials]" is not "regarded as their author or their proprietor, in the sense of [the Copyright Act], so as to be able to confer any title by assignment." *Banks*, 128 U. S., at 253. The Court supported this conclusion by stating that "there has always been a judicial consensus . . . that no copyright could[,] under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." *Ibid.* (emphasis deleted). And the Court observed that this rule reflected the view that the "authentic exposition and interpretation of the law . . . is free for publication to all," which in turn prevents a judge from qualifying as an author. *Ibid.*

Importantly, the Court also briefly discussed whether the State of Ohio could directly hold the copyright. In answering this question, the Court did not suggest that States were categorically prohibited from holding copyrights as authors or assignees. Instead, the Court simply noted that the State fell outside the scope of the Act because it was not a "resident" or "citizen of the United States," as then required by statute, and because it did not meet other statutory criteria. *Ibid.* The Court felt it necessary to observe, however, that "[w]hether the State could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States or a resident therein, who should be the author of a book, is a question not involved in the present case, and we refrain from considering it." *Ibid.*

Finally, in *Callaghan* v. *Myers*, 128 U. S. 617 (1888), the Court addressed the limits of the government edicts doctrine. In that case, the Court settled another dispute between a publisher of court decisions and an alleged infringer. The plaintiff purchased the proprietary rights to the reports prepared by the Illinois Supreme Court's reporter of decisions, Freeman, including the copyright to the reports. Unlike in *Banks*, these reports also contained material authored by Freeman. *Callaghan*, 128 U. S., at 645. The alleged infringers copied the judicial decisions and Freeman's materials. In finding for the plaintiff, this Court reiterated that "there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges." *Id.*, at 647 (citing *Banks*, 128 U. S. 244). But the Court concluded that "no [similar] ground of public policy" justified denying a state official a copyright "cover[ing] the matter which is the result of his intellectual labor." *Callaghan*, 128 U. S., at 647.

II

These precedents establish that judicial opinions cannot be copyrighted. But they do not exclude from copyright protection notes that are prepared by an official court reporter and published together with the reported opinions. There is no apparent reason why the same logic would not apply to statutes and regulations. Thus, it must follow from our precedents that statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be. See *Howell* v. *Miller*, 91 F. 129 (CA6 1898) (Harlan, J.) (explaining that, under *Banks* and *Callaghan*, annotations to Michigan statutes could be copyrighted).

A

It is fair to say that the Court's 19th-century decisions do not provide any extended explanation of the basis for the government edicts doctrine. The majority is nonetheless content to accept these precedents reflexively, without examining the origin or validity of the rule they announced. For

the majority, it is enough that the precedents established a rule that "seemed too obvious to adorn with further explanation." *Ante*, at 264. But the contours of the rule were far from clear, and to understand the scope of the doctrine, we must explore its underlying rationale.

In my view, the majority's uncritical extrapolation of precedent is inconsistent with the judicial role. An unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statutes alike. Although we have not been asked to revisit these precedents, it behooves us to explore the origin of and justification for them, especially when we are asked to apply their rule for the first time in over 130 years.

The Court's precedents suggest three possible grounds supporting their conclusion. In *Banks*, the Court referred to the meaning of the term "author" in copyright law. While the Court did not develop this argument, it is conceivable that the contemporaneous public meaning of the term "author" was narrower in the copyright context than in ordinary speech. At the time this Court decided *Banks*, the Copyright Act provided protection for books, maps, prints, engravings, musical and dramatic compositions, photographs, and works of art.[1] Judicial opinions differ markedly from these works. Books, for instance, express the thoughts of their authors. They typically have no power beyond the ability of their words to influence readers, and they usually are published at private expense. Judicial opinions, on the other hand, do not simply express the thoughts of the judges who write or endorse them. Instead, they elaborate and apply rules of law that, in turn, represent the implementation of the will of the people. Unlike other copyrightable works of authorship, judicial opinions have binding legal effect, and they are produced and issued at public expense.

[1] See 1 Stat. 124; ch. 36, 2 Stat. 171; ch. 16, 4 Stat. 436; ch. 169, 11 Stat. 138–139; ch. 126, 13 Stat. 540; ch. 230, 16 Stat. 212.

Moreover, copyright law understands an author to be one whose work will be encouraged by the grant of an exclusive right. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 579 U. S. 197, 204 (2016). But judges, when acting in an official capacity, do not fit that description. The Court in *Banks* may have had these differences in mind when it concluded that a judge fell outside the scope of the term "author." 128 U. S., at 253.

History may also suggest a narrower meaning of "author" in the copyright context. In England, at least as far back as 1666, courts and commentators agreed "that the property of all law books is in the king, because he pays the judges who pronounce the law." G. Curtis, Law of Copyright 130 (1847); see also *Banks & Bros.* v. *West Publishing Co.*, 27 F. 50, 57 (CC Minn. 1886) (citing English cases and treatises and concluding that "English courts generally sustain the crown's proprietary rights in judicial opinions"). Blackstone described this as a "prerogative copyrigh[t]," explaining that "[t]he king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council." 2 W. Blackstone, Commentaries on the Laws of England 410 (1766) (emphasis deleted); see also *Wheaton*, 8 Pet., at 659–660. This history helps to explain the dearth of cases permitting individuals to obtain copyrights in judicial opinions. But under the Constitution, sovereignty lies with the people, not a king. See The Federalist No. 22, p. 152 (C. Rossiter ed. 1961); *id.*, No. 39, at 241. The English historical practice, when superimposed on the Constitution's recognition that sovereignty resides in the people, helps to explain the Court's conclusion that the "authentic exposition and interpretation of the law . . . is free for publication to all." *Banks*, 128 U. S., at 253.

Finally, concerns of fair notice, often recognized by this Court's precedents as an important component of due proc-

ess, also may have animated the reasoning of these 19th-century cases. As one court put it, "[t]he decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. . . . Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions." *Nash* v. *Lathrop*, 142 Mass. 29, 35, 6 N. E. 559, 560 (1886) (cited in *Banks*, 128 U. S., at 253–254); see also *American Soc. for Testing and Materials* v. *Public.Resource.Org, Inc.*, 896 F. 3d 437, 458–459 (CADC 2018) (Katsas, J., concurring).

B

Allowing annotations to be copyrighted does not run afoul of any of these possible justifications for the government edicts doctrine. First, unlike judicial opinions and statutes, these annotations do not even purport to embody the will of the people because they are not law. The General Assembly of Georgia has made abundantly clear through a variety of provisions that the annotations do not create any binding obligations. OCGA § 1–1–7 states that "[a]ll historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and do not constitute part of the law." Section 1–1–1 further provides that "[t]he statutory portion of the codification of Georgia laws . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations . . . and other materials . . . and shall be published by authority of the state." Thus, although the materials "merge" prior to publication in the "official" code, the very provision calling for that merger makes clear that the annotations serve as commentary, not law.

As additional evidence that the annotations do not represent the will of the people, the General Assembly does not

enact statutory annotations under its legislative power. See Ga. Const., Art. III, § 1, ¶1 (vesting the legislative power in the General Assembly). To enact state law, Georgia employs a process of bicameralism and presentment similar to that embodied in the United States Constitution. See Ga. Const., Art. III, § 5; Art. V, § 2, ¶4. The annotations do not go through this process, a fact that even the majority must acknowledge. *Ante*, at 268; Ga. S. 52, Reg. Sess., § 54(b) (2019–2020) ("Annotations . . . except as otherwise provided in the Code . . . are not enacted as statutes by the provisions of this Act").

Second, unlike judges and legislators, the creators of annotations are incentivized by the copyright laws to produce a desirable product that will eventually earn them a profit. And though the Commission may require Lexis to follow strict guidelines, the independent synthesis, analysis, and creative drafting behind the annotations makes them analogous to other copyrightable materials. See Brief for Matthew Bender & Co., Inc., as *Amicus Curiae* 4–7.

Lastly, the annotations do not impede fair notice of the laws. As just stated, the annotations do not carry the binding force of law. They simply summarize independent sources of legal information and consolidate them in one place. Thus, OCGA annotations serve a similar function to other copyrighted research tools provided by private parties such as the American Law Reports and Westlaw, which also contain information of great "practical significance." *Ante*, at 274. Compare, *e. g.*, OCGA § 34–9–260 (annotation for *Cho Carwash Property, L. L. C.* v. *Everett*, 326 Ga. App. 6, 755 S. E. 2d 823 (2014)) with Ga. Code Ann. § 34–9–260 (Westlaw's annotation for the same).

The majority resists this conclusion, suggesting that without access to the annotations, readers of Georgia law will be unable to fully understand the true meaning of Georgia's statutory provisions, such as provisions that have been un-

dermined or nullified by court decisions. *Ante*, at 274–275. That is simply incorrect. As the majority tacitly concedes, a person seeking information about changes in Georgia statutory law can find that information by consulting the original source for the change in the law's status—the court decisions themselves. See *ibid.* The inability to access the OCGA merely deprives a researcher of one specific tool, not to the underlying factual or legal information summarized in that tool. See also *post*, at 295 (GINSBURG, J., dissenting).[2]

C

The text of the Copyright Act supports my reading of the precedents.[3] Specifically, there are four indications in the

[2] The majority contends that, rather than seeking to understand the origins of our precedents, we should simply accept the text of the opinions that the Justices "voted on and committed to writing." *Ante*, at 274, n. 4. But that begs the question: What does the text of the relevant opinions tell us? The answer is not much. It is precisely this lack of explication that makes it necessary to explore the "judicial *consensus*" and public policy referred to in *Banks* v. *Manchester*, 128 U. S. 244, 253 (1888). Instead, the majority attempts to dissect the language of our prior opinions in the same way it would interpret a statute, an approach we have repeatedly cautioned against. See *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 515 (1993); *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 341 (1979). The proper approach is to "read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004); see also *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821) (Marshall, C. J., for the Court) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").

[3] As the majority explains, *ante*, at 267, the annotations were created as part of a work-for-hire agreement between the Commission and Lexis. See 17 U. S. C. § 201(b). Because no party disputes the validity of the contract, I express no opinion regarding whether the contract established an employer/employee relationship or whether the Commission may be considered a "person" under § 201(b).

text of the Copyright Act that the OCGA annotations are copyrightable. As an initial matter, the Act does not define the word "author," 17 U. S. C. § 101, or make any reference to the government edicts doctrine. Accordingly, the term "author" itself does not shed any light on whether the doctrine covers statutory annotations. Second, while the Act excludes from copyright protection "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties," § 101; see also § 105, the Act contains no similar prohibition against works of state governments or works prepared at their behest. "Congress' use of explicit language in one provision cautions against inferring the same limitation" elsewhere in the statute. *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. 26, 34 (2016) (internal quotation marks omitted); *Pacific Operators Offshore, LLP* v. *Valladolid*, 565 U. S. 207, 216 (2012). Third, the Act specifically notes that annotations are copyrightable derivative works. § 101. Here, again, the Act does not expressly exclude from copyright protection annotations created either by the State or at the State's request. Fourth, the Act provides that an author may hold a copyright in "material contributed" in a derivative work, "as distinguished from the preexisting material employed in the work." § 103(b); see also *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 359 (1991). These aspects of the statutory text, taken together, further support the conclusion that the OCGA annotations are copyrightable.

For all these reasons, I would conclude that, as with the privately created annotations in *Callaghan*, Georgia's statutory annotations at issue in this case are copyrightable.

III

The majority reads this Court's precedents differently. In its view, the Court in *Banks* held that judges are not "authors" within the scope of the Copyright Act for "whatever

work they perform in their capacity as judges," 128 U. S., at 253, so the same must be true for legislators, see *ante*, at 266. Accordingly, works created by legislators in their legislative capacity are not "original works of authorship," § 102, and therefore cannot be copyrighted. This argument is flawed in multiple respects.

A

Most notably, the majority's textual analysis hinges on accepting that its construction of "authorship," *i. e.*, all works produced in a judge's or legislator's official capacity, was so well established by our 19th-century precedents that Congress incorporated it into the multiple revisions of the Copyright Act. See *ante*, at 270–271. Such confidence is questionable, to say the least.

The majority's understanding of the government edicts doctrine seems to have been lost on dozens of States and Territories, as well as the lower courts in this case. As already stated, the 25 jurisdictions with official annotated codes apparently did not view this Court's precedents as establishing the "official duties" definition of authorship. See Brief for State of Arkansas et al. as *Amici Curiae*.[4] And if

[4] According to one study published in 2000, approximately half of States owned copyright in official state statutory compilations, court reports, or administrative regulations. Dmitrieva, State Ownership of Copyrights in Primary Law Materials, 23 Hastings Com. & Entertainment L. J. 81, 83, 97–105 (2000). The majority attempts to undermine this study by emphasizing that some of these States owned copyright in primary law materials. *Ante*, at 271, n. 3. This misunderstands the point. I do not claim that this evidence demonstrates that the States necessarily interpreted the government edicts doctrine correctly. I merely point out that these divergent practices seriously undercut the majority's claim that its interpretation of "authorship" was well settled and universally understood. On this score, the majority has no answer but to insinuate that the lawmakers of over half the Nation's jurisdictions disregarded federal law and the Constitution to pursue their own agendas in the face of supposedly clear precedent.

"our precedents answer the question" so clearly, *ante*, at 271, one wonders why the Eleventh Circuit reached its conclusion in such a roundabout fashion. Rather than following the majority's "straightforward" path, *ante*, at 263, the Eleventh Circuit looked to the "zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not" to determine whether the annotations were "sufficiently law-like" to be "constructively authored by the People." *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1233, 1242, 1243 (2018). The District Court likewise does not appear to have viewed the question as well settled. In a cursory analysis, it determined that the annotations were copyrightable based on *Callaghan*. *Code Revision Comm'n* v. *Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1356 (ND Ga. 2017). It is risible to presume that Congress had knowledge of and incorporated a "settled" meaning that eluded a multitude of States and Territories, as well as at least four Article III judges. *Ante*, at 270–271. Cf. *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U. S. 334, 344–345 (2019).

This presumption of congressional knowledge also provides the basis for the majority's conclusion that the annotations are not "original works of authorship." See *ante*, at 269–270 (discussing § 101). Stripped of the fiction that this Court's 19th-century precedents clearly demonstrated that "authorship" encompassed all works performed as part of a legislator's duties, the majority's textual argument fails.

The majority does not confront this criticism head on. Instead, it simply repeats, without any further elaboration, its unsupported conclusion that "[t]he Court long ago interpreted the word 'author' to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act." *Ante*, at 274. This wave of the "magic wand of *ipse dixit*" does nothing to strengthen the majority's argument,

and in fact only serves to underscore its weakness. *United States* v. *Yermian*, 468 U. S. 63, 77 (1984) (Rehnquist, J., dissenting).[5]

B

In addition to its textual deficiencies, the majority's understanding of this Court's precedents fails to account for the critical differences between the role that judicial opinions play in expounding upon the law compared to that of statutes. The majority finds it meaningful, for instance, that *Banks* prohibited dissents and concurrences from being copyrighted, even though they carry no legal force. *Ante*, at 273. At an elementary level, it is true that the judgment is the only part of a judicial decision that has legal effect. But it blinks reality to ignore that every word of a judicial opinion—whether it is a majority, a concurrence, or a dissent—expounds upon the law in ways that do not map neatly on to the legislative function. Setting aside summary decisions, the reader of a judicial opinion will always gain critical insight into the reasoning underlying a judicial holding by reading all opinions in their entirety. Understanding the reasoning that animates the rule in turn provides pivotal insight into how the law will likely be applied in future judicial opinions.[6] Thus, deprived of access to judicial opinions, indi-

[5] The majority's approach is also hard to reconcile with the recognition in *Wheaton* v. *Peters*, 8 Pet. 591 (1834), that annotations prepared by the Reporter of Decisions could be copyrighted. Wheaton was paid a salary of $1,000, and it is difficult to say whether this salary funded his work on the opinions or his work on the annotations. See *id.*, at 614, 617 (argument).

[6] For instance, this Court has not overruled *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), which pronounced a test for evaluating Establishment Clause claims. But a reader would do well to carefully scrutinize the various opinions in *American Legion* v. *American Humanist Assn.*, 588 U. S. 29 (2019), to understand the markedly different way that this precedent functions in our current jurisprudence compared to when it was first decided. Moreover, sometimes a separate writing takes on canonical status, like Justice Jackson's concurrence regarding the executive power in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 634–638 (1952)

viduals cannot access the primary, and therefore best, source of information for the meaning of the law.[7] And as true as that is today, access to these opinions was even more essential in the 19th century before the proliferation of federal

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(opinion concurring in judgment and opinion of the Court); see also *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring) (reasonable expectation of privacy Fourth Amendment test). Still other times, the reasoning in an opinion for less than a majority of the Court provides the explicit basis for a later majority's holding. See, *e. g.*, *McKinney* v. *Arizona*, 589 U. S. 139, 145 (2020) (discussing *Ring* v. *Arizona*, 536 U. S. 584, 612 (2002) (Scalia, J., concurring)); *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (incorporating into the majority the Eighth Amendment "'evolving standards of decency'" test first announced in *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). Even "'comments in [a] dissenting opinion,'" *ante*, at 273, sometimes reemerge as the foundational reasoning in a majority opinion. See, *e. g.*, *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 237 (2019) (discussing *Nevada* v. *Hall*, 440 U. S. 410, 433–439 (1979) (Rehnquist, J., dissenting)); *Lawrence* v. *Texas*, 539 U. S. 558, 578 (2003) ("JUSTICE STEVENS' [dissenting] analysis, in our view, should have been controlling in *Bowers* [v. *Hardwick*, 478 U. S. 186 (1986),] and should control here"). These examples, and myriad more, demonstrate that the majority treats the role of separate judicial opinions in an overly simplistic fashion.

[7] *Banks* also stated that judicially prepared syllabi and headnotes cannot be copyrighted. 128 U. S., at 253. The majority cites these materials as further evidence of its broad rule, because the majority finds it beyond cavil that "these supplementary materials do not have the force of law." *Ante*, at 273. The majority feels it appropriate to assume—without any historical inquiry—that the words "syllabus" and "headnote" carried the same meaning, or served the same function, in 1888 as they do now. Without briefing on this issue, I am not willing to make that leap. See *Hixson* v. *Burson*, 54 Ohio St. 470, 485, 43 N. E. 1000, 1003 (1896) ("reluctantly overrul[ing] the second syllabus" of a previous decision); *Holliday* v. *Brown*, 34 Neb. 232, 234, 51 N. W. 839, 840 (1892) ("It is an unwritten rule of this court that members thereof are bound only by the points as stated in the syllabus of each case"); see also *Frazier* v. *State*, 15 Ga. App. 365, 365–367, 83 S. E. 273, 273–274 (1914) (clarifying the meaning of a court-written headnote and emphasizing that to understand an opinion's meaning, the headnote and opinion must be read together); *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906) (acknowledging that some state statutes rendered headnotes the work of the court carrying legal force).

and state regulatory law fundamentally altered the role that common-law judging played in expounding upon the law. See also *post*, at 293 (GINSBURG, J., dissenting).

These differences provide crucial context for *Banks*' reasoning. Specifically, to ensure that judicial "exposition and interpretation of the law" remains "free for publication to all," the word "author" must be read to encompass all judicial duties. *Banks*, 128 U. S., at 253. But these differences also demonstrate that the same rule does not *a fortiori* apply to all legislative duties.[8]

C

In addition to being flawed as a textual and precedential matter, the majority's rule will prove difficult to administer. According to one group of *amici*, nearly all jurisdictions with annotated codes use private contractors that "almost invariably prepare [annotations] under the supervision of legislative-branch or judicial-branch officials, including state legislators or state-court judges." Brief for State of Arkansas et al. as *Amici Curiae* 16–17. Under the majority's view, any one of these commissions or counsels could potentially be reclassified as an "adjunct to the legislature." *Ante*, at 269. But the majority's test for ascertaining the true nature of these commissions raises far more questions than it answers.

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[8] Although legislative history is not at issue in this case, the majority also contends that its rule is necessary to fend off the possibility that "[a] State could monetize its entire suite of legislative history." *Ante*, at 275. Putting aside the jurisprudential debate over the use of such materials in interpreting federal statutes, many States can, and have, specifically authorized courts to consider legislative history when construing statutes. See, *e. g.*, Colo. Rev. Stat. § 2–4–203(1)(c) (2019); Iowa Code § 4.6(3) (2019); Minn. Stat. § 645.16(7) (2018); N. M. Stat. Ann. § 12–2A–20(C)(2) (2019); N. D. Cent. Code Ann. § 1–02–39(3) (2019); Ohio Rev. Code Ann. § 1.49(C) (Lexis Supp. 2019); 1 Pa. Cons. Stat. § 1921(c)(7) (2016). Given the direct role that legislative history plays in the construction of statutes in these States, it is hardly clear that such States could subject their legislative histories to copyright.

The majority lists a number of factors—including the Commission's membership and funding, how the annotations become part of the OCGA, and descriptions of the Commission from court cases—to support its conclusion that the Commission is really part of the legislature. See *ante*, at 267–268. But it does not specify whether these factors are exhaustive or illustrative and, if the latter, what other factors may be important. The majority also does not specify whether some factors weigh more heavily than others when deciding whether to deem an oversight body a legislative adjunct.

And even when the majority does list concrete factors, pivotal guidance remains lacking. For example, the majority finds it meaningful that 9 out of the Commission's 15 members are legislators. *Ante*, at 267; see OCGA §28–9–2 (noting that the other members of the Commission include the State's Lieutenant Governor, a judge, a district attorney, and three other state bar members). But how many legislative members are needed for a commission to become a legislative adjunct? The majority provides no answers to any of these questions.

* * *

The majority's rule will leave in the lurch the many States, private parties, and legal researchers who relied on the previously bright-line rule. Perhaps, to the detriment of all, many States will stop producing annotated codes altogether. Were that to occur, the majority's fear of an "economy-class" version of the law will truly become a reality. See *ante*, at 274. As Georgia explains, its contract enables the OCGA to be sold at a fraction of the cost of competing annotated codes. For example, Georgia asserts that Lexis sold the OCGA for $404 in 2016, while West Publishing's competing annotated code sold for $2,570. Should state annotated codes disappear, those without the means to pay the competitor's significantly higher price tag will have a valuable research tool taken away from them. Meanwhile, this Court, which is privileged to have access to numerous research resources,

will scarcely notice. These negative practical ramifications are unfortunate enough when they reflect the deliberative legislative choices that we as judges are bound to respect. They are all the more regrettable when they are the result of our own meddling. Fortunately, as the majority and I agree, "'critics of [today's] ruling can take their objections across the street, [where] Congress can correct any mistake it sees.'" *Ante*, at 270–271 (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015)).

We have "stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives," *Eldred* v. *Ashcroft*, 537 U. S. 186, 212 (2003), because "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984). Because the majority has strayed from its proper role, I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

Beyond doubt, state laws are not copyrightable. Nor are other materials created by state legislators in the course of performing their lawmaking responsibilities, *e. g.*, legislative committee reports, floor statements, unenacted bills. *Ante*, at 266. Not all that legislators do, however, is ineligible for copyright protection; the government edicts doctrine shields only "works that are (1) created by judges and legislators (2) *in the course of their judicial and legislative duties*." *Ibid.* (emphasis added). The core question this case presents, as I see it: Are the annotations in the Official Code of Georgia Annotated (OCGA) done in a legislative capacity? The answer, I am persuaded, should be no.

To explain why, I proceed from common ground. All agree that headnotes and syllabi for judicial opinions—both a kind of annotation—are copyrightable when created by a

reporter of decisions, *Callaghan* v. *Myers*, 128 U. S. 617, 645–650 (1888), but are not copyrightable when created by judges, *Banks* v. *Manchester*, 128 U. S. 244, 253 (1888). That is so because "[t]he whole work done by . . . judges," *ibid.*, including dissenting and concurring opinions, ranks as work performed in their judicial capacity. Judges do not outsource their writings to "arm[s]" or "adjunct[s]," cf. *ante*, at 259, 269, to be composed in their stead. Accordingly, the judicial opinion-drafting process in its entirety—including the drafting of headnotes and syllabi, in jurisdictions where that is done by judges—falls outside the reach of copyright protection.

One might ask: If a judge's annotations are not copyrightable, why are those created by legislators? The answer lies in the difference between the role of a judge and the role of a legislator. "[T]o the judiciary" we assign "the duty of interpreting and applying" the law, *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923), and sometimes making the applicable law, see Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964). See also *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). In contrast, the role of the legislature encompasses the process of "making laws"—not construing statutes after their enactment. *Mellon*, 262 U. S., at 488; see *Patchak* v. *Zinke*, 583 U. S. 244, 250 (2018) (plurality opinion) ("[T]he legislative power is the power to make law."). The OCGA annotations, in my appraisal, do not rank as part of the Georgia Legislature's *lawmaking process* for three reasons.

First, the annotations are not created contemporaneously with the statutes to which they pertain; instead, the annotations comment on statutes already enacted. See, *e. g.*, App. 268–269 (text of enacted laws are transmitted to the publisher for the addition of commentary); *id.*, at 403–404 (publisher adds new case notes on a rolling basis as courts con-

strue existing statutes).[1] In short, annotating begins only after lawmaking ends. This sets the OCGA annotations apart from uncopyrightable legislative materials like committee reports, generated before a law's enactment, and tied tightly to the task of law-formulation.

Second, the OCGA annotations are descriptive rather than prescriptive. Instead of stating the legislature's perception of what a law conveys, the annotations summarize writings in which others express *their* views on a given statute. For example, the OCGA contains "case annotations" for "[a]ll decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia and all decisions of the federal courts in cases which arose in Georgia construing any portion of the general statutory law of the state." *Id.*, at 403. Per the Code Revision Commission's instructions, each annotation should "accurately reflect the facts, holding, and statutory construction" adopted by the court. *Id.*, at 404. The annotations are neutrally cast; they do not opine on whether the summarized case was correctly decided. See, *e. g.*, OCGA § 17–7–50 (2013) (case annotation summarizing facts and holdings of nine cases construing right to grand jury hearing). This characteristic of the annotations distinguishes them from preenactment legislative materials that touch or concern the correct interpretation of the legislature's work.

Third, and of prime importance, the OCGA annotations are "given for the purpose of convenient reference" by the public, § 1–1–7 (2019); they aim to inform the citizenry at large, they do not address, particularly, those seated in legislative chambers.[2] Annotations are thus unlike, for example,

[1] For example, OCGA § 11–2A–213 was enacted, in its current form, in 1993. See 1993 Ga. Laws p. 633. The case notes contained in the OCGA summarize judicial decisions construing the statute years later. See § 11–2A–213 (2002) (citing *Griffith* v. *Medical Rental Supply of Albany, Ga., Inc.*, 244 Ga. App. 120, 534 S. E. 2d 859 (2000); *Bailey* v. *Tucker Equip. Sales, Inc.*, 236 Ga. App. 289, 510 S. E. 2d 904 (1999)).

[2] Suppose a committee of Georgia's legislature, to inform the public, instructs a staffer to write a guide titled "The Workways of the Georgia Legislature." The final text describing how the legislature operates is

surveys, work commissioned by a legislature to aid in determining whether existing law should be amended.

The requirement that the statutory portions of the OCGA "shall be merged with annotations," § 1–1–1, does not render the annotations anything other than explanatory, referential, or commentarial material. See *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 331, 260 S. E. 2d 30, 35 (1979) (observation by the Supreme Court of Georgia that "inclusion of annotations in [the] 'official Code' " does not "give the annotations any official weight").[3] Annotations aid the legal researcher, and that aid is enhanced when annotations are printed beneath or alongside the relevant statutory text. But the placement of annotations in the OCGA does not alter their auxiliary, nonlegislative character.

* * *

Because summarizing judicial decisions and commentary bearing on enacted statutes, in contrast to, for example, drafting a committee report to accompany proposed legislation, is not done in a legislator's law-shaping capacity, I would hold the OCGA annotations copyrightable and therefore reverse the judgment of the Court of Appeals for the Eleventh Circuit.

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circulated to members of the legislature and approved by a majority. Contrary to the Court's decision, I take it that such a work, which entails no lawmaking, would be copyrightable.

[3] That the Georgia Supreme Court described the Commission's work as "within the sphere of legislative authority" for state separation-of-powers purposes, *Harrison Co.* v. *Code Revision Comm'n*, 244 Ga. 325, 330, 260 S. E. 2d 30, 34 (1979), does not resolve the federal Copyright Act question before us. Cf. *Yates* v. *United States*, 574 U. S. 528, 537 (2015) (plurality opinion) ("In law as in life, . . . the same words, placed in different contexts, sometimes mean different things."); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

Syllabus

MAINE COMMUNITY HEALTH OPTIONS *v.* UNITED STATES

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

No. 18–1023. Argued December 10, 2019—Decided April 27, 2020*

The Patient Protection and Affordable Care Act established online exchanges where insurers could sell their healthcare plans. The now-expired "Risk Corridors" program aimed to limit the plans' profits and losses during the exchanges' first three years (2014 through 2016). See § 1342, 124 Stat. 211. Section 1342 set out a formula for computing a plan's gains or losses at the end of each year, providing that eligible profitable plans "shall pay" the Secretary of the Department of Health and Human Services (HHS), while the Secretary "shall pay" eligible unprofitable plans. The Act neither appropriated funds for these yearly payments nor limited the amounts that the Government might pay. Nor was the program required to be budget neutral. Each year, the Government owed more money to unprofitable insurers than profitable insurers owed to the Government, resulting in a total deficit of more than $12 billion. And at the end of each year, the appropriations bills for the Centers for Medicare and Medicaid Services (CMS) included a rider preventing CMS from using the funds for Risk Corridors payments. Petitioners—four health-insurance companies that claim losses under the program—sued the Federal Government for damages in the Court of Federal Claims. Invoking the Tucker Act, they alleged that § 1342 obligated the Government to pay the full amount of their losses as calculated by the statutory formula and sought a money judgment for the unpaid sums owed. Only one petitioner prevailed in the trial courts, and the Federal Circuit ruled for the Government in each appeal, holding that § 1342 had initially created a Government obligation to pay the full amounts, but that the subsequent appropriations riders impliedly "repealed or suspended" that obligation.

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*Together with No. 18–1028, *Moda Health Plan, Inc.* v. *United States* (see this Court's Rule 12.4) and *Blue Cross and Blue Shield of North Carolina* v. *United States* (see this Court's Rule 12.4); and No. 18–1038, *Land of Lincoln Mutual Health Insurance Co.* v. *United States*, also on certiorari to the same court.

Syllabus

Held:

1. The Risk Corridors statute created a Government obligation to pay insurers the full amount set out in § 1342's formula. Pp. 307–314.

(a) The Government may incur an obligation directly through statutory language, without also providing details about how the obligation must be satisfied. See *United States* v. *Langston*, 118 U. S. 389. Pp. 307–310.

(b) Section 1342 imposed a legal duty of the United States that could mature into a legal liability through the insurers' participation in the exchanges. This conclusion flows from the express terms and context of § 1342, which imposed an obligation by using the mandatory term "shall." The section's mandatory nature is underscored by the adjacent provisions, which differentiate between when the HHS Secretary "shall" take certain actions and when she "may" exercise discretion. See §§ 1341(b)(2), 1343(b). Section 1342 neither requires the Risk Corridors program to be budget neutral nor suggests that the Secretary's payments to unprofitable plans pivoted on profitable plans' payments to the Secretary or that a partial payment would satisfy the Government's whole obligation. It thus must be given its plain meaning: The Government "shall pay" the sum prescribed by § 1342. Pp. 310–311.

(c) Contrary to the Government's contention, neither the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. Nor does § 1342's obligation-creating language turn on whether Congress expressly provided budget authority before appropriating funds. The Government's arguments also conflict with well-settled principles of statutory interpretation. That § 1342 contains no language limiting the obligation to the availability of appropriations, while Congress expressly used such limiting language in other Affordable Care Act provisions, indicates that Congress intended a different meaning in § 1342. Pp. 311–314.

2. Congress did not impliedly repeal the obligation through its appropriations riders. Pp. 314–321.

(a) Because "'repeals by implication are not favored,'" *Morton* v. *Mancari*, 417 U. S. 535, 549, this Court will regard each of two statutes effective unless Congress' intention to repeal is "'clear and manifest,'" or the laws are "irreconcilable," *id.*, at 550–551. In the appropriations context, this requires the Government to show "something more than the mere omission to appropriate a sufficient sum." *United States* v. *Vulte*, 233 U. S. 509, 515. As *Langston* and *Vulte* confirm, the appropriations riders here did not manifestly repeal or discharge the Government's uncapped obligation, see *Langston*, 118 U. S., at 394, and do not

indicate "any other purpose than the disbursement of a sum of money for the particular fiscal years," *Vulte*, 233 U. S., at 514. Nor is there any indication that HHS and CMS thought that the riders clearly expressed an intent to repeal. Pp. 315–317.

(b) Appropriations measures have been found irreconcilable with statutory obligations to pay, but the riders here did not use the kind of "shall not take effect" language decisive in *United States* v. *Will*, 449 U. S. 200, 222–223, or purport to "suspen[d]" § 1342 prospectively or to foreclose funds from "any other Act" "notwithstanding" § 1342's money-mandating text, *United States* v. *Dickerson*, 310 U. S. 554, 556–557. They also did not reference § 1342's payment formula, let alone "irreconcilabl[y]" change it, *United States* v. *Mitchell*, 109 U. S. 146, 150, or provide that payments from profitable plans would be "'in full compensation'" of the Government's obligation to unprofitable plans, *United States* v. *Fisher*, 109 U. S. 143, 150. Pp. 317–319.

(c) The legislative history cited by the Federal Circuit is also unpersuasive. Pp. 320–321.

3. Petitioners properly relied on the Tucker Act to sue for damages in the Court of Federal Claims. Pp. 321–329.

(a) The United States has waived its immunity for certain damages suits in the Court of Federal Claims through the Tucker Act. Because that Act does not create "substantive rights," *United States* v. *Navajo Nation*, 556 U. S. 287, 290, a plaintiff must premise her damages action on "other sources of law," like "statutes or contracts," *ibid.*, provided those statutes "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained,'" *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 472. The Act does, however, yield when the obligation-creating statute provides its own detailed remedies or when the Administrative Procedure Act provides an avenue for relief. Pp. 322–324.

(b) Petitioners clear each hurdle: The Risk Corridors statute is fairly interpreted as mandating compensation for damages, and neither exception to the Tucker Act applies. Section 1342's mandatory "'shall pay' language" falls comfortably within the class of statutes that permit recovery of money damages in the Court of Federal Claims. This finding is bolstered by § 1342's focus on compensating insurers for past conduct. And there is no separate remedial scheme supplanting the Court of Federal Claims' power to adjudicate petitioners' claims. See *United States* v. *Bormes*, 568 U. S. 6, 12. Nor does the Administrative Procedure Act bar petitioners' Tucker Act suit. In contrast to *Bowen* v. *Massachusetts*, 487 U. S. 879, a Medicaid case where the State sued the HHS Secretary under the Administrative Procedure Act in district court, petitioners here seek not prospective, nonmonetary relief to clarify future obligations but specific sums already calculated, past due, and

designed to compensate for completed labors. The Risk Corridors statute and Tucker Act allow them that remedy. And because the Risk Corridors program expired years ago, this litigation presents no special concern, as *Bowen* did, about managing a complex ongoing relationship or tracking ever-changing accounting sheets. Pp. 324–327.

No. 18–1023 and No. 18–1028 (second judgment), 729 Fed. Appx. 939; No. 18–1028 (first judgment), 892 F. 3d 1311; No. 18–1038, 892 F. 3d 1184, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, KAGAN, and KAVANAUGH, JJ., joined, and in which THOMAS and GORSUCH, JJ., joined as to all but Part III–C. ALITO, J., filed a dissenting opinion, *post*, p. 329.

Paul D. Clement argued the cause for petitioners in all cases. With him on the briefs in No. 18–1028 were *Erin E. Murphy*, *C. Harker Rhodes IV*, *Kasdin M. Mitchell*, and *Caroline Brown*. On the briefs in No. 18–1023 were *Stephen J. McBrady*, *Clifton S. Elgarten*, *Daniel W. Wolff*, and *A. Xavier Baker*. On the briefs in No. 18–1038 were *Jonathan S. Massey*, *Marc Goldman*, *Daniel P. Albers*, and *Mark E. Rust*.

Deputy Solicitor General Kneedler argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Jonathan C. Bond*, *Mark B. Stern*, and *Alisa B. Klein*.†

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†Briefs of *amici curiae* urging reversal in all cases were filed for 24 States et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Peenesh Shah*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Kevin G. Clarkson* of Alaska, *Xavier Becerra* of California, *Philip J. Weiser* of Colorado, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Kwame Raoul* of Illinois, *Andy Beshear* of Kentucky, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Letitia James* of New York, *Josh Stein* of North Carolina, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washing-

JUSTICE SOTOMAYOR delivered the opinion of the Court.*

The Patient Protection and Affordable Care Act expanded healthcare coverage to many who did not have or could not afford it. The Affordable Care Act did this by, among other things, providing tax credits to help people buy insurance and establishing online marketplaces where insurers could sell plans. To encourage insurers to enter those marketplaces, the Act created several programs to defray the carriers' costs and cabin their risks.

Among these initiatives was the "Risk Corridors" program, a temporary framework meant to compensate insurers for unexpectedly unprofitable plans during the marketplaces' first three years. The since-expired Risk Corridors statute, § 1342, set a formula for calculating payments under the program: If an insurance plan loses a certain amount of money, the Federal Government "shall pay" the plan; if the plan makes a certain amount of money, the plan "shall pay" the Government. See § 1342, 124 Stat. 211–212 (codified at 42 U. S. C. § 18062). Some plans made money and paid the Government. Many suffered losses and sought reimbursement. The Government, however, did not pay.

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ton, and *Bridget Hill* of Wyoming; for America's Health Insurance Plans by *Pratik A. Shah*, *Hyland Hunt*, and *Ruthanne M. Deutsch*; for the Association for Community Affiliated Plans by *William L. Roberts*, *Jonathan W. Dettmann*, and *Nicholas J. Nelson*; for the Blue Cross Blue Shield Association by *K. Lee Blalack II*, *Jennifer Sokoler*, and *Shane A. Hunt*; for Economists by *Stephen A. Swedlow* and *Andrew H. Schapiro*; for Highmark Inc. et al. by *Colin E. Wrabley* and *Lawrence S. Sher*; for the National Association of Insurance Commissioners by *Derek T. Teeter*, *Douglas J. Schmidt*, *Michael T. Raupp*, and *Gail Sciacchetano*; for Wisconsin Physicians Service Insurance Corp. et al. by *Frank A. Gumina*; and in No. 18–1028 for the Chamber of Commerce of the United States of America by *Paul J. Zidlicky*, *Jacqueline G. Cooper*, and *C. Frederick Beckner III*.

Eric R. Bolinder and *R. James Valvo III* filed a brief for Americans for Prosperity as *amicus curiae* urging affirmance in all cases.

*JUSTICE THOMAS and JUSTICE GORSUCH join all but Part III–C of this opinion.

These cases are about whether petitioners—insurers who claim losses under the Risk Corridors program—have a right to payment under § 1342 and a damages remedy for the unpaid amounts. We hold that they do. We conclude that § 1342 of the Affordable Care Act established a money-mandating obligation, that Congress did not repeal this obligation, and that petitioners may sue the Government for damages in the Court of Federal Claims.

I

A

In 2010, Congress passed the Patient Protection and Affordable Care Act, 124 Stat. 119, seeking to improve national health-insurance markets and extend coverage to millions of people without adequate (or any) health insurance. To that end, the Affordable Care Act called for the creation of virtual health-insurance markets, or "Health Benefit Exchanges," in each State. 42 U. S. C. § 18031(b)(1). Individuals may buy health-insurance plans directly on an exchange and, depending on their household income, receive tax credits for doing so. 26 U. S. C. § 36B; 42 U. S. C. §§ 18081, 18082. Once an insurer puts a plan on an exchange, it must "accept every employer and individual in the State that applies for such coverage," 42 U. S. C. § 300gg–1(a), and may not tether premiums to a particular applicant's health, § 300gg(a). In other words, the Act "ensure[s] that anyone can buy insurance." *King* v. *Burwell*, 576 U. S. 473, 493 (2015).

Insurance carriers had many reasons to participate in these new exchanges. Through the Affordable Care Act, they gained access to millions of new customers with tax credits worth "billions of dollars in spending each year." *Id.*, at 485. But the exchanges posed some business risks, too—including a lack of "reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage." 892 F. 3d 1311, 1314 (CA Fed. 2018) (case below in No. 18–1028).

This uncertainty could have given carriers pause and affected the rates they set. So the Affordable Care Act created several risk-mitigation programs. At issue here is the Risk Corridors program.[1]

B

The Risk Corridors program aimed to limit participating plans' profits and losses for the exchanges' first three years (2014, 2015, and 2016). See § 1342, 124 Stat. 211, 42 U. S. C. § 18062. It did so through a formula that computed a plan's gains or losses at the end of each year. Plans with profits above a certain threshold would pay the Government, while plans with losses below that threshold would receive payments from the Government. § 1342(b), 124 Stat. 211–212. Specifically, § 1342 stated that the eligible profitable plans "shall pay" the Secretary of the Department of Health and Human Services (HHS), while the Secretary "shall pay" the eligible unprofitable plans. *Ibid.*[2]

When it enacted the Affordable Care Act in 2010, Congress did not simultaneously appropriate funds for the yearly payments the Secretary could potentially owe under the Risk Corridors program. Neither did Congress limit the

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[1] The others were the "Reinsurance" and "Risk Adjustment" programs. The former ran from 2014 to 2016 and required insurers to pay premiums into a pool that compensated carriers covering "high risk individuals." § 1341, 124 Stat. 208, 42 U. S. C. § 18061. The latter is still in effect and annually transfers funds from insurance plans with relatively low-risk enrollees to plans with higher risk enrollees. See § 1343, 124 Stat. 212, 42 U. S. C. § 18063.

[2] If a health-insurance plan made (or lost) up to 3 percentage points more than expected in a plan year, the plan would keep the gains (or losses). If the plan made (or lost) between 3 and 8 percentage points more than predicted, it would give up half of the earnings (or would be compensated for half of the shortfalls) exceeding the 3 percentage-point threshold. If the gains (or losses) exceeded predictions by 8 percentage points, the insurers would pay (or receive) 80 percent of the gains (or losses) exceeding the 8 percentage-point mark. See § 1342(b), 124 Stat. 211–212, 42 U. S. C. § 18062(b).

amounts that the Government might pay under § 1342. Nor did the Congressional Budget Office (CBO) "score"—that is, calculate the budgetary impact of—the Risk Corridors program.

In later years, the CBO noted that the Risk Corridors statute did not require the program to be budget neutral. The CBO reported that, "[i]n contrast" to the Act's other risk-mitigation programs, "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit." CBO, The Budget and Economic Outlook: 2014 to 2024, p. 59 (2014). The CBO thus recognized that "[i]f insurers' costs exceed their expectations, on average, the risk corridor program will impose costs on the federal budget." *Id.*, at 110.

Like the CBO, the federal agencies charged with implementing the program agreed that § 1342 did not require budget neutrality. Nine months before the program started, HHS acknowledged that the Risk Corridors program was "not statutorily required to be budget neutral." 78 Fed. Reg. 15473 (2013). HHS assured, however, that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." *Ibid.*

Similar guidance came from the Centers for Medicare and Medicaid Services (CMS), the agency tasked with helping the HHS Secretary collect and remit program payments. CMS confirmed that a lack of payments from profitable plans would not relieve the Government from making its payments to the unprofitable ones. See 79 Fed. Reg. 30260 (2014). Citing "concerns that risk corridors collections may not be sufficient to fully fund risk corridors payments" to the unprofitable plans, CMS declared that "[i]n the unlikely event of a shortfall . . . HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." *Ibid.*

C

The program's first year, 2014, tallied a deficit of about $2.5 billion. Profitable plans owed the Government $362 million, while the Government owed unprofitable plans $2.87 billion. See CMS, Risk Corridors Payment Proration Rate for 2014 (2015).

At the end of the first year, Congress enacted a bill appropriating a lump sum for CMS' Program Management. See Pub. L. 113–235, Div. G, Tit. II, 128 Stat. 2130–2131 (providing for the fiscal year ending September 30, 2015). The bill included a rider restricting the appropriation's effect on Risk Corridors payments out to issuers:

> "None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors)." §227, *id.*, at 2491.

The program's second year resembled its first. In February 2015, HHS repeated its belief that "risk corridors collections w[ould] be sufficient to pay for all" of the Government's "risk corridors payments." 80 Fed. Reg. 10779 (2015). The agency again "recognize[d] that the Affordable Care Act requires the Secretary to make full payments to issuers." *Ibid.* "In the unlikely event that risk corridors collections" were "insufficient to make risk corridors payments," HHS reassured, the Government would "use other sources of funding for the risk corridors payments, subject to the availability of appropriations." *Ibid.*

The 2015 program year also ran a deficit, this time worth about $5.5 billion. See CMS, Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year (2016). Facing a second shortfall, CMS continued to "recogniz[e] that the Affordable Care Act requires the Secretary to make full pay-

ments to issuers." CMS, Risk Corridors Payments for 2015, p. 1 (2016). CMS also confirmed that "HHS w[ould] record risk corridors payments due as an obligation of the United States Government for which full payment is required." *Ibid.* And at the close of the second year, Congress enacted another appropriations bill with the same rider as before. See Pub. L. 114–113, § 225, 129 Stat. 2624 (providing for the fiscal year ending September 30, 2016).

The program's final year, 2016, was similar. The Government owed unprofitable insurers about $3.95 billion more than profitable insurers owed the Government. See CMS, Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year (2017). And Congress passed an appropriations bill with the same rider. See Pub. L. 115–31, § 223, 131 Stat. 543 (providing for the fiscal year ending September 30, 2017).

All told, the Risk Corridors program's deficit exceeded $12 billion.

D

The dispute here is whether the Government must pay the remaining deficit. Petitioners in these consolidated cases are four health-insurance companies that participated in the healthcare exchanges: Maine Community Health Options, Blue Cross and Blue Shield of North Carolina, Land of Lincoln Mutual Health Insurance Company, and Moda Health Plan, Inc. They assert that their plans were unprofitable during the Risk Corridors program's 3-year term and that, under § 1342, the HHS Secretary still owes them hundreds of millions of dollars.

These insurers sued the Federal Government for damages in the United States Court of Federal Claims, invoking the Tucker Act, 28 U. S. C. § 1491. They alleged that § 1342 of the Affordable Care Act obligated the Government to pay the full amount of their losses as calculated by the statutory formula and sought a money judgment for the unpaid sums

owed—a claim that, if successful, could be satisfied through the Judgment Fund.[3] These lawsuits saw mixed results in the trial courts. Petitioner Moda prevailed; the others did not.[4]

A divided panel of the United States Court of Appeals for the Federal Circuit ruled for the Government in each appeal. See 892 F. 3d 1311; 892 F. 3d 1184 (2018); 729 Fed. Appx. 939 (2018). As relevant here, the Federal Circuit concluded that § 1342 had initially created a Government obligation to pay the full amounts that petitioners sought under the statutory formula. See 892 F. 3d, at 1320–1322. The court also recognized that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances." *Id.*, at 1321.

Even so, the court held that Congress' appropriations riders impliedly "repealed or suspended" the Government's obligation. *Id.*, at 1322. Although the panel acknowledged that "[r]epeals by implication are generally disfavored"—especially when the "alleged repeal occurred in an appropriations bill"—it found that the riders here "adequately expressed Congress's intent to suspend" the Government's payments to unprofitable plans "beyond the sum of pay-

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[3] For a meritorious claim brought within the Tucker Act's 6-year statute of limitations, 28 U. S. C. § 2501, federal law generally requires that the "final judgment rendered by the United States Court of Federal Claims against the United States . . . be paid out of any general appropriation therefor." § 2517(a). The Judgment Fund is a permanent and indefinite appropriation for "[n]ecessary amounts . . . to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . payment is not otherwise provided for." 31 U. S. C. § 1304(a)(1).

[4] Compare 130 Fed. Cl. 436 (2017) (granting Moda Health Plan partial summary judgment on its statutory and implied-in-fact-contract claims), with 129 Fed. Cl. 81 (2016) (dismissing Land of Lincoln's statutory, contract, and Takings Clause claims), 131 Fed. Cl. 457 (2017) (dismissing Blue Cross and Blue Shield's statutory and contract claims), and 133 Fed. Cl. 1 (2017) (dismissing Maine Community Health's statutory claims).

ments" it collected from profitable plans. *Id.*, at 1322–1323, 1325.

Judge Newman dissented, observing that the Government had not identified any "statement of abrogation or amendment of the statute," nor any "disclaimer" of the Government's "statutory and contractual commitments." *Id.*, at 1335. The dissent also reasoned that precedent undermined the court's conclusion and that the appropriations riders could not apply retroactively because the Government had used the Risk Corridors program to induce insurers to enter the exchanges. *Id.*, at 1336–1339. Emphasizing the importance of Government credibility in public-private enterprise, the dissent warned that the majority's decision would "undermin[e] the reliability of dealings with the government." *Id.*, at 1340.

A majority of the Federal Circuit declined to revisit the court's decision en banc, 908 F. 3d 738 (2018) (*per curiam*); see also *id.*, at 740 (Newman, J., dissenting); *id.*, at 741 (Wallach, J., dissenting), and we granted certiorari, 588 U. S. 905 (2019).

These cases present three questions: First, did § 1342 of the Affordable Care Act obligate the Government to pay participating insurers the full amount calculated by that statute? Second, did the obligation survive Congress' appropriations riders? And third, may petitioners sue the Government under the Tucker Act to recover on that obligation? Because our answer to each is yes, we reverse.

II

The Risk Corridors statute created a Government obligation to pay insurers the full amount set out in § 1342's formula.

A

An "obligation" is a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty . . . that

could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." GAO, A Glossary of Terms Used in the Federal Budget Process 70 (GAO–05–734SP, 2005). The Government may incur an obligation by contract or by statute. See *ibid.*

Incurring an obligation, of course, is different from paying one. After all, the Constitution's Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7; see also GAO, Principles of Federal Appropriations Law 2–3 (4th ed. 2016) (hereinafter GAO Redbook) ("[T]he authority to incur obligations by itself is not sufficient to authorize payments from the Treasury"). Creating and satisfying a Government obligation, therefore, typically involves four steps: (1) Congress passes an organic statute (like the Affordable Care Act) that creates a program, agency, or function; (2) Congress passes an Act authorizing appropriations; (3) Congress enacts the appropriation, granting "budget authority" to incur obligations and make payments, and designating the funds to be drawn; and (4) the relevant Government entity begins incurring the obligation. See *id.*, at 2–56; see also Op. Comp. Gen., B–193573 (Dec. 19, 1979).

But Congress can deviate from this pattern. It may, for instance, authorize agencies to enter into contracts and "incur obligations in advance of appropriations." GAO Redbook 2–4. In that context, the contracts "constitute obligations binding on the United States," such that a "failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit." *Id.*, at 2–5; see also, *e. g.*, *Cherokee Nation of Okla.* v. *Leavitt*, 543 U. S. 631, 636–638 (2005) (rejecting the Government's argument that it is legally bound by its contractual promise to pay "if, and only if, Congress appropriated suffi-

cient funds"); *Salazar* v. *Ramah Navajo Chapter*, 567 U. S. 182, 191 (2012) ("Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's 'valid obligations will remain enforceable in the courts'" (quoting 2 GAO Redbook 6–17 (2d ed. 1992)).

Congress can also create an obligation directly by statute, without also providing details about how it must be satisfied. Consider, for example, *United States* v. *Langston*, 118 U. S. 389 (1886). In that case, Congress had enacted a statute fixing an official's annual salary at "$7,500 from the date of the creation of his office." *Id.*, at 394. Years later, however, Congress failed to appropriate enough funds to pay the full amount, prompting the officer to sue for the remainder. *Id.*, at 393. Understanding that Congress had created the obligation by statute, this Court held that a subsequent failure to appropriate enough funds neither "abrogated [n]or suspended" the Government's pre-existing commitment to pay. *Id.*, at 394. The Court thus affirmed judgment for the officer for the balance owed. *Ibid.*[5]

The GAO shares this view. As the Redbook explains, if Congress created an obligation by statute without detailing how it will be paid, "an agency could presumably meet a funding shortfall by such measures as making prorated payments." GAO Redbook 2–36, n. 39. But "such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation" and "[t]he recipient would remain legally entitled to the balance." *Ibid.* Thus, the GAO warns, although a "failure to appropriate" funds

[5]The Government suggests that *Langston* is irrelevant because that case predates the Judgment Fund, cf. n. 3, *supra*, meaning that the Court "had no occasion" to determine whether the statute at issue "authorized a money-damages remedy" against the Government, Brief for United States 30. But by affirming a judgment against the United States, *Langston* necessarily confirmed the Government's obligation to pay independent of a specific appropriation. What remedies ensure that the Government makes good on its duty to pay is a separate question that we take up below. See Part IV, *infra*.

"will prevent administrative agencies from making payment," that failure "is unlikely to prevent recovery by way of a lawsuit." *Id.*, at 2–63 (citing, *e. g.*, *Langston*, 118 U. S., at 394).

Put succinctly, Congress can create an obligation directly through statutory language.

B

Section 1342 imposed a legal duty of the United States that could mature into a legal liability through the insurers' actions—namely, their participating in the healthcare exchanges.

This conclusion flows from § 1342's express terms and context. See, *e. g.*, *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 583 U. S. 366, 378 (2018) (statutory interpretation "begins with the text"). The first sign that the statute imposed an obligation is its mandatory language: "shall." "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 171 (2016); see also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) (observing that " 'shall' " typically "creates an obligation impervious to . . . discretion"). Section 1342 uses the command three times: The HHS Secretary "shall establish and administer" the Risk Corridors program from 2014 to 2016, "shall provide" for payments according to a precise statutory formula, and "shall pay" insurers for losses exceeding the statutory threshold. §§ 1342(a), (b)(1), 114 Stat. 211, 42 U. S. C. §§ 18062(a), (b)(1).

Section 1342's adjacent provisions also underscore its mandatory nature. In § 1341 (a reinsurance program) and § 1343 (a risk-adjustment program), the Affordable Care Act differentiates between when the HHS Secretary "shall" take certain actions and when she "may" exercise discretion. See § 1341(b)(2), 124 Stat. 209, 42 U. S. C. § 18061(b)(2) ("[T]he Secretary . . . shall include" a formula that "may be de-

signed" in multiple ways); § 1343(b), 124 Stat. 212, 42 U. S. C. § 18063(b) ("The Secretary . . . shall establish" and "may utilize" certain criteria). Yet Congress chose mandatory terms for § 1342. "When," as is the case here, Congress "distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware*, 579 U. S., at 172.

Nothing in § 1342 requires the Risk Corridors program to be budget neutral, either. Nor does the text suggest that the Secretary's payments to unprofitable plans pivoted on profitable plans' payments to the Secretary, or that a partial payment would satisfy the Government's whole obligation. Thus, without "any indication" that § 1342 allows the Government to lessen its obligation, we must "give effect to [Section 1342's] plain command." *Lexecon*, 523 U. S., at 35. That is, the statute meant what it said: The Government "shall pay" the sum that § 1342 prescribes.[6]

C

The Government does not contest that § 1342's plain terms appeared to create an obligation to pay whatever amount the statutory formula provides. It insists instead that the Appropriations Clause, Art. I, § 9, cl. 7, and the Anti-Deficiency Act, 31 U. S. C. § 1341, "qualified" that obligation by making "HHS's payments contingent on appropriations by Congress." Brief for United States 20. "Because Congress did not appropriate funds beyond the amounts collected" from profitable plans, this argument goes, "HHS's

[6] Our conclusion matches the interpretations that HHS and CMS have repeated since before the Risk Corridors program began. In the agencies' view, the Risk Corridors program was "not statutorily required to be budget neutral" and instead required HHS to "remit payments" "[r]egardless of the balance of payments and receipts." 78 Fed. Reg. 15473 (HHS regulation); accord, 79 Fed. Reg. 30260 (CMS regulation noting that even "[i]n the unlikely event of a shortfall for the 2015 program year, . . . the Affordable Care Act requires the Secretary to make full payments to issuers").

statutory duty [to pay unprofitable plans] extended only to disbursing those collected amounts." *Id.*, at 24–25.

That does not follow. Neither the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. Rather, both provisions constrain how federal employees and officers may make or authorize payments without appropriations. See U. S. Const., Art. I, § 9, cl. 7 (requiring an "Appropriatio[n] made by Law" before money may "be drawn" to satisfy a payment obligation); 31 U. S. C. § 1341(a)(1)(A) ("An officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"). As we have explained, "'[a]n appropriation *per se* merely imposes limitations upon the Government's own agents,'" but "'its insufficiency does not pay the Government's debts, nor cancel its obligations.'" *Ramah*, 567 U. S., at 197 (quoting *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892)). If anything, the Anti-Deficiency Act confirms that Congress can create obligations without contemporaneous funding sources: That Act's prohibitions give way "as specified" or "authorized" by "any other provision of law." 31 U. S. C. § 1341(a)(1). Here, the Government's obligation was authorized by the Risk Corridors statute.

And contrary to the Government's view, § 1342's obligation-creating language does not turn on whether Congress expressly provided "budget authority" before appropriating funds. Budget authority is an agency's power "provided by Federal law to incur financial obligations," 88 Stat. 297, 2 U. S. C. § 622(2)(A), "that will result in immediate or future outlays of government funds," GAO Redbook 2–1; see also *id.*, at 2–55 ("Agencies may incur obligations only after Congress grants budget authority"); GAO, A Glossary of Terms Used in the Federal Budget Process, at 20–21. As explained above, Congress usually gives budget authority

through an appropriations Act or by expressly granting an agency authority to contract for the Government. See GAO Redbook 2–1 to 2–5. But budget authority is not necessary for Congress itself to create an obligation by statute. See *Langston*, 118 U. S., at 394; cf. *Raines* v. *Byrd*, 521 U. S. 811, 815 (1997) (treating legal obligations of the Government as distinct from budget authority).

The Government's arguments also conflict with well-settled principles of statutory interpretation. At bottom, the Government contends that the existence and extent of its obligation here is "subject to the availability of appropriations." Brief for United States 41. But that language appears nowhere in § 1342, even though Congress could have expressly limited an obligation to available appropriations or specific dollar amounts. Indeed, Congress did so explicitly in other provisions of the Affordable Care Act.[7]

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[7] See, *e. g.*, 42 U. S. C. § 280k(a) ("The Secretary . . . shall, subject to the availability of appropriations, establish a 5-year national, public education campaign"); § 293k(c) ("Fifteen percent of the amount appropriated . . . in each . . . fiscal year shall be allocated to [certain] physician assistant training programs"); § 293k–1(e) ("There is authorized to be appropriated to carry out this section, $10,000,000"); § 293k–2(e) (payments "made to an entity from an award of a grant or contract under [§ 293k–2(a)] shall be . . . subject to the availability of appropriations for the fiscal year involved to make the payments"); § 300hh–31(a) ("Subject to the availability of appropriations, the Secretary . . . shall establish [an epidemiology-laboratory program] to award grants"); note following § 1396a ("In no case may . . . the aggregate amount of payments made by the Secretary to eligible States under this section exceed $75,000,000"); § 1397m–1(b)(2)(A) ("Subject to the availability of appropriations . . . the amount paid to a State for a fiscal year under [an adult protective services program] shall equal . . . ").

This kind of limiting language is not unique to the Affordable Care Act. When Congress has restricted "shall pay" language to an appropriation or available funds, it has done so expressly. See, *e. g.*, 2 U. S. C. § 2064; 5 U. S. C. § 8334; 7 U. S. C. §§ 2013, 2031, 3243, 6523, 7717; 10 U. S. C. §§ 1175, 1413a, 1598, 2031, 2410j, 2774, 9780; 12 U. S. C. § 3337; 15 U. S. C. § 4723; 16 U. S. C. §§ 45f, 410aa–1, 426n, 459e–1, 460m–16, 698f, 1852; 20 U. S. C. §§ 80q–5, 1070a, 1134b, 1161g; 22 U. S. C. § 2906; 25 U. S. C. § 1912; 30

This Court generally presumes that "'when Congress includes particular language in one section of a statute but omits it in another,'" Congress "'intended a difference in meaning.'" *Digital Realty Trust, Inc.* v. *Somers*, 583 U. S. 149, 161 (2018) (quoting *Loughrin* v. *United States*, 573 U. S. 351, 358 (2014) (alterations omitted)). The Court likewise hesitates "'to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *Republic of Sudan* v. *Harrison*, 587 U. S. 1, 12 (2019) (quoting *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988)). The "subject to appropriations" and payment-capping language in other sections of the Affordable Care Act would be meaningless had § 1342 simultaneously achieved the same end with silence.

In sum, the plain terms of the Risk Corridors provision created an obligation neither contingent on nor limited by the availability of appropriations or other funds.

III

The next question is whether Congress impliedly repealed the obligation through its appropriations riders. It did not.

U. S. C. § 1314; 32 U. S. C. § 716; 34 U. S. C. § 12573; 38 U. S. C. § 5317A; 42 U. S. C. §§ 303, 624, 655, 677, 1203, 1353, 1396b, 8623, 12622, 16014, 16512; 46 U. S. C. §§ 51504, 53106, 53206; 47 U. S. C. § 395; 49 U. S. C. § 5312; 50 U. S. C. §§ 4236, 4237; 52 U. S. C. § 21061.

Congress has also been explicit when it has capped payments, often setting a dollar amount or designating a specific fund from which the Government shall pay. See, *e. g.*, 5 U. S. C. §§ 8102a, 8134, 8461; 7 U. S. C. §§ 26, 6523; 10 U. S. C. § 1413a; 16 U. S. C. §§ 450e–1, 460kk; 19 U. S. C. § 2296; 20 U. S. C. §§ 1070g–1, 1078, 3988, 5607; 22 U. S. C. § 3681; 30 U. S. C. § 1240a; 31 U. S. C. § 3343; 38 U. S. C. § 1542; 42 U. S. C. §§ 290bb–38, 295h, 618, 5318a, 15093; 43 U. S. C. §§ 1356a, 1619; 46 U. S. C. § 53106; 50 U. S. C. § 4114.

These common limitations—and our discussion below, see Part IV, *infra*—diminish the dissent's concern that other statutes may support a damages action in the Court of Federal Claims. *Post*, at 331 (opinion of ALITO, J.).

A

Because Congress did not expressly repeal § 1342, the Government seeks to show that Congress impliedly did so. But "repeals by implication are not favored," *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974) (internal quotation marks omitted), and are a "rarity," *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, 142 (2001) (internal quotation marks omitted). Presented with two statutes, the Court will "regard each as effective"—unless Congress' intention to repeal is "'"clear and manifest,"'" or the two laws are "irreconcilable." *Morton*, 417 U. S., at 550–551 (quoting *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939)); see also *FCC* v. *NextWave Personal Communications Inc.*, 537 U. S. 293, 304 (2003) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted)).

This Court's aversion to implied repeals is "especially" strong "in the appropriations context." *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429, 440 (1992); see also *New York Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 810, 369 F. 2d 743, 748 (1966). The Government must point to "something more than the mere omission to appropriate a sufficient sum." *United States* v. *Vulte*, 233 U. S. 509, 515 (1914); accord, GAO Redbook 2–63 ("The mere failure to appropriate sufficient funds is not enough"). The question, then, is whether the appropriations riders manifestly repealed or discharged the Government's uncapped obligation.

Langston confirms that the appropriations riders did neither. Recall that in *Langston*, Congress had established a statutory obligation to pay a salary of $7,500, yet later appropriated a lesser amount. 118 U. S., at 393–394. This Court held that Congress did not "abrogat[e] or suspen[d]" the salary-fixing statute by "subsequent enactments [that] merely appropriated a less amount" than necessary to pay, because the appropriations bill lacked "words that expressly

or by clear implication modified or repealed the previous law." *Id.*, at 394.

Vulte reaffirmed that a mere failure to appropriate does not repeal or discharge an obligation to pay. At issue there was whether certain appropriations Acts had repealed a Government obligation to pay bonuses to military servicemen. 233 U. S., at 511–512. A 1902 statute had provided a 10 percent bonus to officers serving outside the contiguous United States, but in 1906 and 1907, Congress enacted appropriations funding the bonuses for officers "excep[t those in] P[ue]rto Rico and Hawaii." *Id.*, at 512. Then, in 1908, Congress enacted a statute stating "'[t]hat the increase of pay . . . shall be as now provided by law.'" *Id.*, at 513. When Lieutenant Nelson Vulte sought a bonus for his service in Puerto Rico from 1908 to 1909, the Government refused, contending that the appropriations Acts had impliedly repealed its obligation altogether.

Relying on *Langston*, *Vulte* rejected that argument. "[I]t is to be remembered," the Court wrote, that the alleged repeals "were in appropriation acts and no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years." 233 U. S., at 514. At most, the appropriations had "temporarily suspend[ed]" payments, but they did not use "'the most clear and positive terms'" required to "modif[y] or repea[l]" the Government's obligation itself. *Id.*, at 514–515 (quoting *Minis* v. *United States*, 15 Pet. 423, 445 (1841)). Because the Government had failed to show that repeal was the only "'reasonable interpretation'" of the appropriation Acts, the obligation persisted. 233 U. S., at 515 (quoting *Minis*, 15 Pet., at 445).

The parallels among *Langston*, *Vulte*, and these cases are clear. Here, like in *Langston* and *Vulte*, Congress "merely appropriated a less amount" than that required to satisfy the Government's obligation, without "expressly or by clear implication modif[ying]" it. *Langston*, 118 U. S., at 394; see

also *Vulte*, 233 U. S., at 515. The riders stated that "[n]one of the funds made available by this Act," as opposed to any other sources of funds, "may be used for payments under" the Risk Corridors statute. §227, 128 Stat. 2491; accord, §225, 129 Stat. 2624; §223, 131 Stat. 543. But "no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years." *Vulte*, 233 U. S., at 514. And especially because the Government had already begun incurring the prior year's obligation each time Congress enacted a rider, reasonable (and nonrepealing) interpretations exist. Indeed, finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired insurers' rights to payment. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265–266, 280 (1994); see also GAO Redbook 1–61 to 1–62.

The relevant agencies' responses to the riders also undermine the case for an implied repeal here. Had Congress "clearly expressed" its intent to repeal, one might have expected HHS or CMS to signal the sea change. *Morton*, 417 U. S., at 551. But even after Congress enacted the first rider, the agencies reiterated that "the Affordable Care Act requires the Secretary to make full payments to issuers," 80 Fed. Reg. 10779, and that "HHS w[ould] record risk corridors payments due as an obligation of the United States Government for which full payment is required," CMS, Risk Corridors Payments for 2015, at 1. They understood that profitable insurers' payments to the Government would not dispel the Secretary's obligation to pay unprofitable insurers, even "in the event of a shortfall." *Ibid.*

Given the Court's potent presumption in the appropriations context, an implied-repeal-by-rider must be made of sterner stuff.

B

To be sure, this Court's implied-repeal precedents reveal two situations where the Court has deemed appropriations

measures irreconcilable with statutory obligations to pay. But neither one applies here.

The first line of cases involved appropriations bills that, without expressly invoking words of "repeal," reached that outcome by completely revoking or suspending the underlying obligation before the Government began incurring it. See *United States* v. *Will*, 449 U. S. 200 (1980); *United States* v. *Dickerson*, 310 U. S. 554 (1940). *Will* concluded that Congress had canceled an obligation to pay cost-of-living raises through appropriations bills that bluntly stated that future raises "'shall not take effect'" or that restricted funds from "'this Act or any other Act.'" 449 U. S., at 206–207, 223.[8] Likewise, *Dickerson* held that a series of appropriations bills repealed an obligation to pay military-reenlistment bonuses due in particular fiscal years. See 310 U. S., at 561. One enactment "'hereby suspended'" the bonuses before they took effect, and another "continued" this suspension for additional years, providing that "'no part of any appropriation contained in this or any other Act for the [next] fiscal year . . . shall be available for the payment [of the bonuses] notwithstanding'" the statute creating the Government's obligation to pay. *Id.*, at 555–557.

Here, by contrast, the appropriations riders did not use the kind of "shall not take effect" language decisive in *Will*. See 449 U. S., at 222–223. Nor did the riders purport to "suspen[d]" § 1342 prospectively or to foreclose funds from "any other Act" "notwithstanding" § 1342's money-mandating text. *Dickerson*, 310 U. S., at 556–557; see also *Will*, 449 U. S., at 206–207. Neither *Will* nor *Dickerson* supports the Federal Circuit's implied-repeal holding.

The second strand of precedent turned on provisions that reformed statutory payment formulas in ways "irreconcilable" with the original methods. See *United States* v.

[8] Still, *Will* held unconstitutional the changes that purported to reduce the Government's payment obligations after the obligation-creating statutes had already taken effect. See 449 U. S., at 224–226, 230.

Mitchell, 109 U. S. 146, 150 (1883); see also *United States* v. *Fisher*, 109 U. S. 143, 145–146 (1883). In *Mitchell*, an appropriations bill decreased the salaries for federal interpreters (from $400 to $300) and changed how the agency would distribute any "'additional pay'" (from "'all emoluments and allowances whatsoever'" to payments at the agency head's discretion). 109 U. S., at 147, 149. And in *Fisher*, Congress altered an obligation to pay judges $3,000 per year by providing that a lesser appropriation would be "'in full compensation'" for services rendered in the next fiscal year. 109 U. S., at 144.[9]

The appropriations bills here created no such conflict as in *Mitchell* and *Fisher*. The riders did not reference § 1342's payment formula at all, let alone "irreconcilabl[y]" change it. *Mitchell*, 109 U. S., at 150. Nor did they provide that Risk Corridors payments from profitable plans would be "'in full compensation'" of the Government's obligation to unprofitable plans. *Fisher*, 109 U. S., at 146. Instead, the riders here must be taken at face value: as a "mere omission to appropriate a sufficient sum." *Vulte*, 233 U. S., at 515. Congress could have used the kind of language we have held to effect a repeal or suspension—indeed, it did so in other provisions of the relevant appropriations bills. See, *e. g.*, § 716, 128 Stat. 2163 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used . . . "); § 714, 129 Stat. 2275 (same); § 714, 131 Stat. 168 (same). But for the Risk Corridors program, it did not.

[9] The Federal Circuit has also recognized that Congress may override a statutory payment formula through an appropriation that expressly earmarks a lesser amount for that payment obligation in the upcoming fiscal year. See *Highland Falls-Fort Montgomery Central School Dist.* v. *United States*, 48 F. 3d 1166, 1169–1171 (1995); see also GAO Redbook 2–62 (discussing *Highland Falls* and noting that earmarking a lesser amount can create an "irreconcilable conflict" with a statutory payment formula). Perhaps because these cases do not involve an earmark to satisfy an incompatible payment formula, the Federal Circuit did not rely on *Highland Falls* below.

C

We also find unpersuasive the only pieces of legislative history that the Federal Circuit cited. According to the Court of Appeals, a floor statement and an unpublished GAO letter provided "clear intent" to cancel or "suspend" the Government's Risk Corridors obligation. See 892 F. 3d, at 1318–1319, 1325–1326. We doubt that either source could ever evince the kind of clear congressional intent required to repeal a statutory obligation through an appropriations rider. See *United States* v. *Kwai Fun Wong*, 575 U. S. 402, 412 (2015). But even if they could, they did not do so here.

The floor statement (which Congress adopted as an "explanatory statement") does not cross the clear-expression threshold. See 160 Cong. Rec. 17805, 18307 (2014); see also § 4, 128 Stat. 2132. That statement interpreted an HHS regulation as saying that "the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects." 160 Cong. Rec., at 18307.[10] But that misunderstands the referenced regulation, which provided only that HHS "project[ed]" that the program would be budget neutral and that the agency "intend[ed]" to treat it that way, while making clear that "it [was] difficult to estimate" the "aggregate risk corridors payments and charges at [the] time." 79 Fed. Reg. 13829. HHS' goals did not alter its prior interpretation that the Risk Corridors program was "not statutorily required to be budget neutral."

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[10] The statement provides in full:

"In 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect. The agreement includes new bill language to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec., at 18307.

78 Fed. Reg. 15473. And neither the floor statement nor the appropriations rider said anything requiring budget neutrality or redefining § 1342's formula.[11]

The GAO letter is even more inapt. In it, the GAO responded to two legislators' inquiry by identifying two sources of available funding for the first year of Risk Corridors payments: CMS' appropriations for the 2014 fiscal year and profitable insurance plans' payments to the Secretary. 892 F. 3d, at 1318; see also App. in No. 17–1994 (CA Fed.), pp. 234–240. Because the rider cut off the first source of funds, the Federal Circuit inferred congressional intent "to temporarily cap" the Government's payments "at the amount of payments" profitable plans made "for each of the applicable years" of the Risk Corridors program. 892 F. 3d, at 1325. That was error. The letter has little value because it appears nowhere in the legislative record. Perhaps for that reason, the Government does not rely on it.

IV

Having found that the Risk Corridors statute established a valid yet unfulfilled Government obligation, this Court must turn to a final question: Where does petitioners' lawsuit belong, and for what relief? We hold that petitioners prop-

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[11] In this implied-repeal context, it is also telling that Congress considered—but did not enact—bills containing the type of text that may have satisfied the clear-expression rule. See, *e. g.*, Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong., 2d Sess., § 2 (2014) ("'[T]he Secretary shall ensure that payments out and payments in . . . are provided for in amounts that the Secretary determines are necessary to reduce to zero the cost . . . to the Federal Government of carrying out the program under this section'"); Taxpayer Bailout Protection Act, S. 359, 114th Cong., 1st Sess., § 2 (2015) ("'The Secretary shall ensure that the amount of payments to plans . . . does not exceed the amount of payments to the Secretary'" and "'shall proportionately decrease the amount of payments to plans'"); Taxpayer Bailout Protection Act, H. R. 724, 114th Cong., 1st Sess., § 2 (2015) (same).

erly relied on the Tucker Act to sue for damages in the Court of Federal Claims.

A

The United States is immune from suit unless it unequivocally consents. *United States* v. *Navajo Nation*, 556 U. S. 287, 289 (2009). The Government has waived immunity for certain damages suits in the Court of Federal Claims through the Tucker Act, 24 Stat. 505. See *United States* v. *Mitchell*, 463 U. S. 206, 212 (1983). That statute permits "claim[s] against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. § 1491(a)(1).

The Tucker Act, however, does not create "substantive rights." *Navajo Nation*, 556 U. S., at 290. A plaintiff relying on the Tucker Act must premise her damages action on "other sources of law," like "statutes or contracts." *Ibid.* For that reason, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." *Mitchell*, 463 U. S., at 216. Nor will every "failure to perform an obligation . . . creat[e] a right to monetary relief" against the Government. *United States* v. *Bormes*, 568 U. S. 6, 16 (2012).

To determine whether a statutory claim falls within the Tucker Act's immunity waiver, we typically employ a "fair interpretation" test. A statute creates a "right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 472 (2003) (quoting *Mitchell*, 463 U. S., at 217); see also *Navajo Nation*, 556 U. S., at 290 ("The other source of law need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages"). Satisfy-

ing this rubric is generally both necessary and sufficient to permit a Tucker Act suit for damages in the Court of Federal Claims. *White Mountain Apache*, 537 U. S., at 472–473.[12]

But there are two exceptions. The Tucker Act yields when the obligation-creating statute provides its own de-

[12] Relying on *Alexander* v. *Sandoval*, 532 U. S. 275 (2001), the dissent's logic suggests that a federal statute could never provide a cause of action for damages absent magic words explicitly inviting suit. See *post*, at 329–330, 332–334. We have repeatedly rejected that notion—including in opinions written by *Sandoval*'s author. See, *e. g.*, *United States* v. *Bormes*, 568 U. S. 6, 15–16 (2012); *United States* v. *Navajo Nation*, 556 U. S. 287, 290 (2009). Not even *Sandoval* went as far as the dissent; that decision instead explained that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." 532 U. S., at 286. That is precisely what the money-mandating inquiry does: It provides a framework for determining when Congress has authorized a claim against the Government.

This framework also makes good sense. Cf. *post*, at 331–332. As the author of *Sandoval* explained, if a statutory obligation to pay money is mandatory, then the congressionally conferred "right to receive money," *post*, at 335, n. 5, will typically display an intent to provide a damages remedy for the defaulted amount, *Bowen* v. *Massachusetts*, 487 U. S. 879, 923 (1988) (Scalia, J., dissenting) (a "statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount"). As this Court recently observed, Congress enacted the Tucker Act to "suppl[y] the missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *Bormes*, 568 U. S., at 12.

By the dissent's contrary suggestion, not only is a mandatory statutory obligation to pay meaningless, so too is a constitutional one. After all, the Constitution did not "expressly create . . . a right of action," *post*, at 330, when it mandated "just compensation" for Government takings of private property for public use, Amdt. 5; see also *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315–316 (1987). Although there is no express cause of action under the Takings Clause, aggrieved owners can sue through the Tucker Act under our case law. *E. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1016–1017 (1984) (citing *United States* v. *Causby*, 328 U. S. 256, 267 (1946)).

tailed remedies, or when the Administrative Procedure Act, 60 Stat. 237, provides an avenue for relief. See *Bormes*, 568 U. S., at 13, 16; *Bowen* v. *Massachusetts*, 487 U. S. 879, 900–908 (1988).

B

Petitioners clear each hurdle: The Risk Corridors statute is fairly interpreted as mandating compensation for damages, and neither exception to the Tucker Act applies.

1

Rarely has the Court determined whether a statute can "fairly be interpreted as mandating compensation by the Federal Government." *Mitchell*, 463 U. S., at 216–217 (internal quotation marks omitted). Likely this is because so-called money-mandating provisions are uncommon, see M. Solomson, Court of Federal Claims: Jurisdiction, Practice, and Procedure 4–18 (2016), and because Congress has at its disposal several blueprints for conditioning and limiting obligations, see n. 7, *supra*; see also GAO Redbook 2–22 to 2–24, 2–54 to 2–58. But Congress used none of those tools in § 1342. The Risk Corridors statute is one of the rare laws permitting a damages suit in the Court of Federal Claims.

Here again § 1342's mandatory text is significant. Statutory "'shall pay' language" often reflects congressional intent "to create both a right and a remedy" under the Tucker Act. *Bowen*, 487 U. S., at 906, n. 42; see also, *e. g.*, *id.*, at 923 (Scalia, J., dissenting) ("[A] statute commanding the payment of a specified amount of money by the United States impliedly authorizes (absent other indication) a claim for damages in the defaulted amount"); *United States* v. *Testan*, 424 U. S. 392, 404 (1976) (suggesting that the Back Pay Act, 5 U. S. C. § 5596, may permit damages suits under the Tucker Act "in carefully limited circumstances"); *Mitchell*, 463 U. S., at 217 (similar). Section 1342's triple mandate—that the HHS Secretary "shall establish and administer" the program, "shall provide" for payment according to the statutory

formula, and "shall pay" qualifying insurers—falls comfortably within the class of money-mandating statutes that permit recovery of money damages in the Court of Federal Claims.

Bolstering our finding is § 1342's focus on compensating insurers for past conduct. In assessing Tucker Act actions, this Court has distinguished statutes that "attempt to compensate a particular class of persons for past injuries or labors" from laws that "subsidize future state expenditures." *Bowen*, 487 U. S., at 906, n. 42. (The first group permits Tucker Act suits; the second does not.) The Risk Corridors statute sits securely in the first category: It uses a backwards-looking formula to compensate insurers for losses incurred in providing healthcare coverage for the prior year.[13]

2

Nor is there a separate remedial scheme supplanting the Court of Federal Claims' power to adjudicate petitioners' claims.

True, the Tucker Act "is displaced" when "a law assertedly imposing monetary liability on the United States contains its own judicial remedies." *Bormes*, 568 U. S., at 12. A plaintiff in that instance cannot rely on our "fair interpretation"

[13] Despite agreeing that "[t]he Court is correct" on the case law, the dissent proposes supplemental briefing and re-argument. *Post*, at 331, 335. We underscore, however, that all Members of this Court agree that today's cases do not break new doctrinal ground.

The Federal Circuit, moreover, concurs in our conclusion. 892 F. 3d 1311, 1320, n. 2 (2018) (holding that § 1342 "is money-mandating for [Tucker Act] purposes" (citing *Greenlee County* v. *United States*, 487 F. 3d 871, 877 (CA Fed. 2007))). It also agrees with our analysis broadly, having held that "shall pay" language "generally makes a statute money-mandating" under the Tucker Act. *Id.*, at 877 (internal quotation marks omitted). Conversely, the Court of Appeals has concluded that a statute is not money mandating where the Government enjoys "complete discretion" in determining whether (and whom) to pay. See, *e. g.*, *Doe* v. *United States*, 463 F. 3d 1314, 1324 (2006) (noting that the statutory term, "may," creates a rebuttable presumption that the "statute creates discretion").

test, and instead must stick to the money-mandating statute's "*own* text" to "determine whether the damages liability Congress crafted extends to the Federal Government." *Id.*, at 15–16. Examples include the Fair Credit Reporting Act, 84 Stat. 1127, and the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. The former superseded the Tucker Act by creating a cause of action, imposing a statute of limitations, and providing subject-matter jurisdiction in federal district courts. See 15 U. S. C. §§ 1681n, 1681*o*, 1681p; *Bormes*, 568 U. S., at 15. And the latter did so by allowing aggrieved parties to petition the Secretary of Agriculture and by paving a path for judicial review. See 7 U. S. C. § 608c(15); *Horne* v. *Department of Agriculture*, 569 U. S. 513, 527 (2013).

Unlike those statutes, however, the Affordable Care Act did not establish a comparable remedial scheme. Nor has the Government identified one. So this exception to the Tucker Act is no barrier here.

Neither does the Administrative Procedure Act bar petitioners' Tucker Act suit. To be sure, in *Bowen*, this Court held in the Medicaid context that a State properly sued the HHS Secretary under the Administrative Procedure Act (not the Tucker Act) in district court (not the Court of Federal Claims) for failure to make statutorily required payments. See 487 U. S., at 882–887, 901–905.

But *Bowen* is distinguishable on several scores. First, the relief requested there differed materially from what petitioners pursue here. In *Bowen*, the State did not seek money damages, but instead sued for prospective declaratory and injunctive relief to clarify the extent of the Government's ongoing obligations under the Medicaid program. Unlike § 1342, which "provide[s] compensation for specific instances of past injuries or labors," *id.*, at 901, n. 31, the pertinent Medicaid provision was a "grant-in-aid program," which "direct[ed] the Secretary . . . to subsidize future state expenditures," *id.*, at 906, n. 42. Thus, the suit in *Bowen* "was not

merely for past due sums, but for an injunction to correct the method of calculating payments going forward." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 212 (2002). And because the Court of Federal Claims "does not have the general equitable powers of a district court to grant prospective relief," 487 U. S., at 905, the Court reasoned that *Bowen* belonged in district court.

Second, the parties' relationship in *Bowen* also differs from the one implicated here. The State had employed the Administrative Procedure Act in *Bowen* because of the litigants' "complex ongoing relationship," which made it important that a district court adjudicate future disputes. *Ibid.*; see also *id.*, at 900, n. 31. The Court added that the Administrative Procedure Act "is tailored" to "[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets," while the Tucker Act is suited to "remedy-[ing] particular categories of past injuries or labors for which various federal statutes provide compensation." *Id.*, at 904–905, n. 39.

These observations confirm that petitioners properly sued the Government in the Court of Federal Claims. Petitioners' prayer for relief under the Risk Corridors statute looks nothing like the requested redress in *Bowen*. Petitioners do not ask for prospective, nonmonetary relief to clarify future obligations; they seek specific sums already calculated, past due, and designed to compensate for completed labors. The Risk Corridors statute and Tucker Act allow them that remedy. And because the Risk Corridors program expired years ago, this litigation presents no special concern about managing a complex ongoing relationship or tracking ever-changing accounting sheets. Petitioners' suit thus lies in the Tucker Act's heartland.[14]

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[14] The dissent concedes that there may "be some sharply defined categories of claims that may be properly asserted" through the Tucker Act "simply as a matter of precedent." *Post*, at 333, and nn. 3, 4 (citing takings,

V

In establishing the temporary Risk Corridors program, Congress created a rare money-mandating obligation requiring the Federal Government to make payments under § 1342's formula. And by failing to appropriate enough sums for payments already owed, Congress did simply that and no more: The appropriations bills neither repealed nor discharged § 1342's unique obligation. Lacking other statutory paths to relief, and absent a *Bowen* barrier, petitioners may seek to collect payment through a damages action in the Court of Federal Claims.[15]

These holdings reflect a principle as old as the Nation itself: The Government should honor its obligations. Soon after ratification, Alexander Hamilton stressed this insight as a cornerstone of fiscal policy. "States," he wrote, "who observe their engagements . . . are respected and trusted: while the reverse is the fate of those . . . who pursue an opposite conduct." Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), in 6 Papers of Alexander Hamilton 68 (H. Syrett & J. Cooke eds. 1962). Centuries later, this Court's case law still concurs.

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breach-of-contract, failure-to-pay-compensation, and breach-of-fiduciary-duty claims as examples). Petitioners' claim—breach of an unambiguous statutory promise to pay for services rendered to the Government—fits easily within those precedents. The only differences the dissent seems to assert here are that the dollar figure is higher and that petitioners do not deserve a "bailout" for their "bet" that the Federal Government would comply with federal law. *Post*, at 330, 334; but cf., *e. g.*, 79 Fed. Reg. 30260 (assuring insurers with "concerns that risk corridors collections may not be sufficient to fully fund risk corridors payments" that the Government would still pay). Our analysis in Tucker Act cases has never revolved on such results-oriented reasoning.

[15] Having found that the Risk Corridors statute is a money-mandating provision for which a Tucker Act suit lies, we need not resolve petitioners' alternative arguments for recovery based on an implied-in-fact contract theory or under the Takings Clause.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, dissenting.

Twice this Term, we have made the point that we have basically gotten out of the business of recognizing private rights of action not expressly created by Congress. Just a month ago in *Comcast Corp.* v. *National Assn. of African American-Owned Media*, 589 U. S. 327, 334 (2020), after noting a 1975 decision[1] inferring a private right of action under 42 U. S. C. § 1981, we wrote the following about that decision:

> "That was during a period when the Court often 'assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose.' *Ziglar* v. *Abbasi*, 582 U. S. 120, 132 (2017) (internal quotation marks omitted). With the passage of time, of course, we have come to appreciate that, '[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress' and '[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.' *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001) (internal quotation marks omitted)."

A month before that, in *Hernández* v. *Mesa*, 589 U. S. 93 (2020), we made the same point and accordingly refused to infer a cause of action under the Fourth Amendment for an allegedly unjustified cross-border shooting. We reasoned that "a lawmaking body that enacts a provision that creates a right . . . may not wish to pursue the provision's purpose

[1] *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459 (1975).

to the extent of authorizing private suits for damages." *Id.*, at 100. Other recent opinions are similar. See, *e. g.*, *Ziglar* v. *Abbasi*, 582 U. S. 120, 132–136, 145 (2017); *Jesner* v. *Arab Bank, PLC*, 584 U. S. 241, 264–265 (2018); *id.*, at 274 (THOMAS, J., concurring); *id.*, at 274–275, 276–277 (ALITO, J., concurring in part and concurring in judgment); *id.*, at 280–281 (GORSUCH, J., concurring in part and concurring in judgment).

Today, however, the Court infers a private right of action that has the effect of providing a massive bailout for insurance companies that took a calculated risk and lost. These companies chose to participate in an Affordable Care Act program that they thought would be profitable. I assume for the sake of argument that the Court is correct in holding that § 1342 of the Affordable Care Act created an obligation that was not rescinded by subsequent appropriations riders. Thus, for present purposes, I do not dispute the thrust of the analysis in Parts I–III of the opinion of the Court.

I

My disagreement concerns the critical question that the Court decides in the remainder of its opinion. In order for petitioners to recover, federal law must provide a right of action for damages. The Tucker Act, 28 U. S. C. § 1491, under which petitioners brought suit, provides a waiver of sovereign immunity and a grant of federal-court jurisdiction, but it does not create any right of action. See, *e. g.*, *United States* v. *Navajo Nation*, 556 U. S. 287, 290 (2009). Nor does any other federal statute expressly create such a right of action. The Court, however, holds that § 1342 of the Affordable Care Act does so by implication. Because § 1342 says that the United States "shall pay" for the companies' losses, 42 U. S. C. § 18062(b)(1), the Court finds it is proper to infer a private right of action to recover for these losses.

This is an important step. Under the Court's decision, billions of taxpayer dollars will be turned over to insurance companies that bet unsuccessfully on the success of the pro-

gram in question. This money will have to be paid even though Congress has pointedly declined to appropriate money for that purpose.

Not only will today's decision have a massive immediate impact, its potential consequences go much further. The Court characterizes provisions like § 1342 as "rare," *ante*, at 324, but the phrase the "Secretary shall pay"—the language that the Court construes as creating a cause of action—appears in many other federal statutes.

II

The Court concludes that it is proper for us to recognize a right of action to collect damages from the United States under any statute that "'can fairly be interpreted as mandating compensation.'" *Ante*, at 322. The Court is correct that prior cases have set out this test, but as the Court acknowledges, we have "[r]arely" had to determine whether it was met. See *ante*, at 324. And we have certainly never inferred such a right in a case even remotely like these.

Nor has any prior case provided a reasoned explanation of the basis for the test. In *United States* v. *Testan*, 424 U. S. 392 (1976), the Court simply lifted the language in question from an opinion of the old United States Court of Claims before holding that the test was not met in the case at hand. *Id.*, at 400–402 (citing *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967)). The Court of Claims opinion, in turn, did not explain the origin or basis for this test. See *id.*, at 607, 372 F. 2d, at 1009. And not only have later cases parroted this language, they have expanded it. In *United States* v. *White Mountain Apache Tribe*, 537 U. S. 465, 473 (2003) (emphasis added), the Court wrote that "[i]t is enough . . . that a statute . . . be *reasonably amenable* to the reading that it mandates a right of recovery in damages."

Despite the uncertain foundation of this test, our post-*Testan* decisions have simply taken it as a given. I would

not continue that practice. Before holding that this test requires the payment of billions of dollars that Congress has pointedly refused to appropriate, we ought to be sure that there is a reasonable basis for this test. And that is questionable.[2]

III

There is obvious tension between what the Court now calls the "money-mandating" test, *ante*, at 324–325, and our recent decisions regarding the recognition of private rights of action. Take the statute at issue in our *Comcast* decision. That provision, 42 U. S. C. § 1981(a), states:

> "All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." (Emphasis added.)

Our opinion in *Comcast* suggested that we might not find this "shall have" language sufficient to justify the recognition of a damages claim if the question came before us today as a matter of first impression. See 589 U. S., at 333–334. But if that is so, how can we reach a different conclusion with respect to the "shall pay" language in § 1342 of the Affordable Care Act? Similarly, the Fourth Amendment provides that "[t]he right of the people to be secure . . . against unreasonable . . . seizures . . . *shall not be violated.*" (Emphasis added.) Can this rights-mandating language be distinguished from what the Court describes as the "money-mandating" language found in § 1342? See *Hernández*, 589 U. S., at 103, 113–114 (rejecting extension of *Bivens* v. *Six*

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[2] Moreover, there is at least an argument that the Court's application of the test here is itself in conflict with *United States* v. *Testan*, 424 U. S. 392, 400 (1976), which also directed that the "grant of a right of action must be made with specificity."

Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971), to Fourth Amendment claim arising in a "new context").

One might argue that the assumptions underlying the enactment of the Tucker Act justify our exercising more leeway in inferring rights of action that may be asserted under that Act. When the Tucker Act was enacted in 1887, Congress undoubtedly assumed that the federal courts would "'[r]ais[e] up causes of action,'" *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001), in the manner of a common-law court. At that time, federal courts often applied general common law. But since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the federal courts have lacked this power. Yet the "money-mandating" test that the Court applies today, *ante*, at 324–325, and n. 13, bears a disquieting resemblance to the sort of test that a common-law court might use in deciding whether to create a new cause of action. To be sure, *some* of the claims asserted under the Tucker Act, most notably contract claims, are governed by the new federal common law that applies in limited areas involving "'uniquely federal interests.'" *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 504 (1988); see also *Testan*, 424 U. S., at 400. And the recognition of an implied right to recover on such claims is thus easy to reconcile with the post-*Erie* regime. There may also be some sharply defined categories of claims[3] that may be properly asserted simply as a matter of precedent.[4] But

[3] Takings claims are an example. During the period when federal courts applied general common law, such claims were brought under the Tucker Act, apparently on the theory of implied contract. See, *e. g.*, *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *United States* v. *Lynah*, 188 U. S. 445, 458–459 (1903). But the Court rejected the argument that a takings claim could be based "exclusively on the Constitution, without reference to any statute of the United States, or to any contract arising under an act of Congress." *Hooe* v. *United States*, 218 U. S. 322, 335 (1910).

[4] Compare *Testan*, 424 U. S., at 400 (suggesting that private remedies might be available for contract claims); *United States* v. *Mitchell*, 463 U. S. 206, 224–228 (1983) (relying on "fiduciary relationship . . . [that] arises when the Government assumes . . . control over forests and property be-

the exercise of common-law power in cases like the ones now before us is a different matter.

An argument based on Congress's assumptions in enacting the Tucker Act would present a question that is similar to one we have confronted under the Alien Tort Statute (ATS), a provision like the Tucker Act that grants federal jurisdiction but does not itself create any right of action. *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 713 (2004). Our cases have assumed that the ATS was enacted on the assumption that it would provide a jurisdictional basis for plaintiffs to assert common-law claims, see *id.*, at 724, but our recent cases have held that even there, we should exercise "great caution" before recognizing any new claims not created by statute, *id.*, at 728. See also *Jesner*, 584 U. S., at 264–265; *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 116–117 (2013). There is every reason to believe that a similar caution should guide cases under the Tucker Act—especially when billions of dollars of federal funds are at stake. The money-mandating test that the Court applies here is in stark tension with this precedent.

Despite its importance, the legitimacy of inferring a right of action under § 1342 has not received much attention in these cases. The Federal Circuit addressed the question in passing in a footnote, 892 F. 3d 1311, 1320, n. 2 (2018), and in this Court, the briefing and argument focused primarily on other issues. No attempt was made to reconcile our approach to inferring rights of action in Tucker Act cases with our broader jurisprudence.

I am unwilling to endorse the Court's holding in these cases without understanding how the "money-mandating"

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longing to Indians" to create cause of action); *Bell* v. *United States*, 366 U. S. 393 (1961) (adjudicating suit brought by former service members for compensation while they were prisoners of war), with *Bowen* v. *Massachusetts*, 487 U. S. 879, 905, n. 42 (1988) (rejecting cause of action cognizable under the Tucker Act based on "shall pay" requirement under the Medicaid Act, 42 U. S. C. § 1396b(a)).

test on which the Court relies fits into our general approach to the recognition of implied rights of action.[5] Because the briefing and argument that we have received have not fully addressed this important question, I would request supplemental briefing and set the cases for re-argument next Term.

For these reasons, I respectfully dissent.

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[5] The Court claims that the logic of this opinion "suggests that a federal statute could never provide a cause of action for damages absent magic words explicitly inviting suit." *Ante*, at 323, n. 12. But all I suggest is that the Court request briefing on the question of inferring causes of action to recover damages under the Tucker Act. The Court makes no effort to explain how the test it applies here can be reconciled with our general approach to inferring private rights of action but is apparently content to allow that inconsistency to remain.

The Court is flatly wrong in saying that the test in *Alexander* v. *Sandoval*, 532 U. S. 275, 286 (2001)—whether a statute "displays an intent to create not just a private right but also a private remedy"—is "precisely" the same as its "money-mandating inquiry." *Ante*, at 323, n. 12. In fact, the "money-mandating inquiry" is precisely contrary to the statement in *Sandoval*. *Sandoval* said unequivocally that it is not enough if a statute merely "displays an intent to create . . . a private right," 532 U. S., at 286, but according to the Court, it is sufficient for a statute to manifest only an intent to create a right to receive money.

The Court asserts that there is no real difference between the billion-dollar private right of action that the Court now creates on behalf of sophisticated economic actors and our prior precedents, *ante*, at 327, n. 14, but the Court does not identify analogous precedents—perhaps because there are none to cite.

Syllabus

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL. *v.* CITY OF NEW YORK, NEW YORK, ET AL.

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

No. 18–280. Argued December 2, 2019—Decided April 27, 2020

Petitioners sought to enjoin enforcement of a New York City rule that restricted the transport of firearms, claiming that the rule violated the Second Amendment. The District Court and the Court of Appeals rejected petitioners' claim. After the Court granted certiorari, the City amended its rule to allow the transport of firearms to a second home or shooting range outside the City, precisely the relief requested by petitioners.

Held: Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is moot. Because mootness is attributable to a change in the challenged legal framework, the Court vacates the decision below and remands for further proceedings. The courts below may consider on remand whether petitioners may add a claim for damages in this lawsuit with respect to the City's old rule.

883 F. 3d 45, vacated and remanded.

Paul D. Clement argued the cause for petitioners. With him on the briefs were *Erin E. Murphy* and *Matthew D. Rowen.*

Principal Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Vivek Suri*, and *Michael S. Raab.*

Richard Dearing argued the cause for respondents. With him on the brief were *Zachary W. Carter*, *Claude S. Platton*, *Elina Druker*, *Ingrid R. Gustafson*, *Susan Paulson*, *Jeffrey L. Fisher*, *Anton Metlitsky*, *Jennifer B. Sokoler*, and *Bradley N. Garcia.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, *Elizabeth B. Murrill*, Solicitor General, and *Michelle Ward Ghetti*, Deputy Solicitor

PER CURIAM.

In the District Court, petitioners challenged a New York City rule regarding the transport of firearms. Petitioners claimed that the rule violated the Second Amendment. Petitioners sought declaratory and injunctive relief against

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General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Chris Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Eric S. Schmitt* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for Academics for the Second Amendment by *Joseph Edward Olson* and *David T. Hardy*; for the American Civil Rights Union by *Kenneth A. Klukowski*; for the California Rifle and Pistol Association, Inc., et al. by *C. D. Michel*, *Sean A. Brady*, and *Anna M. Barvir*; for the Cato Institute by *Ilya Shapiro*; for Commonwealth Second Amendment, Inc., by *Alan Gura*; for the Firearms Policy Foundation et al. by *Erik S. Jaffe* and *Gene C. Schaerr*; for Judicial Watch, Inc., et al. by *Chris Fedeli*; for the Liberal Gun Club by *David D. Jensen* and *Daniel L. Schmutter*; for the Madison Society Foundation, Inc., by *Donald E. J. Kilmer, Jr.*; for the Mountain States Legal Foundation by *Cristen Wohlgemuth*; for the National African American Gun Association, Inc., by *Stephen P. Halbrook*; for the National Rifle Association of America, Inc., by *David H. Thompson*, *Howard C. Nielson, Jr.*, *Peter A. Patterson*, and *John D. Ohlendorf*; for the National Sheriffs' Association et al. by *Dan M. Peterson*; for Pink Pistols by *Brian Koukoutchos*; for Professors of Second Amendment Law et al. by *David B. Kopel* and *Joseph G. S. Greenlee*; for Rep. Bradley Byrne et al. by *E. Travis Ramey* and *William Grayson Lambert*; for Robert Leider by *William S. Consovoy* and *J. Michael Connolly*; and for George K. Young by *Stephen D. Stamboulieh* and *Alan Alexander Beck*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Letitia James*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Andrew W. Amend*, Assistant Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *William Tong* of Connecticut, *Karl A. Racine* of the District of Columbia, *Kwame Raoul* of Illinois, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Gurbir S. Grewal* of New Jersey,

enforcement of the rule insofar as the rule prevented their transport of firearms to a second home or shooting range outside of the city. The District Court and the Court of Appeals rejected petitioners' claim. See 883 F. 3d 45 (CA2 2018). We granted certiorari. 586 U. S. 1126 (2019). After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city, which is the precise relief that petitioners requested in the prayer for relief

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Ellen F. Rosenblum of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Mark R. Herring* of Virginia; for the Citizens Crime Commission of New York City by *Harry Sandick*; for the National Education Association by *Alice O'Brien*, *Jason Walta*, and *Emma Leheny*; for the National League of Cities et al. by *Lawrence Rosenthal* and *Lisa Soronen*; and for 139 Members of the United States House of Representatives by *Avi Weitzman*, *Akiva Shapiro*, and *Lee R. Crain*.

Briefs of *amici curiae* were filed for Americans Against Gun Violence by *Fred J. Hiestand*; for the Becket Fund for Religious Liberty by *Luke W. Goodrich* and *Joseph C. Davis*; for Black Guns Matter by *J. Steven Foley*; for Brady et al. by *Paul R. Q. Wolfson* and *Jonathan E. Lowy*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Constitutional Law Professors by *Vincent Levy*; for Corpus Linguistics Professors et al. by *Brian R. Matsui* and *Jamie A. Levitt*; for the Everytown for Gun Safety Support Fund by *Deepak Gupta*, *Jonathan E. Taylor*, *Eric A. Tirschwell*, and *William J. Taylor, Jr.*; for Federal Courts Scholars by *Michael B. Kimberly*, *Paul W. Hughes*, and *Adam M. Samaha*, *pro se*; for the Giffords Law Center to Prevent Gun Violence by *Benjamin C. Mizer*, *Amanda K. Rice*, and *J. Adam Skaggs*; for Gun Owners of America, Inc., et al. by *Robert J. Olson*, *William J. Olson*, *Jeremiah L. Morgan*, *Herbert W. Titus*, *Joseph W. Miller*, and *John I. Harris III*; for the March for Our Lives Action Fund by *Ira M. Feinberg* and *Kirti Datla*; for Public Health Researchers et al. by *Jeffrey T. Green*; for Second Amendment Law Professors by *Donald B. Verrilli, Jr.*, and *Justin P. Raphael*; for William J. Bratton by *Roberto J. Gonzalez*; for Patrick J. Charles by *John M. Grenfell*, *Thomas V. Loran III*, and *Francine T. Radford*; for Neal Goldfarb by *Mr. Goldfarb*, *pro se*; and for Sen. Sheldon Whitehouse et al. by *Mr. Whitehouse*, *pro se*.

in their complaint. App. 48. Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot. Petitioners now argue, however, that the new rule may still infringe their rights. In particular, petitioners claim that they may not be allowed to stop for coffee, gas, food, or restroom breaks on the way to their second homes or shooting ranges outside of the city. The City responds that those routine stops are entirely permissible under the new rule. We do not here decide that dispute about the new rule; as we stated in *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 482–483 (1990):

> "Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. See, *e. g.*, *Deakins* v. *Monaghan*, 484 U. S., at 204; *United States* v. *Munsingwear*, *Inc.*, 340 U. S. 36, 39–40 (1950). However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully. See *Diffenderfer* v. *Central Baptist Church of Miami*, *Inc.*, 404 U. S. 412, 415 (1972)."

Petitioners also argue that, even though they have not previously asked for damages with respect to the City's old rule, they still could do so in this lawsuit. Petitioners did not seek damages in their complaint; indeed, the possibility of a damages claim was not raised until well into the litigation in this Court. The City argues that it is too late for petitioners to now add a claim for damages. On remand, the Court of Appeals and the District Court may consider whether petitioners may still add a claim for damages in this lawsuit with respect to New York City's old rule. The judgment of the

Court of Appeals is vacated, and the case is remanded for such proceedings as are appropriate.

It is so ordered.

JUSTICE KAVANAUGH, concurring.

I agree with the *per curiam* opinion's resolution of the procedural issues before us—namely, that petitioners' claim for injunctive relief against New York City's old rule is moot and that petitioners' new claims should be addressed as appropriate in the first instance by the Court of Appeals and the District Court on remand.

I also agree with JUSTICE ALITO's general analysis of *Heller* and *McDonald*. *Post*, at 364; see *District of Columbia* v. *Heller*, 554 U. S. 570 (2008); *McDonald* v. *Chicago*, 561 U. S. 742 (2010); *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1269 (CADC 2011) (Kavanaugh, J., dissenting). And I share JUSTICE ALITO's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, and with whom JUSTICE THOMAS joins except for Part IV–B, dissenting.

By incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced. Twelve years ago in *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), we held that the Second Amendment protects the right of ordinary Americans to keep and bear arms. Two years later, our decision in *McDonald* v. *Chicago*, 561 U. S. 742 (2010), established that this right is fully applicable to the States. Since then, the lower courts have decided numerous cases involving Second Amendment challenges to a variety of federal, state, and local laws. Most have failed. We have been asked to re-

view many of these decisions, but until this case, we denied all such requests.

On January 22, 2019, we granted review to consider the constitutionality of a New York City ordinance that burdened the right recognized in *Heller*. Among other things, the ordinance prohibited law-abiding New Yorkers with a license to keep a handgun in the home (a "premises license") from taking that weapon to a firing range outside the City. Instead, premises licensees wishing to gain or maintain the ability to use their weapons safely were limited to the seven firing ranges in the City, all but one of which were largely restricted to members and their guests.

In the District Court and the Court of Appeals, the City vigorously and successfully defended the constitutionality of its ordinance, and the law was upheld based on what we are told is the framework for reviewing Second Amendment claims that has been uniformly adopted by the Courts of Appeals.[1] One might have thought that the City, having convinced the lower courts that its law was consistent with *Heller*, would have been willing to defend its victory in this Court. But once we granted certiorari, both the City and the State of New York sprang into action to prevent us from deciding this case. Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed its ordinance. And for good measure the State enacted a law making the old New York City ordinance illegal.

Thereafter, the City and *amici* supporting its position strove to have this case thrown out without briefing or argument. The City moved for dismissal "as soon as is reasonably practicable" on the ground that it had "no legal reason to file a brief." Suggestion of Mootness 1. When we refused to jettison the case at that early stage, the City submit-

[1] See Brief for Second Amendment Law Professors et al. as *Amici Curiae* 8–9.

ted a brief but "stress[ed] that [its] true position [was] that it ha[d] no view at all regarding the constitutional questions presented" and that it was "offer[ing] a defense of the . . . former rul[e] in the spirit of something a Court-appointed *amicus curiae* might do." Brief for Respondents 2.

A prominent brief supporting the City went further. Five United States Senators, four of whom are members of the bar of this Court, filed a brief insisting that the case be dismissed. If the Court did not do so, they intimated, the public would realize that the Court is "motivated mainly by politics, rather than by adherence to the law," and the Court would face the possibility of legislative reprisal. Brief for Sen. Sheldon Whitehouse et al. as *Amici Curiae* 2–3, 18 (internal quotation marks omitted).

Regrettably, the Court now dismisses the case as moot. If the Court were right on the law, I would of course approve that disposition. Under the Constitution, our authority is limited to deciding actual cases or controversies, and if this were no longer a live controversy—that is, if it were now moot—we would be compelled to dismiss. But if a case is on our docket and we have jurisdiction, we have an obligation to decide it. As Chief Justice Marshall wrote for the Court in *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821), "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

Thus, in this case, we must apply the well-established standards for determining whether a case is moot, and under those standards, we still have a live case before us. It is certainly true that the new City ordinance and the new State law give petitioners *most of* what they sought, but that is not the test for mootness. Instead, "a case 'becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party.'" *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013) (emphasis added). "'As long as the parties have a concrete interest, *however small*, in the out-

come of the litigation, the case is not moot.'" *Ibid.* (emphasis added).

Respondents have failed to meet this "heavy burden." *Adarand Constructors, Inc.* v. *Slater*, 528 U. S. 216, 222 (2000) (*per curiam*) (internal quotation marks omitted). This is so for two reasons. First, the changes in City and State law do not provide petitioners with all the injunctive relief they sought. Second, if we reversed on the merits, the District Court on remand could award damages to remedy the constitutional violation that petitioners suffered.

I

A

1

New York State has strict laws governing the possession of firearms. With only a few exceptions, possession without a license is punishable by imprisonment and a fine. N. Y. Penal Law Ann. §§ 60.01(3), 70.15, 265.01–265.04, 265.20(a)(3) (West Cum. Supp. 2020). Local authorities administer the licensing program, § 400.00(3)(a), and in New York City, this is done by the New York City Police Department's (NYPD's) License Division. See 38 N. Y. C. R. R. § 5–01 *et seq.* (2020); N. Y. Penal Law Ann. § 265.00(10); N. Y. C. Admin. Code § 10–131 (2020).

New York State law contemplates two primary forms of handgun license—a premises license, which allows the licensee to keep the registered handgun at a home or business, and a carry license, which permits the licensee to carry a concealed handgun outside the home. N. Y. Penal Law Ann. §§ 400.00(2)(a), (b), (f). In this case, only premises licenses are at issue.

State law imposes an exacting standard for obtaining a premises license, and the NYPD License Division subjects applicants to rigorous vetting. Licenses may be issued only if, among other things, an applicant is "of good moral charac-

ter" and "no good cause exists for the denial of the license." §§400.00(1)(b), (n); see also App. 95–109 ("Instructions to Handgun License Applicants" (capitalization omitted)).

New York City residents must submit their applications in-person at One Police Plaza in Manhattan. An applicant must pay a fee of $431.50; must provide proof of age, citizenship, and residence; and must produce an original Social Security card. *Id.*, at 95–96, 98. A completed application must specify the particular handgun that the applicant wishes to possess and the address for which the license is sought. It must list all the applicant's residences and places of employment for the past five years. *Id.*, at 99–100, 104–105. An applicant must answer questions about past arrests, summonses, indictments, convictions, and civil orders, and must respond to probing questions about past drug use, subpoenas and testimony, unsuccessful applications for civil service positions, military service, mental illness, and physical conditions (such as "Epilepsy," "Diabetes," or "any Nervous Disorder") that could, in the judgment of the License Division, interfere with the use of a handgun. *Id.*, at 96–97, 101–102. The applicant must explain where and how he or she will safeguard the handgun when not in use, and furnish the name and address of a New York State resident who will take custody of the handgun in the event of the applicant's death or disability. *Id.*, at 104.

And these application requirements are only the beginning. The submission of an application triggers a "'rigorous'" police investigation "into the applicant's mental health history, criminal history, [and] moral character." *Kachalsky* v. *County of Westchester*, 701 F. 3d 81, 87 (CA2 2012). A licensing officer is required by law to review mental health records, investigate the truthfulness of the statements in the application, and forward the applicant's fingerprints to the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation to determine if the applicant has a criminal record. N. Y. Penal Law Ann.

§§ 400.00(1), (4). Under City law, grounds for denial include, among other things, any arrest, indictment, or conviction for a crime or violation (with the exception of minor traffic violations) in any federal, state, or local jurisdiction; a dishonorable discharge from the military; alcoholism, drug use, or mental illness; "a poor driving history"; failure to pay debts, including child support and taxes; and untruthfulness in the application. 38 N. Y. C. R. R. § 5–10. The process also includes an in-person interview, during which the License Division may request additional paperwork. App. 100.

It takes the License Division approximately six months to process applications, § 5–07(a), and during this time, the applicant cannot lawfully possess a handgun in the home, § 5–09. When the license issues and the applicant wishes to obtain it, he or she must appear in person at police headquarters for at least the third time. § 5–07(b). At present, we are told, approximately 40,000 City residents (representing about 1.29% of the households in the City)[2] have been issued handgun licenses.

The NYPD may revoke a premises license at any time, § 5–07(d), including for such things as laminating the license, § 5–22(a)(4). And a license expires after three years, so a licensee who wants to continue to possess a gun in the home after that time must file a renewal application. § 5–28(a).

2

The ordinance that petitioners challenged in this case was adopted in 2001. Before then, the NYPD issued both premises licenses and so-called "target licenses," which allowed licensees to transport their handguns to specified, preapproved ranges outside of the City. See App. to Pet. for Cert. 90–92. Target licenses were eliminated in 2001, and from that time until the City's post-certiorari change of heart,

[2] The last census found that there were 3,109,784 households in the City. D. Gaquin & M. Ryan, County and City Extra: Special Decennial Census Edition 607 (2012).

premises licensees could practice with their guns only if: they traveled "directly to and from an *authorized* small arms range/shooting club"; their guns were unloaded and secured in a locked container; and any ammunition was "carried separately." § 5–23(a)(3) (in effect prior to July 21, 2019) (emphasis added); *id.*, at 88. And—what is most important for present purposes—the only "authorized" ranges or clubs were ones "located in New York City." App. 50, 63. At the relevant time, there were only seven such ranges in the entire City: two in Staten Island, two in Queens, one in Brooklyn, one in Manhattan, and one in the Bronx. See *id.*, at 92–93. All but one generally admitted only members and their guests, and the only range open to the public was closed for a time during the pendency of the case below.

B

1

In 2013, three individuals and one organization representing New York gun owners brought suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, against the City and the NYPD License Division, contending that the restrictive premises license scheme, 38 N. Y. C. R. R. § 5–23, violated their rights under the Second Amendment and other provisions of the Constitution.

One of the individual petitioners, Romolo Colantone, has held a New York City firearms license since 1979. App. 28–29, 51. Colantone currently has a premises license for his residence and wishes to take his handgun to ranges and competitions outside the City and to his second home in Hancock, New York. He refrained from doing so because of the ordinance prohibiting such travel. *Id.*, at 32, 53–54. For example, Colantone registered to participate in the 2012 World Class Steel Northeast Regional Championship in Old Bridge, New Jersey—about 20 miles from his home in the City. Plaintiffs' Memorandum in Support of Cross-Motion for Summary Judgt. in No. 1:13–cv–2115 (SDNY), Doc. No. 44

(Plaintiffs' Memo). But after the hosts of that competition alerted him that his premises license did not allow him to transport his handgun to New Jersey—and after Inspector Andrew Lunetta, the commanding officer of the NYPD License Division, confirmed this—Colantone pulled out of the competition. App. 32, 49–50, 55.

Plaintiff Efrain Alvarez has had a firearms license for approximately 30 years, and plaintiff Jose Anthony Irizarry has been licensed for 15 years. Both men would like to take their handguns to ranges and competitions outside the City, but they have not done so because of the same ordinance. See *id.*, at 29, 32–33. After the hosts of the previously noted competition in New Jersey advised them that their New York City premises licenses barred them from taking their handguns outside the City, they both decided not to attend. *Id.*, at 32–33. For the same reason, Alvarez also did not participate in the International Defensive Pistol Association Postal Matches in Simsbury, Connecticut. *Ibid.* All three individual petitioners aver that they regularly traveled outside the City to ranges and championships before learning of the restriction imposed by § 5–23. *Id.*, at 32–33.

Petitioners' amended complaint maintained that the Second Amendment requires "*unrestricted* access to gun ranges and shooting events in order to practice and perfect safe gun handling skills." *Id.*, at 36 (emphasis added). The complaint asserts that practice is necessary for "the safe and responsible use of firearms for . . . self-defense, and the defense of one's home." *Id.*, at 33. And a New York City ordinance backs this up, providing that a licensee "should endeavor to engage in periodic handgun practice at an authorized small arms range/shooting club." § 5–22(a)(14). According to the complaint, the City, by limiting licensees like petitioners to the seven ranges in the City, imposed a serious burden on the exercise of their Second Amendment right. App. 36.

The amended complaint's prayer for relief sought an injunction against enforcement of the travel restriction, as well as attorney's fees, costs of suit, declaratory relief . . . and "*[a]ny other such further relief as the [c]ourt deems just and proper.*" *Id.*, at 47–48 (emphasis added).

2

The City vigorously defended its law. The ordinance did not impinge on petitioners' Second Amendment right, the City told the lower courts, and even if it did, the law survived heightened scrutiny. That was so, the City maintained, because the travel restrictions were "necessary to protect the public safety insofar as the transport of firearms outside the home potentially endangers the public." City of New York's Memorandum in Support of Cross-Motion for Summary Judgt. & Opposition to Plaintiffs' Motion for Preliminary Injunction in No. 1:13–cv–2115, Doc. No. 36, p. 10.

To support this assertion, the City relied on the declaration of Inspector Lunetta, which attempted to explain why the restrictions were "necessary to address . . . public safety concerns." App. 76. Lunetta justified the law in three ways. First, he maintained that the restriction on out-of-city transport promoted public safety by causing "premises license holders [to] bring their firearms into the public domain less frequently." *Id.*, at 78; see also *id.*, at 77.

Second, he claimed that the transport restriction helped to prevent the gun violence that might occur if a licensee became involved in an altercation while on the way to an out-of-city range or competition. Lunetta asserted that licensees are "as susceptible as anyone else" to "stress-inducing circumstance[s]" that can lead to violence. *Ibid.*

Finally, he claimed that the travel restriction made it simpler for a patrol officer to check whether the holder of a premises license who is found in possession of a gun outside the home is really headed for a range or is simply using that as a pretext for carrying a gun. *Id.*, at 78–79. He declared

that "there were several reported cases where [holders of premises or target licenses] were charged with criminal possession of a weapon when found with their firearms while not en route to a range." *Id.*, at 89. He cited five cases, *id.*, at 88–89, but not one of the opinions indicates that the licensee claimed to be headed to a range or competition outside the City.[3]

The District Court denied petitioners' motions for preliminary injunction and summary judgment and granted the City's cross-motion for summary judgment. 86 F. Supp. 3d 249, 261–263 (2015). The District Court deemed any burden on petitioners' Second Amendment right "minimal or, at most, modest." *Id.*, at 260. And the court credited the City's public safety rationale, citing the Lunetta declaration approvingly and discussing the importance of the travel restrictions in limiting the movement of licensees with their handguns. See *id.*, at 262.

The Second Circuit affirmed. The panel derided the ordinance's burdens on petitioners' Second Amendment right as "trivial" and expressly credited Lunetta's explanation of the public safety purposes served by the travel restriction. 883 F. 3d 45, 63–64 (2018).

When petitioners filed a petition for certiorari, the City opposed review, contending, among other things, that the travel restriction promoted public safety, as demonstrated by Lunetta's declaration (which the City cited six times). Brief in Opposition 9, 21–23. We nevertheless granted review on January 22, 2019, and this, as noted, apparently led

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[3] In one case, the violation charged was transporting a loaded gun. *People* v. *Schumann*, 133 Misc. 2d 499, 507 N. Y. S. 2d 349 (Crim. Ct. 1986). In another case, the gun was not in a locked container. *People* v. *Thompson*, 92 N. Y. 2d 957, 705 N. E. 2d 1200 (1998); see also *People* v. *Lap*, 150 Misc. 2d 724, 570 N. Y. S. 2d 258 (Crim. Ct. 1991) (loaded and unlocked). In the other two, there is no mention of an out-of-city range. *Lugo* v. *Safir*, 272 App. Div. 2d 216, 708 N. Y. S. 2d 618 (2000); *People* v. *Ocasio*, 108 Misc. 2d 211, 441 N. Y. S. 2d 148 (1981).

the City to reconsider whether the travel restriction was actually needed for public safety purposes.

C

On April 12, the NYPD published a proposed amendment to the travel restriction that was admittedly spurred at least in part by our grant of review. See Motion to Hold Briefing Schedule in Abeyance in No. 18–280, p. 3. Under this amendment, holders of premises licenses would be allowed to take their guns to ranges, competitions, and second homes outside the City provided that the licensees traveled "directly" between their residences and the permitted destinations. After a period of notice and comment, the proposed amendment was adopted on June 21 and took effect on July 21. Suggestion of Mootness 5–6.

Our grant of certiorari also prompted action by New York State. With the support of the City, Tr. of Oral Arg. 46, the Legislature enacted a new law abrogating any local law, rule, or regulation that prevented the holder of a premises license from transporting a licensed handgun "directly to or from" an authorized range, competition, or second home. N. Y. Penal Law Ann. § 400.00(6) (as in effect July 16, 2019).

Shortly after the new State law took effect, the City filed a Suggestion of Mootness, asking us to vacate the decision below and to remand with instructions to dismiss. The City urged us to rule on this matter expeditiously so that it would not be required to file a brief defending its prior law. Suggestion of Mootness 1. When we refused to vacate at that stage, the City protested that briefing the merits "require[d] the City to do what Article III's case-or-controversy requirement is designed to avoid: engage in litigation regarding the constitutionality of a law that no longer exists" and that the City would not reenact. Brief for Respondents 1. When the case was argued, counsel for the City was asked whether the repeal of the travel restriction had made the City any

less safe, and his unequivocal answer was no. Tr. of Oral Arg. 52.

II

The Court vacates the judgment of the Court of Appeals, *apparently* on the ground that this case is now moot. (Other than mootness, no other basis for vacating comes to mind, and therefore I proceed on that assumption.) And if that is the reason for what the Court has done, the Court is wrong. This case is not moot.

Article III, § 2 of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies," and as a result, we may not "'decide questions that cannot affect the rights of litigants in the case before [us].'" *Chafin*, 568 U. S., at 172. Nor may we advise "'what the law would be upon a hypothetical state of facts.'" *Ibid.* This means that the dispute between the parties in a case must remain alive until its ultimate disposition. If a live controversy ceases to exist—*i. e.*, if a case becomes moot—then we have no jurisdiction to proceed. But in order for this to happen, a case must really be dead, and as noted, that occurs only "'when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Ibid.* (quoting *Knox* v. *Service Employees*, 567 U. S. 298, 307 (2012)). "'[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Chafin*, 568 U. S., at 172 (quoting *Knox*, 567 U. S., at 307–308). Thus, to establish mootness, a "demanding standard" must be met. *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 587 U. S. 370, 377 (2019).

We have been particularly wary of attempts by parties to manufacture mootness in order to evade review. See *Knox*, 567 U. S., at 307; accord, *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 661 (1993). And it is black-letter law that we have a "virtually unflagging" obligation to exercise our jurisdiction.

Colorado River Water Conservation Dist. v. *United States*, 424 U. S. 800, 817 (1976).

In this case, the amended City ordinance and the new State law gave petitioners most of what they sought in their complaint, but the new laws did not give them complete relief. It is entirely possible for them to obtain more relief, and therefore this case is not moot. This is so for the following reasons.

A

First, this case is not moot because the amended City ordinance and new State law do not give petitioners all the *prospective relief* they seek. Petitioners asserted in their complaint that the Second Amendment guarantees them, as holders of premises licenses, "unrestricted access" to ranges, competitions, and second homes outside of New York City, App. 36, and the new laws do not give them that.[4]

The new City ordinance has limitations that petitioners claim are unconstitutional, namely, that a trip outside the City must be "direc[t]" and travel within the City must be "continuous and uninterrupted." 38 N. Y. C. R. R. §§5–23(a)(3), (7). Exactly what these restrictions mean is not clear from the face of the rule, and the City has done little to clarify their reach. At argument, counsel told us that the new rule allows "bathroom breaks," "coffee stops," and any other "reasonably necessary stops in the course of travel." Tr. of Oral Arg. 36, 64. But the meaning of a "reasonably

[4] Contrary to the City's suggestion, see Reply to Suggestion of Mootness 5, petitioners have not softened their stance over the course of this litigation. At summary judgment, petitioners asked that the District Court declare 38 N. Y. C. R. R. §5–23 unconstitutional and enjoin its enforcement "*in any manner* that prohibits or precludes [petitioners] from traveling" with their handguns to a range, competition, or second home outside the borders of New York City. Notice of Cross-Motion for Summary Judgt. in No. 1:13–cv–2115, Doc. No. 43, p. 1; Plaintiffs' Memo, at 39; and Plaintiffs' Reply Memorandum, Doc. No. 53, p. 13 (emphasis added); see also Motion for Preliminary Injunction, Doc. No. 9, p. 1.

necessary" stop is hardly clear. What about a stop to buy groceries just before coming home? Or a stop to pick up a friend who also wants to practice at a range outside the City? Or a quick visit to a sick relative or friend who lives near a range? The City does not know the answer to such questions. See, *e. g.*, *id.*, at 65–66.

Based on all this, we are left with no clear idea where the City draws the line, and the situation is further complicated by the overlay of State law. The new State law appears to prevent the City from penalizing any "direc[t]" trip to a range or competition outside the City, but the State law does not define that limitation. Petitioners wanted to enter competitions in upstate New York more than a five hour drive from the City. Could they stop along the way? And if so, for how long? The State has not explained its understanding of this limitation, and in any event, prosecutorial decisions in New York are generally made by the State's 67 elected district attorneys. See *Haggerty* v. *Himelein*, 221 App. Div. 2d 138, 144–145, 644 N. Y. S. 2d 934, 940 (1996). The bottom line is that petitioners, who sought "unrestricted access" to out-of-city ranges and competitions, are still subject to restrictions of undetermined meaning.

These restrictions may not seem very important, but that is beside the point for purposes of mootness. Nor does it matter whether, in the end, those restrictions would be found to violate the Second Amendment. All that matters for present purposes is that the City still withholds from petitioners something that they have claimed from the beginning is their constitutional right. It follows that the case is not moot. It is as simple as that.

The situation here resembles that in *Knox*, 567 U. S. 298. The issue in that case was whether a public sector union had provided nonmembers the sort of notice that our case law required before they could be forced to pay a fee to subsidize certain union activities. We granted certiorari to review

the Ninth Circuit's holding that the notice that the union had provided was sufficient, but before we could decide the case, the union sent out a new notice and moved to dismiss the case as moot. The employees objected that the new notice was inadequate, and we refused to dismiss. In so doing, we did not opine on the adequacy of the new notice but simply held that the case was not moot because "there [was] still a live controversy as to the adequacy" of the notice. *Id.*, at 307. Although the new notice might have given the nonmembers most of what they sought, they still possessed " 'a concrete interest, however small, in the outcome of the litigation.' " *Id.*, at 307–308. And that was enough.

The situation here is essentially the same. Petitioners got most, but not all, of the prospective relief they wanted, and that means that the case is not dead.

B

The case is not moot for a separate and independent reason: If this Court were to hold, as petitioners request and as I believe we should, that 38 N. Y. C. R. R. § 5–23 violated petitioners' Second Amendment right, the District Court on remand could (and probably should) award damages. See *Mission Product Holdings*, 587 U. S., at 376–377. Petitioners brought their claims under 42 U. S. C. § 1983, which permits the recovery of damages. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 695–701 (1978). And while the amended complaint does not expressly seek damages, it is enough that it requests "[a]ny other such further relief as the [c]ourt deems just and proper." App. 48. Under modern pleading standards, that suffices.

The Federal Rules of Civil Procedure provide that a "final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." Rule 54(c) (emphasis added); see also 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure

§§ 2662, 2664 (4th ed. 2014) (Wright & Miller).[5] Courts have refused to award relief outside the pleadings only when that would somehow prejudice the defendant, such as when the defendant did not have an opportunity to contest the basis for that relief. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975); *United States* v. *Marin*, 651 F. 2d 24, 30 (CA1 1981); 10 Wright & Miller § 2664. Otherwise, "a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows a right to it." *Id.*, § 2662, at 168. Here, that could include damages.

1

At a minimum, if petitioners succeeded on their challenge to the travel restrictions, they would be eligible for nominal damages. When a plaintiff's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury. See *Carey* v. *Piphus*, 435 U. S. 247 (1978); *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299 (1986). Nominal damages are "the appropriate means of vindicating rights whose deprivation has not caused actual, provable injury." *Id.*, at 308, n. 11 (internal quotation marks omitted); see also *Carey*, 435 U. S., at 266. And they are particularly important in vindicating constitutional interests. See *Riverside* v. *Rivera*, 477 U. S. 561, 574 (1986) (plurality opinion). Consequently, courts routinely

[5] Lower courts have affirmed that Fed. Rule Civ. Proc. 54(c) means what it says: "[R]elief in damages is not foreclosed by plaintiff's failure to ask for damages in prayer." *Jet Inv., Inc.* v. *Department of Army*, 84 F. 3d 1137, 1143 (CA9 1996); *Illinois Physicians Union* v. *Miller*, 675 F. 2d 151, 158 (CA7 1982) ("It is well-settled that the district court may grant monetary relief . . . , even without a specific request"); *United States* v. *Marin*, 651 F. 2d 24, 30 (CA1 1981) (affirming award of damages although not expressly requested in complaint); *Sapp* v. *Renfroe*, 511 F. 2d 172, 176, n. 3 (CA5 1975) (allowing claim for damages raised for first time on appeal in light of Rule 54(c) and the catchall prayer for relief in plaintiff's complaint); accord, 10 Wright & Miller § 2664.

award nominal damages for constitutional violations. See, *e. g.*, *Stoedter* v. *Gates*, 704 Fed. Appx. 748, 762 (CA10 2017) (Fourth Amendment); *Klein* v. *Laguna Beach*, 810 F. 3d 693, 697 (CA9 2016) (free speech); *Project Vote/Voting for America, Inc.* v. *Dickerson*, 444 Fed. Appx. 660, 661 (CA4 2011) (*per curiam*) (free speech); *Price* v. *Charlotte*, 93 F. 3d 1241, 1257 (CA4 1996) (equal protection). And it is widely recognized that a claim for nominal damages precludes mootness. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, n. 47 (3d ed. Supp. 2019) (collecting cases); see also, *e. g.*, *Central Radio Co.* v. *Norfolk*, 811 F. 3d 625, 631–632 (CA4 2016); *Morgan* v. *Plano Independent School Dist.*, 589 F. 3d 740, 748, n. 32 (CA5 2009); *Bernhardt* v. *County of Los Angeles*, 279 F. 3d 862, 872 (CA9 2002); *Amato* v. *Saratoga Springs*, 170 F. 3d 311, 317 (CA2 1999) (Sand, J., joined by Sotomayor, J.); *Committee for First Amendment* v. *Campbell*, 962 F. 2d 1517, 1526–1527 (CA10 1992); *Henson* v. *Honor Committee of U. Va.*, 719 F. 2d 69, 72, n. 5 (CA4 1983).[6]

2

It is even possible that one or more of the petitioners may be eligible for compensatory damages. To get such relief, they would of course be required to show that they suffered an "actual injury." See *Carey*, 435 U. S., at 266; D. Dobbs & C. Roberts, Law of Remedies § 7.4(1), p. 660 (3d ed. 2018). But petitioners may be able to make such a showing. As discussed above, the failure to include in their complaint specific factual allegations of actual injury would not preclude such recovery.[7] See Fed. Rule Civ. Proc. 54(c). Nor were

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[6] A single Circuit has held that a claim for nominal damages alone does not maintain a live dispute. See *Flanigan's Enterprises, Inc. of Ga.* v. *Sandy Springs*, 868 F. 3d 1248 (CA11 2017). But that holding is difficult to reconcile with *Carey* and *Stachura*'s endorsement of nominal damages as an appropriate constitutional remedy.

[7] Even if specific allegations in the complaint were necessary, the District Court could allow amendment. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 331 (1971); 6 Wright & Miller § 1474 (3d ed. 2010).

petitioners obligated to provide information supporting actual injury in opposing the City's motion for summary judgment.

If we were to reverse the judgment below and hold the City's old rule unconstitutional, it would be appropriate to remand the case for proceedings on the question of remedies. We have frequently done this when we reverse a judgment that was entered against the plaintiff on liability grounds. See, *e. g.*, *Mission Product Holdings*, 587 U. S., at 376, 387 (deeming case live due to claim for damages, reversing judgment against petitioner, and remanding for further proceedings); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720, 748 (2007) (holding case live due in part to damages claim in complaint, reversing judgment against petitioners, and remanding for further proceedings); *Firefighters* v. *Stotts*, 467 U. S. 561, 583 (1984) (holding case live due to damages caused by lower court injunction and reversing); *Powell* v. *McCormack*, 395 U. S. 486, 493, 550 (1969) (remanding for award of unpaid congressional salary); cf., *e. g.*, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 478, n. 1 (1989) (holding that expiration of challenged ordinance did not moot dispute over whether defendant's action was "unlawful and thus entitle[d] appellee to damages").

With this is mind, the possibility of actual damages cannot be ruled out. One or more of the petitioners could seek compensation for out-of-pocket expenses, such as membership fees at in-city ranges. The current record shows that at least one of the petitioners is a member of a range in the City. App. 93–94. In addition, a petitioner may be entitled to compensation for expenses incurred in registering for out-of-city competitions from which he was compelled to withdraw. The record shows that one petitioner signed up for such a competition but had to pull out as a result of the City ordinance. *Id.*, at 32, 55. Petitioners could also seek compensation for any intangible but nevertheless real and personal injuries that they suffered due to their inability to attend shooting competitions, to practice at out-of-city ranges,

or to take their licensed handguns to second homes. Non-economic damages such as loss of enjoyment are available in § 1983 litigation. See *Stachura*, 477 U. S., at 306–307; *Carey*, 435 U. S., at 260–264; Dobbs, Law of Remedies § 7.4(1), at 660, § 8.1(4), at 676; cf. 4 F. Harper, F. James, & O. Gray, Torts § 25.10A (3d ed. 2007) (surveying loss of enjoyment awards). Among other things, depriving a licensee of the opportunity to obtain the benefits of competing and perhaps obtaining recognition at a well-known competition may cause a real loss. Lower courts have affirmed awards of compensatory damages for similar kinds of injuries resulting from constitutional violations. See Dobbs, Law of Remedies, at 660.[8] Petitioners could introduce evidence on remand to show such loss.

For purposes of determining whether this case is moot, the question is not whether petitioners would actually succeed

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[8] For example, in *Brooks* v. *Andolina*, 826 F. 2d 1266 (1987), the Third Circuit held that a prisoner could seek damages for various deprivations suffered during punitive segregation imposed in retaliation for the exercise of his free speech rights. *Id.*, at 1270. These injuries included loss of visiting and phone privileges, recreation rights, and access to the law library.

In *Young* v. *Little Rock*, 249 F. 3d 730 (2001), the Eighth Circuit affirmed a jury award of compensatory damages for wrongful detention that caused psychological harm. *Id.*, at 736.

In *Drake* v. *Lawrence*, 524 N. E. 2d 337 (1988), the Indiana Court of Appeals affirmed a compensatory damages award for, among other things, the embarrassment of a false arrest in front of an employee and customer and the anxiety associated with pending charges. *Id.*, at 342.

In *Watseka* v. *Illinois Public Action Council*, 796 F. 2d 1547 (1986), aff'd, 479 U. S. 1048 (1987), the Seventh Circuit affirmed an award of damages for "specific compensable, non-abstract harm" resulting from an unconstitutional ordinance restricting door-to-door solicitation. That harm included the organization's inability to recruit new members, disseminate its views, and encourage others to support its positions. 796 F. 2d, at 1558–1559; see also, *e. g.*, *King* v. *Zamiara*, 788 F. 3d 207, 213–214 (CA6 2015) (affirming compensatory damages award for injury caused by transfer of inmate in retaliation for filing lawsuit, when transfer impeded his ability to participate in litigation).

in obtaining such damages or whether their loss was substantial. If there is a possibility of obtaining damages in any amount, the case is not moot.

3

One final point about damages must be addressed. We have warned in dicta that a claim of damages, "asserted solely to avoid otherwise certain mootness, [bears] close inspection." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 71 (1997). But if, after close inspection, we conclude that the stringent test for mootness is not met, we have no authority to dismiss on that ground.

Nothing in *Arizonans for Official English* suggests otherwise. In that case, the plaintiff, who was an employee of the State of Arizona when she filed her complaint, sued the State under § 1983, claiming that a state constitutional amendment declaring English the official language of the State unconstitutionally prevented her from using Spanish to perform her job. Her requests for declaratory and injunctive relief became moot when she left state employment for the private sector, and we held that her request for nominal damages from the State did not save her case from mootness since a State may not be sued under § 1983. *Id.*, at 67–69, 71. The situation here is different because nothing blocks an award of nominal damages from a city.[9]

[9] The *per curiam* refuses to decide whether petitioners have a live claim for damages, claiming that the lower courts should determine in the first instance whether any effort to recover damages has come "too late." *Ante*, at 339. But as previously discussed, see *supra*, at 354–355, prejudice is the critical factor in determining whether to permit a late request for a form of relief not expressly demanded in a complaint, and the *per curiam* does not identify any reason why allowing petitioners' request for damages at this juncture would prejudice the City. Under the Court's decision, allowing damages will not prolong this litigation, because the case is being remanded anyway, and there is no suggestion that the City would have litigated the case any differently if it had been on express notice that petitioners were seeking the sort of modest damages discussed in this opinion.

C

Relief would be particularly appropriate here because the City's litigation strategy caused petitioners to incur what are surely very substantial attorney's fees in challenging the constitutionality of a City ordinance that the City went to great lengths to defend.[10] Of course, a claim for attorney's fees is not alone sufficient to preserve a live controversy. *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 480 (1990). But where a live controversy remains, a defendant who would otherwise be liable for attorney's fees should not be able to wiggle out on the basis of a spurious claim of mootness.

If a § 1983 plaintiff achieves *any success on the merits*, even an award of nominal damages, the plaintiff is a prevailing party and is eligible for attorney's fees under 42 U. S. C. § 1988. See *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 603 (2001). For this reason, were the Court to exercise jurisdiction in this case and rule for petitioners, they would be eligible for attorney's fees. See *Farrar* v. *Hobby*, 506 U. S. 103, 109 (1992).

On the other hand, dismissing the case as moot means that petitioners are stuck with the attorney's fees they incurred in challenging a rule that the City ultimately abandoned—and which it now admits was not needed for public safety. That is so because "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U. S., at 605.

Section 1988 attorney's fees are an important component of civil rights enforcement. See *id.*, at 635–638 (GINSBURG, J., dissenting). The prospect of an award of attorney's fees

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[10] Attorney's fees are specifically requested in the amended complaint. App. 48.

ensures that "private attorneys general" can enforce the civil rights laws through civil litigation, even if they "'cannot afford legal counsel.'" *Id.*, at 635–636.

Here, the City fought petitioners tooth and nail in the District Court and the Court of Appeals, insisting that its old ordinance served important public safety purposes. When petitioners sought review in this Court, the City opposed certiorari on the same ground. But once we granted review, the City essentially attempted to impose a unilateral settlement that deprived petitioners of attorney's fees. And those fees would likely be substantial. They would reflect five years of intensive litigation—everything from the drafting of the complaint, through multiple rounds of District Court motion practice, to appellate review, and proceedings in this Court.

III

The *per curiam* provides no sound reason for holding that this case is moot. The *per curiam* states that the City's current rule gave petitioners "the precise relief [they] requested" in their prayer for relief, *ante*, at 338, but that is not so. Petitioners' prayer for relief asks the court to enjoin 38 N. Y. C. R. R. § 5–23 insofar as it "prohibit[s]" travel outside the City to ranges, competitions, and second homes. App. 48. The new rule's conditions unmistakably continue to prohibit some travel outside the City to those destinations. For this reason, petitioners have not obtained the "unrestricted access" that, they have always maintained, the Second Amendment guarantees. *Id.*, at 36. The *per curiam* implies that the current rule, as interpreted at oral argument by counsel for the City, gives petitioners everything that they now seek, *ante*, at 338, but that also is not true. Petitioners still claim the right to "unrestricted access" and counsel's off-the-cuff concessions do not give them that.[11]

[11] The City's enforcement position as to "coffee, gas, food, or restroom breaks" by no means resolves the meaning of § 5–23. The City's counsel informed the Court that those stops are permissible because they are "rea-

The *per curiam*'s main argument appears to go as follows: Petitioners' original claim was a challenge to New York's old rule; this claim is now moot due to the repeal of that rule; and what petitioners are now asserting is a new claim, namely, that New York's current rule is also unconstitutional.

This argument also misrepresents the nature of the claim asserted in petitioners' complaint. What petitioners claimed in their complaint and still claim is that they are entitled to "unrestricted access" to out-of-city ranges and competitions. App. 36. The City's replacement of one law denying unrestricted access with another that also denies that access did not change the nature of petitioners' claim or render it moot.

Consider where acceptance of the argument adopted by the *per curiam* leads. Suppose that a city council, seeking to suppress a local paper's opposition to some of its programs, adopts an ordinance prohibiting the publication of any editorial without the approval of a city official. Suppose that a newspaper challenges the constitutionality of this rule, arguing that the First Amendment confers the unrestricted right to editorialize without prior approval. If the council then repeals its ordinance and replaces it with a new one requiring approval only if the editorial concerns one particular city program, would that render the pending lawsuit moot and require the paper to commence a new one?

Or take this example. A State enacts a law providing that any woman wishing to obtain an abortion must submit certification from five doctors that the procedure is medically necessary. After a woman sues, claiming that any requirement of physician certification is unconstitutional, the State

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sonably necessary" under the new rule. Tr. of Oral Arg. 64–65. But what that means is far from clear, and, at any rate, coffee breaks and the like are just illustrative examples of potential ways in which the new rule affords something less than unfettered access to gun ranges, competitions, and second homes outside the City. See *supra*, at 352–353.

replaces its old law with a new one requiring certification by three physicians. Would the court be required to dismiss the woman's suit? Suppose the court, following the precedent set by today's decision, holds that the case is moot, and suppose that the woman brings a second case challenging the new law on the same ground. If the State repeals that law and replaces it with one requiring certification by two doctors, would the second suit be moot? And what if the State responds to a third suit by enacting replacement legislation demanding certification by one doctor?

Mootness doctrine does not require such results. A challenge to an allegedly unconstitutional law does not become moot with the enactment of new legislation that reduces but does not eliminate the injury originally alleged. And that is the situation here.

The Court cites one case in support of its holding, *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 482–483 (1990), but that decision is wholly inapposite. The situation in *Lewis* was complicated, but the critical point for present purposes is that, by the time the case reached this Court, the enactment of new legislation meant that the plaintiff no longer had Article III standing to assert its original claim. *Id.*, at 478–479. But instead of simply ordering that the case be dismissed, the Court remanded to give the plaintiff the opportunity to assert a different claim and, if necessary, to amend the complaint or "develop the record" to show it had standing to pursue this new claim. *Id.*, at 482.

The situation here is entirely different. It is not disputed that petitioners have standing to contest the City's restrictions on trips to out-of-city ranges and competitions, and as a result of those restrictions, petitioners have suffered and will continue to suffer injury that is concrete, traceable to actions taken by the City, and remediable by a court. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330 (2016). They are not asserting a new claim. Their original claim—that they have the right under the Second Amendment to unrestricted ac-

cess to out-of-city ranges and competitions—is unchanged, and this claim does not require an amendment of the complaint or any supplementation of the record to support their allegations of injury.

For these reasons, there is no justification for holding that this case is moot.

IV

A

Having shown that this case is not moot, I proceed to the merits of petitioners' claim that the City ordinance violated the Second Amendment. This is not a close question. The answer follows directly from *Heller*.

In *Heller*, we held that a District of Columbia rule that effectively prevented a law-abiding citizen from keeping a handgun in the home for purposes of self-defense constituted a core violation of the Second Amendment. 554 U. S., at 635. We based this decision on the scope of the right to keep and bear arms as it was understood at the time of the adoption of the Second Amendment. *Id.*, at 577–605, 628–629. We recognized that history supported the constitutionality of some laws limiting the right to possess a firearm, such as laws banning firearms from certain sensitive locations and prohibiting possession by felons and other dangerous individuals. See *id.*, at 626–627; see also *McDonald*, 561 U. S., at 787; *id.*, at 904 (Stevens, J., dissenting). But history provided no support for laws like the District's. See 554 U. S., at 629–634.

For a similar reason, 38 N. Y. C. R. R. § 5–23 also violated the Second Amendment. We deal here with the same core Second Amendment right, the right to keep a handgun in the home for self-defense. As the Second Circuit "assume[d]," a necessary concomitant of this right is the right to take a gun outside the home for certain purposes. 883 F. 3d, at 58–59. One of these is to take a gun for maintenance or repair, which City law allows. See § 5–22(a)(16). Another is to

take a gun outside the home in order to transfer ownership lawfully, which the City also allows. §5–26(j). And still another is to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly. As we said in *Heller*, "'to bear arms implies something more than the mere keeping [of arms]; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.'" 554 U. S., at 617–618 (quoting T. Cooley, Constitutional Law 271 (1880)); see also *Luis* v. *United States*, 578 U. S. 5, 26 (2016) (THOMAS, J., concurring in judgment) ("The right to keep and bear arms . . . 'implies a corresponding right . . . to acquire and maintain proficiency in their use'"); *Ezell* v. *Chicago*, 651 F. 3d 684, 704 (CA7 2011) ("[T]he core right wouldn't mean much without the training and practice that make it effective").

It is true that a lawful gun owner can sometimes practice at a range using a gun that is owned by and rented at the range. But the same model gun that the person owns may not be available at a range, and in any event each individual gun may have its own characteristics. See Brief for Professors of Second Amendment Law et al. as *Amici Curiae* 10–12; see also App. 51, 56, 59 (referencing differences across ranges and shooting competitions). Once it is recognized that the right at issue is a concomitant of the same right recognized in *Heller*, it became incumbent on the City to justify the restrictions its rule imposes, but the City has not done so. It points to no evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits. The City argues that municipalities restricted the places within their jurisdiction where a gun could be fired, Brief for Respondents 18, and it observes that the Second Amendment surely does not mean that a New York City resident with a premises license can practice in Central Park or Times Square, *id.*, at 21. That is certainly true, but that is not the

question. Petitioners do not claim the right to fire weapons in public places *within the City*. Instead, they claim they have a right to practice at ranges and competitions *outside the City*, and neither the City, the courts below, nor any of the many *amici* supporting the City have shown that municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice.

B

If history is not sufficient to show that the New York City ordinance is unconstitutional, any doubt is dispelled by the weakness of the City's showing that its travel restriction significantly promoted public safety. Although the courts below claimed to apply heightened scrutiny, there was nothing heightened about what they did.

As noted, the City relied entirely on the declaration of Inspector Lunetta, but this declaration provides little support. See *supra*, at 348–349. Some of what Inspector Lunetta asserted was simply not relevant to the justification for drawing a distinction between trips to a range in the City and trips to a range in a neighboring jurisdiction. For example, he stated that persons holding premises licenses "do not always transport their firearms in a locked box carrying ammunition separately, as required by NYPD rules," but the issue in this case does not concern the storage of a gun on the way to a range. App. 77–78. Similarly, he declared that "[p]remises license holders have not demonstrated proper cause to carry a concealed firearm in public," *id.*, at 78, but the question before us is not whether petitioners have the right to do what they could if they had carry licenses.

Other statements actually undermine the City's public safety rationale. Thus, the fact that prosecutors typically do not bring even misdemeanor charges against licensees who carry a weapon in violation of the limitations of their licenses, *ibid.*, does not suggest that the City regards violations as presenting a particularly significant threat to public safety.

When all that is irrelevant is brushed aside, what remains are the three arguments noted earlier. First, Inspector Lunetta asserted that the travel restrictions discouraged licensees from taking their guns outside the home, but this is a strange argument for several reasons. It would make sense only if it is less convenient or more expensive to practice at a range in the City, but that contradicts the City's argument that the seven ranges in the City provide ample opportunity for practice. And discouraging trips to a range contradicts the City's own rule recommending that licensees practice. Once it is recognized that a reasonable opportunity to practice is part of the very right recognized in *Heller*, what this justification amounts to is a repudiation of part of what we held in that decision.

Second, Inspector Lunetta claimed that prohibiting trips to out-of-city ranges helps prevent a person who is taking a gun to a range from using it in a fit of rage after an auto accident or some other altercation that occurs along the way. And to bolster this argument, Inspector Lunetta asserted that persons who have met the City's demanding requirements for obtaining a premises license are just as likely as anyone else to use their guns in a fit of rage. App. 77. If that is so, it does not reflect well on the City's intensive vetting scheme, see *supra*, at 343–345, and in any event, the assertion is dubious on its face.

More to the point, this argument does not explain why a person headed for a range outside the City is any more likely to engage in such conduct than a person whose destination is a range in the City. There might be *something* to the argument if ranges in the City were closer than those just outside its borders, but the City never attempted to show that. The courts below were incurious about the validity of Inspector Lunetta's assertion, and given the location of the City's seven ranges, the assertion is more than dubious.[12]

[12] Two of the seven City ranges (28%) were located in Staten Island (home to under 6% of the City's residents), and the trip there from the other boroughs is not quick. Another range (the only one open to the

Inspector Lunetta's final justification for the travel restrictions was only marginally stronger. It goes like this. Suppose that a patrol officer stops a premises licensee and finds that this individual is carrying a gun, and suppose that the licensee says he is taking the gun to a range to practice or is returning from a range. If the range in question is one in the City, the officer will be better able to check the story than if the range is outside the officer's jurisdiction. App. 79–80.

How strong is this argument? The City presumably has access to records of cases in which licensees were cited for unauthorized possession of guns outside the home, and it failed to provide any evidence that holders of target licenses had used their right to practice at out-of-city ranges as a pretext. And it is dubious that it would be much harder for an officer to check whether a licensee was really headed for an out-of-city range as opposed to one in the City. If a licensee claims to be headed for a range in the City, the officer can check whether the range is open and whether the individual appears to be on a route that plausibly leads to that range. But how much more difficult would it be to do the same thing if the range is in one of the counties that border New York City or across the Hudson River in New Jersey? A phone call would be enough to determine the range's operating hours, and the route would still be easy to determine: There are only a few bridges and tunnels to New Jersey and just a few main thoroughfares to the neighboring New York counties. A court conducting any form of serious scrutiny would have demanded that the City provide some substantiation for this claim, but nothing like that was provided or demanded.

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public) was located in the north Bronx. See Brief for Appellants in No. 15–638, p. 32 (CA2) (explaining that, for plaintiff Colantone, "traveling from his home in Staten Island to the authorized range Olinville Arms in the Bronx [involves] a far longer drive" than to a shooting club in New Jersey).

Would the situation be much different if the individual claimed to be headed home from a range? Once again, it would not be difficult for the officer to check whether the range was or recently had been open. And it is not at all apparent that determining whether a licensee was on a route to his or her residence would be any harder if the range at which the licensee claimed to have practiced was outside the City.

Inspector Lunetta's declaration stated that ranges in the City are required to keep a record of everyone who practices there, and therefore if a person claims to be coming from a city range, the officer could easily check that story. But the declaration does not state that ranges in nearby jurisdictions do not keep similar records.[13] It should have been easy enough for the City to check, and a court engaged in any serious form of scrutiny would have questioned the absence of evidence, but no substantiation was provided or demanded below.

In sum, the City's travel restriction burdened the very right recognized in *Heller*. History provides no support for a restriction of this type. The City's public safety arguments were weak on their face, were not substantiated in

[13] Inspector Lunetta also expressed concern that officers in other jurisdictions might detect and report fewer license violations. App. 80. But Inspector Lunetta did not support this prediction, and his declaration gives reason to doubt whether a decrease in referrals will actually occur. Lunetta explains that the NYPD License Division already receives "reports from [the New York State Division of Criminal Justice System] regarding all arrests made within the State of New York for which an arrestee is fingerprinted." *Id.*, at 86. But "[n]o formal report is forwarded to the License Division for summonses and other arrests and incidents for which a detainee is not fingerprinted." *Ibid.* "[T]he License Division may be, but is not always, notified of an arrest" made by the Federal Government or authorities in another State. *Ibid.* By Lunetta's own account, the NYPD already appears reliant on the State fingerprinting database to detect violations in other jurisdictions. There is no reason to expect that database to be any less effective today in alerting the License Division to potential violations than it was under the old ordinance.

any way, and were accepted below with no serious probing. And once we granted review in this case, the City's public safety concerns evaporated.

We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.

* * *

This case is not moot. The City violated petitioners' Second Amendment right, and we should so hold. I would reverse the judgment of the Court of Appeals and remand the case to the District Court to provide appropriate relief. I therefore respectfully dissent.

Syllabus

UNITED STATES *v.* SINENENG-SMITH

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

No. 19–67. Argued February 25, 2020—Decided May 7, 2020

Respondent Evelyn Sineneng-Smith operated an immigration consulting firm in San Jose, California. She assisted clients working without authorization in the United States to file applications for a labor-certification program that once provided a path for aliens to adjust to lawful permanent resident status. Sineneng-Smith knew that her clients could not meet the long-passed statutory application-filing deadline, but she nonetheless charged each client over $6,000, netting more than $3.3 million.

Sineneng-Smith was indicted for multiple violations of 8 U. S. C. § 1324(a)(1)(A)(iv) and (B)(i). Those provisions make it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law," § 1324(a)(1)(A)(iv), and impose an enhanced penalty if the crime is "done for the purpose of commercial advantage or private financial gain," § 1324(a)(1)(B)(i). In the District Court, she urged that the provisions did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied. The District Court rejected her arguments and she was convicted, as relevant here, on two counts under § 1324(a)(1)(A)(iv) and (B)(i).

Sineneng-Smith essentially repeated the same arguments on appeal to the Ninth Circuit. Again she asserted a right under the First Amendment to file administrative applications on her clients' behalf, and she argued that the statute could not constitutionally be applied to her conduct. Instead of adjudicating the case presented by the parties, however, the court named three *amici* and invited them to brief and argue issues framed by the panel, including a question never raised by Sineneng-Smith: Whether the statute is overbroad under the First Amendment. In accord with the *amici*'s arguments, the Ninth Circuit held that § 1324(a)(1)(A)(iv) is unconstitutionally overbroad.

Held: The Ninth Circuit panel's drastic departure from the principle of party presentation constituted an abuse of discretion.

The Nation's adversarial adjudication system follows the principle of party presentation. *Greenlaw* v. *United States*, 554 U. S. 237, 243. "[I]n both civil and criminal cases, . . . we rely on the parties to frame the

issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Ibid.*

That principle forecloses the controlling role the Ninth Circuit took on in this case. No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith, represented by competent counsel, had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that § 1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including abstract advocacy and legal advice. It did so even though Sineneng-Smith's counsel had presented a contrary theory of the case in her briefs and before the District Court. A court is not hidebound by counsel's precise arguments, but the Ninth Circuit's radical transformation of this case goes well beyond the pale. On remand, the case is to be reconsidered shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties. Pp. 375–380.

910 F. 3d 461, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 382.

Eric J. Feigin argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Matthew Guarnieri*, and *Scott A. C. Meisler*.

Mark C. Fleming argued the cause for respondent. With him on the brief were *Eric L. Hawkins*, *Thomas G. Sprankling*, *Alan E. Schoenfeld*, *Emily J. Barnet*, and *Beth C. Neitzel*.*

**Lawrence J. Joseph* and *Christopher J. Hajec* filed a brief for the Immigration Law Reform Institute as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmation were filed for the City and County of San Francisco et al. by *Dennis J. Herrera*, *Aileen M. McGrath*, *Erin Kuka*, and *Mark A. Flessner*; for Amnesty International by *Matthew S. Hellman*, *David A. Strauss*, and *Sarah M. Konsky*; for Asian Americans Advancing Justice | AAJC et al. by *Emily T. Kuwahara*, *Chiemi D. Suzuki*, *Harry P. Cohen*, and *Niyati Shah*; for the Cato Institute by *Ilya Shapiro*; for the Electronic Frontier Foundation et al. by *David Greene*; for Immigration Representatives et al. by *William C. Perdue*, *Allon Kedem*, and *Sirine Shebaya*; for the National Association of Criminal De-

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns 8 U. S. C. § 1324, which makes it a federal felony to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." § 1324(a)(1)(A)(iv). The crime carries an enhanced penalty if "done for the purpose of commercial advantage or private financial gain." § 1324(a)(1)(B)(i).[1]

Respondent Evelyn Sineneng-Smith operated an immigration consulting firm in San Jose, California. She was indicted for multiple violations of § 1324(a)(1)(A)(iv) and (B)(i). Her clients, most of them from the Philippines, worked without authorization in the home health care industry in the United States. Between 2001 and 2008, Sineneng-Smith assisted her clients in applying for a "labor certification" that once allowed certain aliens to adjust their status to that of lawful permanent resident permitted to live and work in the United States. § 1255(i)(1)(B)(ii).

There was a hindrance to the efficacy of Sineneng-Smith's advice and assistance. To qualify for the labor-certification dispensation she promoted to her clients, an alien had to be in the United States on December 21, 2000, and apply for certification before April 30, 2001. § 1255(i)(1)(C). Sineneng-Smith knew her clients did not meet the application-filing deadline; hence, their applications could not

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fense Lawyers et al. by *Elliott Schulder* and *Stephen R. Sady*; for Religious Organizations by *Anton Metlitsky* and *Jeremy Girton*; and for The Rutherford Institute et al. by *Erin Glenn Busby, Lisa R. Eskow, Michael F. Sturley, John W. Whitehead, David D. Cole, Esha Bhandari, Cecillia D. Wang,* and *Nicole G. Berner.*

A brief of *amicus curiae* was filed for Eugene Volokh by *Mr. Volokh, pro se.*

[1] For violations of 8 U. S. C. § 1324(a)(1)(A)(iv), the prison term is "not more than 5 years," § 1324(a)(1)(B)(ii); if "the offense was done for . . . private financial gain," the prison term is "not more than 10 years," § 1324(a)(1)(B)(i).

put them on a path to lawful residence.[2] Nevertheless, she charged each client $5,900 to file an application with the Department of Labor and another $900 to file with the U. S. Citizenship and Immigration Services. For her services in this regard, she collected more than $3.3 million from her unwitting clients.

In the District Court, Sineneng-Smith urged unsuccessfully, *inter alia*, that the above-cited provisions, properly construed, did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied. See Motion to Dismiss in No. 10–cr–414 (ND Cal.), pp. 7–13, 20–25; Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), pp. 14–19, 20–25. She was convicted on two counts under § 1324(a)(1)(A)(iv) and (B)(i), and on other counts (filing false tax returns and mail fraud) she does not now contest. Throughout the District Court proceedings and on appeal, she was represented by competent counsel.

On appeal from the § 1324 convictions to the Ninth Circuit, both on brief and at oral argument, Sineneng-Smith essentially repeated the arguments she earlier presented to the District Court. See Brief for Appellant in No. 15–10614 (CA9), pp. 11–28. The case was then moved by the appeals panel onto a different track. Instead of adjudicating the case presented by the parties, the appeals court named three *amici* and invited them to brief and argue issues framed by the panel, including a question Sineneng-Smith herself never raised earlier: "Whether the statute of conviction is overbroad . . . under the First Amendment." App. 122–124. In

[2] Sineneng-Smith argued that labor-certification applications were often approved despite expiration of the statutory dispensation, and that an approved application, when submitted as part of a petition for adjustment of status, would place her clients in line should Congress reactivate the dispensation. See Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), p. 16.

the ensuing do over of the appeal, counsel for the parties were assigned a secondary role. The Ninth Circuit ultimately concluded, in accord with the invited *amici*'s arguments, that § 1324(a)(1)(A)(iv) is unconstitutionally overbroad. 910 F. 3d 461, 485 (2018). The Government petitioned for our review because the judgment of the Court of Appeals invalidated a federal statute. Pet. for Cert. 24. We granted the petition. 588 U. S. 948 (2019).

As developed more completely hereinafter, we now hold that the appeals panel departed so drastically from the principle of party presentation as to constitute an abuse of discretion. We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.

I

In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw* v. *United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243. In criminal cases, departures from the party presentation principle have usually occurred "to protect a *pro se* litigant's rights." *Id.*, at 244; see, *e. g.*, *Castro* v. *United States*, 540 U. S. 375, 381–383 (2003) (affirming courts' authority to recast *pro se* litigants' motions to "avoid an unnecessary dismissal" or "inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis" (citation omitted)). But as a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advanc-

ing the facts and argument entitling them to relief." *Id.*, at 386 (Scalia, J., concurring in part and concurring in judgment).[3]

In short: "[C]ourts are essentially passive instruments of government." *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate. See, *e. g.*, *Day* v. *McDonough*, 547 U. S. 198, 202 (2006) (federal court had "authority, on its own initiative," to correct a party's "evident miscalculation of the elapsed time under a statute [of limitations]" absent "intelligent waiver").[4] But this case scarcely fits that bill. To explain why that is so, we turn first to the proceedings in the District Court.

In July 2010, a grand jury returned a multicount indictment against Sineneng-Smith, including three counts of violating § 1324, three counts of mail fraud in violation of 18 U. S. C. § 1341, and two counts of willfully subscribing to a false tax return in violation of 26 U. S. C. § 7206(1). Sineneng-Smith pleaded guilty to the tax-fraud counts, App. to Pet. for Cert. 78a–79a, and did not pursue on appeal the two mail-fraud counts on which she was ultimately convicted.

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[3] See Kaplan, Civil Procedure—Reflections on the Comparison of Systems, 9 Buffalo L. Rev. 409, 431–432 (1960) (U. S. system "exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge"; "German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal").

[4] In an addendum to this opinion, we list cases in which this Court has called for supplemental briefing or appointed *amicus curiae* in recent years. None of them bear any resemblance to the redirection ordered by the Ninth Circuit panel in this case.

We therefore concentrate this description on her defenses against the § 1324 charges.

Before trial, Sineneng-Smith moved to dismiss the § 1324 counts. Motion to Dismiss in No. 10–cr–414 (ND Cal.). She asserted first that the conduct with which she was charged—advising and assisting aliens about labor certifications—is not proscribed by § 1324(a)(1)(A)(iv) and (B)(i). Being hired to file lawful applications on behalf of aliens already residing in the United States, she maintained, did not "encourage" or "induce" them to remain in this country. *Id.*, at 7–13. Next, she urged, alternatively, that clause (iv) is unconstitutionally vague and therefore did not provide fair notice that her conduct was prohibited, *id.*, at 13–18, or should rank as a content-based restraint on her speech, *id.*, at 22–24. She further asserted that she has a right safeguarded to her by the Petition and Free Speech Clauses of the First Amendment to file applications on her clients' behalf. *Id.*, at 20–25. Nowhere did she so much as hint that the statute is infirm, not because her own conduct is protected, but because it trenches on the First Amendment sheltered expression of others.

The District Court denied the motion to dismiss, holding that Sineneng-Smith could "encourag[e]" noncitizens to remain in the country, within the meaning of § 1324(a)(1)(A)(iv), "[b]y suggesting to [them] that the applications she would make on their behalf, in exchange for their payments, would allow them to eventually obtain legal permanent residency in the United States." App. to Pet. for Cert. 73a. The court also rejected Sineneng-Smith's constitutional arguments, reasoning that she was prosecuted, not for filing clients' applications, but for falsely representing to noncitizens that her efforts, for which she collected sizable fees, would enable them to gain lawful status. *Id.*, at 75a.

After a 12-day trial, the jury found Sineneng-Smith guilty on the three § 1324 counts charged in the indictment, along with the three mail-fraud counts. App. 118–121. Sineneng-

Smith then moved for a judgment of acquittal. She renewed, "almost verbatim," the arguments made in her motion to dismiss, App. to Pet. for Cert. 65a, and the District Court rejected those arguments "[f]or the same reasons as the court expressed in its order denying Sineneng-Smith's motion to dismiss," *ibid.* She simultaneously urged that the evidence did not support the verdicts. Motion for Judgt. of Acquittal in No. 10–cr–414 (ND Cal.), at 1–14. The District Court found the evidence sufficient as to two of the three § 1324 counts and two of the three mail-fraud counts. App. to Pet. for Cert. 67a.[5]

Sineneng-Smith's appeal to the Ninth Circuit from the District Court's § 1324 convictions commenced unremarkably. On brief and at oral argument, she reasserted the self-regarding arguments twice rehearsed, initially in her motion to dismiss, and later in her motion for acquittal. Brief for Appellant in No. 15–10614 (CA9), at 9–27, 35–41; Recording of Oral Arg. (Apr. 18, 2017), at 37:00–39:40; see *supra*, at 377. With the appeal poised for decision based upon the parties' presentations, the appeals panel intervened. It ordered further briefing, App. 122–124, but not from the parties. Instead, it named three organizations—"the Federal Defender Organizations of the Ninth Circuit (as a group)[,] the Immigrant Defense Project[,] and the National Immigration Project of the National Lawyers Guild"—and invited them to file *amicus* briefs on three issues:

> "1. Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?
>
> "2. Whether the statute of conviction is void for vagueness or likely void for vagueness, either under the

[5] The court sentenced Sineneng-Smith to 18 months on each of the remaining counts; three years of supervised release on the § 1324 and mail-fraud counts; and one year of supervised release on the filing of false tax returns count, all to run concurrently. She was also ordered to pay $43,550 in restitution, a $15,000 fine, and a $600 special assessment.

First Amendment or the Fifth Amendment, and if so, whether any permissible limiting construction would cure the constitutional vagueness problem?

"3. Whether the statute of conviction contains an implicit *mens rea* element which the Court should enunciate. If so: (a) what should that *mens rea* element be; and (b) would such a *mens rea* element cure any serious constitutional problems the Court might determine existed?" *Ibid.*

Counsel for the parties were permitted, but "not required," to file supplemental briefs "*limited to responding to any and all amicus/amici briefs*." *Id.*, at 123 (emphasis added). Invited *amici* and *amici* not specifically invited to file were free to "brief such further issues as they, respectively, believe the law and the record calls for." *Ibid.* The panel gave invited *amici* 20 minutes for argument, and allocated only 10 minutes to Sineneng-Smith's counsel. Reargument Order in No. 15–10614 (CA9), Doc. No. 92. Of the three specified areas of inquiry, the panel reached only the first, holding that § 1324(a)(1)(A)(iv) was facially overbroad under the First Amendment, 910 F. 3d, at 483–485, and was not susceptible to a permissible limiting construction, *id.*, at 472, 479.

True, in the redone appeal, Sineneng-Smith's counsel adopted without elaboration counsel for *amici*'s overbreadth arguments. See Supplemental Brief for Appellant in No. 15–10614 (CA9), p. 1. How could she do otherwise? Understandably, she rode with an argument suggested by the panel. In the panel's adjudication, her own arguments, differently directed, fell by the wayside, for they did not mesh with the panel's overbreadth theory of the case.

II

No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith herself had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not

to address the party-presented controversy, the panel projected that § 1324(a)(1)(A)(iv) might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother's plea to her alien grandchild to remain in the United States. 910 F. 3d, at 483–484.[6] Nevermind that Sineneng-Smith's counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that "[i]nvalidation for [First Amendment] overbreadth is 'strong medicine' that is not to be 'casually employed.'" *United States* v. *Williams*, 553 U. S. 285, 293 (2008) (quoting *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999)).

As earlier observed, see *supra*, at 376, a court is not hidebound by the precise arguments of counsel, but the Ninth Circuit's radical transformation of this case goes well beyond the pale.

* * *

For the reasons stated, we vacate the Ninth Circuit's judgment and remand the case for reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.

It is so ordered.

Addendum of cases, 2015–2020, in which this Court called for supplemental briefing or appointed *amicus curiae*

This Court has sought supplemental briefing: to determine whether a case presented a controversy suitable for the

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[6] The Solicitor General maintained that the statute does not reach protected speech. Brief for United States 32. In the Government's view, § 1324(a)(1)(A)(iv) should be construed to prohibit only speech facilitating or soliciting illegal activity, thus falling within the exception to the First Amendment for speech integral to criminal conduct. *Id.*, at 22–26, 31 (citing *United States* v. *Williams*, 553 U. S. 285, 298 (2008)).

Court's review, *Trump* v. *Mazars USA, LLP*, 590 U. S. 921 (ordering briefing on application of political question doctrine and related justiciability principles); *Frank* v. *Gaos*, 586 U. S. 995 (2018) (ordering briefing on Article III standing); *Wittman* v. *Personhuballah*, 576 U. S. 1093 (2015) (same); Docket Entry in *Gloucester County School Bd.* v. *G. G.*, O. T. 2016, No. 16–273 (Feb. 23, 2017) (ordering briefing on intervening Department of Education and Department of Justice guidance document); *Kingdomware Technologies, Inc.* v. *United States*, 577 U. S. 970 (2015) (ordering briefing on mootness); to determine whether the case could be resolved on a basis narrower than the question presented, *Zubik* v. *Burwell*, 578 U. S. 901 (2016) (ordering briefing on whether the plaintiffs could obtain relief without entirely invalidating challenged federal regulations); and to clarify an issue or argument the parties raised, *Google LLC* v. *Oracle America, Inc.*, 590 U. S. 928 (ordering further briefing on the parties' dispute over the standard of review applicable to the question presented); *Babb* v. *Wilkie*, 589 U. S. 1164 (2020) (ordering briefing on an assertion counsel made for the first time at oral argument about alternative remedies available to the plaintiff); *Sharp* v. *Murphy*, reported *sub nom. Carpenter* v. *Murphy*, 586 U. S. 1046 (2018) (ordering briefing on the implications of the parties' statutory interpretations).

In rare instances, we have ordered briefing on a constitutional issue implicated, but not directly presented, by the question on which we granted certiorari. See *Jennings* v. *Rodriguez*, 580 U. S. 1040 (2016) (in a case about availability of a bond hearing under a statute mandating detention of certain noncitizens, briefing ordered on whether the Constitution requires such a hearing); *Johnson* v. *United States*, 574 U. S. 1069 (2015) (in a case involving interpretation of the Armed Career Criminal Act's residual clause, briefing ordered on whether that clause is unconstitutionally vague). But in both cases, the parties had raised the relevant constitutional challenge in lower courts; the question was not in-

terjected into the case for the first time by an appellate forum. In *Jennings*, moreover, the parties' statutory arguments turned expressly on the constitutional issue. *Jennings* v. *Rodriguez*, 583 U. S. 281 (2018). And in *Johnson*, although this Court had interpreted the Act's residual clause four times in the preceding nine years, there still remained "pervasive disagreement" in the lower courts about its application. *Johnson* v. *United States*, 576 U. S. 591, 601 (2015).

We have appointed *amicus curiae*: to present argument in support of the judgment below when a prevailing party has declined to defend the lower court's decision or an aspect of it, *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 589 U. S. 1041 (2019); *Holguin-Hernandez* v. *United States*, 588 U. S. 918 (2019); *Culbertson* v. *Berryhill*, 584 U. S. 999 (2018); *Lucia* v. *SEC*, 583 U. S. 1099 (2018); *Beckles* v. *United States*, 579 U. S. 965 (2016); *Welch* v. *United States*, 577 U. S. 1098 (2016); *McLane Co.* v. *EEOC*, 580 U. S. 985 (2016); *Green* v. *Brennan*, 576 U. S. 1087 (2015); *Reyes Mata* v. *Lynch*, reported *sub nom. Reyes Mata* v. *Holder*, 574 U. S. 1118 (2015); and to address the Court's jurisdiction to decide the question presented, *Montgomery* v. *Louisiana*, 575 U. S. 933 (2015).

JUSTICE THOMAS, concurring.

I agree with the Court that the Ninth Circuit abused its discretion in reaching out to decide whether 8 U. S. C. § 1324(a)(1)(A)(iv) is unconstitutionally overbroad. In my view, however, the Court of Appeals' decision violates far more than the party presentation rule. The merits of that decision also highlight the troubling nature of this Court's overbreadth doctrine. That doctrine provides that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States* v. *Stevens*, 559 U. S. 460, 473 (2010) (quoting *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442,

449, n. 6 (2008)). Although I have previously joined the Court in applying this doctrine, I have since developed doubts about its origins and application. It appears that the overbreadth doctrine lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles. I would therefore consider revisiting this doctrine in an appropriate case.

I

This Court's overbreadth jurisprudence is untethered from the text and history of the First Amendment. It first emerged in the mid-20th century. In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the Court determined that an antipicketing statute was "invalid on its face" due to its "sweeping proscription of freedom of discussion," *id.*, at 101–105. The Court rejected the State's argument that the statute was constitutional because it was "limited or restricted in its application" to proscribable "violence and breaches of the peace [that] are the concomitants of picketing." *Id.*, at 105. Without considering whether the defendant's actual conduct was entitled to First Amendment protection, the Court concluded that the law was unconstitutional because it "d[id] not aim specifically at evils within the allowable area of state control but, on the contrary, swe[pt] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Id.*, at 97.

Since then, the Court has invoked this rationale to facially invalidate a wide range of laws, from statutes enacted by Congress, see, *e. g.*, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234 (2002), to measures passed by city officials, see, *e. g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569 (1987). These laws covered a variety of subjects, from nudity in drive-in movies, *Erznoznik* v. *Jacksonville*, 422 U. S. 205 (1975), to charitable solicitations, *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620 (1980), to depictions of animal cruelty, *Stevens*, *supra*, at

460. And all these laws were considered unconstitutional not because they necessarily violated an individual's First Amendment rights but "because of a judicial prediction or assumption that the statute's very existence *may* cause [some citizens] to refrain from constitutionally protected [activity]." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973) (emphasis added); see also *Erznoznik*, *supra*, at 216.

Notably, this Court has not attempted to ground its void-for-overbreadth rule in the text or history of the First Amendment. It did not do so in *Thornhill*, and it has not done so since. Rather, the Court has justified this doctrine solely by reference to policy considerations and value judgments. See *New York* v. *Ferber*, 458 U. S. 747, 768–769 (1982). It has stated that facially invalidating overbroad statutes is sometimes necessary because "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society," and thus "need breathing space to survive."* *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). And, in the context of the freedom of speech, the Court has justified the overbreadth doctrine's departure from traditional principles of adjudication by noting free speech's "transcendent value to all society, and not merely

*The Court often discusses the doctrine as applying in the context of "First Amendment rights" more generally. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–613 (1973); see also *NAACP* v. *Button*, 371 U. S. 415, 433 (1963) (discussing "the First Amendment freedoms"). Such arguments are typically raised in free speech cases, but the Court has occasionally entertained overbreadth challenges invoking the freedom of the press, see, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and the freedom of association, see, *e. g.*, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967). Curiously, however, the Court has never applied this doctrine in the context of the First Amendment's Religion Clauses. In fact, the Court currently applies a far less protective standard to free exercise claims, upholding laws that substantially burden religious exercise so long as they are neutral and generally applicable. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). The Court has never acknowledged, much less explained, this discrepancy.

to those exercising their rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

In order to protect this "transcendent" right, *ibid.*, the Court will deem a statute unconstitutional when, in "the judgment of this Court[,] the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of [the] statut[e]." *Broadrick*, *supra*, at 612. In other words, the doctrine is driven by a judicial determination of what serves the public good. But there is "no evidence [from the founding] indicat-[ing] that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare." Campbell, Natural Rights and the First Amendment, 127 Yale L. J. 246, 259 (2017). This makes sense given that the Founders viewed value judgments and policy considerations to be the work of legislatures, not unelected judges. See *Obergefell* v. *Hodges*, 576 U. S. 644, 709 (2015) (ROBERTS, C. J., dissenting). Nevertheless, such judgments appear to be the very foundation upon which this Court's modern overbreadth doctrine was built.

Perhaps unsurprisingly, the overbreadth doctrine shares a close relationship with this Court's questionable vagueness doctrine. See *Johnson* v. *United States*, 576 U. S. 591, 611–623 (2015) (THOMAS, J., concurring in judgment). In fact, it appears that the Court's void-for-overbreadth rule developed as a result of the vagueness doctrine's application in the First Amendment context. For example, this Court's decision in *Thornhill*, which is recognized as "the fountainhead of the overbreadth doctrine," Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 11, cited a vagueness precedent in support of its overbreadth analysis. 310 U. S., at 96 (citing *Stromberg* v. *California*, 283 U. S. 359, 367 (1931)). And the decision expressed concerns regarding the antipicketing statute's "vague" terms with "no ascertainable meaning" and their

resulting potential for "discriminatory enforcement." *Thornhill*, *supra*, at 97–98, 100–101; cf. *Chicago* v. *Morales*, 527 U. S. 41, 56 (1999) (opinion of Stevens, J.). As the overbreadth doctrine has developed, it has "almost wholly merged" with the vagueness doctrine as applied to "statutes covering [F]irst [A]mendment activities." Sargentich, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 873 (1970). Given the dubious origins of the vagueness doctrine, I find this shared history "unsettling." *Johnson*, *supra*, at 621 (opinion of THOMAS, J.).

II

In addition to its questionable origins, the overbreadth doctrine violates the usual standard for facial challenges. Typically, this Court will deem a statute unconstitutional on its face only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). But the overbreadth doctrine empowers courts to hold statutes facially unconstitutional even when they can be validly applied in numerous circumstances, including the very case before the court.

By lowering the bar for facial challenges in the First Amendment context, the overbreadth doctrine exacerbates the many pitfalls of what is already a "disfavored" method of adjudication. *Washington State Grange*, 552 U. S., at 450. "[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U. S., at 610–611. But when a court entertains—or in this case, seeks out—an overbreadth challenge, it casts aside the "judicial restraint" necessary to avoid "'premature'" and "'unnecessary pronouncement[s] on constitutional issues.'" *Washington State Grange*, *supra*, at 450 (quoting *United States* v. *Raines*, 362 U. S. 17, 22 (1960)). This principle of restraint has long served as a fundamental limit on the scope of judicial power. See *Liverpool, New York & Philadelphia S. S. Co.* v. *Com-*

missioners of Emigration, 113 U. S. 33, 39 (1885). "[T]here is good evidence that courts [in the early Republic] understood judicial review to consist [simply] 'of a refusal to give a statute effect as operative law in resolving a case'" once that statute was determined to be unconstitutional. *Johnson*, *supra*, at 615 (opinion of THOMAS, J.) (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010)). Thus, our "modern practice of strik[ing] down" legislation as facially unconstitutional bears little resemblance to the practices of 18th- and 19th- century courts. *Johnson*, *supra*, at 615 (opinion of THOMAS, J.) (internal quotation marks omitted); see also Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018) ("[F]ederal courts have no authority to erase a duly enacted law from the statute books").

Moreover, by relaxing the standard for facial challenges, the overbreadth doctrine encourages "speculat[ion]" about "'imaginary' cases," *Washington State Grange*, *supra*, at 450 (quoting *Raines*, *supra*, at 22), and "summon[s] forth an endless stream of fanciful hypotheticals," *United States* v. *Williams*, 553 U. S. 285, 301 (2008). And, when a court invalidates a statute based on its theoretical, illicit applications at the expense of its real-world, lawful applications, the court "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, *supra*, at 451.

Collaterally, this Court has a tendency to lower the bar for facial challenges when preferred rights are at stake. See, *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). This ad hoc approach to constitutional adjudication impermissibly expands the judicial power and "reduc[es] constitutional law to policy-driven value judgments." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 643 (2016) (THOMAS, J., dissenting). We ought to "abid[e] by one set of rules to adjudicate constitutional rights," *ibid.*, partic-

ularly when it comes to the disfavored practice of facial challenges.

III

Finally, by allowing individuals to challenge a statute based on a third party's constitutional rights, the overbreadth doctrine is at odds with traditional standing principles. This Court has long adhered to the rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991); see also *Clark* v. *Kansas City*, 176 U. S. 114, 118 (1900); *Owings* v. *Norwood's Lessee*, 5 Cranch 344, 348 (1809) (Marshall, C. J.). The Court has created a "limited" exception to this rule, allowing third-party standing in certain cases in which the litigant has "a close relation to the third party" and there is a substantial "hindrance to the third party's ability to protect his or her own interests." *Powers*, *supra*, at 410–411. Litigants raising overbreadth challenges rarely satisfy either requirement, but the Court nevertheless allows third-party standing to "avoi[d] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U. S., at 487. As I have previously explained, this Court "has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate." *Whole Woman's Health*, *supra*, at 643 (THOMAS, J., dissenting).

The overbreadth doctrine's disregard for the general rule against third-party standing is especially problematic in light of the rule's apparent roots in Article III's case-or-controversy requirement. Although the modern Court has characterized the rule as a prudential rather than jurisdictional matter, see *Craig* v. *Boren*, 429 U. S. 190, 193 (1976), it has never provided a substantive justification for that assertion. And the Court has admitted that this rule against third-party standing is "not always clearly distinguished from the constitutional limitation[s]" on standing, *Barrows* v.

Jackson, 346 U. S. 249, 255 (1953); is "closely related to Art[icle] III concerns," *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975); and even is "grounded in Art[icle] III limits on the jurisdiction of federal courts to actual cases and controversies," *Ferber*, 458 U. S., at 767, n. 20.

These statements find support in a historical understanding of Article III. To understand the scope of the Constitution's case-or-controversy requirement, "we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.'" *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344 (2016) (THOMAS, J., concurring) (quoting *Honig* v. *Doe*, 484 U. S. 305, 340 (1988) (Scalia, J., dissenting)). "Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate." *Spokeo*, 578 U. S., at 344 (THOMAS, J., concurring). "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded." *Ibid.* Personal constitutional rights, such as those protected under the First Amendment, are "private rights" in that they "'belon[g] to individuals, considered as individuals.'" *Ibid.* (quoting 3 W. Blackstone, Commentaries on the Laws of England *2); see also *Ferber*, *supra*, at 767 (recognizing "the personal nature of constitutional rights" as a "cardinal principl[e] of our constitutional order"); Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 287 (2008) (listing "First Amendment rights" as examples of private rights provided by the Constitution). Thus, when a litigant challenges a statute on the grounds that it has violated his First Amendment rights, he has alleged an injury sufficient to establish standing for his claim, regardless of the attendant damages or other real-world harms he may or may not have suffered.

Overbreadth doctrine turns this traditional common-law rule on its head: It allows a litigant without a legal injury to assert the First Amendment rights of hypothetical third

parties, so long as he has personally suffered a real-world injury. See *Broadrick*, 413 U. S., at 612. In other words, the litigant has no private right of his own that is genuinely at stake. See Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 722–723 (2004); see also Hessick, 93 Cornell L. Rev., at 280–281. At common law, this sort of "factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief." *Ibid.* Courts adhered to the "obvious" and "ancient maxim" that one's real-world damages alone cannot "lay the foundation of an action . . . if the act complained of does not violate any of his legal rights." *Parker* v. *Griswold*, 17 Conn. *288, *302–*303 (1846).

Here, the overbreadth challenge embraced by respondent on appeal relied entirely on the free speech rights of others—immigration lawyers, activists, clergy, and even grandmothers. This is not terribly surprising given that the overbreadth arguments were developed by *amici* organizations that represent some of these third parties, not by respondent herself. See *ante*, at 379. Although it appears respondent lacked standing on appeal to assert the rights of individuals not before the court, she did have standing to seek relief for alleged violations of her own constitutional rights, which she raised before the Ninth Circuit commandeered her appeal. On remand, the Court of Appeals will be well within the bounds of its Article III jurisdiction in considering these narrower arguments.

* * *

The overbreadth doctrine appears to be the handiwork of judges, based on the misguided "notion that some constitutional rights demand preferential treatment." *Whole Woman's Health*, 579 U. S., at 641 (THOMAS, J., dissenting). It seemingly lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges, and violates Article III principles regarding judicial power and standing. In an appropriate case, we should consider revisiting this doctrine.

Syllabus

KELLY *v.* UNITED STATES ET AL.

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

No. 18–1059. Argued January 14, 2020—Decided May 7, 2020

During former New Jersey Governor Chris Christie's 2013 reelection campaign, his Deputy Chief of Staff, Bridget Anne Kelly, avidly courted Democratic mayors for their endorsements, but Fort Lee's Mayor refused to back the Governor's campaign. Determined to punish the Mayor, Kelly, Port Authority Deputy Executive Director William Baroni, and another Port Authority official, David Wildstein, decided to reduce from three to one the number of lanes long reserved at the George Washington Bridge's toll plaza for Fort Lee's morning commuters. To disguise their efforts at political retribution, Wildstein devised a cover story: The lane realignment was for a traffic study. As part of that cover story, the defendants asked Port Authority traffic engineers to collect some numbers about the effect of the changes. At the suggestion of a Port Authority manager, they also agreed to pay an extra toll collector overtime so that Fort Lee's one remaining lane would not be shut down if the collector on duty needed a break. The lane realignment caused four days of gridlock in Fort Lee, and only ended when the Port Authority's Executive Director learned of the scheme. Baroni and Kelly were convicted in federal court of wire fraud, fraud on a federally funded program or entity (the Port Authority), and conspiracy to commit each of those crimes. The Third Circuit affirmed.

Held: Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.

The federal wire fraud statute makes it a crime to effect (with the use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. § 1343. Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity. § 666(a)(1)(A). These statutes are "limited in scope to the protection of property rights," and do not authorize federal prosecutors to "set[ ] standards of disclosure and good government for local and state officials." *McNally* v. *United States*, 483 U. S. 350, 360. So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an object of their fraud was money or property. *Cleveland* v. *United States*, 531 U. S. 12, 26.

Syllabus

The Government argues that the scheme had the object of obtaining the Port Authority's money or property in two ways. First, the Government claims that Baroni and Kelly sought to commandeer part of the Bridge itself by taking control of its physical lanes. Second, the Government asserts that the defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors. For different reasons, neither of these theories can sustain the verdicts.

Baroni's and Kelly's realignment of the access lanes was an exercise of regulatory power—a reallocation of the lanes between different groups of drivers. This Court has already held that a scheme to alter such a regulatory choice is not one to take the government's property. *Id.*, at 23. And while a government's right to its employees' time and labor is a property interest, the prosecution must also show that it is an "object of the fraud." *Pasquantino* v. *United States,* 544 U. S. 349, 355. Here, the time and labor of the Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's lanes—an incidental (even if foreseen) byproduct of their regulatory object. Neither defendant sought to obtain the services that the employees provided. Pp. 398–404.

909 F. 3d 550, reversed and remanded.

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

Yaakov M. Roth argued the cause for petitioner. With him on the briefs were *Michael A. Carvin*, *Anthony J. Dick*, *Andrew J. M. Bentz*, and *Michael D. Critchley.*

Michael A. Levy argued the cause for William E. Baroni, Jr., respondent under this Court's Rule 12.6, in support of petitioner. With him on the briefs were *Christopher M. Egleson* and *Matthew J. Letten.*

Eric J. Feigin argued the cause for the United States. With him on the brief were *Acting Solicitor General Wall*, *Assistant Attorney General Benczkowski*, and *Colleen E. Roh Sinzdak*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Joshua L. Dratel*; and for Michael Binday by *David W. Shapiro.*

Michael Dominic Meuti filed a brief for Sen. Sheldon Whitehouse as *amicus curiae* urging affirmance.

JUSTICE KAGAN delivered the opinion of the Court.

For four days in September 2013, traffic ground to a halt in Fort Lee, New Jersey. The cause was an unannounced realignment of 12 toll lanes leading to the George Washington Bridge, an entryway into Manhattan administered by the Port Authority of New York and New Jersey. For decades, three of those access lanes had been reserved during morning rush hour for commuters coming from the streets of Fort Lee. But on these four days—with predictable consequences—only a single lane was set aside. The public officials who ordered that change claimed they were reducing the number of dedicated lanes to conduct a traffic study. In fact, they did so for a political reason—to punish the Mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid.

Exposure of their behavior led to the criminal convictions we review here. The Government charged the responsible officials under the federal statutes prohibiting wire fraud and fraud on a federally funded program or entity. See 18 U. S. C. §§ 1343, 666(a)(1)(A). Both those laws target fraudulent schemes for obtaining property. See § 1343 (barring fraudulent schemes "for obtaining money or property"); § 666(a)(1)(A) (making it a crime to "obtain[ ] by fraud . . . property"). The jury convicted the defendants, and the lower courts upheld the verdicts.

The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. Tr. of Oral Arg. 58. We disagree. The re-

alignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions.

I

The setting of this case is the George Washington Bridge. Running between Fort Lee and Manhattan, it is the busiest motor-vehicle bridge in the world. Twelve lanes with toll-booths feed onto the Bridge's upper level from the Fort Lee side. Decades ago, the then-Governor of New Jersey committed to a set allocation of those lanes for the morning commute. And (save for the four days soon described) his plan has lasted to this day. Under the arrangement, nine of the lanes carry traffic coming from nearby highways. The three remaining lanes, designated by a long line of traffic cones laid down each morning, serve only cars coming from Fort Lee.

The case's cast of characters are public officials who worked at or with the Port Authority and had political ties to New Jersey's then-Governor Chris Christie. The Port Authority is a bi-state agency that manages bridges, tunnels, airports, and other transportation facilities in New York and New Jersey. At the time relevant here, William Baroni was its Deputy Executive Director, an appointee of Governor Christie and the highest ranking New Jersey official in the agency. Together with the Executive Director (a New York appointee), he oversaw "all aspects of the Port Authority's business," including operation of the George Washington Bridge. App. 21 (indictment). David Wildstein (who became the Government's star witness) functioned as Baroni's Chief of Staff. And Bridget Anne Kelly was a Deputy Chief of Staff to Governor Christie with special responsibility for managing his relations with local officials. She often worked hand-in-hand with Baroni and Wildstein to deploy

the Port Authority's resources in ways that would encourage mayors and other local figures to support the Governor.

The fateful lane change arose out of one mayor's resistance to such blandishments. In 2013, Governor Christie was up for reelection, and he wanted to notch a large, bipartisan victory as he ramped up for a presidential campaign. On his behalf, Kelly avidly courted Democratic mayors for their endorsements—among them, Mark Sokolich of Fort Lee. As a result, that town received some valuable benefits from the Port Authority, including an expensive shuttle-bus service. But that summer, Mayor Sokolich informed Kelly's office that he would not back the Governor's campaign. A frustrated Kelly reached out to Wildstein for ideas on how to respond. He suggested that getting rid of the dedicated Fort Lee lanes on the Bridge's toll plaza would cause rush-hour traffic to back up onto local streets, leading to gridlock there. Kelly agreed to the idea in an admirably concise e-mail: "Time for some traffic problems in Fort Lee." App. 917 (trial exhibit). In a later phone conversation, Kelly confirmed to Wildstein that she wanted to "creat[e] a traffic jam that would punish" Mayor Sokolich and "send him a message." *Id.*, at 254 (Wildstein testimony). And after Wildstein relayed those communications, Baroni gave the needed sign-off.

To complete the scheme, Wildstein then devised "a cover story"—that the lane change was part of a traffic study, intended to assess whether to retain the dedicated Fort Lee lanes in the future. *Id.*, at 264. Wildstein, Baroni, and Kelly all agreed to use that "public policy" justification when speaking with the media, local officials, and the Port Authority's own employees. *Id.*, at 265. And to give their story credibility, Wildstein in fact told the Port Authority's engineers to collect "some numbers on how[ ] far back the traffic was delayed." *Id.*, at 305. That inquiry bore little resemblance to the Port Authority's usual traffic studies. Accord-

ing to one engineer's trial testimony, the Port Authority never closes lanes to study traffic patterns, because "computer-generated model[ing]" can itself predict the effect of such actions. *Id.*, at 484 (testimony of Umang Patel); see *id.*, at 473–474 (similar testimony of Victor Chung). And the information that the Port Authority's engineers collected on this singular occasion was mostly "not useful" and "discarded." *Id.*, at 484–485 (Patel testimony). Nor did Wildstein or Baroni show any interest in the data. They never asked to review what the engineers had found; indeed, they learned of the results only weeks later, after a journalist filed a public-records request. So although the engineers spent valuable time assessing the lane change, their work was to no practical effect.

Baroni, Wildstein, and Kelly also agreed to incur another cost—for extra toll collectors—in pursuit of their object. Wildstein's initial thought was to eliminate all three dedicated lanes by not laying down any traffic cones, thus turning the whole toll plaza into a free-for-all. But the Port Authority's chief engineer told him that without the cones "there would be a substantial risk of sideswipe crashes" involving cars coming into the area from different directions. *Id.*, at 284 (Wildstein testimony). So Wildstein went back to Baroni and Kelly and got their approval to keep one lane reserved for Fort Lee traffic. That solution, though, raised another complication. Ordinarily, if a toll collector on a Fort Lee lane has to take a break, he closes his booth, and drivers use one of the other two lanes. Under the one-lane plan, of course, that would be impossible. So the Bridge manager told Wildstein that to make the scheme work, "an extra toll collector" would always have to be "on call" to relieve the regular collector when he went on break. *Id.*, at 303. Once again, Wildstein took the news to Baroni and Kelly. Baroni thought it was "funny," remarking that "only at the Port Authority would [you] have to pay

a toll collector to just sit there and wait." *Ibid.* Still, he and Kelly gave the okay.

The plan was now ready, and on September 9 it went into effect. Without advance notice and on the (traffic-heavy) first day of school, Port Authority employees placed traffic cones two lanes further to the right than usual, restricting cars from Fort Lee to a single lane. Almost immediately, the town's streets came to a standstill. According to the Fort Lee Chief of Police, the traffic rivaled that of 9/11, when the George Washington Bridge had shut down. School buses stood in place for hours. An ambulance struggled to reach the victim of a heart attack; police had trouble responding to a report of a missing child. Mayor Sokolich tried to reach Baroni, leaving a message that the call was about an "urgent matter of public safety." *Id.*, at 323. Yet Baroni failed to return that call or any other: He had agreed with Wildstein and Kelly that they should all maintain "radio silence." *Id.*, at 270. A text from the Mayor to Baroni about the locked-in school buses—also unanswered—went around the horn to Wildstein and Kelly. The last replied: "Is it wrong that I am smiling?" *Id.*, at 990 (Kelly text message). The three merrily kept the lane realignment in place for another three days. It ended only when the Port Authority's Executive Director found out what had happened and reversed what he called their "abusive decision." *Id.*, at 963 (e-mail of Patrick Foye).

The fallout from the scheme was swift and severe. Baroni, Kelly, and Wildstein all lost their jobs. More to the point here, they all ran afoul of federal prosecutors. Wildstein pleaded guilty to conspiracy charges and agreed to cooperate with the Government. Baroni and Kelly went to trial on charges of wire fraud, fraud on a federally funded program or entity (the Port Authority), and conspiracy to commit each of those crimes. The jury found both of them guilty on all counts. The Court of Appeals for the Third

Circuit affirmed, rejecting Baroni's and Kelly's claim that the evidence was insufficient to support their convictions. See *United States* v. *Baroni*, 909 F. 3d 550, 560–579 (2018). We granted certiorari. 588 U. S. 919 (2019).

II

The Government in this case needed to prove *property* fraud. The federal wire fraud statute makes it a crime to effect (with use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. § 1343. Construing that disjunctive language as a unitary whole, this Court has held that "the money-or-property requirement of the latter phrase" also limits the former. *McNally* v. *United States*, 483 U. S. 350, 358 (1987). The wire fraud statute thus prohibits only deceptive "schemes to deprive [the victim of] money or property." *Id.*, at 356. Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity like the Port Authority. § 666(a)(1)(A). So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an "object of the[ir] fraud [was] 'property.'" *Cleveland* v. *United States*, 531 U. S. 12, 26 (2000).[1]

That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials. Some decades ago, courts of appeals often construed the federal fraud laws to "proscribe[ ] schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 483 U. S., at 355. This Court declined to go along. The fraud statutes, we held in *McNally*, were "limited in scope to the protection of

[1] The conspiracy verdicts raise no separate issue. None of the parties doubts that those convictions stand or fall with the substantive offenses. If there was property fraud here, there was also conspiracy to commit it. But if not, not.

property rights." *Id.*, at 360. They did not authorize federal prosecutors to "set[ ] standards of disclosure and good government for local and state officials." *Ibid.* Congress responded to that decision by enacting a law barring fraudulent schemes "to deprive another of the intangible right of honest services"—regardless of whether the scheme sought to divest the victim of any property. § 1346. But the vagueness of that language led this Court to adopt "a limiting construction," confining the statute to schemes involving bribes or kickbacks. *Skilling* v. *United States*, 561 U. S. 358, 405, 410 (2010). We specifically rejected a proposal to construe the statute as encompassing "undisclosed self-dealing by a public official," even when he hid financial interests. *Id.*, at 409. The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Cf. N. J. Stat. Ann. § 2C:30–2 (West 2016) (prohibiting the unauthorized exercise of official functions). Save for bribes or kickbacks (not at issue here), a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property." 18 U. S. C. § 1343; see § 666(a)(1)(A) (similar).

The Government acknowledges this much, but thinks Baroni's and Kelly's convictions remain valid. According to the Government's theory of the case, Baroni and Kelly "used a lie about a fictional traffic study" to achieve their goal of reallocating the Bridge's toll lanes. Brief for United States 43. The Government accepts that the lie itself—*i. e.*, that the lane change was part of a traffic study, rather than political payback—could not get the prosecution all the way home. See *id.*, at 43–44. As the Government recognizes, the deceit must also have had the "object" of obtaining the Port Authority's money or property. *Id.*, at 44. The scheme met that requirement, the Government argues, in two ways. First, the Government claims that Baroni and Kelly sought to "commandeer[ ]" part of the Bridge itself—to "take control" of its "physical lanes." Tr. of Oral Arg. 58–59. Sec-

ond, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment. On either theory, the Government insists, Baroni's and Kelly's scheme targeted "a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes." Brief for United States 22 (quoting *Pasquantino* v. *United States*, 544 U. S. 349, 356 (2005)).

We cannot agree. As we explain below, the Government could not have proved—on either of its theories, though for different reasons—that Baroni's and Kelly's scheme was "directed at the [Port Authority's] property." Brief for United States 44. Baroni and Kelly indeed "plotted to reduce [Fort Lee's] lanes." *Id.*, at 34. But that realignment was a quintessential exercise of regulatory power. And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property. See *Cleveland*, 531 U. S., at 23. By contrast, a scheme to usurp a public employee's paid time is one to take the government's property. But Baroni's and Kelly's plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes.

Start with this Court's decision in *Cleveland*, which reversed another set of federal fraud convictions based on the distinction between property and regulatory power. The defendant there had engaged in a deceptive scheme to influence, to his own benefit, Louisiana's issuance of gaming licenses. The Government argued that his fraud aimed to deprive the State of property by altering its licensing decisions. This Court rejected the claim. The State's "intangible rights of allocation, exclusion, and control"—its prerogatives over who should get a benefit and who should not—do "not create a property interest." *Ibid.* Rather, the Court stated, those rights "amount to no more and no

less than" the State's "sovereign power to regulate." *Ibid.*; see *id.*, at 20 ("[T]he State's core concern" in allocating gaming licenses "is *regulatory*"). Or said another way: The defendant's fraud "implicate[d] the Government's role as sovereign" wielding "traditional police powers"—not its role "as property holder." *Id.*, at 23–24. And so his conduct, however deceitful, was not property fraud.

The same is true of the lane realignment. Through that action, Baroni and Kelly changed the traffic flow onto the George Washington Bridge's tollbooth plaza. Contrary to the Government's view, the two defendants did not "commandeer" the Bridge's access lanes (supposing that word bears its normal meaning). They (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use. Rather, Baroni and Kelly regulated use of the lanes, as officials responsible for roadways so often do—allocating lanes as between different groups of drivers. To borrow *Cleveland*'s words, Baroni and Kelly exercised the regulatory rights of "allocation, exclusion, and control"—deciding that drivers from Fort Lee should get two fewer lanes while drivers from nearby highways should get two more. They did so, according to all the Government's evidence, for bad reasons; and they did so by resorting to lies. But still, *what* they did was alter a regulatory decision about the toll plaza's use—in effect, about which drivers had a "license" to use which lanes. And under *Cleveland*, that run-of-the-mine exercise of regulatory power cannot count as the taking of property.

A government's right to its employees' time and labor, by contrast, can undergird a property fraud prosecution. Suppose that a mayor uses deception to get "on-the-clock city workers" to renovate his daughter's new home. *United States* v. *Pabey*, 664 F. 3d 1084, 1089 (CA7 2011). Or imagine that a city parks commissioner induces his employees into doing gardening work for political contributors. See *United States* v. *Delano*, 55 F. 3d 720, 723 (CA2 1995). As both de-

fendants agree, the cost of those employees' services would qualify as an economic loss to a city, sufficient to meet the federal fraud statutes' property requirement. See Brief for Respondent Baroni 27; Tr. of Oral Arg. 16. No less than if the official took cash out of the city's bank account would he have deprived the city of a "valuable entitlement." *Pasquantino*, 544 U. S., at 357.

But that property must play more than some bit part in a scheme: It must be an "object of the fraud." *Id.*, at 355; see Brief for United States 44; *supra*, at 398. Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.[2] In the home-and-garden examples cited above, that constraint raised no problem: The entire point of the fraudsters' plans was to obtain the employees' services. But now consider the difficulty if the prosecution in *Cleveland* had raised a similar employee-labor argument. As the Government noted at oral argument here, the fraud on Louisiana's licensing system doubtless imposed costs calculable in employee time: If nothing else, some state worker had to process each of the fraudster's falsified applications. But still, the Government acknowledged, those costs were "[i]ncidental." Tr. of Oral Arg. 63. The object of the scheme was never to get the employees' labor: It was to get gaming licenses. So the labor costs could not sustain the conviction for property fraud. See *id.*, at 62–63.

This case is no different. The time and labor of Port Authority employees were just the implementation costs of the

[2] Without that rule, as Judge Easterbrook has elaborated, even a practical joke could be a federal felony. See *United States* v. *Walters*, 997 F. 2d 1219, 1224 (CA7 1993). His example goes: "A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation," thus expending the cost of gasoline. *Ibid.* "But there is no party; the address is a vacant lot; B is the butt of a joke." *Ibid.* Wire fraud? No. And for the reason Judge Easterbrook gave: "[T]he victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it." *Id.*, at 1226.

defendants' scheme to reallocate the Bridge's access lanes. Or said another way, the labor costs were an incidental (even if foreseen) byproduct of Baroni's and Kelly's regulatory object. Neither defendant sought to obtain the services that the employees provided. The back-up toll collectors—whom Baroni joked would just "sit there and wait"—did nothing he or Kelly thought useful. App. 303; see *supra*, at 397. Indeed, those workers came onto the scene only because the Port Authority's chief engineer managed to restore one of Fort Lee's lanes to reduce the risk of traffic accidents. See *supra*, at 396. In the defendants' original plan, which scrapped all reserved lanes, there was no reason for extra toll collectors. And similarly, Baroni and Kelly did not hope to obtain the data that the traffic engineers spent their time collecting. By the Government's own account, the traffic study the defendants used for a cover story was a "sham," and they never asked to see its results. Brief for United States 4, 32; see *supra*, at 395–396. Maybe, as the Government contends, all of this work was "needed" to realize the final plan—"to accomplish what [Baroni and Kelly] were trying to do with the [B]ridge." Tr. of Oral Arg. 60. Even if so, it would make no difference. Every regulatory decision (think again of *Cleveland*, see *supra*, at 402) requires the use of some employee labor. But that does not mean every scheme to alter a regulation has that labor as its object. Baroni's and Kelly's plan aimed to impede access from Fort Lee to the George Washington Bridge. The cost of the employee hours spent on implementing that plan was its incidental byproduct.

To rule otherwise would undercut this Court's oft-repeated instruction: Federal prosecutors may not use property fraud statutes to "set[ ] standards of disclosure and good government for local and state officials." *McNally*, 483 U. S., at 360; see *supra*, at 399. Much of governance involves (as it did here) regulatory choice. If U. S. Attorneys could prosecute as property fraud every lie a state or local official

tells in making such a decision, the result would be—as *Cleveland* recognized—"a sweeping expansion of federal criminal jurisdiction." 531 U. S., at 24. And if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow. In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome. They do not "proscribe[ ] schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 483 U. S., at 355; see *supra*, at 398. They bar only schemes for obtaining property.

III

As Kelly's own lawyer acknowledged, this case involves an "abuse of power." Tr. of Oral Arg. 19. For no reason other than political payback, Baroni and Kelly used deception to reduce Fort Lee's access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town's residents. But not every corrupt act by state or local officials is a federal crime. Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

LUCKY BRAND DUNGAREES, INC., ET AL. *v.* MARCEL FASHIONS GROUP, INC.

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

No. 18–1086. Argued January 13, 2020—Decided May 14, 2020

Petitioners (collectively Lucky Brand) and respondent (Marcel) both use the word "Lucky" as part of their marks on jeans and other apparel. Marcel received a trademark registration for the phrase "Get Lucky," and Lucky Brand uses the registered trademark "Lucky Brand" and other marks with the word "Lucky." This has led to nearly 20 years of litigation, proceeding in three rounds. The first round resulted in a 2003 settlement agreement in which Lucky Brand agreed to stop using the phrase "Get Lucky" and Marcel agreed to release any claims regarding Lucky Brand's use of its own trademarks. In the second round (2005 Action), Lucky Brand sued Marcel and its licensee for violating its trademarks. Marcel filed several counterclaims turning, as relevant here, on Lucky Brand's alleged continued use of "Get Lucky," but it did not claim that Lucky Brand's use of its own marks alone infringed the "Get Lucky" mark. In both a motion to dismiss the counterclaims and an answer to them, Lucky Brand argued that the counterclaims were barred by the settlement agreement, but it did not invoke that defense later in the proceedings. The court in the 2005 Action permanently enjoined Lucky Brand from copying or imitating Marcel's "Get Lucky" mark, and a jury found against Lucky Brand on Marcel's remaining counterclaims. In the third round (2011 Action), Marcel sued Lucky Brand for continuing to infringe the "Get Lucky" mark, but it did not reprise its 2005 allegation about Lucky Brand's use of the "Get Lucky" phrase. After protracted litigation, Lucky Brand moved to dismiss, arguing—for the first time since early in the 2005 Action—that Marcel had released its claims in the settlement agreement. Marcel countered that Lucky Brand could not invoke the release defense because it could have pursued that defense in the 2005 Action but did not. The District Court granted Lucky Brand's motion to dismiss. The Second Circuit vacated and remanded, concluding that "defense preclusion" prohibited Lucky Brand from raising an unlitigated defense that it should have raised earlier.

Held: Because Marcel's 2011 Action challenged different conduct—and raised different claims—from the 2005 Action, Marcel cannot preclude Lucky Brand from raising new defenses. Pp. 411–417.

(a) This case asks whether so-called "defense preclusion" is a valid application of res judicata: a term comprising the doctrine of issue preclusion, which precludes a party from relitigating an issue actually decided in a prior action and necessary to the judgment, and the doctrine of claim preclusion, which prevents parties from raising issues that could have been raised and decided in a prior action. Any preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion. See, *e. g.*, *Davis* v. *Brown*, 94 U. S. 423, 428. Here, issue preclusion does not apply, so the causes of action must share a "common nucleus of operative fact[s]" for claim preclusion to apply, Restatement (Second) of Judgments § 24, Comment *b*, p. 199. Pp. 411–413.

(b) Because the two suits here involved different marks and different conduct occurring at different times, they did not share a "common nucleus of operative facts." The 2005 claims depended on Lucky Brand's alleged use of "Get Lucky." But in the 2011 Action, Marcel alleged that the infringement was Lucky Brand's use of its other marks containing the word "Lucky," not any use of "Get Lucky" itself. The conduct in the 2011 Action also occurred after the conclusion of the 2005 Action. But claim preclusion generally "'does not bar claims that are predicated on events that postdate the filing of the initial complaint,'" *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 600, because events occurring after a plaintiff files suit often give rise to new "operative facts" creating a new claim to relief. Pp. 413–415.

(c) Marcel claims that treatises and this Court's cases support a version of "defense preclusion" that extends to the facts of this case. But none of those authorities describe scenarios applicable here, and they are unlikely to stand for anything more than that traditional claim- or issue-preclusion principles may bar defenses raised in a subsequent suit—principles that do not bar Lucky Brand's release defense here. Pp. 415–417.

898 F. 3d 232, reversed and remanded.

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

Dale M. Cendali argued the cause for petitioners. With him on the briefs were *John C. O'Quinn*, *Matthew D. Rowen*, *Claudia Ray*, and *Mary C. Mazzello.*

Michael B. Kimberly argued the cause for respondent. With him on the brief were *Paul W. Hughes*, *Eugene R. Fidell*, *Louis R. Gigliotti*, and *Robert L. Greener.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case arises from protracted litigation between petitioners Lucky Brand Dungarees, Inc., and others (collectively Lucky Brand) and respondent Marcel Fashions Group, Inc. (Marcel). In the latest lawsuit between the two, Lucky Brand asserted a defense against Marcel that it had not pressed fully in a preceding suit between the parties. This Court is asked to determine whether Lucky Brand's failure to litigate the defense in the earlier suit barred Lucky Brand from invoking it in the later suit. Because the parties agree that, at a minimum, the preclusion of such a defense in this context requires that the two suits share the same claim to relief—and because we find that the two suits here did not—Lucky Brand was not barred from raising its defense in the later action.

I

Marcel and Lucky Brand both sell jeans and other apparel. Both entities also use the word "Lucky" as part of their marks on clothing. In 1986, Marcel received a federal trademark registration for "Get Lucky"; a few years later, in 1990, Lucky Brand began selling apparel using the registered trademark "Lucky Brand" and other marks that include the word "Lucky." 779 F. 3d 102, 105 (CA2 2015).

Three categories of marks are at issue in this case: Marcel's "Get Lucky" mark; Lucky Brand's "Lucky Brand" mark; and various other marks owned by Lucky Brand that contain the word "Lucky." These trademarks have led to nearly 20 years of litigation between the two companies, proceeding in three rounds.

A

In 2001—the first round—Marcel sued Lucky Brand, alleging that Lucky Brand's use of the phrase "Get Lucky" in advertisements infringed Marcel's trademark. In 2003, the parties signed a settlement agreement. As part of the deal,

Lucky Brand agreed to stop using the phrase "Get Lucky." App. 191. In exchange, Marcel agreed to release any claims regarding Lucky Brand's use of its own trademarks. *Id.*, at 191–192.

B

The ink was barely dry on the settlement agreement when, in 2005, the parties began a second round of litigation (2005 Action). Lucky Brand filed suit, alleging that Marcel and its licensee violated its trademarks by copying its designs and logos in a new clothing line. As relevant here, Marcel filed several counterclaims that all turned, in large part, on Lucky Brand's alleged continued use of "Get Lucky": One batch of allegations asserted that Lucky Brand had continued to use Marcel's "Get Lucky" mark in violation of the settlement agreement, while others alleged that Lucky Brand's use of the phrase "Get Lucky" and "Lucky Brand" together was "confusingly similar to"—and thus infringed—Marcel's "Get Lucky" mark. Defendants' Answer, Affirmative Defenses, and Counterclaims to Plaintiffs' Complaint in No. 1:05–cv–06757 (SDNY), Doc. 40–2, p. 39; see *id.*, at 34–41. None of Marcel's counterclaims alleged that Lucky Brand's use of its own marks alone—*i. e.*, independent of any alleged use of "Get Lucky"—infringed Marcel's "Get Lucky" mark.

Lucky Brand moved to dismiss the counterclaims, alleging that they were barred by the release provision of the settlement agreement. After the District Court denied the motion without prejudice, Lucky Brand noted the release defense once more in its answer to Marcel's counterclaims. But as the 2005 Action proceeded, Lucky Brand never again invoked the release defense.

The 2005 Action concluded in two phases. First, as a sanction for misconduct during discovery, the District Court concluded that Lucky Brand violated the settlement agreement by continuing to use "Get Lucky" and permanently enjoined Lucky Brand from copying or imitating Marcel's "Get

Lucky" mark. Order Granting Partial Summary Judgment and Injunction in No. 1:05–cv–06757, Doc. 183; see also App. 203–204. The injunction did not enjoin, or even mention, Lucky Brand's use of any other marks or phrases containing the word "Lucky." Order Granting Partial Summary Judgment and Injunction, Doc. 183. The case then proceeded to trial. The jury found against Lucky Brand on Marcel's remaining counterclaims—those that alleged infringement from Lucky Brand's continued use of the "Get Lucky" catchphrase alongside its own marks. See Brief for Respondent 52.

C

In April 2011, the third round of litigation began: Marcel filed an action against Lucky Brand (2011 Action), maintaining that Lucky Brand continued to infringe Marcel's "Get Lucky" mark and, in so doing, contravened the judgment issued in the 2005 Action.

This complaint did not reprise Marcel's earlier allegation (in the 2005 Action) that Lucky Brand continued to use the "Get Lucky" phrase. Marcel argued only that Lucky Brand's continued, post-2010 use of Lucky Brand's own marks—some of which used the word "Lucky"—infringed Marcel's "Get Lucky" mark in a manner that (according to Marcel) was previously found infringing.[1] Marcel requested that the District Court enjoin Lucky Brand from using any of Lucky Brand's marks containing the word "Lucky."

The District Court granted Lucky Brand summary judgment, concluding that Marcel's claims in the 2011 Action

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[1] See Complaint for Injunctive Relief and Trademark Infringement in No. 1:11–cv–05523 (SDNY), Doc. 1, ¶15 ("Despite the entry of the [2005 Action judgment], [Lucky Brand] ha[s] continued to willfully . . . infringe [Marcel's] GET LUCKY mark by using the Lucky Brand marks in the identical manner and form and on the same goods for which [it] w[as] found liable for infringement"); *id.*, ¶20 ("Despite the entry of the" 2005 Action judgment, Lucky Brand has "continued its uninterrupted and willful use of the Lucky Brand marks and any other trademarks including the word 'Lucky' ").

were essentially the same as its counterclaims in the 2005 Action.

But the Court of Appeals for the Second Circuit disagreed. 779 F. 3d 102. The court concluded that Marcel's claims in the 2011 Action were distinct from those it had asserted in the 2005 Action, because the claims at issue in the 2005 Action were "for earlier infringements." *Id.*, at 110. As the court noted, "[w]inning a judgment . . . does not deprive the plaintiff of the right to sue" for the defendant's "subsequent similar violations." *Id.*, at 107.

The Second Circuit further rejected Marcel's request to hold Lucky Brand in contempt for violating the injunction issued in the 2005 Action. The court noted that the conduct at issue in the 2011 Action was Lucky Brand's use of its own marks—not the use of the phrase "Get Lucky." By contrast, the 2005 injunction prohibited Lucky Brand from using the "Get Lucky" mark—not Lucky Brand's own marks that happened to contain the word "Lucky." *Id.*, at 111. Moreover, the court reasoned that the jury in the 2005 Action had been "free to find infringement of Marcel's 'Get Lucky' mark based solely on Lucky Brand's use of [the phrase] 'Get Lucky.'" *Id.*, at 112. The court vacated and remanded for further proceedings.

On remand to the District Court, Lucky Brand moved to dismiss, arguing—for the first time since its motion to dismiss and answer in the 2005 Action—that Marcel had released its claims by entering the settlement agreement. Marcel countered that Lucky Brand was precluded from invoking the release defense, because it could have pursued the defense fully in the 2005 Action but had neglected to do so. The District Court granted Lucky Brand's motion to dismiss, holding that it could assert its release defense and that the settlement agreement indeed barred Marcel's claims.

The Second Circuit vacated and remanded, concluding that a doctrine it termed "defense preclusion" prohibited Lucky

Brand from raising the release defense in the 2011 Action. 898 F. 3d 232 (2018). Noting that a different category of preclusion—issue preclusion—may be wielded against a defendant, see *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979), the court reasoned that the same should be true of claim preclusion: A defendant should be precluded from raising an unlitigated defense that it should have raised earlier. The panel then held that "defense preclusion" bars a party from raising a defense where: "(i) a previous action involved an adjudication on the merits"; "(ii) the previous action involved the same parties"; "(iii) the defense was either asserted or could have been asserted, in the prior action"; and "(iv) the district court, in its discretion, concludes that preclusion of the defense is appropriate." 898 F. 3d, at 241. Finding each factor satisfied in this case, the panel vacated the District Court's judgment. We granted certiorari, 588 U. S. 919 (2019), to resolve differences among the Circuits regarding when, if ever, claim preclusion applies to defenses raised in a later suit. Compare 898 F. 3d, at 241, with *Hallco Mfg. Co.* v. *Foster*, 256 F. 3d 1290, 1297–1298 (CA Fed. 2001); *McKinnon* v. *Blue Cross and Blue Shield of Alabama*, 935 F. 2d 1187, 1192 (CA11 1991).

II

A

This case asks whether so-called "defense preclusion" is a valid application of res judicata: a term that now comprises two distinct doctrines regarding the preclusive effect of prior litigation. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (3d ed. 2016) (Wright & Miller). The first is issue preclusion (sometimes called collateral estoppel), which precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment. *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980); see *Parklane Hosiery*, 439 U. S., at 326, n. 5.

The second doctrine is claim preclusion (sometimes itself called res judicata). Unlike issue preclusion, claim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated. If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown* v. *Felsen*, 442 U. S. 127, 131 (1979); see also Wright & Miller § 4407. Suits involve the same claim (or "cause of action") when they "'aris[e] from the same transaction,'" *United States* v. *Tohono O'odham Nation*, 563 U. S. 307, 316 (2011) (quoting *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 482, n. 22 (1982)), or involve a "common nucleus of operative facts," Restatement (Second) of Judgments § 24, Comment *b*, p. 199 (1980) (Restatement (Second)).

Put another way, claim preclusion "describes the rules formerly known as 'merger' and 'bar.'" *Taylor* v. *Sturgell*, 553 U. S. 880, 892, n. 5 (2008). "If the plaintiff wins, the entire claim is merged in the judgment; the plaintiff cannot bring a second independent action for additional relief, and the defendant cannot avoid the judgment by offering new defenses." Wright & Miller § 4406. But "[i]f the second lawsuit involves a new claim or cause of action, the parties may raise assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action." *Ibid.*

As the Second Circuit itself seemed to recognize, see 898 F. 3d, at 236–237, this Court has never explicitly recognized "defense preclusion" as a standalone category of res judicata, unmoored from the two guideposts of issue preclusion and claim preclusion. Instead, our case law indicates that any such preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion. See, *e. g.*,

Davis v. *Brown*, 94 U. S. 423, 428 (1877) (holding that where two lawsuits involved different claims, preclusion operates "only upon the matter actually at issue and determined in the original action").[2] The parties thus agree that where, as here, issue preclusion does not apply, a defense can be barred only if the "causes of action are the same" in the two suits—that is, where they share a " 'common nucleus of operative fact[s].' " Brief for Respondent 2, 27, 31, 50; accord, Reply Brief 3.

B

Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts." Restatement (Second) § 24, Comment *b*, at 199.

To start, claims to relief may be the same for the purposes of claim preclusion if, among other things, " 'a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action.' " Wright & Miller § 4407. Here, however, the 2011 Action did not imperil the judgment of the 2005 Action because the lawsuits involved both different conduct and different trademarks.

In the 2005 Action, Marcel alleged that Lucky Brand infringed Marcel's "Get Lucky" mark both by directly imitat-

[2] There may be good reasons to question any application of claim preclusion to defenses. It has been noted that in suits involving successive claims against the same defendant, courts often "assum[e] that the defendant may raise defenses in the second action that were not raised in the first, even though they were equally available and relevant in both actions." Wright & Miller § 4414. This is because "[v]arious considerations, other than the actual merits, may govern" whether to bring a defense, "such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and [a party's] own situation." *Cromwell* v. *County of Sac*, 94 U. S. 351, 356 (1877). Here, however, this Court need not determine when (if ever) applying claim preclusion to defenses may be appropriate, because a necessary predicate—identity of claims—is lacking.

ing its "Get Lucky" mark and by using the "Get Lucky" slogan alongside Lucky Brand's other marks in a way that created consumer confusion. Brief for Respondent 52. Marcel appears to admit, thus, that its claims in the 2005 Action depended on Lucky Brand's alleged use of "Get Lucky." *Id.*, at 9–10 ("Marcel's reverse-confusion theory [in the 2005 Action] depended, in part, on Lucky's continued imitation of the GET LUCKY mark").

By contrast, the 2011 Action did not involve any alleged use of the "Get Lucky" phrase. Indeed, Lucky Brand had been enjoined in the 2005 Action from using "Get Lucky," and in the 2011 Action, Lucky Brand was found not to have violated that injunction. 779 F. 3d, at 111–112. The parties thus do not argue that Lucky Brand continued to use "Get Lucky" after the 2005 Action concluded, and at oral argument, counsel for Marcel appeared to confirm that Marcel's claims in the 2011 Action did not allege that Lucky Brand continued to use "Get Lucky." Tr. of Oral Arg. 46. Instead, Marcel alleged in the 2011 Action that Lucky Brand committed infringement by using Lucky Brand's own marks containing the word "Lucky"—not the "Get Lucky" mark itself. Plainly, then, the 2011 Action challenged different conduct, involving different marks.

Not only that, but the complained-of conduct in the 2011 Action occurred after the conclusion of the 2005 Action. Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 600 (2016) (internal quotation marks omitted); *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 327–328 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been

sued upon in the previous case"). This is for good reason: Events that occur after the plaintiff files suit often give rise to new "[m]aterial operative facts" that "in themselves, or taken in conjunction with the antecedent facts," create a new claim to relief. Restatement (Second) § 24, Comment *f*, at 203; 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice § 131.22[1], p. 131–55, n. 1 (3d ed. 2019) (citing cases where "[n]ew facts create[d a] new claim").

This principle takes on particular force in the trademark context, where the enforceability of a mark and likelihood of confusion between marks often turns on extrinsic facts that change over time. As Lucky Brand points out, liability for trademark infringement turns on marketplace realities that can change dramatically from year to year. Brief for Petitioners 42–45. It is no surprise, then, that the Second Circuit held that Marcel's 2011 Action claims were not barred by the 2005 Action. By the same token, the 2005 Action could not bar Lucky Brand's 2011 defenses.

At bottom, the 2011 Action involved different marks, different legal theories, and different conduct—occurring at different times. Because the two suits thus lacked a "common nucleus of operative facts," claim preclusion did not and could not bar Lucky Brand from asserting its settlement agreement defense in the 2011 Action.

III

Resisting this conclusion, Marcel points to treatises and this Court's cases, arguing that they support a version of "defense preclusion" doctrine that extends to the facts of this case. Brief for Respondent 24–26. But these authorities do no such thing. As an initial matter, regardless of what those authorities might imply about "defense preclusion," none of them describe scenarios applicable here. Moreover, we doubt that these authorities stand for anything more than that traditional claim- or issue-preclusion principles may bar

defenses raised in a subsequent suit—principles that, as explained above, do not bar Lucky Brand's release defense here.

Take, for example, cases that involve either judgment enforcement or a collateral attack on a prior judgment. *Id.*, at 26–35. In the former scenario, a party takes action to enforce a prior judgment already issued against another; in the latter, a party seeks to avoid the effect of a prior judgment by bringing a suit to undo it. If, in either situation, a different outcome in the second action "would nullify the initial judgment or would impair rights established in the initial action," preclusion principles would be at play. Restatement (Second) § 22(b), at 185; Wright & Miller § 4414. In both scenarios, courts simply apply claim preclusion or issue preclusion to prohibit a claim or defense that would attack a previously decided claim.[3] But these principles do not preclude defendants from asserting defenses to new claims, which is precisely what Marcel would have us do here.

In any event, judgment-enforcement and collateral-attack scenarios are far afield from the circumstances of this case. Lucky Brand's defense in the 2011 Action did not threaten the judgment issued in the 2005 Action or, as Marcel argues, "achieve the same practical result" that the above-mentioned

[3] One might ask: If any preclusion of defenses (under the claim-preclusion rubric) requires identity of claims in two suits, how could the second similar suit have avoided standard claim preclusion in the first place? Different contexts may yield different answers. In a judgment-enforcement context, the answer may be that claim preclusion applies only "to a final judgment rendered in an action *separate* from that in which the doctrine is asserted." 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice § 131.31[1], p. 131–116 (3d ed. 2019) (emphasis added). Thus—although claim preclusion does apply to a later, standalone suit seeking relief that could have been obtained in the first—it "is not applicable to . . . efforts to obtain supplemental relief in the original action, or direct attacks on the judgment." *Ibid.* The upshot is that—even if a court deems the underlying core of operative facts to be the same—a plaintiff in that circumstance is not precluded from enforcing its rights with respect to continuing wrongful conduct.

principles seek to avoid. Brief for Respondent 31–32. Indeed, while the judgment in the 2005 Action plainly prohibited Lucky Brand from using "Get Lucky," it did not do the same with respect to Lucky Brand's continued, standalone use of its own marks containing the word "Lucky"—the only conduct at issue in the 2011 Action. Put simply, Lucky Brand's defense to new claims in the 2011 Action did not risk impairing the 2005 judgment.

Nor do cases like *Beloit* v. *Morgan*, 7 Wall. 619 (1869), aid Marcel. See Brief for Respondent 32–33. To be sure, *Beloit* held that a defendant in a second suit over bonds "of the same issue" was precluded from raising a defense it had not raised in the first suit. 7 Wall., at 620. But the Court there explained that the judgment in the first suit "established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them." *Id.*, at 623. In other words, by challenging the validity of all bonds of the same issue, the defense in the second suit would have threatened the validity of the judgment in the first suit. The same cannot be said of the defense raised in the 2011 Action vis-à-vis the judgment in the 2005 Action.

* * *

At bottom, Marcel's 2011 Action challenged different conduct—and raised different claims—from the 2005 Action. Under those circumstances, Marcel cannot preclude Lucky Brand from raising new defenses. The judgment of the Second Circuit is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Syllabus

OPATI, IN HER OWN RIGHT AND AS EXECUTRIX OF THE ESTATE OF OPATI, DECEASED, ET AL. *v.* REPUBLIC OF SUDAN ET AL.

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

No. 17–1268. Argued February 24, 2020—Decided May 18, 2020

In 1998, al Qaeda operatives detonated truck bombs outside the United States Embassies in Kenya and Tanzania. Victims and their family members sued the Republic of Sudan under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA), formerly 28 U. S. C. § 1605(a)(7), alleging that Sudan had assisted al Qaeda in perpetrating the attacks. At the time, the plaintiffs faced § 1606's bar on punitive damages for suits proceeding under any of the § 1605 sovereign immunity exceptions. In 2008, Congress amended the FSIA in the National Defense Authorization Act (NDAA). 122 Stat. 3. In NDAA § 1083(a), Congress moved § 1605(a)(7) to a new section and created an express federal cause of action for acts of terror that also provided for punitive damages. See § 1605A(c). In § 1083(c)(2), it gave effect to existing lawsuits that had been "adversely affected" by prior law "as if" they had been originally filed under the new § 1605A(c). And in § 1083(c)(3), it provided a time-limited opportunity for plaintiffs to file new actions "arising out of the same act or incident" as an earlier action and claim § 1605A's benefits. Following these amendments, the original plaintiffs amended their complaint to include the new federal cause of action under § 1605A(c), and hundreds of others filed new, similar claims. The district court entered judgment for the plaintiffs and awarded approximately $10.2 billion in damages, including roughly $4.3 billion in punitive damages. As relevant here, the court of appeals held that the plaintiffs were not entitled to punitive damages because Congress had included no statement in NDAA § 1083 clearly authorizing punitive damages for preenactment conduct.

Held: Plaintiffs in a federal cause of action under § 1605A(c) may seek punitive damages for preenactment conduct. Even assuming (without granting) that Sudan may claim the benefit of the presumption of prospectivity—the assumption that Congress means its legislation to apply only to future conduct, see *Landgraf* v. *USI Film Products*, 511 U. S. 244—Congress was as clear as it could have been when it expressly authorized punitive damages under § 1605A(c) and explicitly

made that new cause of action available to remedy certain past acts of terrorism.

Sudan stresses that § 1083(c) does not *itself* contain an express authorization of punitive damages. It does admit that § 1083(c) authorizes plaintiffs to bring § 1605A(c) claims for preenactment conduct. And it does concede that § 1605A(c) allows for damages that "may include economic damages, solatium, [and] pain and suffering" for preenactment conduct. That list in the statute also "include[s] . . . punitive damages," and no plausible account of § 1083(c) could be clear enough to authorize the retroactive application of all other § 1605A(c) features except punitive damages. Sudan also contends that § 1605A(c)'s wording "may include . . . punitive damages" fails the clarity test. But "the 'word "may" clearly connotes discretion,'" *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93, 103, and simply vests district courts with discretion to determine whether punitive damages are appropriate. In addition, all of the categories of special damages mentioned in § 1605A(c) are provided on equal terms. Finally, Sudan suggests that a super-clarity rule should apply here because retroactive punitive damages raise special constitutional concerns. Such an interpretative rule is not reasonably administrable.

This Court declines to resolve other matters raised by the parties outside the question presented. But having decided that punitive damages are permissible for federal claims and that the reasons the court of appeals offered for its contrary decision were mistaken, it follows that the court of appeals must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law. Pp. 425–431.

864 F. 3d 751, vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which all other Members joined, except KAVANAUGH, J., who took no part in the consideration or decision of the case.

Matthew D. McGill argued the cause for petitioners. With him on the briefs were *Lochlan F. Shelfer*, *Joshua M. Wesneski*, *Steven R. Perles*, *Steven W. Pelak*, *Brett C. Ruff*, *Michael J. Miller*, and *Gavriel Mairone*.

Erica L. Ross argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Sharon Swingle*, and *Sonia M. Carson*.

Christopher M. Curran argued the cause for respondents. With him on the brief were *Nicole Erb*, *Claire A. DeLelle*, *Celia A. McLaughlin*, and *Nicolle Kownacki*.

JUSTICE GORSUCH delivered the opinion of the Court.

In 1998, al Qaeda operatives simultaneously detonated truck bombs outside the United States Embassies in Kenya and Tanzania. Hundreds died, thousands were injured. In time, victims and their family members sued the Republic of Sudan in federal court, alleging that it had assisted al Qaeda in perpetrating the attacks. After more than a decade of motions practice, intervening legislative amendments, and a trial, the plaintiffs proved Sudan's role in the attacks and established their entitlement to compensatory and punitive damages. On appeal, however, Sudan argued, and the court agreed, that the Foreign Sovereign Immunities Act barred the punitive damages award. It is that decision we now review and, ultimately, vacate.

*

The starting point for nearly any dispute touching on foreign sovereign immunity lies in *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall explained that foreign sovereigns do not enjoy an inherent right to be held immune from suit in American courts: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Id.*, at 136. Still, Chief Justice Marshall continued, many countries had declined to exercise jurisdiction over foreign sovereigns in cases involving foreign ministers and militaries. *Id.*, at 137–140. And, accepting a suggestion from the Executive Branch, the Court agreed as a matter of comity to extend that same immunity to a foreign sovereign in the case at hand. *Id.*, at 134, 145–147.

For much of our history, claims of foreign sovereign immunity were handled on a piecework basis that roughly paral-

leled the process in *Schooner Exchange*. Typically, after a plaintiff sought to sue a foreign sovereign in an American court, the Executive Branch, acting through the State Department, filed a "suggestion of immunity"—case-specific guidance about the foreign sovereign's entitlement to immunity. See *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 487 (1983). Because foreign sovereign immunity is a matter of "grace and comity," *Republic of Austria* v. *Altmann*, 541 U. S. 677, 689 (2004), and so often implicates judgments the Constitution reserves to the political branches, courts "consistently . . . deferred" to these suggestions, *Verlinden*, 461 U. S., at 486.

Eventually, though, this arrangement began to break down. In the mid-20th century, the State Department started to take a more restrictive and nuanced approach to foreign sovereign immunity. See *id.*, at 486–487. Sometimes, too, foreign sovereigns neglected to ask the State Department to weigh in, leaving courts to make immunity decisions on their own. See *id.*, at 487–488. "Not surprisingly" given these developments, "the governing standards" for foreign sovereign immunity determinations over time became "neither clear nor uniformly applied." *Id.*, at 488.

In 1976, Congress sought to remedy the problem and address foreign sovereign immunity on a more comprehensive basis. The result was the Foreign Sovereign Immunities Act (FSIA). As a baseline rule, the FSIA holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts. See 28 U. S. C. §§ 1603(a), 1604. But the law also includes a number of exceptions. See, *e. g.*, §§ 1605, 1607. Of particular relevance today is the terrorism exception Congress added to the law in 1996. That exception permits certain plaintiffs to bring suits against countries who have committed or supported specified acts of terrorism and who are designated by the State Department as state sponsors of terror. Still, as originally enacted, the exception shielded even these countries from

the possibility of punitive damages. See Antiterrorism and Effective Death Penalty Act of 1996 (codifying state-sponsored terrorism exception at 28 U. S. C. § 1605(a)(7)); § 1606 (generally barring punitive damages in suits proceeding under any of § 1605's sovereign immunity exceptions).

Two years after Congress amended the FSIA, al Qaeda attacked the U. S. Embassies in Kenya and Tanzania. In response, a group of victims and affected family members led by James Owens sued Sudan in federal district court, invoking the newly adopted terrorism exception and alleging that Sudan had provided shelter and other material support to al Qaeda. As the suit progressed, however, a question emerged. In its recent amendments, had Congress merely withdrawn immunity for state-sponsored terrorism, allowing plaintiffs to proceed using whatever pre-existing causes of action might be available to them? Or had Congress gone further and created a new federal cause of action to address terrorism? Eventually, the D. C. Circuit held that Congress had only withdrawn immunity without creating a new cause of action. See *Cicippio-Puelo* v. *Islamic Republic of Iran*, 353 F. 3d 1024, 1033 (2004).

In response to that and similar decisions, Congress amended the FSIA again in the National Defense Authorization Act for Fiscal Year 2008 (NDAA), 122 Stat. 338. Four changes, all found in a single section, bear mention here. First, in § 1083(a) of the NDAA, Congress moved the state-sponsored terrorism exception from its original home in § 1605(a)(7) to a new section of the U. S. Code, 28 U. S. C. § 1605A. This had the effect of freeing claims brought under the terrorism exception from the FSIA's usual bar on punitive damages. See § 1606 (denying punitive damages in suits proceeding under a sovereign immunity exception found in § 1605 but not § 1605A). Second, also in § 1083(a), Congress created an express federal cause of action for acts of terror. This new cause of action, codified at 28 U. S. C. § 1605A(c), is open to plaintiffs who are U. S. nationals, mem-

bers of the Armed Forces, U. S. government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages. Third, in § 1083(c)(2) of the NDAA, a provision titled "Prior Actions," Congress addressed existing lawsuits that had been "adversely affected on the groun[d] that" prior law "fail[ed] to create a cause of action against the state." Actions like these, Congress instructed, were to be given effect "as if" they had been originally filed under § 1605A(c)'s new federal cause of action. Finally, in § 1083(c)(3) of the NDAA, a provision titled "Related Actions," Congress provided a time-limited opportunity for plaintiffs to file *new* actions "arising out of the same act or incident" as an earlier action and claim the benefits of 28 U. S. C. § 1605A.

Following these amendments, the *Owens* plaintiffs amended their complaint to include the new federal cause of action, and hundreds of additional victims and family members filed new claims against Sudan similar to those in *Owens*. Some of these new plaintiffs were U. S. nationals or federal government employees or contractors who sought relief under the new § 1605A(c) federal cause of action. But others were the foreign-national family members of U. S. government employees or contractors killed or injured in the attacks. Ineligible to invoke § 1605A(c)'s new federal cause of action, these plaintiffs relied on § 1605A(a)'s state-sponsored terrorism exception to overcome Sudan's sovereign immunity and then advance claims sounding in state law.

After a consolidated bench trial in which Sudan declined to participate, the district court entered judgment in favor of the plaintiffs. District Judge John Bates offered detailed factual findings explaining that Sudan had knowingly served as a safe haven near the two United States Embassies and allowed al Qaeda to plan and train for the attacks. The court also found that Sudan had provided hundreds of Sudanese passports to al Qaeda, allowed al Qaeda operatives to

travel over the Sudan-Kenya border without restriction, and permitted the passage of weapons and money to supply al Qaeda's cell in Kenya. See *Owens* v. *Republic of Sudan*, 826 F. Supp. 2d 128, 139–146 (DC 2011).

The question then turned to damages. Given the extensive and varied nature of the plaintiffs' injuries, the court appointed seven Special Masters to aid its factfinding. Over more than two years, the Special Masters conducted individual damages assessments and submitted written reports. Based on these reports, and after adding a substantial amount of prejudgment interest to account for the many years of delay, the district court awarded a total of approximately $10.2 billion in damages, including roughly $4.3 billion in punitive damages to plaintiffs who had brought suit in the wake of the 2008 amendments.

At that point, Sudan decided to appear and appeal. Among other things, Sudan sought to undo the district court's punitive damages award. Generally, Sudan argued, Congress may create new forms of liability for past conduct only by clearly stating its intention to do so. And, Sudan continued, when Congress passed the NDAA in 2008, it nowhere clearly authorized punitive damages for anything countries like Sudan might have done in the 1990s.

The court of appeals agreed. It started by addressing the plaintiffs who had proceeded under the new federal cause of action in § 1605A(c). The court noted that, in passing the NDAA, Congress clearly authorized individuals to use the Prior Actions and Related Actions provisions to bring new federal claims attacking past conduct. Likewise, the law clearly allowed these plaintiffs to collect compensatory damages for their claims. But, the court held, Congress included no statement clearly authorizing *punitive* damages for preenactment conduct. See *Owens* v. *Republic of Sudan*, 864 F. 3d 751, 814–817 (CADC 2017). Separately but for essentially the same reasons, the court held that the foreign-national family member plaintiffs who had proceeded

under state-law causes of action were also barred from seeking and obtaining punitive damages. *Id.*, at 817.

The petitioners responded by asking this Court to review the first of these rulings and decide whether the 2008 NDAA amendments permit plaintiffs proceeding under the federal cause of action in § 1605A(c) to seek and win punitive damages for past conduct. We agreed to resolve that question. 588 U. S. 919 (2019).

*

The principle that legislation usually applies only prospectively "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). This principle protects vital due process interests, ensuring that "individuals . . . have an opportunity to know what the law is" before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later. *Ibid.* The principle serves vital equal protection interests as well: If legislative majorities could too easily make new laws with retroactive application, disfavored groups could become easy targets for discrimination, with their past actions visible and unalterable. See *id.*, at 266–267. No doubt, reasons like these are exactly why the Constitution discourages retroactive lawmaking in so many ways, from its provisions prohibiting *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts, to its demand that any taking of property be accompanied by just compensation. See *id.*, at 266.

Still, Sudan doesn't challenge the constitutionality of the 2008 NDAA amendments on these or any other grounds—the arguments we confront today are limited to the field of statutory interpretation. But, as both sides acknowledge, the principle of legislative prospectivity plays an important role here too. In fact, the parties devote much of their briefing to debating exactly how that principle should inform our interpretation of the NDAA.

For its part, Sudan points to *Landgraf*. There, the Court observed that, "in decisions spanning two centuries," we have approached debates about statutory meaning with an assumption that Congress means its legislation to respect the principle of prospectivity and apply only to future conduct—and that, if and when Congress wishes to test its power to legislate retrospectively, it must say so "clear[ly]." *Id.*, at 272. All this is important, Sudan tells us, because when we look to the NDAA we will find no *clear* statement allowing courts to award punitive damages for past conduct.

But if Sudan focuses on the rule, the petitioners highlight an exception suggested by *Altmann*. Because foreign sovereign immunity is a gesture of grace and comity, *Altmann* reasoned, it is also something that may be withdrawn retroactively without the same risk to due process and equal protection principles that other forms of backward-looking legislation can pose. Foreign sovereign immunity's "principal purpose," after all, "has never been to permit foreign states . . . to shape their conduct in reliance on the promise of future immunity from suit in United States courts." 541 U. S., at 696. Thus, *Altmann* held, "[i]n th[e] *sui generis* context [of foreign sovereign immunity], . . . it [is] more appropriate, absent contraindications, to defer to the most recent . . . decision [of the political branches] than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Ibid.* And, the petitioners stress, once the presumption of prospectivity is swept away, the NDAA is easily read to authorize punitive damages for completed conduct.

Really, this summary only begins to scratch the surface of the parties' debate. Sudan replies that it may be one thing to retract immunity retroactively consistent with *Altmann*, because all that does is open a forum to hear an otherwise available legal claim. But it is another thing entirely to create new rules regulating primary conduct and impose them retroactively. When Congress wishes to do *that*, Sudan

says, it must speak just as clearly as *Landgraf* commanded. And, Sudan adds, the NDAA didn't simply open a new forum to hear a pre-existing claim; it also created a new cause of action governing completed conduct that the petitioners now seek to exploit. Cf. *Altmann*, 541 U. S., at 702–704 (Scalia, J., concurring). In turn, the petitioners retort that *Altmann* itself might have concerned whether a new forum could hear an otherwise available and pre-existing claim, but its reasoning went further. According to the petitioners, the decision also strongly suggested that the presumption of prospectivity does not apply at all when it comes to suits against foreign sovereigns, full stop. These points and more the parties develop through much of their briefing before us.

As we see it, however, there is no need to resolve the parties' debate over interpretive presumptions. Even if we assume (without granting) that Sudan may claim the benefit of *Landgraf*'s presumption of prospectivity, Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using § 1605A(c)'s new federal cause of action. After all, in § 1083(a), Congress created a federal cause of action that expressly allows suits for damages that "may include economic damages, solatium, pain and suffering, and *punitive damages*." (Emphasis added.) This new cause of action was housed in a new provision of the U. S. Code, 28 U. S. C. § 1605A, to which the FSIA's usual prohibition on punitive damages does not apply. See § 1606. Then, in §§ 1083(c)(2) and (c)(3) of the very same statute, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in § 1605A. Both provisions specifically authorized new claims for preenactment conduct. Put another way, Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism.

Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation.

Sudan's primary rejoinder only serves to underscore the conclusion. Like the court of appeals before it, Sudan stresses that § 1083(c) *itself* contains no express authorization of punitive damages. But it's hard to see what difference that makes. Sudan admits that § 1083(c) authorizes plaintiffs to bring claims under § 1605A(c) for acts committed before the 2008 amendments. Sudan concedes, too, that § 1605A(c) authorizes plaintiffs to seek and win "economic damages, solatium, [and] pain and suffering," for preenactment conduct. In fact, except for the two words "punitive damages," Sudan accepts that *every other* jot and tittle of § 1605A(c) applies to actions properly brought under § 1083(c) for past conduct. And we can see no plausible account on which § 1083(c) could be clear enough to authorize the retroactive application of all other features of § 1605A(c), just not these two words.

Sudan next contends that § 1605A(c) fails to authorize retroactive punitive damages with sufficient clarity because it sounds equivocal—the provision says only that awards "may" include punitive damages. But this language simply vests district courts with discretion to determine whether punitive damages are appropriate in view of the facts of a particular case. As we have repeatedly observed when discussing remedial provisions using similar language, "the 'word "may" *clearly* connotes discretion.'" *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93, 103 (2016) (quoting *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136 (2005), in turn quoting *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533 (1994); emphasis added). What's more, all of the categories of special damages mentioned in § 1605A(c) are provided on equal terms: "[D]amages *may* include economic damages, solatium, pain and suffering, and punitive damages." (Emphasis added.) Sudan admits that the stat-

ute vests the district court with discretion to award the first three kinds of damages for preenactment conduct—and the same can be no less true when it comes to the fourth.

That takes us to Sudan's final argument. Maybe Congress did act clearly when it authorized a new cause of action and other forms of damages for past conduct. But because retroactive damages of the *punitive* variety raise special constitutional concerns, Sudan says, we should create and apply a new rule requiring Congress to provide a super-clear statement when it wishes to authorize their use.

We decline this invitation. It's true that punitive damages aren't merely a form a compensation but a form of punishment, and we don't doubt that applying new punishments to completed conduct can raise serious constitutional questions. See *Landgraf*, 511 U. S., at 281. But if Congress *clearly* authorizes retroactive punitive damages in a manner a litigant thinks unconstitutional, the better course is for the litigant to challenge the law's constitutionality, not ask a court to ignore the law's manifest direction. Besides, when we fashion interpretive rules, we usually try to ensure that they are reasonably administrable, comport with linguistic usage and expectations, and supply a stable backdrop against which Congress, lower courts, and litigants may plan and act. See *id.*, at 272–273. And Sudan's proposal promises more nearly the opposite: How much clearer-than-clear should we require Congress to be when authorizing the retroactive use of punitive damages? Sudan doesn't even try to say, except to assure us it knows a super-clear statement when it sees it, and can't seem to find one here. That sounds much less like an administrable rule of law than an appeal to the eye of the beholder.

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With the question presented now resolved, both sides ask us to tackle other matters in this long-running litigation. Perhaps most significantly, the petitioners include a post-

script asking us to decide whether Congress also clearly authorized retroactive punitive damages in claims brought by foreign-national family members under state law using § 1605A(a)'s exception to sovereign immunity. Sudan insists that, if we take up that question, we must account for the fact that § 1605A(a), unlike § 1605A(c), does not expressly discuss punitive damages. And in fairness, Sudan contends, we should also resolve whether litigants may invoke state law at all, in light of the possibility that § 1605A(c) now supplies the exclusive cause of action for claims involving state-sponsored acts of terror.

We decline to resolve these or other matters outside the question presented. The petitioners chose to limit their petition to the propriety of punitive damages under the federal cause of action in § 1605A(c). See Pet. for Cert. i. The Solicitor General observed this limitation in the question presented at the petition stage. See Brief for United States as *Amicus Curiae* 19, n. 8. The parties' briefing and argument on matters outside the question presented has been limited, too, and we think it best not to stray into new terrain on the basis of such a meager invitation and with such little assistance.

Still, we acknowledge one implication that necessarily follows from our holding today. The court of appeals refused to allow punitive damages awards for foreign-national family members proceeding under state law for "the same reason" it refused punitive damages for the plaintiffs proceeding under § 1605A(c)'s federal cause of action. 864 F. 3d, at 818. The court stressed that it would be "puzzling" if punitive damages were permissible for state claims but not federal ones. *Id.*, at 817. Having now decided that punitive damages *are* permissible for federal claims, and that the reasons the court of appeals offered for its contrary decision were mistaken, it follows that the court of appeals must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law.

The judgment of the court of appeals with respect to punitive damages is vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Reporter's Note

The next page is purposely numbered 901. The numbers between 431 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 APRIL 20 THROUGH
MAY 29, 2020

APRIL 20, 2020

Certiorari Granted—Vacated and Remanded

No. 19–5133. BROWN *v.* BARR, ATTORNEY GENERAL OF THE UNITED STATES. C. A. 11th 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 confession of error by the Solicitor General in his brief for respondent filed on March 6, 2020.

No. 19–6220. BRONSOZIAN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of pending application to vacate the judgment and dismiss the indictment. Reported below: 764 Fed. Appx. 633.

Certiorari Dismissed

No. 19–7619. WIMBUSH *v.* CONWAY ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 768 Fed. Appx. 958.

No. 19–7922. RENDELMAN *v.* TRUE, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Courts Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 19M118. MURPHY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVI-

SION. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. 19M128. MATTHEWS *v.* BRAUN, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 19M129. KANEKA CORP. *v.* XIAMEN KINGDOMWAY GROUP CO. ET AL. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 18–540. RUTLEDGE, ATTORNEY GENERAL OF ARKANSAS *v.* PHARMACEUTICAL CARE MANAGEMENT ASSN. C. A. 8th Cir. [Certiorari granted, 589 U. S. 1127.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–587. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, 588 U. S. 919];

No. 18–588. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. D. C. Cir. [Certiorari granted, 588 U. S. 919]; and

No. 18–589. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. *v.* BATALLA VIDAL ET AL. C. A. 2d Cir. [Certiorari granted *sub nom. McAleenan* v. *Batalla Vidal*, 588 U. S. 919.] Motion of respondents Martin Jonathan Batalla Vidal et al. in No. 18–589 for leave to file a supplemental brief after oral argument granted.

No. 19–368. FORD MOTOR CO. *v.* MONTANA EIGHTH JUDICIAL DISTRICT COURT ET AL. Sup. Ct. Mont.; and

No. 19–369. FORD MOTOR CO. *v.* BANDEMER. Sup. Ct. Minn. [Certiorari granted, 589 U. S. 1164.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied. Motion of Minnesota et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 19–431. LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME *v.* PENNSYLVANIA ET AL.; and

No. 19–454. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. [Certiorari

granted, 589 U. S. 1165.] Motion of the Solicitor General for divided argument granted.

No. 19–518. COLORADO DEPARTMENT OF STATE *v.* BACA ET AL. C. A. 10th Cir. [Certiorari granted, 589 U. S. 1165.] Motion of petitioner to dispense with printing joint appendix granted.

No. 19–5410. BORDEN *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 589 U. S. 1251.] Motion of petitioner to dispense with printing joint appendix granted.

No. 19–6836. WIMBUSH *v.* MICKENS, WARDEN. Sup. Ct. Ga. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1196] denied.

No. 19–7189. MOORE *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1250] denied.

No. 19–7191. BAKER *v.* MACY'S FLORIDA STORES, LLC. Dist. Ct. App. Fla., 4th Dist.; and

No. 19–7629. HILL-LOMAX *v.* VITTETOE ET AL. Sup. Ct. Iowa. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 11, 2020, within which to pay the docketing fees required by this Court's Rule 38(a).

No. 19–7200. ADAMS *v.* CALHOUN COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1196] denied.

No. 19–8102. IN RE WHITE. Petition for writ of habeas corpus denied.

No. 19–1090. IN RE BISHAY;

No. 19–7691. IN RE STARKS; and

No. 19–7902. IN RE MOON. Petitions for writs of mandamus denied.

No. 19–7658. IN RE STRANGE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 19–783. VAN BUREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 940 F. 3d 1192.

Certiorari Denied

No. 19–506. W. M. V. C. ET AL. *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 926 F. 3d 202.

No. 19–587. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 3d 1109.

No. 19–611. BOUCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 937 F. 3d 702.

No. 19–643. HURRY ET AL. *v.* FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 600.

No. 19–672. RAMS FOOTBALL CO., LLC, ET AL. *v.* ST. LOUIS REGIONAL CONVENTION AND SPORTS COMPLEX AUTHORITY ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 531 S. W. 3d 608.

No. 19–732. NATOFSKY *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 921 F. 3d 337.

No. 19–794. MACIAS ET AL. *v.* NICHOLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 845.

No. 19–857. GPI DISTRIBUTORS, INC. *v.* NORTHEAST OHIO REGIONAL SEWER DISTRICT. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-4871.

No. 19–878. GENTILE *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 939 F. 3d 549.

No. 19–893. WARONKER *v.* HEMPSTEAD UNION FREE SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 788.

No. 19–894. YAMASHITA ET AL. *v.* SCHOLASTIC INC. C. A. 2d Cir. Certiorari denied. Reported below: 936 F. 3d 98.

No. 19–967. WOOD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 580 S. W. 3d 566.

No. 19–984. MAZIE SLATER KATZ & FREEMAN, LLC *v.* COMMON BENEFIT FEE AND COST COMMITTEE. C. A. 4th Cir. Certiorari denied.

No. 19–993. ROSAS *v.* AUSTIN INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied.

No. 19–1004. JAFFE *v.* SHERMAN, UNITED STATES CONGRESSMAN. C. A. 9th Cir. Certiorari denied.

No. 19–1013. HSU *v.* UBS FINANCIAL SERVICES, INC. C. A. 9th Cir. Certiorari denied.

No. 19–1014. BERRY *v.* DELAWARE COUNTY SHERIFF'S OFFICE. C. A. 6th Cir. Certiorari denied.

No. 19–1016. KIRSCH *v.* REDWOOD RECOVERY SERVICES, LLC, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 672, 451 P. 3d 897.

No. 19–1024. POWE ET UX. *v.* DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE FOR RESIDENTIAL ASSET SECURITIZATION TRUST SERIES 2004–A7 MORTGAGE PASS-THROUGH CERTIFICATES 2004–G. C. A. 5th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 321.

No. 19–1028. KORSUNSKA *v.* WOLF, ACTING SECRETARY OF HOMELAND SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 393.

No. 19–1036. WATERS *v.* PAXTON, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 257.

No. 19–1043. PAUL G., A CONSERVED ADULT, BY AND THROUGH HIS CONSERVATOR STEVE G. *v.* MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 3d 1096.

No. 19–1086. GARCIA *v.* FALK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 796.

No. 19–1089. GINDI *v.* NEW YORK CITY DEPARTMENT OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 786 Fed. Appx. 280.

No. 19–1110. BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM ET AL. *v.* BOSTON SCIENTIFIC CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 936 F. 3d 1365.

No. 19–1113. RUMBIN *v.* DEVOS, SECRETARY OF EDUCATION, ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–1118. PALUMBO *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 193 Conn. App. 457, 219 A. 3d 878.

No. 19–1120. SACCAMENO *v.* OCWEN LOAN SERVICING, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 3d 1071.

No. 19–1125. MENZIES *v.* SEYFARTH SHAW LLP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 3d 328.

No. 19–1127. NEFF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 Fed. Appx. 81.

No. 19–1133. HODGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 413.

No. 19–1136. CHONG YIM ET AL. *v.* CITY OF SEATTLE, WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 194 Wash. 2d 651, 451 P. 3d 675.

No. 19–1142. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 366.

No. 19–1146. CENTAUR, L. L. C. *v.* RIVER VENTURES, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 942 F. 3d 670.

No. 19–1159. BOUCHARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 19–1162. THOMPSON *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 795 Fed. Appx. 15.

No. 19–1163. ROTTSCHAEFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 788 Fed. Appx. 832.

No. 19–6055. FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 901 F. 3d 1150.

No. 19–6413. LANGLEY *v.* PRINCE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 926 F. 3d 145.

No. 19–6609. STONER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 781 Fed. Appx. 81.

No. 19–6647. BAXTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 617.

No. 19–6696. MYERS-MCNEIL *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 262 N. C. App. 497, 822 S. E. 2d 317.

No. 19–6927. FORD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7001. BAGCHO, AKA CHAGUL, AKA BAGCHAGUL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 923 F. 3d 1131.

No. 19–7003. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 931.

No. 19–7073. THOMAS *v.* KENMARK VENTURES, LLC. C. A. 9th Cir. Certiorari denied.

No. 19–7182. MANCILLA LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 336.

No. 19–7215. RHODES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 366.

No. 19–7220. GUERRERO-SAUCEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 19–7236. DEBLASE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 19–7268. RUPAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 591.

No. 19–7314. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7333. MARTINEZ-PAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 180.

No. 19–7565. WRIGHT *v.* ALVAREZ ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7577. BROWN *v.* BROWN. C. A. 3d Cir. Certiorari denied. Reported below: 775 Fed. Appx. 722.

No. 19–7579. BARRY *v.* PERKINS ET AL. C. A. 2d Cir. Certiorari denied.

No. 19–7592. MCALLISTER *v.* MALFITANO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 183.

No. 19–7596. McDuffy-Johnson *v.* Lane. C. A. 5th Cir. Certiorari denied.

No. 19–7601. Garrett *v.* Madder et al. C. A. 9th Cir. Certiorari denied.

No. 19–7611. Johnson *v.* North Carolina. Ct. App. N. C. Certiorari denied.

No. 19–7612. Sims *v.* Wells Fargo Bank, N. A., et al. C. A. 11th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 884.

No. 19–7615. Vukich *v.* Unified Judicial System of Pennsylvania. C. A. 3d Cir. Certiorari denied. Reported below: 778 Fed. Appx. 79.

No. 19–7632. Bolen *v.* Hooks, Secretary, North Carolina Department of Public Safety. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 143.

No. 19–7641. Yusong Gong *v.* University of Michigan et al. C. A. 6th Cir. Certiorari denied.

No. 19–7642. Karnofel *v.* Superior Waterproofing, Inc. Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2019-Ohio-1409.

No. 19–7647. Castillo *v.* Nevada (Reported below: 135 Nev. 126, 442 P. 3d 558); and Doyle *v.* Nevada (135 Nev. 637, 448 P. 3d 552). Sup. Ct. Nev. Certiorari denied.

No. 19–7649. Caro *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 5th 463, 442 P. 3d 316.

No. 19–7655. Worrell *v.* Emigrant Mortgage Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 842.

No. 19–7668. Herran *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 129 N. E. 3d 836.

No. 19–7669. Mattison *v.* Willis et al. C. A. 4th Cir. Certiorari denied. Reported below: 774 Fed. Appx. 800.

No. 19–7673. El Bey, fka Warren *v.* Weaver et al. C. A. 11th Cir. Certiorari denied.

No. 19–7678. El Bey, fka Warren *v.* Doughtery County State Court et al. C. A. 11th Cir. Certiorari denied.

No. 19–7680. Howard *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 657, 448 P. 3d 567.

No. 19–7683. Blacher *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 19–7686. Buford *v.* Laborers' International Union Local 269 et al. C. A. 7th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 341.

No. 19–7687. Palacios Plata *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–7692. R. A. S. *v.* Montgomery County Children and Youth Services. Super. Ct. Pa. Certiorari denied. Reported below: 221 A. 3d 1264.

No. 19–7700. McCain *v.* A. F. Evans Co., Inc., et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 19–7703. Lee *v.* Kelley, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 19–7704. Massengale *v.* Municipality of Anchorage, Alaska, et al. C. A. 9th Cir. Certiorari denied.

No. 19–7710. Young *v.* Jackson-Mitchell, Warden. C. A. 6th Cir. Certiorari denied.

No. 19–7712. Jaramillo *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–7717. Wilson *v.* Inch, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied.

No. 19–7724. Barker *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 19–7725. Conrad *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 19–7728. English *v.* Energy Future Holdings Corp. et al. C. A. 3d Cir. Certiorari denied. Reported below: 785 Fed. Appx. 945.

No. 19–7736. WOODS *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 188.

No. 19–7746. RUNNELS *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 19–7748. SOUFFRANT *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–7758. LIN OUYANG *v.* ACHEM INDUSTRY AMERICA, INC. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 19–7763. BERNIER *v.* HOLLAND, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 139.

No. 19–7766. GARCIA *v.* LACEY ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 19–7767. TORRES ORTEGA *v.* FLORIDA ATTORNEY GENERAL ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7783. MARTIN *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 19–7787. MCNEAL *v.* ERVIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7795. FOSTER *v.* CHAPMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–7801. BARSTAD *v.* WASHINGTON DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7809. WALTERS *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied.

No. 19–7842. CLERVRAIN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 19–7846. VESELI *v.* HACKER-AGNEW, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7847. WATTS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–7852. Parson *v.* United States Air Force et al. C. A. 9th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 462.

No. 19–7858. Ballard *v.* Clark, Superintendent, State Correctional Institution at Albion, et al. C. A. 3d Cir. Certiorari denied.

No. 19–7868. Turner *v.* Kemna. C. A. 8th Cir. Certiorari denied.

No. 19–7878. Ramon Santillan *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 944 F. 3d 731.

No. 19–7879. Rivera-Carrasquillo et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 933 F. 3d 33.

No. 19–7908. Prunty *v.* Inch, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 19–7918. Harris *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 673.

No. 19–7927. Newcomb *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 19–7928. Prince *v.* Moody, Attorney General of Florida, et al. C. A. 11th Cir. Certiorari denied.

No. 19–7930. Pearson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 940 F. 3d 1210.

No. 19–7931. Lopez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 494.

No. 19–7933. Bogard *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 19–7945. Aguedo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 764.

No. 19–7946. Greineder *v.* Medeiros, Superintendent, Massachusetts Correctional Institution at Norfolk. C. A. 1st Cir. Certiorari denied.

No. 19–7947. FLOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7951. TAYLOR *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 287 So. 3d 527.

No. 19–7952. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 340.

No. 19–7956. TSAI *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. 1st Cir. Certiorari denied.

No. 19–7960. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 844.

No. 19–7985. HOOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 433.

No. 19–7986. HAMM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 3d 728.

No. 19–7987. HAMBRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 944 F. 3d 565.

No. 19–7993. SWAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7998. MONTANEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 145.

No. 19–7999. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–8002. HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 403.

No. 19–8005. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 779.

No. 19–8008. FONTANEZ *v.* COAKLEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 251.

No. 19–8010. CHHIM *v.* CITY OF HOUSTON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 780.

No. 19–8014. ARTIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 945 F. 3d 578.

No. 19–8015. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 346.

No. 19–8016. VEGA, AKA JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 945.

No. 19–8019. SIFUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 865.

No. 19–8020. JORDAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 245.

No. 19–8027. GOMEZ-CARRASQUILLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–8030. BATEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 355.

No. 19–8031. GREGG *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied.

No. 19–8034. ATKINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8036. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 3d 315.

No. 19–8038. JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 837.

No. 19–8041. JAMISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 975.

No. 19–8048. GOODMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 790 Fed. Appx. 238.

No. 19–8049. RUFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 211.

No. 19–8053. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 205.

No. 19–8054. VINEYARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 945 F. 3d 1164.

No. 19–8055. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 777 Fed. Appx. 18.

No. 19–8056. MATALKA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 273.

No. 19–8065. VASQUEZ-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–8066. LARA-CERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 299.

No. 19–8071. EARLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 478.

No. 19–8072. CERVANTES *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–8079. ELK SHOULDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 488.

No. 19–8080. SOLORZANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 480.

No. 19–8082. WILLIX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8083. WASHINGTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 19–8094. MOTUPALLI *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 791 Fed. Appx. 895.

No. 19–8097. REED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 796 Fed. Appx. 119.

No. 19–8098. CARLOS RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 56.

No. 19–8100. RODRIGUEZ-LUCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–1577. PENNSYLVANIA *v.* ADAMS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 651 Pa. 440, 205 A. 3d 1195.

No. 19–512. ROBINSON *v.* DEPARTMENT OF EDUCATION. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 3d 799.

JUSTICE THOMAS, with whom JUSTICE KAVANAUGH joins, dissenting.

This petition presents the question whether the general civil enforcement provisions of the Fair Credit Reporting Act (FCRA), 15 U. S. C. §§ 1681n–1681*o*, waive the Federal Government's sovereign immunity for FCRA civil enforcement suits. Because this important question has divided the Courts of Appeals, I would grant review.

I

Petitioner claims to be the victim of identity theft. After he unsuccessfully sought to remove an allegedly fraudulent student loan from his credit history, he filed suit against the lender—the United States Department of Education—seeking damages for violations of the FCRA. Under the FCRA's general civil enforcement provisions, "[a]ny person" who willfully or negligently fails "to comply with any requirement imposed under [§ 1681 *et seq.*] is liable to [the] consumer" for damages. §§ 1681n–1681*o*. The statute defines "person" to include "any . . . government or governmental subdivision or agency." § 1681a(b).

The Department of Education moved to dismiss petitioner's complaint, asserting federal sovereign immunity. The District Court granted the motion, and the Fourth Circuit affirmed. Relying on the interpretive presumption that "'person' does not include the sovereign," *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 780 (2000), the Fourth Circuit concluded that, despite the statutory definition, it could plausibly read "person" to not include the Federal Government. Moreover, the court observed that the opposite interpretation would lead to absurdities in other FCRA enforcement provisions. For example, if the Federal Government were a "person," it could be liable under the FCRA for federal criminal charges. See 917 F. 3d 799, 804 (CA4 2019) (contemplating "a court's puzzlement upon seeing a criminal case captioned '*United States v. United States*'"). And the court noted that petitioner's reading would render superfluous a more limited sovereign-immunity waiver in one of the FCRA's specific civil enforcement provisions, § 1681u(j), which makes "[a]ny agency or department of the United States . . . liable to [a] consumer" for damages when it unlawfully discloses that consumer's credit information to the Federal Bureau

of Investigation. Comparing this express language and that of other sovereign-immunity waivers recognized by this Court with the language of § 1681n and § 1681*o*, the Fourth Circuit determined that the FCRA's general civil enforcement provisions do not clearly waive the Federal Government's sovereign immunity.

II

As both parties acknowledge, the Fourth Circuit's decision in this case deepened a pre-existing Circuit split. While the Ninth Circuit agrees that the FCRA's general civil enforcement provisions do not waive federal sovereign immunity, *Daniel* v. *National Park Serv.*, 891 F. 3d 762 (2018), the Seventh Circuit has reached the opposite conclusion, *Bormes* v. *United States*, 759 F. 3d 793 (2014). Thus, borrowers of federal loans in Illinois, Indiana, and Wisconsin have access to a cause of action against the Federal Government while borrowers with the same types of loans in 14 other States are barred from suit.

Because of the Court's inaction, this disparity will persist. Contrary to the Department's speculation, this Circuit split shows no signs of resolving itself. In fact, the Seventh Circuit recently reaffirmed its position in *Meyers* v. *Oneida Tribe of Wis.*, 836 F. 3d 818 (2016). In holding that the FCRA's general civil enforcement provisions do not abrogate *tribal* sovereign immunity, the court reaffirmed and distinguished its earlier decision in *Bormes*, which recognized a waiver of *federal* sovereign immunity. 836 F. 3d, at 826. In that court's view, the ordinary meaning of "government," as used in the FCRA's definition of "person," clearly encompasses the Federal Government but does not include Indian tribes. *Ibid.* Thus, absent intervention from this Court, or a majority of active judges on the Seventh Circuit, the Courts of Appeals will remain in conflict.

III

The question whether sovereign immunity has been waived is one of critical importance to any functioning government, but particularly to a democratic republic. This is especially true when it comes to suits for money damages, because "the allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Alden* v. *Maine*, 527 U. S. 706, 751 (1999). Were the Federal Government to be stripped of sovereign immunity without consent, "private suits for money

damages would place unwarranted strain on the [Government's] ability to govern in accordance with the will of [its] citizens." *Id.*, at 750–751.

These ramifications are magnified here because the Federal Government's potential liability under the FCRA is substantial. As the Nation's primary student-loan lender, it is one of the largest furnishers of credit information in the country. According to petitioner, the Federal Government is responsible for 90 percent of student loans nationwide in a market that has tripled between 2007 and 2018, from $500 billion to a staggering $1.5 trillion. Pet. for Cert. 39. A waiver of sovereign immunity would thus have a significant impact on the public fisc.

* * *

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 586 U. S. 1057 (2018) (THOMAS, J., dissenting from denial of certiorari) (quoting this Court's Rule 10(a)). Because the question presented in this petition has divided the Circuits and concerns a matter of great importance, it warrants our review. I respectfully dissent from the denial of certiorari.

No. 19–514. JENKINS *v.* NEBRASKA. Sup. Ct. Neb. Motion of Promise of Justice Initiative et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 303 Neb. 676, 931 N. W. 2d 851.

No. 19–627. ISLAS-VELOZ *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Motion of Law Professors for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 914 F. 3d 1249.

No. 19–739. BARBOUR ET AL. *v.* HALLIBURTON CO. ET AL. C. A. 5th Cir. Motion of Patrick A. Juneau, New Class Claims Administrator of the Punitive Damages Settlement Program, for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 934 F. 3d 434.

Rehearing Denied

No. 19–488. WALTNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 589 U. S. 1202;

No. 19–703. DAVIS *v.* MTGLQ INVESTORS, L. P., 589 U. S. 1203;
No. 19–713. NUNU *v.* RISK ET AL., 589 U. S. 1204;
No. 19–823. PEARSALL *v.* GUERNSEY, 589 U. S. 1207;
No. 19–880. KEMP *v.* GEORGIA STATE UNIVERSITY ADMISSIONS OFFICE ET AL., 589 U. S. 1208;
No. 19–5596. LATHAM *v.* UNITED STATES, 589 U. S. 1141;
No. 19–6590. WHITTEN *v.* ATYIA ET AL., 589 U. S. 1169;
No. 19–6630. HUNTER *v.* MURDOCH ET AL., 589 U. S. 1169;
No. 19–6695. RIGWAN *v.* NEUS; and RIGWAN *v.* NEUS ET AL., 589 U. S. 1181;
No. 19–6794. SMITH *v.* ST. JOSEPH'S/CANDLER HEALTH SYSTEM, INC., 589 U. S. 1212;
No. 19–6980. WILLIAMSON *v.* CITY OF WICHITA, KANSAS, 589 U. S. 1217;
No. 19–7077. SANCHEZ *v.* CALIFORNIA ET AL., 589 U. S. 1220;
No. 19–7166. KARNOFEL *v.* SUPERIOR WATERPROOFING, INC., 589 U. S. 1256; and
No. 19–7275. BOYETT *v.* NEW MEXICO, 589 U. S. 1226. Petitions for rehearing denied.

No. 19–7119. BELL *v.* RANSOM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 589 U. S. 1245. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

APRIL 21, 2020

Dismissals Under Rule 46

No. 19–6932. MCDONALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 773 Fed. Appx. 788.

No. 19–7626. RARDEN *v.* OHIO. Ct. App. Ohio, 12th App. Dist., Butler County. Certiorari dismissed under this Court's Rule 46. Reported below: 2019-Ohio-2161.

APRIL 24, 2020

Miscellaneous Orders

No. 19A785. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* NEW YORK ET AL. D. C. S. D. N. Y. Motion to temporarily lift or modify stay [589 U. S. 1173] denied. This order does not preclude filing in the District Court as counsel considers appropriate.

No. 19A905. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. *v.* COOK COUNTY, ILLINOIS, ET AL. D. C. N. D. Ill. Motion to temporarily lift or modify stay [589 U. S. 1190] denied. This order does not preclude filing in the District Court as counsel considers appropriate.

APRIL 27, 2020

Certiorari Granted—Vacated and Remanded

No. 18–999. ATLANTA GAS LIGHT CO. *v.* BENNETT REGULATOR GUARDS, INC. C. A. Fed. Cir. Reported below: 905 F. 3d 1311; and

No. 18–1027. SUPERIOR COMMUNICATIONS, INC. *v.* VOLTSTAR TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Thryv, Inc.* v. *Click-To-Call Technologies, LP*, 590 U. S. 45 (2020).

No. 18–1585. NAGI *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ramos* v. *Louisiana*, 590 U. S. 83 (2020). JUSTICE THOMAS would deny the petition for writ of certiorari. Reported below: 2017–1257 (La. App. 1 Cir. 4/9/18).

JUSTICE ALITO, concurring.

In this and in all other cases in which the Court grants, vacates, and remands in light of *Ramos* v. *Louisiana*, I concur in the judgment on the understanding that the Court is not deciding or expressing a view on whether the question was properly raised below but is instead leaving that question to be decided on remand.

No. 18–7488. LEWIS *v.* LOUISIANA. Ct. App. La., 4th Cir. Reported below: 2016–0224 (La. App. 4 Cir. 12/29/16), 209 So. 3d 202;

No. 18–8748. ALRIDGE *v.* LOUISIANA. Ct. App. La., 4th Cir. Reported below: 2017–0231 (La. App. 4 Cir. 5/23/18), 249 So. 3d 260;

No. 18–9130. DICK *v.* OREGON. Ct. App. Ore.;

No. 18–9693. SHEPPARD *v.* LOUISIANA. Ct. App. La., 1st Cir. Reported below: 2018–0086 (La. App. 1 Cir. 9/21/18);

No. 18–9787. CREHAN *v.* LOUISIANA. Ct. App. La., 1st Cir. Reported below: 2018–0746 (La. App. 1 Cir. 11/5/18);

No. 18–9821. HEARD *v.* LOUISIANA. Ct. App. La., 3d Cir. Reported below: 2018–236 (La. App. 3 Cir. 11/7/18), 258 So. 3d 875; and

No. 19–6679. JOHNSON *v.* LOUISIANA. Ct. App. La., 4th Cir. Reported below: 2018–0409 (La. App. 4 Cir. 3/13/19), 266 So. 3d 969. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Ramos* v. *Louisiana*, 590 U. S. 83 (2020).

JUSTICE ALITO, concurring.

In this and in all other cases in which the Court grants, vacates, and remands in light of *Ramos* v. *Louisiana*, I concur in the judgment on the understanding that the Court is not deciding or expressing a view on whether the question was properly raised below but is instead leaving that question to be decided on remand.

No. 18–8897. DYSON *v.* LOUISIANA. Ct. App. La., 3d Cir. Reported below: 2017–21 (La. App. 3 Cir. 5/17/17), 220 So. 3d 785;

No. 18–9463. BROOKS *v.* LOUISIANA. Ct. App. La., 1st Cir. Reported below: 2017–1755 (La. App. 1 Cir. 9/24/18), 258 So. 3d 944;

No. 19–5301. RICHARDS *v.* LOUISIANA. Ct. App. La., 3d Cir. Reported below: 2017–1135 (La. App. 3 Cir. 6/6/18), 247 So. 3d 878; and

No. 19–5989. VICTOR *v.* LOUISIANA. Ct. App. La., 5th Cir. Reported below: 15–339 (La. App. 5 Cir. 5/26/16), 195 So. 3d 128. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Ramos* v. *Louisiana*, 590 U. S. 83 (2020). JUSTICE THOMAS would deny the petitions for writs of certiorari.

JUSTICE ALITO, concurring.

In this and in all other cases in which the Court grants, vacates, and remands in light of *Ramos* v. *Louisiana*, I concur in the judgment on the understanding that the Court is not deciding or expressing a view on whether the question was properly raised below but is instead leaving that question to be decided on remand.

No. 19–741. ESTATE OF KLIEMAN, BY AND THROUGH ITS ADMINISTRATOR, KESNER, ET AL. *v.* PALESTINIAN AUTHORITY, AKA PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Promoting Security and Justice for Victims of Terrorism Act of 2019, 133 Stat.

3082. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 923 F. 3d 1115.

No. 19–764. SOKOLOW ET AL. *v.* PALESTINE LIBERATION ORGANIZATION ET AL. C. A. 2d Cir. Motion of Senator Charles Grassley et al. for leave to file brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Promoting Security and Justice for Victims of Terrorism Act of 2019, 133 Stat. 3082. Reported below: 925 F. 3d 570.

Certiorari Dismissed

No. 19–7806. FOX *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 19–8133. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders**

No. 19M130. ROBERSON *v.* JACKSON, WARDEN, ET AL.; and
No. 19M131. JOHNSON *v.* MORGAN, WARDEN, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 19–715. TRUMP ET AL. *v.* MAZARS USA, LLP, ET AL. C. A. D. C. Cir.; and
No. 19–760. TRUMP ET AL. *v.* DEUTSCHE BANK AG ET AL. C. A. 2d Cir. [Certiorari granted, 589 U. S. 1120.] The parties and the Solicitor General are directed to file supplemental letter

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*For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see 590 U. S. 1019; amendments to the Federal Rules of Bankruptcy Procedure, see 590 U. S. 1025; an amendment to the Federal Rules of Civil Procedure, see 590 U. S. 1033; and an amendment to the Federal Rules of Evidence, see 590 U. S. 1039.

briefs addressing whether the political question doctrine or related justiciability principles bear on the Court's adjudication of these cases. Briefs, not to exceed 15 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, May 8, 2020.

No. 19–6851. LASHER *v.* NEBRASKA STATE BOARD OF PHARMACY ET AL. C. A. 8th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1196] denied.

No. 19–6874. IN RE LEONARD. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 1167] denied.

No. 19–7756. IN RE DEVILLE. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 18, 2020, within which to pay the docketing fee required by Rule 38(a).

No. 19–7393. IN RE GULBRANDSON;

No. 19–8163. IN RE TANAMOR-STEFFAN; and

No. 19–8207. IN RE BROWN. Petitions for writs of habeas corpus denied.

No. 19–7727. IN RE DAVIS. Petition for writ of mandamus denied.

No. 19–7770. IN RE WILLIAMS. Petition for writ of prohibition denied.

Certiorari Denied

No. 19–455. ARRIS INTERNATIONAL LTD. *v.* CHANBOND, LLC, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 773 Fed. Appx. 605.

No. 19–586. HOLLINGSWORTH *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 767 Fed. Appx. 1006.

No. 19–687. LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* EDWARDS AQUIFER AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 937 F. 3d 457.

No. 19–777. ELECTRONIC PRIVACY INFORMATION CENTER *v.* DEPARTMENT OF COMMERCE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 928 F. 3d 95.

No. 19–779. PIERRE-PAUL *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 930 F. 3d 684.

No. 19–789. MAGHREB PETROLEUM EXPLORATION, S. A., ET AL. *v.* DEJORIA. C. A. 5th Cir. Certiorari denied. Reported below: 935 F. 3d 381.

No. 19–792. VUGO, INC. *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 931 F. 3d 42.

No. 19–887. SIMON ET AL. *v.* MARRIOTT INTERNATIONAL, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 19–891. LEHMANN *v.* HAIMS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 171 App. Div. 3d 1176, 99 N. Y. S. 3d 96.

No. 19–908. ARAUJO BULEJE *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 19–995. MURRAY *v.* MAYO CLINIC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 934 F. 3d 1101.

No. 19–1034. MITCHELL *v.* DILLAHUNT. Ct. App. Minn. Certiorari denied.

No. 19–1047. WEISS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARSH, DECEASED *v.* MARSH, AS EXECUTOR OF THE ESTATE OF MARSH, DECEASED, ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 19–1149. UPMC ET AL. *v.* UNITED STATES EX REL. BOOKWALTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 946 F. 3d 162.

No. 19–1151. KUMAR *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 416.

No. 19–1169. YBARRA *v.* TEXAS HEALTH AND HUMAN SERVICES COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 222.

No. 19–1170. CAMPBELL *v.* WOLF, ACTING SECRETARY OF HOMELAND SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 132.

No. 19–1174. KIMBROUGH *v.* NEAL, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 941 F. 3d 879.

No. 19–7052. CALLEJAS RIVERA *v.* UNITED STATES; IBARA-RAMOS *v.* UNITED STATES (Reported below: 785 Fed. Appx. 270); and FUNEZ GARSILLA *v.* UNITED STATES (780 Fed. Appx. 191). C. A. 5th Cir. Certiorari denied.

No. 19–7322. SANCHEZ-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 372.

No. 19–7339. JONES *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 656.

No. 19–7388. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 3d 782.

No. 19–7410. MORA-GALINDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 374.

No. 19–7508. LEISER *v.* KLOTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 933 F. 3d 696.

No. 19–7701. KERNS *v.* WENNER. C. A. 9th Cir. Certiorari denied. Reported below: 773 Fed. Appx. 1009.

No. 19–7702. JACKSON *v.* BEREAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–7709. TOTH *v.* ANTONACCI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 688.

No. 19–7715. CASTILLO-REYES *v.* INGALLS ET AL. Sup. Ct. Va. Certiorari denied.

No. 19–7721. PARSONS *v.* MCDANIEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 164.

No. 19–7741. JOHNSON *v.* VICTORIA FIRE & CASUALTY INSURANCE CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7742. LEWIS *v.* BERRY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 19–7769. WILSON *v.* SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–7772. Barron *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 19–7774. Muhammad *v.* Wells Fargo Bank, N. A. C. A. 7th Cir. Certiorari denied.

No. 19–7779. Garcia *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7785. Wolf *v.* Peery, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 680.

No. 19–7788. Corrales Vega *v.* Horton, Warden. C. A. 6th Cir. Certiorari denied.

No. 19–7789. Klein *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 19–7793. Deuschel *v.* City of Long Beach, California. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 19–7803. Williams *v.* Kemp, Governor of Georgia, et al. C. A. 11th Cir. Certiorari denied.

No. 19–7808. Taylor *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 19–7818. Benjamin *v.* McGinley, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied.

No. 19–7837. Slavin *v.* Residential Rentals, Trustee. Sup. Ct. N. H. Certiorari denied.

No. 19–7840. Jones *v.* Errington. C. A. 5th Cir. Certiorari denied.

No. 19–7859. Blacher *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 19–7883. Harris *v.* Arkansas. C. A. 8th Cir. Certiorari denied.

No. 19–7889. Rosario-Colon *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2019–0406 (La. App. 1 Cir. 9/27/19), 289 So. 3d 126.

No. 19–7891. Rogers *v.* Barr, Attorney General. C. A. 4th Cir. Certiorari denied.

No. 19–7893. Roos *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2019 Ark. 360, 588 S. W. 3d 738.

No. 19–7997. Pierre *v.* Irizarry, Chief Judge, et al. C. A. 2d Cir. Certiorari denied.

No. 19–8040. Meas *v.* Vidal, Superintendent, Souza-Baranowski Correctional Center, et al. C. A. 1st Cir. Certiorari denied.

No. 19–8046. Cervantes *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied.

No. 19–8067. Mohammed *v.* DuPage Legal Assistance Foundation et al. C. A. 7th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 551.

No. 19–8076. Galindo *v.* Cain, Superintendent, Snake River Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 19–8089. Jenkins *v.* Amsberry. C. A. 9th Cir. Certiorari denied.

No. 19–8104. Gonzalez-Arias *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 946 F. 3d 17.

No. 19–8106. Arteaga Aragon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 409.

No. 19–8109. Bogan *v.* Brookhart, Warden. C. A. 7th Cir. Certiorari denied.

No. 19–8110. AlBritton *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 122.

No. 19–8111. Broxmeyer *v.* Ormond, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 147.

No. 19–8113. Andoe *v.* Biden et al. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 968.

No. 19–8120. Thomas *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 462.

No. 19–8121. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 933 F. 3d 971.

No. 19–8129. BOUNDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 3d 767.

No. 19–8130. AL-AMIN *v.* STIRLING, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Certiorari denied.

No. 19–8137. POSADAS-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 270.

No. 19–8144. PADGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 51.

No. 19–8145. CRUZ *v.* BETANCOURT. C. A. 9th Cir. Certiorari denied. Reported below: 771 Fed. Appx. 826.

No. 19–8147. MURILLO-MORALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 792 Fed. Appx. 11.

No. 19–8148. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–8160. RUTLEDGE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 268 So. 3d 173.

Rehearing Denied

No. 19–898. COLLINS *v.* THORNTON, 589 U. S. 1253;

No. 19–929. SHUMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 589 U. S. 1253;

No. 19–6767. TRUE *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 589 U. S. 1183;

No. 19–6833. ROWE *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 589 U. S. 1213;

No. 19–6869. JEFFERSON *v.* SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 589 U. S. 1214;

No. 19–6909. ROSA *v.* RHODES, WARDEN, 589 U. S. 1170;

No. 19–7058. IN RE RANDALL, 589 U. S. 1166;

No. 19–7065. BRASPENICK *v.* JOHNSON LAW PLC, 589 U. S. 1219;

No. 19–7096. SMITH *v.* JACKSON, 589 U. S. 1220;

No. 19–7135. HYE-YOUNG PARK *v.* SECOLSKY ET AL., 589 U. S. 1255;

No. 19–7150. WALTON *v.* KOWALSKI, WARDEN, 589 U. S. 1255;
No. 19–7154. IN RE EATON, 589 U. S. 1201;
No. 19–7498. SANDERS *v.* UNITED STATES, 589 U. S. 1257; and
No. 19–7502. PETERS *v.* ILLINOIS, 589 U. S. 1258. Petitions for rehearing denied.

MAY 4, 2020

Certiorari Granted—Vacated and Remanded

No. 18–268. KINDER MORGAN ENERGY PARTNERS, L. P., ET AL. *v.* UPSTATE FOREVER ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *County of Maui* v. *Hawaii Wildlife Fund*, 590 U. S. 165 (2020). Reported below: 887 F. 3d 637.

Miscellaneous Orders

No. 19M133. ABDUL-LATIF *v.* UNITED STATES;
No. 19M134. KEE *v.* RAEMISCH ET AL.; and
No. 19M135. PURISIMA *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18–956. GOOGLE LLC *v.* ORACLE AMERICA, INC. C. A. Fed. Cir. [Certiorari granted, 589 U. S. 1066.] The parties are directed to file supplemental letter briefs addressing the appropriate standard of review for the second question presented, including but not limited to the implications of the Seventh Amendment, if any, on that standard. Briefs, not to exceed 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, August 7, 2020.

No. 19–1092. IN RE TCT MOBILE INTERNATIONAL LTD.;
No. 19–8161. IN RE SMITH; and
No. 19–8162. IN RE SMITH. Petitions for writs of mandamus denied.

No. 19–7841. IN RE JOHNSON. Petition for writ of mandamus and/or prohibition denied.

No. 19–7871. IN RE WOODSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process,

the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Certiorari Granted

No. 19–930. CIC Services, LLC *v.* Internal Revenue Service et al. C. A. 6th Cir. Certiorari granted. Reported below: 925 F. 3d 247.

No. 19–5807. Edwards *v.* Vannoy, Warden. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether this Court's decision in *Ramos* v. *Louisiana*, 590 U. S. 83 (2020), applies retroactively to cases on federal collateral review."

Certiorari Denied

No. 18–593. StarLink Logistics, Inc. *v.* ACC, LLC, et al. Ct. App. Tenn. Certiorari denied.

No. 18–1329. Jobe *v.* Barr, Attorney General. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 144.

No. 19–618. Shaffer *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 653 Pa. 258, 209 A. 3d 957.

No. 19–819. Procopio *v.* Wilkie, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied.

No. 19–827. Territory of Guam et al. *v.* Davis. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 3d 822.

No. 19–910. K. G. S., Individually and as Guardian and Next Friend of Doe, a Minor Child *v.* Facebook, Inc. Sup. Ct. Ala. Certiorari denied.

No. 19–940. Gonzalez-De Leon *v.* Barr, Attorney General. C. A. 6th Cir. Certiorari denied. Reported below: 932 F. 3d 489.

No. 19–949. Wisconsin Department of Revenue et al. *v.* Union Pacific Railroad Co. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 3d 336.

No. 19–957. NKOMO *v.* BARR, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 930 F. 3d 129.

No. 19–959. TAMKO BUILDING PRODUCTS, INC. *v.* WILLIAMS ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 2019 OK 61, 451 P. 3d 146.

No. 19–1064. MAKEKAU ET AL. *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 943 F. 3d 1200.

No. 19–1076. CORRIGAN *v.* CITY OF SAVAGE, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 614.

No. 19–1077. JAYE *v.* OAK KNOLL VILLAGE CONDOMINIUM OWNERS ASSN., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 782 Fed. Appx. 197.

No. 19–1083. CLOUSER *v.* DOHERTY ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 222 A. 3d 1043.

No. 19–1107. SIDES ET AL. *v.* CENTRAL KANSAS CONSERVANCY, INC. Ct. App. Kan. Certiorari denied. Reported below: 56 Kan. App. 2d 1099, 443 P. 3d 337.

No. 19–1175. FRITZ ET UX. *v.* WASHOE COUNTY, NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 135 Nev. 644, 441 P. 3d 1089.

No. 19–1179. STOYANOV *v.* MCPHERSON, ACTING SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 225.

No. 19–1198. CANVS CORP. *v.* BARRETT, SECRETARY OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 789 Fed. Appx. 880.

No. 19–6429. DAVIS *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 765 Fed. Appx. 312.

No. 19–7099. STOREY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 584 S. W. 3d 437.

No. 19–7116. GALINDO-MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 Fed. Appx. 769.

No. 19–7479. PRICE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–7504. Brooks *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–7693. Mills *v.* Saul, Commissioner of Social Security. C. A. 9th Cir. Certiorari denied.

No. 19–7807. Young *v.* Boggio et al. C. A. 3d Cir. Certiorari denied. Reported below: 787 Fed. Appx. 65.

No. 19–7814. Herriott *v.* Herriott. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 19–7815. Grimsley *v.* Oregon et al. C. A. 9th Cir. Certiorari denied.

No. 19–7822. Williby *v.* Zuckerberg et al. C. A. 9th Cir. Certiorari denied.

No. 19–7827. Hall *v.* Texas. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 19–7828. Hayward *v.* Foley, Warden. C. A. 6th Cir. Certiorari denied.

No. 19–7829. Phillips *v.* South Coast Plaza et al. C. A. 9th Cir. Certiorari denied.

No. 19–7831. Antonio Cortez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–7832. Pierce *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 19–7849. Black *v.* Dolan, Commissioner of Probation Department. C. A. 1st Cir. Certiorari denied.

No. 19–7850. Autry *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–7856. Djerf *v.* Shinn, Director, Arizona Department of Corrections. C. A. 9th Cir. Certiorari denied. Reported below: 931 F. 3d 870.

No. 19–7860. Rowles *v.* GEO Group, Inc., et al. C. A. 11th Cir. Certiorari denied.

No. 19–7861. Reilly *v.* Florida et al. C. A. 11th Cir. Certiorari denied.

No. 19–7864. Crosby *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 19–7867. Mims *v.* Illinois Health and Family Services. Sup. Ct. Ill. Certiorari denied.

No. 19–7870. Peets *v.* Fox, Warden. C. A. 9th Cir. Certiorari denied.

No. 19–7874. Andrews *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 19–7877. Rogers *v.* Gastelo, Warden. C. A. 9th Cir. Certiorari denied.

No. 19–7890. Richards *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 19–7892. Roark *v.* New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 175 App. Div. 3d 752, 103 N. Y. S. 3d 867.

No. 19–7895. Brown *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 19–7897. Webster *v.* CorVel Enterprise Co., Inc., et al. Ct. App. Ore. Certiorari denied. Reported below: 294 Ore. App. 512, 429 P. 3d 451.

No. 19–7900. Miller *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 19–7941. Doe *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 19–7948. Davis *v.* Johnson, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied. Reported below: 795 Fed. Appx. 100.

No. 19–7957. Ruffin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 478.

No. 19–7958. Quinones *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 19–7963. YISRAEL *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 19–7965. EDNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 19–7971. LEWIS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 19–7972. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 182.

No. 19–7974. MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7976. FLEMING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7977. HOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7978. DELGADO, AKA DELGADO-PINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 798 Fed. Appx. 105.

No. 19–7979. CHADWICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 795.

No. 19–7981. CASTANEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 19–7984. PEREDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 499.

No. 19–7988. BAPTISTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 935 F. 3d 1304.

No. 19–8003. HOOVER *v.* NDOH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 295.

No. 19–8017. CANCINO ET AL. *v.* CAMERON COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 414.

No. 19–8035. DE JESUS VALENCIA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 19–8092. PADILLA *v.* BARR, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 956.

No. 19–8131. SHERON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 332.

No. 19–8139. DURAN CERRITOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 826.

No. 19–8154. STAMP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 680.

No. 19–8155. SAUNDERS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8158. HEINDENSTROM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 946 F. 3d 57.

No. 19–8172. CARSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 238.

No. 19–8173. ST. CLAIRE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 19–8178. NORRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 3d 902.

No. 19–8187. POTTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 3d 357.

No. 19–8188. HAMILTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 800 Fed. Appx. 476.

No. 19–8193. PURIFOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 291.

No. 19–8218. PAZ-ALVAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

Rehearing Denied

No. 19–670. FLECK *v.* WETCH ET AL., 589 U. S. 1263;

No. 19–1041. KHRAPKO *v.* SPLAIN ET AL., 589 U. S. 1278;

No. 19–6442. YEAGER *v.* NATIONAL PUBLIC RADIO ET AL., 589 U. S. 1124;

No. 19–6928. LOFTON *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 589 U. S. 1215;

No. 19–6982. COLLINS *v.* BARNES & THORNBURG LLP ET AL., 589 U. S. 1217;

No. 19–7173. ROSE *v.* UNITED STATES, 589 U. S. 1222;

No. 19–7199. TOOLY *v.* SCHWALLER, 589 U. S. 1223;
No. 19–7204. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 589 U. S. 1266;
No. 19–7229. LOWE *v.* PARRIS ET AL., 589 U. S. 1266;
No. 19–7318. YABLONSKY *v.* CALIFORNIA, 589 U. S. 1227;
No. 19–7383. MAY *v.* ARKANSAS, 589 U. S. 1282;
No. 19–7409. PRYOR *v.* UNITED STATES, 589 U. S. 1267;
No. 19–7509. IN RE MATTISON, 589 U. S. 1201; and
No. 19–7606. MCKINNON *v.* FLORIDA (two judgments), 589 U. S. 1285. Petitions for rehearing denied.

No. 19–392. ARMSTRONG *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., 589 U. S. 1269. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

MAY 6, 2020

Miscellaneous Order

No. 19A1032. FRIENDS OF DEVITO ET AL. *v.* WOLF, GOVERNOR OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, denied.

MAY 14, 2020

Miscellaneous Order

No. 19A1034. VALENTINE ET AL. *v.* COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Application to vacate stay, presented to JUSTICE ALITO, and by him referred to the Court, denied.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, respecting the denial of application to vacate stay.

In this lawsuit, inmates in a Texas geriatric prison allege that their facility failed to protect them from the dangers of COVID–19. The District Court heard unrebutted testimony about the imminent dangers faced by the inmates, some of whom have already died. It also heard testimony about the facility's lackluster efforts to keep the illness from spreading and held that the facility's inexplicable failures amounted to deliberate indifference for its elderly inmates in violation of the Eighth Amendment. On that basis, it issued an injunction requiring the prison to follow

an extensive protocol, including frequent cleaning and increased education efforts. 2020 WL 1899 274 (SD Tex., Apr. 16, 2020). The Court of Appeals for the Fifth Circuit stayed that injunction pending appeal, and the inmates now seek to vacate that stay in this Court. 956 F. 3d 797 (2020) (*per curiam*).

Notably, where the Court is asked to undo a stay issued below, the bar is high. Among other things, applicants must show that the lower court was "'demonstrably wrong in its application of accepted standards in deciding to issue the stay.'" *Western Airlines, Inc.* v. *Teamsters*, 480 U. S. 1301, 1305 (1987) (O'Connor, J., in chambers). The Fifth Circuit ruled, among other things, that the prison was substantially likely to succeed on its claim that the inmates failed to exhaust their remedies as required by the Prison Litigation and Reform Act of 1995 (PLRA), 110 Stat. 1321–71, 42 U. S. C. § 1997e(a). Under the circumstances of this case, where the inmates filed a lawsuit before filing any grievance with the prison itself, it is hard to conclude that the Fifth Circuit was demonstrably wrong on this preliminary procedural holding.

I write separately to highlight the disturbing allegations presented below. Further, where plaintiffs demonstrate that a prison grievance system cannot or will not respond to an inmate's complaint, they could well satisfy an exception to the PLRA's exhaustion requirement. Finally, while States and prisons retain discretion in how they respond to health emergencies, federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and death.

I

The facility at issue (the Pack Unit) houses about 1,200 inmates, more than 800 of whom are 65 or older. As the District Court found, the risk of COVID–19 spreading in the Pack Unit is particularly high. The facility is a dormitory-style prison, with each inmate separated only by a short, cubicle-style half wall. When the District Court issued its ruling, COVID–19 had already begun to spread in the facility. On April 11, 2020, one inmate, Leonard Clerkly, was transferred to the hospital because of difficulty breathing, a symptom the hospital linked to COVID–19. He was pronounced dead mere hours later.

Before and after Clerkly's death, prison administrators began implementing policies to control the spread of COVID–19. For instance, the prison placed all inmates on a precautionary lockdown

and began taking some inmates' temperatures twice a day. It also established a policy of providing inmates with cloth masks to be changed daily and instructed inmates to request additional soap at no cost. But the District Court found that the facility inexplicably failed to comply with some of its self-declared policies.

The District Court heard unrefuted testimony that, despite the prison's claim of enhanced cleaning measures, its cleaning protocol in practice remained virtually the same. The facility neither increased the number of inmate janitors nor ensured that the existing janitors did their jobs safely and effectively. One janitor testified that, just as before the pandemic, the cleaning solution provided to the cleaning crews was frequently depleted by mid-afternoon, only halfway through a shift. Each day he received only one pair of gloves to share with his cojanitor, an arrangement medical experts described as tantamount to no gloves at all. 455 F. Supp 3d 308, 316–318, 322–323 (SD Tex. 2020).

The facility's failures to comply with its own safety protocol became even clearer after Clerkly's death. Prison policies required that any inmate showing signs of COVID–19 be "'triaged'" and "'placed in medical isolation'" and that all areas used by the symptomatic inmate be thoroughly disinfected. *Id.*, at 323–324. Yet even though Clerkly had difficulty breathing and died only a few hours after being transported to the hospital, the prison "made no representations" to the District Court that "they identified Mr. Clerkly as symptomatic, evaluated him for potential COVID-19 infection, or isolated or treated him for COVID-19 at any point before his transport to the hospital on the day of his death." *Id.*, at 324. In fact, the prison "did not implement further precautionary measures until three days after Mr. Clerkly's death." *Ibid.* In the meantime, while the prison waited for a positive COVID–19 test that seemed certain to come, "countless inmates were knowingly exposed to a serious substantial risk of harm." *Ibid.*

II

Having heard testimony from several witnesses from the Pack Unit and from prison experts who declared the Pack Unit practices "woefully inadequate," the District Court held that applicants were likely to succeed on their Eighth Amendment claim. *Id.*, at 325. The court noted the "obvious" risk of COVID–19 to the older men in the Pack Unit and reasoned that the prison's

failure to take basic steps, many of which were required by its own policies, evinced deliberate indifference. *Id.*, at 322, 327. The District Court then ordered the prison to mitigate the harm to inmates, including through some measures recommended by an expert witness who had managed prisons himself. *Id.*, at 317–319, 321–326; 2020 WL 1899274.

Despite the District Court's detailed, careful findings, based on live testimony and the court's own visit to the Pack Unit, the Fifth Circuit stayed the injunction. The Fifth Circuit noted that the prison had submitted evidence of "the protective measures it ha[d] taken as a result" of the COVID–19 pandemic, and so the question was simply whether the Eighth Amendment required the prison "to do more." 956 F. 3d, at 801–802.[1] But in crediting the prison's assurances, the Fifth Circuit did not address all of the District Court's factual findings that the prison had inexplicably discarded its own rules and, in doing so, evinced deliberate indifference to the medical needs of its inmates.[2] See *Farmer* v. *Brennan*, 511 U. S. 825, 842 (1994) (noting that deliberate indifference is a question of fact often made out by "inference from circumstantial evidence"). The Fifth Circuit may have acted outside its authority in refusing to defer to those factual findings. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Similarly, while the Fifth Circuit faulted the District Court for issuing

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[1] One member of the Fifth Circuit panel concurred in judgment. See 956 F. 3d, at 806 (opinion of Higginson, J.). The concurrence reasoned that the inmates were unlikely to prevail on exhaustion, but noted that a merits panel could find on a full record that an exception to the PLRA's exhaustion requirement applied. The concurrence also argued that the motions panel should not have addressed the merits of the inmates' "intensely fact-based" claims in light of the District Court's "extensive and careful findings of fact that mitigation deficiencies still exist" in the prison. *Id.*, at 807–808.

[2] The Fifth Circuit also faulted the District Court for imposing standards higher than those recommended by the Centers for Disease Control and Prevention (CDC). But as the District Court noted, the CDC Guidelines themselves caution that they "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." 455 F. Supp. 3d 308, 325 (SD Tex. 2020) (internal quotation marks omitted). Given the particular vulnerabilities of the inmates in the Pack Unit, even counsel for the prison admitted that steps beyond those prescribed by the CDC may be necessary. *Ibid.* And, of course, the District Court found that the prison was regularly failing to comply with standards far below what the CDC suggests. Much of its injunction targeted that behavior.

an admittedly exacting injunction, that injunction too was rooted in equally detailed factfinding regarding the prison's failure to live up to its promises.

Also concerning was some of the Fifth Circuit's language regarding exhaustion. This Court has made clear that the PLRA requires exhaustion only of "available" judicial remedies. *Ross* v. *Blake*, 578 U. S. 632, 642 (2016). "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose.'" *Ibid.* (some internal quotation marks omitted). Thus, when a grievance procedure is a "dead end"—when "the facts on the ground" indicate that the grievance procedure provides no possibility of relief—the procedures may well be "unavailable." *Id.*, at 643.

The Fifth Circuit seemed to reject the possibility that grievance procedures could ever be a "dead end" even if they could not provide relief before an inmate faced a serious risk of death. But if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like COVID–19, the procedures may be "unavailable" to meet the plaintiff's purposes, much in the way they would be if prison officials ignored the grievances entirely. *Ibid.* Here, of course, it is difficult to tell whether the prison's system fits in that narrow category, as applicants did not attempt to avail themselves of the grievance process before filing suit. But I caution that in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed.

III

While I disagree with much of the Fifth Circuit's analysis at this preliminary juncture, the court required reports every 10 days on the status of the inmates in the prison's care. I expect that it and other courts will be vigilant in protecting the constitutional rights of those like applicants. As the circumstances of this case make clear, the stakes could not be higher. Just a few nights ago, respondents revealed that "numerous inmates and staff members" at the Pack Unit "are now COVID–19 positive and the vast majority of those tested positive within the past two weeks." Supp. Brief Regarding Emergency Application 1.

Nothing in this Court's order, of course, prevents the Fifth Circuit from amending its stay. Nor does anything in our order prevent applicants from seeking new relief in the District Court, as appropriate, based on changed circumstances. Finally, administrative convenience must be balanced against the risk of danger presented by emergency situations. The prison, for example, has failed to explain why it could not simply decrease dorm density, despite having an empty unit at its disposal.

It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.

May 18, 2020

Certiorari Granted—Vacated and Remanded

No. 19–864. Beers *v.* Barr, Attorney General, et al. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 927 F. 3d 150.

Certiorari Dismissed

No. 19–7866. Popal *v.* Brown. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7905. Arunachalam *v.* Exxon Mobil Corp. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7910. Arunachalam *v.* Intuit, Inc. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7935. Ball *v.* City of Marion, Illinois. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–7953. Lopez *v.* Lopez. Ct. App. Cal., 4th App. Dist., Div. 3. Motion of petitioner for leave to proceed *in forma pau-*

peris denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–8029. ARUNACHALAM *v.* LYFT, INC. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and this petition.

No. 19–8064. WEEKS *v.* PAYNE, WARDEN, ET AL. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 19–8211. BANKS *v.* BRAUN ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 19–8252. CHAMBERS *v.* HARDY ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 19M136. IN RE STARLING. Motion for leave to proceed as a veteran denied.

No. 19M137. ROSAS *v.* UNIVERSITY OF TEXAS AT SAN ANTONIO ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 19–8037. RUTTKAMP *v.* BANK OF NEW YORK MELLON, FKA BANK OF NEW YORK. App. Ct. Conn.; and

No. 19–8061. WEIXING WANG *v.* MARCOTTE. Sup. Ct. N. H. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 8, 2020, within which to pay the docketing fees required by this Court's Rule 38(a).

No. 18–9554. IN RE ALLEN;

No. 19–1226. IN RE BAMDAD;

No. 19–8282. In re Watson; and
No. 19–8285. In re Williams. Petitions for writs of habeas corpus denied.

No. 19–8345. In re Ciotta. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 19–7938. In re Townsend. Petition for writ of mandamus denied.

No. 19–7885. In re Findlay. Petition for writ of prohibition denied.

Certiorari Denied

No. 19–55. Richards *v.* Barrett, Secretary of the Air Force, et al. C. A. Armed Forces. Certiorari denied.

No. 19–605. Arizona *v.* Martin. Sup. Ct. Ariz. Certiorari denied. Reported below: 247 Ariz. 101, 446 P. 3d 806.

No. 19–682. Kelsay *v.* Ernst. C. A. 8th Cir. Certiorari denied. Reported below: 933 F. 3d 975.

No. 19–815. Phoenix *v.* Regions Bank. C. A. 11th Cir. Certiorari denied. Reported below: 936 F. 3d 1184.

No. 19–849. Dyroff, Individually and on Behalf of the Estate of Greer *v.* Ultimate Software Group, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 934 F. 3d 1093.

No. 19–859. Force et al. *v.* Facebook, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 934 F. 3d 53.

No. 19–912. Robles *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 19–1006. Facebook, Inc., et al. *v.* Superior Court of California, San Francisco County, et al. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 19–1049. Bolivarian Republic of Venezuela et al. *v.* Crystallex International Corp. C. A. 3d Cir. Certiorari denied. Reported below: 932 F. 3d 126.

No. 19–1079. M. W. Watermark, LLC, et al. *v.* Evoqua Water Technologies, LLC. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 3d 222.

No. 19–1081. Rosenblatt *v.* City of Santa Monica, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 3d 439.

No. 19–1088. Fox *v.* Miller, Chapter 7 Trustee. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 688.

No. 19–1093. Clarkston et al. *v.* White. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 3d 988.

No. 19–1095. Beggs et ux. *v.* Story et al. Sup. Ct. Va. Certiorari denied.

No. 19–1096. Multiventas y Servicios, Inc., et al. *v.* Oriental Bank. Sup. Ct. P. R. Certiorari denied.

No. 19–1109. Yoakum *v.* Sabre GLBL Inc. C. A. 5th Cir. Certiorari denied. Reported below: 775 Fed. Appx. 176.

No. 19–1111. Deem *v.* DiMella-Deem et al. C. A. 2d Cir. Certiorari denied. Reported below: 941 F. 3d 618.

No. 19–1112. Jones *v.* Eder et al. C. A. 5th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 327.

No. 19–1114. National Collegiate Athletic Assn. et al. *v.* New Jersey Thoroughbred Horsemen's Assn., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 939 F. 3d 597.

No. 19–1117. Malukas *v.* Barr, Attorney General. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 3d 968.

No. 19–1119. Sauk Prairie Conservation Alliance *v.* Department of the Interior et al. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 3d 664.

No. 19–1122. Hong Tang *v.* University of Baltimore et al. C. A. 4th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 254.

No. 19–1128. MENDES DA COSTA *v.* PEREIRA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 792 Fed. Appx. 865.

No. 19–1129. FOTE *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 784 Fed. Appx. 781.

No. 19–1132. BLACKBIRD TECH LLC, DBA BLACKBIRD TECHNOLOGIES *v.* HEALTH IN MOTION LLC, DBA INSPIRE FITNESS, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 944 F. 3d 910.

No. 19–1139. HINES *v.* REGIONS BANK, FKA UNION PLANTERS BANK, N. A. C. A. 11th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 853.

No. 19–1150. KIRCHHOFF *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 193.

No. 19–1161. HAWKINS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 158 Ohio St. 3d 94, 2019-Ohio-4210, 140 N. E. 3d 577.

No. 19–1168. MACHALA *v.* KRAL ET AL. Ct. App. D. C. Certiorari denied. Reported below: 223 A. 3d 99.

No. 19–1172. TARGOWSKI *v.* RAWLINS. C. A. 8th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 922.

No. 19–1188. SAMACA, LLC *v.* CELLAIRIS FRANCHISE, INC., ET AL. (two judgments). Ct. App. Ga. Certiorari denied.

No. 19–1196. JOHNSON *v.* PAULDING COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 780 Fed. Appx. 796.

No. 19–1202. TAFFE ET AL. *v.* FIRST NATIONAL BANK OF ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 450 P. 3d 239.

No. 19–1211. NORTH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 800 Fed. Appx. 211.

No. 19–1213. HAMMERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 942 F. 3d 1001.

No. 19–1228. KANEKA CORP. *v.* XIAMEN KINGDOMWAY GROUP CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 767 Fed. Appx. 998.

No. 19–5497. MCGILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–6006. WILKERSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 19–6588. PEDROZA-ROCHA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 933 F. 3d 490.

No. 19–6701. LABAT *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 19–6705. WILKINS *v.* GALVIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–6922. BATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 312.

No. 19–7217. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 3d 1153.

No. 19–7425. HETTINGA *v.* ARCADIA MANAGEMENT SERVICES CO. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 19–7455. BUSH *v.* SHARP, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 926 F. 3d 644.

No. 19–7476. KEMP *v.* PAYNE, DIRECTOR, ARKANSAS DIVISION OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 924 F. 3d 489.

No. 19–7553. HUMBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–7607. WESTRUM *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 421.

No. 19–7627. SALGADO MARTINEZ *v.* SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 926 F. 3d 1215.

No. 19–7645. GONZALES *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVI-

SION. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 250.

No. 19–7805. HOLLOMAN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 274.

No. 19–7882. HARRIS *v.* MAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 776 Fed. Appx. 180.

No. 19–7888. BANKS *v.* WAFFLE HOUSE, INC. Sup. Ct. Ga. Certiorari denied.

No. 19–7899. NIGL *v.* LITSCHER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 940 F. 3d 329.

No. 19–7901. POWERS *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied.

No. 19–7906. OSBORNE *v.* GEORGIADES. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 220.

No. 19–7907. OLSEN *v.* FRANCOIS. Ct. App. Wis. Certiorari denied. Reported below: 2019 WI App 48, 388 Wis. 2d 475, 934 N. W. 2d 573.

No. 19–7912. MEHDIPOUR *v.* SWEENEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 847.

No. 19–7913. PARINEH *v.* MARTEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–7920. JOHNSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–7921. SCOTT *v.* SUPERIOR COURT OF CALIFORNIA, MONTEREY COUNTY. C. A. 9th Cir. Certiorari denied.

No. 19–7923. SMITH *v.* KENNEDY. C. A. 5th Cir. Certiorari denied.

No. 19–7924. STACZ *v.* ESA MANAGEMENT, LLC, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 19–7925. O'ROURKE *v.* LASHBROOK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 19–7926. Lin Ouyang *v.* Achem Industry America, Inc. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 19–7929. Yost-Rudge *v.* A to Z Properties, Inc., et al. Sup. Ct. Fla. Certiorari denied.

No. 19–7932. Auch *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 96 Mass. App. 1106, 137 N. E. 3d 1084.

No. 19–7936. Zavaglia *v.* Boston University School of Medicine. C. A. 1st Cir. Certiorari denied.

No. 19–7937. Yaney et al. *v.* Mason et al. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 19–7943. J. H. *v.* E. R. S. Ct. App. Colo. Certiorari denied. Reported below: 452 P. 3d 174.

No. 19–7954. Leonhart *v.* Shoop, Warden. C. A. 6th Cir. Certiorari denied.

No. 19–7955. Berryman *v.* Haas et al. C. A. 6th Cir. Certiorari denied.

No. 19–7959. Tedesco *v.* Ferguson, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied. Reported below: 789 Fed. Appx. 293.

No. 19–7961. Throneberry *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 19–7962. Womack *v.* Robertson, Warden. C. A. 9th Cir. Certiorari denied.

No. 19–7964. Aizupitis *v.* Delaware. Super. Ct. Del. Certiorari denied.

No. 19–7966. Langford *v.* Cobb. C. A. 9th Cir. Certiorari denied.

No. 19–7968. Ndoromo *v.* Barr, Attorney General, et al. C. A. D. C. Cir. Certiorari denied.

No. 19–7969. McBride *v.* Berry, Warden. C. A. 11th Cir. Certiorari denied.

No. 19–7973. CHISOLM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 227 Md. App. 755.

No. 19–7975. MYER *v.* ALL DULLES AREA MUSLIM SOCIETY. Sup. Ct. Va. Certiorari denied.

No. 19–7980. PATTERSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 131.

No. 19–7982. PENLAND *v.* OHIO. Ct. App. Ohio, 1st App. Dist., Hamilton County. Certiorari denied.

No. 19–7983. NEWTON *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2019-Ohio-3653.

No. 19–7989. BRYNER *v.* CLEARFIELD CITY, UTAH, ET AL. Ct. App. Utah. Certiorari denied.

No. 19–7990. ROMAN *v.* KIM ET AL. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 19–7992. DAVIS *v.* BANK OF NEW YORK MELLON CORP., AS TRUSTEE FOR SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, SERIES 2005–BC3. Ct. Civ. App. Ala. Certiorari denied.

No. 19–7994. BUTLER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 287 So. 3d 530.

No. 19–7995. JACKSON *v.* MAGOON ESTATES LTD. ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8001. VINAROV *v.* CITIMORTGAGE, INC. Sup. Ct. Ill. Certiorari denied.

No. 19–8007. GABRIEL *v.* OUTLAW. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 19–8011. DELLINGER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–8012. DREVALEVA *v.* ALAMEDA HEALTH SYSTEM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 51.

No. 19–8013. ALEXANDER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 220 A. 3d 620.

No. 19–8018. HUMPHREY *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 19–8021. JACKSON *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 782 Fed. Appx. 690.

No. 19–8023. ORR *v.* TENNESSEE BUREAU OF INVESTIGATION ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–8024. HUNSBERGER *v.* DURAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 155.

No. 19–8025. MCKINNEY *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 2019 Ark. App. 347, 583 S. W. 3d 399.

No. 19–8028. GORE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 288 So. 3d 1280.

No. 19–8032. HARRIS *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–8042. TAYLOR *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 19–8050. MERRITT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 945 F. 3d 578.

No. 19–8051. HESSIANI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 658.

No. 19–8057. BROWN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 131 N. E. 3d 740.

No. 19–8060. DOE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8081. ISAAC FLORES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 19–8087. JENKINS *v.* FIELDS, AS ADMINISTRATOR OF THE ESTATE OF JENKINS. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2019-Ohio-2112.

No. 19–8091. OFFICER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 2d 1075.

No. 19–8099. SMITH *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2019 UT App 141, 449 P. 3d 971.

No. 19–8108. ALBRECHT *v.* ALBRECHT. Sup. Ct. N. H. Certiorari denied.

No. 19–8115. WHITE *v.* EDS CARE MANAGEMENT, LLC, ET AL. Sup. Ct. Mich. Certiorari denied.

No. 19–8122. WIDDIFIELD *v.* MAZZA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–8125. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 19–8127. TYLER *v.* HOOKS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 945 F. 3d 159.

No. 19–8146. PURISIMA *v.* SAUL, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied.

No. 19–8151. ALCOCER ROA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 846.

No. 19–8171. DAWSON *v.* BANK OF NEW YORK MELLON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 816.

No. 19–8184. WALSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 337.

No. 19–8199. BULLARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 937 F. 3d 654.

No. 19–8204. FOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8212. SOTO-GARCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 345.

No. 19–8214. ATKINS *v.* CROWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 3d 476.

No. 19–8215. RIVERA-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 74.

No. 19–8219. MEDRANO *v.* FRAUENHEIM, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 792 Fed. Appx. 422.

No. 19–8220. MACLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8222. MASON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 951 F. 3d 567.

No. 19–8228. MARSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 3d 524.

No. 19–8231. JUVENILE MALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 792 Fed. Appx. 86.

No. 19–8235. EATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 418.

No. 19–8237. ROMERO-SALGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 346.

No. 19–8240. VALENTINI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 944 F. 3d 343.

No. 19–8249. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 801 Fed. Appx. 941.

No. 19–8250. GAUSSIRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 Fed. Appx. 458.

No. 19–8254. DOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 Fed. Appx. 879.

No. 19–8255. MEDINA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 789 Fed. Appx. 499.

No. 19–8256. BROWDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8261. ATH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 951 F. 3d 179.

No. 19–8263. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 797 Fed. Appx. 854.

No. 19–8265. HARTLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 785 Fed. Appx. 131.

No. 19–8267. CASCELLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 943 F. 3d 1.

No. 19–8269. JAMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8273. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 795 Fed. Appx. 956.

No. 19–8274. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8275. SWINTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 797 Fed. Appx. 589.

No. 19–8277. AUGUSTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8312. CANDELARIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8315. VINCENT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8325. HUSSEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–1421. NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE *v.* ORLANDO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 915 F. 3d 113.

No. 19–835. VALERO ENERGY CORP. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY (two judgments). C. A. D. C. Cir. Motion of National Association of Home Builders of the United States for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 936 F. 3d 628 (first judgment); 937 F. 3d 559 (second judgment).

No. 19–867. WEXFORD HEALTH ET AL. *v.* GARRETT. C. A. 3d Cir. Certiorari denied. Reported below: 938 F. 3d 69.

JUSTICE THOMAS, dissenting.

Under the Prison Litigation Reform Act of 1995 (PLRA), prisoners must exhaust administrative remedies before challenging prison conditions in federal court. 110 Stat. 1321–71, 42 U. S. C.

§ 1997e(a). This case presents the question whether a prisoner who fails to comply with that exhaustion requirement may cure the defect by filing an amended or supplemental complaint after his release. Because the Circuits are divided on this important question of federal law, I would grant the petition for certiorari.

While incarcerated, respondent brought this *pro se* action against prison medical personnel under 42 U. S. C. § 1983, but he did not complete the prison's grievance process before filing suit. After he was released, respondent filed an amended and supplemental complaint. The District Court dismissed respondent's claims against petitioners for failure to exhaust administrative remedies as required by the PLRA.

The Third Circuit vacated the District Court's judgment, concluding that the PLRA's exhaustion requirement no longer applied to respondent's claims in light of his postrelease filing. 938 F. 3d 69 (2019). The court rejected petitioners' argument that the plain language of the statute, which speaks to when an "action [may] be brought," requires courts to assess PLRA compliance at the time of the initial filing. § 1997e(a). Noting that our decision in *Jones* v. *Bock*, 549 U. S. 199 (2007), characterized this language as "boilerplate," *id.*, at 220, the court determined that the statute's text did not clearly displace normal procedural rules. The court further concluded that, under Federal Rule of Civil Procedure 15, the amended and supplemental complaint related back to respondent's initial filing and therefore superseded the original complaint. Because respondent was no longer a prisoner when he amended and supplemented his complaint, the court reasoned that he was no longer subject to the PLRA's prefiling requirements.

The Third Circuit noted that its holding was consistent with the Ninth Circuit's approach in *Jackson* v. *Fong*, 870 F. 3d 928 (2017), but conflicted with the Eleventh Circuit's en banc decision in *Harris* v. *Garner*, 216 F. 3d 970 (2000). In *Harris*, the Eleventh Circuit interpreted the same statutory language in a related PLRA requirement and held that prisoners could not cure their initial filing defects by amending or supplementing their complaints after release. *Id.*, at 981–982; see also *Smith* v. *Terry*, 491 Fed. Appx. 81, 83 (CA11 2012) (applying *Harris* to the PLRA's exhaustion requirement). The Third Circuit's position also conflicts with that of the Fifth Circuit, which has recently explained that a complaint must be dismissed and refiled postrelease in order for a prisoner to avoid the PLRA's exhaustion require-

ment. *Bargher* v. *White*, 928 F. 3d 439, 447–448 (2019). Thus, four Courts of Appeals are evenly divided on the question presented.*

Respondent suggests that the Fifth and Eleventh Circuits may revisit their view in light of our decision in *Jones*. As an initial matter, both Circuits have affirmed their positions in decisions that postdate *Jones*. See *Bargher*, 928 F. 3d 439; *Smith*, 491 Fed. Appx. 81. But more importantly, respondent reads our "boilerplate" dicta for far more than it is worth. In *Jones*, we rejected court-made pleading rules for *pro se* litigants, explaining that "the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice *beyond the departures specified by the PLRA itself*." 549 U. S., at 214 (emphasis added). Thus, that decision actually confirms that the PLRA's prefiling requirements displace the Federal Rules of Civil Procedure, including Rule 15. We characterized the phrase "'no action shall be brought'" as "boilerplate" solely for the purpose of explaining that the PLRA speaks to the dismissal of defective claims, not necessarily entire complaints. *Id.*, at 220. We have never addressed the meaning of that language as applied to the context at issue here.

Finally, this question warrants our review because its resolution will have significant ramifications for not only prisoners and prison officials but also federal courts. In recent years, nearly 10,000 lawsuits have been filed annually by prisoners challenging prison conditions. See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, U. S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (2019) (Table C–2). And nearly twice as many lawsuits are filed annually raising other civil rights claims, *ibid.*, which are subject to similarly worded prefiling requirements under the PLRA, see, *e. g.*, § 1997e(e). Recognizing the PLRA's important role in curtailing the proliferation of abusive prisoner litigation, we have repeatedly rejected lower courts' attempts to create end-runs around the statute's exhaustion requirement. See, *e. g.*, *Ross* v. *Blake*, 578 U. S. 632, 639–642 (2016); *Woodford* v. *Ngo*, 548 U. S. 81, 91, n. 2 (2006); *Porter* v. *Nussle*, 534 U. S. 516, 520 (2002); *Booth* v. *Churner*, 532 U. S. 731, 741, n. 6 (2001). The same may be warranted here.

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*A panel of the Sixth Circuit has also agreed with the Eleventh Circuit in dicta. See *Cox* v. *Mayer*, 332 F. 3d 422, 428 (2003).

Because this petition presents an important question that has divided the Circuits, it deserves our review. See this Court's Rule 10(a). I see no reason to continue allowing certain prisoners in the Third and Ninth Circuits to proceed unencumbered by the PLRA's exhaustion requirement while those in the Fifth and Eleventh Circuits are required to comply. I therefore respectfully dissent from the denial of certiorari.

No. 19–1021. JESSOP ET AL. *v.* CITY OF FRESNO, CALIFORNIA, ET AL. C. A. 9th Cir. Motions of Institute for Justice, Cato Institute et al., New Civil Liberties Alliance, National Association of Criminal Defense Lawyers, Constitutional Accountability Center, and DKT Liberty Project et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 936 F. 3d 937.

No. 19–7810. EATON *v.* PACHECO, WARDEN. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 931 F. 3d 1009.

No. 19–7915. DEATLEY *v.* WILLIAMS, EXECUTIVE DIRECTOR, COLORADO 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: 782 Fed. Appx. 736.

No. 19–8291. YAZZIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 791 Fed. Appx. 777.

No. 19–8293. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 19–876. RAMIREZ *v.* HOGUE ET AL., 589 U. S. 1276;

No. 19–1005. HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, ET AL. *v.* ENVIRONMENTAL RESEARCH CENTER, INC., 589 U. S. 1277;

No. 19–6426. RAMIREZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 589 U. S. 1254;

No. 19–6657. SMITH *v.* SCOTT ET AL., 589 U. S. 1181;

No. 19–6783. JARVIS *v.* ALLISON, SHERIFF, PEARL RIVER COUNTY, MISSISSIPPI, ET AL., 589 U. S. 1212;

No. 19–6839. SMITH *v.* UNDERWOOD, ATTORNEY GENERAL OF NEW YORK, ET AL., 589 U. S. 1213;

No. 19–7017. WILLIAMS *v.* TACO BELL, 589 U. S. 1218;

No. 19–7023. COTTON *v.* ECKSTEIN, WARDEN, 589 U. S. 1218;

No. 19–7085. OEUR *v.* COUNTY OF LOS ANGELES, CALIFORNIA, 589 U. S. 1220;

No. 19–7228. CARTER *v.* UNITED STATES, 589 U. S. 1224;

No. 19–7230. IN RE LOPEZ, 589 U. S. 1263;

No. 19–7374. IN RE WALLACE, 589 U. S. 1274;

No. 19–7413. CLANCY *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL., 589 U. S. 1283;

No. 19–7489. DURAN *v.* DIAZ, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, 589 U. S. 1261;

No. 19–7716. WALLACE *v.* UNITED STATES, 589 U. S. 1288;

No. 19–7792. IN RE LOPEZ, 589 U. S. 1293; and

No. 19–7944. IN RE BEEBE, 589 U. S. 1293. Petitions for rehearing denied.

MAY 19, 2020

Certiorari Denied

No. 19–8483 (19A1040). BARTON *v.* STANGE, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE GORSUCH, and by him referred to the Court, denied. Reported below: 959 F. 3d 867.

MAY 20, 2020

Miscellaneous Order

No. 19A1035. DEPARTMENT OF JUSTICE *v.* HOUSE COMMITTEE ON THE JUDICIARY. Application for stay of the mandate, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. Issuance of the mandate of the United States Court of Appeals for the District of Columbia Circuit, case No. 19–5288, is stayed pending filing and disposition of a petition for writ of certiorari, if such petition is filed on or before June 1, 2020, by 5 p.m. 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 issuance of the judgment of this Court. If no petition for writ of certiorari is filed on or before June 1, 2020, by 5 p.m., the stay shall terminate.

MAY 21, 2020

Miscellaneous Order

No. 19A1038. IDAHO DEPARTMENT OF CORRECTION ET AL. *v.* EDMO. D. C. Idaho. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied. JUSTICE THOMAS and JUSTICE ALITO would grant the application.

MAY 26, 2020

Certiorari Granted—Vacated and Remanded

No. 19–7685. LINDSEY *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 *Davis* v. *United States*, 589 U. S. 345 (2020) (*per curiam*). Reported below: 774 Fed. Appx. 261.

Certiorari Dismissed

No. 19–8059. ARUNACHALAM *v.* UBER TECHNOLOGIES, INC. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 19A1021. PERRY-BEY ET AL. *v.* CITY OF NORFOLK, VIRGINIA, ET AL. Sup. Ct. Va. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 19A1041. WILLIAMS, WARDEN, ET AL. *v.* WILSON ET AL. D. C. N. D. Ohio. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. The Government is seeking a stay only of the District Court's April 22 preliminary injunction. But on May 19, the District Court issued a new order enforcing the preliminary injunction and imposing additional measures. The Government has not sought review of or a stay of the May 19 order in the United States Court of Appeals for the Sixth Circuit. Particularly in light of that proce-

dural posture, the Court declines to stay the District Court's April 22 preliminary injunction without prejudice to the Government seeking a new stay if circumstances warrant. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would grant the application.

No. D–3058. IN RE DISBARMENT OF ROMERO. Disbarment entered. [For earlier order herein, see 589 U. S. 1129.]

No. 19M138. SMITH *v.* UNIVERSITY OF CHICAGO MEDICAL CENTER. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 18–107. R. G. & G. R. HARRIS FUNERAL HOMES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. [Certiorari granted, 587 U. S. 960.] Motion to substitute Donna Stephens, as Trustee of the Aimee A. and Donna Stephens Trust, as respondent in place of Aimee Stephens, deceased, granted.

No. 19–8006. GREINER *v.* MACOMB COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 16, 2020, within which to pay the docketing fee required by this Court's Rule 38(a).

No. 19–1140. IN RE PERKINS; and
No. 19–8033. IN RE HAMPTON. Petitions for writs of mandamus denied.

No. 19–8284. IN RE YOUNG. Petition for writ of mandamus and/or prohibition denied.

No. 19–8351. IN RE RAGHUBIR. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 19–871. JOHNSON *v.* KISER, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 19–873. GEOPHYSICAL SERVICE, INC. *v.* TGS–NOPEC GEOPHYSICAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 784 Fed. Appx. 253.

No. 19–917. JOSLYN MANUFACTURING CO., LLC, ET AL. *v.* VALBRUNA SLATER STEEL CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 934 F. 3d 553.

No. 19–972. MCMILLEN *v.* NEW CANEY INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 939 F. 3d 640.

No. 19–974. SCHMITT ET AL. *v.* LAROSE, OHIO SECRETARY OF STATE. C. A. 6th Cir. Certiorari denied. Reported below: 933 F. 3d 628.

No. 19–992. SKIPPER, WARDEN *v.* BYRD. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 3d 248.

No. 19–1048. RAMOS *v.* BARR, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 802 Fed. Appx. 510.

No. 19–1056. NOEM, GOVERNOR OF SOUTH DAKOTA, ET AL. *v.* FLANDREAU SANTEE SIOUX TRIBE. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 3d 928.

No. 19–1101. CANADA *v.* MERLINI. C. A. 1st Cir. Certiorari denied. Reported below: 926 F. 3d 21.

No. 19–1131. ACTAVIS LABORATORIES FL, INC. *v.* NALPROPION PHARMACEUTICALS LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 934 F. 3d 1344.

No. 19–1148. BRUNO, AS PARENT, GUARDIAN, AND NEXT FRIEND OF R. B., A MINOR, ET AL. *v.* NORTHSIDE INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 287.

No. 19–1152. ISL LOAN TRUST ET AL. *v.* MILLENNIUM LAB HOLDINGS II, LLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 3d 126.

No. 19–1160. MURPHY *v.* OFFICE OF DISCIPLINARY COUNSEL. Sup. Ct. Pa. Certiorari denied.

No. 19–1164. JOHNSON *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 19–1167. KENNEDY *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–1171. McDonald *v.* Citibank, N. A., et al. Ct. App. Colo. Certiorari denied.

No. 19–1178. Zabka et al. *v.* United States et al. C. A. 7th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 401.

No. 19–1183. Odyssey Contracting Corp. *v.* L & L Painting Co., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 944 F. 3d 483.

No. 19–1187. Matco Tools Corp. et al. *v.* United States District Court for the Northern District of California et al. C. A. 9th Cir. Certiorari denied. Reported below: 781 Fed. Appx. 681.

No. 19–1192. Missouri ex rel. Key Insurance Co. *v.* Roldan, Judge, Circuit Court of Missouri, Jackson County, et al. Sup. Ct. Mo. Certiorari denied. Reported below: 587 S. W. 3d 638.

No. 19–1199. Higginson *v.* Becerra, Attorney General of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 786 Fed. Appx. 705.

No. 19–1210. Harry's Nurses Registry et al. *v.* Gayle et al. C. A. 2d Cir. Certiorari denied. Reported below: 802 Fed. Appx. 1.

No. 19–1223. Taylor, as Representative of the Estate of Lilly, Deceased, et al. *v.* McLennan County, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 634.

No. 19–1236. Evens *v.* Evens. Sup. Ct. S. D. Certiorari denied.

No. 19–1238. Watson *v.* McCarthy, Secretary of the Army. C. A. 5th Cir. Certiorari denied. Reported below: 793 Fed. Appx. 277.

No. 19–1245. Kwushue *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 19–1247. Lovingood *v.* Discovery Communications, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 800 Fed. Appx. 840.

No. 19–6668. Wolf et al. *v.* Idaho Board of Correction et al. C. A. 9th Cir. Certiorari denied. Reported below: 772 Fed. Appx. 557.

No. 19–6926. Campbell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 937 F. 3d 1254.

No. 19–7061. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 788 Fed. Appx. 654.

No. 19–7288. Gammell *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 932 F. 3d 1175.

No. 19–7456. Carroll *v.* Alabama. Sup. Ct. Ala. Certiorari denied.

No. 19–7629. Hill-Lomax *v.* Vittetoe et al. Sup. Ct. Iowa. Certiorari denied.

No. 19–8022. Dixon *v.* Shinn, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 932 F. 3d 789.

No. 19–8047. Daniel *v.* Ward, Commissioner, Georgia Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 783 Fed. Appx. 1007.

No. 19–8052. Almahmmody *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–8058. Brack, aka Barrack, aka Black *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 19–8068. Boudette *v.* Boudette, nka Oskerson. Sup. Ct. Mont. Certiorari denied. Reported below: 397 Mont. 519, 453 P. 3d 893.

No. 19–8069. Newton *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2019-Ohio-3566.

No. 19–8070. Lai *v.* United States et al. C. A. 2d Cir. Certiorari denied.

No. 19–8073. Baker *v.* Clark, Superintendent, State Correctional Institution at Albion, et al. C. A. 3d Cir. Certiorari denied.

No. 19–8074. GUNTER *v.* PULSIPHER. C. A. 10th Cir. Certiorari denied.

No. 19–8075. MENDEL *v.* UBER TECHNOLOGIES, INC., ET AL. (Reported below: 805 Fed. Appx. 485); MENDEL *v.* UBER TECHNOLOGIES, INC., ET AL.; and MENDEL *v.* CHAO, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8077. ANDERSON *v.* VALENZUELA ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8078. BANKS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 19–8084. YOUNG *v.* HALLIGAN. C. A. 3d Cir. Certiorari denied. Reported below: 789 Fed. Appx. 928.

No. 19–8085. ZAMICHIELI *v.* MCGINLEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 19–8086. JACKSON *v.* TAYLOR, INTERIM COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 19–8088. RODRIGUES *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 96 Mass. App. 105, 132 N. E. 3d 1067.

No. 19–8093. PASSALACQUA *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 19–8096. NOBLE *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 19–8124. GARCIA VELASCO *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 19–8135. TANAMOR-STEFFAN *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 19–8169. MADERO-GIL *v.* UNITED STATES (Reported below: 797 Fed. Appx. 890); MAJANO MALDONADO *v.* UNITED STATES (798 Fed. Appx. 821); HERNANDEZ LOZANO *v.* UNITED STATES (796 Fed. Appx. 227); REYNOSO-VALDEZ *v.* UNITED STATES (798 Fed. Appx. 833); and MELENDEZ-WISENTHAL, AKA

DIAZ ISAGUIRRE, AKA AGUILLAR, AKA ANTONIO GONZALEZ *v.* UNITED STATES (797 Fed. Appx. 876). C. A. 5th Cir. Certiorari denied.

No. 19–8181. JORDAN *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 771 Fed. Appx. 286.

No. 19–8194. CRUPI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 172 App. Div. 3d 898, 100 N. Y. S. 3d 56.

No. 19–8196. GENTRY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 247 Ariz. 381, 449 P. 3d 707.

No. 19–8208. HARRIS *v.* JENNINGS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 19–8232. JACKSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 19–8248. WILMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 19–8268. BROWN *v.* DESROCHERS ET AL. C. A. 6th Cir. Certiorari denied.

No. 19–8279. LAGASSE *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 19–8294. JOHNSON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied.

No. 19–8295. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 778 Fed. Appx. 227.

No. 19–8308. GOODEN *v.* UNITED STATES NAVY/UNITED STATES MARINE CORPS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 411.

No. 19–8310. HAYNES *v.* PETERS, DIRECTOR, OREGON DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 19–8316. TROY-MCKOY *v.* NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 3d 905, 137 N. E. 3d 1106.

No. 19–8328. STREGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–8329. STREGE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 19–8333. ALI, AKA PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 791 Fed. Appx. 430.

No. 19–8334. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 790 Fed. Appx. 782.

No. 19–8336. REYES-YANEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 796 Fed. Appx. 427.

No. 19–8339. SANTIAGO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 947 F. 3d 1.

No. 19–8340. SCRUGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 799 Fed. Appx. 432.

No. 19–8342. DUHEART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 794 Fed. Appx. 440.

No. 19–8361. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 19–8364. VANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 3d 846.

No. 19–8376. GUERRERO-CASTRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 939 F. 3d 16.

No. 17–1236. REPUBLIC OF SUDAN ET AL. *v.* OWENS ET AL. C. A. D. C. Cir. Motion of former U. S. Ambassadors for leave to file brief as *amici curiae* granted. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this motion and this petition. Reported below: 864 F. 3d 751.

No. 17–1406. REPUBLIC OF SUDAN ET AL. *v.* OPATI, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE ESTATE OF OPATI, DECEASED, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 864 F. 3d 751.

No. 19–766. NORTH CAROLINA *v.* COURTNEY. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 372 N. C. 458, 831 S. E. 2d 260.

No. 19–1012. General Electric Co. *v.* Raytheon Technologies Corp., fka United Technologies Corp. C. A. Fed. Cir. Certiorari denied. Justice Breyer and Justice Alito took no part in the consideration or decision of this petition. Reported below: 928 F. 3d 1349.

No. 19–5921. Montgomery *v.* United States. C. A. 8th Cir. Motion of Ethics Bureau at Yale for leave to file brief as *amicus curiae* granted. Certiorari denied.

Rehearing Denied

No. 19–943. Vazirabadi *v.* Denver Health and Hospital Authority et al., 589 U. S. 1294;

No. 19–6877. Brown *v.* Florida, 589 U. S. 1265;

No. 19–7169. Cobble *v.* United States, 589 U. S. 1222;

No. 19–7296. In re Martinez, 589 U. S. 1263;

No. 19–7302. Shampine *v.* Sarver's Realty et al., 589 U. S. 1280;

No. 19–7391. Davis *v.* Tegley et al., 589 U. S. 1296;

No. 19–7402. Sanders *v.* Hennepin County Human Service and Public Health Department Child Support et al., 589 U. S. 1296;

No. 19–7471. Brown *v.* San Bernardino County, California, et al., 589 U. S. 1284; and

No. 19–7605. Kane *v.* Pennsylvania, 589 U. S. 1308. Petitions for rehearing denied.

May 29, 2020

Miscellaneous Orders

No. 19A1039. Marlowe *v.* LeBlanc, Secretary, Louisiana Department of Public Safety and Corrections, et al. C. A. 5th Cir. Application to vacate stay, presented to Justice Alito, and by him referred to the Court, denied. Nothing in this order should be construed to preclude applicant from filing a grievance setting out specifically the relief he requests be provided to him in prison, and in the event that such request is filed, it should be decided promptly.

No. 19A1044. South Bay United Pentecostal Church et al. *v.* Newsom, Governor of California, et al. Application for injunctive relief, presented to Justice Kagan, and by

her referred to the Court, denied. JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice § 17.4, p. 17–9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and

fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985).

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 467 (2017); see also, *e. g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531–532. California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities." *Id.*, at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

No. 19A1046. Elim Romanian Pentecostal Church et al. *v.* Pritzker, Governor of Illinois. Application for injunctive relief, presented to Justice Kavanaugh, and by him referred to the Court, denied. The Illinois Department of Public health issued new guidance on May 28. The denial is without prejudice to applicants filing new motion for appropriate relief if circumstances warrant.