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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 2011

JUNE 11 THROUGH SEPTEMBER 25, 2012

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

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CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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JOHN G. ROBERTS, JR., CHIEF JUSTICE.
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ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
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JOHN PAUL STEVENS, ASSOCIATE JUSTICE.

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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 September 28, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2011

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## ELGIN ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL.

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

No. 11–45. Argued February 27, 2012—Decided June 11, 2012

The Civil Service Reform Act of 1978 (CSRA) "established a comprehensive system for reviewing personnel action taken against federal employees," *United States* v. *Fausto*, 484 U. S. 439, 455, including removals, 5 U. S. C. § 7512. A qualifying employee has the right to a hearing before the Merit Systems Protection Board (MSPB), §§ 7513(d), 7701(a)(1)–(2), which is authorized to order reinstatement, backpay, and attorney's fees, §§ 1204(a)(2), 7701(g). An employee who is dissatisfied with the MSPB's decision is entitled to judicial review in the Federal Circuit. §§ 7703(a)(1), (b)(1).

Petitioners were federal employees discharged pursuant to 5 U. S. C. § 3328, which bars from executive agency employment anyone who has knowingly and willfully failed to register for the Selective Service as required by the Military Selective Service Act, 50 U. S. C. App. § 453. Petitioner Elgin challenged his removal before the MSPB, claiming that § 3328 is an unconstitutional bill of attainder and unconstitutionally discriminates based on sex when combined with the Military Selective Service Act's male-only registration requirement. The MSPB referred the case to an Administrative Law Judge (ALJ), who dismissed the appeal for lack of jurisdiction, concluding that an employee is not entitled to MSPB review of agency action that is based on an absolute statutory bar to employment. The ALJ also concluded that the MSPB lacked

authority to determine the constitutionality of a federal statute. Rather than seeking further MSPB review or appealing to the Federal Circuit, Elgin joined other petitioners raising the same constitutional challenges to their removals in a suit in Federal District Court. The District Court found that it had jurisdiction and denied petitioners' constitutional claims on the merits. The First Circuit vacated and remanded with instructions to dismiss for lack of jurisdiction. The First Circuit held that petitioners were employees entitled to MSPB review despite the statutory bar to their employment. The court further concluded that challenges to a removal are not exempt from the CSRA review scheme simply because an employee challenges the constitutionality of the statute authorizing the removal.

*Held:* The CSRA precludes district court jurisdiction over petitioners' claims because it is fairly discernible that Congress intended the statute's review scheme to provide the exclusive avenue to judicial review for covered employees who challenge covered adverse employment actions, even when those employees argue that a federal statute is unconstitutional. Pp. 8–23.

(a) Relying on *Webster* v. *Doe*, 486 U. S. 592, 603, petitioners claim that 28 U. S. C. § 1331's general grant of federal-question jurisdiction to district courts remains undisturbed unless Congress explicitly directs otherwise. But *Webster*'s "heightened showing" applies only when a statute purports to "deny any judicial forum for a colorable constitutional claim," 486 U. S., at 603, not when Congress channels judicial review of a constitutional claim to a particular court, see *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200. Here, where the claims can be "meaningfully addressed in the" Federal Circuit, *id.*, at 215, the proper inquiry is whether Congress' intent to preclude district court jurisdiction was "'fairly discernible in the statutory scheme,'" *id.*, at 207. Pp. 8–10.

(b) It is "fairly discernible" from the CSRA's text, structure, and purpose that Congress precluded district court jurisdiction over petitioners' claims. Pp. 10–15.

(1) Just as the CSRA's "elaborate" framework demonstrated Congress' intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review in *Fausto*, 484 U. S., at 443, the CSRA indicates that extrastatutory review is not available to those employees to whom the CSRA grants administrative and judicial review. It "prescribes in great detail the protections and remedies applicable to" adverse personnel actions against federal employees, *ibid.*, specifically enumerating the major adverse actions and employee classifications to which the CSRA's procedural protections and review provisions apply, §§ 7511, 7512, setting out the procedures due an employee prior to final

agency action, § 7513, and exhaustively detailing the system of review before the MSPB and the Federal Circuit, §§ 7701, 7703. Petitioners and the Government do not dispute that petitioners are removed employees to whom CSRA review is provided, but petitioners claim that there is an exception to the CSRA review scheme for employees who bring constitutional challenges to federal statutes; this claim finds no support in the CSRA's text and structure. The availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue. Nothing in the CSRA's text suggests that its exclusive review scheme is inapplicable simply because a covered employee raises a constitutional challenge. And § 7703(b)(2)—which expressly exempts from Federal Circuit review challenges alleging that a covered action was based on discrimination prohibited by enumerated federal employment laws—demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. Pp. 10–13.

(2) The CSRA's purpose also supports the conclusion that the statutory review scheme is exclusive, even for constitutional challenges. The CSRA's objective of creating an integrated review scheme to replace inconsistent decisionmaking and duplicative judicial review would be seriously undermined if a covered employee could challenge a covered employment action first in a district court, and then again in a court of appeals, simply by challenging the constitutionality of the statutory authorization for the action. Claim-splitting and preclusion doctrines would not necessarily eliminate the possibility of parallel proceedings before the MSPB and the district court, and petitioners point to nothing in the CSRA to support the notion that Congress intended to allow employees to pursue constitutional claims in district court at the expense of forgoing other, potentially meritorious claims before the MSPB. Pp. 13–15.

(c) Petitioners invoke the "presum[ption] that Congress does not intend to limit [district court] jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 489. But none of those characteristics is present here. Pp. 15–23.

(1) Petitioners' constitutional claims can receive meaningful review within the CSRA scheme even if the MSPB, as it claims, is not authorized to decide a federal law's constitutionality. Their claims can be "meaningfully addressed" in the Federal Circuit, which has held that it can determine the constitutionality of a statute upon which an employ-

ee's removal was based, notwithstanding the MSPB's professed lack of authority to decide the question. The CSRA review scheme also fully accommodates the potential need for a factual record. Even without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question. If further development is necessary, the CSRA empowers the MSPB to take evidence and find facts for Federal Circuit review. See 5 U. S. C. §§ 1204(b)(1)–(2). Petitioners err in arguing that the MSPB will invariably dismiss a case without ever reaching the factfinding stage in an appeal such as theirs. The MSPB may determine that it lacks authority to decide the issue; but absent another infirmity in the adverse action, it will affirm the employing agency's decision. The Federal Circuit can then review the decision, including any factual record developed by the MSPB. Petitioners' argument is not illustrated by Elgin's case, which was dismissed on the threshold ground that he was not an "employee" with a right to appeal because his employment was absolutely barred by statute. Pp. 16–21.

(2) Petitioners' claims are also not "wholly collateral" to the CSRA scheme. Their constitutional claims are the vehicle by which they seek to reverse the removal decisions, to return to federal employment, and to receive lost compensation. A challenge to removal is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme, and reinstatement, backpay, and attorney's fees are precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide. Pp. 21–22.

(3) Finally, in arguing that their constitutional claims are not the sort that Congress intended to channel through the MSPB because they are beyond the MSPB's expertise, petitioners overlook the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise, *e. g.*, whether a resignation, as in petitioner Tucker's case, amounts to a constructive discharge. Pp. 22–23.

641 F. 3d 6, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 23.

*Harvey A. Schwartz* argued the cause for petitioners. With him on the briefs were *Leah M. Nicholls* and *Brian Wolfman.*

*Eric J. Feigin* argued the cause for respondents. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Srinivasan*, *Marleigh D. Dover*, *Jeffrey Clair*, *Elaine Kaplan*, *Steven E. Abow*, *Robin M. Richardson*, and *Elizabeth Ghauri.**

JUSTICE THOMAS delivered the opinion of the Court.

Under the Civil Service Reform Act of 1978 (CSRA), 5 U. S. C. § 1101 *et seq.*, certain federal employees may obtain administrative and judicial review of specified adverse employment actions. The question before us is whether the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional. We hold that it does.

I

The CSRA "established a comprehensive system for reviewing personnel action taken against federal employees." *United States* v. *Fausto*, 484 U. S. 439, 455 (1988). As relevant here, Subchapter II of Chapter 75 governs review of major adverse actions taken against employees "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503(a), 7513(a). Employees entitled to review are those in the "competitive service" and "excepted service" who meet certain requirements regarding probationary periods and years of service.[1] § 7511(a)(1). The reviewable

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**Elaine Mittleman*, *pro se*, filed a brief as *amicus curiae* urging reversal.

[1] The CSRA divides civil service employees into three main categories. *Fausto*, 484 U. S., at 441, n. 1. "Senior Executive Service" employees occupy high-level positions in the Executive Branch but are not required to be appointed by the President and confirmed by the Senate. 5 U. S. C. § 3131(2). "[C]ompetitive service" employees—the relevant category for purposes of this case—are all other Executive Branch employees whose nomination by the President and confirmation by the Senate are not required and who are not specifically excepted from the competitive service by statute. § 2102(a)(1). The competitive service also includes

agency actions are removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less. § 7512.

When an employing agency proposes a covered action against a covered employee, the CSRA gives the employee the right to notice, representation by counsel, an opportunity to respond, and a written, reasoned decision from the agency. § 7513(b). If the agency takes final adverse action against the employee, the CSRA gives the employee the right to a hearing and to be represented by an attorney or other representative before the Merit Systems Protection Board (MSPB). §§ 7513(d), 7701(a)(1)–(2). The MSPB is authorized to order relief to prevailing employees, including reinstatement, backpay, and attorney's fees. §§ 1204(a)(2), 7701(g).

An employee who is dissatisfied with the MSPB's decision is entitled to judicial review in the United States Court of Appeals for the Federal Circuit. That court "shall review the record and hold unlawful and set aside any agency action, findings, or conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "obtained without procedures required by law, rule, or regulation having been followed," or "unsupported by substantial evidence." §§ 7703(a)(1), (c). The Federal Circuit has "exclusive jurisdiction" over appeals from a final decision of the MSPB. 28 U. S. C. § 1295(a)(9); see also 5 U. S. C. § 7703(b)(1) (judicial review of an MSPB decision "shall be" in the Federal Circuit).

## II

Petitioners are former federal competitive service employees who failed to comply with the Military Selective Service

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employees in other branches of the Federal Government and in the District of Columbia government who are specifically included by statute. §§ 2102(a)(2)–(3). Finally, "excepted service" employees are employees who are not in the Senior Executive Service or in the competitive service. § 2103.

Act, 50 U. S. C. App. § 453. That Act requires male citizens and permanent-resident aliens of the United States between the ages of 18 and 26 to register for the Selective Service. Another federal statute, 5 U. S. C. § 3328 (hereinafter Section 3328), bars from employment by an executive agency anyone who has knowingly and willfully failed to register. Pursuant to Section 3328, petitioners were discharged (or allegedly constructively discharged) by respondents, their employing agencies.

Among petitioners, only Michael Elgin appealed his removal to the MSPB. Elgin argued that Section 3328 is an unconstitutional bill of attainder and unconstitutionally discriminates on the basis of sex when combined with the registration requirement of the Military Selective Service Act. The MSPB referred Elgin's appeal to an Administrative Law Judge (ALJ) for an initial decision.[2] The ALJ dismissed the appeal for lack of jurisdiction, concluding that an employee is not entitled to MSPB review of agency action that is based on an absolute statutory bar to employment. App. to Pet. for Cert. 100a–101a. The ALJ also held that Elgin's constitutional claims could not "confer jurisdiction" on the MSPB because it "lacks authority to determine the constitutionality of a statute." *Id.*, at 101a.

Elgin neither petitioned for review by the full MSPB nor appealed to the Federal Circuit. Instead, he joined the other petitioners in filing suit in the United States District Court for the District of Massachusetts, raising the same constitutional challenges to Section 3328 and the Military Selective Service Act. App. 4, 26–28, 29. Petitioners sought equitable relief in the form of a declaratory judgment that the challenged statutes are unconstitutional, an injunction prohibiting enforcement of Section 3328, reinstatement to

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[2] See § 7701(b)(1) (authorizing referral of MSPB appeals to an ALJ); 5 CFR §§ 1201.111–1201.114 (2011) (detailing procedures for an initial decision by an ALJ and review by the MSPB).

their former positions, backpay, benefits, and attorney's fees. *Id.*, at 29–30.

The District Court rejected respondents' argument that it lacked jurisdiction and denied petitioners' constitutional claims on the merits. See *Elgin* v. *United States*, 697 F. Supp. 2d 187 (Mass. 2010). The District Court held that the CSRA did not preclude it from hearing petitioners' claims, because the MSPB had no authority to determine the constitutionality of a federal statute. *Id.*, at 193. Hence, the District Court concluded that it retained jurisdiction under the general grant of federal-question jurisdiction in 28 U. S. C. § 1331. 697 F. Supp. 2d, at 194.

The United States Court of Appeals for the First Circuit vacated the judgment and remanded with instructions to dismiss for lack of jurisdiction. See 641 F. 3d 6 (2011). The Court of Appeals held that challenges to a removal are not exempted from the CSRA review scheme simply because the employee argues that the statute authorizing the removal is unconstitutional. *Id.*, at 11–12. According to the Court of Appeals, the CSRA provides a forum—the Federal Circuit—that may adjudicate the constitutionality of a federal statute, and petitioners "were obliged to use it." *Id.*, at 12–13.

We granted certiorari to decide whether the CSRA precludes district court jurisdiction over petitioners' claims even though they are constitutional claims for equitable relief. See 565 U. S. 962 (2011). We conclude that it does, and we therefore affirm.

## III

We begin with the appropriate standard for determining whether a statutory scheme of administrative and judicial review provides the exclusive means of review for constitutional claims. Petitioners argue that even if they may obtain judicial review of their constitutional claims before the Federal Circuit, they are not precluded from pursuing their claims in federal district court. According to petitioners,

the general grant of federal-question jurisdiction in 28 U. S. C. § 1331, which gives district courts authority over constitutional claims, remains undisturbed unless Congress explicitly directs otherwise. In support of this argument, petitioners rely on *Webster* v. *Doe*, 486 U. S. 592, 603 (1988), which held that "where Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." The *Webster* Court noted that this "heightened showing" was required "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Ibid.* (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 681, n. 12 (1986)). Petitioners contend that the CSRA does not meet this standard because it does not expressly bar suits in district court.

Petitioners' argument overlooks a necessary predicate to the application of *Webster*'s heightened standard: a statute that purports to "deny any judicial forum for a colorable constitutional claim." 486 U. S., at 603. *Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court. We held as much in *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200 (1994). In that case, we considered whether a statutory scheme of administrative review followed by judicial review in a federal appellate court precluded district court jurisdiction over a plaintiff's statutory and constitutional claims. *Id.*, at 206. We noted that the plaintiff's claims could be "meaningfully addressed in the Court of Appeals" and that the case therefore did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Id.*, at 215, and n. 20 (quoting *Bowen*, *supra*, at 681, n. 12). Accordingly, we did not require *Webster*'s "heightened showing," but instead asked only whether Congress' intent to preclude district court jurisdiction was " 'fairly dis-

cernible in the statutory scheme.'" 510 U. S., at 207 (quoting *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 351 (1984)).

Like the statute in *Thunder Basin*, the CSRA does not foreclose all judicial review of petitioners' constitutional claims, but merely directs that judicial review shall occur in the Federal Circuit. Moreover, as we explain below, the Federal Circuit is fully capable of providing meaningful review of petitioners' claims. See *infra*, at 16–21. Accordingly, the appropriate inquiry is whether it is "fairly discernible" from the CSRA that Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme, even in cases in which the employees raise constitutional challenges to federal statutes.

## IV

To determine whether it is "fairly discernible" that Congress precluded district court jurisdiction over petitioners' claims, we examine the CSRA's text, structure, and purpose. See *Thunder Basin*, *supra*, at 207; *Fausto*, 484 U. S., at 443.

### A

This is not the first time we have addressed the impact of the CSRA's text and structure on the availability of judicial review of a federal employee's challenge to an employment decision. In *Fausto*, we considered whether a so-called "nonpreference excepted service employe[e]" could challenge his suspension in the United States Claims Court, even though the CSRA did not then afford him a right to review in the MSPB or the Federal Circuit.[3] *Id.*, at 440–441, 448. Citing "[t]he comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial

[3] Certain veterans and their close relatives are considered "preference eligible" civil service employees. *Fausto*, 484 U. S., at 441, n. 1.

review contained in Chapter 75," the Court concluded that "the absence of provision for these employees to obtain judicial review" was a "considered congressional judgment." *Id.*, at 448. The Court thus found it "fairly discernible" that Congress intended to preclude all judicial review of Fausto's statutory claims.[4] *Id.*, at 452 (citing *Block*, *supra*, at 349).

Just as the CSRA's "elaborate" framework, 484 U. S., at 443, demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review. Indeed, in *Fausto* we expressly assumed that "competitive service employees, who *are* given review rights by Chapter 75, cannot expand these rights by resort to" judicial review outside of the CSRA scheme. See *id.*, at 450, n. 3. As *Fausto* explained, the CSRA "prescribes in great detail the protections and remedies applicable to" adverse personnel actions against federal employees. *Id.*, at 443. For example, Subchapter II of Chapter 75, the portion of the CSRA relevant to petitioners, specifically enumerates the major adverse actions and employee classifications to which the CSRA's procedural protections and review provisions apply. 5 U. S. C. §§ 7511, 7512. The subchapter then sets out the procedures due an employee prior to final agency action. § 7513. And, Chapter 77 of the CSRA exhaustively details the system of review before the MSPB and the Federal Circuit. §§ 7701, 7703; see also *Fausto*, *supra*, at 449 (emphasizing that the CSRA's structure evinces "the primacy" of review by the MSPB and the Federal Circuit). Given the painstaking detail with which the CSRA sets out the method for covered

[4] Although *Fausto* interpreted the CSRA to entirely foreclose judicial review, the Court had no need to apply a heightened standard like that applied in *Webster* v. *Doe*, 486 U. S. 592 (1988), because Fausto did not press any constitutional claims.

employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court.

Petitioners do not dispute that they are employees who suffered adverse actions covered by the foregoing provisions of the CSRA. Nor do they contest that the CSRA's text and structure support implied preclusion of district court jurisdiction, at least as a general matter. Petitioners even acknowledge that the MSPB routinely adjudicates some constitutional claims, such as claims that an agency took adverse employment action in violation of an employee's First or Fourth Amendment rights, and that these claims must be brought within the CSRA scheme. See Brief for Petitioners 33; Tr. of Oral Arg. 7–11, 15, 21; see also, *e. g.*, *Smith* v. *Department of Transp.*, 106 MSPR 59, 78–79 (2007) (applying *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), to an employee's claim that he was suspended in retaliation for the exercise of his First Amendment rights); *Garrison* v. *Department of Justice*, 67 MSPR 154 (1995) (considering whether an order directing an employee to submit to a drug test was reasonable under the Fourth Amendment). Nevertheless, petitioners seek to carve out an exception to CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes.

The text and structure of the CSRA, however, provide no support for such an exception. The availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue. See, *e. g.*, 5 U. S. C. §§ 7511(a)(1) (defining "employee"), 7512 (defining "[a]ctions covered"), 7513(d) (providing that "[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board"), 7703(a)(1) (providing that "[a]ny employee . . . adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision" in the

Federal Circuit). Nothing in the CSRA's text suggests that its exclusive review scheme is inapplicable simply because a covered employee challenges a covered action on the ground that the statute authorizing that action is unconstitutional. As the Government correctly notes, "[t]he plain language of [the CSRA's] provisions applies to an employee who challenges his removal on the ground that the statute requiring it is unconstitutional no less than it applies to an employee who challenges his removal on any other ground." Brief for Respondents 33–34.

In only one situation does the CSRA expressly exempt a covered employee's appeal of a covered action from Federal Circuit review based on the type of claim at issue. When a covered employee "alleges that a basis for the action was discrimination" prohibited by enumerated federal employment laws, 5 U. S. C. § 7702(a)(1)(B), the CSRA allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action as provided by the applicable employment law. See § 7703(b)(2). Each of the cross-referenced employment laws authorizes an action in federal district court. See 42 U. S. C. § 2000e–5(f); 29 U. S. C. § 633a(c); § 216(b). Title 5 U. S. C. § 7703(b)(2) demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. That Congress declined to include an exemption from Federal Circuit review for challenges to a statute's constitutionality indicates that Congress intended no such exception.

## B

The purpose of the CSRA also supports our conclusion that the statutory review scheme is exclusive, even for employees who bring constitutional challenges to federal statutes. As we have previously explained, the CSRA's "integrated scheme of administrative and judicial review" for aggrieved federal employees was designed to replace an "'outdated patchwork of statutes and rules'" that afforded

employees the right to challenge employing agency actions in district courts across the country. *Fausto*, 484 U. S., at 444–445. Such widespread judicial review, which included appeals in all of the Federal Courts of Appeals, produced "wide variations in the kinds of decisions . . . issued on the same or similar matters" and a double layer of judicial review that was "wasteful and irrational." *Id.*, at 445 (internal quotation marks omitted).

The CSRA's objective of creating an integrated scheme of review would be seriously undermined if, as petitioners would have it, a covered employee could challenge a covered employment action first in a district court, and then again in one of the courts of appeals, simply by alleging that the statutory authorization for such action is unconstitutional. Such suits would reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid. Moreover, petitioners' position would create the possibility of parallel litigation regarding the same agency action before the MSPB and a district court. An employee could challenge the constitutionality of the statute authorizing an agency's action in district court, but the MSPB would remain the exclusive forum for other types of challenges to the agency's decision. See Tr. of Oral Arg. 4–7, 9, 15–16.

Petitioners counter that doctrines regarding claim splitting and preclusion would bar parallel suits before the MSPB and the district court. But such doctrines would not invariably eliminate the possibility of simultaneous proceedings, for a tribunal generally has discretion to decide whether to dismiss a suit when a similar suit is pending elsewhere. See 18 C. Wright et al., Federal Practice and Procedure § 4406 (2d ed. 2002 and Supp. 2011). In any event, petitioners point to nothing in the CSRA to support the odd notion that Congress intended to allow employees to pursue constitutional claims in district court at the cost of forgoing other, potentially meritorious claims before the MSPB.

Finally, we note that a jurisdictional rule based on the nature of an employee's constitutional claim would deprive the aggrieved employee, the MSPB, and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case. For example, petitioners contend that facial and as-applied constitutional challenges to statutes may be brought in district court, while other constitutional challenges must be heard by the MSPB. See *supra*, at 12; n. 5, *infra*. But, as we explain below, that line is hazy at best and incoherent at worst. See *ibid.* The dissent's approach fares no better. The dissent carves out for district court adjudication only facial constitutional challenges to statutes, but we have previously stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 331 (2010). By contrast, a jurisdictional rule based on the type of employee and adverse agency action at issue does not involve such amorphous distinctions. Accordingly, we conclude that the better interpretation of the CSRA is that its exclusivity does not turn on the constitutional nature of an employee's claim, but rather on the type of the employee and the challenged employment action.

## V

Petitioners raise three additional factors in arguing that their claims are not the type that Congress intended to be reviewed within the CSRA scheme. Specifically, petitioners invoke our "presum[ption] that Congress does not intend to limit [district court] jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U. S.,

at 212–213). Contrary to petitioners' suggestion, none of those characteristics are present here.

A

First, petitioners argue that the CSRA review scheme provides no meaningful review of their claims because the MSPB lacks authority to declare a federal statute unconstitutional. Petitioners are correct that the MSPB has repeatedly refused to pass upon the constitutionality of legislation. See, *e. g.*, *Malone* v. *Department of Justice*, 13 M. S. P. B. 81, 83 (1983) ("[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes"). This Court has also stated that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin*, 510 U. S., at 215 (internal quotation marks and brackets omitted).[5]

[5] According to petitioners, the MSPB can decide claims that an agency violated an employee's First or Fourth Amendment rights (and those claims consequently must be brought within the CSRA scheme), *supra*, at 12, because such claims allege only that an agency "acted in an unconstitutional manner" and do not challenge the constitutionality of a federal statute either facially or as applied. See Tr. of Oral Arg. 10, 21. That distinction is dubious at best. Agencies are created by and act pursuant to statutes. Thus, unless an action is beyond the scope of the agency's statutory authority, an employee's claim that the agency "acted in an unconstitutional manner" will generally be a claim that the statute authorizing the agency action was unconstitutionally applied to him. See, *e. g.*, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 565 (1968) (holding that the statute authorizing a government employee's termination was unconstitutional as applied under the First and Fourteenth Amendments where the employee was fired because of his speech). In any event, the curious line that petitioners draw only highlights the weakness of their position, for it certainly is not "fairly discernible" from the CSRA's text, structure, or purpose that the statutory review scheme is exclusive for so-called "unconstitutional manner" claims but not for facial or as-applied constitutional challenges to statutes. See *supra*, at 11–14.

We need not, and do not, decide whether the MSPB's view of its power is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction. See *ibid.* (describing this rule as "not mandatory"). In *Thunder Basin*, we held that Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme "[e]ven if" the administrative body could not decide the constitutionality of a federal law. *Ibid.* That issue, we reasoned, could be "meaningfully addressed in the Court of Appeals" that Congress had authorized to conduct judicial review. *Ibid.*[6] Likewise, the CSRA provides review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' claims that Section 3328 and the Military Selective Service Act's registration requirement are unconstitutional.

Petitioners insist, however, that the Federal Circuit cannot decide their constitutional claims either. Emphasizing the Federal Circuit's holdings that its jurisdiction over employee appeals is coextensive with the MSPB's jurisdiction, petitioners argue that the Federal Circuit likewise lacks jurisdiction

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[6] The dissent misreads *Thunder Basin*. The dissent contends that the "heart of the preclusion analysis" in *Thunder Basin* involved statutory claims reviewable by the administrative body and that the "only constitutional issue" was decided by this Court "'not on preclusion grounds but on the merits.'" *Post*, at 32 (opinion of ALITO, J.) (quoting 510 U. S., at 219 (SCALIA, J., concurring in part and concurring in judgment)). To be sure, the *Thunder Basin* Court did decide the merits of the petitioner's "second constitutional challenge," namely whether the Court's finding of preclusion was itself unconstitutional. See *id.*, at 219–221, and n.; see also *id.*, at 216 (describing this "alternative" argument). But the petitioner's suit also included another constitutional claim: a due process challenge to a statute that permitted a regulatory agency, before a hearing, to immediately fine the petitioner for noncompliance with the statute. See Brief for Petitioner in *Thunder Basin Coal Co.* v. *Reich*, O. T. 1993, No. 92–896, p. 13. The Court expressly found that the statutory review scheme precluded district court jurisdiction over that constitutional claim. See 510 U. S., at 214–216.

to decide their challenge to the constitutionality of a federal statute. Petitioners are incorrect.

As we have explained, the CSRA makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue. See *supra*, at 5–6, 12–13; see also 5 CFR § 1201.3(a) (stating that "[t]he Board has jurisdiction over appeals from agency actions" and enumerating covered actions); *Todd* v. *MSPB*, 55 F. 3d 1574, 1576 (CA Fed. 1995) (explaining that the employee "has the burden of establishing that she and the action she seeks to appeal [are] within the [MSPB's] jurisdiction"). Accordingly, as the cases cited by petitioners demonstrate, the Federal Circuit has questioned its jurisdiction when an employee appeals from a type of adverse action over which the MSPB lacked jurisdiction.[7] But the Federal Circuit has never held, in an appeal from agency action within the MSPB's jurisdiction, that its authority to decide particular legal questions is derivative of the MSPB's authority. To the contrary, in *Briggs* v. *MSPB*, 331 F. 3d 1307, 1312–1313 (2003), the Federal Circuit concluded that it could determine the constitutionality of a statute upon which an employee's removal was based, notwithstanding the MSPB's professed lack of authority to decide the question.[8]

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[7] See *Schmittling* v. *Department of Army*, 219 F. 3d 1332, 1336 (CA Fed. 2000) (remanding for MSPB to determine if employee suffered a prohibited personnel action within the scope of its jurisdiction); *Perez* v. *MSPB*, 931 F. 2d 853, 855 (CA Fed. 1991) (action against employee was not suspension within MSPB's jurisdiction); *Manning* v. *MSPB*, 742 F. 2d 1424, 1425–1427 (CA Fed. 1984) (reassignment of employee was not an adverse action within MSPB's jurisdiction); *Rosano* v. *Department of Navy*, 699 F. 2d 1315 (CA Fed. 1983) (refusal to prorate employee's health insurance premiums was not an adverse action within MSPB's jurisdiction).

[8] It is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide. See, *e. g.*, *Preseault* v. *ICC*, 853 F. 2d 145, 148–149 (CA2 1988) (provision of the National Trails System Act Amendments of 1983), aff'd on other grounds, 494 U. S. 1 (1990); *Reid* v. *Engen*, 765 F. 2d 1457, 1460–1461 (CA9 1985) (provision of the Federal Aviation Act of 1958); *Chadha* v. *INS*, 634 F. 2d

Petitioners next contend that even if the Federal Circuit could consider their claims in the first instance, resolution of the claims requires a factual record that neither the MSPB (because it lacks authority to decide the legal question) nor the Federal Circuit (because it is an appellate court) can create. To the contrary, we think the CSRA review scheme fully accommodates an employee's potential need to establish facts relevant to his constitutional challenge to a federal statute. Even without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question. See, *e. g.*, *Rothe Development Corp.* v. *Department of Defense*, 545 F. 3d 1023, 1045–1046 (CA Fed. 2008) (judicially noticing facts relevant to equal protection challenge). And, if resolution of a constitutional claim requires the development of facts beyond those that the Federal Circuit may judicially notice, the CSRA empowers the MSPB to take evidence and find facts for Federal Circuit review. See 5 U. S. C. §§ 1204(b)(1)–(2) (providing that the MSPB may administer oaths, examine witnesses, take depositions, issue interrogatories, subpoena testimony and documents, and otherwise receive evidence when a covered employee appeals a covered adverse employment action). Unlike petitioners, we see nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain. Congress has authorized magistrate judges, for example, to conduct evidentiary hearings and make findings of fact relevant to dispositive pretrial motions, although they are powerless to issue a final ruling on such motions. See 28 U. S. C. §§ 636(b)(1)(A)–(B); *United States* v. *Raddatz*, 447 U. S. 667, 673 (1980).[9]

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408, 411, 413 (CA9 1980) (provision of the Immigration and Nationality Act), aff'd, 462 U. S. 919 (1983).

[9] The dissent argues that the MSPB may struggle to determine what facts are relevant to the constitutional question, given that it will not decide the claim. See *post*, at 33. But the MSPB's professed lack of au-

Petitioners nonetheless insist that the MSPB will never reach the factfinding stage in an appeal challenging the constitutionality of a federal statute, pointing to the ALJ's dismissal for lack of jurisdiction in petitioner Elgin's case. Again, petitioners are incorrect. When a covered employee appeals a covered adverse action, the CSRA grants the MSPB jurisdiction over the appeal. See *supra*, at 18. If the employee attacks the adverse action on the ground that a statute is unconstitutional, the MSPB may determine that it lacks authority to decide that particular issue; but absent another infirmity in the adverse action, the MSPB will affirm the employing agency's decision rather than dismiss the appeal. See, *e. g.*, *Briggs*, *supra*, at 1311. The Federal Circuit can then review the MSPB decision, including any factual record developed by the MSPB in the course of its decision on the merits.

Contrary to petitioners' suggestion, Elgin's case does not illustrate that the MSPB will invariably dismiss an appeal challenging the constitutionality of a federal statute before reaching the factfinding stage. The ALJ dismissed Elgin's case on the threshold jurisdictional ground that he was not an "employee" with a right to appeal to the MSPB because his employment was absolutely barred by statute. See App. to Pet. for Cert. 100a–101a. The Government conceded before the First Circuit that this jurisdictional argument was incorrect, see Brief for Respondents 10, and the Court of

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thority to declare a statute unconstitutional does not mean that the MSPB cannot identify the legal principles that govern the constitutional analysis and thus the scope of necessary development of the factual record. The MSPB routinely identifies the relevant constitutional framework from federal-court decisions when deciding other constitutional claims. See *supra*, at 12 (citing First and Fourth Amendment cases); see also, *e. g.*, *Fitzgerald* v. *Department of Defense*, 80 MSPR 1, 14–15 (1998) (analyzing a claim under the Due Process Clauses of the Fifth and Fourteenth Amendments). We therefore see little reason to credit the dissent's prediction that our holding will result in a complicated back and forth between a befuddled MSPB and the Federal Circuit.

Appeals agreed, see 641 F. 3d, at 10–11. The parties do not raise that issue here, and we do not address it. What matters for present purposes is that the particular circumstances of Elgin's case do not demonstrate that the MSPB will dismiss an appeal that is otherwise within its jurisdiction merely because it lacks the authority to decide a particular claim.[10]

In sum, the CSRA grants the MSPB and the Federal Circuit jurisdiction over petitioners' appeal because they are covered employees challenging a covered adverse employment action. Within the CSRA review scheme, the Federal Circuit has authority to consider and decide petitioners' constitutional claims. To the extent such challenges require factual development, the CSRA equips the MSPB with tools to create the necessary record. Thus, petitioners' constitutional claims can receive meaningful review within the CSRA scheme.[11]

B

Petitioners next contend that the CSRA does not preclude district court jurisdiction over their claims because they are "wholly collateral" to the CSRA scheme. According to peti-

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[10] Before this Court, the Government again conceded the error of its argument that Elgin is not an "employee" within the MSPB's jurisdiction and indicated that it would support a motion by Elgin to reopen his case before the MSPB. See Tr. of Oral Arg. 32.

[11] The dissent cites *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), for the "basic principle," *post,* at 30, that preclusion cannot be inferred when "'the administrative appeals process does not address the kind of . . . constitutional claims' at issue," *ibid.* (quoting *McNary*, 498 U. S., at 493). But that statement from *McNary* was not a reference to an administrative body's inability to decide a constitutional claim. Rather, *McNary* was addressing a statutory review scheme that provided no opportunity for the plaintiffs to develop a factual record relevant to their constitutional claims before the administrative body and then restricted judicial review to the administrative record created in the first instance. *Ibid.* As we have explained, the CSRA review process is not similarly limited. See *supra,* at 19.

tioners, their bill-of-attainder and sex discrimination claims "have nothing to do with the types of day-to-day personnel actions adjudicated by the MSPB," Brief for Petitioners 29, and petitioners "are not seeking the CSRA's 'protections and remedies,'" Reply Brief 3. We disagree.

As evidenced by their district court complaint, petitioners' constitutional claims are the vehicle by which they seek to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action. See App. 29–30. A challenge to removal is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme. Likewise, reinstatement, backpay, and attorney's fees are precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide. See *supra*, at 6; see also *Heckler* v. *Ringer*, 466 U. S. 602, 614 (1984) (holding that plaintiffs' claims were not wholly collateral to a statutory scheme of administrative and judicial review of Medicare payment decisions, where plaintiffs' constitutional and statutory challenge to an agency's procedure for reaching payment decisions was "at bottom" an attempt to reverse the agency's decision to deny payment). Far from a suit wholly collateral to the CSRA scheme, the case before us is a challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords.

C

Relatedly, petitioners argue that their constitutional claims are not the sort that Congress intended to channel through the MSPB because they are outside the MSPB's expertise. But petitioners overlook the many threshold questions that may accompany a constitutional claim and to which the MSPB can apply its expertise. Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional

challenge. For example, petitioner Henry Tucker asserts that his resignation amounted to a constructive discharge. That issue falls squarely within the MSPB's expertise, and its resolution against Tucker would avoid the need to reach his constitutional claims. In addition, the challenged statute may be one that the MSPB regularly construes, and its statutory interpretation could alleviate constitutional concerns. Or, an employee's appeal may involve other statutory or constitutional claims that the MSPB routinely considers, in addition to a constitutional challenge to a federal statute. The MSPB's resolution of those claims in the employee's favor might fully dispose of the case. Thus, because the MSPB's expertise can otherwise be "brought to bear" on employee appeals that challenge the constitutionality of a statute, we see no reason to conclude that Congress intended to exempt such claims from exclusive review before the MSPB and the Federal Circuit. See *Thunder Basin*, 510 U. S., at 214–215 (concluding that, where administrative Commission's expertise "could be brought to bear" on appeal, Commission's exclusive review of alleged statutory violation was appropriate despite its lack of expertise in interpreting a particular statute (internal quotation marks and brackets omitted)).

* * *

For the foregoing reasons, we conclude that it is fairly discernible that the CSRA review scheme was intended to preclude district court jurisdiction over petitioners' claims. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE ALITO, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, dissenting.

Petitioners are former federal employees who were discharged for failing to register for the military draft as

required under 5 U. S. C. § 3328. They filed a putative class-action suit in Federal District Court, arguing that the registration requirement is facially unconstitutional because it discriminates on the basis of gender and operates as a bill of attainder. Their complaint sought backpay as well as declaratory and injunctive relief reinstating their employment and preventing the Government from enforcing § 3328 against them.

The Court affirms the dismissal of petitioners' suit on the ground that the Civil Service Reform Act of 1978 (CSRA) provides an exclusive administrative remedy for claims of wrongful termination brought by covered federal employees. Because the CSRA provides an avenue for employees to pursue their grievances through the Merit Systems Protection Board, the majority concludes, Congress must have intended to remove petitioners' claims from the ordinary ambit of the federal courts.

The problem with the majority's reasoning is that petitioners' constitutional claims are a far cry from the type of claim that Congress intended to channel through the Board. The Board's mission is to adjudicate fact-specific employment disputes within the existing statutory framework. By contrast, petitioners argue that one key provision of that framework is facially unconstitutional. Not only does the Board lack authority to adjudicate facial constitutional challenges, but such challenges are wholly collateral to the type of claims that the Board is authorized to hear.

The majority attempts to defend its holding by noting that, although the Board cannot consider petitioners' claims, petitioners may appeal from the Board to the Federal Circuit, which *does* have authority to address facial constitutional claims. But that does not cure the oddity of requiring such claims to be filed initially before the Board, which can do nothing but pass them along unaddressed, leaving the Federal Circuit to act as a court of first review, but with little capacity for factfinding.

Because I doubt that Congress intended to channel petitioners' constitutional claims into an administrative tribunal that is powerless to decide them, I respectfully dissent.

## I

As a general matter, federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. Under this provision, it has long been "established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). In light of § 1331, the question is not whether Congress has specifically conferred jurisdiction, but whether it has taken it away. See *Whitman* v. *Department of Transportation*, 547 U. S. 512, 514 (2006) *(per curiam)*.

Congress may remove certain claims from the general jurisdiction of the federal courts in order to channel these claims into a system of statutory review. For example, in *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1 (2000), we considered a clause providing that "'no action . . . to recover on any claim'" arising under the Medicare laws "shall be 'brought under section 1331 . . . of title 28,'" *id.*, at 5 (quoting 42 U. S. C. § 405(h); brackets omitted). When dealing with an express preclusion clause like this, we determine the scope of preclusion simply by interpreting the words Congress has chosen.

We have also recognized that preclusion can be implied. When Congress creates an administrative process to handle certain types of claims, it impliedly removes those claims from the ordinary jurisdiction of the federal courts. Under these circumstances, the test is whether "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enterprise Fund* v. *Public Company Accounting Over-*

*sight Bd.*, 561 U. S. 477, 489 (2010) (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 207, 212 (1994); alteration in *Free Enterprise*). In making this determination, we look to "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review" through the alternative administrative process that Congress has established. *Thunder Basin*, *supra*, at 207 (citation omitted).

We have emphasized two important factors for determining whether Congress intended an agency to have exclusive original jurisdiction over a claim. The first is whether the claim falls within the agency's area of expertise, which would give the agency a comparative advantage over the courts in resolving the claim. "Generally, when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.' " *Free Enterprise Fund*, *supra*, at 489 (quoting *Whitney Nat. Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411, 420 (1965)).

Second, even if a claim would not benefit from agency expertise, we nonetheless consider whether the claim is legally or factually related to the type of dispute the agency is authorized to hear. If so, the claim may be channeled through the administrative process to guard against claim splitting, which could involve redundant analysis of overlapping issues of law and fact. But for claims that fall outside the agency's expertise and are "wholly collateral" to the type of dispute the agency is authorized to hear, the interest in requiring unified administrative review is considerably reduced. *Thunder Basin*, *supra*, at 212 (internal quotation marks omitted); see also *Free Enterprise Fund*, *supra*, at 490–491.

## II

The CSRA was enacted to "provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service." §3(1), 92 Stat. 1112.

To that end, the CSRA created an "integrated scheme of administrative and judicial review [of personnel actions], designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U. S. 439, 445 (1988).

Chapter 75 of Title 5 sets forth detailed procedures for adverse actions taken against certain covered employees "for such cause as will promote the efficiency of the service." 5 U. S. C. § 7513(a). When an agency takes such an action, it must provide the employee with advance written notice of the action and the specific reasons for it, give the employee an opportunity to respond, allow the employee to be represented by an attorney, and provide the employee with a final written decision. See §§ 7513(b)(1)–(4). Following these internal agency procedures, an aggrieved employee may appeal to the Merit Systems Protection Board. § 7513(d).

The Board's mission is "to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices." Merit Systems Protection Board, An Introduction to the Merit Systems Protection Board 5 (1999). The Board adjudicates employment disputes in accordance with applicable federal laws and regulations, including the "[m]erit system principles" and "[p]rohibited personnel principles" identified in §§ 2301, 2302. After the Board renders a decision, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction on appeal. See §§ 7703(a)(1), (b)(1); 28 U. S. C. § 1295(a)(9).

The parties agree that petitioners are covered employees who may file an appeal to the Board protesting their removal from federal employment. The parties also agree, however, that the Board lacks authority to adjudicate claims like those asserted by petitioners, which attack the validity of a federal statute as a facial matter. As this Court has noted, "[a]dju-

dication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin*, *supra*, at 215 (alteration in original; internal quotation marks omitted). The Board itself has consistently taken the position that it lacks "authority to determine the constitutionality of statutes." *Malone* v. *Department of Justice*, 13 M. S. P. B. 81, 83 (1983) (citing *Montana Ch. of Assn. of Civilian Technicians, Inc.* v. *Young*, 514 F. 2d 1165, 1167 (CA9 1975)). Thus, the Board's own self-described role in the administrative process is simply to apply the relevant statutes as written, without addressing any facial challenges to the validity of those statutes.

III

There is no basis for the majority's conclusion that petitioners must file their constitutional challenges before the Board instead of a federal district court. Congress has not expressly curtailed the jurisdiction of the federal courts to consider facial constitutional claims relating to federal employment, and no such limitation can be fairly discerned from the CSRA. Not only are petitioners' claims "wholly collateral to [the CSRA's] review provisions and outside the agency's expertise," *Thunder Basin*, *supra*, at 212 (internal quotation marks omitted), but the Board itself admits that it is completely powerless to consider the merits of petitioners' arguments. In short, neither efficiency nor agency expertise can explain why Congress would want the Board to have exclusive jurisdiction over claims like these. To the contrary, imposing a scheme of exclusive administrative review in this context breeds inefficiency and creates a procedural framework that is needlessly vexing.

A

Petitioners argue that registration for the military draft violates the Equal Protection and Bill of Attainder Clauses. These facial constitutional arguments are entirely outside the Board's power to decide, and they do not remotely impli-

cate the Board's administrative expertise. They have nothing to do with the statutory rules of federal employment, and nothing to do with any application of the "merit system principles" or the "prohibited personnel practices" that the Board administers.

Petitioners' constitutional claims also have no relation to any of the facts that might be relevant to a proceeding before the Board. The Board typically addresses factual issues pertaining to the specific circumstances in which employee grievances arise. For example: Why was a particular employee removed from federal employment? Does the employer have a sound, nonprohibited basis for the employment action in question? See, *e. g.*, *Davis* v. *Department of Veterans Affairs*, 106 MSPR 654, 657–658 (2007).

By contrast, petitioners' claims involve general factual issues pertaining to the facial constitutionality of the military draft. The equal protection question is whether men and women are sufficiently different to justify disparate treatment under the Military Selective Service Act. *Rostker* v. *Goldberg*, 453 U. S. 57, 78 (1981). The factual record that petitioners wish to develop would address issues of gender difference that might be considered relevant to military service. See Brief for Petitioners 48 (alleging that "women's role in the military has changed dramatically in the past thirty years"). Likewise, under the Bill of Attainder Clause, the key question is whether requiring draft registration as a condition of federal employment amounts to the singling out of a particular person or group for punishment without trial. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468–469 (1977). Whatever the relevant facts may be on either claim, it is clear that they can have no conceivable bearing on any matter the Board is authorized to address.

B

Administrative agencies typically do not adjudicate facial constitutional challenges to the laws that they administer. Such challenges not only lie outside the realm of special

agency expertise, but they are also wholly collateral to other types of claims that the agency is empowered to consider. When "the administrative appeals process does not address the kind of . . . constitutional claims" at issue, we cannot infer that Congress intended to "limi[t] judicial review of these claims to the procedures set forth in [the statutory scheme]." *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 493 (1991).

Several other cases confirm this basic principle. In *Free Enterprise Fund*, for example, the plaintiffs were not required to pursue their constitutional claims through the Public Accounting Company Oversight Board, because they were challenging the very existence of the Board itself. 561 U. S., at 490–491. Likewise, in *Johnson* v. *Robison*, 415 U. S. 361, 373–374 (1974), where petitioners brought claims "challenging the constitutionality of laws providing benefits," the Court held that these claims were not precluded by a statute creating exclusive administrative review over how those benefits were administered. And in *Mathews* v. *Eldridge*, 424 U. S. 319, 327–332 (1976), we held that although a party challenging the denial of statutory benefits was generally required to proceed through the statutory process of administrative review, a constitutional challenge to the administrative process itself could still be brought directly in federal court.

The present case follows the same pattern: Petitioners are challenging the facial validity of a law that the Board is bound to apply to them, and so it makes little sense for them to seek review before the Board.

The wholly collateral nature of petitioners' claims makes them readily distinguishable from claims that this Court has held to be impliedly excluded from the original jurisdiction of the federal courts. In *Fausto*, for example, we held that the CSRA precluded a statutory Back Pay Act claim involving a dispute over whether an employee had engaged in unauthorized use of a Government vehicle. 484 U. S., at 455.

The plaintiff in that case did not challenge the constitutional validity of the applicable legal framework, but argued instead that the framework had been improperly applied to him. He argued that he had been wrongfully suspended from work, and that he was entitled to backpay as a result. *Id.*, at 440. For that type of fact-specific personnel dispute, we determined, Congress had intended for the CSRA's comprehensive administrative scheme to provide the exclusive avenue of relief. *Id.*, at 455.

Similarly, in *Bush* v. *Lucas*, 462 U. S. 367 (1983), we declined to allow a claim under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), brought by an employee seeking money damages for an alleged "retaliatory demotion or discharge because he ha[d] exercised his First Amendment rights." 462 U. S., at 381. Although the claim was constitutional in nature, we noted that it "ar[o]se out of an employment relationship that is governed by comprehensive procedural and substantive provisions" that had been enacted by Congress. *Id.*, at 368. The employee was pursuing an as-applied challenge that depended on the case-specific facts of why he had been fired. The gravamen of the employee's claim was that he had been "unfairly disciplined for making critical comments about [his agency]." *Id.*, at 386. Under the statutory scheme that Congress had created, the employee could have pursued a very similar statutory claim for wrongful removal within the administrative process. *Id.*, at 386–388. Under these circumstances, we found that Congress did not intend to allow a duplicative nonstatutory claim for damages based on the same set of underlying facts.

Finally, the majority's reliance on *Thunder Basin* is entirely misplaced. See *ante*, at 16–17. In that case, we found that a statutory scheme impliedly precluded a preenforcement challenge brought by a mining company seeking to enjoin an order issued by the Mine Safety and Health Administration. 510 U. S., at 205. Importantly, the plaintiff com-

pany was seeking review of purely statutory claims that were reviewable in the first instance by the administrative commission that Congress had established. The only constitutional issue was a matter of timing: The company argued that it had a due process right to immediate judicial review of its statutory claims, because it would suffer irreparable harm if it were forced to wait until after the agency initiated an enforcement action. *Ibid.* The Court disagreed, holding that the statutory scheme was "consistent with due process" even though it provided for only postenforcement review. *Id.*, at 218. Thus, the Court rejected the company's constitutional claim "not on preclusion grounds but on the merits." *Id.*, at 219 (SCALIA, J., concurring in part and concurring in judgment). The heart of the preclusion analysis was that the company could not use a preenforcement challenge to obtain judicial review of statutory claims that Congress had clearly intended to channel into administrative review.*

C

By requiring facial constitutional claims to be filed before the Board, the majority's holding sets up an odd sequence of procedural hoops for petitioners to jump through. As the

*The majority contends that the petitioner in *Thunder Basin* really had two distinct constitutional claims. The primary constitutional claim was a "due process challenge to a statute that permitted a regulatory agency, before a hearing, to immediately fine the petitioner for noncompliance with the statute." *Ante*, at 17, n. 6. On top of this, according to the majority, the petitioner also had a separate constitutional claim, which asserted that precluding initial judicial review of the first constitutional claim would violate due process. In the majority's view, only the latter claim was rejected on the merits. But this hairsplitting makes no difference. The entire thrust of the petitioner's constitutional argument was simply that proceeding through the statutory scheme would make meaningful judicial review impossible. The Court rejected that argument, effectively disposing of any constitutional infirmity that the petitioner alleged. Unlike in the present case, there was no freestanding constitutional claim attacking the validity of the statutory framework on substantive rather than procedural grounds.

Government concedes, the Board is powerless to adjudicate facial constitutional claims, and so these claims cannot be addressed on the merits until they reach the Federal Circuit on appeal. As a result, the Federal Circuit will be forced to address the claims in the first instance, without the benefit of any relevant factfinding at the administrative level. This is a strange result, because "statutes that provide for only a single level of judicial review in the courts of appeals are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record." *McNary*, 498 U. S., at 497 (internal quotation marks omitted).

The Government admits that the absence of first-tier factfinding might very well result in "the initial record" being "insufficient to permit meaningful consideration of a constitutional claim," but suggests that the court could always "remand the case to the [Board] for further factual development." Brief for Respondents 41. The majority accepts this solution, *ante*, at 19, but it is hard to see how it will work in practice. Without any authority to decide merits issues, the Board may find it difficult to adjudicate disputes about the relevancy of evidence sought in discovery. Nor will the Board find it easy to figure out which facts it must find before sending the case back to the Federal Circuit.

Even if these problems can be overcome, that will not resolve the needless complexity of the majority's approach. According to the majority, petitioners should file their claims with the Board, which must then kick the claims up to the Federal Circuit, which must then remand the claims back to the Board, which must then develop the record and send the case back to the Federal Circuit, which can only then consider the constitutional issues.

To be sure, this might be sufficient to afford "meaningful review" of petitioners' claims, *ante*, at 21, but that is not the only consideration. The question is whether it is "fairly discernible" that Congress intended to impose these pinball

procedural requirements instead of permitting petitioners' claims to be decided in a regular lawsuit in federal district court. And why would it? As already noted, the benefits of preventing claim splitting are considerably reduced with respect to facial constitutional claims that are wholly collateral to an administrative proceeding. Because collateral constitutional claims have no overlap with the issues of law and fact that will pertain to the administrative proceeding, allowing the constitutional claims to be adjudicated separately before a district court does not invite wasteful or duplicative review. It simply allows the district court to develop the factual record and then provide a first-tier legal analysis, thereby enhancing both the quality and efficiency of appellate review.

To the extent that there is some need to prevent claim splitting, that purpose is already served by ordinary principles of claim preclusion. Plaintiffs generally must bring all claims arising out of a common set of facts in a single lawsuit, and federal district courts have discretion to enforce that requirement as necessary "to avoid duplicative litigation." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976); *Stone* v. *Department of Aviation*, 453 F. 3d 1271, 1278 (CA10 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions"). See also 18 C. Wright et al., Federal Practice and Procedure § 4406, p. 40 (2d ed. 2002, Supp. 2011) (discussing "principles of 'claim splitting' that are similar to claim preclusion, but that do not require a prior judgment"). Thus, if an aggrieved employee goes to a district court with claims that would duplicate the factfinding or legal analysis of a separate Board proceeding, the district court would be free to dismiss the case.

The majority suggests that its approach will allow the Board to resolve some cases on nonconstitutional grounds,

thus avoiding needless adjudication of constitutional issues. See *ante*, at 22–23. But achieving that goal does not require the blunt instrument of jurisdictional preclusion. District courts have broad discretion to manage their dockets, including the power to refrain from reviewing a constitutional claim pending adjudication of a nonconstitutional claim that might moot the case. See *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952) (acknowledging the equitable discretion of courts, in furtherance of "[w]ise judicial administration" and "conservation of judicial resources," to stay proceedings to prevent "two litigations where one will suffice" (internal quotation marks omitted)). In short, the district courts are well equipped to guard against piecemeal litigation without any help from the majority's holding.

Finally, the majority contends that channeling facial constitutional claims through the Board is necessary to provide "clear guidance about the proper forum for the employee's claims at the outset of the case." *Ante*, at 15. Because it can be hard to tell the difference between facial and as-applied challenges, the majority argues, it is less confusing simply to require that all claims must be brought before the Board. This is a red herring. Labels aside, the most sensible rule would be to allow initial judicial review of constitutional claims that attack the validity of a statute based on its inherent characteristics, not as a result of how the statute has been applied. That line is bright enough, and the distinction is already one that the Board must draw based on its own determination that it can hear some as-applied challenges but lacks "authority to determine the constitutionality of statutes." *Malone*, 13 M. S. P. B., at 83.

## IV

The presumptive power of the federal courts to hear constitutional challenges is well established. In this case, however, the majority relies on a very weak set of inferences to

strip the courts of their original jurisdiction over petitioners' claims. Because I believe Congress would have been very surprised to learn that it implied this result when it passed the CSRA, I respectfully dissent.

Syllabus

# PARKER, WARDEN *v.* MATTHEWS

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

No. 11–845. Decided June 11, 2012

Respondent Matthews argued at trial that he suffered from an "extreme emotional disturbance" that reduced his murder charge to first-degree manslaughter under Kentucky law. He was nevertheless convicted of murder and sentenced to death. The Kentucky Supreme Court affirmed, rejecting Matthews' claim that the evidence was insufficient to prove a lack of extreme emotional disturbance and his claim of prosecutorial misconduct. The District Court dismissed Matthews' subsequent federal habeas petition, but the Sixth Circuit reversed with instructions to grant relief.

*Held:* The Sixth Circuit lacked authority under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to issue a writ of habeas corpus here. The Kentucky Supreme Court's rejection of Matthews' two claims was neither "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court nor "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U. S. C. § 2254(d). The Sixth Circuit first concluded that the State Supreme Court had impermissibly assigned the burden of proof on the extreme emotional disturbance question to Matthews rather than the Commonwealth. But the case, as submitted to the jury, assigned the burden to the Commonwealth, the jury found that burden carried, and the State Supreme Court found the evidence adequate to sustain that finding. Given the deference afforded both to juries and to state courts, the Kentucky Supreme Court's rejection of Matthews' sufficiency claim controls. The Sixth Circuit also concluded that the prosecutor's closing remarks suggested collusion between the attorney and the defendant and thereby denied Matthews due process. But no precedent of this Court prohibits a prosecutor from emphasizing a defendant's motive to exaggerate exculpatory facts, and the Sixth Circuit's own precedents do not constitute the "clearly established Federal law" necessary for habeas relief under AEDPA. See *Renico* v. *Lett*, 559 U. S. 766, 778–779.

Certiorari granted; 651 F. 3d 489, reversed and remanded.

PER CURIAM.

In this habeas case, the United States Court of Appeals for the Sixth Circuit set aside two 29-year-old murder convictions based on the flimsiest of rationales. The court's decision is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 559 U. S. 766, 779 (2010). We therefore grant the petition for certiorari and reverse.

## I

Between 1 and 2 a.m. on the morning of June 29, 1981, respondent David Eugene Matthews broke into the Louisville home he had until recently shared with his estranged wife, Mary Marlene Matthews (Marlene). At the time, Matthews' mother-in-law, Magdalene Cruse, was staying at the home with her daughter. Matthews found Cruse in bed and shot her in the head at pointblank range, using a gun he had purchased with borrowed funds hours before. Matthews left Cruse there mortally wounded and went into the next room, where he found his wife. He had sexual relations with her once or twice; stayed with her until about 6 a.m.; and then shot her twice, killing her. Cruse would die from her wound later that day.

Matthews was apprehended that morning at his mother's house, where he had already begun to wash the clothes he wore during the crime. Later in the day, police officers found the murder weapon secreted below the floorboards of a backyard shed on the property. At the police station, Matthews made a tape-recorded statement to a police detective in which he denied responsibility for the murders.

A grand jury indicted Matthews for the two murders and for burglary. At trial, he did not contest that he killed the two victims. Instead, he sought to show that he had acted under "extreme emotional disturbance," which under Ken-

tucky law serves to reduce a homicide that would otherwise be murder to first-degree manslaughter. Ky. Rev. Stat. Ann. §§ 507.020(1)(a), 507.030(1)(b) (West 2006). As support for that claim, Matthews pointed to the troubled history of his marriage with Marlene. Matthews and his wife had been frequently separated from one another, and their periods of separation were marked by extreme hostility. Marlene would regularly procure criminal warrants against Matthews; several weeks before the murders she obtained one charging Matthews with sexual abuse of Marlene's 6-year-old daughter, which had led to Matthews' spending roughly three weeks in jail. Witnesses also testified that Marlene sought to control Matthews when they were together and would yell at him from across the street when they were separated; and Matthews' mother recounted that Marlene would leave the couple's young child crying in the street late at night outside the house where Matthews was sleeping in order to antagonize him.

Matthews also introduced the testimony of a psychiatrist, Dr. Lee Chutkow, who had evaluated Matthews. Dr. Chutkow related what Matthews had told him about the murders, including that Matthews had been drinking heavily and taking Valium and a stimulant drug. Dr. Chutkow testified that he had diagnosed Matthews as suffering from an adjustment disorder, which he described as a "temporary emotional and behavioral disturbance in individuals who are subject to a variety of stresses," that would temporarily impair a person's judgment and cause symptoms such as "anxiety, nervousness, depression, even suicide attempts or attempts to hurt other people." 6 Record 558. Dr. Chutkow testified to his opinion that Matthews was acting under the influence of extreme emotional disturbance at the time of the murders—in particular, that he experienced "extreme tension, irritability, and almost a kind of fear of his late wife," *id.*, at 567, whom he perceived as having tormented and emasculated him.

The jury convicted Matthews on all charges, and he was sentenced to death. The Kentucky Supreme Court affirmed the convictions and sentence, rejecting Matthews' 37 claims of error. *Matthews* v. *Commonwealth*, 709 S. W. 2d 414, 417 (1985). In response to Matthews' argument that the evidence was insufficient to establish that he had acted in the absence of extreme emotional disturbance, the court concluded that the evidence regarding Matthews' "conduct before, during and after the crimes was more than sufficient to support the jury's findings of capital murder." *Id.*, at 421. A claim that the prosecutor had committed misconduct during his closing argument was rejected on the merits, but without discussion.

Following an unsuccessful state postconviction proceeding, Matthews filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Western District of Kentucky. Matthews contended, among other things, that the Kentucky Supreme Court had contravened clearly established federal law in rejecting his claim that the evidence was insufficient to prove that he had not acted under the influence of extreme emotional disturbance and in rejecting his claim of prosecutorial misconduct. The District Court dismissed the petition, but a divided panel of the Sixth Circuit reversed with instructions to grant relief. 651 F. 3d 489 (2011).

## II

Under AEDPA, the Sixth Circuit had no authority to issue the writ of habeas corpus unless the Kentucky Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d). The Sixth Circuit gave two grounds for its conclusion that Matthews was entitled to relief under this "difficult to meet . . . and highly deferential standard,"

*Cullen* v. *Pinholster*, 563 U. S. 170, 181 (2011) (internal quotation marks omitted). Neither is valid.

A

First, the Sixth Circuit held that the Kentucky Supreme Court had impermissibly shifted to Matthews the burden of proving extreme emotional disturbance, and that the Commonwealth had failed to prove the absence of extreme emotional disturbance beyond a reasonable doubt. The Sixth Circuit reasoned that, at the time Matthews committed his offenses, the allocation of the burden of proof on extreme emotional disturbance was governed by the Kentucky Supreme Court's decision in *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 108 (1980), which placed the burden of producing evidence on the defendant, but left the burden of proving the absence of extreme emotional disturbance with the Commonwealth in those cases in which the defendant had introduced evidence sufficient to raise a reasonable doubt on the issue. According to the Sixth Circuit, however, the Kentucky Supreme Court departed from that understanding in Matthews' case and placed the burden of proving extreme emotional disturbance "entirely on the defendant," 651 F. 3d, at 500.

The Sixth Circuit's interpretation is supported by certain aspects of the Kentucky Supreme Court's opinion in Matthews' case. For example, the state court indicated that Matthews had "present[ed] extensive evidence" of his extreme emotional disturbance, yet the court rejected his sufficiency-of-the-evidence claim by finding the evidence he had presented "far from overwhelming," rather than by stating that it failed to raise a reasonable doubt. *Matthews*, *supra*, at 420–421. The state court also observed that it had recently clarified in *Wellman* v. *Commonwealth*, 694 S. W. 2d 696 (1985), that "absence of extreme emotional disturbance is not an element of the crime of murder which the Commonwealth must affirmatively prove." *Matthews*, *supra*, at 421. In the Sixth Circuit's view, the Kentucky Supreme Court's

reliance on this *Wellman* formulation of extreme emotional disturbance in resolving Matthews' appeal violated the Due Process Clause, as construed by this Court in *Bouie* v. *City of Columbia*, 378 U. S. 347, 354 (1964), because it involved the retroactive application of an " 'unexpected and indefensible' " judicial revision of the Kentucky murder statute.

The Kentucky Supreme Court's initial assessment of the evidence and reliance upon *Wellman* would be relevant if they formed the sole basis for denial of Matthews' sufficiency-of-the-evidence claim. It is not clear, however, that they did. The Kentucky Supreme Court explained that "[t]he trial court's instructions in regard to extreme emotional disturbance were adequate, and the proof supported the jury's findings of intentional murder." 709 S. W. 2d, at 421. Those jury instructions required the jury to find beyond a reasonable doubt that Matthews had not acted "under the influence of extreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be." 6 Record 625, 628–629. The case had been submitted to the jury with the burden assigned to the Commonwealth, the jury had found that burden carried, and the Kentucky Supreme Court found the evidence adequate to sustain that finding. That ground was sufficient to reject Matthews' claim, so it is irrelevant that the court also invoked a ground of questionable validity. See *Wetzel* v. *Lambert*, 565 U. S. 520, 524–525 (2012) *(per curiam)*.[1]

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[1] An ambiguously worded footnote in the Sixth Circuit's opinion, see 651 F. 3d 489, 504, n. 5 (2011), suggests that the court may have found an additional due process violation. The court referred to a statement in the Kentucky Supreme Court's decision in *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 109 (1980), that "[u]nless the evidence raising the issue [of extreme emotional disturbance] is of such probative force that otherwise the defendant would be entitled as a matter of law to an acquittal on the higher charge (murder), the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof." Relying on its own opinion in Gall's federal habeas proceeding, *Gall* v. *Parker*, 231 F. 3d 265

The Sixth Circuit's opinion also challenges the conclusion that the evidence supported a finding of no extreme emotional disturbance. We have said that "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial," *Cavazos* v. *Smith*, 565 U. S. 1, 2 (2011) *(per curiam)*. The evidence is sufficient to support a conviction whenever, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979). And a state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas unless the "decision was 'objectively unreasonable.'" *Cavazos*, *supra*, at 2.

In light of this twice-deferential standard, it is abundantly clear that the Kentucky Supreme Court's rejection of Matthews' sufficiency claim is controlling in this federal habeas proceeding. The Sixth Circuit noted that Dr. Chutkow expressed an opinion that Matthews was under the influence of extreme emotional disturbance at the time of the murders, and did not retreat from that opinion on cross-examination. But there was ample evidence pointing in the other direction as well. As the Kentucky Supreme Court observed, Mat-

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(CA6 2000) *(Gall II)*, the Sixth Circuit suggested that the quoted statement "require[d] a defendant to bear the heavy burden of disproving an element of a crime beyond a reasonable doubt," 651 F. 3d, at 504, n. 5, in violation of this Court's decision in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). That is not so. The statement explicitly acknowledges that the burden of proof rests with the prosecution, but merely asserts that when the burden of production is assigned to the defendant the jury may find the prosecution's burden of proof satisfied without introduction of negating evidence, unless the defendant's evidence is so probative as to establish reasonable doubt as a matter of law. That seems to us a truism. See 2 J. Strong, McCormick on Evidence § 338, pp. 419–420 (5th ed. 1999). Our opinion in *Mullaney* addressed a situation in which the burden of persuasion *was* shifted to the defendant, see 421 U. S., at 702, and n. 31; it does not remotely show that the Kentucky Supreme Court's truism contravened clearly established federal law.

thews' claim of extreme emotional disturbance was belied by "the circumstances of the crime," 709 S. W. 2d, at 421—including the facts that he borrowed money to purchase the murder weapon the day of the murders, that he waited several hours after buying the gun before starting for his wife's home, and that he delayed several hours between shooting his mother-in-law and killing his wife. The claim was also belied by his behavior after the murders, including his "[taking] steps to hide the gun and clean his clothes," and later "giv[ing] a false statement to the police." *Ibid.* The Sixth Circuit discounted this evidence because Dr. Chutkow testified that Matthews' deliberateness and consciousness of wrongdoing were not inconsistent with the diagnosis of extreme emotional disturbance. 651 F. 3d, at 504, n. 4. But expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that *the jurors* were entitled to consider the tension between Dr. Chutkow's testimony and their own commonsense understanding of emotional disturbance. In resolving the conflict in favor of Dr. Chutkow's testimony, the Sixth Circuit overstepped the proper limits of its authority. See *Jackson*, *supra*, at 326.

More fundamentally, the Sixth Circuit did not appear to consider the possibility that the jury could have found the symptoms described by Dr. Chutkow inadequate to establish what is required to reduce murder to manslaughter under Kentucky law: that Matthews "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Ky. Rev. Stat. Ann. § 507.020(1)(a). Dr. Chutkow himself agreed that many people face tension and anxiety—two symptoms he attributed to Matthews. 6 Record 579–580. And he agreed that many people suffer from adjustment disorders. *Id.*, at 592. But of course very

few people commit murders. In light of these points, which bear on the proper characterization of Matthews' mental condition and the reasonableness of his conduct, the Kentucky Supreme Court made no objectively unreasonable error in concluding that the question of extreme emotional disturbance was properly committed to the jury for resolution.

B

As a second ground for its decision, the Sixth Circuit held that certain remarks made by the prosecutor during his closing argument constituted a denial of due process. This claim was rejected on the merits by the Kentucky Supreme Court (albeit without analysis) and therefore receives deferential review under the AEDPA standard. See *Harrington* v. *Richter*, 562 U. S. 86, 98 (2011). The "clearly established Federal law" relevant here is our decision in *Darden* v. *Wainwright*, 477 U. S. 168 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.*, at 181 (quoting *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974)).

According to the Sixth Circuit, the prosecutor violated *Darden* by suggesting that Matthews had colluded with his lawyer, David Busse, and with Dr. Chutkow to manufacture an extreme emotional disturbance defense. But although the Sixth Circuit quoted a lengthy section of the prosecutor's closing argument which could be understood as raising a charge of collusion,[2] the court did not address the prosecu-

[2] The full text of the section the Sixth Circuit found objectionable is as follows:

"He's arraigned, he meets with his attorney and either he tells his attorney, I did it or I didn't do it. One or the other. But, the attorney knows what the evidence is. By the way, the defendant knows what the evidence is, because while he's giving this statement, it's sitting right in front of him at the Homicide Office. Here's the gun. Here's the shoes, David. 'Nah,

tor's statement that immediately followed the quoted portion and expressly disavowed any suggestion of collusion:

> "And that's not to say that Mr. Busse is unethical. Not at all. He is entitled to the best defense he can get, but that's the only defense he has, what the doctor has to say, and that's not to say that the doctor gets on the stand and perjures himself. He's telling you the truth. He wouldn't perjure himself for anything. He's telling you the truth, Ladies and Gentlemen." 7 Record 674.

With the prosecutor's immediate clarification that he was *not* alleging collusion in view, the Sixth Circuit's conclusion that this feature of the closing argument clearly violated due process is unsupportable. Nor does the prosecutor's sugges-

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nah, I never saw it before. I never borrowed a gun. I never borrowed any money. I wasn't there. I was at home in bed asleep.' He's denying it there.

"And what does his attorney think? His attorney sees all this evidence, and he's going through his mind, what kind of legal excuse can I have? What is this man's defense? Self protection? No, there's no proof of a gun found at that house on 310 North 24th Street. No proof of that. Protection of another? The defendant's mother is at home on Lytle Street. He isn't protecting her over there on North 24th Street. Intoxication? Yeah, well, he was drinking that night. Maybe that will mean something.

"But that isn't enough, Ladies and Gentlemen. Mr. Busse has to contact a psychiatrist to see his client, and he comes in and sees his client one month after the day of his arrest, one month to the day, and by that time, Mr. David Eugene Matthews sees his defense in the form of Doctor Chutkow, and do you think this guy is aware of what's going on? He's competent. He can work with his attorney, and he enhances his story to Doctor Chutkow. Yeah, I was drinking. I was drinking a lot. I was taking a lot of pills, too, and let me tell you about the pills I was taking.

"Don't you think he has a purpose in enhancing his story to the psychiatrist? Don't you think he would exaggerate his fears about his wife, his mother-in-law, and all these other things about what other people might be doing to his mother? Don't you think he would overstate the extent of his intoxication to his psychiatrist? It's the defense of last resort, Ladies and Gentlemen. He has no excuse for his conduct, but that's his only way out." 7 Record 673–674.

tion that Matthews had "enhance[d] his story to Doctor Chutkow," *ibid.*, suffice to justify the Sixth Circuit's grant of habeas relief. In context, that statement is clearly a part of a broader argument that Matthews had a motive to exaggerate his emotional disturbance in his meetings with Dr. Chutkow. Shortly after the quoted statement, the prosecutor continued with a series of rhetorical questions:

> "Don't you think he would exaggerate his fears about his wife, his mother-in-law, and all these other things about what other people might be doing to his mother? Don't you think he would overstate the extent of his intoxication to his psychiatrist?" *Ibid.*

The Sixth Circuit cited no precedent of this Court in support of its conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts.

The Sixth Circuit also suggested that the prosecutor "denigrated the [extreme emotional disturbance] defense itself," 651 F. 3d, at 506, by stating that "[i]t's the defense of last resort, Ladies and Gentlemen. He has no excuse for his conduct, but that's his only way out." 7 Record 674. But the Kentucky Supreme Court could have understood this comment too as having been directed at Matthews' motive to exaggerate his emotional disturbance—*i. e.*, as emphasizing that the unavailability of any other defense raised the stakes with respect to extreme emotional disturbance.

Moreover, even if the comment is understood as directing the jury's attention to inappropriate considerations, that would not establish that the Kentucky Supreme Court's rejection of the *Darden* prosecutorial misconduct claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U. S., at 103. Indeed, *Darden* itself held that a closing argument considerably more inflammatory than the one at issue here did

not warrant habeas relief. See 477 U. S., at 180, n. 11 (prosecutor referred to the defendant as an " 'animal' "); *id.*, at 180, n. 12 (" 'I wish I could see [the defendant] with no face, blown away by a shotgun' "). Particularly because the *Darden* standard is a very general one, leaving courts "more leeway . . . in reaching outcomes in case-by-case determinations," *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004), the Sixth Circuit had no warrant to set aside the Kentucky Supreme Court's conclusion.

The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision. After quoting the governing standard from our decision in *Darden*, the Sixth Circuit added that it would "engag[e] in a two step inquiry to determine whether the prosecutorial misconduct rises to the level of unconstitutionality. 'To satisfy the standard . . . , the conduct must be both improper and flagrant.' " 651 F. 3d, at 505 (quoting *Broom* v. *Mitchell*, 441 F. 3d 392, 412 (CA6 2006)). It went on to evaluate the flagrancy step of that inquiry in light of four factors derived from its own precedent: " '(1) the likelihood that the remarks . . . tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against [Matthews].' " 651 F. 3d, at 506 (quoting *Broom*, *supra*, at 412). And it stated that "the prosecutor's comments in this case were sufficiently similar to" certain comments held unconstitutional in its prior decision in *Gall II*, 231 F. 3d 265 (CA6 2000), "that they rise to the level of impropriety." 651 F. 3d, at 506.

As we explained in correcting an identical error by the Sixth Circuit two Terms ago, see *Renico*, 559 U. S., at 778–779, circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court," 28 U. S. C. § 2254(d)(1). It therefore cannot form the basis for

habeas relief under AEDPA. Nor can the Sixth Circuit's reliance on its own precedents be defended in this case on the ground that they merely reflect what has been "clearly established" by our cases. The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here. To make matters worse, the Sixth Circuit decided *Gall II* under pre-AEDPA law, see 231 F. 3d, at 283, n. 2, so that case did not even *purport* to reflect clearly established law as set out in this Court's holdings. It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief.

* * *

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Syllabus

# WILLIAMS *v.* ILLINOIS

## CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 10–8505. Argued December 6, 2011—Decided June 18, 2012

At petitioner's bench trial for rape, Sandra Lambatos, a forensic specialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of petitioner's blood. She testified that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, L. J., were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude, on Confrontation Clause grounds, Lambatos' testimony insofar as it implicated events at Cellmark, but the prosecution said that petitioner's confrontation rights were satisfied because he had the opportunity to cross-examine the expert who had testified as to the match. The prosecutor argued that Illinois Rule of Evidence 703 permitted an expert to disclose facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts, and that any deficiency went to the weight of the evidence, not its admissibility. The trial court admitted the evidence and found petitioner guilty. Both the Illinois Appellate Court and the State Supreme Court affirmed, concluding that Lambatos' testimony did not violate petitioner's confrontation rights because Cellmark's report was not offered into evidence to prove the truth of the matter asserted.

*Held:* The judgment is affirmed.

238 Ill. 2d 125, 939 N. E. 2d 268, affirmed.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded that the form of expert testimony given in this case does not violate the Confrontation Clause. Pp. 64–86.

(a) Before *Crawford* v. *Washington*, 541 U. S. 36, this Court took the view that the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule. In *Crawford*, the Court held that such statements could be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.*, at 59. In both *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, and *Bullcoming* v. *New Mexico*, 564 U. S. 647, two of the many cases that have arisen

from *Crawford*, this Court ruled that scientific reports could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation. In each case, the report at issue "contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial." 564 U. S., at 656–657. Here, in contrast, the question is the constitutionality of allowing an expert witness to discuss others' testimonial statements if those statements are not themselves admitted as evidence. Pp. 64–67.

(b) An expert witness may voice an opinion based on facts concerning the events at issue even if the expert lacks firsthand knowledge of those facts. A long tradition in American courts permits an expert to testify in the form of a "hypothetical question," where the expert assumes the truth of factual predicates and then offers testimony based on those assumptions. See *Forsyth* v. *Doolittle*, 120 U. S. 73, 77. Modern evidence rules dispense with the need for hypothetical questions and permit an expert to base an opinion on facts "made known to the expert at or before the hearing," though such reliance does not constitute admissible evidence of the underlying information. Ill. Rule Evid. 703; Fed. Rule Evid. 703. Both Illinois and Federal Rules bar an expert from disclosing the inadmissible evidence in jury trials but not in bench trials. This is important because *Crawford*, while departing from prior Confrontation Clause precedent in other respects, reaffirmed the proposition that the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U. S., at 59, n. 9. Pp. 67–70.

(c) For Confrontation Clause purposes, the references to Cellmark in the trial record either were not hearsay or were not offered for the truth of the matter asserted. Pp. 70–81.

(1) Petitioner's confrontation right was not violated when Lambatos answered "yes" to a question about whether there was a match between the DNA profile "found in semen from the vaginal swabs of [L. J.]" and the one identified as petitioner's. Under Illinois law, this putatively offending phrase was not admissible for the purpose of proving the truth of the matter asserted—*i. e.*, that the matching DNA profile was "found in semen from the vaginal swabs." Rather, that fact was a mere premise of the prosecutor's question, and Lambatos simply assumed it to be true in giving her answer. Because this was a bench trial, the Court assumes that the trial judge understood that the testimony was not admissible to prove the truth of the matter asserted. It is also unlikely that the judge took the testimony as providing chain-of-custody evidence. The record does not support such an understanding; no trial judge is likely to be so confused; and the admissible evidence left little room for argument that Cellmark's sample came from any

source but L. J.'s swabs, since the profile matched the very man she identified in a lineup and at trial as her attacker. Pp. 70–75.

(2) Nor did the substance of Cellmark's report need to be introduced in order to show that Cellmark's profile was based on the semen in L. J.'s swabs or that its procedures were reliable. The issue here is whether petitioner's confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion. If there were no proof that Cellmark's profile was accurate, Lambatos' testimony would be irrelevant, but the Confrontation Clause bars not the admission of irrelevant evidence, but the admission of testimonial statements by declarants who are not subject to cross-examination. Here, the trial record does not lack admissible evidence with respect to the source of the sample tested by Cellmark or the reliability of its profile. The State offered conventional chain-of-custody evidence, and the match between Cellmark's profile and petitioner's was telling confirmation that Cellmark's profile was deduced from the semen on L. J.'s swabs. The match also provided strong circumstantial evidence about the reliability of Cellmark's work. Pp. 75–79.

(3) This conclusion is consistent with *Bullcoming* and *Melendez-Diaz*, where forensic reports were introduced for the purpose of proving the truth of what they asserted. In contrast, Cellmark's report was considered for the limited purpose of seeing whether it matched something else, and the relevance of that match was established by independent circumstantial evidence showing that the report was based on a sample from the crime scene. There are at least four safeguards to prevent abuses in such situations. First, trial courts can screen out experts who would act as conduits for hearsay by strictly enforcing the requirement that experts display genuine "scientific, technical, or other specialized knowledge" to help the trier of fact understand the evidence or determine a fact at issue. Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, a trial judge may instruct the jury that the statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence establishing its underlying premises. Fourth, if the prosecution cannot muster independent admissible evidence to prove foundational facts, the expert's testimony cannot be given weight by the trier of fact. Pp. 79–81.

(d) Even if Cellmark's report had been introduced for its truth, there would have been no Confrontation Clause violation. The Clause refers to testimony by "witnesses against" an accused, prohibiting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (1) out-of-court statements having the pri-

mary purpose of accusing a targeted individual of engaging in criminal conduct, and (2) formalized statements such as affidavits, depositions, prior testimony, or confessions. These characteristics were present in every post-*Crawford* case in which a Confrontation Clause violation has been found, except for *Hammon* v. *Indiana*, 547 U. S. 813. But, even in *Hammon*, the particular statement, elicited during police interrogation, had the primary purpose of accusing a targeted individual. A person who makes a statement to resolve an ongoing emergency is not like a trial witness because the declarant's purpose is to bring an end to an ongoing threat. *Michigan* v. *Bryant*, 562 U. S. 344, 358. Such a statement's admissibility "is the concern of . . . rules of evidence, not the Confrontation Clause. " *Id.*, at 359. The forensic reports in *Melendez-Diaz* and *Bullcoming* ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving a particular criminal defendant's guilt. But the Cellmark report's primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Nor could anyone at Cellmark possibly know that the profile would inculpate petitioner. There was thus no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile. *Bryant*, *supra*, at 361. Lab technicians producing a DNA profile generally have no way of knowing whether it will turn out to be incriminating, exonerating, or both. And with numerous technicians working on a profile, it is likely that each technician's sole purpose is to perform a task in accordance with accepted procedures. The knowledge that defects in a DNA profile may be detected from the profile itself provides a further safeguard. Pp. 81–86.

JUSTICE THOMAS concluded that the disclosure of Cellmark's out-of-court statements through Lambatos' expert testimony did not violate the Confrontation Clause solely because Cellmark's statements lacked the requisite "formality and solemnity" to be considered " 'testimonial,' " see *Michigan* v. *Bryant*, 562 U. S. 344, 378 (THOMAS, J., concurring in judgment). Pp. 103–118.

(a) There was no plausible reason for the introduction of Cellmark's statements other than to establish their truth. Pp. 104–110.

(1) Illinois Rule of Evidence 703 permits an expert to base his opinion on facts about which he lacks personal knowledge and to disclose those facts to the trier of fact. Under Illinois law, such facts are not admitted for their truth, but only to explain the basis of the expert's opinion. See *People* v. *Pasch*, 152 Ill. 2d 133. But state evidence rules do not trump a defendant's constitutional right to confrontation. This Court ensures that an out-of-court statement was introduced for a

"legitimate, nonhearsay purpose" before relying on the not-for-its-truth rationale to dismiss the Confrontation Clause's application. See *Tennessee* v. *Street*, 471 U. S. 409, 417. Statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose because, to use the basis testimony in evaluating the expert's opinion, the factfinder must consider the truth of the basis testimony. This commonsense conclusion is not undermined by any historical practice exempting expert basis testimony from the rigors of the Confrontation Clause. Before the Federal Rules of Evidence were adopted in 1975, an expert could render an opinion based only on facts that the expert had personally perceived or learned at trial. In 1975, that universe of facts was expanded to include facts that the expert learned out of court by means other than his own perception. The disclosure of such facts raises Confrontation Clause concerns. Pp. 104–107.

(2) Those concerns are fully applicable here. In concluding that petitioner's DNA profile matched the profile derived from L. J.'s swabs, Lambatos relied on Cellmark's out-of-court statements that its profile was in fact derived from those swabs, rather than from some other source. Thus, the validity of Lambatos' opinion ultimately turned on the truth of Cellmark's statements. Pp. 107–109.

(b) These statements, however, were not "testimonial" for purposes of the Confrontation Clause, which "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford* v. *Washington*, 541 U. S. 36, 51. "'Testimony,'" in turn, is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Ibid.* In light of its text, the Confrontation Clause regulates only the use of statements bearing "indicia of solemnity." *Davis* v. *Washington*, 547 U. S. 813, 836–837, 840 (opinion of THOMAS, J.). This test comports with history because solemnity marked the practices that the Confrontation Clause was designed to eliminate, namely, the *ex parte* examination of witnesses under English bail and committal statutes. See *id.*, at 835. Accordingly, the Clause reaches "'formalized testimonial materials,'" such as depositions, affidavits, and prior testimony, or statements resulting from "'formalized dialogue,'" such as custodial interrogation. *Bryant*, *supra*, at 379 (THOMAS, J., concurring in judgment). Applying these principles, Cellmark's report is not a statement by a "witnes[s]" under the Confrontation Clause. It lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. And, although it was produced at the request of law enforcement, it was not the product of formalized dialogue resembling custodial interrogation. *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, and *Bullcoming* v. *New Mexico*, 564 U. S. 647, distinguished. Pp. 110–117.

Syllabus

ALITO, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 86. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 103. KAGAN, J., filed a dissenting opinion, in which SCALIA, GINSBURG, and SOTOMAYOR, JJ., joined, *post*, p. 118.

*Brian W. Carroll* argued the cause for petitioner. With him on the briefs were *Michael J. Pelletier*, *Alan D. Goldberg*, and *James E. Chadd*.

*Anita Alvarez* argued the cause for respondent. With her on the brief were *Lisa Madigan*, Attorney General of Illinois, *Alan J. Spellberg*, *Ashley A. Romito*, *Michelle Katz*, and *Amy Watroba Kern*.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, and *Anthony A. Yang*.*

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*Briefs of *amici curiae* urging reversal were filed for the California Public Defenders Association et al. by *Donald J. Bartell* and *John N. Aquilina;* for the Innocence Network by *Keith A. Findley;* for the Public Defender Service for the District of Columbia et al. by *Sandra K. Levick*, *Catharine F. Easterly*, and *Jeffrey L. Fisher;* and for Richard D. Friedman by *Mr. Friedman*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Michael DeWine*, Attorney General of Ohio, *Alexandra T. Schimmer*, Solicitor General, *Elisabeth A. Long*, Deputy Solicitor, and *Samuel Peterson*, Assistant Attorney General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Leonardo M. Rapadas* of Guam, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Mi-*

JUSTICE ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

In this case, we decide whether *Crawford* v. *Washington*, 541 U. S. 36, 50 (2004), precludes an expert witness from testifying in a manner that has long been allowed under the law of evidence. Specifically, does *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify? We also decide whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof.

In petitioner's bench trial for rape, the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of petitioner's blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile. The expert also explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark. The expert made no other statement that was offered for the

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*chael A. Delaney* of New Hampshire, *Paula T. Dow* of New Jersey, *Gary King* of New Mexico, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *John R. Kroger* of Oregon, *Linda L. Kelly* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Rob McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; for the National District Attorneys Association et al. by *Albert C. Locher* and *W. Scott Thorpe;* and for the New York County District Attorney's Office et al. by *Cyrus R. Vance, Jr.*, *Caitlin J. Halligan*, *Hilary Hassler*, *Michael A. Cardozo*, and *Paul Shechtman.*

purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced. Nevertheless, petitioner contends that the expert's testimony violated the Confrontation Clause as interpreted in *Crawford*.

Petitioner's main argument is that the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs. But both the Illinois Appellate Court and the Illinois Supreme Court found that this statement was not admitted for the truth of the matter asserted, and it is settled that the Confrontation Clause does not bar the admission of such statements. See *id.*, at 59–60, n. 9 (citing *Tennessee* v. *Street*, 471 U. S. 409 (1985)). For more than 200 years, the law of evidence has permitted the sort of testimony that was given by the expert in this case. Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. While it was once the practice for an expert who based an opinion on assumed facts to testify in the form of an answer to a hypothetical question, modern practice does not demand this formality and, in appropriate cases, permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts. See Fed. Rule Evid. 703. That is precisely what occurred in this case, and we should not lightly "swee[p] away an accepted rule governing the admission of scientific evidence." *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 330 (2009) (KENNEDY, J., dissenting).

We now conclude that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not

offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.

As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. See *Perry* v. *New Hampshire*, 565 U. S. 228 (2012). The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a

particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.

## I

### A

On February 10, 2000, in Chicago, Illinois, a young woman, L. J., was abducted while she was walking home from work. The perpetrator forced her into his car and raped her, then robbed her of her money and other personal items and pushed her out into the street. L. J. ran home and reported the attack to her mother, who called the police. An ambulance took L. J. to the hospital, where doctors treated her wounds and took a blood sample and vaginal swabs for a sexual-assault kit. A Chicago Police detective collected the kit, labeled it with an inventory number, and sent it under seal to the Illinois State Police (ISP) lab.

At the ISP lab, a forensic scientist received the sealed kit. He conducted a chemical test that confirmed the presence of semen on the vaginal swabs, and he then resealed the kit and placed it in a secure evidence freezer.

During the period in question, the ISP lab often sent biological samples to Cellmark Diagnostics Laboratory in Germantown, Maryland, for DNA testing. There was evidence that the ISP lab sent L. J.'s vaginal swabs to Cellmark for testing and that Cellmark sent back a report containing a male DNA profile produced from semen taken from those swabs. At this time, petitioner was not under suspicion for L. J.'s rape.

Sandra Lambatos, a forensic specialist at the ISP lab, conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to a profile produced by the lab from a sample of petitioner's blood that had been taken after he was arrested on unrelated charges on August 3, 2000.

On April 17, 2001, the police conducted a lineup at which L. J. identified petitioner as her assailant. Petitioner was

then indicted for aggravated criminal sexual assault, aggravated kidnaping, and aggravated robbery. In lieu of a jury trial, petitioner chose to be tried before a state judge.

B

Petitioner's bench trial began in April 2006. In open court, L. J. again identified petitioner as her attacker. The State also offered three expert forensic witnesses to link petitioner to the crime through his DNA. First, Brian Hapack, an ISP forensic scientist, testified that he had confirmed the presence of semen on the vaginal swabs taken from L. J. by performing an acid phosphatase test. After performing this test, he testified, he resealed the evidence and left it in a secure freezer at the ISP lab.

Second, Karen Abbinanti, a state forensic analyst, testified that she had used polymerase chain reaction (PCR) and short tandem repeat (STR) techniques to develop a DNA profile from a blood sample that had been drawn from petitioner after he was arrested in August 2000. She also stated that she had entered petitioner's DNA profile into the state forensic database.

Third, the State offered Sandra Lambatos as an expert witness in forensic biology and forensic DNA analysis. On direct examination, Lambatos testified about the general process of using the PCR and STR techniques to generate DNA profiles from forensic samples such as blood and semen. She then described how these DNA profiles could be matched to an individual based on the individual's unique genetic code. In making a comparison between two DNA profiles, Lambatos stated, it is a "commonly accepted" practice within the scientific community for "one DNA expert to rely on the records of another DNA expert." App. 51. Lambatos also testified that Cellmark was an "accredited crime lab" and that, in her experience, the ISP lab routinely sent evidence samples via Federal Express to Cellmark for DNA testing in order to expedite the testing process and to

"reduce [the lab's] backlog." *Id.*, at 49–50. To keep track of evidence samples and preserve the chain of custody, Lambatos stated, she and other analysts relied on sealed shipping containers and labeled shipping manifests, and she added that experts in her field regularly relied on such protocols. *Id.*, at 50–51.

Lambatos was shown shipping manifests that were admitted into evidence as business records, and she explained what they indicated, namely, that the ISP lab had sent L. J.'s vaginal swabs to Cellmark, and that Cellmark had sent them back, along with a deduced male DNA profile. *Id.*, at 52–55. The prosecutor asked Lambatos whether there was "a computer match" between "the male DNA profile found in semen from the vaginal swabs of [L. J.]" and "[the] male DNA profile that had been identified" from petitioner's blood sample. *Id.*, at 55.

The defense attorney objected to this question for "lack of foundation," arguing that the prosecution had offered "no evidence with regard to any testing that's been done to generate a DNA profile by another lab to be testified to by this witness." *Ibid.*

The prosecutor responded: "I'm not getting at what another lab did." *Id.*, at 56. Rather, she said, she was simply asking Lambatos about "her own testing based on [DNA] information" that she had received from Cellmark. *Ibid.* The trial judge agreed, noting, "If she says she didn't do her own testing and she relied on a test of another lab and she's testifying to that, we will see what she's going to say." *Ibid.*

The prosecutor then proceeded, asking Lambatos, "Did you compare the semen that had been identified by Brian Hapack from the vaginal swabs of [L. J.] to the male DNA profile that had been identified by Karen [Abbinanti] from the blood of [petitioner]?" *Ibid.*

Lambatos answered "Yes." *Ibid.* Defense counsel lodged an objection "to the form of the question," but the trial judge overruled it. *Ibid.* Lambatos then testified

that, based on her own comparison of the two DNA profiles, she "concluded that [petitioner] cannot be excluded as a possible source of the semen identified in the vaginal swabs," and that the probability of the profile's appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." *Id.*, at 57. Asked whether she would "call this a match to [petitioner]," Lambatos answered yes, again over defense counsel's objection. *Id.*, at 58.

The Cellmark report itself was neither admitted into evidence nor shown to the factfinder. Lambatos did not quote or read from the report; nor did she identify it as the source of any of the opinions she expressed.

On cross-examination, Lambatos confirmed that she did not conduct or observe any of the testing on the vaginal swabs, and that her testimony relied on the DNA profile produced by Cellmark. *Id.*, at 59. She stated that she trusted Cellmark to do reliable work because it was an accredited lab, but she admitted she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs. *Id.*, at 59–62.

Asked whether the DNA sample might have been degraded before Cellmark analyzed it, Lambatos answered that, while degradation was technically possible, she strongly doubted it had occurred in this case. She gave two reasons. First, the ISP lab likely would have noticed the degradation before sending the evidence off to Cellmark. Second, and more important, Lambatos also noted that the data making up the DNA profile would exhibit certain telltale signs if it had been deduced from a degraded sample: The visual representation of the DNA sequence would exhibit "specific patterns" of degradation, and she "didn't see any evidence" of that from looking at the profile that Cellmark produced. *Id.*, at 81–82.

When Lambatos finished testifying, the defense moved to exclude her testimony "with regards to testing done by

[Cellmark]" based on the Confrontation Clause. *Id.*, at 90. Defense counsel argued that there was "no evidence with regards to . . . any work done by [Cellmark] to justify testimony coming into this case with regard to their analysis." *Ibid.* (alteration in original). Thus, while defense counsel objected to and sought the exclusion of Lambatos' testimony insofar as it implicated events at the Cellmark lab, defense counsel did not object to or move for the exclusion of any other portion of Lambatos' testimony, including statements regarding the contents of the shipment sent to or received back from Cellmark. See *id.*, at 55, 56, 90. See also 385 Ill. App. 3d 359, 367–368, 895 N. E. 2d 961, 968 (2008) (chain-of-custody argument based on shipping manifests waived).

The prosecution responded that petitioner's Confrontation Clause rights were satisfied because he had the opportunity to cross-examine the expert who had testified that there was a match between the DNA profiles produced by Cellmark and Abbinanti. App. 91. Invoking Illinois Rule of Evidence 703,[1] the prosecutor argued that an expert is allowed to disclose the facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts. She further argued that any deficiency in the foundation for the expert's opinion "[d]oesn't go to the admissibility of [that] testimony," but instead "goes to the weight of the testimony." App. 91.

The trial judge agreed with the prosecution and stated that "the issue is . . . what weight do you give the test, not do you exclude it." *Id.*, at 94. Accordingly, the judge stated that he would not exclude Lambatos' testimony, which

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[1] Consistent with the Federal Rules, Illinois Rule of Evidence 703 provides as follows:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

was "based on her own independent testing of the data received from [Cellmark]." *Id.*, at 94–95 (alteration in original).

The trial court found petitioner guilty of the charges against him. The State Appellate Court affirmed in relevant part, concluding that Lambatos' testimony did not violate petitioner's confrontation rights because the Cellmark report was not offered into evidence to prove the truth of the matter it asserted. See 385 Ill. App. 3d, at 369, 895 N. E. 2d, at 969–970 ("Cellmark's report was not offered for the truth of the matter asserted; rather, it was offered to provide a basis for Lambatos' opinion"). The Supreme Court of Illinois also affirmed. 238 Ill. 2d 125, 939 N. E. 2d 268 (2010). Under state law, the court noted, the Cellmark report could not be used as substantive evidence. When Lambatos referenced the report during her direct examination, she did so "for the limited purpose of explaining the basis for [her expert opinion]," not for the purpose of showing "the truth of the matter asserted" by the report. *Id.*, at 150, 939 N. E. 2d, at 282. Thus, the report was not used to establish its truth, but only "to show the underlying facts and data Lambatos used before rendering an expert opinion." *Id.*, at 145, 939 N. E. 2d, at 279.

We granted certiorari. 564 U. S. 1052 (2011).

## II

### A

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Before *Crawford*, this Court took the view that the Confrontation Clause did not bar the admission of an out-of-court statement that fell within a firmly rooted exception to the hearsay rule, see *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), but in *Crawford*, the Court adopted a fundamentally new interpretation of the confrontation right, hold-

ing that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," 541 U. S., at 59. *Crawford* has resulted in a steady stream of new cases in this Court. See *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011); *Michigan* v. *Bryant*, 562 U. S. 344 (2011); *Melendez-Diaz*, 557 U. S. 305; *Giles* v. *California*, 554 U. S. 353 (2008); *Davis* v. *Washington*, together with *Hammon* v. *Indiana*, 547 U. S. 813 (2006).

Two of these decisions involved scientific reports. In *Melendez-Diaz*, the defendant was arrested and charged with distributing and trafficking in cocaine. At trial, the prosecution introduced bags of a white powdery substance that had been found in the defendant's possession. The trial court also admitted into evidence three "certificates of analysis" from the state forensic laboratory stating that the bags had been "examined with the following results: The substance was found to contain: Cocaine." 557 U. S., at 308 (internal quotation marks omitted).

The Court held that the admission of these certificates, which were executed under oath before a notary, violated the Sixth Amendment. They were created for "the sole purpose of providing evidence against a defendant," *id.*, at 323, and were "'quite plainly affidavits,'" *id.*, at 330 (THOMAS, J., concurring). The Court emphasized that the introduction of the report to prove the nature of the substance found in the defendant's possession was tantamount to "live, in-court testimony" on that critical fact and that the certificates did "precisely what a witness does on direct examination." *Id.*, at 311 (internal quotation marks omitted). There was no doubt that the certificates were used to prove the truth of the matter they asserted. Under state law, "the sole purpose of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance." *Ibid.* (internal quotation marks omitted; emphasis deleted). On these facts, the Court said,

it was clear that the certificates were "testimonial statements" that could not be introduced unless their authors were subjected to the "'crucible of cross-examination.'" *Id.*, at 311, 317 (quoting *Crawford*, *supra*, at 61).

In *Bullcoming*, we held that another scientific report could not be used as substantive evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation. The defendant in that case had been convicted of driving while intoxicated. At trial, the court admitted into evidence a forensic report certifying that a sample of the defendant's blood had an alcohol concentration of 0.21 grams per hundred milliliters, well above the legal limit. Instead of calling the analyst who signed and certified the forensic report, the prosecution called another analyst who had not performed or observed the actual analysis, but was only familiar with the general testing procedures of the laboratory. The Court declined to accept this surrogate testimony, despite the fact that the testifying analyst was a "knowledgeable representative of the laboratory" who could "explain the lab's processes and the details of the report." 564 U. S., at 674–675 (KENNEDY, J., dissenting). The Court stated simply: "The accused's right is to be confronted with the analyst who made the certification." *Id.*, at 657.

Just as in *Melendez-Diaz*, the forensic report that was "introduce[d]" in *Bullcoming* "contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial." 564 U. S., at 657. The report was signed by the nontestifying analyst who had authored it, stating, "I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. The concentration of alcohol in this sample is based on the grams of alcohol in one hundred milliliters of blood." App. in *Bullcoming,* O. T. 2010, No. 09–10876, p. 62. Critically, the report was introduced at trial for the substantive purpose of proving the truth of the matter asserted by its out-of-court author—namely, that the defendant had a blood-alcohol

level of 0.21. This was the central fact in question at the defendant's trial, and it was dispositive of his guilt.

In concurrence, JUSTICE SOTOMAYOR highlighted the importance of the fact that the forensic report had been admitted into evidence for the purpose of proving the truth of the matter it asserted. She emphasized that "this [was] not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." 564 U. S., at 673 (opinion concurring in part) (citing Fed. Rule Evid. 703). "We would face a different question," she observed, "if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." 564 U. S., at 673.

We now confront that question.

## B

It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks firsthand knowledge of those facts.

At common law, courts developed two ways to deal with this situation. An expert could rely on facts that had already been established in the record. But because it was not always possible to proceed in this manner, and because record evidence was often disputed, courts developed the alternative practice of allowing an expert to testify in the form of a "hypothetical question." Under this approach, the expert would be asked to assume the truth of certain factual predicates, and was then asked to offer an opinion based on those assumptions. See 1 K. Broun, McCormick on Evidence § 14, p. 87 (6th ed. 2006); 1 J. Wigmore, Evidence § 677, p. 1084 (2d ed. 1923) ("If the witness is skilled enough, his opinion may be adequately obtained upon hypothetical data alone; and it is immaterial whether he has ever seen the per-

son, place or thing in question" (citation omitted)). The truth of the premises could then be established through independent evidence, and the factfinder would regard the expert's testimony to be only as credible as the premises on which it was based.

An early example of this approach comes from the English case of *Beckwith* v. *Sydebotham*, 1 Camp. 116, 170 Eng. Rep. 897 (K. B. 1807), where a party sought to prove the seaworthiness of a ship, the *Earl of Wycombe*, by calling as witnesses "several eminent surveyors of ships who had never seen the 'Earl of Wycombe.'" *Ibid.* The opposing party objected to the testimony because it relied on facts that were not known to be true, but the judge disagreed. Because the experts were "peculiarly acquainted" with "a matter of skill or science," the judge said, the "jury might be assisted" by their hypothetical opinion based on certain assumed facts. *Id.*, at 117, 170 Eng. Rep., at 897. The judge acknowledged the danger of the jury's being unduly prejudiced by wrongly assuming the truth of the hypothetical facts, but the judge noted that the experts could be asked on cross-examination what their opinion of the ship's seaworthiness would be if different hypothetical facts were assumed. If the party that had called the experts could not independently prove the truth of the premises they posited, then the experts' "opinion might not go for much; but still it was admissible evidence." *Ibid.*

There is a long tradition of the use of hypothetical questions in American courts. In 1887, for example, this Court indicated its approval of the following jury instruction:

> "As to the questions, you must understand that they are not evidence; they are mere statements to these witnesses . . . and, upon the hypothesis or assumption of these questions the witnesses are asked to give their [opinion]. You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in

> these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts." *Forsyth* v. *Doolittle*, 120 U. S. 73, 77 (internal quotation marks omitted).

Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical questions. Under both the Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are "made known to the expert at or before the hearing," but such reliance does not constitute admissible evidence of this underlying information. Ill. Rule Evid. 703; Fed. Rule Evid. 703. Accordingly, *in jury trials*, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence.[2] In bench trials, however, both the Illinois and the Federal Rules place no restriction on the revelation of such information to the factfinder. When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose. As we have noted, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U. S. 339, 346 (1981) *(per curiam)*. There is a "well-established presumption" that "*the judge [has] adhered to basic rules of procedure*" when the

[2] But disclosure of these facts or data to the jury is permitted if the value of disclosure "substantially outweighs [any] prejudicial effect," Fed. Rule Evid. 703, or "the probative value . . . outweighs the risk of unfair prejudice," *People* v. *Pasch*, 152 Ill. 2d 133, 223, 604 N. E. 2d 294, 333 (1992). When this disclosure occurs, "the underlying facts" are revealed to the jury "for the limited purpose of explaining the basis for [the expert's] opinion" and not "for the truth of the matter asserted." *Id.*, at 176, 604 N. E. 2d, at 311.

judge is acting as a factfinder. *Id.*, at 346–347 (emphasis added). See also *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1078 (1991) (Rehnquist, C. J., dissenting).

This feature of Illinois and federal law is important because *Crawford*, while departing from prior Confrontation Clause precedent in other respects, took pains to reaffirm the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U. S., at 59–60, n. 9 (citing *Tennessee* v. *Street*, 471 U. S. 409). In *Street*, the defendant claimed that the police had coerced him into adopting the confession of his alleged accomplice. The prosecution sought to rebut this claim by showing that the defendant's confession differed significantly from the accomplice's. Although the accomplice's confession was clearly a testimonial statement, the Court held that the jurors could hear it as long as they were instructed to consider that confession not for its truth, but only for the "distinctive and limited purpose" of comparing it to the defendant's confession, to see whether the two were identical. *Id.*, at 417.

## III

### A

In order to assess petitioner's Confrontation Clause argument, it is helpful to inventory exactly what Lambatos said on the stand about Cellmark. She testified to the truth of the following matters: Cellmark was an accredited lab, App. 49; the ISP occasionally sent forensic samples to Cellmark for DNA testing, *ibid.;* according to shipping manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark, *id.*, at 52–55; and, finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood, *id.*, at 55–56. Lambatos had personal knowledge of all of these matters, and therefore none of this testimony infringed petitioner's confrontation right.

Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work.

B

The principal argument advanced to show a Confrontation Clause violation concerns the phrase that Lambatos used when she referred to the DNA profile that the ISP lab received from Cellmark. This argument is developed most fully in the dissenting opinion, and therefore we refer to the dissent's discussion of this issue.

In the view of the dissent, the following is the critical portion of Lambatos' testimony, with the particular words that the dissent finds objectionable italicized:

> "Q Was there a computer match generated of the male DNA profile *found in semen from the vaginal swabs of [L. J.]* to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> "A Yes, there was." *Post*, at 124 (opinion of KAGAN, J.) (quoting App. 56; emphasis added).

According to the dissent, the italicized phrase violated petitioner's confrontation right because Lambatos lacked personal knowledge that the profile produced by Cellmark was based on the vaginal swabs taken from the victim, L. J. As the dissent acknowledges, there would have been "nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise." *Post*, at 129. Thus, if Lambatos' testimony had been slightly modified as follows, the dissent would see no problem:

> "Q Was there a computer match generated of the male DNA profile ***produced by Cellmark*** ~~found in semen~~

~~from the vaginal swabs of [L. J.]~~ to a male DNA profile that had been identified as having originated from Sandy Williams?

"A Yes, there was."[3]

The defect in this argument is that under Illinois law (like federal law) it is clear that the putatively offending phrase in Lambatos' testimony was not admissible for the purpose of proving the truth of the matter asserted—*i. e.*, that the matching DNA profile was "found in semen from the vaginal swabs." Rather, that fact was a mere premise of the prosecutor's question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles. There is no reason to think that the trier of fact took Lambatos' answer as substantive evidence to establish where the DNA profiles came from.

The dissent's argument would have force if petitioner had elected to have a jury trial. In that event, there would have been a danger of the jury's taking Lambatos' testimony as proof that the Cellmark profile was derived from the sample obtained from the victim's vaginal swabs. Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury.

This case, however, involves *a bench trial*, and we must assume that the trial judge understood that the portion of Lambatos' testimony to which the dissent objects was not

[3] The small difference between what Lambatos actually said on the stand and the slightly revised version that the dissent would find unobjectionable shows that, despite the dissent's rhetoric, its narrow argument would have little practical effect in future cases. Prosecutors would be allowed to do exactly what the prosecution did in this case so long as their testifying experts' testimony was slightly modified along the lines shown above. Following that course presumably would not constitute a "prosecutorial dodge," "subterfuge," "indirection," the "neat trick" of "sneak[ing]" in evidence, or the countenancing of constitutional violations with "a wink and a nod." See *post*, at 120, 132, 133, 128 (opinion of KAGAN, J.).

admissible to prove the truth of the matter asserted.[4] The dissent, on the other hand, reaches the truly remarkable conclusion that the wording of Lambatos' testimony confused the trial judge. Were it not for that wording, the argument goes, the judge might have found that the prosecution failed to introduce sufficient admissible evidence to show that the Cellmark profile was derived from the sample taken from the victim, and the judge might have disregarded the DNA evidence. This argument reflects a profound lack of respect for the acumen of the trial judge.[5]

To begin, the dissent's argument finds no support in the trial record. After defense counsel objected to Lambatos' testimony, the prosecutor made clear that she was asking Lambatos only about "her own testing based on [DNA] information" that she had received from Cellmark. App. 56. Recognizing that Lambatos' testimony would carry weight only if the underlying premises could be established, the judge noted that "the issue is . . . what weight do you give the test [performed by Lambatos], not do you exclude it." *Id.*, at 94. This echoes the old statement in *Beckwith* that an expert's opinion based on disputed premises "might not go for much; but still it [is] admissible evidence." 1 Camp., at 117, 170 Eng. Rep., at 897. Both the Illinois Appellate Court and the Illinois Supreme Court viewed the record in this way, and we see no ground for disagreement.[6]

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[4] We do not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Cf. *post*, at 130 (opinion of KAGAN, J.). Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence.

[5] See *post*, at 130–131 (opinion of KAGAN, J.) ("I do not doubt that a judge typically will do better than a jury in excluding such inadmissible evidence from his decisionmaking process. *Perhaps* the judge did so here" (emphasis added)).

[6] The dissent finds evidence of the trial judge's confusion in his statement that petitioner is " 'the guy whose DNA, *according to the evidence from the experts*, is in the semen recovered from the victim's vagina.' " *Post*, at 131

Second, it is extraordinarily unlikely that any trial judge would be confused in the way that the dissent posits. That Lambatos was not competent to testify to the chain of custody of the sample taken from the victim was a point that any trial judge or attorney would immediately understand. Lambatos, after all, had absolutely nothing to do with the collection of the sample from the victim, its subsequent handling or preservation by the police in Illinois, or its shipment to and receipt by Cellmark. No trial judge would take Lambatos' testimony as furnishing "the missing link" in the State's evidence regarding the identity of the sample that Cellmark tested. See *post*, at 123 (opinion of KAGAN, J.).

Third, the admissible evidence left little room for argument that the sample tested by Cellmark came from any source other than the victim's vaginal swabs.[7] This is so because there is simply no plausible explanation for how Cellmark could have produced a DNA profile that matched Williams' if Cellmark had tested any sample other than the one taken from the victim. If any other items that might have contained Williams' DNA had been sent to Cellmark or were otherwise in Cellmark's possession, there would have been a chance of a mixup or of cross-contamination. See

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(emphasis added). The dissent interprets the phrase "according to the evidence from the experts" as a reference to what one expert, Lambatos, said about the origin of the sample that Cellmark tested. In context, however, the judge's statement is best understood as attributing to Lambatos nothing more than the conclusion that there was a match between the two DNA profiles that were compared. The foundational facts, that one of the profiles came from the defendant and that the other came from "'the semen recovered from the victim's vagina,'" were established not by expert testimony but by ordinary chain-of-custody evidence.

[7] Our point is not that admissible evidence regarding the identity of the sample that Cellmark tested excuses the admission of testimonial hearsay on this matter. Compare *post*, at 108–109 (THOMAS, J., concurring in judgment), with *post*, at 130–131 (KAGAN, J., dissenting). Rather, our point is that, because there was substantial (albeit circumstantial) evidence on this matter, there is no reason to infer that the trier of fact must have taken Lambatos' statement as providing "the missing link."

*District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 80 (2009) (ALITO, J., concurring). But there is absolutely nothing to suggest that Cellmark had any such items. Thus, the fact that the Cellmark profile matched Williams—the very man whom the victim identified in a lineup and at trial as her attacker—was itself striking confirmation that the sample that Cellmark tested was the sample taken from the victim's vaginal swabs. For these reasons, it is fanciful to suggest that the trial judge took Lambatos' testimony as providing critical chain-of-custody evidence.

C

Other than the phrase that Lambatos used in referring to the Cellmark profile, no specific passage in the trial record has been identified as violating the Confrontation Clause, but it is nevertheless suggested that the State somehow introduced "the substance of Cellmark's report into evidence." *Post*, at 125 (KAGAN, J., dissenting). The main impetus for this argument appears to be the (erroneous) view that unless the substance of the report was sneaked in, there would be insufficient evidence in the record on two critical points: first, that the Cellmark profile was based on the semen in the victim's vaginal swabs and, second, that Cellmark's procedures were reliable. This argument is both legally irrelevant for present purposes and factually incorrect.

As to legal relevance, the question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion about the DNA match. In order to prove these underlying facts, the prosecution relied on circumstantial evidence, and the Illinois courts found that this evidence was sufficient to satisfy state-law requirements regarding proof of foundational facts. See 385 Ill. App. 3d, at 366–368, 895 N. E. 2d, at 967–968; 238 Ill. 2d, at 138, 939 N. E. 2d, at 275. We cannot review that interpretation and application of Illinois law.

Thus, even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L. J.'s vaginal swabs, that would not establish a Confrontation Clause violation. If there were no proof that Cellmark produced an accurate profile based on that sample, Lambatos' testimony regarding the match would be irrelevant; but the Confrontation Clause, as interpreted in *Crawford*, does not bar the admission of irrelevant evidence, only testimonial statements by declarants who are not subject to cross-examination.[8]

It is not correct, however, that the trial record lacks admissible evidence with respect to the source of the sample that Cellmark tested or the reliability of the Cellmark profile. As to the source of the sample, the State offered conventional chain-of-custody evidence, namely, the testimony of the physician who obtained the vaginal swabs, the testimony of the police employees who handled and kept custody of that evidence until it was sent to Cellmark, and the shipping manifests, which provided evidence that the swabs were sent to Cellmark and then returned to the ISP lab. In addition, as already discussed, the match between the Cellmark profile and petitioner's profile was itself telling confirmation that the Cellmark profile was deduced from the semen on the vaginal swabs.

This match also provided strong circumstantial evidence regarding the reliability of Cellmark's work. Assuming (for the reasons discussed above) that the Cellmark profile was based on the semen on the vaginal swabs, how could shoddy or dishonest work in the Cellmark lab[9] have resulted in the

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[8] Applying the Due Process Clause, we have held that a federal court may determine whether a rational trier of fact could have found the existence of all the elements needed for conviction for a state offense, *Jackson* v. *Virginia*, 443 U. S. 307, 314 (1979), but petitioner has not raised a due process claim. And in any event, L. J.'s identification of petitioner as her assailant would be sufficient to defeat any such claim.

[9] See *post*, at 135–136 (KAGAN, J., dissenting).

production of a DNA profile that just so happened to match petitioner's? If the semen found on the vaginal swabs was not petitioner's and thus had an entirely different DNA profile, how could sloppy work in the Cellmark lab have transformed that entirely different profile into one that matched petitioner's? And without access to any other sample of petitioner's DNA (and recall that petitioner was not even under suspicion at this time), how could a dishonest lab technician have substituted petitioner's DNA profile? Under the circumstances of this case, it was surely permissible for the trier of fact to infer that the odds of any of this were exceedingly low.

This analysis reveals that much of the dissent's argument rests on a very clear error. The dissent argues that Lambatos' testimony could be "true" only if the predicate facts asserted in the Cellmark report were true, and therefore Lambatos' reference to the report must have been used for the purpose of proving the truth of those facts. See *post*, at 126. But the truth of Lambatos' testimony, properly understood, was not dependent on the truth of any predicate facts. Lambatos testified that two DNA profiles matched. The correctness of this expert opinion, which the defense was able to test on cross-examination, was not in any way dependent on the origin of the samples from which the profiles were derived. Of course, Lambatos' opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the profiles, but that has nothing to do with the truth of her testimony.

The dissent is similarly mistaken in its contention that the Cellmark report "was offered for its truth because that is all such 'basis evidence' can be offered for." *Post*, at 130; see also *post*, at 106 (THOMAS, J., concurring in judgment) ("[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose"). This view is directly contrary to the current version

of Rule 703 of the Federal Rules of Evidence, which this Court approved and sent to Congress in 2000. Under that Rule, "basis evidence" that is not admissible for its truth may be disclosed even in a jury trial under appropriate circumstances. The purpose for allowing this disclosure is that it may "assis[t] the jury to evaluate the expert's opinion." Advisory Committee's 2000 Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 361. The Rule 703 approach, which was controversial when adopted,[10] is based on the idea that the disclosure of basis evidence can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion. For example, if the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears—to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.

Perhaps because it cannot seriously dispute the legitimate nonhearsay purpose of illuminating the expert's thought process, the dissent resorts to the last-ditch argument that, after all, it really does not matter whether Lambatos' statement regarding the source of the Cellmark report was admitted for its truth. The dissent concedes that "the trial judge might have ignored Lambatos's statement about the Cellmark report," but nonetheless maintains that "the admission of that statement violated the Confrontation Clause even if the judge ultimately put it aside." *Post*, at 131, n. 3. But in a bench trial, it is not necessary for the judge to stop

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[10] See Advisory Committee's 2000 Notes on Rule 703, at 361.

and make a formal statement on the record regarding the limited reason for which the testimony is admitted. If the judge does not consider the testimony for its truth, the effect is precisely the same. Thus, if the trial judge in this case did not rely on the statement in question for its truth, there is simply no way around the proviso in *Crawford* that the Confrontation Clause applies only to out-of-court statements that are "use[d]" to "establis[h] the truth of the matter asserted." 541 U. S., at 59–60, n. 9 (citing *Street*, 471 U. S. 409).

For all these reasons, we conclude that petitioner's Sixth Amendment confrontation right was not violated.

D

This conclusion is entirely consistent with *Bullcoming* and *Melendez-Diaz*. In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood-alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the report, *i. e.*, that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, just as in *Street*, the report was not to be considered for its truth but only for the "distinctive and limited purpose" of seeing whether it matched something else. 471 U. S., at 417. The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime.

Our conclusion will not open the door for the kind of abuses suggested by some of petitioner's *amici* and the dis-

sent. See *post*, at 127–128; Brief for Richard D. Friedman as *Amicus Curiae* 20–21. In the hypothetical situations posited, an expert expresses an opinion based on factual premises not supported by any admissible evidence, and may also reveal the out-of-court statements on which the expert relied.[11] There are at least four safeguards to prevent such abuses. First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evi-

[11] Both JUSTICE THOMAS and JUSTICE KAGAN quote statements in D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence § 4.10.1, pp. 196–197 (2d ed. 2011) (hereinafter New Wigmore), that are critical of the theory that an expert, without violating the Confrontation Clause, may express an opinion that is based on testimonial hearsay and may, in some circumstances, disclose that testimonial hearsay to the trier of fact. The principal basis for this criticism seems to be the fear that juries, even if given limiting instructions, will view the disclosed hearsay as evidence of the truth of the matter asserted. See *id.*, at 196, n. 36 (referring reader to the more detailed discussion in Mnookin, Expert Evidence and the Confrontation Clause After *Crawford v. Washington*, 15 J. L. & Pol'y 791 (2007)); New Wigmore 197, and n. 39 (citing jury cases); Mnookin, *supra*, at 802–804, 811–813. This argument plainly has no application in a case like this one, in which a judge sits as the trier of fact. In the 2012 Supplement of The New Wigmore, the authors discuss the present case and criticize the reasoning of the Illinois courts as follows:

"The problem with [the not-for-the-truth-of-the-matter argument accepted by the Illinois courts] is that Lambatos had to rely on the truth of the statements in the Cellmark report to reach her own conclusion. The claim that evidence that *the jury* must credit in order to credit the conclusion of the expert is introduced for something other than its truth is sheer fiction." § 4.11.6, at 24 (emphasis added).

This discussion is flawed. It overlooks the fact that there was no jury in this case, and as we have explained, the trier of fact did not have to rely on any testimonial hearsay in order to find that Lambatos' testimony about the DNA match was supported by adequate foundational evidence and was thus probative.

dence to a jury. See Fed. Rule Evid. 703; *People* v. *Pasch*, 152 Ill. 2d 133, 175–176, 604 N. E. 2d 294, 310–311 (1992). Third, if such evidence is disclosed, the trial judges may, and under most circumstances must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. See Fed. Rules Evid. 105, 703; *People* v. *Scott*, 148 Ill. 2d 479, 527–528, 594 N. E. 2d 217, 236–237 (1992). And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.[12]

## IV

### A

Even if the Cellmark report had been introduced for its truth, we would nevertheless conclude that there was no

[12] Our discussion of the first ground for our decision cannot conclude without commenting on the Kocak case, which dramatically appears at the beginning of the dissent. In that case, a Cellmark lab analyst realized while testifying at a pretrial hearing that there was an error in the lab's report and that the DNA profile attributed to the accused was actually that of the victim. The lesson of this cautionary tale is nothing more than the truism that it is possible for an apparently incriminating DNA profile to be mistakenly attributed to an accused. But requiring that the lab analyst or analysts who produced the DNA profile be called as prosecution witnesses is neither sufficient nor necessary to prevent such errors. Since samples may be mixed up or contaminated at many points along the way from a crime scene to the lab, calling one or more lab analysts will not necessarily catch all such mistakes. For example, a mistake might be made by a clerical employee responsible for receiving shipments of samples and then providing them to the lab's technicians. What is needed is for the trier of fact to make sure that the evidence, whether direct or circumstantial, rules out the possibility of such mistakes at every step along the way. And in the usual course of authentication, defense counsel will have access to sufficient information to inquire into, question, or challenge the procedures used by a laboratory if this seems to be a prudent and productive strategy.

Confrontation Clause violation. The Confrontation Clause refers to testimony by "witnesses against" an accused. Both the noted evidence scholar John Henry Wigmore and Justice Harlan interpreted the Clause in a strictly literal sense as referring solely to persons who testify in court, but we have not adopted this narrow view. It has been said that "[t]he difficulty with the Wigmore-Harlan view in its purest form is its tension with much of the apparent history surrounding the evolution of the right of confrontation at common law." *White* v. *Illinois*, 502 U. S. 346, 360 (1992) (THOMAS, J., concurring in part and concurring in judgment). "[T]he principal evil at which the Confrontation Clause was directed," the Court concluded in *Crawford*, "was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U. S., at 50. "[I]n England, pretrial examinations of suspects and witnesses by government officials 'were sometimes read in court in lieu of live testimony.'" *Bryant*, 562 U. S., at 353 (quoting *Crawford*, *supra*, at 43). The Court has thus interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right. But any further expansion would strain the constitutional text.

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (1) They involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (2) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions. In all but one of the post-*Crawford* cases[13] in which a Confrontation Clause violation has been

[13] Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced. Those decisions are not challenged in this case and are to be deemed binding precedents, but they can and should be distinguished on the facts here.

found, both of these characteristics were present. See *Bullcoming*, 564 U. S., at 653 (certified lab report having purpose of showing that defendant's blood-alcohol level exceeded legal limit); *Melendez-Diaz*, 557 U. S., at 308 (certified lab report having purpose of showing that substance connected to defendant contained cocaine); *Crawford*, *supra*, at 38 (custodial statement made after *Miranda* v. *Arizona*, 384 U. S. 436 (1966), warnings that shifted blame from declarant to accused).[14] The one exception occurred in *Hammon* v. *Indiana*, 547 U. S. 813, 829–832 (2006), which was decided together with *Davis* v. *Washington*, but in *Hammon* and every other post-*Crawford* case in which the Court has found a violation of the confrontation right, the statement at issue had the primary purpose of accusing a targeted individual.

B

In *Hammon*, the one case in which an informal statement was held to violate the Confrontation Clause, we considered statements elicited in the course of police interrogation. We held that a statement does not fall within the ambit of the Clause when it is made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 547 U. S., at 822. In *Bryant*, another police-interrogation case, we explained that a person who makes a statement to resolve an ongoing emergency is not acting like a trial witness because the declarant's purpose is not to provide a solemn declaration for use at trial, but to bring an end to an ongoing threat. See 562 U. S., at 358, 361. We noted that "the prospect of fabrication . . . is presumably significantly diminished" when a statement is made under such circumstances, *id.*, at 361, and that reliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause, *id.*, at 358–359. We emphasized that if a

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[14] With respect to *Crawford*, see *Davis* v. *Washington*, 547 U. S. 813, 840 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part).

statement is not made for "the primary purpose of creating an out-of-court substitute for trial testimony," its admissibility "is the concern of state and federal rules of evidence, not the Confrontation Clause." *Ibid.*

In *Melendez-Diaz* and *Bullcoming*, the Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial. There was nothing resembling an ongoing emergency, as the suspects in both cases had already been captured, and the tests in question were relatively simple and can generally be performed by a single analyst. In addition, the technicians who prepared the reports must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating.

C

The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual. In identifying the primary purpose of an out-of-court statement, we apply an objective test. *Bryant*, 562 U. S., at 360. We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. *Ibid.*

Here, the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner—or for that matter, anyone else whose

DNA profile was in a law enforcement database. Under these circumstances, there was no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile. *Id.*, at 361.

The situation in which the Cellmark technicians found themselves was by no means unique. When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both.

It is also significant that in many labs, numerous technicians work on each DNA profile. See Brief for New York County District Attorney's Office et al. as *Amici Curiae* 6 (New York lab uses at least 12 technicians for each case); *People* v. *Johnson*, 389 Ill. App. 3d 618, 627, 906 N. E. 2d 70, 79 (2009) ("[A]pproximately 10 Cellmark analysts were involved in the laboratory work in this case"). When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.

Finally, the knowledge that defects in a DNA profile may often be detected from the profile itself provides a further safeguard. In this case, for example, Lambatos testified that she would have been able to tell from the profile if the sample used by Cellmark had been degraded prior to testing. As noted above, moreover, there is no real chance that "sample contamination, sample switching, mislabeling, [or] fraud" could have led Cellmark to produce a DNA profile that falsely matched petitioner. *Post*, at 137 (KAGAN, J., dissenting). At the time of the testing, petitioner had not yet been

identified as a suspect, and there is no suggestion that anyone at Cellmark had a sample of his DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of petitioner, who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful.

In short, the use at trial of a DNA report prepared by a modern, accredited laboratory "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Bryant*, *supra*, at 379 (THOMAS, J., concurring in judgment).

* * *

For the two independent reasons explained above, we conclude that there was no Confrontation Clause violation in this case. Accordingly, the judgment of the Supreme Court of Illinois is

*Affirmed.*

JUSTICE BREYER, concurring.

This case raises a question that I believe neither the plurality nor the dissent answers adequately: How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians? In this context, what, if any, are the outer limits of the "testimonial statements" rule set forth in *Crawford* v. *Washington*, 541 U. S. 36 (2004)? Because I believe the question difficult, important, and not squarely addressed either today or in our earlier opinions, and because I believe additional briefing would help us find a proper, generally applicable answer, I would set this case for reargument. In the absence of doing so, I adhere to the dissenting views set forth in *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009), and *Bullcoming*

v. *New Mexico*, 564 U. S. 647 (2011). I also join the plurality's opinion.

## I

### A

This case is another in our series involving the intersection of the Confrontation Clause and expert testimony. Before trial, the prosecution's expert, Sandra Lambatos, received a copy of a report prepared by Cellmark Diagnostics Laboratory. That report reflected the fact that Cellmark technicians had received material from vaginal swabs taken from the crime victim, had identified semen in that material, and had derived a profile of the male DNA that the semen contained. Lambatos then entered that profile into an Illinois State Police Crime Laboratory computerized database, which contained, among many other DNA profiles, a profile derived by the crime laboratory from Williams' blood (taken at an earlier time). The computer she was using showed that the two profiles matched. Lambatos then confirmed the match.

Later, Lambatos testified at trial, where the prosecutor asked her three relevant questions. First, the prosecutor asked whether there was "a computer match generated of the male DNA profile [derived by Cellmark] found in [the] semen from the vaginal swabs . . . to [the] male DNA profile [found in the database] that had been identified as having originated from Sandy Williams." App. 56. Since the computer had shown such a match, Lambatos answered affirmatively. *Ibid.*

Second, the prosecutor asked whether Lambatos had independently "compare[d the DNA profile that Cellmark had derived from] the semen that had been identified . . . from the vaginal swabs of [the victim] to the male DNA profile [found in the database] that had been [derived] . . . from the blood of Sandy Williams." *Ibid.* Lambatos again answered affirmatively. *Ibid.*

Third, the prosecutor asked whether, in Lambatos' expert opinion, the DNA profile derived from the semen identified in the vaginal swabs of the victim was "a match to Sandy Williams." *Id.*, at 58. Lambatos again answered affirmatively. *Ibid.*

The Confrontation Clause problem lies in the fact that Lambatos did not have personal knowledge that the male DNA profile that Cellmark said was derived from the crime victim's vaginal swab sample was in fact correctly derived from that sample. And no Cellmark expert testified that it was true. Rather, she simply relied for her knowledge of the fact upon Cellmark's report. And the defendant Williams had no opportunity to cross-examine the individual or individuals who produced that report.

In its first conclusion, the plurality explains why it finds that admission of Lambatos' testimony nonetheless did not violate the Confrontation Clause. That Clause concerns out-of-court statements admitted for their truth. *Ante*, at 70. Lambatos' testimony did not introduce the Cellmark report (which other circumstantial evidence supported) for its truth. *Ante*, at 70–75. Rather, Lambatos used the Cellmark report only to indicate the underlying factual information upon which she based her independent expert opinion. *Ibid.* Under well-established principles of evidence, experts may rely on otherwise inadmissible out-of-court statements as a basis for forming an expert opinion if they are of a kind that experts in the field normally rely upon. See Fed. Rule Evid. 703; Ill. Rule Evid. 703. Nor need the prosecution enter those out-of-court statements into evidence for their truth. That, the Illinois courts held, is just what took place here. *Ante*, at 64.

The dissent would abandon this well-established rule. It would not permit Lambatos to offer an expert opinion in reliance on the Cellmark report unless the prosecution also produces one or more experts who wrote or otherwise produced the report. I am willing to accept the dissent's characteriza-

tion of the present rule as artificial, see *post*, at 132–133 (opinion of KAGAN, J.), but I am not certain that the dissent has produced a workable alternative, see *Bullcoming*, *supra*, at 679–680 (KENNEDY, J., dissenting) (expressing similar view).

Once one abandons the traditional rule, there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so. Experts—especially laboratory experts—regularly rely on the technical statements and results of other experts to form their own opinions. The reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another. Hence my general question: How does the Confrontation Clause apply to crime laboratory reports and underlying technical statements made by laboratory technicians?

B

The general question is not easy to answer. The California case described at the outset of the dissenting opinion helps to illustrate the difficulty. In that example, Cellmark, the very laboratory involved in this case, tested a DNA sample taken from the crime scene. A laboratory analyst, relying upon a report the laboratory had prepared, initially stated (at a pretrial hearing about admissibility) that the laboratory had found that the crime-scene DNA sample matched a sample of the defendant's DNA. But during the hearing and after reviewing the laboratory's notes, the laboratory analyst realized that the written report was mistaken. In fact, the testing showed only that the crime-scene DNA matched a sample of the victim's DNA, not the defendant's DNA. At some point during the writing of the report, someone, perhaps the testifying analyst herself, must have misread the proper original sample labeling. Upon discovering the error, the analyst corrected her testimony.

The example is useful, not simply because as adapted it might show the importance of cross-examination (an importance no one doubts), but also because it can reveal the nature of the more general question before us. When the laboratory in the example received the DNA samples, it labeled them properly. The laboratory's final report mixed up the labels. Any one of many different technicians could be responsible for an error like that. And the testifying analyst might not have reviewed the underlying notes and caught the error during direct examination (or for that matter, during cross-examination).

Adapting the example slightly, assume that the admissibility of the initial laboratory report into trial had been directly at issue. Who should the prosecution have had to call to testify? Only the analyst who signed the report noting the match? What if the analyst who made the match knew nothing about either the laboratory's underlying procedures or the specific tests run in the particular case? Should the prosecution then have had to call all potentially involved laboratory technicians to testify? Six to twelve or more technicians could have been involved. (See Appendix, *infra*, which lists typically relevant laboratory procedures.) Some or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report. Indeed, petitioner's *amici* argue that the technicians at each stage of the process should be subject to cross-examination. See Brief for Innocence Network as *Amicus Curiae* 13–23 (hereinafter Innocence Network Brief).

And as is true of many hearsay statements that fall within any of the 20 or more hearsay exceptions, cross-examination could sometimes significantly help to elicit the truth. See Fed. Rule Evid. 803 (listing 24 hearsay exceptions). The Confrontation Clause as interpreted in *Crawford* recognizes, as a limitation upon a pure "testimonial statement" require-

ment, circumstances where the defendant had an adequate "prior opportunity to cross-examine." 541 U. S., at 59. To what extent might the "testimonial statements" requirement embody one or more (or modified versions) of these traditional hearsay exceptions as well?

Lower courts and treatise writers have recognized the problem. And they have come up with a variety of solutions. The New Wigmore, for example, lists several nonexclusive approaches to when testifying experts may rely on testing results or reports by nontestifying experts (*i. e.*, DNA technicians or analysts), including: (1) "the dominant approach," which is simply to determine the need to testify by looking at "the quality of the nontestifying expert's report, the testifying expert's involvement in the process, and the consequent ability of the testifying expert to use independent judgment and interpretive skill"; (2) permitting "a substitute expert to testify about forensic science results only when the first expert is unavailable" (irrespective of the lack of opportunity to cross-examine the first expert, cf. *Crawford*, *supra*, at 59); (3) permitting "a substitute expert" to testify if "the original test was documented in a thorough way that permits the substitute expert to evaluate, assess, and interpret it"; (4) permitting a DNA analyst to introduce DNA test results at trial without having "personally perform[ed] every specific aspect of each DNA test in question, provided the analyst was present during the critical stages of the test, is familiar with the process and the laboratory protocol involved, reviews the results in proximity to the test, and either initials or signs the final report outlining the results"; (5) permitting the introduction of a crime laboratory DNA report without the testimony of a technician where the "testing in its preliminary stages" only "requires the technician simply to perform largely mechanical or ministerial tasks . . . absent some reason to believe there was error or falsification"; and (6) permitting introduction of the report without requiring the technicians to testify where

there is a showing of "genuine unavailability." See D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence, §§ 4.10.2, 4.10.3, pp. 202, 204, 206 (2d ed. 2011) (internal quotation marks and footnote omitted); *id.*, § 4.11.6, at 24 (Supp. 2012).

Some of these approaches seem more readily compatible with *Crawford* than others. Some seem more easily considered by a rules committee (or by state courts) than by this Court. Nonetheless, all assume some kind of *Crawford* boundary—some kind of limitation upon the scope of its application—though they reflect different views as to just how and when that might be done.

Answering the underlying general question just discussed, and doing so soon, is important. Trial judges in both federal and state courts apply and interpret hearsay rules as part of their daily trial work. The trial of criminal cases makes up a large portion of that work. And laboratory reports frequently constitute a portion of the evidence in ordinary criminal trials. Obviously, judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly.

The several different opinions filed today embody several serious, but different, approaches to the difficult general question. Yet none fully deals with the underlying question as to how, after *Crawford*, Confrontation Clause "testimonial statement" requirements apply to crime laboratory reports. Nor can I find a general answer in *Melendez-Diaz* or *Bullcoming*. While, as a matter of pure logic, one might use those cases to answer a narrowed version of the question presented here, see *post*, at 124–125 (KAGAN, J., dissenting), those cases do not fully consider the broader evidentiary problem presented. I consequently find the dissent's response, "Been there, done that," unsatisfactory. *Post*, at 137.

Under these circumstances, I would have this case reargued. I would request the parties and *amici* to focus spe-

cifically upon the broader "limits" question. And I would permit them to discuss, not only the possible implications of our earlier post-*Crawford* opinions, but also any necessary modifications of statements made in the opinions of those earlier cases.

## II

In the absence of reargument, I adhere to the dissenting view set forth in *Melendez-Diaz* and *Bullcoming*, under which the Cellmark report would not be considered "testimonial" and barred by the Confrontation Clause. See also *ante*, at 81–86 (setting forth similar conclusion). That view understands the Confrontation Clause as interpreted in *Crawford* to bar the admission of "*[t]estimonial*" statements made out of court unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. 541 U. S., at 59 (emphasis added). It also understands the word "testimonial" as having outer limits and *Crawford* as describing a constitutional heartland. And that view would leave the States with constitutional leeway to maintain traditional expert testimony rules as well as hearsay exceptions where there are strong reasons for doing so and *Crawford*'s basic rationale does not apply.

In particular, the States could create an exception that presumptively would allow introduction of DNA reports from accredited crime laboratories. The defendant would remain free to call laboratory technicians as witnesses. Were there significant reason to question a laboratory's technical competence or its neutrality, the presumptive exception would disappear, thereby requiring the prosecution to produce any relevant technical witnesses. Such an exception would lie outside *Crawford*'s constitutional limits.

Consider the report before us. Cellmark's DNA report embodies technical or professional data, observations, and judgments; the employees who contributed to the report's findings were professional analysts working on technical matters at a certified laboratory; and the employees operated

behind a veil of ignorance that likely prevented them from knowing the identity of the defendant in this case. Statements of this kind fall within a hearsay exception that has constituted an important part of the law of evidence for decades. See Fed. Rule Evid. 803(6) ("Records of A Regularly Conducted Activity"); 2 J. Wigmore, Evidence §§ 1517–1533, pp. 1878–1899 (1904) ("Regular Entries"). And for somewhat similar reasons, I believe that such statements also presumptively fall outside the category of "testimonial" statements that the Confrontation Clause makes inadmissible.

As the plurality points out, *ante*, at 81–86, the introduction of statements of this kind does not risk creating the "principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U. S., at 50. That evil consists of the pre-Constitution practice of using "*ex parte* examinations as evidence against the accused." *Ibid.* Sir Walter Raleigh's case illustrates the point. State authorities questioned Lord Cobham, the key witness against Raleigh, outside his presence. They then used those testimonial statements in court against Raleigh. And when Raleigh asked to face and to challenge his accuser, he was denied that opportunity. See *id.*, at 44.

The Confrontation Clause prohibits the use of this kind of evidence because allowing it would deprive a defendant of the ability to cross-examine the witness. *Id.*, at 61–62; *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895). That deprivation would prevent a defendant from confronting the witness. And it would thereby prevent a defendant from probing the witness' perception, memory, narration, and sincerity. See, *e. g.*, 2 K. Broun et al., McCormick on Evidence § 245, p. 125 (6th ed. 2006); E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 119–127 (1956); 30 C. Wright & K. Graham, Federal Practice and Procedure § 6324, pp. 44–49 (1997); see also M. Hale, History of the Common Law of England 258 (1713) (explaining virtues of confronting witness); 3 W. Blackstone, Commentaries

on the Laws of England 373 (1768) (same). But the need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work.

For one thing, as the hearsay exception itself reflects, alternative features of such situations help to guarantee its accuracy. An accredited laboratory must satisfy well-established professional guidelines that seek to ensure the scientific reliability of the laboratory's results. App. 59–60, 74, 86–87; see Brief for National District Attorneys Association et al. as *Amici Curiae* 25, n. 5 (hereinafter NDAA Brief) (noting that the standards date back 30 years); Giannelli, Regulating Crime Laboratories: The Impact of DNA Evidence, 15 J. L. & Pol'y 59, 72–76 (2007). For example, forensic DNA testing laboratories permitted to access the FBI's Combined DNA Index System must adhere to standards governing, among other things, the organization and management of the laboratory; education, training, and experience requirements for laboratory personnel; the laboratory's physical facilities and security measures; control of physical evidence; validation of testing methodologies; procedures for analyzing samples, including the reagents and controls that are used in the testing process; equipment calibration and maintenance; documentation of the process used to test each sample handled by the laboratory; technical and administrative review of every case file; proficiency testing of laboratory personnel; corrective action that addresses any discrepancies in proficiency tests and casework analysis; internal and external audits of the laboratory; environmental health and safety; and outsourcing of testing to vendor laboratories. See Brief for New York County District Attorney's Office et al. as *Amici Curiae* 4, n. 4 (hereinafter NY County DAO Brief); see also App. to NY County DAO Brief A22–A49.

These standards are not foolproof. Nor are they always properly applied. It is not difficult to find instances in

which laboratory procedures have been abused. See, *e. g.*, Innocence Network Brief 6–11; App. to Brief for Public Defender Service for the District of Columbia et al. as *Amici Curiae* 1a–12a; cf. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 Va. J. Soc. Pol'y & L. 439 (1997). Moreover, DNA testing itself has exonerated some defendants who previously had been convicted in part upon the basis of testimony by laboratory experts. See *Melendez-Diaz*, 557 U. S., at 319 (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1 (2009)).

But if accreditation did not prevent admission of faulty evidence in some of those cases, neither did cross-examination. In the wrongful-conviction cases to which this Court has previously referred, the forensic experts all testified in court and were available for cross-examination. Sklansky, Hearsay's Last Hurrah, 2009 S. Ct. Rev. 1, 72–73 (cited study "did not identify *any* cases in which hearsay from forensic analysts contributed to the conviction of innocent defendants"); see Garrett & Neufeld, *supra*, at 10–12, 84, 89 (noting that cross-examination was rarely effective); see also Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Cal. L. Rev. 721, 785–786 (2007) (suggesting need for greater reliance upon accreditation and oversight of accredited laboratories); Sklansky, *supra*, at 74 (same). Similarly, the role of cross-examination is ambiguous in the laboratory example that the dissent describes. See *post*, at 118–119. (Apparently, the report's error came to light and was corrected after cross-examination had concluded, see Thompson, Taroni, & Aitken, Author's Response, 48 J. For. Sci. 1202 (2003), and in any event all parties had received the correctly labeled underlying laboratory data, see Clarke, Commentary, *id.*, at 1201.)

For another thing, the fact that the laboratory testing takes place behind a veil of ignorance makes it unlikely that a particular researcher has a defendant-related motive to behave dishonestly, say, to misrepresent a step in an analysis or otherwise to misreport testing results. Cf. *Michigan* v. *Bryant*, 562 U. S. 344, 361 (2011) (discussing the "prospect of fabrication" as a factor in whether the Confrontation Clause requires statements "to be subject to the crucible of cross-examination"). The laboratory here, for example, did not know whether its test results might help to incriminate a particular defendant. *Ante*, at 84–86; cf. *Melendez-Diaz*, *supra*, at 310–311; *Bullcoming*, 564 U. S., at 664.

Further, the statements at issue, like those of many laboratory analysts, do not easily fit within the linguistic scope of the term "testimonial statement" as we have used that term in our earlier cases. As the plurality notes, in every post-*Crawford* case in which the Court has found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual. *Ante*, at 82–84; see, *e. g.*, *Davis* v. *Washington*, 547 U. S. 813, 822 (2006) ("primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution"); *Bryant*, *supra*, at 358 ("primary purpose of creating an out-of-court substitute for trial testimony"). The declarant was essentially an adverse witness making an accusatory, testimonial statement—implicating the core concerns of the Lord Cobham-type affidavits. But here the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect's DNA from the semen he left in committing the crime. See *ante*, at 84–86.

Finally, to bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of fact-finding at a criminal trial. Such a precedent could bar the admission of other reliable case-specific technical information such as, say, autopsy reports. Autopsies, like the DNA re-

port in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon after death. And when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial? *E. g.*, *State* v. *Lackey*, 280 Kan. 190, 195–196, 120 P. 3d 332, 341 (2005); see also *People* v. *Geier*, 41 Cal. 4th 555, 601–602, 161 P. 3d 104, 136–137 (2007). Is the Confrontation Clause "'effectively'" to function "'as a statute of limitations for murder'"? *Melendez-Diaz*, *supra*, at 335 (KENNEDY, J., dissenting) (quoting Comment, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L. Rev. 1093, 1115 (2008)).

In general, such a holding could also increase the risk of convicting the innocent. The New York County District Attorney's Office and the New York City Office of the Chief Medical Examiner tell us that the additional cost and complexity involved in requiring live testimony from perhaps dozens of ordinary laboratory technicians who participate in the preparation of a DNA profile may well force a laboratory "to reduce the amount of DNA testing it conducts, and force prosecutors to forgo forensic DNA analysis in cases where it might be highly probative. In the absence of DNA testing, defendants might well be prosecuted solely on the basis of eyewitness testimony, the reliability of which is often questioned." NY County DAO Brief 10 (citing *United States* v. *Wade*, 388 U. S. 218, 229 (1967)); see also NDAA Brief 26 (such a holding "will also impact the innocent who may wait to be cleared from suspicion or exonerated from mistaken conviction"). I find this plausible. But cf. Innocence Network Brief 3. An interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound. Cf. *Maryland* v. *Craig*, 497 U. S. 836, 845

(1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant").

Consequently, I would consider reports such as the DNA report before us presumptively to lie outside the perimeter of the Clause as established by the Court's precedents. Such a holding leaves the defendant free to call the laboratory employee as a witness if the employee is available. Moreover, should the defendant provide good reason to doubt the laboratory's competence or the validity of its accreditation, then the alternative safeguard of reliability would no longer exist and the Constitution would entitle the defendant to Confrontation Clause protection. Similarly, should the defendant demonstrate the existence of a motive to falsify, then the alternative safeguard of honesty would no longer exist and the Constitution would entitle the defendant to Confrontation Clause protection. Cf. 2 Wigmore, Evidence § 1527, at 1892 (in respect to the business records exception, "there must have been no motive to misrepresent"). Thus, the defendant would remain free to show the absence or inadequacy of the alternative reliability/honesty safeguards, thereby rebutting the presumption and making the Confrontation Clause applicable. No one has suggested any such problem in respect to the Cellmark report at issue here.

Because the plurality's opinion is basically consistent with the views set forth here, I join that opinion in full.

## APPENDIX

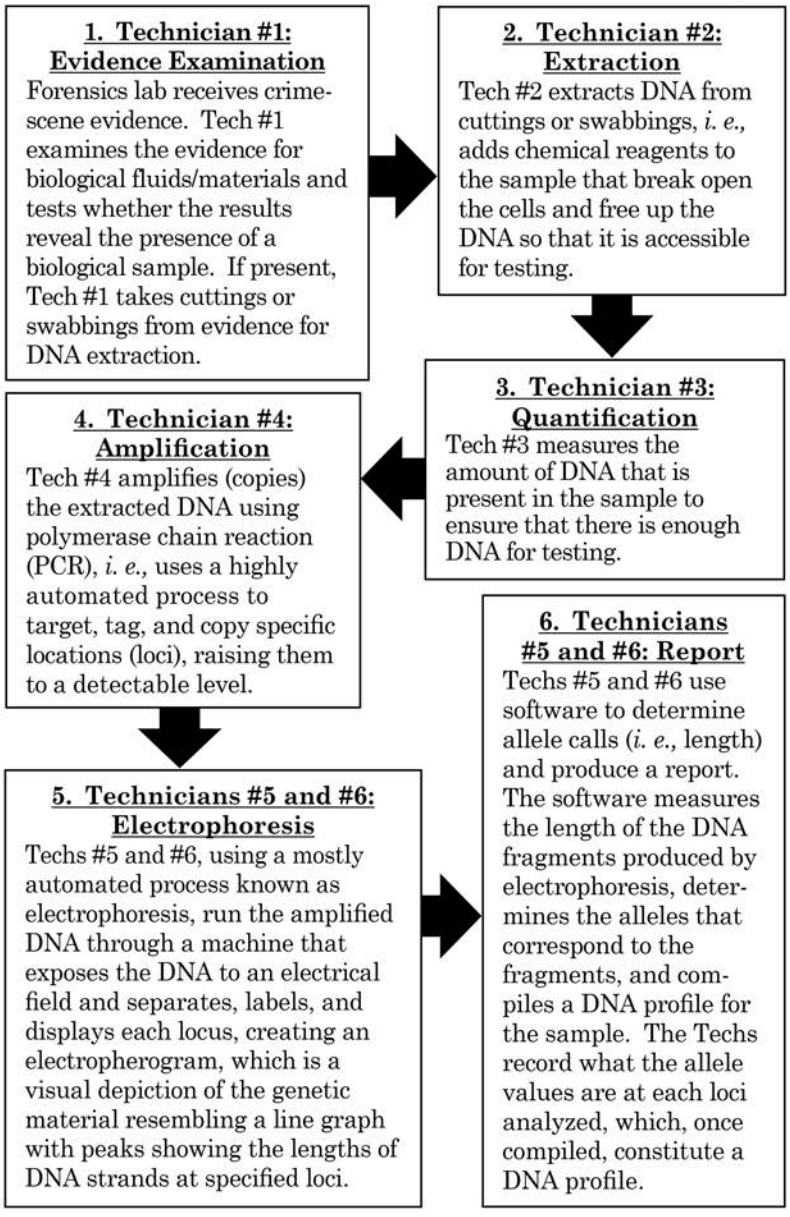
This appendix outlines the way that a typical modern forensic laboratory conducts DNA analysis. See NY County DAO Brief 7–8; NDAA Brief 22–23; Innocence Network Brief 13–23; see also Dept. of Justice, Office of the Inspector General, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities 6–14 (May 2004), online at http://www.justice.gov/oig/special/0405/final.pdf (as visited June 14,

2012, and available in Clerk of Court's case file). The DNA analysis takes place in three parts, through three different sets of laboratory experts: (1) A DNA profile is derived from the suspect's DNA sample, (2) a DNA profile is derived from the crime-scene DNA sample, and (3) an analyst compares the two profiles and makes a conclusion.

As many as six technicians may be involved in deriving the profile from the suspect's sample; as many as six more technicians may be involved in deriving the profile from the crime-scene sample; and an additional expert may then be required for the comparative analysis, for a total of about a dozen different laboratory experts. Each expert may make technical statements (express or implied) during the DNA analysis process that are in turn relied upon by other experts. The *amici* dispute how many of these experts the Confrontation Clause requires to be subject to cross-examination. Compare Innocence Network Brief 13–23 with NY County DAO Brief 7–8 and NDAA Brief 22–23. In charting the three-step process, the appendix first summarizes the laboratory procedures used to derive a DNA profile and then illustrates potential statements that technicians may make to explain their analysis.

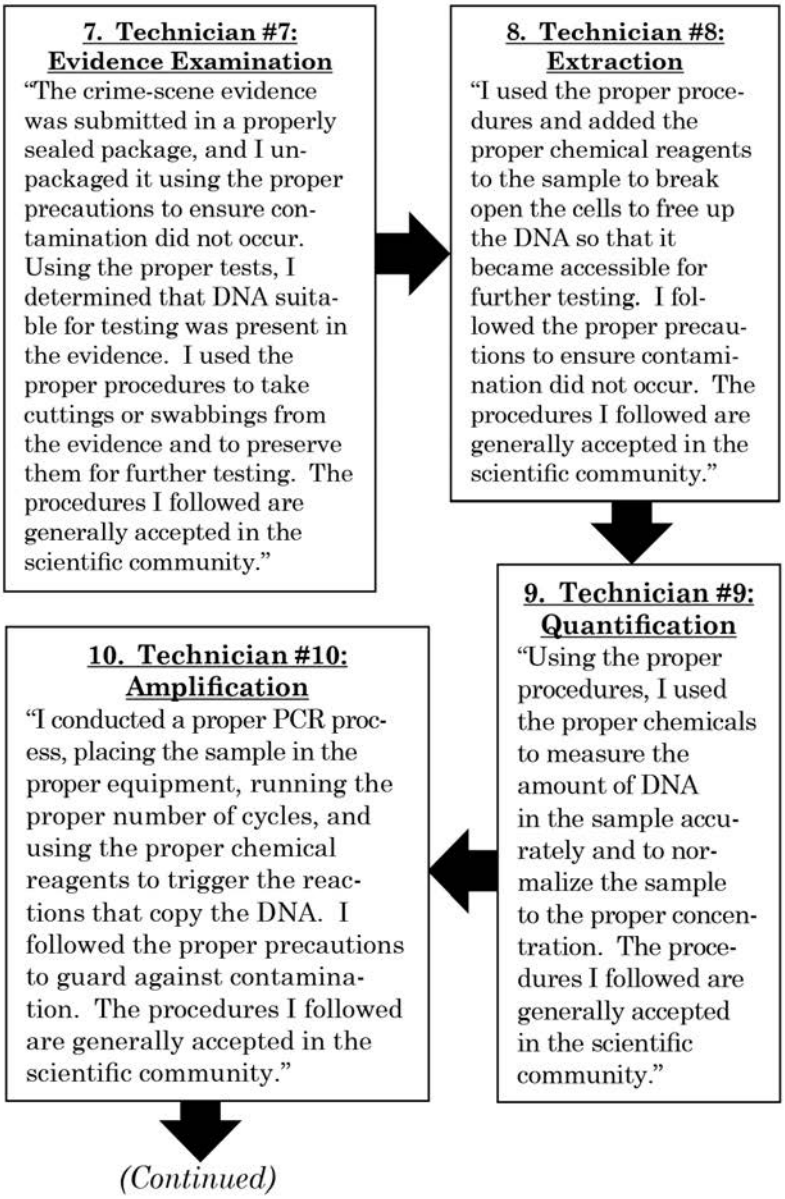
Appendix to opinion of BREYER, J.

*A. Profile of Suspect's Sample (Summary of Lab Process)*

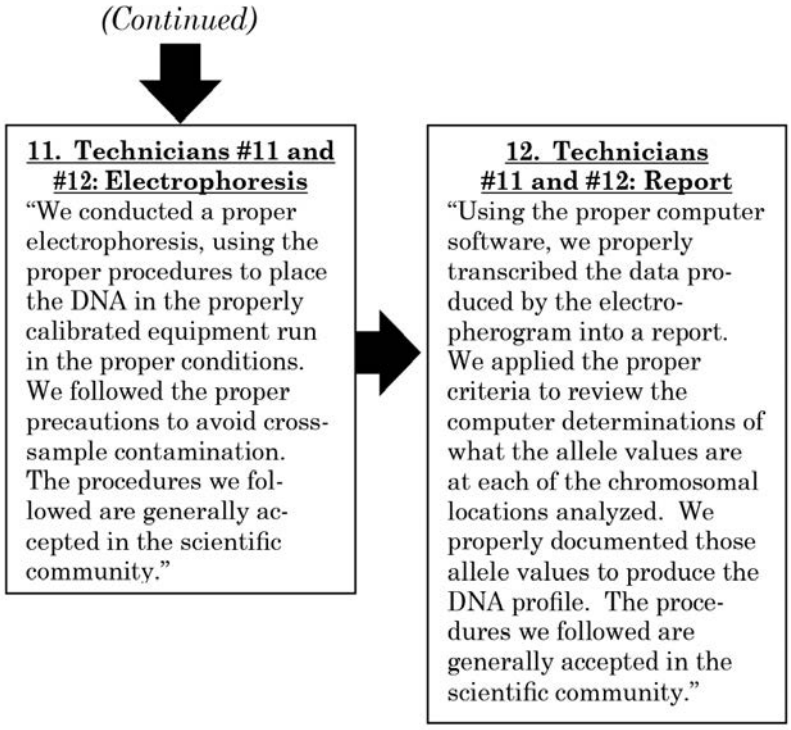


Appendix to opinion of BREYER, J.

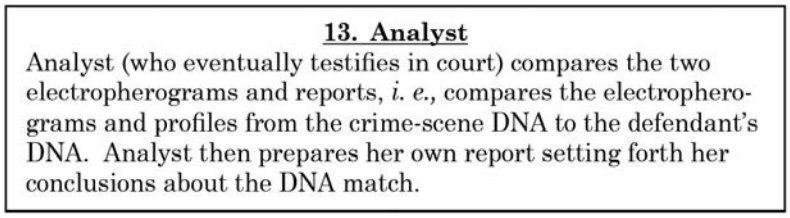
*B. Profile of Crime-Scene Sample (Examples of Statements)*




*(Continued)*




*C. Comparison Between the Two DNA Profiles*




JUSTICE THOMAS, concurring in the judgment.

I agree with the plurality that the disclosure of Cellmark's out-of-court statements through the expert testimony of Sandra Lambatos did not violate the Confrontation Clause. I reach this conclusion, however, solely because Cellmark's

statements lacked the requisite "formality and solemnity" to be considered "'testimonial'" for purposes of the Confrontation Clause. See *Michigan* v. *Bryant*, 562 U. S. 344, 378 (2011) (THOMAS, J., concurring in judgment). As I explain below, I share the dissent's view of the plurality's flawed analysis.

I

The threshold question in this case is whether Cellmark's statements were hearsay at all. As the Court has explained, "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford* v. *Washington*, 541 U. S. 36, 60, n. 9 (2004) (citing *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985)). Here, the State of Illinois contends that Cellmark's statements—that it successfully derived a male DNA profile and that the profile came from L. J.'s swabs—were introduced only to show the basis of Lambatos' opinion, and not for their truth. In my view, however, there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth.

A

Illinois Rule of Evidence 703 (2011) and its federal counterpart permit an expert to base his opinion on facts about which he lacks personal knowledge and to disclose those facts to the trier of fact. Relying on these Rules, the State contends that the facts on which an expert's opinion relies are not to be considered for their truth, but only to explain the basis of his opinion. See *People* v. *Pasch*, 152 Ill. 2d 133, 176, 604 N. E. 2d 294, 311 (1992) ("By allowing an expert to reveal the information for this purpose alone, it will undoubtedly aid the jury in assessing the value of his opinion"); see also Advisory Committee's 2000 Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 361 (stating that expert basis testimony is admissible "only for the purpose of assisting the jury in evaluating an expert's opinion"). Accordingly, in the

State's view, the disclosure of expert "basis testimony" does not implicate the Confrontation Clause.

I do not think that rules of evidence should so easily trump a defendant's confrontation right. To be sure, we should not "lightly swee[p] away an accepted rule" of federal or state evidence law, *ante*, at 57 (internal quotation marks omitted), when applying the Confrontation Clause. "Rules of limited admissibility are commonplace in evidence law." Mnookin, Expert Evidence and the Confrontation Clause After *Crawford v. Washington*, 15 J. L. & Pol'y 791, 812 (2007). And, we often presume that courts and juries follow limiting instructions. See, *e. g.*, *Street*, *supra*, at 415, n. 6. But we have recognized that concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules. See *Barber* v. *Page*, 390 U. S. 719, 724–725 (1968) (defining a constitutional standard for whether a witness is "'unavailable'" for purposes of the Confrontation Clause); see also *Ohio* v. *Roberts*, 448 U. S. 56, 76 (1980) (recognizing that *Barber* "explored the issue of *constitutional* unavailability" (emphasis added)). Likewise, we have held that limiting instructions may be insufficient in some circumstances to protect against violations of the Confrontation Clause. See *Bruton* v. *United States*, 391 U. S. 123 (1968).

Of particular importance here, we have made sure that an out-of-court statement was introduced for a "*legitimate*, nonhearsay purpose" before relying on the not-for-its-truth rationale to dismiss the application of the Confrontation Clause. See *Street*, 471 U. S., at 417 (emphasis added). In *Street*, the defendant testified that he gave a false confession because police coerced him into parroting his accomplice's confession. *Id.*, at 411. On rebuttal, the prosecution introduced the accomplice's confession to demonstrate to the jury the ways in which the two confessions differed. *Id.*, at 411–412. Finding no Confrontation Clause problem, this Court held that the accomplice's out-of-court confession was not in-

troduced for its truth, but only to impeach the defendant's version of events. *Id.*, at 413–414. Although the Court noted that the confession was not hearsay "under traditional rules of evidence," *id.*, at 413, the Court did not accept that nonhearsay label at face value. Instead, the Court thoroughly examined the use of the out-of-court confession and the efficacy of a limiting instruction before concluding that the Confrontation Clause was satisfied "[i]n this context." *Id.*, at 417.

Unlike the confession in *Street*, statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. "To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true." D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence § 4.10.1, p. 196 (2d ed. 2011) (hereinafter Kaye). "If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions." *Ibid.*[1]

Contrary to the plurality's suggestion, this commonsense conclusion is not undermined by any longstanding historical

[1] The plurality relies heavily on the fact that this case involved a bench trial, emphasizing that a judge sitting as factfinder is presumed—more so than a jury—to "understand the limited reason for the disclosure" of basis testimony and to "not rely on that information for any improper purpose." *Ante*, at 69. Even accepting that presumption, the point is not that the factfinder is unable to understand the restricted purpose for basis testimony. Instead, the point is that the purportedly "limited reason" for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the basis testimony is true.

practice exempting expert basis testimony from the rigors of the Confrontation Clause. Prior to the adoption of the Federal Rules of Evidence in 1975, an expert could render an opinion based only on facts that the expert had personally perceived or facts that the expert learned at trial, either by listening to the testimony of other witnesses or through a hypothetical question based on facts in evidence. See Advisory Committee's 2000 Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 361; 29 C. Wright & V. Gold, Federal Practice and Procedure § 6271, pp. 300–301 (1997) (hereinafter Wright); 1 K. Broun et al., McCormick on Evidence § 14, p. 86 (6th ed. 2006) (hereinafter Broun); Kaye § 4.6, at 156–157. In those situations, there was little danger that the expert would rely on testimonial hearsay that was not subject to confrontation because the expert and the witnesses on whom he relied were present at trial. It was not until 1975 that the universe of facts upon which an expert could rely was expanded to include facts of the case that the expert learned out of court by means other than his own perception. 1 Broun § 14, at 87; Kaye § 4.6, at 157. It is the expert's disclosure of those facts that raises Confrontation Clause concerns.[2]

B

Those concerns are fully applicable in this case. Lambatos opined that petitioner's DNA profile matched the male profile derived from L. J.'s vaginal swabs. In reaching that

[2] In its discussion of history, the plurality relies on *Beckwith* v. *Sydebotham*, 1 Camp. 116, 170 Eng. Rep. 897 (K. B. 1807). In that case, experts were asked to render opinions on a ship's seaworthiness based on facts read into court from the sworn *ex parte* deposition of a witness who purported to have seen the ship's deficiencies. To be sure, *Beckwith* involved expert reliance on testimonial hearsay. But *Beckwith* was an English case decided after the ratification of the Confrontation Clause, and this form of expert testimony does not appear to have been a common feature of early American evidentiary practice. See 29 Wright § 6271, at 300–301; 1 Broun § 14, at 86–87; Kaye § 4.6, at 156–157.

conclusion, Lambatos relied on Cellmark's out-of-court statements that the profile it reported was in fact derived from L. J.'s swabs, rather than from some other source. Thus, the validity of Lambatos' opinion ultimately turned on the truth of Cellmark's statements. The plurality's assertion that Cellmark's statements were merely relayed to explain "the assumptions on which [Lambatos'] opinion rest[ed]," *ante*, at 58, overlooks that the value of Lambatos' testimony depended on the truth of those very assumptions.[3]

It is no answer to say that *other* nonhearsay evidence established the basis of the expert's opinion. Here, Lambatos disclosed Cellmark's statements that it generated a male DNA profile from L. J.'s swabs, but other evidence showed that L. J.'s swabs contained semen and that the swabs were shipped to and received from Cellmark. *Ante*, at 61. That evidence did not render Cellmark's statements superfluous. Of course, evidence that Cellmark received L. J.'s swabs and later produced a DNA profile is some indication that Cellmark in fact generated the profile from those swabs, rather than from some other source (or from no source at all). Cf. *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 319 (2009) (citing brief that describes "cases of documented 'drylabbing' where forensic analysts report results of tests that were never performed," including DNA tests).

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[3] Cellmark's statements were not introduced for the nonhearsay purpose of showing their effect on Lambatos—*i. e.*, to explain what prompted her to search the DNA database for a match. See, *e. g.*, 30B M. Graham, Federal Practice and Procedure § 7034.1, pp. 521–529 (interim ed. 2011) (noting that out-of-court statements introduced for their effect on listener do not implicate the Confrontation Clause). The statements that Lambatos conveyed went well beyond what was necessary to explain why she performed the search. Lambatos did not merely disclose that she received a DNA profile from Cellmark. Rather, she further disclosed Cellmark's statements that the profile was "male" and that it was "found in semen from the vaginal swabs of [L. J.]." App. 56. Those facts had nothing to do with her decision to conduct a search. They were introduced for their truth.

But the only direct evidence to that effect was Cellmark's statement, which Lambatos relayed to the factfinder. In any event, the factfinder's ability to rely on other evidence to evaluate an expert's opinion does not alter the conclusion that basis testimony is admitted for its truth. The existence of other evidence corroborating the basis testimony may render any Confrontation Clause violation harmless, but it does not change the purpose of such testimony and thereby place it outside of the reach of the Confrontation Clause.[4] I would thus conclude that Cellmark's statements were introduced for their truth.

C

The plurality's contrary conclusion may seem of little consequence to those who view DNA testing and other forms of "hard science" as intrinsically reliable. But see *Melendez-Diaz*, *supra*, at 318 ("Forensic evidence is not uniquely immune from the risk of manipulation"). Today's holding, however, will reach beyond scientific evidence to ordinary out-of-court statements. For example, it is not uncommon for experts to rely on interviews with third parties in forming their opinions. See, *e. g.*, *People* v. *Goldstein*, 6 N. Y. 3d 119, 123–124, 843 N. E. 2d 727, 729–730 (2005) (psychiatrist disclosed statements made by the defendant's acquaintances

[4] The plurality concludes that the Confrontation Clause would not be implicated here "even if the record did not contain any [other] evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L. J.'s vaginal swabs." *Ante*, at 76. But, far from establishing a "legitimate" nonhearsay purpose for Cellmark's statements, *Tennessee* v. *Street*, 471 U. S. 409, 417 (1985), a complete lack of other evidence tending to prove the facts conveyed by Cellmark's statements would completely refute the not-for-its-truth rationale. The trial court, in announcing its verdict, expressly concluded that petitioner's DNA matched the "DNA . . . in the semen recovered from the victim's vagina." 4 Record JJJ151. Absent other evidence, it would have been impossible for the trial court to reach that conclusion without relying on the truth of Cellmark's statement that its test results were based on the semen from L. J.'s swabs.

as part of the basis of her opinion that the defendant was motivated to kill by his feelings of sexual frustration).

It is no answer to say that "safeguards" in the rules of evidence will prevent the abuse of basis testimony. *Ante*, at 80. To begin with, courts may be willing to conclude that an expert is not acting as a "mere condui[t]" for hearsay, *ibid.*, as long as he simply provides some opinion based on that hearsay. See Brief for Respondent 18, n. 4 (collecting cases). In addition, the hearsay may be the kind of fact on which experts in a field reasonably rely. See Fed. Rule Evid. 703; *Goldstein*, *supra*, at 125, 843 N. E. 2d, at 731 (evidence showed that reputable psychiatrists relied upon third-party interviews in forming their opinions). Of course, some courts may determine that hearsay of this sort is not substantially more probative than prejudicial and therefore should not be disclosed under Rule 703. But that balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused. See *Crawford*, 541 U. S., at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

## II

### A

Having concluded that the statements at issue here were introduced for their truth, I turn to whether they were "testimonial" for purposes of the Confrontation Clause. In *Crawford*, the Court explained that "[t]he text of the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.*, at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). "'Testimony,'" in turn, is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U. S., at 51. In light of its text, I continue to think that the Confrontation

Clause regulates only the use of statements bearing "indicia of solemnity." *Davis* v. *Washington*, 547 U. S. 813, 836–837, 840 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). This test comports with history because solemnity marked the practices that the Confrontation Clause was designed to eliminate, namely, the *ex parte* examination of witnesses under the English bail and committal statutes passed during the reign of Queen Mary. See *id.*, at 835; *Bryant*, 562 U. S., at 378 (THOMAS, J., concurring in judgment); *Crawford*, *supra*, at 43–45. Accordingly, I have concluded that the Confrontation Clause reaches "'formalized testimonial materials,'" such as depositions, affidavits, and prior testimony, or statements resulting from "'formalized dialogue,'" such as custodial interrogation. *Bryant*, *supra*, at 379; see also *Davis*, *supra*, at 836–837.[5]

Applying these principles, I conclude that Cellmark's report is not a statement by a "witnes[s]" within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. See Report of Laboratory Examination (Feb. 15, 2001), Lodging of Petitioner. The report is signed by two "reviewers," but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. See *ibid.* And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

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[5] In addition, I have stated that, because the Confrontation Clause "sought to regulate prosecutorial abuse occurring through use of *ex parte* statements," it "also reaches the use of technically informal statements when used to evade the formalized process." *Davis*, 547 U. S., at 838 (opinion concurring in judgment in part and dissenting in part). But, in this case, there is no indication that Cellmark's statements were offered "in order to evade confrontation." *Id.*, at 840.

The Cellmark report is distinguishable from the laboratory reports that we determined were testimonial in *Melendez-Diaz*, 557 U. S. 305, and in *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011). In *Melendez-Diaz*, the reports in question were "sworn to before a notary public by [the] analysts" who tested a substance for cocaine. 557 U. S., at 308. In *Bullcoming*, the report, though unsworn, included a "Certificate of Analyst" signed by the forensic analyst who tested the defendant's blood sample. 564 U. S., at 653. The analyst "affirmed that '[t]he seal of th[e] sample was received intact and broken in the laboratory,' that 'the statements in [the analyst's block of the report] are correct,' and that he had 'followed the procedures set out on the reverse of th[e] report.'" *Ibid.*

The dissent insists that the *Bullcoming* report and Cellmark's report are equally formal, separated only by such "minutia" as the fact that Cellmark's report "is not labeled a 'certificate.'" *Post*, at 139 (opinion of KAGAN, J.). To the contrary, what distinguishes the two is that Cellmark's report, in substance, certifies nothing. See *supra*, at 111. That distinction is constitutionally significant because the scope of the confrontation right is properly limited to extrajudicial statements similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent. See *Davis*, *supra*, at 835–836 (opinion of THOMAS, J.). By certifying the truth of the analyst's representations, the unsworn *Bullcoming* report bore "a 'striking resemblance,'" 547 U. S., at 837 (quoting *Crawford*, 541 U. S., at 52), to the Marian practice in which magistrates examined witnesses, typically on oath, and "certif[ied] the results to the court," *id.*, at 44. And, in *Melendez-Diaz*, we observed that "'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" 557 U. S., at 310–311. Cellmark's report is marked by no such indicia of solemnity.

Contrary to the dissent's suggestion, acknowledging that the Confrontation Clause is implicated only by formalized statements that are characterized by solemnity will not result in a prosecutorial conspiracy to elude confrontation by using only informal extrajudicial statements against an accused. As I have previously noted, the Confrontation Clause reaches bad-faith attempts to evade the formalized process. See *supra*, at 111, n. 5 (quoting *Davis*, *supra*, at 838). Moreover, the prosecution's use of informal statements comes at a price. As the dissent recognizes, such statements are "less reliable" than formalized statements, *post*, at 140, and therefore less persuasive to the factfinder. Cf. *post*, at 137, n. 6 (arguing that prosecutors are unlikely to "'forgo DNA evidence in favor of less reliable eyewitness testimony'" simply because the defendant is entitled to confront the DNA analyst). But, even assuming that the dissent accurately predicts an upswing in the use of "less reliable" informal statements, that result does not "turn the Confrontation Clause upside down." *Post*, at 140. The Confrontation Clause does not require that evidence be reliable, *Crawford*, *supra*, at 61, but that the reliability of a specific "class of testimonial statements"—formalized statements bearing indicia of solemnity—be assessed through cross-examination, see *Melendez-Diaz*, *supra*, at 309–310.

B

Rather than apply the foregoing principles, the plurality invokes its "primary purpose" test. The original formulation of that test asked whether the primary purpose of an extrajudicial statement was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, *supra*, at 822. I agree that, for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a

criminal prosecution. See *Bryant*, 562 U. S., at 380–381 (SCALIA, J., dissenting). But this necessary criterion is not sufficient, for it sweeps into the ambit of the Confrontation Clause statements that lack formality and solemnity and is thus "disconnected from history." *Davis*, 547 U. S., at 838–842 (THOMAS, J., concurring in judgment in part and dissenting in part); *Bryant*, *supra*, at 378 (THOMAS, J., concurring in judgment). In addition, a primary purpose inquiry divorced from solemnity is unworkable in practice. *Davis*, *supra*, at 839; *Bryant*, *supra*, at 379. Statements to police are often made *both* to resolve an ongoing emergency *and* to establish facts about a crime for potential prosecution. The primary purpose test gives courts no principled way to assign primacy to one of those purposes. *Davis*, *supra*, at 839. The solemnity requirement is not only true to the text and history of the Confrontation Clause, but goes a long way toward resolving that practical difficulty. If a statement bears the formality and solemnity necessary to come within the scope of the Clause, it is highly unlikely that the statement was primarily made to end an ongoing emergency.

The shortcomings of the original primary purpose test pale in comparison, however, to those plaguing the reformulated version that the plurality suggests today. The new primary purpose test asks whether an out-of-court statement has "the primary purpose of accusing a targeted individual of engaging in criminal conduct." *Ante*, at 82. That test lacks any grounding in constitutional text, in history, or in logic.

The new test first requires that an out-of-court statement be made "for the purpose of proving the guilt of a *particular* criminal defendant." *Ante*, at 84 (emphasis added). Under this formulation, statements made "before any suspect was identified" are beyond the scope of the Confrontation Clause. See *ante*, at 58. There is no textual justification, however, for limiting the confrontation right to statements made after the accused's identity became known. To be sure, the Sixth

Amendment right to confrontation attaches "[i]n . . . criminal prosecutions," at which time the accused has been identified and apprehended. But the text of the Confrontation Clause does not constrain the time at which one becomes a "witnes[s]." Indeed, we have previously held that a declarant may become a "witnes[s]" before the accused's prosecution. See *Crawford*, 541 U. S., at 50–51 (rejecting the view that the Confrontation Clause applies only to in-court testimony).

Historical practice confirms that a declarant could become a "witnes[s]" before the accused's identity was known. As previously noted, the confrontation right was a response to *ex parte* examinations of witnesses in 16th-century England. Such examinations often occurred after an accused was arrested or bound over for trial, but some examinations occurred while the accused remained "unknown or fugitive." J. Langbein, Prosecuting Crime in the Renaissance 90 (1974) (describing examples, including the deposition of a victim who was swindled out of 20 shillings by a "'cunning man'"); see also 1 J. Stephen, A History of the Criminal Law of England 217–218 (1883) (describing the sworn examinations of witnesses by coroners, who were charged with investigating suspicious deaths by asking local citizens if they knew "who [was] culpable either of the act or of the force" (internal quotation marks omitted)).

There is also little logical justification for the plurality's rule. The plurality characterizes Cellmark's report as a statement elicited by police and made by Cellmark not "to accuse petitioner or to create evidence for use at trial," but rather to resolve the ongoing emergency posed by "a dangerous rapist who was still at large." *Ante*, at 84. But, as I have explained, that distinction is unworkable in light of the mixed purposes that often underlie statements to the police. See *supra*, at 114. The difficulty is only compounded by the plurality's attempt to merge the purposes of both the police and the declarant. See *ante*, at 82; *Bryant*, *supra*, at 367–370 (majority opinion).

But if one purpose must prevail, here it should surely be the evidentiary one, whether viewed from the perspective of the police, Cellmark, or both. The police confirmed the presence of semen on L. J.'s vaginal swabs on February 15, 2000, placed the swabs in a freezer, and waited until November 28, 2000, to ship them to Cellmark. App. 30–34, 51–52. Cellmark, in turn, did not send its report to the police until April 3, 2001, *id.*, at 54, over a year after L. J.'s rape. Given this timeline, it strains credulity to assert that the police and Cellmark were primarily concerned with the exigencies of an ongoing emergency, rather than with producing evidence in the ordinary course.

In addition to requiring that an out-of-court statement "targe[t]" a particular accused, the plurality's new primary purpose test also considers whether the statement is so "inherently inculpatory," *ante,* at 58, that the declarant should have known that his statement would incriminate the accused. In this case, the plurality asserts that "[t]he technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both," *ante,* at 85, and thus "no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner," *ante,* at 84.

Again, there is no textual justification for this limitation on the scope of the Confrontation Clause. In *Melendez-Diaz*, we held that "[t]he text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor." 557 U. S., at 313. We emphasized that "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.*, at 314. Thus, the distinction between those who make "inherently inculpatory" statements and those who make other statements that are merely "helpful to the prosecution" has no foundation in the text of the Amendment.

It is also contrary to history. The 16th-century Marian statutes instructed magistrates to transcribe any information by witnesses that "'shall be material to prove the felony.'" See, *e. g.*, 1 Stephen, *supra*, at 219 (quoting 1 & 2 Phil. & Mary, ch. 13 (1554)). Magistrates in the 17th and 18th centuries were also advised by practice manuals to take the *ex parte* examination of a witness even if his evidence was "weak" or the witness was "unable to inform any material thing against" an accused. J. Beattie, Crime and the Courts in England: 1660–1800, p. 272 (1986) (internal quotation marks omitted). Thus, neither law nor practice limited *ex parte* examinations to those witnesses who made "inherently inculpatory" statements.

This requirement also makes little sense. A statement that is not facially inculpatory may turn out to be highly probative of a defendant's guilt when considered with other evidence. Recognizing this point, we previously rejected the view that a witness is not subject to confrontation if his testimony is "inculpatory only when taken together with other evidence." *Melendez-Diaz*, *supra*, at 313. I see no justification for reviving that discredited approach, and the plurality offers none.[6]

* * *

Respondent and its *amici* have emphasized the economic and logistical burdens that would be visited upon States should every analyst who reports DNA results be required to testify at trial. See, *e. g.*, *ante*, at 85 (citing brief stating that some crime labs use up to 12 technicians when testing

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[6] The plurality states that its test "will not prejudice any defendant who really wishes to probe the reliability" of out-of-court statements introduced in his case because the person or persons who made the statements "may always be subpoenaed by the defense and questioned at trial." *Ante*, at 58–59. *Melendez-Diaz* rejected this reasoning as well, holding that the defendant's subpoena power "is no substitute for the right of confrontation." 557 U. S., at 324.

a DNA sample). These burdens are largely the product of a primary purpose test that reaches out-of-court statements well beyond the historical scope of the Confrontation Clause and thus sweeps in a broad range of sources on which modern experts regularly rely. The proper solution to this problem is not to carve out a Confrontation Clause exception for expert testimony that is rooted only in legal fiction. See *ante*, at 58. Nor is it to create a new primary purpose test that ensures that DNA evidence is treated differently. See *ibid.* Rather, the solution is to adopt a reading of the Confrontation Clause that respects its historically limited application to a narrow class of statements bearing indicia of solemnity. In forgoing that approach, today's decision diminishes the Confrontation Clause's protection in cases where experts convey the contents of solemn, formalized statements to explain the bases for their opinions. These are the very cases in which the accused *should* "enjoy the right . . . to be confronted with the witnesses against him."

JUSTICE KAGAN, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, dissenting.

Some years ago, the State of California prosecuted a man named John Kocak for rape. At a preliminary hearing, the State presented testimony from an analyst at the Cellmark Diagnostics Laboratory—the same facility used to generate DNA evidence in this case. The analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples—one from Kocak and one from the victim. The analyst's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to Kocak. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from Kocak, and Kocak's as coming from the victim. So the DNA on the sweatshirt matched not Kocak,

but the victim herself. See Tr. in No. SCD110465 (Super. Ct. San Diego Cty., Cal., Nov. 17, 1995), pp. 3–4 ("I'm a little hysterical right now, but I think . . . the two names should be switched"), online at http://www.nlada.org/forensics/for_lib/Documents/1037341561.0/JohnIvanKocak.pdf (as visited June 15, 2012, and available in Clerk of Court's case file). In trying Kocak, the State would have to look elsewhere for its evidence.

Our Constitution contains a mechanism for catching such errors—the Sixth Amendment's Confrontation Clause. That Clause, and the Court's recent cases interpreting it, require that testimony against a criminal defendant be subject to cross-examination. And that command applies with full force to forensic evidence of the kind involved in both the Kocak case and this one. In two decisions issued in the last three years, this Court held that if a prosecutor wants to introduce the results of forensic testing into evidence, he must afford the defendant an opportunity to cross-examine an analyst responsible for the test. Forensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened. The Kocak incident illustrates how the Clause is designed to work: Once confronted, the analyst discovered and disclosed the error she had made. That error would probably not have come to light if the prosecutor had merely admitted the report into evidence or asked a third party to present its findings. Hence the genius of an 18th-century device as applied to 21st-century evidence: Cross-examination of the analyst is especially likely to reveal whether vials have been switched, samples contaminated, tests incompetently run, or results inaccurately recorded.

Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams

a chance to question the analyst who produced that evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach—no less (perhaps more) than the confrontation-free methods of presenting forensic evidence we have formerly banned—deprived Williams of his Sixth Amendment right to "confron[t] . . . the witnesses against him."

The Court today disagrees, though it cannot settle on a reason why. JUSTICE ALITO, joined by three other Justices, advances two theories—that the expert's summary of the Cellmark report was not offered for its truth, and that the report is not the kind of statement triggering the Confrontation Clause's protection. In the pages that follow, I call JUSTICE ALITO's opinion "the plurality," because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication. See *ante*, at 104 (THOMAS, J., concurring in judgment) ("I share the dissent's view of the plurality's flawed analysis"). JUSTICE THOMAS, for his part, contends that the Cellmark report is nontestimonial on a different rationale. But no other Justice joins his opinion or subscribes to the test he offers.

That creates five votes to approve the admission of the Cellmark report, but not a single good explanation. The plurality's first rationale endorses a prosecutorial dodge; its second relies on distinguishing indistinguishable forensic reports. JUSTICE THOMAS's concurrence, though positing an altogether different approach, suffers in the end from similar flaws. I would choose another path—to adhere to the simple rule established in our decisions, for the good reasons we have previously given. Because defendants like Williams have a constitutional right to confront the witnesses against them, I respectfully dissent from the Court's fractured decision.

I

Our modern Confrontation Clause doctrine began with *Crawford* v. *Washington*, 541 U. S. 36 (2004). About a quarter century earlier, we had interpreted the Clause to allow the admission of any out-of-court statement falling within a "firmly rooted hearsay exception" or carrying "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). But in *Crawford*, we concluded that our old approach was misguided. Drawing on historical research about the Clause's purposes, we held that the prosecution may not admit "testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination." 541 U. S., at 53–54. That holding has two aspects. First, the Confrontation Clause applies only to out-of-court statements that are "testimonial." Second, where the Clause applies, it guarantees to a defendant just what its name suggests—the opportunity to cross-examine the person who made the statement. See *id.*, at 59.

A few years later, we made clear that *Crawford*'s rule reaches forensic reports. In *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009), the Commonwealth introduced a laboratory's "'certificates of analysis'" stating that a substance seized from the defendant was cocaine. *Id.*, at 308. We held that the certificates fell within the Clause's "'core class of testimonial statements'" because they had a clear "evidentiary purpose": They were "'made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.'" *Id.*, at 310–311 (quoting *Crawford*, 541 U. S., at 51–52). Accordingly, we ruled, the defendant had a right to cross-examine the analysts who had authored them. In reaching that conclusion, we rejected the Commonwealth's argument that the Confrontation Clause should not apply because the statements resulted from "'neutral scientific testing,'" and so were presumptively reliable. 557 U. S., at

318. The Clause, we noted, commands that "'reliability be assessed in a particular manner'"—through "'testing in the crucible of cross-examination.'" *Id.*, at 317 (quoting *Crawford*, 541 U. S., at 61). Further, we doubted that the testing summarized in the certificates was "as neutral or as reliable" as the Commonwealth suggested. Citing chapter and verse from various studies, we concluded that "[f]orensic evidence is not uniquely immune from the risk of manipulation" and mistake. 557 U. S., at 318; see *id.*, at 319.

And just two years later (and just one year ago), we reiterated *Melendez-Diaz*'s analysis when faced with a State's attempt to evade it. In *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011), a forensic report showed the defendant's blood-alcohol concentration to exceed the legal limit for drivers. The State tried to introduce that finding through the testimony of a person who worked at the laboratory but had not performed or observed the blood test or certified its results. We held that *Melendez-Diaz* foreclosed that tactic. The report, we stated, resembled the certificates in *Melendez-Diaz* in "all material respects," 564 U. S., at 664: Both were signed documents providing the results of forensic testing designed to "'prov[e] some fact' in a criminal proceeding," *ibid.* (quoting *Melendez-Diaz*, 557 U. S., at 310). And the State's resort to a "surrogate" witness, in place of the analyst who produced the report, did not satisfy the Confrontation Clause. *Bullcoming*, 564 U. S., at 661. Only the presence of "that particular scientist," we reasoned, would enable Bullcoming's counsel to ask "questions designed to reveal whether incompetence . . . or dishonesty" had tainted the results. *Id.*, at 652, 662. Repeating the refrain of *Melendez-Diaz*, we held that "[t]he accused's right is to be confronted with" the actual analyst, unless he is unavailable and the accused "had an opportunity, pretrial, to cross-examine" him. *Bullcoming*, 564 U. S., at 652.

This case is of a piece. The report at issue here shows a DNA profile produced by an analyst at Cellmark's labora-

tory, allegedly from vaginal swabs taken from a young woman, L. J., after she was raped. That report is identical to the one in *Bullcoming* (and *Melendez-Diaz*) in "all material respects." 564 U. S., at 664. Once again, the report was made to establish "'some fact' in a criminal proceeding"—here, the identity of L. J.'s attacker. *Ibid.* (quoting *Melendez-Diaz*, 557 U. S., at 310); see *infra*, at 137. And once again, it details the results of forensic testing on evidence gathered by the police. Viewed side-by-side with the *Bullcoming* report, the Cellmark analysis has a comparable title; similarly describes the relevant samples, test methodology, and results; and likewise includes the signatures of laboratory officials. Compare Cellmark Diagnostics Report of Laboratory Examination (Feb. 15, 2001), Lodging of Petitioner, with App. in *Bullcoming* v. *New Mexico*, O. T. 2010, No. 09–10876, pp. 62–65. So under this Court's prior analysis, the substance of the report could come into evidence only if Williams had a chance to cross-examine the responsible analyst.

But that is not what happened. Instead, the prosecutor used Sandra Lambatos—a state-employed scientist who had not participated in the testing—as the conduit for this piece of evidence. Lambatos came to the stand after two other state analysts testified about forensic tests they had performed. One recounted how she had developed a DNA profile of Sandy Williams from a blood sample drawn after his arrest. And another told how he had confirmed the presence of (unidentified) semen on the vaginal swabs taken from L. J. All this was by the book: Williams had an opportunity to cross-examine both witnesses about the tests they had run. But of course, the State still needed to supply the missing link—it had to show that DNA found in the semen on L. J.'s vaginal swabs matched Williams's DNA. To fill that gap, the prosecutor could have called the analyst from Cellmark to testify about the DNA profile she had produced from the swabs. But instead, the State called Lambatos as

an expert witness and had her testify that the semen on those swabs contained Sandy Williams's DNA:

> "Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L. J.] to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> "A Yes, there was.
>
> "Q Did you compare the semen . . . from the vaginal swabs of [L. J.] to the male DNA profile . . . from the blood of Sandy Williams?
>
> "A Yes, I did.
>
> . . . . .
>
> "Q [I]s the semen identified in the vaginal swabs of [L. J.] consistent with having originated from Sandy Williams?
>
> "A Yes." App. 56–57.

And so it was Lambatos, rather than any Cellmark employee, who informed the trier of fact that the testing of L. J.'s vaginal swabs had produced a male DNA profile implicating Williams.

Have we not already decided this case? Lambatos's testimony is functionally identical to the "surrogate testimony" that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz* (which, for its part, straightforwardly applied our decision in *Crawford*). Like the surrogate witness in *Bullcoming*, Lambatos "could not convey what [the actual analyst] knew or observed about the events . . . , *i. e.*, the particular test and testing process he employed." *Bullcoming*, 564 U. S., at 661. "Nor could such surrogate testimony expose any lapses or lies" on the testing analyst's part. *Id.*, at 661–662. Like the lawyers in *Melendez-Diaz* and *Bullcoming*, Williams's attorney could not ask questions about that analyst's "proficiency, the care he took in performing his work, and his veracity." 564 U. S., at 662, n. 7. He could not probe whether the analyst had

tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results. See App. to Brief for Public Defender Service for the District of Columbia et al. as *Amici Curiae* 5a, 11a (describing mistakes and fraud at Cellmark's laboratory). Indeed, Williams's lawyer was even more hamstrung than Bullcoming's. At least the surrogate witness in *Bullcoming* worked at the relevant laboratory and was familiar with its procedures. That is not true of Lambatos: She had no knowledge at all of Cellmark's operations. Indeed, for all the record discloses, she may never have set foot in Cellmark's laboratory.

Under our case law, that is sufficient to resolve this case. "[W]hen the State elected to introduce" the substance of Cellmark's report into evidence, the analyst who generated that report "became a witness" whom Williams "had the right to confront." *Bullcoming*, 564 U. S., at 663. As we stated just last year, "Our precedent[s] cannot sensibly be read any other way." *Ibid.*

## II

The plurality's primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in *Crawford*. "The Clause," we cautioned there, "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U. S., at 59–60, n. 9 (citing *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985)). The Illinois Supreme Court relied on that statement in concluding that Lambatos's testimony was permissible. On that court's view, "Lambatos disclosed the underlying facts from Cellmark's report" not for their truth, but "for the limited purpose of explaining the basis for her [expert] opinion," so that the factfinder could assess that opinion's value. 238 Ill. 2d 125, 150, 939 N. E. 2d 268, 282 (2010). The plurality wraps itself in that holding, similarly asserting that Lambatos's recitation of Cellmark's findings,

when viewed through the prism of state evidence law, was not introduced to establish "the truth of any . . . matter concerning [the] Cellmark" report. *Ante*, at 71; see *ante*, at 57, 77–78. But five Justices agree, in two opinions reciting the same reasons, that this argument has no merit: Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements. See *ante*, at 104–110 (opinion of THOMAS, J.).

To see why, start with the kind of case *Crawford* had in mind. In acknowledging the not-for-the-truth carveout from the Clause, the Court cited *Tennessee* v. *Street* as exemplary. See *Crawford*, 541 U. S., at 59–60, n. 9. There, Street claimed that his stationhouse confession of murder was a sham: A police officer, he charged, had read aloud his alleged accomplice's confession and forced him to repeat it. To help rebut that defense, the State introduced the other confession into the record, so the jury could see how it differed from Street's. This Court rejected Street's Confrontation Clause claim because the State had offered the out-of-court statement not to prove "the truth of [the accomplice's] assertions" about the murder, but only to disprove Street's claim of how the police elicited his confession. *Street*, 471 U. S., at 413. Otherwise said, the truth of the admitted statement was utterly immaterial; the only thing that mattered was that the statement (whether true or false) varied from Street's.

The situation could not be more different when a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, because the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such "basis evi-

dence" comes in not for its truth, but only to help the factfinder evaluate an expert's opinion "very weak," "factually implausible," "nonsense," and "sheer fiction." D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence § 4.10.1, pp. 196–197 (2d ed. 2011); *id.*, § 4.11.6, at 24 (Supp. 2012). "One can sympathize," notes that treatise, "with a court's desire to permit the disclosure of basis evidence that is quite probably reliable, such as a routine analysis of a drug, but to pretend that it is not being introduced for the truth of its contents strains credibility." *Id.*, § 4.10.1, at 198 (2d ed. 2011); see also, *e. g.*, *People* v. *Goldstein*, 6 N. Y. 3d 119, 128, 843 N. E. 2d 727, 732–733 (2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful"). Unlike in *Street*, admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress.[1]

Consider a prosaic example not involving scientific experts. An eyewitness tells a police officer investigating an assault that the perpetrator had an unusual, star-shaped birthmark over his left eye. The officer arrests a person bearing that birthmark (let's call him Starr) for committing the offense. And at trial, the officer takes the stand and recounts just what the eyewitness told him. Presumably the plurality would agree that such testimony violates the Confrontation Clause unless the eyewitness is unavailable and the defendant had a prior opportunity to cross-examine

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[1] In responding to this reasoning, the plurality confirms it. According to the plurality, basis evidence supports the "credibility of the expert's opinion" by showing that he has relied on, and drawn logical inferences from, sound "factual premises." *Ante*, at 78. Quite right. And that process involves assessing such premises' truth: If they are, as the plurality puts it, "unsupported by other evidence in the record" or otherwise baseless, they will not "allay [a factfinder's] fears" about an "expert's reasoning." *Ibid.* I could not have said it any better.

him. Now ask whether anything changes if the officer couches his testimony in the following way: "I concluded that Starr was the assailant because a reliable eyewitness told me that the assailant had a star-shaped birthmark and, look, Starr has one just like that." Surely that framing would make no constitutional difference, even though the eyewitness's statement now explains the basis for the officer's conclusion. It remains the case that the prosecution is attempting to introduce a testimonial statement that has no relevance to the proceedings apart from its truth—and that the defendant cannot cross-examine the person who made it. Allowing the admission of this evidence would end-run the Confrontation Clause, and make a parody of its strictures.

And that example, when dressed in scientific clothing, is no different from this case. The Cellmark report identified the rapist as having a particular DNA profile (think of it as the quintessential birthmark). The Confrontation Clause prevented the State from introducing that report into evidence except by calling to the stand the person who prepared it. See *Melendez-Diaz*, 557 U. S., at 310–311; *Bullcoming*, 564 U. S., at 652. So the State tried another route—introducing the substance of the report as part and parcel of an expert witness's conclusion. In effect, Lambatos testified (like the police officer above): "I concluded that Williams was the rapist because Cellmark, an accredited and trustworthy laboratory, says that the rapist has a particular DNA profile and, look, Williams has an identical one." And here too, that form of testimony should change nothing. The use of the Cellmark statement remained bound up with its truth, and the statement came into evidence without any opportunity for Williams to cross-examine the person who made it. So if the plurality were right, the State would have a ready method to bypass the Constitution (as much as in my hypothetical case); a wink and a nod, and the Confrontation Clause would not pose a bar to forensic evidence.

The plurality tries to make plausible its not-for-the-truth rationale by rewriting Lambatos's testimony about the Cellmark report. According to the plurality, Lambatos merely "assumed" that Cellmark's DNA profile came from L. J.'s vaginal swabs, accepting for the sake of argument the prosecutor's premise. *Ante*, at 72. But that is incorrect. Nothing in Lambatos's testimony indicates that she was making an assumption or considering a hypothesis. To the contrary, Lambatos affirmed, without qualification, that the Cellmark report showed a "male DNA profile found in semen from the vaginal swabs of [L. J.]." App. 56. Had she done otherwise, this case would be different. There was nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise. Similarly, Lambatos could have added that *if* the Cellmark report resulted from scientifically sound testing of L. J.'s vaginal swabs, *then* it would link Williams to the assault. What Lambatos could not do was what she did: indicate that the Cellmark report *was* produced in this way by saying that L. J.'s vaginal swabs contained DNA matching Williams's.[2]

[2] The plurality suggests that Lambatos's testimony is merely a modern, streamlined way of answering hypothetical questions and therefore raises no constitutional issue, see *ante*, at 57, 67–70; similarly, the plurality contends that the difference between what Lambatos said and what I would allow involves only "slightly revis[ing]" her testimony and so can be of no consequence, see *ante*, at 72, n. 3. But the statement "if X is true, then Y follows" differs materially—and constitutionally—from the statement "Y is true because X is true (according to Z)." The former statement is merely a logical proposition, whose validity the defendant can contest by questioning the speaker. And then, assuming the prosecutor tries to prove the statement's premise through some other witness, the defendant can rebut that effort through cross-examination. By contrast, the latter statement as well contains a factual allegation (that X is true), which the defendant can only effectively challenge by confronting the person who made it (Z). That is why recognizing the difference between these two forms of testimony is not to insist on an archaism or a formality, but to

By testifying in that manner, Lambatos became just like the surrogate witness in *Bullcoming*—a person knowing nothing about "the particular test and testing process," but vouching for them regardless. 564 U. S., at 661. We have held that the Confrontation Clause requires something more.

The plurality also argues that Lambatos's characterization of the Cellmark report did not violate the Confrontation Clause because the case "involve[d] a bench trial." *Ante*, at 72 (emphasis deleted). I welcome the plurality's concession that the Clause might forbid presenting Lambatos's statement to a jury, see *ibid.*; it indicates that the plurality realizes that her testimony went beyond an "assumption." But the presence of a judge does not transform the constitutional question. In applying the Confrontation Clause, we have never before considered relevant the decisionmaker's identity. See, *e. g.*, *Davis* v. *Washington*, 547 U. S. 813 (2006). And this case would be a poor place to begin. Lambatos's description of the Cellmark report was offered for its truth because that is all such "basis evidence" can be offered for; as described earlier, the only way the factfinder could consider whether that statement supported her opinion (that the DNA on L. J.'s swabs came from Williams) was by assessing the statement's truth. See *supra*, at 126–129. That is so, as a simple matter of logic, whether the factfinder is a judge or a jury. And thus, in either case, admission of the statement, without the opportunity to cross-examine, violates the Confrontation Clause. See *ante*, at 106, n. 1 (opinion of THOMAS, J.).

In saying that much, I do not doubt that a judge typically will do better than a jury in excluding such inadmissible evidence from his decisionmaking process. Perhaps the judge

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ensure, in line with the Constitution, that defendants have the ability to confront their accusers. And if prosecutors can easily conform their conduct to that constitutional directive, as the plurality suggests, so much the better: I would not have thought it a ground of complaint that the Confrontation Clause, properly understood, manages to protect defendants without overly burdening the State.

did so here; perhaps, as the plurality thinks, he understood that he could not consider Lambatos's representation about the Cellmark report, and found that other, "circumstantial evidence" established "the source of the sample that Cellmark tested" and "the reliability of the Cellmark profile." *Ante*, at 75–76. Some indications are to the contrary: In delivering his verdict, the judge never referred to the circumstantial evidence the plurality marshals, but instead focused only on Lambatos's testimony. See 4 Record JJJ151 (calling Lambatos "the best DNA witness I have ever heard" and referring to Williams as "the guy whose DNA, according to the evidence from the experts, is in the semen recovered from the victim's vagina"). But I take the plurality's point that when read "[i]n context" the judge's statements might be "best understood" as meaning something other than what they appear to say. See *ante*, at 73–74, n. 6. Still, that point suggests only that the admission of Lambatos's statement was harmless—that the judge managed to put it out of mind. After all, whether a factfinder is confused by an error is a separate question from whether an error has occurred. So the plurality's argument does not answer the only question this case presents: whether a constitutional violation happened when Lambatos recited the Cellmark report's findings.[3]

[3] The plurality asserts (without citation) that I am "reach[ing] the truly remarkable conclusion that the wording of Lambatos' testimony confused the trial judge," *ante*, at 73, and then spends three pages explaining why that conclusion is wrong, see *ante*, at 73–75. But the plurality is responding to an argument of its own imagining, because I reach no such conclusion. As I just stated, the trial judge might well have ignored Lambatos's statement about the Cellmark report and relied on other evidence to conclude that "the Cellmark profile was derived from the sample taken from the victim," *ante*, at 73. All I am saying is that the admission of that statement violated the Confrontation Clause even if the judge ultimately put it aside, because it came into evidence for nothing other than its truth. See *supra*, at 126–129.

Similarly, the plurality claims (still without citation) that I think the other evidence about the Cellmark report insufficient, see *ante*, at 75. But once again, the plurality must be reading someone else's opinion. I express no view on sufficiency of the evidence because it is irrelevant to

At bottom, the plurality's not-for-the-truth rationale is a simple abdication to state-law labels. Although the utility of the Cellmark statement that Lambatos repeated logically depended on its truth, the plurality thinks this case decided by an Illinois rule holding that the facts underlying an expert's opinion are not admitted for that purpose. See *ante*, at 69–72; *People* v. *Pasch*, 152 Ill. 2d 133, 175–177, 604 N. E. 2d 294, 311 (1992). But we do not typically allow state law to define federal constitutional requirements. And needless to say (or perhaps not), the Confrontation Clause is a constitutional rule like any other. As JUSTICE THOMAS observes, even before *Crawford*, we did not allow the Clause's scope to be "dictated by state or federal evidentiary rules." *Ante*, at 105. Indeed, in *Street*, we independently reviewed whether an out-of-court statement was introduced for its truth—the very question at issue in this case. See 471 U. S., at 413–416. And in *Crawford*, we still more firmly disconnected the Confrontation Clause inquiry from state evidence law, by overruling an approach that looked in part to whether an out-of-court statement fell within a "'firmly rooted hearsay exception.'" 541 U. S., at 60 (quoting *Roberts*, 448 U. S., at 66). That decision made clear that the Confrontation Clause's protections are not coterminous with rules of evidence. So the plurality's state-law-first approach would be an about-face.

Still worse, that approach would allow prosecutors to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits. Imagine for a moment a poorly trained, incompetent, or dishonest laboratory

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the Confrontation Clause issue we took this case to decide. It is the plurality that wrongly links the two, spending another five pages trumpeting the strength of the Cellmark report, see *ante*, at 76–78, 85–86. But the plurality cannot properly decide whether a Confrontation Clause violation occurred at Williams's trial by determining that Williams was guilty. The American criminal justice system works the opposite way: determining guilt by holding trials in accord with constitutional requirements.

analyst. (The analyst in *Bullcoming*, placed on unpaid leave for unknown reasons, might qualify.) Under our precedents, the prosecutor cannot avoid exposing that analyst to cross-examination simply by introducing his report. See *Melendez-Diaz*, 557 U. S., at 311. Nor can the prosecutor escape that fate by offering the results through the testimony of another analyst from the laboratory. See *Bullcoming*, 564 U. S., at 652. But under the plurality's approach, the prosecutor could choose the analyst-witness of his dreams (as the judge here said, "the best DNA witness I have ever heard"), offer her as an expert (she knows nothing about the test, but boasts impressive degrees), and have her provide testimony identical to the best the actual tester might have given ("the DNA extracted from the vaginal swabs matched Sandy Williams's")—all so long as a state evidence rule says that the purpose of the testimony is to enable the factfinder to assess the expert opinion's basis. (And this tactic would not be confined to cases involving scientific evidence. As JUSTICE THOMAS points out, the prosecutor could similarly substitute experts for all kinds of people making out-of-court statements. See *ante*, at 109–110.) The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick—but really, what a way to run a criminal justice system. No wonder five Justices reject it.

## III

The plurality also argues, as a "second, independent basis" for its decision, that the Cellmark report falls outside the Confrontation Clause's ambit because it is nontestimonial. *Ante*, at 58. The plurality tries out a number of supporting theories, but all in vain: Each one either conflicts with this Court's precedents or misconstrues this case's facts. JUSTICE THOMAS rejects the plurality's views for similar reasons as I do, thus bringing to five the number of Justices who

repudiate the plurality's understanding of what statements count as testimonial. See *ante*, at 103–104, 114–117. JUSTICE THOMAS, however, offers a rationale of his own for deciding that the Cellmark report is nontestimonial. I think his essay works no better. When all is said and done, the Cellmark report is a testimonial statement.

A

According to the plurality, we should declare the Cellmark report nontestimonial because "the use at trial of a DNA report prepared by a modern, accredited laboratory 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.'" *Ante*, at 86 (quoting *Michigan* v. *Bryant*, 562 U. S. 344, 379 (2011) (THOMAS, J., concurring in judgment)). But we just last year treated as testimonial a forensic report prepared by a "modern, accredited laboratory"; indeed, we declared that the report at issue "fell within the core class of testimonial statements" implicating the Confrontation Clause. *Bullcoming*, 564 U. S., at 665 (internal quotation marks omitted); see Brief for New Mexico Department of Health, Scientific Laboratory Division, as *Amicus Curiae* in *Bullcoming*, O. T. 2010, No. 09–10786, pp. 1–2 (discussing accreditation). And although the plurality is close, it is not quite ready (or able) to dispense with that decision. See *ante*, at 82, n. 13 ("Experience might yet show that the holdings in *[Bullcoming* and other post-*Crawford]* cases should be reconsidered"). So the plurality must explain: What could support a distinction between the laboratory analysis there and the DNA test in this case?[4]

[4] JUSTICE BREYER does not attempt to distinguish our precedents, opting simply to adhere to "the dissenting view set forth in *Melendez-Diaz* and *Bullcoming*." See *ante*, at 93 (concurring opinion). He principally worries that under those cases, a State will have to call to the witness stand "[s]ix to twelve or more technicians" who have worked on a report. See *ante*, at 90; see also *ante*, at 88–89, 101–103. But none of our cases—including this one—has presented the question of *how many* analysts must

As its first stab, the plurality states that the Cellmark report was "not prepared for the primary purpose of accusing a targeted individual." *Ante*, at 84. Where that test comes from is anyone's guess. JUSTICE THOMAS rightly shows that it derives neither from the text nor from the history of the Confrontation Clause. See *ante*, at 114–117 (opinion concurring in judgment). And it has no basis in our precedents. We have previously asked whether a statement was made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"—in other words, for the purpose of providing evidence. *Davis*, 547 U. S., at 822; see also *Bullcoming*, 564 U. S., at 664; *Bryant*, 562 U. S., at 361; *Melendez-Diaz*, 557 U. S., at 310–311; *Crawford*, 541 U. S., at 51–52. None of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual; indeed, in *Melendez-Diaz*, we rejected a related argument that laboratory "analysts are not subject to confrontation because they are not 'accusatory' witnesses." 557 U. S., at 313.

Nor does the plurality give any good reason for adopting an "accusation" test. The plurality apparently agrees with JUSTICE BREYER that prior to a suspect's identification, it will be "unlikely that a particular researcher has a defendant-related motive to behave dishonestly." *Ante*, at 97 (BREYER, J., concurring); see *ante*, at 84–85 (plurality opinion). But surely the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with per-

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testify about a given report. (That may suggest that in most cases a lead analyst is readily identifiable.) The problem in the cases—again, including this one—is that *no* analyst came forward to testify. In the event that some future case presents the multiple-technician issue, the Court can focus on "the broader 'limits' question" that troubles JUSTICE BREYER, *ante*, at 93. But the mere existence of that question is no reason to wrongly decide the case before us—which, it bears repeating, involved the testimony of not twelve or six or three or one, but zero Cellmark analysts.

sonal vendettas. And as to that predominant concern, it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect.[5]

The plurality next attempts to invoke our precedents holding statements nontestimonial when made "to respond to an 'ongoing emergency,'" rather than to create evidence for trial, *Bryant*, 562 U. S., at 358; here, the plurality insists, the Cellmark report's purpose was "to catch a dangerous rapist who was still at large." *Ante*, at 84. But that is to stretch both our "ongoing emergency" test and the facts of this case beyond all recognition. We have previously invoked that test to allow statements by a woman who was being assaulted and a man who had just been shot. In doing so, we stressed the "informal [and] harried" nature of the statements, *Bryant*, 562 U. S., at 377—that they were made as, or "minutes" after, *id.*, at 374, the events they described "actually happen[ed]," *Davis*, 547 U. S., at 827 (emphasis deleted), by "frantic" victims of criminal attacks, *ibid.*, to officers trying to figure out "what had . . . occurred" and what threats remained, *Bryant*, 562 U. S., at 376 (internal quotation marks omitted). On their face, the decisions have nothing to say about laboratory analysts conducting routine tests far away from a crime scene. And this case presents a peculiarly inapt set of facts for extending those precedents. Lambatos testified at trial that "all reports in this case were prepared for this criminal investigation . . . [a]nd for the purpose of the eventual litigation," App. 82—in other words, for the purpose of producing evidence, not enabling emergency re-

[5] Neither can the plurality gain any purchase from the idea that a DNA profile is not "inherently inculpatory" because it "tends to exculpate all but one of the more than 7 billion people in the world today." *Ante*, at 58; see *ante*, at 85. *All* evidence shares this feature: the more inculpatory it is of a single person, the more exculpatory it is of the rest of the world. The one is but the flipside of the other. But no one has ever before suggested that this logical corollary provides a reason to ignore the Constitution's efforts to ensure the reliability of evidence.

sponders. And that testimony fits the relevant timeline. The police did not send the swabs to Cellmark until November 2008—nine months after L. J.'s rape—and did not receive the results for another four months. See *id.*, at 30–34, 51–52, 54. That is hardly the typical emergency response.

Finally, the plurality offers a host of reasons for why reports like this one are reliable: "[T]here [i]s no prospect of fabrication," *ante*, at 85 (internal quotation marks omitted); multiple technicians may "work on each DNA profile," *ibid.*; and "defects in a DNA profile may often be detected from the profile itself," *ibid.* See also *ante*, at 95–99 (opinion of BREYER, J.). But once again: Been there, done that. In *Melendez-Diaz*, this Court rejected identical arguments, noting extensive documentation of "[s]erious deficiencies . . . in the forensic evidence used in criminal trials." 557 U. S., at 319; see *supra*, at 122; see also *Bullcoming*, 564 U. S., at 654, n. 1 (citing similar errors in laboratory analysis); Brief for Public Defender Service for the District of Columbia et al. as *Amici Curiae* 13 (discussing "[s]ystemic problems," such as sample contamination, sample switching, mislabeling, and fraud, at "'flagship' DNA labs"). Scientific testing is "technical," to be sure, *ante*, at 86 (opinion of BREYER, J.); but it is only as reliable as the people who perform it. That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way? Indeed, as scientific evidence plays a larger and larger role in criminal prosecutions, those inquiries will often be the most important in the case.[6]

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[6] Both the plurality and JUSTICE BREYER warn that if we require analysts to testify, we will encourage prosecutors to forgo DNA evidence in favor of less reliable eyewitness testimony and so "increase the risk of convicting the innocent." *Ante*, at 98 (BREYER, J., concurring); see *ante*, at 58 (plurality opinion). Neither opinion provides any evidence, even by way of anecdote, for that view, and I doubt any exists. DNA evidence

And *Melendez-Diaz* made yet a more fundamental point in response to claims of the *über alles* reliability of scientific evidence: It is not up to us to decide, *ex ante*, what evidence is trustworthy and what is not. See 557 U. S., at 317–318; see also *Bullcoming*, 564 U. S., at 660. That is because the Confrontation Clause prescribes its own "procedure for determining the reliability of testimony in criminal trials." *Crawford*, 541 U. S., at 67. That procedure is cross-examination. And "[d]ispensing with [it] because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.*, at 62.

So the plurality's second basis for denying Williams's right of confrontation also fails. The plurality can find no reason consistent with our precedents for treating the Cellmark report as nontestimonial. That is because the report is, in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial. And that simple fact should be sufficient to resolve the question.

B

JUSTICE THOMAS's unique method of defining testimonial statements fares no better. On his view, the Confrontation Clause "regulates only the use of statements bearing 'indicia of solemnity.' " *Ante*, at 111 (quoting *Davis*, 547 U. S., at 836–

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is usually the prosecutor's most powerful weapon, and a prosecutor is unlikely to relinquish it just because he must bring the right analyst to the stand. Consider what Lambatos told the factfinder here: The DNA in L. J.'s vaginal swabs matched Williams's DNA and would match only "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." App. 56–57. No eyewitness testimony could replace that evidence. I note as well that the Innocence Network—a group particularly knowledgeable about the kinds of evidence that produce erroneous convictions—disagrees with the plurality's and JUSTICE BREYER's view. It argues here that "[c]onfrontation of the analyst . . . is essential to permit proper adversarial testing" and so to *decrease* the risk of convicting the innocent. Brief for the Innocence Network as *Amicus Curiae* 3, 7.

837). And Cellmark's report, he concludes, does not qualify because it is "neither a sworn nor a certified declaration of fact." *Ante*, at 111. But JUSTICE THOMAS's approach grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections.

To see the point, start with precedent, because the Court rejected this same kind of argument, as applied to this same kind of document, at around this same time just last year. In *Bullcoming*, the State asserted that the forensic report at issue was nontestimonial because—unlike the report in *Melendez-Diaz*—it was not sworn before a notary public. We responded that applying the Confrontation Clause only to a sworn forensic report "would make the right to confrontation easily erasable"—next time, the laboratory could file the selfsame report without the oath. 564 U. S., at 664. We then held, as noted earlier, that "[i]n all material respects," the forensic report in *Bullcoming* matched the one in *Melendez-Diaz*. 564 U. S., at 664; see *supra*, at 122. First, a law enforcement officer provided evidence to a state laboratory assisting in police investigations. See 564 U. S., at 664. Second, the analyst tested the evidence and "prepared a certificate concerning the result[s]." *Id.*, at 665. Third, the certificate was "formalized in a signed document . . . headed a 'report.'" *Ibid.* (some internal quotation marks omitted). That was enough.

Now compare that checklist of "material" features to the report in this case. The only differences are that Cellmark is a private laboratory under contract with the State (which no one thinks relevant), and that the report is not labeled a "certificate." That amounts to (maybe) a nickel's worth of difference: The similarities in form, function, and purpose dwarf the distinctions. See *supra*, at 122–123. Each report is an official and signed record of laboratory test results, meant to establish a certain set of facts in legal proceedings. Neither looks any more "formal" than the other; neither *is* any more formal than the other. See *ibid.* The variances

are no more (probably less) than would be found if you compared different law schools' transcripts or different companies' cashflow statements or different States' birth certificates. The difference in labeling—a "certificate" in one case, a "report of laboratory examination" in the other—is not of constitutional dimension.

Indeed, JUSTICE THOMAS's approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of little value. The prosecution could avoid its demands by using the right kind of forms with the right kind of language. (It would not take long to devise the magic words and rules—principally, never call anything a "certificate.") [7] And still worse: The new conventions, precisely by making out-of-court statements less "solem[n]," *ante*, at 104, would also make them less reliable—and so turn the Confrontation Clause upside down. See *Crawford*, 541 U. S., at 52–53, n. 3 ("We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK"). It is not surprising that no other Member of the Court has adopted this position. To do so, as JUSTICE THOMAS rightly says of the plurality's decision, would be to "diminis[h] the Confrontation Clause's protection" in "the very cases in which the accused *should* 'enjoy the right . . . to be confronted with the witnesses against him.'" *Ante*, at 118.

## IV

Before today's decision, a prosecutor wishing to admit the results of forensic testing had to produce the technician responsible for the analysis. That was the result of not one, but two decisions this Court issued in the last three years.

[7] JUSTICE THOMAS asserts there is no need to worry, because "the Confrontation Clause reaches bad-faith attempts to evade the formalized process." *Ante*, at 113; see *ante*, at 111, n. 5. I hope he is right. But JUSTICE THOMAS provides scant guidance on how to conduct this novel inquiry into motive.

But that clear rule is clear no longer. The five Justices who control the outcome of today's case agree on very little. Among them, though, they can boast of two accomplishments. First, they have approved the introduction of testimony at Williams's trial that the Confrontation Clause, rightly understood, clearly prohibits. Second, they have left significant confusion in their wake. What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.

The better course in this case would have been simply to follow *Melendez-Diaz* and *Bullcoming*. Precedent-based decisionmaking provides guidance to lower court judges and predictability to litigating parties. Today's plurality and concurring opinions, and the uncertainty they sow, bring into relief that judicial method's virtues. I would decide this case consistently with, and for the reasons stated by, *Melendez-Diaz* and *Bullcoming*. And until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.

I respectfully dissent.

Syllabus

# CHRISTOPHER ET AL. *v.* SMITHKLINE BEECHAM CORP., DBA GLAXOSMITHKLINE

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

No. 11–204. Argued April 16, 2012—Decided June 18, 2012

The Fair Labor Standards Act of 1938 (FLSA) requires employers to pay employees overtime wages, see 29 U. S. C. § 207(a), but this requirement does not apply with respect to workers employed "in the capacity of outside salesman," § 213(a)(1). Congress did not elaborate on the meaning of "outside salesman," but it delegated authority to the Department of Labor (DOL) to issue regulations to define the term. Three of the DOL's regulations are relevant to this case. First, 29 CFR § 541.500 defines "outside salesman" to mean "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U. S. C. § 203(k)]." §§ 541.500(a)(1)–(2). Section 203(k), in turn, states that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Second, § 541.501 clarifies that "[s]ales within the meaning of [§ 203(k)] include the transfer of title to tangible property." § 541.501(b). Third, § 541.503 provides that promotion work that is "performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work," whereas promotion work that is "incidental to sales made, or to be made, by someone else is not." § 541.503(a). The DOL provided additional guidance in connection with its promulgation of these regulations, stressing that an employee is an "outside salesman" when the employee, "in some sense, has made sales." 69 Fed. Reg. 22162.

The prescription drug industry is subject to extensive federal regulation, including the requirement that prescription drugs be dispensed only upon a physician's prescription. In light of this requirement, pharmaceutical companies have long focused their direct marketing efforts on physicians. Pharmaceutical companies promote their products to physicians through a process called "detailing," whereby employees known as "detailers" or "pharmaceutical sales representatives" try to persuade physicians to write prescriptions for the products in appropriate cases.

Petitioners were employed by respondent as pharmaceutical sales representatives for roughly four years, and during that time their primary objective was to obtain a nonbinding commitment from physicians to prescribe respondent's products in appropriate cases. Each week,

petitioners spent about 40 hours in the field calling on physicians during normal business hours and an additional 10 to 20 hours attending events and performing other miscellaneous tasks. Petitioners were not required to punch a clock or report their hours, and they were subject to only minimal supervision. Petitioners were well compensated for their efforts, and their gross pay included both a base salary and incentive pay. The amount of incentive pay was determined based on the performance of petitioners' assigned portfolio of drugs in their assigned sales territories. It is undisputed that petitioners were not paid time-and-a-half wages when they worked more than 40 hours per week.

Petitioners filed suit, alleging that respondent violated the FLSA by failing to compensate them for overtime. Respondent moved for summary judgment, arguing that petitioners were "employed . . . in the capacity of outside salesman," § 213(a)(1), and therefore were exempt from the FLSA's overtime compensation requirement. The District Court agreed and granted summary judgment to respondent. Petitioners filed a motion to alter or amend the judgment, contending that the District Court had erred in failing to accord controlling deference to the DOL's interpretation of the pertinent regulations, which the DOL had announced in an *amicus* brief filed in a similar action. The District Court rejected this argument and denied the motion. The Ninth Circuit, agreeing that the DOL's interpretation was not entitled to controlling deference, affirmed.

*Held:* Petitioners qualify as outside salesmen under the most reasonable interpretation of the DOL's regulations. Pp. 153–169.

(a) The DOL filed *amicus* briefs in the Second Circuit and the Ninth Circuit in which it took the view that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought." Brief for Secretary of Labor as *Amicus Curiae* in *In re Novartis Wage and Hour Litigation*, No. 09–0437 (CA2), p. 11. The DOL changed course after the Court granted certiorari in this case, however, and now maintains that "[a]n employee does not make a 'sale'. . . unless he actually transfers title to the property at issue." Brief for United States as *Amicus Curiae* 12–13. The DOL's current interpretation of its regulations is not entitled to deference under *Auer* v. *Robbins*, 519 U. S. 452. Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, see *id.*, at 461–462, this general rule does not apply in all cases. Deference is inappropriate, for example, when the agency's interpretation is "'"plainly erroneous or inconsistent with the regulation,"'" *id.*, at 461, or when there is reason to suspect that the interpre-

tation "does not reflect the agency's fair and considered judgment on the matter," *id.*, at 462. There are strong reasons for withholding *Auer* deference in this case. Petitioners invoke the DOL's interpretation to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the DOL's interpretation would result in precisely the kind of "unfair surprise" against which this Court has long warned. See, *e. g., Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170–171. Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations do not provide clear notice. Even more important, despite the industry's decades-long practice, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. The only plausible explanation for the DOL's inaction is acquiescence. Whatever the general merits of *Auer* deference, it is unwarranted here. The DOL's interpretation should instead be given a measure of deference proportional to its power to persuade. See *United States* v. *Mead Corp.*, 533 U. S. 218, 228. Pp. 153–159.

(b) The DOL's current interpretation—that a sale demands a transfer of title—is quite unpersuasive. It plainly lacks the hallmarks of thorough consideration. Because the DOL first announced its view that pharmaceutical sales representatives are not outside salesmen in a series of *amicus* briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the DOL's internal decisionmaking process proved to be untenable. The interpretation is also flatly inconsistent with the FLSA. The statute defines "sale" to mean, *inter alia*, a "consignment for sale," and a "consignment for sale" does not involve the transfer of title. The DOL relies heavily on 29 CFR § 541.501, which provides that "[s]ales . . . include the transfer of title to tangible property," § 541.501(b), but it is apparent that this regulation does not mean that a sale must include a transfer of title, only that transactions involving a transfer of title are included within the term "sale." The DOL's "explanation that obtaining a non-binding commitment to prescribe a drug constitutes promotion, and not sales," Reply Brief 17, is also unconvincing. Since promotion work that is performed incidental to an employee's own sales is exempt, the DOL's conclusion that detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales. Pp. 159–161.

(c) Because the DOL's interpretation is neither entitled to *Auer* deference nor persuasive in its own right, traditional tools of interpretation

must be employed to determine whether petitioners are exempt outside salesmen. Pp. 161–169.

(1) The FLSA does not furnish a clear answer to this question, but it provides at least one interpretive clue by exempting anyone "employed . . . in the capacity of [an] outside salesman." 29 U. S. C. § 213(a)(1). The statute's emphasis on "capacity" counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works. The DOL's regulations provide additional guidance. Section 541.500 defines an outside salesman as an employee whose primary duty is "making sales" and adopts the statutory definition of "sale." This statutory definition contains at least three important textual clues. First, the definition is introduced with the verb "includes," which indicates that the examples enumerated in the text are illustrative, not exhaustive. See *Burgess* v. *United States*, 553 U. S. 124, 131, n. 3. Second, the list of transactions included in the statutory definition is modified by "any," which, in the context of § 203(k), is best read to mean "'one or some indiscriminately of whatever kind,'" *United States* v. *Gonzales*, 520 U. S. 1, 5. Third, the definition includes the broad catchall phrase "other disposition." Under the rule of *ejusdem generis*, the catchall phrase is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity. Nothing in the remaining regulations requires a narrower construction. Pp. 161–164.

(2) Given this interpretation of "other disposition," it follows that petitioners made sales under the FLSA and thus are exempt outside salesmen within the meaning of the DOL's regulations. Petitioners obtain nonbinding commitments from physicians to prescribe respondent's drugs. This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies operate, comfortably falls within the catchall category of "other disposition." That petitioners bear all of the external indicia of salesmen provides further support for this conclusion. And this holding also comports with the apparent purpose of the FLSA's exemption. The exemption is premised on the belief that exempt employees normally earn salaries well above the minimum wage and perform a kind of work that is difficult to standardize to a particular timeframe and that cannot easily be spread to other workers. Petitioners—each of whom earned an average of more than $70,000 per year and spent 10 to 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory—are hardly the kind of employees that the FLSA was intended to protect. Pp. 165–167.

Syllabus

(3) Petitioners' remaining arguments are also unavailing. Pp. 167–169.

635 F. 3d 383, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 169.

*Thomas C. Goldstein* argued the cause for petitioners. With him on the briefs were *Kevin K. Russell*, *Amy Howe*, *Eric B. Kingsley*, *Michael R. Pruitt*, *Otto S. Shill III*, *Jeremy Heisler*, *David W. Sanford*, and *Katherine M. Kimpel.*

*Deputy Solicitor General Stewart* argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Verrilli*, *Jeffrey B. Wall*, *M. Patricia Smith*, and *Sarah J. Starrett.*

*Paul D. Clement* argued the cause for respondent. With him on the brief were *Jeffrey M. Harris*, *Neal D. Mollen*, and *Mark E. Richardson III.**

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*Briefs of *amici curiae* urging reversal were filed for the Certified Class of Pharmaceutical Representatives from Johnson & Johnson by *Aashish Y. Desai;* for Medical Professionals by *Sarah M. Shalf;* for the National Employment Lawyers Association et al. by *Paul W. Mollica*, *Catherine K. Ruckelshaus*, and *Rebecca M. Hamburg;* and for Pharmaceutical Representatives by *Michael R. DiChiara*, *Stephen A. Weiss*, and *James A. O'Brien III.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Matthew W. Lampe*, *Robin S. Conrad*, and *E. Michael Rossman;* for the Equal Employment Advisory Council by *Rae T. Vann* and *Danny E. Petrella;* for the National Federation of Independent Business Small Business Legal Center by *Kevin M. Kraham*, *Tammy D. McCuthen*, *S. Libby Henninger*, *Lisa A. Schreter*, *Karen R. Harned*, and *Elizabeth Milito;* for the Pharmaceutical Research and Manufacturers of America by *Jeffrey S. Bucholtz*, *Michael W. Johnston*, *James M. "Mit" Spears*, and *Melissa B. Kimmel;* and for the Washington Legal Foundation et al. by *Cory L. Andrews.*

*John Eastman*, *Anthony T. Caso*, and *Edwin Meese III* filed a brief for the Center for Constitutional Jurisprudence as *amicus curiae.*

JUSTICE ALITO delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA) imposes minimum wage and maximum hours requirements on employers, see 52 Stat. 1062–1063, as amended, 29 U. S. C. §§ 206–207 (2006 ed. and Supp. IV), but those requirements do not apply to workers employed "in the capacity of outside salesman," § 213(a)(1). This case requires us to decide whether the term "outside salesman," as defined by Department of Labor (DOL or Department) regulations, encompasses pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases. We conclude that these employees qualify as "outside salesm[e]n."

## I

### A

Congress enacted the FLSA in 1938 with the goal of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981); see also 29 U. S. C. § 202(a). Among other requirements, the FLSA obligates employers to compensate employees for hours in excess of 40 per week at a rate of 1½ times the employees' regular wages. See § 207(a). The overtime compensation requirement, however, does not apply with respect to all employees. See § 213. As relevant here, the statute exempts workers "employed . . . in the capacity of outside salesman." § 213(a)(1).[1]

Congress did not define the term "outside salesman," but it delegated authority to the DOL to issue regulations "from time to time" to "defin[e] and delimi[t]" the term. *Ibid.* The DOL promulgated such regulations in 1938, 1940, and 1949. In 2004, following notice-and-comment procedures,

[1] This provision also exempts workers "employed in a bona fide executive, administrative, or professional capacity." 29 U. S. C. § 213(a)(1).

the DOL reissued the regulations with minor amendments. See 69 Fed. Reg. 22122 (2004). The current regulations are nearly identical in substance to the regulations issued in the years immediately following the FLSA's enactment. See 29 CFR §§ 541.500–541.504 (2011).

Three of the DOL's regulations are directly relevant to this case: §§ 541.500, 541.501, and 541.503. We refer to these three regulations as the "general regulation," the "sales regulation," and the "promotion-work regulation," respectively.

The general regulation sets out the definition of the statutory term "employee employed in the capacity of outside salesman." It defines the term to mean "any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U. S. C. § 203(k)]" [2] and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." [3] §§ 541.500(a)(1)–(2). The referenced statutory provision, 29 U. S. C. § 203(k), states that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Thus, under the general regulation, an outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

The sales regulation restates the statutory definition of sale discussed above and clarifies that "[s]ales within the meaning of [29 U. S. C. § 203(k)] include the transfer of title to tangible property, and in certain cases, of tangible

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[2] The definition also includes any employee "[w]hose primary duty is . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 CFR § 541.500(a)(1)(ii). That portion of the definition is not at issue in this case.

[3] It is undisputed that petitioners were "customarily and regularly engaged away" from respondent's place of business in performing their responsibilities.

and valuable evidences of intangible property." 29 CFR § 541.501(b).

Finally, the promotion-work regulation identifies "[p]romotion work" as "one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed." § 541.503(a). Promotion work that is "performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work," whereas promotion work that is "incidental to sales made, or to be made, by someone else is not exempt outside sales work." *Ibid.*

Additional guidance concerning the scope of the outside salesman exemption can be gleaned from reports issued in connection with the DOL's promulgation of regulations in 1940 and 1949, and from the preamble to the 2004 regulations. See DOL, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940) (hereinafter 1940 Report); DOL, Wage and Hour and Public Contracts Divs., Report and Recommendations on Proposed Revisions of Regulations, Part 541 (1949) (hereinafter 1949 Report); 69 Fed. Reg. 22122–22163 (hereinafter Preamble). Although the DOL has rejected proposals to eliminate or dilute the requirement that outside salesmen make their own sales, the Department has stressed that this requirement is met whenever an employee "in some sense make[s] a sale." 1940 Report 46; see also Preamble 22162 (reiterating that the exemption applies only to an employee who, "in some sense, has made sales"). And the DOL has made it clear that "[e]xempt status should not depend" on technicalities, such as "whether it is the sales employee or the customer who types the order into a computer system and hits the return button," *id.*, at 22163, or whether "the order is filled by [a] jobber rather than directly by [the employee's] own employer," 1949 Report 83.

B

Respondent SmithKline Beecham Corporation is in the business of developing, manufacturing, and selling prescription drugs. The prescription drug industry is subject to extensive federal regulation, including the now-familiar requirement that prescription drugs be dispensed only upon a physician's prescription.[4] In light of this requirement, pharmaceutical companies have long focused their direct marketing efforts not on the retail pharmacies that dispense prescription drugs but rather on the medical practitioners who possess the authority to prescribe the drugs in the first place. Pharmaceutical companies promote their prescription drugs to physicians through a process called "detailing," whereby employees known as "detailers" or "pharmaceutical sales representatives" provide information to physicians about the company's products in hopes of persuading them to write prescriptions for the products in appropriate cases. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 558–559 (2011) (describing the process of "detailing"). The position of "detailer" has existed in the pharmaceutical industry in substantially its current form since at least the 1950's, and in recent years the industry has employed more than 90,000 detailers nationwide. See 635 F. 3d 383, 387, and n. 5, 396 (CA9 2011).

Respondent hired petitioners Michael Christopher and Frank Buchanan as pharmaceutical sales representatives in

[4] Congress imposed this requirement in 1951 when it amended the Federal Food, Drug, and Cosmetic Act (FDCA) to provide that drugs that are "not safe for use except under the supervision of a practitioner" may be dispensed "only . . . upon a . . . prescription of a practitioner licensed by law to administer such drug." Durham-Humphrey Amendment of 1951, ch. 578, 65 Stat. 648–649 (codified at 21 U. S. C. § 353(b)). As originally enacted in 1938, the FDCA allowed manufacturers to designate certain drugs as prescription only, but "it did not say which drugs were to be sold by prescription or that there were any drugs that could not be sold without a prescription." Temin, The Origin of Compulsory Drug Prescriptions, 22 J. Law & Econ. 91, 98 (1979). Prior to Congress' enactment of the FDCA, a prescription was not needed to obtain any drug other than certain narcotics. See *id.*, at 97.

2003. During the roughly four years when petitioners were employed in that capacity,[5] they were responsible for calling on physicians in an assigned sales territory to discuss the features, benefits, and risks of an assigned portfolio of respondent's prescription drugs. Petitioners' primary objective was to obtain a nonbinding commitment[6] from the physician to prescribe those drugs in appropriate cases, and the training that petitioners received underscored the importance of that objective.

Petitioners spent about 40 hours each week in the field calling on physicians. These visits occurred during normal business hours, from about 8:30 a.m. to 5 p.m. Outside of normal business hours, petitioners spent an additional 10 to 20 hours each week attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks. Petitioners were not required to punch a clock or report their hours, and they were subject to only minimal supervision.

Petitioners were well compensated for their efforts. On average, Christopher's annual gross pay was just over $72,000, and Buchanan's was just over $76,000.[7] Petitioners' gross pay included both a base salary and incentive pay. The amount of petitioners' incentive pay was based on the sales volume or market share of their assigned drugs in their assigned sales territories,[8] and this amount was uncapped. Christopher's incentive pay exceeded 30 percent of his gross pay during each of his years of employment; Buchanan's ex-

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[5] Respondent terminated Christopher's employment in 2007, and Buchanan left voluntarily the same year to accept a similar position with another pharmaceutical company.

[6] The parties agree that the commitment is nonbinding.

[7] The median pay for pharmaceutical detailers nationwide exceeds $90,000 per year. See Brief for Respondent 14.

[8] The amount of incentive pay is not formally tied to the number of prescriptions written or commitments obtained, but because retail pharmacies are prohibited from dispensing prescription drugs without a physician's prescription, retail sales of respondent's products necessarily reflect the number of prescriptions written.

ceeded 25 percent. It is undisputed that respondent did not pay petitioners time-and-a-half wages when they worked in excess of 40 hours per week.

C

Petitioners brought this action in the United States District Court for the District of Arizona under 29 U. S. C. § 216(b). Petitioners alleged that respondent violated the FLSA by failing to compensate them for overtime, and they sought both backpay and liquidated damages as relief. Respondent moved for summary judgment, arguing that petitioners were "employed . . . in the capacity of outside salesman," § 213(a)(1), and therefore were exempt from the FLSA's overtime compensation requirement.[9] The District Court agreed and granted summary judgment to respondent. See App. to Pet. for Cert. 37a–47a.

After the District Court issued its order, petitioners filed a motion to alter or amend the judgment, contending that the District Court had erred in failing to accord controlling deference to the DOL's interpretation of the pertinent regulations. That interpretation had been announced in an uninvited *amicus* brief filed by the DOL in a similar action then pending in the Second Circuit. See Brief for Secretary of Labor as *Amicus Curiae* in *In re Novartis Wage and Hour Litigation*, No. 09–0437 (hereinafter Secretary's *Novartis* Brief). The District Court rejected this argument and denied the motion. See App. to Pet. for Cert. 48a–52a.

The Court of Appeals for the Ninth Circuit affirmed. See 635 F. 3d 383. The Court of Appeals agreed that the DOL's interpretation[10] was not entitled to controlling deference.

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[9] Respondent also argued that petitioners were exempt administrative employees. The District Court and the Court of Appeals found it unnecessary to reach that argument, and the question is not before us.

[10] The DOL filed an *amicus* brief in the Ninth Circuit advancing substantially the same interpretation it had advanced in its brief in the Second Circuit. See Brief for Secretary of Labor as *Amicus Curiae* in No. 10–15257.

See *id.*, at 393–395. It held that, because the commitment that petitioners obtained from physicians was the maximum possible under the rules applicable to the pharmaceutical industry, petitioners made sales within the meaning of the regulations. See *id.*, at 395–397. The court found it significant, moreover, that the DOL had previously interpreted the regulations as requiring only that an employee "'in some sense'" make a sale, see *id.*, at 395–396 (emphasis deleted), and had "acquiesce[d] in the sales practices of the drug industry for over seventy years," *id.*, at 399.

The Ninth Circuit's decision conflicts with the Second Circuit's decision in *In re Novartis Wage and Hour Litigation*, 611 F. 3d 141, 153–155 (2010) (holding that the DOL's interpretation is entitled to controlling deference). We granted certiorari to resolve this split, 565 U. S. 1057 (2011), and we now affirm the judgment of the Ninth Circuit.

## II

We must determine whether pharmaceutical detailers are outside salesmen as the DOL has defined that term in its regulations. The parties agree that the regulations themselves were validly promulgated and are therefore entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). But the parties disagree sharply about whether the DOL's interpretation of the regulations is owed deference under *Auer* v. *Robbins*, 519 U. S. 452 (1997). It is to that question that we now turn.

### A

The DOL first announced its view that pharmaceutical detailers are not exempt outside salesmen in an *amicus* brief filed in the Second Circuit in 2009, and the Department has subsequently filed similar *amicus* briefs in other cases, including the case now before us.[11] While the DOL's ultimate

[11] The DOL invites "interested parties to inform it of private cases involving the misclassification of employees in contravention of the new Part 541 rule" so that it may file *amicus* briefs "in appropriate cases to share

conclusion that detailers are not exempt has remained unchanged since 2009, the same cannot be said of its reasoning. In both the Second Circuit and the Ninth Circuit, the DOL took the view that "a 'sale' for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought." Secretary's *Novartis* Brief 11; see also Brief for Secretary of Labor as *Amicus Curiae* in No. 10–15257 (CA9), p. 12. Perhaps because of the nebulous nature of this "consummated transaction" test,[12] the Department changed course after we granted certiorari in this case. The Department now takes the position that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." Brief for United States as *Amicus Curiae* 12–13 (hereinafter U. S. Brief).[13] Petitioners and the DOL assert that this new interpretation of the regulations is entitled to controlling

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with courts the Department's view of the proper application of the new Part 541 rule." See DOL, Office of Solicitor, Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm (as visited June 15, 2012, and available in Clerk of Court's case file).

[12] For example, it is unclear why a physician's nonbinding commitment to prescribe a drug in an appropriate case cannot qualify as a sale under this test. The broad term "transaction" easily encompasses such a commitment. See Webster's Third New International Dictionary 2425 (2002) (hereinafter Webster's Third) (defining "transaction" to mean "a communicative action or activity involving two parties or two things reciprocally affecting or influencing each other"). A "consummated transaction" is simply a transaction that has been fully completed. See *id.*, at 490 (defining "consummate" to mean "to bring to completion"). And a pharmaceutical sales representative who obtains such a commitment is "directly involv[ed]" in this transaction. Thus, once a pharmaceutical sales representative and a physician have fully completed their agreement, it may be said that they have entered into a "consummated transaction."

[13] When pressed to clarify its position at oral argument, the DOL suggested that a "transfer of possession in contemplation of a transfer of title" might also suffice. Tr. of Oral Arg. 17.

deference. See Brief for Petitioners 31–42; U. S. Brief 30–34.[14]

Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, see *Chase Bank USA, N. A.* v. *McCoy*, 562 U. S. 195, 210 (2011); *Auer*, 519 U. S., at 461–462, this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "'"plainly erroneous or inconsistent with the regulation."'" *Id.*, at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 359 (1989)). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra*, at 462; see also, *e. g.*, *Chase Bank*, *supra*, at 213. This might occur when the agency's interpretation conflicts with a prior interpretation, see, *e. g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 515 (1994), or when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 213 (1988), or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," *Auer*, *supra*, at 462 (quoting *Bowen*, *supra*, at 212; alteration in original).

In this case, there are strong reasons for withholding the deference that *Auer* generally requires. Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that

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[14] Neither petitioners nor the DOL asks us to accord controlling deference to the "consummated transaction" interpretation the Department advanced in its briefs in the Second Circuit and Ninth Circuit, nor could we given that the Department has now abandoned that interpretation. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 480 (1992) (noting that "it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself").

occurred well before that interpretation was announced. To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Gates & Fox Co.* v. *Occupational Safety and Health Review Comm'n*, 790 F. 2d 154, 156 (CADC 1986) (Scalia, J.).[15] Indeed, it would result in precisely the kind of "unfair surprise" against which our cases have long warned. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170–171 (2007) (deferring to new interpretation that "create[d] no unfair surprise" because agency had proceeded through notice-and-comment rulemaking); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 158 (1991) (identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 295 (1974) (suggesting that an

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[15] Accord, *Phelps Dodge Corp.* v. *Federal Mine Safety and Health Review Comm'n*, 681 F. 2d 1189, 1192 (CA9 1982) (recognizing that "the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited"); *Kropp Forge Co.* v. *Secretary of Labor*, 657 F. 2d 119, 122 (CA7 1981) (refusing to impose sanctions where standard the regulated party allegedly violated "d[id] not provide 'fair warning' of what is required or prohibited"); *Dravo Corp.* v. *Occupational Safety and Health Review Comm'n*, 613 F. 2d 1227, 1232–1233 (CA3 1980) (rejecting agency's expansive interpretation where agency did not "state with ascertainable certainty what is meant by the standards [it] ha[d] promulgated" (internal quotation marks omitted; emphasis deleted)); *Diamond Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 528 F. 2d 645, 649 (CA5 1976) (explaining that "statutes and regulations which allow monetary penalties against those who violate them" must "give an employer fair warning of the conduct [they] prohibi[t] or requir[e]"); 1 R. Pierce, Administrative Law Treatise § 6.11, p. 543 (5th ed. 2010) (observing that "[i]n penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule").

agency should not change an interpretation in an adjudicative proceeding where doing so would impose "new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements" or in a case involving "fines or damages").

This case well illustrates the point. Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this. The general regulation adopts the broad statutory definition of "sale," and that definition, in turn, employs the broad catchall phrase "other disposition." See 29 CFR § 541.500(a)(1). This catchall phrase could reasonably be construed to encompass a nonbinding commitment from a physician to prescribe a particular drug, and nothing in the statutory or regulatory text or the DOL's prior guidance plainly requires a contrary reading. See Preamble 22162 (explaining that an employee must "in some sense" make a sale); 1940 Report 46 (same).

Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully.[16] We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. See, *e. g.*, *Heckler* v. *Chaney*, 470 U. S. 821, 831 (1985) (noting that

[16] It appears that the DOL only once directly opined on the exempt status of detailers prior to 2009. In 1945, the Wage and Hour Division issued an opinion letter tentatively concluding that "medical detailists" who performed "work . . . aimed at increasing the use of [their employer's] product in hospitals and through physicians' recommendations" qualified as administrative employees. Applicability of Exemption for Administrative Employees to Medical Detailists, Letter Ruling (May 19, 1945), 1 CCH Labor Law Service, Federal Wage-Hour Guide ¶33,093. But that letter did not address the outside salesman exemption.

"an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"). But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. As the Seventh Circuit has noted, while it may be "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing," the "more plausible hypothesis" is that the Department did not think the industry's practice was unlawful. *Dong Yi* v. *Sterling Collision Centers, Inc.*, 480 F. 3d 505, 510–511 (2007). There are now approximately 90,000 pharmaceutical sales representatives; the nature of their work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week. Other than acquiescence, no explanation for the DOL's inaction is plausible.

Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages,[17] but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby "frustrat[ing] the notice and predictability purposes of rulemaking." *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (SCALIA, J., concurring); see also Stephenson & Pogoriler, *Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449, 1461–1462 (2011); Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 655–668 (1996). It is one thing

[17] For instance, it "makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process." *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (SCALIA, J., concurring).

to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 228 (2001) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)).

B

We find the DOL's interpretation of its regulations quite unpersuasive. The interpretation to which we are now asked to defer—that a sale demands a transfer of title—plainly lacks the hallmarks of thorough consideration. Because the DOL first announced its view that pharmaceutical sales representatives do not qualify as outside salesmen in a series of *amicus* briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the Department's internal decisionmaking process proved to be untenable. After arguing successfully in the Second Circuit and then unsucessfully in the Ninth Circuit that a sale for present purposes simply requires a "consummated transaction," the DOL advanced a different interpretation in this Court. Here, the DOL's brief states unequivocally that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." U. S. Brief 12–13.

This new interpretation is flatly inconsistent with the FLSA, which defines "sale" to mean, *inter alia*, a "consignment for sale." A "consignment for sale" does not involve

the transfer of title. See, *e. g.*, *Sturm* v. *Boker*, 150 U. S. 312, 330 (1893) ("The agency to sell and return the proceeds, or the specific goods if not sold . . . does not involve a change of title"); Hawkland, Consignment Selling Under the Uniform Commercial Code, 67 Com. L. J. 146, 147 (1962) (explaining that "'[a] consignment of goods for sale does not pass the title at any time, nor does it contemplate that it should be passed'" (quoting *Rio Grande Oil Co.* v. *Miller Rubber Co. of N. Y.*, 31 Ariz. 84, 87, 250 P. 564, 565 (1926))).

The DOL cannot salvage its interpretation by arguing that a "consignment for sale" may *eventually* result in the transfer of title (from the consignor to the ultimate purchaser if the consignee in fact sells the good). Much the same may be said about a physician's nonbinding commitment to prescribe a particular product in an appropriate case. In that situation, too, agreement may eventually result in the transfer of title (from the manufacturer to a pharmacy and ultimately to the patient for whom the drug is prescribed).

In support of its new interpretation, the DOL relies heavily on its sales regulation, which states in part that "[s]ales [for present purposes] *include* the transfer of title to tangible property," 29 CFR § 541.501(b) (emphasis added). This regulation, however, provides little support for the DOL's position. The DOL reads the sales regulation to mean that a "sale" *necessarily* includes the transfer of title, but that is not what the regulation says. And it seems clear that that is not what the regulation means. The sentence just subsequent to the one on which the DOL relies, echoing the terms of the FLSA, makes clear that a "consignment for sale" qualifies as a sale. Since a consignment for sale does not involve a transfer of title, it is apparent that the sales regulation does not mean that a sale must include a transfer of title, only that transactions involving a transfer of title are included within the term "sale."

Petitioners invite us to look past the DOL's "determination that a sale must involve the transfer of title" and instead defer to the Department's "explanation that obtaining a non-

binding commitment to prescribe a drug constitutes promotion, and not sales." Reply Brief 17. The problem with the DOL's interpretation of the promotion-work regulation, however, is that it depends almost entirely on the DOL's flawed transfer-of-title interpretation. The promotion-work regulation does not distinguish between promotion work and sales; rather, it distinguishes between exempt promotion work and nonexempt promotion work. Since promotion work that is performed incidental to an employee's own sales is exempt, the DOL's conclusion that pharmaceutical detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales. For the reasons already discussed, we find this reasoning wholly unpersuasive.

In light of our conclusion that the DOL's interpretation is neither entitled to *Auer* deference nor persuasive in its own right, we must employ traditional tools of interpretation to determine whether petitioners are exempt outside salesmen.

C

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We begin with the text of the FLSA. Although the provision that establishes the overtime salesman exemption does not furnish a clear answer to the question before us, it provides at least one interpretive clue: It exempts anyone "employed . . . *in the capacity* of [an] outside salesman." 29 U. S. C. § 213(a)(1) (emphasis added). "Capacity," used in this sense, means "[o]utward condition or circumstances; relation; character; position." Webster's New International Dictionary 396 (2d ed. 1934); see also 2 Oxford English Dictionary 89 (def. 9) (1933) ("[p]osition, condition, character, relation"). The statute's emphasis on the "capacity" of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.

The DOL's regulations provide additional guidance. The general regulation defines an outside salesman as an employee whose primary duty is "making sales," and it adopts the statutory definition of "sale." 29 CFR § 541.500(a)(1)(i). This definition contains at least three important textual clues. First, the definition is introduced with the verb "includes" instead of "means." This word choice is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive. See *Burgess* v. *United States*, 553 U. S. 124, 131, n. 3 (2008) (explaining that "[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning . . . than where . . . the definition declares what a term 'means' " (alteration in original; some internal quotation marks omitted)). Indeed, Congress used the narrower word "means" in other provisions of the FLSA when it wanted to cabin a definition to a specific list of enumerated items. See, *e. g.*, 29 U. S. C. § 203(a) (" 'Person' *means* an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons" (emphasis added)).

Second, the list of transactions included in the statutory definition of sale is modified by the word "any." We have recognized that the modifier "any" can mean "different things depending upon the setting," *Nixon* v. *Missouri Municipal League*, 541 U. S. 125, 132 (2004), but in the context of 29 U. S. C. § 203(k), it is best read to mean " 'one or some indiscriminately of whatever kind,' " *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) (quoting Webster's Third 97 (1976)). That is so because Congress defined "sale" to include both the unmodified word "sale" and transactions that might not be considered sales in a technical sense, including exchanges and consignments for sale.[18]

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[18] Given that the FLSA provides its own definition of "sale" that is more expansive than the term's ordinary meaning, the DOL's reliance on dictionary definitions of the word "sale" is misplaced. See, *e. g.*, *Burgess* v. *United States*, 553 U. S. 124, 130 (2008) (noting that "[w]hen a statute

Third, Congress also included a broad catchall phrase: "other disposition." Neither the statute nor the regulations define "disposition," but dictionary definitions of the term range from "relinquishment or alienation" to "arrangement." See Webster's New International Dictionary 644 (def. 1(b)) (1927) ("[t]he getting rid, or making over, of anything; relinquishment or alienation"); *ibid.* (def. 1(a)) ("[t]he ordering, regulating, or administering of anything"); 3 Oxford English Dictionary, at 493 (def. 4) ("[t]he action of disposing of, putting away, getting rid of, making over, etc."); *ibid.* (def. 1) ("[t]he action of setting in order, or condition of being set in order; arrangement, order"). We agree with the DOL that the rule of *ejusdem generis* should guide our interpretation of the catchall phrase, since it follows a list of specific items.[19] But the limit the DOL posits, one that would confine the phrase to dispositions involving "contract[s] for the exchange of goods or services in return for value," see U. S. Brief 20, is much too narrow, as is petitioners' view that a sale requires a "firm agreement" or "firm commitment" to buy, see Tr. of Oral Arg. 64, 66. These interpretations would defeat Congress' intent to define "sale" in a broad manner and render the general statutory language meaningless. See *United States* v. *Alpers*, 338 U. S. 680, 682 (1950) (instructing that rule of *ejusdem generis* cannot be employed to "obscure and defeat the intent and purpose of Congress" or "render general words meaningless"). Indeed, we are hard pressed to think of any contract for the exchange of goods or services in return for value or any firm agreement to buy that would not also fall within one of the specifically enumerated categories.[20]

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includes an explicit definition, we must follow that definition" (internal quotation marks omitted)).

[19] The canon of *ejusdem generis* "limits general terms [that] follow specific ones to matters similar to those specified." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 294 (2011) (alteration in original; internal quotation marks omitted).

[20] The dissent's approach suffers from the same flaw. The dissent contends that, in order to make a sale, an employee must at least obtain a "firm commitment to buy." *Post*, at 178 (opinion of BREYER, J.). But

The specific list of transactions that precedes the phrase "other disposition" seems to us to represent an attempt to accommodate industry-by-industry variations in methods of selling commodities. Consequently, we think that the catchall phrase "other disposition" is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity.

Nothing in the remaining regulations requires a narrower construction.[21] As discussed above, the sales regulation instructs that sales within the meaning of 29 U. S. C. § 203(k) "*include* the transfer of title to tangible property," 29 CFR § 541.501(b) (emphasis added), but this regulation in no way limits the broad statutory definition of "sale." And although the promotion-work regulation distinguishes between promotion work that is incidental to an employee's own sales and work that is incidental to sales made by someone else, see § 541.503(a), this distinction tells us nothing about the meaning of "sale." [22]

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when an employee who has extended an offer to sell obtains a "firm commitment to buy," that transaction amounts to a "contract to sell." Given that a "contract to sell" already falls within the statutory definition of "sale," the dissent's interpretation would strip the catchall phrase of independent meaning.

[21] In the past, we have stated that exemptions to the FLSA must be "narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960). Petitioners and the DOL contend that *Arnold* requires us to construe the outside salesman exemption narrowly, but *Arnold* is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA.

[22] The dissent's view that pharmaceutical detailers are more naturally characterized as nonexempt promotional employees than as exempt outside salesmen relies heavily on the DOL's explanation in its 1940 Report that "sales promotion men" are not salesmen. See *post*, at 175; see also 1940 Report 46. There, the Department described a "sales promotion man" as an employee who merely "pav[es] the way for salesmen" and who

Given our interpretation of "other disposition," it follows that petitioners made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOL's regulations. Obtaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells.[23] This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate, comfortably falls within the catchall category of "other disposition."

That petitioners bear all of the external indicia of salesmen provides further support for our conclusion. Petitioners were hired for their sales experience. They were trained to

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frequently "deals with retailers who are not customers of his own employer but of his employer's customer" and is "interested in sales *by* the retailer, not *to* the retailer." *Ibid.* The dissent asserts that detailers are analogous to "sales promotion men" because they deal with "individuals, namely doctors, 'who are not customers' of their own employer" and "are primarily interested in sales *authorized by* the doctor, not *to* the doctor." *Post*, at 175. But this comparison is inapt. The equivalent of a "sales promotion man" in the pharmaceutical industry would be an employee who promotes a manufacturer's products to the retail pharmacies that sell the products after purchasing them from a wholesaler or distributor. Detailers, by contrast, obtain nonbinding commitments from the gatekeepers who must prescribe the product if any sale is to take place at all.

[23] Our point is not, as the dissent suggests, that any employee who does the most that he or she is able to do in a particular position to ensure the eventual sale of a product should qualify as an exempt outside salesman. See *post*, at 177 (noting that "the 'most' a California firm's marketing employee may be able 'to do' to secure orders from New York customers is to post an advertisement on the Internet"). Rather, our point is that, when an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based on technicalities.

close each sales call by obtaining the maximum commitment possible from the physician. They worked away from the office, with minimal supervision, and they were rewarded for their efforts with incentive compensation. It would be anomalous to require respondent to compensate petitioners for overtime, while at the same time exempting employees who function identically to petitioners in every respect except that they sell physician-administered drugs, such as vaccines and other injectable pharmaceuticals, that are ordered by the physician directly rather than purchased by the end user at a pharmacy with a prescription from the physician.

Our holding also comports with the apparent purpose of the FLSA's exemption for outside salesmen. The exemption is premised on the belief that exempt employees "typically earned salaries well above the minimum wage" and enjoyed other benefits that "se[t] them apart from the nonexempt workers entitled to overtime pay." Preamble 22124. It was also thought that exempt employees performed a kind of work that "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium." *Ibid.* Petitioners—each of whom earned an average of more than $70,000 per year and spent between 10 and 20 hours outside normal business hours each week performing work related to his assigned portfolio of drugs in his assigned sales territory—are hardly the kind of employees that the FLSA was intended to protect. And it would be challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position. See, *e. g.*, Brief for Pharmaceutical Research and Manufacturers of America (PhRMA) as *Amicus Curiae* 14–20 (explaining that "key aspects of [detailers'] jobs as they are

currently structured are fundamentally incompatible with treating [detailers] as hourly employees").

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The remaining arguments advanced by petitioners and the dissent are unavailing. Petitioners contend that detailers are more naturally classified as nonexempt promotional employees who merely stimulate sales made by others than as exempt outside salesmen. They point out that respondent's prescription drugs are not actually sold until distributors and retail pharmacies order the drugs from other employees. See Reply Brief 7. Those employees,[24] they reason, are the true salesmen in the industry, not detailers. This formalistic argument is inconsistent with the realistic approach that the outside salesman exemption is meant to reflect.

Petitioners' theory seems to be that an employee is properly classified as a nonexempt promotional employee whenever there is another employee who actually makes the sale in a technical sense. But, taken to its extreme, petitioners' theory would require that we treat as a nonexempt promotional employee a manufacturer's representative who takes an order from a retailer but then transfers the order to a jobber's employee to be filled, or a car salesman who receives a commitment to buy but then asks his or her assistant to enter the order into the computer. This formalistic approach would be difficult to reconcile with the broad language of the regulations and the statutory definition of "sale," and it is in significant tension with the DOL's past

[24] According to one of respondent's *amici*, most pharmaceutical companies "have systems in place to maintain the inventories of wholesalers and retailers of prescription drugs (consisting mainly of periodic restocking pursuant to a general contract), [and] these systems are largely ministerial and require only a few employees to administer them." Brief for PhRMA 24; see also *ibid.* (explaining that one of its members employs more than 2,000 pharmaceutical sales representatives but "fewer than ten employees who are responsible for processing orders from retailers and wholesalers, a ratio that is typical of how the industry is structured").

practice. See 1949 Report 83 (explaining that the manufacturer's representative was clearly "performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer"); Preamble 22162 (noting that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales").

Petitioners additionally argue that detailers are the functional equivalent of employees who sell a "concept," and they point to Wage and Hour Division opinion letters, as well as lower court decisions, deeming such employees nonexempt. See Brief for Petitioners 47–48. Two of these opinions, however, concerned employees who were more analogous to buyers than to sellers. See *Clements* v. *Serco, Inc.*, 530 F. 3d 1224, 1229–1230, n. 4 (CA10 2008) (explaining that, although military recruiters "[i]n a loose sense" were "selling the Army's services," it was the Army that would "pa[y] for the services of the recruits who enlist"); Opinion Letter from DOL, Wage and Hour Div. (Aug. 19, 1994), 1994 WL 1004855 (explaining that selling the "concept" of organ donation "is similar to that of outside buyers who in a very loose sense are sometimes described as selling their employer's 'service' to the person for whom they obtain their goods"). And the other two opinions are likewise inapposite. One concerned employees who were not selling a good or service at all, see Opinion Letter from DOL, Wage and Hour Div., FLSA 2006–16 (May 22, 2006), 2006 WL 1698305 (concluding that employees who solicit charitable contributions are not exempt), and the other concerned employees who were incapable of selling any good or service because their employer had yet to extend an offer, see Opinion Letter from DOL, Wage and Hour Div. (Apr. 20, 1999), 1999 WL 1002391 (concluding that college recruiters are not exempt because they merely induce qualified customers to apply to the college, and the college "in turn decides whether to make a contractual offer of its educational services to the applicant").

Finally, the dissent posits that the "primary duty" of a pharmaceutical detailer is not "to obtain a promise to prescribe a particular drug," but rather to "provid[e] information so that the doctor will keep the drug in mind with an eye toward using it when appropriate." *Post,* at 174. But the record in this case belies that contention. Petitioners' end goal was not merely to make physicians aware of the medically appropriate uses of a particular drug. Rather, it was to convince physicians actually to prescribe the drug in appropriate cases. See App. to Pet. for Cert. 40a (finding that petitioners' "primary objective was convincing physicians to prescribe [respondent's] products to their patients").

* * *

For these reasons, we conclude that petitioners qualify as outside salesmen under the most reasonable interpretation of the DOL's regulations. The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Fair Labor Standards Act of 1938 (FLSA) exempts from federal maximum hour and minimum wage requirements "any employee employed . . . in the capacity of outside salesman." 29 U. S. C. § 213(a)(1). The question is whether drug company detailers fall within the scope of the term "outside salesman." In my view, they do not.

## I

The Court describes the essential aspects of the detailer's job as follows: First, the detailer "provide[s] information to physicians about the company's products in hopes of persuading them to write prescriptions for the products in appropriate cases." *Ante,* at 150. Second, the detailers "cal[l] on physicians in an assigned sales territory to discuss the fea-

tures, benefits, and risks of an assigned portfolio of respondent's prescription drugs," and they seek a "nonbinding commitment from the physician to prescribe those drugs in appropriate cases . . . ." *Ante*, at 151 (footnote omitted). Third, the detailers' compensation includes an "incentive" element "based on the sales volume or market share of their assigned drugs in their assigned sales territories." *Ibid.* The Court adds that the detailers work with "only minimal supervision" and beyond normal business hours "attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks." *Ibid.*

As summarized, I agree with the Court's description of the job. In light of important, near-contemporaneous differences in the Justice Department's views as to the meaning of relevant Labor Department regulations, see *ante*, at 153–154, I also agree that we should not give the Solicitor General's current interpretive view any especially favorable weight, *ante*, at 159. Thus, I am willing to assume, with the Court, that we should determine whether the statutory term covers the detailer's job as here described through our independent examination of the statute's language and the related Labor Department regulations. But, I conclude on that basis that a detailer is not an "outside salesman."

## II

The FLSA does not itself define the term "outside salesman." Rather, it exempts from wage and hour requirements "any employee employed . . . in the capacity of outside salesman *(as such terms are defined and delimited from time to time by regulations of the Secretary)*." 29 U. S. C. § 213(a)(1) (emphasis added). Thus, we must look to relevant Labor Department regulations to answer the question. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 165 (2007) (explaining that "the FLSA explicitly leaves gaps" to be filled by regulations).

There are three relevant regulations. The first is entitled "General rule for outside sales employees," 29 CFR § 541.500 (2011); the second is entitled "Making sales or obtaining orders," § 541.501; and the third is entitled "Promotion work," § 541.503. The relevant language of the first two regulations is similar. The first says that the term "'employee employed in the capacity of outside salesman' . . . shall mean any employee . . . [w]hose primary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities . . . ." § 541.500(a)(1). The second regulation tells us that the first regulation "requires that the employee be engaged in . . . (1) Making sales within the meaning of section 3(k) of the Act, or (2) Obtaining orders or contracts for services or for the use of facilities." § 541.501(a).

The second part of these quoted passages is irrelevant here, for it concerns matters not at issue, namely, "orders or contracts for *services* or for the *use of facilities.*" The remaining parts of the two regulations are similarly irrelevant. See Appendix, *infra*. Thus, the relevant portions of the first two regulations say simply that the employee's "primary duty" must be "making sales within the meaning of section 3(k) of the Act." And § 3(k) of the Act says that the word "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U. S. C. § 203(k).

Unless we give the words of the statute and regulations some special meaning, a detailer's primary duty is not that of "making sales" or the equivalent. A detailer might convince a doctor to prescribe a drug for a particular kind of patient. If the doctor encounters such a patient, he might prescribe the drug. The doctor's client, the patient, might take the prescription to a pharmacist and ask the pharmacist to fill the prescription. If so, the pharmacist might sell the manufacturer's drug to the patient, or might substitute a generic version. But it is the pharmacist, not the detailer, who will have sold the drug.

To put the same fairly obvious point in the language of the regulations and of § 3(k) of the FLSA, see 29 U. S. C. § 203(k), the detailer does not "sell" anything to the doctor. See Black's Law Dictionary 1454 (9th ed. 2009) (defining "sale" as "[t]he transfer of property or title for a price"). Nor does he, during the course of that visit or immediately thereafter, "exchange" the manufacturer's product for money or for anything else. He enters into no "contract to sell" on behalf of anyone. He "consign[s]" nothing "for sale." He "ship[s]" nothing for sale. He does not "dispos[e]" of any product at all.

What the detailer does is inform the doctor about the nature of the manufacturer's drugs and explain their uses, their virtues, their drawbacks, and their limitations. The detailer may well try to convince the doctor to prescribe the manufacturer's drugs for patients. And if the detailer is successful, the doctor will make a "nonbinding commitment" to write prescriptions using one or more of those drugs where appropriate. If followed, that "nonbinding commitment" is, at most, a nonbinding promise to consider advising a patient to use a drug where medical indications so indicate (if the doctor encounters such a patient), and to write a prescription that will likely (but may not) lead that person to order that drug under its brand name from the pharmacy. (I say "may not" because 30% of patients in a 2-year period have not filled a prescription given to them by a doctor. See USA Today, Kaiser Family Foundation, Harvard School of Public Health, The Public on Prescription Drugs and Pharmaceutical Companies 3 (2008), online at http://www.kff.org/kaiserpolls/upload/7748.pdf (all Internet materials as visited June 13, 2012, and available in Clerk of Court's case file). And when patients do fill prescriptions, 75% are filled with generic drugs. See Dept. of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Science and Data Policy, Expanding the Use of Generic Drugs 2 (2010).)

Where in this process does the detailer *sell* the product? At most he obtains from the doctor a "nonbinding commitment" to advise his patient to take the drug (or perhaps a generic equivalent) as well as to write any necessary prescription. I put to the side the fact that neither the Court nor the record explains exactly what a "nonbinding commitment" is. Like a "definite maybe," an "impossible solution," or a "theoretical experience," a "nonbinding commitment" seems to claim more than it can deliver. Regardless, other than in colloquial speech, to obtain a commitment to *advise* a client to buy a product is not to obtain a commitment to *sell* that product, no matter how often the client takes the advice (or the patient does what the doctor recommends).

The third regulation, entitled "Promotion work," lends support to this view. That is because the detailer's work as described above is best viewed as promotion work. The regulation makes clear that promotion work falls within the statutory exemption only when the promotion work "is actually performed incidental to and in conjunction with *an employee's own outside sales* or solicitations." 29 CFR § 541.503(a) (emphasis added). But it is not exempt if it is "incidental to sales made, or to be made, by someone else." *Ibid.*

The detailer's work, in my view, is more naturally characterized as involving "[p]romotional activities designed to stimulate sales . . . made by someone else," § 541.503(b), *e. g.*, the pharmacist or the wholesaler, than as involving "[p]romotional activities designed to stimulate" the detailer's "*own* sales."

Three other relevant documents support this reading. First, the Pharmaceutical Research and Manufacturers of America (PhRMA), of which respondent is a member, publishes a "Code on Interactions with Healthcare Professionals." See PhRMA, Code on Interactions with Healthcare Professionals (rev. July 2008) (PhRMA Code), online at http://www.phrma.org/sites/default/files/108/phrma_marketing_code_

2008.pdf. The PhRMA Code describes a detailer's job in some depth. It consistently refers to detailers as "delivering accurate, up-to-date information to healthcare professionals," *id.*, at 14, and it stresses the importance of a doctor's treatment decision being based "solely on each patient's medical needs" and the doctor's "medical knowledge and experience," *id.*, at 2. The PhRMA Code also forbids the offering or providing of anything "in a manner or on conditions that would interfere with the independence of a healthcare professional's prescribing practices." *Id.*, at 13. But the PhRMA Code nowhere refers to detailers as if they were salesmen, rather than providers of information, nor does it refer to any kind of commitment.

To the contrary, the document makes clear that the pharmaceutical industry itself understands that it cannot be a detailer's "primary duty" to obtain a nonbinding commitment, for, in respect to many doctors, such a commitment taken alone is unlikely to make a significant difference to their doctor's use of a particular drug. When a particular drug, say Drug D, constitutes the best treatment for a particular patient, a knowledgeable doctor should (hence likely will) prescribe it *irrespective of any nonbinding commitment* to do so. Where some other drug, however, is likely to prove more beneficial for a particular patient, that doctor should *not* (hence likely will not) prescribe Drug D *irrespective of any nonbinding commitment* to the contrary.

At a minimum, the document explains why a detailer should not (hence likely does not) see himself as seeking *primarily* to obtain a promise to prescribe a particular drug, as opposed to providing information so that the doctor will keep the drug in mind with an eye toward using it when appropriate. And because the detailer's "primary duty" is informational, as opposed to sales oriented, he fails to qualify as an outside salesman. See § 541.500(a)(1)(i) (restricting the outside salesman exemption to employees "[w]hose *primary duty* is . . . making sales" (emphasis added)). A detailer operating in accord with the PhRMA Code "sells" the product

only in the way advertisers (particularly very low key advertisers) "sell" a product: by creating demand for the product, not by taking orders.

Second, a Labor Department Wage and Hour Division report written in 1940 further describes the work of "sales promotion men." See Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940 Report). The 1940 Report says that such individuals "pav[e] the way" for sales by others. *Id.*, at 46. "Frequently," they deal "with [the] retailers who are not customers of [their] own employer but of [their] employer's customer." *Ibid.* And they are "primarily interested in sales *by* the retailer, not *to* the retailer." *Ibid.* "[T]hey do not make actual sales," and they "are admittedly not outside salesmen." *Ibid.*

Like the "sales promotion men," the detailers before us deal with individuals, namely, doctors, "who are not customers" of their own employer. And the detailers are primarily interested in sales *authorized by* the doctor, not *to* the doctor. According to the 1940 Report, sales promotion men are not "outside salesmen," primarily because they seek to bring about not their own sales but sales by others. Thus, the detailers in this case are not "outside salesmen."

Third, a Wage and Hour Division Report written in 1949 notes that where "work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work." See Dept. of Labor, Wage and Hour and Public Contracts Divs., Report and Recommendations on Proposed Revisions of Regulations, Part 541, p. 82 (1949) (1949 Report). It adds that in borderline cases

> "the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, *at least to the extent of obtaining a commitment to buy from the person to whom he is selling.* If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his

> own specific sales his activities are not exempt." *Id.*, at 83 (emphasis added).

The 1949 Report also refers to a

> "company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock . . . , consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity requested." *Id.*, at 84.

It says this company representative is *not* an "outside salesman" because he

> "does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy)." *Ibid.*

See also 29 CFR § 541.503(c) (explaining that if an employee "does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work").

A detailer does not take orders, he does not consummate a sale, and he does not direct his efforts toward the consummation of any eventual sale (by the pharmacist) any more than does the "company['s] representative" in the 1949 Report's example. The doctor whom the detailer visits, like the example's store manager, "has no authority to buy."

Taken together, the statute, regulations, ethical codes, and Labor Department Reports indicate that the drug detailers do not promote their "own sales," but rather "sales made, or to be made, by someone else." Therefore, detailers are not "outside salesmen."

## III

The Court's different conclusion rests primarily upon its interpretation of the statutory words "other disposition" as "including those arrangements that are tantamount, in a par-

ticular industry, to a paradigmatic sale of a commodity." *Ante*, at 164. Given the fact that the doctor buys nothing, the fact that the detailer sells nothing to the doctor, and the fact that any "nonbinding commitment" by the doctor must, of ethical necessity, be of secondary importance, there is nothing about the detailer's visit with the doctor that makes the visit (or what occurs during the visit) "tantamount . . . to a paradigmatic sale." *Ante*, at 164–165. See Part I, *supra*.

The Court adds that "[o]btaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells." *Ante*, at 165. And that may be so. But there is no "most they are able to do" test. After all, the "most" a California firm's marketing employee may be able "to do" to secure orders from New York customers is to post an advertisement on the Internet, but that fact does not help qualify the posting employee as a "salesman." The Court adds that it means to apply this test only when the law precludes "an entire industry . . . from selling its products in the ordinary manner." *Ibid.*, n. 23. But the law might preclude an industry from selling its products through an outside salesman without thereby leading the legal term "outside salesman" to apply to whatever is the next best thing. In any event, the Court would be wrong to assume, if it does assume, that there is in nearly every industry an outside salesman lurking somewhere (if only we can find him). An industry might, after all, sell its goods through wholesalers or retailers, while using its own outside employees to encourage sales only by providing third parties with critically important information.

The Court expresses concern lest a holding that detailers are not "salesmen" lead to holdings that the statute forbids treating as a "salesman" an employee "who takes an order from a retailer but then transfers the order to a jobber's employee to be filled," *ante*, at 167, or "a car salesman who

receives a commitment to buy but then asks his or her assistant to enter the order into the computer," *ibid.* But there is no need for any such fear. Both these examples involve employees who are salesmen because they obtain a firm commitment to buy the product. See 1949 Report 83 (as to the first example, such an employee "has obtained a commitment from the customer"); 69 Fed. Reg. 22163 (2004) (as to the second example, explaining that "[e]xempt status should not depend on . . . who types the order into a computer," but maintaining requirement that a salesman "obtai[n] a commitment to buy from the person to whom he is selling"). The problem facing the detailer is that he does not obtain any such commitment.

Finally, the Court points to the detailers' relatively high pay, their uncertain hours, the location of their work, their independence, and the fact that they frequently work overtime, all as showing that detailers fall within the basic purposes of the statutory provision that creates exceptions from wage and hour requirements. *Ante,* at 151–152. The problem for the detailers, however, is that the statute seeks to achieve its general objectives by creating certain categories of exempt employees, one of which is the category of "outside salesman." It places into that category only those who satisfy the definition of "outside salesman" as "*defined and delimited from time to time by regulations of the Secretary.*" 29 U. S. C. § 213(a)(1) (emphasis added). And the detailers do not fall within that category as defined by those regulations.

For these reasons, with respect, I dissent.

## APPENDIX

1. Title 29 CFR § 541.500 (2011) provides:

> **"General rule for outside sales employees.**
>
> "(a) The term 'employee employed in the capacity of outside salesman' in section 13(a)(1) of the Act shall mean any employee:

"(1) Whose primary duty is:

"(i) making sales within the meaning of section 3(k) of the Act, or

"(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

"(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

"(b) The term 'primary duty' is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

"(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section."

2. Title 29 CFR § 541.501 provides:

**"Making sales or obtaining orders.**

"(a) Section 541.500 requires that the employee be engaged in:

"(1) Making sales within the meaning of section 3(k) of the Act, or

"(2) Obtaining orders or contracts for services or for the use of facilities.

"(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that

'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

"(c) Exempt outside sales work includes not only the sales of commodities, but also 'obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.' Obtaining orders for 'the use of facilities' includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

"(d) The word 'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order."

3. Title 29 CFR § 541.503 provides:

**"Promotion work.**

"(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

"(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be

considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

"(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work."

Syllabus

# SALAZAR, SECRETARY OF THE INTERIOR, ET AL. *v.* RAMAH NAVAJO CHAPTER ET AL.

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

No. 11–551. Argued April 18, 2012—Decided June 18, 2012

The Indian Self-Determination and Education Assistance Act (ISDA) directs the Secretary of the Interior to enter into contracts with willing tribes under which they will provide services such as education and law enforcement that the Federal Government otherwise would have provided. It requires the Secretary to contract to pay the "full amount" of "contract support costs," 25 U. S. C. §§ 450j–1(a)(2), (g), subject to the availability of appropriations, § 450j–1(b). In the event of a contractual breach, tribal contractors are entitled to seek money damages under the Contract Disputes Act.

In Fiscal Years (FYs) 1994 to 2001, respondent Tribes contracted with the Secretary to provide services. During each of those FYs, Congress appropriated sufficient funds to pay any individual tribal contractor's contract support costs in full but did not appropriate enough to pay all tribal contractors collectively. Unable to pay every contractor in full, the Secretary paid the Tribes on a uniform, pro rata basis. Respondents sued under the Contract Disputes Act for breach of contract. The District Court granted the Government summary judgment. The Tenth Circuit reversed, finding the Government liable to each contractor for the full contract amount.

*Held:* The Government must pay each Tribe's contract support costs in full. Pp. 189–201.

(a) In *Cherokee Nation of Okla.* v. *Leavitt*, 543 U. S. 631, this Court considered the Government's promise to pay contract support costs in ISDA self-determination contracts that made the Government's obligation "subject to the availability of appropriations," *id.*, at 634–637. The Government contended that Congress appropriated inadequate funds to fulfill its contractual obligations to the Tribes, while meeting the agency's competing fiscal priorities. Because Congress appropriated sufficient legally unrestricted funds to pay the contracts, however, the Court held that the Government was obligated to pay those costs in full absent "something special about the promises," *id.*, at 637–638.

That conclusion followed directly from well-established principles of Government contracting law: When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in

itself to pay the contractor, the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends. See *Ferris* v. *United States*, 27 Ct. Cl. 542, 546. That is so "even if an agency's total lump-sum appropriation is insufficient to pay all" of its contracts. *Cherokee Nation*, 543 U. S., at 637. This principle safeguards both the expectations of Government contractors and the long-term fiscal interests of the United States. Contractors need not keep track of agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises. And the rule furthers "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *United States* v. *Winstar Corp.*, 518 U. S. 839, 883. Pp. 189–192.

(b) The principles underlying *Cherokee Nation* and *Ferris* control here. Once "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay all the contracts the agency has made." *Cherokee Nation*, 543 U. S., at 637. That condition is satisfied here, because Congress made sufficient funds available to pay any individual contractor in full. Pp. 192–194.

(c) The Government attempts to distinguish *Ferris* and *Cherokee Nation* on the ground that they involved unrestricted, lump-sum appropriations, while Congress here appropriated "not to exceed" a certain amount for contract support costs. The effect of the appropriations in each case, however, was identical: The agency remained free to allocate funds among multiple contractors, so long as the contracts served the purpose Congress identified. The "not to exceed" language still has legal effect; it prevents the Secretary from reprogramming other funds to pay contract support costs, thereby protecting funds that Congress envisioned for other Bureau of Indian Affairs programs.

Section 450j–1(b), which specifies that the Secretary is not required to reduce funding for one tribe's programs to make funds available to another tribe, does not warrant a different result. Consistent with ordinary Government contracting principles, that language merely underscores the Secretary's discretion to allocate funds among tribes. It does not alter the Government's legal obligation when the Secretary fails to pay.

The Government's remaining counterarguments are unpersuasive. First, it suggests that the Secretary could violate the Anti-Deficiency

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Act, which prevents federal officers from making or authorizing an expenditure or obligation exceeding an amount available in an appropriation. That Act applies only to government officials, however, and does not affect the rights of citizens contracting with the Government. Second, the Government argues that permitting respondents to recover from the Judgment Fund would circumvent Congress' intent to cap total expenditures for contract support costs. But ISDA expressly provides that tribal contractors may sue for "money damages" under the Contract Disputes Act, and any ensuing judgments are payable from the Judgment Fund. See *Cherokee Nation*, 543 U. S., at 642. Third, the Government invokes cases in which courts have rejected contractors' attempts to recover for amounts beyond the maximum appropriated by Congress for a particular purpose. See, *e. g.*, *Sutton* v. *United States*, 256 U. S. 575. However, *Sutton* involved a specific line-item appropriation for an amount beyond which the sole contractor could not recover. This case involves several contractors, each of whom contracted within the lump-sum amount Congress appropriated for all contractors. Unlike the sole contractor in *Sutton*, they cannot reasonably be expected to know how much remained available of Congress' lump-sum appropriation. Finally, the Government claims that legislative history suggests that Congress approved of pro rata distribution, but "indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirement on the agency." *Lincoln* v. *Vigil*, 508 U. S. 182, 192. Pp. 194–200.

(d) This case is the product of two decisions in some tension: Congress required the Secretary to accept every qualifying ISDA contract, promising "full" funding for all contract support costs, but then appropriated insufficient funds to pay in full each tribal contractor. Responsibility for the resolution of that situation, however, is committed to Congress. Pp. 200–201.

644 F. 3d 1054, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which GINSBURG, BREYER, and ALITO, JJ., joined, *post*, p. 201.

*Mark R. Freeman* argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Barbara C. Biddle*, *John S. Koppel*, *Patrice H. Kunesh*,

*Michael J. Berrigan*, *Jeffrey C. Nelson*, and *Sabrina A. McCarthy*.

*Carter G. Phillips* argued the cause for respondents. With him on the brief were *Michael P. Gross*, *Jonathan F. Cohn*, *Matthew D. Krueger*, *C. Bryant Rogers*, *Lloyd B. Miller*, *Donald J. Simon*, and *Daniel H. MacMeekin*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Indian Self-Determination and Education Assistance Act (ISDA or Act), 25 U. S. C. § 450 *et seq.*, directs the Secretary of the Interior to enter into contracts with willing tribes, pursuant to which those tribes will provide services such as education and law enforcement that otherwise would have been provided by the Federal Government. ISDA mandates that the Secretary shall pay the full amount of "contract support costs" incurred by tribes in performing their contracts. At issue in this case is whether the Government must pay those costs when Congress appropriates sufficient funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor. Consistent with longstanding principles of Government contracting law, we hold that the Government must pay each tribe's contract support costs in full.

## I

### A

Congress enacted ISDA in 1975 in order to achieve "maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as

*Briefs of *amici curiae* urging affirmance were filed for the Arctic Slope Native Association, Ltd., by *Messrs. Miller, Simon, Phillips, Cohn*, and *Krueger;* for the Chamber of Commerce of the United States of America et al. by *Herbert L. Fenster, Robin S. Conrad, Kate Comerford Todd, David A. Churchill*, and *Matthew S. Hellman;* and for the National Congress of American Indians et al. by *Edward C. DuMont* and *Danielle Spinelli*.

to render such services more responsive to the needs and desires of those communities." 25 U. S. C. § 450a(a). To that end, the Act directs the Secretary of the Interior, "upon the request of any Indian tribe . . . , to enter into a self-determination contract . . . to plan, conduct, and administer" health, education, economic, and social programs that the Secretary otherwise would have administered. § 450f(a)(1).

As originally enacted, ISDA required the Government to provide contracting tribes with an amount of funds equivalent to those that the Secretary "would have otherwise provided for his direct operation of the programs." § 106(h), 88 Stat. 2211. It soon became apparent that this secretarial amount failed to account for the full costs to tribes of providing services. Because of "concern with Government's past failure adequately to reimburse tribes' indirect administrative costs," *Cherokee Nation of Okla.* v. *Leavitt*, 543 U. S. 631, 639 (2005), Congress amended ISDA to require the Secretary to contract to pay the "full amount" of "contract support costs" related to each self-determination contract, §§ 450j–1(a)(2), (g).[1] The Act also provides, however, that "[n]otwithstanding any other provision in [ISDA], the provision of funds under [ISDA] is subject to the availability of appropriations." § 450j–1(b).

Congress included a model contract in ISDA and directed that each tribal self-determination contract "shall . . . contain, or incorporate [it] by reference." § 450*l*(a)(1). The model contract specifies that "'[s]ubject to the availability

[1] As defined by ISDA, contract support costs "shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which . . . (A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract." § 450j–1(a)(2). Such costs include overhead administrative costs, as well as expenses such as federally mandated audits and liability insurance. See *Cherokee Nation of Okla.*, 543 U. S., at 635.

of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement'" between the Secretary and the tribe. § 450*l*(c) (model agreement § 1(b)(4)). That amount "'shall not be less than the applicable amount determined pursuant to [§ 450j–1(a)],'" which includes contract support costs. *Ibid.;* § 450j–1(a)(2). The contract indicates that "'[e]ach provision of [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .'" § 450*l*(c) (model agreement § 1(a)(2)). Finally, the Act makes clear that if the Government fails to pay the amount contracted for, then tribal contractors are entitled to pursue "money damages" in accordance with the Contract Disputes Act. § 450m–1(a).

B

During Fiscal Years (FYs) 1994 to 2001, respondent Tribes contracted with the Secretary of the Interior to provide services such as law enforcement, environmental protection, and agricultural assistance. The Tribes fully performed. During each FY, Congress appropriated a total amount to the Bureau of Indian Affairs (BIA) "for the operation of Indian programs." See, *e. g.,* Department of the Interior and Related Agencies Appropriations Act, 2000, 113 Stat. 1501A–148. Of that sum, Congress provided that "not to exceed [a particular amount] shall be available for payments to tribes and tribal organizations for contract support costs" under ISDA. *E. g., ibid.* Thus, in FY 2000, for example, Congress appropriated $1,670,444,000 to the BIA, of which "not to exceed $120,229,000" was allocated for contract support costs. *Ibid.*

During each relevant FY, Congress appropriated sufficient funds to pay in full any individual tribal contractor's contract support costs. Congress did not, however, appropriate sufficient funds to cover the contract support costs due all tribal contractors collectively. Between FYs 1994 and 2001, appropriations covered only between 77% and 92% of tribes'

aggregate contract support costs. The extent of the shortfall was not revealed until each FY was well underway, at which point a tribe's performance of its contractual obligations was largely complete. See 644 F. 3d 1054, 1061 (CA10 2011). Lacking funds to pay each contractor in full, the Secretary paid tribes' contract support costs on a uniform, pro rata basis. Tribes responded to these shortfalls by reducing ISDA services to tribal members, diverting tribal resources from non-ISDA programs, and forgoing opportunities to contract in furtherance of Congress' self-determination objective. GAO, V. Rezendes, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed 3–4 (GAO/RCED–99–150, 2009).

Respondent Tribes sued for breach of contract pursuant to the Contract Disputes Act, 41 U. S. C. §§ 601–613, alleging that the Government failed to pay the full amount of contract support costs due from FYs 1994 through 2001, as required by ISDA and their contracts. The United States District Court for the District of New Mexico granted summary judgment for the Government. A divided panel of the United States Court of Appeals for the Tenth Circuit reversed. The court reasoned that Congress made sufficient appropriations "legally available" to fund any individual tribal contractor's contract support costs, and that the Government's contractual commitment was therefore binding. 644 F. 3d, at 1063–1065. In such cases, the Court of Appeals held that the Government is liable to each contractor for the full contract amount. Judge Hartz dissented, contending that Congress intended to set a maximum limit on the Government's liability for contract support costs. We granted certiorari to resolve a split among the Courts of Appeals, 565 U. S. 1104 (2012), and now affirm.[2]

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[2] Compare 644 F. 3d 1054 (case below) with *Arctic Slope Native Assn., Ltd.* v. *Sebelius*, 629 F. 3d 1296 (CA Fed. 2010) (no liability to pay total contract support costs beyond cap in appropriations Act).

## II

### A

In evaluating the Government's obligation to pay tribes for contract support costs, we do not write on a clean slate. Only seven years ago, in *Cherokee Nation*, we also considered the Government's promise to pay contract support costs in ISDA self-determination contracts that made the Government's obligation "subject to the availability of appropriations." 543 U. S., at 634–637. For each FY at issue, Congress had appropriated to the Indian Health Service (IHS) a lump sum between $1.277 and $1.419 billion, "far more than the [contract support cost] amounts" due under the Tribes' individual contracts. *Id.*, at 637; see *id.*, at 636 (Cherokee Nation and Shoshone-Paiute Tribes filed claims seeking $3.4 and $3.5 million, respectively). The Government contended, however, that Congress had appropriated inadequate funds to enable the IHS to pay the Tribes' contract support costs in full, while meeting all of the agency's competing fiscal priorities.

As we explained, that did not excuse the Government's responsibility to pay the Tribes. We stressed that the Government's obligation to pay contract support costs should be treated as an ordinary contract promise, noting that ISDA "uses the word 'contract' 426 times to describe the nature of the Government's promise." *Id.*, at 639. As even the Government conceded, "in the case of ordinary contracts . . . 'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds.'" *Id.*, at 641. It followed, therefore, that absent "something special about the promises here at issue," the Government was obligated to pay the Tribes' contract support costs in full. *Id.*, at 638.

We held that the mere fact that ISDA self-determination contracts are made "subject to the availability of appropriations" did not warrant a special rule. *Id.*, at 643 (internal quotation marks omitted). That commonplace provision, we explained, is ordinarily satisfied so long as Congress appropriates adequate legally unrestricted funds to pay the contracts at issue. See *ibid.* Because Congress made sufficient funds legally available to the agency to pay the Tribes' contracts, it did not matter that the BIA had allocated some of those funds to serve other purposes, such that the remainder was insufficient to pay the Tribes in full. Rather, we agreed with the Tribes that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue," the Government's promise to pay was binding. *Id.*, at 637–638.

Our conclusion in *Cherokee Nation* followed directly from well-established principles of Government contracting law. When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends. See *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892); *Dougherty* v. *United States*, 18 Ct. Cl. 496, 503 (1883); see also 2 GAO, Principles of Federal Appropriations Law, p. 6–17 (2d ed. 1992) (hereinafter GAO Redbook).[3] That is so "even if an agency's total lump-

[3] In *Ferris*, for instance, Congress appropriated $45,000 for the improvement of the Delaware River below Bridesburg, Pennsylvania. Act of Mar. 3, 1879, ch. 181, 20 Stat. 364. The Government contracted with Ferris for $37,000 to dredge the river. Halfway through Ferris' performance of his contract, the United States Army Corps of Engineers ran out of money to pay Ferris, having used $17,000 of the appropriation to pay for other improvements. Nonetheless, the Court of Claims found that Ferris could recover for the balance of his contract. As the court explained, the appropriation "merely impose[d] limitations upon the Government's own agents; . . . its insufficiency [did] not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." 27 Ct. Cl.,

sum appropriation is insufficient to pay *all* the contracts the agency has made." *Cherokee Nation*, 543 U. S., at 637. In such cases, "[t]he United States are as much bound by their contracts as are individuals." *Lynch* v. *United States*, 292 U. S. 571, 580 (1934) (internal quotation marks omitted). Although the agency itself cannot disburse funds beyond those appropriated to it, the Government's "valid obligations will remain enforceable in the courts." GAO Redbook, p. 6–17.

This principle safeguards both the expectations of Government contractors and the long-term fiscal interests of the United States. For contractors, the *Ferris* rule reflects that when "a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time." GAO Redbook, p. 6–18. Contractors are responsible for knowing the size of the pie, not how the agency elects to slice it. Thus, so long as Congress appropriates adequate funds to cover a prospective contract, contractors need not keep track of agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises. *Dougherty*, 18 Ct. Cl., at 503. In such cases, if an agency overcommits its funds such that it cannot fulfill its contractual commitments, even the Government has acknowledged that "[t]he risk of over-obligation may be found to fall on the agency," not the contractor. Brief for Federal Parties in *Cherokee Nation* v. *Leavitt*, O. T. 2004, No. 02–1472 etc., p. 24 (hereinafter Brief for Federal Parties).

The rule likewise furthers "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *United States* v. *Winstar Corp.*, 518 U. S. 839, 883 (1996) (plurality opinion). If the Government could be trusted to fulfill its promise to

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at 546; see also *Dougherty*, 18 Ct. Cl., at 503 (rejecting Government's argument that a contractor could not recover upon similar facts because the "appropriation had, at the time of the purchase, been covered by other contracts").

pay only when more pressing fiscal needs did not arise, would-be contractors would bargain warily—if at all—and only at a premium large enough to account for the risk of nonpayment. See, *e. g.*, Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129, 1146 (1996). In short, contracting would become more cumbersome and expensive for the Government, and willing partners more scarce.

B

The principles underlying *Cherokee Nation* and *Ferris* dictate the result in this case. Once "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Cherokee Nation*, 543 U. S., at 637; see also *id.*, at 638 ("[T]he Government denies none of this").

That condition is satisfied here. In each FY between 1994 and 2001, Congress appropriated to the BIA a lump sum from which "not to exceed" between $91 and $125 million was allocated for contract support costs, an amount that exceeded the sum due any tribal contractor. Within those constraints, the ability to direct those funds was "'committed to agency discretion by law.'" *Lincoln* v. *Vigil*, 508 U. S. 182, 193 (1993) (quoting 5 U. S. C. § 701(a)(2)). Nothing, for instance, prevented the BIA from paying in full respondent Ramah Navajo Chapter's contract support costs rather than other tribes', whether based on its greater need or simply because it sought payment first.[4] See *International Union, United Auto., Aerospace & Agricultural Implement Work-*

[4] Indeed, the IHS once allocated its appropriations for new ISDA contracts on a first-come, first-serve basis. See Dept. of Health and Human Services, Indian Self-Determination Memorandum No. 92–2, p. 4 (Feb. 27, 1992).

*ers of Am.* v. *Donovan*, 746 F. 2d 855, 861 (CADC 1984) (Scalia, J.) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit"). And if there was any doubt that that general rule applied here, ISDA's statutory language itself makes clear that the BIA may allocate funds to one tribe at the expense of another. See § 450j–1(b) ("[T]he Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]"). The upshot is that the funds appropriated by Congress were legally available to pay any individual tribal contractor in full. See 1 GAO Redbook, p. 4–6 (3d ed. 2004).

The Government's contractual promise to pay each tribal contractor the "full amount of funds to which the contractor [was] entitled," § 450j–1(g), was therefore binding. We have expressly rejected the Government's argument that "the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contracts) will not prove sufficient to pay *all* similar contracts." *Cherokee Nation*, 543 U. S., at 638. Rather, the tribal contractors were entitled to rely on the Government's promise to pay because they were "not chargeable with knowledge" of the BIA's administration of Congress' appropriation, "nor [could their] legal rights be affected or impaired by its maladministration or by its diversion." *Ferris*, 27 Ct. Cl., at 546.

As in *Cherokee Nation*, we decline the Government's invitation to ascribe "special, rather than ordinary," meaning to the fact that ISDA makes contracts "subject to the availability of appropriations." [5] 543 U. S., at 644. Under our previ-

[5] The Government's reliance on this statutory language is particularly curious because it suggests it is superfluous. See Brief for Petitioners 30–31 (it is "unnecessary" to specify that contracts are "subject to the availability of appropriations" (internal quotation marks omitted)); see also Reply Brief for Petitioners 7 ("*[A]ll* government contracts are contingent upon the appropriations provided by Congress").

ous interpretation of that language, that condition was satisfied here because Congress appropriated adequate funds to pay in full any individual contractor. It is important to afford that language a "uniform interpretation" in this and comparable statutes, "lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Ibid.* It would be particularly anomalous to read the statutory language differently here. Contracts made under ISDA specify that "'[e]ach provision of [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .'" § 450*l*(c) (model agreement § 1(a)(2)). The Government, in effect, must demonstrate that its reading is clearly required by the statutory language. Accordingly, the Government cannot back out of its contractual promise to pay each Tribe's full contract support costs.

## III

### A

The Government primarily seeks to distinguish this case from *Cherokee Nation* and *Ferris* on the ground that Congress here appropriated "not to exceed" a given amount for contract support costs, thereby imposing an express cap on the total funds available. See Brief for Petitioners 26, 49. The Government argues, on this basis, that *Ferris* and *Cherokee Nation* involved "contracts made against the backdrop of unrestricted, lump-sum appropriations," while this case does not. See Brief for Petitioners 49, 26.

That premise, however, is inaccurate. In *Ferris*, Congress appropriated "[f]or improving Delaware River below Bridesburg, Pennsylvania, forty-five thousand dollars." 20 Stat. 364. As explained in the Government's own appropriations law handbook, the "not to exceed" language at issue in this case has an identical meaning to the quoted language in *Ferris*. See GAO Redbook, p. 6–5 ("Words like 'not to exceed' are not the only way to establish a maximum limita-

tion. If the appropriation includes a specific amount for a particular object (such as 'For Cuban cigars, $100'), then the appropriation is a maximum which may not be exceeded"). The appropriation in *Cherokee Nation* took a similar form. See, *e. g.*, 108 Stat. 2527–2528 ("For expenses necessary to carry out . . . [ISDA and certain other enumerated Acts], $1,713,052,000"). There is no basis, therefore, for distinguishing the class of appropriation in those cases from this one. In each case, the agency remained free to allocate funds among multiple contractors, so long as the contracts served the purpose Congress identified.

This result does not leave the "not to exceed" language in Congress' appropriation without legal effect. To the contrary, it prevents the Secretary from reprogramming other funds to pay contract support costs—thereby protecting funds that Congress envisioned for other BIA programs, including tribes that choose not to enter ISDA contracts. But when an agency makes competing contractual commitments with legally available funds and then fails to pay, it is the Government that must bear the fiscal consequences, not the contractor.

B

The dissent attempts to distinguish this case from *Cherokee Nation* and *Ferris* on different grounds, relying on § 450j–1(b)'s proviso that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." In the dissent's view, that clause establishes that each dollar allocated by the Secretary reduces the amount of appropriations legally available to pay other contractors. In effect, the dissent understands § 450j–1(b) to make the legal availability of appropriations turn on the Secretary's expenditures rather than the sum allocated by Congress.

That interpretation, which is inconsistent with ordinary principles of Government contracting law, is improbable. We have explained that Congress ordinarily controls the

availability of appropriations; the agency controls whether to make funds from that appropriation available to pay a contractor. See *Cherokee Nation*, 543 U. S., at 642–643. The agency's allocation choices do not affect the Government's liability in the event of an underpayment. See *id.*, at 641 (when an "'unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose*'").[6] In *Cherokee Nation*, we found those ordinary principles generally applicable to ISDA. See *id.*, at 637–646. We also found no evidence that Congress intended that "the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contracts) will not prove sufficient to pay *all* similar contracts." *Id.*, at 638 (citing Brief for Federal Parties 23–25). The dissent's reading, by contrast, would impose precisely that regime. See *post*, at 204–206.

The better reading of § 450j–1(b) accords with ordinary Government contracting principles. As we explained, *supra*, at 190–192, the clause underscores the Secretary's discretion to allocate funds among tribes, but does not alter the Government's legal obligation when the agency fails to pay. That reading gives full effect to the clause's text, which ad-

[6] The dissent's view notwithstanding, it is beyond question that Congress appropriated sufficient unrestricted funds to pay any contractor in full. The dissent's real argument is that § 450j–1(b) reverses the applicability of the *Ferris* rule to ISDA, so that the Secretary's allocation of funds to one contractor reduces the legal availability of funds to others. See *post*, at 204 (opinion of ROBERTS, C. J.) ("[T]hat the Secretary *could have* allocated the funds to [a] tribe is irrelevant. What matters is what the Secretary actually does, and once he allocates the funds to one tribe, they are not 'available' to another"). We are not persuaded that § 450j–1(b) was intended to enact that radical departure from ordinary Government contracting principles. Indeed, Congress has spoken clearly and directly when limiting the Government's total contractual liability to an amount appropriated in similar schemes; that it did not do so here further counsels against the dissent's reading. See, *e. g.*, 25 U. S. C. § 2008(j)(2) ("If the total amount of funds necessary to provide grants to tribes . . . for a fiscal year exceeds the amount of funds appropriated . . . , the Secretary shall reduce the amount of each grant [pro rata]").

dresses the "amount of funds provided," and specifies that the Secretary is not required to reduce funding for one tribe to make "funds available" to another. 450j–1(b). Indeed, even the Government acknowledges the clause governs the Secretary's discretion to distribute funds. See Brief for Petitioners 52 (pursuant to § 450j–1(b), the Secretary was not obligated to pay tribes' "contract support costs on a first-come, first-served basis, but had the authority to distribute the available money among all tribal contractors in an equitable fashion").

At minimum, the fact that we, the court below, the Government, and the Tribes do not share the dissent's reading of § 450j–1(b) is strong evidence that its interpretation is not, as it claims, "unambiguous[ly]" correct. *Post*, at 207 (opinion of ROBERTS, C. J.). Because ISDA is construed in favor of tribes, that conclusion is fatal to the dissent.

C

The remaining counterarguments are unpersuasive. *First*, the Government suggests that today's holding could cause the Secretary to violate the Anti-Deficiency Act, which prevents federal officers from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation." 31 U. S. C. § 1341(a)(1)(A). But a predecessor version of that Act was in place when *Ferris* and *Dougherty* were decided, see GAO Redbook, pp. 6–9 to 6–10, and the Government did not prevail there. As *Dougherty* explained, the Anti-Deficiency Act's requirements "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." 18 Ct. Cl., at 503; see also *Ferris*, 27 Ct. Cl., at 546 ("An 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").[7]

[7] We have some doubt whether a Government employee would violate the Anti-Deficiency Act by obeying an express statutory command to enter a contract, as was the case here. But we need not decide the ques-

*Second*, the Government argues that Congress could not have intended for respondents to recover from the Judgment Fund, 31 U. S. C. § 1304, because that would allow the Tribes to circumvent Congress' intent to cap total expenditures for contract support costs.[8] That contention is puzzling. Congress expressly provided in ISDA that tribal contractors were entitled to sue for "money damages" under the Contract Disputes Act upon the Government's failure to pay, 25 U. S. C. §§ 450m–1(a), (d), and judgments against the Government under that Act are payable from the Judgment Fund, 41 U. S. C. § 7108(a) (2006 ed., Supp. IV).[9] Indeed, we cited the Contract Disputes Act, Judgment Fund, and Anti-Deficiency Act in *Cherokee Nation*, explaining that if the Government commits its appropriations in a manner that leaves contractual obligations unfulfilled, "the contractor [is] free to pursue appropriate legal remedies arising because the Government broke its contractual promise." 543 U. S., at 642.

*Third*, the Government invokes cases in which courts have rejected contractors' attempts to recover for amounts beyond the maximum appropriated by Congress for a particular purpose. See, *e. g.*, *Sutton* v. *United States*, 256 U. S. 575 (1921). In *Sutton*, for instance, Congress made a specific line-item appropriation of $23,000 for the completion of a par-

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tion, for this case concerns only the contractual rights of tribal contractors, not the consequences of entering into such contracts for agency employees.

[8] The Judgment Fund is a "permanent, indefinite appropriation" enacted by Congress to pay final judgments against the United States when, *inter alia*, "[p]ayment may not legally be made from any other source of funds." 31 CFR § 256.1(a)(4) (2011).

[9] For that reason, the Government's reliance on *Office of Personnel Management* v. *Richmond*, 496 U. S. 414 (1990), is misplaced. In *Richmond*, we held that the Appropriations Clause does not permit plaintiffs to recover money for Government-caused injuries for which Congress "appropriated no money." *Id.*, at 424. *Richmond*, however, indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which "the express terms of a specific statute" establish "a substantive right to compensation" from the Judgment Fund. *Id.*, at 432.

ticular project. *Id.*, at 577. We held that the sole contractor engaged to complete that project could not recover more than that amount for his work.

The *Ferris* and *Sutton* lines of cases are distinguishable, however. GAO Redbook, p. 6–18. "[I]t is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted," but that "under a specific line-item appropriation, the answer is different." *Ibid.*[10] The different results "follo[w] logically from the old maxim that ignorance of the law is no excuse." *Ibid.* "If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it." *Ibid.* This case is far different. Hundreds of tribes entered into thousands of independent contracts, each for amounts well within the lump sum appropriated by Congress to pay contract support costs. Here, where each Tribe's "contract is but one activity under a larger appropriation, it is not reasonable to expect [each] contractor to know how much of that appropriation remain[ed] available for it at any given time." *Ibid.;* see also *Ferris*, 27 Ct. Cl., at 546.

*Finally,* the Government argues that legislative history suggests that Congress approved of the distribution of available funds on a uniform, pro rata basis. But "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear infer-

[10] Of course, "[t]he terms 'lump-sum' and 'line-item' are relative concepts." GAO Redbook, p. 6–165. For example, an appropriation for building two ships "could be viewed as a line-item appropriation in relation to the broader 'Shipbuilding and Conversion' category, but it was also a lump-sum appropriation in relation to the two specific vessels included." *Ibid.* So long as a contractor does not seek payment beyond the amount Congress made legally available for a given purpose, "[t]his factual distinction does not affect the legal principle." *Ibid.* See also *In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976).

ence arises that it does not intend to impose legally binding restrictions." *Lincoln*, 508 U. S., at 192 (internal quotation marks omitted). "[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency." *Ibid.* (internal quotation marks omitted). An agency's discretion to spend appropriated funds is cabined only by the "text of the appropriation," not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history. *International Union, UAW*, 746 F. 2d, at 860–861. That principle also reflects the same ideas underlying *Ferris*. If a contractor's right to payment varied based on a future court's uncertain interpretation of legislative history, it would increase the Government's cost of contracting. Cf. *Cherokee Nation*, 543 U. S., at 644. That long-run expense would likely far exceed whatever money might be saved in any individual case.

## IV

As the Government points out, the state of affairs resulting in this case is the product of two congressional decisions which the BIA has found difficult to reconcile. On the one hand, Congress obligated the Secretary to accept every qualifying ISDA contract, which includes a promise of "full" funding for all contract support costs. On the other, Congress appropriated insufficient funds to pay in full each tribal contractor. The Government's frustration is understandable, but the dilemma's resolution is the responsibility of Congress.

Congress is not short of options. For instance, it could reduce the Government's financial obligation by amending ISDA to remove the statutory mandate compelling the BIA to enter into self-determination contracts, or by giving the BIA flexibility to pay less than the full amount of contract support costs. It could also pass a moratorium on the formation of new self-determination contracts, as it has done

before. See § 328, 112 Stat. 2681–291 to 2681–292. Or Congress could elect to make line-item appropriations, allocating funds to cover tribes' contract support costs on a contractor-by-contractor basis. On the other hand, Congress could appropriate sufficient funds to the BIA to meet the tribes' total contract support cost needs. Indeed, there is some evidence that Congress may do just that. See H. R. Rep. No. 112–151, p. 42 (2011) ("The Committee believes that the Bureau should pay all contract support costs for which it has contractually agreed and directs the Bureau to include the full cost of the contract support obligations in its fiscal year 2013 budget submission").

The desirability of these options is not for us to say. We make clear only that Congress has ample means at hand to resolve the situation underlying the Tribes' suit. Any one of the options above could also promote transparency about the Government's fiscal obligations with respect to ISDA's directive that contract support costs be paid in full. For the period in question, however, it is the Government—not the Tribes—that must bear the consequences of Congress' decision to mandate that the Government enter into binding contracts for which its appropriation was sufficient to pay any individual tribal contractor, but "insufficient to pay *all* the contracts the agency has made." *Cherokee Nation*, 543 U. S., at 637.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

CHIEF JUSTICE ROBERTS, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.

Today the Court concludes that the Federal Government must pay the full amount of contract support costs incurred by the respondent Tribes, regardless of whether there are any appropriated funds left for that purpose. This despite the facts that payment of such costs is "subject to the availability of appropriations," a condition expressly set forth

in both the statute and the contracts providing for such payment, 25 U. S. C. §§ 450j–1(b), 450*l*(c) (model agreement § 1(b)(4)); that payment of the costs for all tribes is "not to exceed" a set amount, *e. g.*, 108 Stat. 2511, an amount that would be exceeded here; and that the Secretary "is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe," § 450j–1(b). Because the Court's conclusion cannot be squared with these unambiguous restrictions on the payment of contract support costs, I respectfully dissent.

The Indian Self-Determination and Education Assistance Act provides: "Notwithstanding any other provision in [the Act], the provision of funds under this [Act] is subject to the availability of appropriations . . . ." *Ibid.* This condition is repeated in the Tribes' contracts with the Government. App. 206; see also § 450*l*(c) (model agreement § 1(b)(4)). The question in this case is whether appropriations were "available" during fiscal years 1994 through 2001 to pay all the contract support costs incurred by the Tribes. Only if appropriations were "available" may the Tribes hold the Government liable for the unpaid amounts.

Congress restricted the amount of funds "available" to pay the Tribes' contract support costs in two ways. First, in each annual appropriations statute for the Department of the Interior from fiscal years 1994 to 2001, Congress provided that spending on contract support costs for all tribes was "not to exceed" a certain amount. The fiscal year 1995 appropriations statute is representative. It provided: "For operation of Indian programs . . . , $1,526,778,000, . . . of which not to exceed $95,823,000 shall be for payments to tribes and tribal organizations for contract support costs . . . ." 108 Stat. 2510–2511. As the Court acknowledges, *ante*, at 194–195, the phrase "not to exceed" has a settled meaning in federal appropriations law. By use of the phrase, Congress imposed a cap on the total funds available for contract support costs in each fiscal year. See 2 General Accounting Office,

Principles of Federal Appropriations Law, p. 6–8 (2d ed. 1992) ("[T]he most effective way to establish a maximum . . . earmark is by the words 'not to exceed' or 'not more than' ").

Second, in § 450j–1(b) itself—in the very same sentence that conditions funding on the "availability of appropriations"—Congress provided that "the Secretary [of the Interior] is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the Act]." An agency may be required to shift funds from one object to another, within statutory limits, when doing so is necessary to meet a contractual obligation. See 1 *id.*, at 2–26 (2d ed. 1991). But the "reduction" clause in § 450j–1(b) expressly provides that the Secretary is "not required" to engage in such reprogramming to make one tribe's funds "available to another tribe." It follows that appropriations allocated for "programs, projects, or activities serving a tribe" are *not* "available" to another tribe, unless the Secretary reallocates them. Contrary to the Court's suggestion, *ante*, at 197, the Government shares this view that the "reduction" clause "specifically relieves the Secretary of any obligation to make funds available to one contractor by reducing payments to others," Brief for Petitioners 51 (citing *Arctic Slope Native Assn., Ltd.* v. *Sebelius*, 629 F. 3d 1296, 1304 (CA Fed. 2010), cert. pending, No. 11–83 (filed July 18, 2011)).

Given these express restrictions established by Congress—which no one doubts are valid—I cannot agree with the Court's conclusion that appropriations were "available" to pay the Tribes' contract support costs in full. Once the Secretary had allocated all the funds appropriated for contract support costs, no other funds could be used for that purpose without violating the "not to exceed" restrictions in the relevant appropriations statutes. The Court agrees. *Ante*, at 194–195. That leaves only one other possible source of funds to pay the disputed costs in this case: funds appropriated for contract support costs, but allocated to pay

such costs incurred by other tribes. Those funds were not "available" either, however, because they were "funding for programs, projects, or activities serving a tribe," and the Secretary was not required to reduce such funding "to make funds available to another tribe." § 450j–1(b).

In reaching a contrary conclusion, the Court fails to appreciate the full significance of the "reduction" clause in § 450j–1(b). As construed by the Court, that clause merely confirms that the Secretary "may allocate funds to one tribe at the expense of another." *Ante*, at 193. But as explained above, the clause does more than that: It also establishes that when the Secretary does allocate funds to one tribe at the expense of another, the latter tribe has no right to those funds—the funds are not "available" to it. The fact that the Secretary *could have* allocated the funds to the other tribe is irrelevant. What matters is what the Secretary actually does, and once he allocates the funds to one tribe, they are not "available" to another.

The Court rejects this reading of the "reduction" clause, on the ground that it would constitute a "radical departure from ordinary Government contracting principles." *Ante*, at 196, n. 6. But the fact that the clause operates as a constraint on the "availability of appropriations" is evident not only from its text, which speaks in terms of "funds available," but also from its placement in the statute, immediately following the "subject to the availability" clause. Under the Court's view, by contrast, the "reduction" clause merely "underscores the Secretary's discretion to allocate funds among tribes." *Ante*, at 196. There is, however, no reason to suppose that Congress enacted the provision simply to confirm this "ordinary" rule. *Ibid.* We generally try to avoid reading statutes to be so "insignificant." *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (internal quotation marks omitted).

The Court maintains that its holding is compelled by our decision in *Cherokee Nation of Okla.* v. *Leavitt*, 543 U. S. 631

(2005). *Ante*, at 192. Like respondents here, the Tribes in *Cherokee Nation* sued the Government for unpaid contract support costs under the Act. Congress had appropriated certain sums to the Indian Health Service "[f]or expenses necessary to carry out" the Act, *e. g.*, 108 Stat. 2527–2528, but—unlike in this case—those appropriations "contained no relevant statutory restriction," 543 U. S., at 637. The Government in *Cherokee Nation* contended that it was not obligated to pay the contract support costs as promised, in light of the "reduction" clause in § 450j–1(b). The Government argued that the clause "makes nonbinding a promise to pay one tribe's costs where doing so would require funds that the Government would otherwise devote to 'programs, projects, or activities serving . . . another tribe.' " *Id.*, at 641 (quoting § 450j–1(b)).

We ruled against the Government, but not because of any disagreement with its reading of the "reduction" clause. The basis for our decision was instead that "the relevant congressional appropriations contained other *unrestricted* funds, small in amount but sufficient to pay the claims at issue." 543 U. S., at 641 (emphasis altered). Those funds were allocated for " 'inherent federal functions,' such as the cost of running the Indian Health Service's central Washington office." *Id.*, at 641–642. They were not restricted by the "reduction" clause, because they were not funds for " 'programs, projects, or activities serving . . . another tribe.' " *Id.*, at 641 (quoting § 450j–1(b)). Nor were they restricted by the pertinent appropriations statutes, which, as noted, contained no relevant limiting language. See *id.*, at 641. We therefore held that those funds—which we described as "unrestricted" throughout our opinion, *id.*, at 641, 642, 643, 647—were available to pay the disputed contract support costs.

As even the Tribes concede, *Cherokee Nation* does not control this case. Tr. of Oral Arg. 39 (counsel for the Tribes)

("I don't think this case is controlled by *Cherokee*"). The reason is not that the appropriations statutes in this case contained "not to exceed" caps while those in *Cherokee Nation* did not. The Court is correct that appropriating an amount "for" a particular purpose has the same effect as providing that appropriations for that purpose are "not to exceed" that amount. *Ante*, at 195. What makes this case different is where Congress drew the line. In *Cherokee Nation*, the statutes capped funding for "expenses necessary to carry out" the Act, a category that included funding for both "inherent federal functions" and contract support costs. Accordingly, funding for one could be used for the other, without violating the cap. Here, by contrast, the statutes capped funding for contract support costs specifically. Thus, once the Secretary exhausted those funds, he could not reprogram other funds—such as funds for "inherent federal functions"—to pay the costs. With the caps in place, moreover, the "reduction" clause, as explained above, rendered unavailable the only possible source of funds left: funds already allocated for other contract support costs. Unlike in *Cherokee Nation*, therefore, there were no unrestricted funds to pay the costs at issue in this case. The Court's quotation from *Cherokee Nation* concerning "when an '"*unrestricted* appropriation is sufficient to fund the contract,"'" *ante*, at 196 (quoting *Cherokee Nation*, *supra*, at 641; emphasis added), is accordingly beside the point.

The Court also relies on *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892). That case involved a Government contract to dredge the Delaware River. When work under the contract stopped because funds from the relevant appropriation had been exhausted, a contractor sued the Government for breach of contract, and the Court of Claims held that he was entitled to recover lost profits. As the court explained, "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its

administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Id.*, at 546. That principle, however, cannot "dictate the result in this case." *Ante*, at 192. The statute in *Ferris* appropriated an amount "[f]or improving [the] Delaware River," which prevented spending for that purpose beyond the specified amount. 20 Stat. 364. But in that case, all funds appropriated for that purpose were equally available to all contractors. Here that is not true; § 450j–1(b) makes clear that funds allocated to one contractor are not available to another. Thus, the principle in *Ferris* does not apply.

It is true, as the Court notes, *ante*, at 194, that each of the Tribes' contracts provides that the Act and the contract "shall be liberally construed for the benefit of the Contractor." App. 203; see also § 450*l*(c) (model agreement § 1(a)(2)). But a provision can be construed "liberally" as opposed to "strictly" only when there is some ambiguity to construe. And here there is none. Congress spoke clearly when it said that the provision of funds was "subject to the availability of appropriations," that spending on contract support costs was "not to exceed" a specific amount, and that the Secretary was "not required" to make funds allocated for one tribe's costs "available" to another. The unambiguous meaning of these provisions is that when the Secretary has allocated the maximum amount of funds appropriated each fiscal year for contract support costs, there are no other appropriations "available" to pay any remaining costs.

This is hardly a typical government contracts case. Many government contracts contain a "subject to the availability of appropriations" clause, and many appropriations statutes contain "not to exceed" language. But this case involves not only those provisions but a third, relieving the Secretary of any obligation to make funds "available" to one contractor by reducing payments to others. Such provisions will not

always appear together, but when they do, we must give them effect. Doing so here, I would hold that the Tribes are not entitled to payment of their contract support costs in full, and I would reverse the contrary judgment of the Court of Appeals for the Tenth Circuit.

Syllabus

# MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS *v.* PATCHAK ET AL.

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

No. 11–246. Argued April 24, 2012—Decided June 18, 2012*

The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire property "for the purpose of providing land for Indians." 25 U. S. C. § 465. Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band), an Indian tribe federally recognized in 1999, requested that the Secretary take into trust on its behalf a tract of land known as the Bradley Property, which the Band intended to use "for gaming purposes." The Secretary took title to the Bradley Property in 2009. Respondent David Patchak, who lives near the Bradley Property, filed suit under the Administrative Procedure Act (APA), asserting that § 465 did not authorize the Secretary to acquire the property because the Band was not a federally recognized tribe when the IRA was enacted in 1934. Patchak alleged a variety of economic, environmental, and aesthetic harms as a result of the Band's proposed use of the property to operate a casino, and requested injunctive and declaratory relief reversing the Secretary's decision to take title to the land. The Band intervened to defend the Secretary's decision. The District Court did not reach the merits of Patchak's suit, but ruled that he lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The D. C. Circuit reversed and also rejected the Secretary's and the Band's alternative argument that sovereign immunity barred the suit.

*Held:*

1. The United States has waived its sovereign immunity from Patchak's action. The APA's general waiver of the Federal Government's immunity from suit does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. 5 U. S. C. § 702. The Government and Band contend that the Quiet Title Act (QTA) is such a statute. The QTA authorizes (and so waives the Government's sovereign immunity from) a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28

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*Together with No. 11–247, *Salazar, Secretary of the Interior, et al.* v. *Patchak et al.*, also on certiorari to the same court.

U. S. C. § 2409a(d). But it contains an exception for "trust or restricted Indian lands." § 2409a(a).

To determine whether the "Indian lands" exception bars Patchak's suit, the Court considers whether the QTA addresses the kind of grievance Patchak advances. It does not, because Patchak's action is not a quiet title action. The QTA, from its title to its jurisdictional grant to its venue provision, speaks specifically and repeatedly of "quiet title" actions, a term universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. Although Patchak's suit contests the Secretary's title, it does not claim any competing interest in the Bradley Property.

Contrary to the argument of the Band and Government, the QTA does not more broadly encompass any "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." § 2409a(a). Rather, § 2409a includes a host of indications that the "civil action" at issue is an ordinary quiet title suit. The Band and Government also contend that the QTA's specific authorization of adverse claimants' suits creates the negative implication that nonclaimants like Patchak cannot challenge Government ownership of land under any statute. That argument is faulty for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. Finally, the Band and Government argue that Patchak's suit should be treated the same as an adverse claimant's because both equally implicate the "Indian lands" exception's policies. That argument must be addressed to Congress. The "Indian lands" exception reflects Congress's judgment about how far to allow quiet title suits—not all suits challenging the Government's ownership of property. Pp. 215–224.

2. Patchak has prudential standing to challenge the Secretary's acquisition. A person suing under the APA must assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153. The Government and Band claim that Patchak's economic, environmental, and aesthetic injuries are not within § 465's zone of interests because the statute focuses on land acquisition, while Patchak's injuries relate to the land's use as a casino. However, § 465 has far more to do with land use than the Government and Band acknowledge. Section 465 is the capstone of the IRA's land provisions, and functions as a primary mechanism to foster Indian tribes' economic development. The Secretary thus takes title to properties with an eye toward how tribes will use those lands to support such development. The Department's regulations make this

statutory concern with land use clear, requiring the Secretary to acquire land with its eventual use in mind, after assessing potential conflicts that use might create. And because § 465 encompasses land's use, neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit. Pp. 224–228.

632 F. 3d 702, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 228.

*Eric D. Miller* argued the cause for petitioners in No. 11–247. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, and *Aaron P. Avila*.

*Patricia A. Millett* argued the cause for petitioner in No. 11–246. With her on the briefs were *James T. Meggesto*, *James E. Tysse*, *Michael C. Small*, *Conly J. Schulte*, *Shilee T. Mullin*, and *Amit Kurlekar*.

*Matthew T. Nelson* argued the cause for respondents in both cases. With him on the brief for respondent Patchak were *Daniel P. Ettinger*, *Aaron D. Lindstrom*, *Nicole L. Mazzocco*, and *Brian J. Murray*.†

JUSTICE KAGAN delivered the opinion of the Court.

A provision of the Indian Reorganization Act (IRA), 25 U. S. C. § 465, authorizes the Secretary of the Interior to acquire property "for the purpose of providing land for Indians." Ch. 576, § 5, 48 Stat. 985. The Secretary here acquired land in trust for an Indian tribe seeking to open a

†Briefs of *amici curiae* urging reversal in both cases were filed for the National Congress of American Indians et al. by *Vernle C. Durocher, Jr.*, and *Timothy J. Droske;* and for Wayland Township et al. by *Michael D. Homier*, *Robert A. Long, Jr.*, and *Ross B. Goldman*.

*David B. Salmons* filed a brief for 28 California Community Groups as *amici curiae* urging affirmance in both cases.

casino. Respondent David Patchak lives near that land and challenges the Secretary's decision in a suit brought under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.* Patchak claims that the Secretary lacked authority under § 465 to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino's operation.

We consider two questions arising from Patchak's action. The first is whether the United States has sovereign immunity from the suit by virtue of the Quiet Title Act (QTA), 86 Stat. 1176. We think it does not. The second is whether Patchak has prudential standing to challenge the Secretary's acquisition. We think he does. We therefore hold that Patchak's suit may proceed.

## I

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. See 63 Fed. Reg. 56936 (1998). Two years later, the Band petitioned the Secretary to exercise her authority under § 465 by taking into trust a tract of land in Wayland Township, Michigan, known as the Bradley Property. The Band's application explained that the Band would use the property "for gaming purposes," with the goal of generating the "revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs." App. 52, 41.[1]

[1] Under the Indian Gaming Regulatory Act, 25 U. S. C. §§ 2701–2721, an Indian tribe may conduct gaming operations on "Indian lands," § 2710, which include lands "held in trust by the United States for the benefit of any Indian tribe," § 2703(4)(B). The application thus requested the Secretary to take the action necessary for the Band to open a casino.

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. See 70 Fed. Reg. 25596. In accordance with applicable regulations, the Secretary committed to wait 30 days before taking action, so that interested parties could seek judicial review. See *ibid.*; 25 CFR § 151.12(b) (2011). Within that window, an organization called Michigan Gambling Opposition (or MichGO) filed suit alleging that the Secretary's decision violated environmental and gaming statutes. The Secretary held off taking title to the property while that litigation proceeded. Within the next few years, a District Court and the D. C. Circuit rejected MichGO's claims. See *Michigan Gambling Opposition* v. *Kempthorne*, 525 F. 3d 23, 27–28 (CADC 2008); *Michigan Gambling Opposition* v. *Norton*, 477 F. Supp. 2d 1 (DC 2007).

Shortly after the D. C. Circuit ruled against MichGO (but still before the Secretary took title), Patchak filed this suit under the APA advancing a different legal theory. He asserted that § 465 did not authorize the Secretary to acquire property for the Band because it was not a federally recognized tribe when the IRA was enacted in 1934. See App. 37. To establish his standing to bring suit, Patchak contended that he lived "in close proximity to" the Bradley Property and that a casino there would "destroy the lifestyle he has enjoyed" by causing "increased traffic," "increased crime," "decreased property values," "an irreversible change in the rural character of the area," and "other aesthetic, socioeconomic, and environmental problems." *Id.*, at 30–31. Notably, Patchak did not assert any claim of his own to the Bradley Property. He requested only a declaration that the decision to acquire the land violated the IRA and an injunction to stop the Secretary from accepting title. See *id.*, at 38–39. The Band intervened in the suit to defend the Secretary's decision.

In January 2009, about five months after Patchak filed suit, this Court denied certiorari in MichGO's case, 555 U. S. 1137,

and the Secretary took the Bradley Property into trust. That action mooted Patchak's request for an injunction to prevent the acquisition, and all parties agree that the suit now effectively seeks to divest the Federal Government of title to the land. See Brief for Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians 17 (hereinafter Tribal Petitioner); Brief for Federal Parties 11; Brief for Respondent Patchak 24–25. The month after the Government took title, this Court held in *Carcieri* v. *Salazar*, 555 U. S. 379, 382 (2009), that § 465 authorizes the Secretary to take land into trust only for tribes that were "under federal jurisdiction" in 1934.[2]

The District Court dismissed the suit without considering the merits (including the relevance of *Carcieri*), ruling that Patchak lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The court reasoned that the injuries Patchak alleged fell outside § 465's "zone of interests." 646 F. Supp. 2d 72, 76 (DC 2009). The D. C. Circuit reversed that determination. See 632 F. 3d 702, 704–707 (2011). The court also rejected the Secretary's and the Band's alternative argument that by virtue of the QTA, sovereign immunity barred the suit. See *id.*, at 707–712. The latter ruling conflicted with decisions of three Circuits holding that the United States has immunity from suits like Patchak's. See *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F. 3d 956, 961–962 (CA10 2004); *Metropolitan Water Dist. of Southern Cal.* v. *United States*, 830 F. 2d 139, 143–144 (CA9 1987) *(per curiam)*; *Florida Dept. of Bus. Regulation* v. *Department of Interior*, 768 F. 2d 1248, 1253–1255 (CA11 1985). We granted certiorari to review both of

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[2] The merits of Patchak's case are not before this Court. We therefore express no view on whether the Band was "under federal jurisdiction" in 1934, as *Carcieri* requires. Nor do we consider how that question relates to Patchak's allegation that the Band was not "federally recognized" at the time. Cf. *Carcieri*, 555 U. S., at 397–399 (BREYER, J., concurring) (discussing this issue).

the D. C. Circuit's holdings, 565 U. S. 1092 (2011), and we now affirm.

## II

We begin by considering whether the United States' sovereign immunity bars Patchak's suit under the APA. That requires us first to look to the APA itself and then, for reasons we will describe, to the QTA. We conclude that the United States has waived its sovereign immunity from Patchak's action.

The APA generally waives the Federal Government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U. S. C. § 702. That waiver would appear to cover Patchak's suit, which objects to official action of the Secretary and seeks only non-monetary relief. But the APA's waiver of immunity comes with an important carve-out: The waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *Ibid.* That provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes. The question thus becomes whether another statute bars Patchak's demand for relief.

The Government and Band contend that the QTA does so. The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. 28 U. S. C. § 2409a(d). The statute, however, contains an exception: The QTA's authorization of suit "does not apply to trust or restricted Indian lands." § 2409a(a). According to the Government and Band, that limitation on quiet title suits satisfies the APA's carve-out and so forbids Patchak's suit. In the Band's words, the QTA exception retains "the United States' full

immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." Brief for Tribal Petitioner 18.

Two hypothetical examples might help to frame consideration of this argument. First, suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations. "[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy"—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment. *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 286, n. 22 (1983) (quoting H. R. Rep. No. 94–1656, p. 13 (1976)).

But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm, and raising no objection at all to the Secretary's title. The QTA could not bar that suit because even though involving Indian lands, it asserts a grievance altogether different from the kind the statute concerns. JUSTICE SCALIA, in a former life as Assistant Attorney General, made this precise point in a letter to Congress about the APA's waiver of immunity (which we hasten to add, given the author, we use not as legislative history, but only for its persuasive force). When a statute "is not addressed to the type of grievance which the plaintiff seeks to assert," then the statute cannot prevent an APA suit. *Id.*, at 28 (May 10, 1976, letter of Assistant Atty. Gen. A. Scalia).[3]

[3] According to the dissent, we should look only to the kind of relief a plaintiff seeks, rather than the type of grievance he asserts, in deciding whether another statute bars an APA action. See *post*, at 232–233 (opin-

We think that principle controls Patchak's case: The QTA's "Indian lands" clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances. As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is *not* a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's "Indian lands" limitation simply inapposite to this litigation.

In reaching this conclusion, we need look no further than the QTA's text. From its title to its jurisdictional grant to its venue provision, the Act speaks specifically and repeatedly of "quiet title" actions. See 86 Stat. 1176 ("An Act [t]o permit suits to adjudicate certain real property quiet title actions"); 28 U. S. C. § 1346(f) (giving district courts jurisdiction over "civil actions . . . to quiet title" to property in which the United States claims an interest); § 1402(d) (setting forth venue for "[a]ny civil action . . . to quiet title" to property in which the United States claims an interest). That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. See, *e. g.*, Black's Law Dictionary 34 (9th ed. 2009) (defining an "*action to quiet title*"

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ion of SOTOMAYOR, J.). But the dissent's test is inconsistent with the one we adopted in *Block*, which asked whether Congress had particularly dealt with a "claim." See *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 286, n. 22 (1983). And the dissent's approach has no obvious limits. Suppose, for example, that Congress passed a statute authorizing a particular form of injunctive relief in a procurement contract suit except when the suit involved a "discretionary function" of a federal employee. Cf. 28 U. S. C. § 2680(a). Under the dissent's method, that exception would preclude *any* APA suit seeking that kind of injunctive relief if it involved a discretionary function, no matter what the nature of the claim. That implausible result demonstrates that limitations on relief cannot sensibly be understood apart from the claims to which they attach.

as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it"); *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 315 (2005) ("[T]he facts showing the plaintiff's title . . . are essential parts of the plaintiff's [quiet title] cause of action" (quoting *Hopkins* v. *Walker*, 244 U. S. 486, 490 (1917))).

And the QTA's other provisions make clear that the recurrent statutory term "quiet title action" carries its ordinary meaning. The QTA directs that the complaint in such an action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U. S. C. § 2409a(d). If the plaintiff does not assert any such right (as Patchak does not), the statute cannot come into play.[4] Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. § 2409a(b). That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right

[4] The dissent contends that the QTA omits two other historical requirements for quiet title suits. See *post*, at 234–235. But many States had abandoned those requirements by the time the QTA was passed. See S. Rep. No. 92–575, p. 6 (1971) (noting "wide differences in State statutory and decisional law" on quiet title suits); Steadman, "Forgive the U. S. Its Trespasses?": Land Title Disputes With the Sovereign—Present Remedies and Prospective Reforms, 1972 Duke L. J. 15, 48–49, and n. 152 (stating that cases had disputed whether a quiet title plaintiff needed to possess the land); *Welch* v. *Kai*, 4 Cal. App. 3d 374, 380–381, 84 Cal. Rptr. 619, 622–623 (1970) (allowing a quiet title action when the plaintiff claimed only an easement); *Benson* v. *Fekete*, 424 S. W. 2d 729 (Mo. 1968) (en banc) (same). So Congress in enacting the QTA essentially chose one contemporaneous form of quiet title action.

to the property. If the United States loses the suit, an award of just compensation to the rightful owner (whoever and wherever he might be) could do nothing to satisfy Patchak's claim.[5]

In two prior cases, we likewise described the QTA as addressing suits in which the plaintiff asserts an ownership interest in Government-held property. In *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273 (1982), we considered North Dakota's claim to land that the United States viewed as its own. We held that the State could not circumvent the QTA's statute of limitations by invoking other causes of action, among them the APA. See *id.*, at 277–278, 286, n. 22. The crux of our reasoning was that Congress had enacted the QTA to address exactly the kind of suit North Dakota had brought. Prior to the QTA, we explained, "citizens asserting title to or the right to possession of lands claimed by the United States" had no recourse; by passing the statute, "Congress sought to rectify this state of affairs." *Id.*, at 282. Our decision reflected that legislative purpose: Congress, we held, "intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.*, at 286. We repeat: "adverse claimants,"

[5] The legislative history, for those who think it useful, further shows that the QTA addresses quiet title actions, as ordinarily conceived. The Senate Report states that the QTA aimed to alleviate the "[g]rave inequity" to private parties "excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs." S. Rep. No. 92–575, at 1. Similarly, the House Report notes that the history of quiet title actions "goes back to the Courts of England," and provided as examples "a plaintiff whose title to land was continually being subjected to litigation in the law courts," and "one who feared that an outstanding deed or other interest might cause a claim to be presented in the future." H. R. Rep. No. 92–1559, p. 6 (1972). From top to bottom, these reports show that Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title, or interest of his own in disputed land.

meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's.

Our decision in *United States* v. *Mottaz*, 476 U. S. 834 (1986), is of a piece. There, we considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. We thought the QTA the relevant statute because the plaintiff herself asserted title to the property. Our opinion quoted the plaintiff's own description of her suit: "At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case." *Id.*, at 842 (quoting Brief for Respondent in *Mottaz*, O. T. 1985, No. 85–546, p. 3). That fact, we held, brought the suit "within the [QTA's] scope": "What [the plaintiff] seeks is a declaration that she alone possesses valid title." 476 U. S., at 842. So once again, we construed the QTA as addressing suits by adverse claimants.

But Patchak is not an adverse claimant—and so the QTA (more specifically, its reservation of sovereign immunity from actions respecting Indian trust lands) cannot bar his suit. Patchak does not contend that he owns the Bradley Property, nor does he seek any relief corresponding to such a claim. He wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it. Patchak's lawsuit therefore lacks a defining feature of a QTA action. He is not trying to disguise a QTA suit as an APA action to circumvent the QTA's "Indian lands" exception. Rather, he is not bringing a QTA suit at all. He asserts merely that the Secretary's decision to take land into trust violates a federal statute—a garden-variety APA claim. See 5 U. S. C. §§ 706(2)(A), (C) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law [or] in excess of statutory jurisdiction [or] authority"). Because that is true—because in then-Assistant Attorney General Scalia's words, the QTA is "not

addressed to the type of grievance which [Patchak] seeks to assert," H. R. Rep. No. 94–1656, at 28—the QTA's limitation of remedies has no bearing. The APA's general waiver of sovereign immunity instead applies.

The Band and Government, along with the dissent, object to this conclusion on three basic grounds. First, they contend that the QTA speaks more broadly than we have indicated, waiving immunity from suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U. S. C. § 2409a(a). That language, the argument goes, encompasses all actions contesting the Government's legal interest in land, regardless whether the plaintiff claims ownership himself. See Brief for Federal Parties 19–20; Reply Brief for Tribal Petitioner 4–6; *post*, at 235 (SOTOMAYOR, J., dissenting). The QTA (not the APA) thus becomes the relevant statute after all—as to both its waiver and its "corresponding" reservation of immunity from suits involving Indian lands. Reply Brief for Tribal Petitioner 6.

But the Band and Government can reach that result only by neglecting key words in the relevant provision. That sentence, more fully quoted, reads: "The United States may be named as a party defendant in *a civil action under this section* to adjudicate a disputed title to real property in which the United States claims an interest." § 2409a(a) (emphasis added). And as we have already noted, "this section"—§ 2409a—includes a host of indications that the "civil action" at issue is an ordinary quiet title suit: Just recall the section's title ("Real property quiet title actions"), and its pleading requirements (the plaintiff "shall set forth with particularity the nature of the right, title, or interest which [he] claims"), and its permission to the Government to remedy an infraction by paying "just compensation." Read with reference to all these provisions (as well as to the QTA's contemporaneously enacted jurisdictional and venue sections), the waiver clause rebuts, rather than supports, the Band's and the Government's argument: That clause speaks

not to any suit in which a plaintiff challenges the Government's title, but only to an action in which the plaintiff also claims an interest in the property.

The Band and Government next invoke cases holding that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons," the statute may "impliedly preclude[ ]" judicial review "of those issues at the behest of other persons." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349 (1984); see *United States* v. *Fausto*, 484 U. S. 439, 455 (1988). Here, the Band and Government contend, the QTA's specific authorization of adverse claimants' suits creates a negative implication: *non*-adverse claimants like Patchak cannot challenge Government ownership of land under any other statute. See Reply Brief for Tribal Petitioner 7–10; Reply Brief for Federal Parties 7–9; see also *post*, at 230. The QTA, says the Band, thus "preempts [Patchak's] more general remedies." Brief for Tribal Petitioner 23 (internal quotation marks omitted).

But we think that argument faulty, and the cited cases inapposite, for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. See *supra*, at 217–221. To see the point, consider a contrasting example. Suppose the QTA authorized suit only by adverse claimants who could assert a property interest of at least a decade's duration. Then suppose an adverse claimant failing to meet that requirement (because, say, his claim to title went back only five years) brought suit under a general statute like the APA. We would surely bar that suit, citing the cases the Government and Band rely on; in our imaginary statute, Congress delineated the class of persons who could bring a quiet title suit, and that judgment would preclude others from doing so. But here, once again, Patchak is not bringing a quiet title action at all. He is not claiming to own the property, and he is not demanding that the court transfer the property to him. So to succeed in

their argument, the Government and Band must go much further than the cited cases: They must say that in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief. Presumably, that contention would extend only to suits involving similar subject matter—*i. e.*, the Government's ownership of property. But that commonality is not itself sufficient. We have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect.

Last, the Band and Government argue that we should treat Patchak's suit as we would an adverse claimant's because they equally implicate the "Indian lands" exception's policies. According to the Government, allowing challenges to the Secretary's trust acquisitions would "pose significant barriers to tribes['] . . . ability to promote investment and economic development on the lands." Brief for Federal Parties 24. That harm is the same whether or not a plaintiff claims to own the land himself. Indeed, the Band argues that the sole difference in this suit cuts in its direction, because non-adverse claimants like Patchak have "the most remote injuries and indirect interests in the land." Brief for Tribal Petitioner 13; see Reply Brief for Federal Parties 11–12; see also *post*, at 228, 234, 236.[6]

That argument is not without force, but it must be addressed to Congress. In the QTA, Congress made a judgment about how far to allow quiet title suits—to a point, but no further. (The "no further" includes not only the "Indian

[6] In a related vein, the dissent argues that our holding will undermine the QTA's "Indian lands" exception by allowing adverse claimants to file APA complaints concealing their ownership interests or to recruit third parties to bring suit on their behalf. See *post*, at 236–238. But we think that concern more imaginary than real. We have trouble conceiving of a plausible APA suit that omits mention of an adverse claimant's interest in property yet somehow leads to relief recognizing that very interest.

lands" exception, but one for security interests and water rights, as well as a statute of limitations, a bar on jury trials, jurisdictional and venue constraints, and the just compensation option discussed earlier.) Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. The Band assumes that plaintiffs like Patchak have a lesser interest than those bringing quiet title actions, and so should be precluded *a fortiori*. But all we can say is that Patchak has a different interest. Whether it is lesser, as the Band argues, because not based on property rights; whether it is greater because implicating public interests; or whether it is in the end exactly the same—that is for Congress to tell us, not for us to tell Congress. As the matter stands, Congress has not assimilated to quiet title actions all other suits challenging the Government's ownership of property. And so when a plaintiff like Patchak brings a suit like this one, it falls within the APA's general waiver of sovereign immunity.

## III

We finally consider the Band's and the Government's alternative argument that Patchak cannot bring this action because he lacks prudential standing. This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970). Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under § 465, which authorizes the acquisition of property "for the purpose of providing land for Indians." And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. See *supra*,

at 213. The Government and Band argue that the relationship between § 465 and Patchak's asserted interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino. See Brief for Tribal Petitioner 46 ("The Secretary's decision to put land into trust does not turn on any particular use of the land, gaming or otherwise[,] . . . [and] thus has no impact on [Patchak] or his asserted interests"); Brief for Federal Parties 34 ("[L]and may be taken into trust for a host of purposes that have nothing at all to do with gaming"). We find this argument unpersuasive.

The prudential standing test Patchak must meet "is not meant to be especially demanding." *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 399 (1987). We apply the test in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." *Ibid.* We do not require any "indication of congressional purpose to benefit the would-be plaintiff." *Id.*, at 399–400.[7] And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*, at 399.

Patchak's suit satisfies that standard, because § 465 has far more to do with land use than the Government and Band

[7] For this reason, the Band's statement that Patchak is "not an Indian or tribal official seeking land" and does not "claim an interest in advancing tribal development," Brief for Tribal Petitioner 42, is beside the point. The question is not whether § 465 seeks to benefit Patchak; everyone can agree it does not. The question is instead, as the Band's and the Government's main argument acknowledges, whether issues of land use (arguably) fall within § 465's scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits. See *infra* this page and 226–227.

acknowledge. Start with what we and others have said about § 465's context and purpose. As the leading treatise on federal Indian law notes, § 465 is "the capstone" of the IRA's land provisions. F. Cohen, Handbook of Federal Indian Law § 15.07[1][a], p. 1010 (2005 ed.) (hereinafter Cohen). And those provisions play a key role in the IRA's overall effort "to rehabilitate the Indian's economic life," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973) (internal quotation marks omitted). "Land forms the basis" of that "economic life," providing the foundation for "tourism, manufacturing, mining, logging, . . . and gaming." Cohen § 15.01, at 965. Section 465 thus functions as a primary mechanism to foster Indian tribes' economic development. As the D. C. Circuit explained in the *MichGO* litigation, the section "provid[es] lands sufficient to enable Indians to achieve self-support." *Michigan Gambling*, 525 F. 3d, at 31 (internal quotation marks omitted); see *Morton* v. *Mancari*, 417 U. S. 535, 542 (1974) (noting the IRA's economic aspect). So when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.

The Department's regulations make this statutory concern with land use crystal clear. Those regulations permit the Secretary to acquire land in trust under § 465 if the "land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 CFR § 151.3(a)(3). And they require the Secretary to consider, in evaluating any acquisition, both "[t]he purposes for which the land will be used" and the "potential conflicts of land use which may arise." §§ 151.10(c), 151.10(f); see § 151.11(a). For "off-reservation acquisitions" made "for business purposes"—like the Bradley Property—the regulations further provide that the tribe must "provide a plan which specifies the anticipated economic benefits associated with the proposed use." § 151.11(c). DOI's regulations thus show that the statute's

implementation centrally depends on the projected use of a given property.

The Secretary's acquisition of the Bradley Property is a case in point. The Band's application to the Secretary highlighted its plan to use the land for gaming purposes. See App. 41 ("[T]rust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming"); *id.*, at 60–61 ("The Tribe intends to . . . renovate the existing . . . building into a gaming facility . . . to offer Class II and/or Class III gaming"). Similarly, DOI's notice of intent to take the land into trust announced that the land would "be used for the purpose of construction and operation of a gaming facility," which the Department had already determined would meet the Indian Gaming Regulatory Act's requirements. 70 Fed. Reg. 25596; 25 U. S. C. §§ 2701–2721. So from start to finish, the decision whether to acquire the Bradley Property under § 465 involved questions of land use.

And because § 465's implementation encompasses these issues, the interests Patchak raises—at least arguably—fall "within the zone . . . protected or regulated by the statute." If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits. The difference here, as the Government and Band point out, is that § 465 specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See 25 CFR §§ 151.10(c), 151.10(f), 151.11(a). And so neighbors to the use (like Patchak) are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether eco-

nomic, environmental, or aesthetic, come within § 465's regulatory ambit.

* * *

The QTA's reservation of sovereign immunity does not bar Patchak's suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D. C. Circuit, and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SOTOMAYOR, dissenting.

In enacting the Quiet Title Act (QTA or Act), Congress waived the Government's sovereign immunity in cases seeking "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U. S. C. § 2409a(a). In so doing, Congress was careful to retain the Government's sovereign immunity with respect to particular claimants, particular categories of land, and particular remedies. Congress and the Executive Branch considered these "carefully crafted provisions" essential to the immunity waiver and "necessary for the protection of the national public interest." *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 284–285 (1983).

The Court's opinion sanctions an end-run around these vital limitations on the Government's waiver of sovereign immunity. After today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land. That outcome cannot be squared with the APA's express admonition that it confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U. S. C. § 702. The Court's holding not only creates perverse incentives for private litigants, but also exposes the Government's

ownership of land to costly and prolonged challenges. Because I believe those results to be inconsistent with the QTA and the APA, I respectfully dissent.

## I

### A

Congress enacted the QTA to provide a comprehensive solution to the problem of real-property disputes between private parties and the United States. The QTA strikes a careful balance between private parties' desire to adjudicate such disputes, and the Government's desire to impose "'appropriate safeguards'" on any waiver of sovereign immunity to ensure "'the protection of the public interest.'" *Block*, 461 U. S., at 282–283; see also S. Rep. No. 92–575, p. 6 (1971).

Section 2409a(a) provides expansively that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." That language mirrors the title proposed by the Executive Branch for the legislation that Congress largely adopted: "A BILL To permit suits to adjudicate disputed titles to lands in which the United States claims an interest." *Id.*, at 7.

The remainder of the Act, however, imposes important conditions upon the Government's waiver of sovereign immunity. First, the right to sue "does not apply to trust or restricted Indian lands." § 2409a(a). The Indian lands exception reflects the view that "a waiver of immunity in this area would not be consistent with specific commitments [the Government] ha[s] made to the Indians through treaties and other agreements." *Block*, 461 U. S., at 283 (internal quotation marks omitted). By exempting Indian lands, Congress ensured that the Government's "solemn obligations" to tribes would not be "abridg[ed] . . . without the consent of the Indians." S. Rep. No. 92–575, at 4.

Second, the Act preserves the United States' power to retain possession or control of any disputed property, even if a

court determines that the Government's property claim is invalid. To that end, § 2409a(b) "allow[s] the United States the option of paying money damages instead of surrendering the property if it lost a case on the merits." *Block*, 461 U. S., at 283. This provision was considered essential to addressing the Government's "main objection in the past to waiving sovereign immunity" where federal land was concerned: that an adverse judgment "would make possible decrees ousting the United States from possession and thus interfer[e] with operations of the Government." S. Rep. No. 92–575, at 5–6. Section 2409a(b) "eliminate[d] cause for such apprehension" by ensuring that—even under the QTA—the United States could not be stripped of its possession or control of property without its consent. *Id.*, at 6.

Finally, the Act limits the class of individuals permitted to sue the Government to those claiming a "right, title, or interest" in disputed property. § 2409a(d). As we have explained, Congress' decision to restrict the class entitled to relief indicates that Congress precluded relief for the remainder. See, *e. g.*, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349 (1984) ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded"). That inference is especially strong here, because the QTA was "enacted against the backdrop of sovereign immunity." S. Rep. No. 94–996, p. 27 (1976). Section 2409a(d) thus indicates that Congress concluded that those without any "right, title, or interest" in a given property did not have an interest sufficient to warrant abrogation of the Government's sovereign immunity.

Congress considered these conditions indispensable to its immunity waiver.[1] "[W]hen Congress attaches conditions to

[1] As we explained in *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 282–283 (1983), Congress' initial proposal lacked such provisions. The Executive Branch, however, strongly opposed the original bill, explaining that it was "too broad and sweeping

legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U. S., at 287. Congress and the Executive Branch intended the scheme to be the exclusive procedure for resolving property title disputes involving the United States. See *id.*, at 285 (describing Act as a "'careful and thorough remedial scheme'"); S. Rep. No. 92–575, at 4 (Section 2409a "provides a *complete*, thoughtful approach to the problem of disputed titles to federally claimed land" (emphasis added)).

For that reason, we held that Congress did not intend to create a "new supplemental remedy" when it enacted the APA's general waiver of sovereign immunity. *Block*, 461 U. S., at 286, n. 22. "'It would require the suspension of disbelief,'" we reasoned, "'to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.'" *Id.*, at 285 (quoting *Brown* v. *GSA*, 425 U. S. 820, 833 (1976)). If a plaintiff could oust the Government of title to land by means of an APA action, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted," and the "Indian lands exception to the QTA would be rendered nugatory." *Block*, 461 U. S., at 284–285. We therefore had little difficulty concluding that Congress did not intend to render the QTA's limitations obsolete by affording any plaintiff the right to dispute the Government's title to any lands by way of an APA action—and to empower any such plaintiff to "disposses[s] [the United States] of the disputed property without being afforded the option of paying damages." *Id.*, at 285.

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in scope and lacking adequate safeguards to protect the public interest." Dispute of Titles on Public Lands: Hearings on S. 216 et al. before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 21 (1971). Congress ultimately agreed, largely adopting the Executive's substitute bill. See *Block*, 461 U. S., at 283–284.

It is undisputed that Patchak does not meet the conditions to sue under the QTA. He seeks to challenge the Government's title to Indian trust land (strike one); he seeks to force the Government to relinquish possession and title outright, leaving it no alternative to pay compensation (strike two); and he does not claim any personal right, title, or interest in the property (strike three). Thus, by its express terms, the QTA forbids the relief Patchak seeks. Compare *ante*, at 214 ("[A]ll parties agree that the suit now effectively seeks to divest the Federal Government of title to the [Indian trust] land"), with *United States* v. *Mottaz*, 476 U. S. 834, 842 (1986) (Section 2409a(a)'s Indian lands exclusion "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians"). Consequently, Patchak may not avoid the QTA's constraints by suing under the APA, a statute enacted only four years later. See 5 U. S. C. § 702 (rendering the APA's waiver of sovereign immunity inapplicable "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought").

B

The majority nonetheless permits Patchak to circumvent the QTA's limitations by filing an action under the APA. It primarily argues that the careful limitations Congress imposed upon the QTA's waiver of sovereign immunity are "simply inapposite" to actions in which the plaintiff advances a different "grievance" to that underlying a QTA suit, *i. e.*, cases in which a plaintiff seeks to "strip the United States of title to the land . . . not on the ground that it is his," but rather because "the Secretary's decision to take land into trust violates a federal statute." *Ante*, at 217, 220. This analysis is unmoored from the text of the APA.

Section 702 focuses not on a plaintiff's motivation for suit, nor the arguments on which he grounds his case, but only on whether another statute expressly or impliedly forbids the

relief he seeks. The relief Patchak admittedly seeks—to oust the Government of title to Indian trust land—is identical to that forbidden by the QTA. Conversely, the Court's hypothetical suit, alleging that the Bradley Property was causing environmental harm, would not be barred by the QTA. See *ante*, at 216. That is not because such an action asserts a different "grievance," but because it seeks different relief—abatement of a nuisance rather than the extinguishment of title.[2]

In any event, the "grievance" Patchak asserts is no different from that asserted in *Block*—a case in which we unanimously rejected a plaintiff's attempt to avoid the QTA's restrictions by way of an APA action or the similar device of an officer's suit.[3] That action, like this one, was styled as a suit claiming that the Government's actions respecting land were "'"not within [its] statutory powers."'" 461 U. S., at 281. Cf. *ante*, at 220 ("[Patchak] asserts merely that the Secretary's decision to take land into trust violates a federal statute"). The relief requested was also identical to that sought here: injunctive relief directing the United States to

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[2] The majority claims, *ante*, at 217, n. 3, that this test has "no obvious limits," but it merely applies the text of § 702 (which speaks of "relief," not "grievances"). In any event, the majority's hypothetical, *ibid.*, compares apples to oranges. I do not contend that the APA bars all injunctive relief involving Indian lands, simply other suits—like this one—that seek "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U. S. C. § 2409a(a). That result is entirely consistent with *Block*—which stated that the APA "specifically confers no 'authority to grant relief if any other statute . . . expressly or impliedly forbids the relief which is sought.'" 461 U. S., at 286, n. 22 (quoting 5 U. S. C. § 702).

[3] An officer's suit is an action directly against a federal officer, but was otherwise identical to the kind of APA action at issue here. Compare *Block*, 461 U. S., at 281 (seeking relief because agency official's actions were "'"not within [his] statutory powers"'"), with 5 U. S. C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations").

"'cease and desist from . . . exercising privileges of ownership'" over the land in question. 461 U. S., at 278; see also App. 38.

The only difference that the majority can point to between *Block* and these cases is that Patchak asserts a weaker interest in the disputed property. But that is no reason to imagine that Congress intended a different outcome. As the majority itself acknowledges, the harm to the United States and tribes when a plaintiff sues to extinguish the Government's title to Indian trust land is identical "whether or not a plaintiff claims to own the land himself." *Ante*, at 223. Yet, if the majority is correct, Congress intended the APA's waiver of immunity to apply to those hypothetical plaintiffs differently. Congress, it suggests, intended to permit anyone to circumvent the QTA's careful limitations and sue to force the Government to relinquish Indian trust lands—anyone, that is, except those with the strongest entitlement to bring such actions: those claiming a personal "right, title, or interest" in the land in question. The majority's conclusion hinges, therefore, on the doubtful premise that Congress intended to waive the Government's sovereign immunity wholesale for those like Patchak, who assert an "aesthetic" interest in land, *ante*, at 212, while retaining the Government's sovereign immunity against those who assert a constitutional interest in land—the deprivation of property without due process of law. This is highly implausible. Unsurprisingly, the majority does not even attempt to explain why Congress would have intended this counterintuitive result.

It is no answer to say that the QTA reaches no further than an "ordinary quiet title suit." *Ante*, at 221. The action permitted by § 2409a is not an ordinary quiet title suit. At common law, equity courts "permit[ted] a bill to quiet title to be filed only by a party in *possession* [of land] against a defendant, who ha[d] been ineffectually seeking to establish a legal title by repeated actions of ejectment." *Wehrman* v. *Conklin*, 155 U. S. 314, 321–322 (1894) (emphasis added).

Section 2409a is broader, requiring neither prerequisite. Moreover, as the majority tells us, see *ante*, at 217, an act to quiet title is "universally understood" as a proceeding "to establish a plaintiff's *title* to land," Black's Law Dictionary 34 (9th ed. 2009) (emphasis added). But § 2409a authorizes civil actions in cases in which neither the Government, nor the plaintiff, claims title to the land at issue. See § 2409a(d) ("The complaint shall set forth . . . the *right*, title, or *interest* which the plaintiff claims" (emphasis added)).[4] A plaintiff may file suit under § 2409a, for instance, when he claims only an easement in land, the right to explore an area for minerals, or some other lesser right or interest. See S. Rep. No. 92–575, at 5. Notwithstanding its colloquial title, therefore, the QTA plainly allows suit in circumstances well beyond "bread-and-butter quiet title actions," *ante*, at 219, n. 5.[5]

The majority attempts to bolster its reading by emphasizing an unexpected source within § 2409a: the clause specifying that the United States may be sued "'in *a civil action under this section*.'" *Ante*, at 221. The majority understands this clause to narrow the QTA's scope (and its limitations on the Government's immunity waiver) to quiet title claims only. But "this section" speaks broadly to civil actions "to adjudicate a disputed title to real property in which the United States claims an interest." § 2409a. Moreover,

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[4] The majority notes that some States permit a broader class of claims under the rubric of "quiet title," and points to the "'wide differences in State statutory and decisional law' on quiet title suits" at the time of the Act. *Ante*, at 218, n. 4. But that substantial variation only illustrates the artificiality of the majority's claim that the Act only "addresses quiet title actions, as *ordinarily* conceived." *Ante*, at 219, n. 5 (emphasis added).

[5] I recognize, of course, that the QTA is titled "[a]n Act [t]o permit suits to adjudicate certain real property quiet title actions." 86 Stat. 1176. But "the title of a statute . . . cannot limit the plain meaning of [its] text." *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947). As explained above, the substance of Congress' enactment plainly extends more broadly than quiet title actions, mirroring the scope of the title proposed by the Government. See *supra*, at 229.

this clause is read most straightforwardly to serve a far more pedestrian purpose: simply to state that a claimant can file "a civil action under this section"—§ 2409a—to adjudicate a disputed title in which the United States claims an interest. Regardless of how one reads the clause, however, it does not alter the APA's clear command that suits seeking relief forbidden by other statutes are not authorized by the APA. And the QTA forbids the relief sought here: injunctive relief forcing the Government to relinquish title to Indian lands.

Even if the majority were correct that the QTA itself reached only as far as ordinary quiet title actions, that would establish only that the QTA does not expressly forbid the relief Patchak seeks. The APA, however, does not waive the Government's sovereign immunity where any other statute "expressly *or impliedly* forbids the relief which is sought." 5 U. S. C. § 702 (emphasis added). The text and history of the QTA, as well as this Court's precedent, make clear that the United States intended to retain its sovereign immunity from suits to dispossess the Government of Indian trust land. Patchak's suit to oust the Government of such land is therefore, at minimum, impliedly forbidden.[6]

## II

Three consequences illustrate the difficulties today's holding will present for courts and the Government. First, it will render the QTA's limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of *Block*, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an "aesthetic" interest in the land but seeking an identical practical objective—to divest the Government of title and possession. §§ 2409a(a), (b). Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.

[6] Because I conclude that sovereign immunity bars Patchak's suit, I would not reach the question whether he has standing.

Second, the majority's holding will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously. When a plaintiff like Patchak asserts an "aesthetic" or "environmental" concern with a planned use of Indian trust land, he may bring a distinct suit under statutes like the National Environmental Policy Act of 1969 and the Indian Gaming Regulatory Act. Those challenges generally may be brought within the APA's ordinary 6-year statute of limitations. Suits to contest the Government's decision to take title to land in trust for Indian tribes, however, have been governed by a different rule. Until today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review. 25 CFR § 151.12 (2011); 61 Fed. Reg. 18082–18083 (1996). That deadline promoted finality and security—necessary preconditions for the investment and "economic development" that are central goals of the Indian Reorganization Act. *Ante*, at 226.[7] Today's result will promote the opposite, retarding tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed.[8]

Finally, the majority's rule creates substantial uncertainty regarding who exactly is barred from bringing APA claims. The majority leaves unclear, for instance, whether its rule bars from suit only those who "claim any competing interest" in the disputed land in their complaint, *ante*, at 217, or those who could claim a competing interest, but plead only that the

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[7] Trust status, for instance, is a prerequisite to making lands eligible for various federal incentives and tax credits closely tied to economic development. See, *e. g.*, App. 56. Delayed suits will also inhibit tribes from investing in uses other than gaming that might be less objectionable—like farming or office use.

[8] Despite notice of the Government's intent through an organization with which he was affiliated, Patchak did not challenge the Government's fee-to-trust decision even though the organization did. See *Michigan Gambling Opposition* v. *Kempthorne*, 525 F. 3d 23 (CADC 2008). Instead, Patchak waited to sue until three years after the Secretary's intent to acquire the property was published. App. 35, 39.

Government's title claim violates a federal statute. If the former, the majority's holding would allow Patchak's challenge to go forward even if he had some personal interest in the Bradley Property, so long as his complaint did not assert it. That result is difficult to square with *Block* and *Mottaz*. If the latter, matters are even more peculiar. Because a shrewd plaintiff will avoid referencing her own property claim in her complaint, the Government may assert sovereign immunity only if its detective efforts uncover the plaintiff's unstated property claim. Not only does that impose a substantial burden on the Government, but it creates perverse incentives for private litigants. What if a plaintiff has a weak claim, or a claim that she does not know about? Did Congress really intend for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?

As these observations illustrate, the majority's rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the "national public interest" demanded should remain immune from challenge. Congress did not intend either result.

* * *

For the foregoing reasons, I would hold that the QTA bars the relief Patchak seeks. I respectfully dissent.

Syllabus

# FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* FOX TELEVISION STATIONS, INC., ET AL.

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

No. 10–1293. Argued January 10, 2012—Decided June 21, 2012*

Title 18 U. S. C. § 1464 bans the broadcast of "any obscene, indecent, or profane language." The Federal Communications Commission (Commission) began enforcing § 1464 in the 1970's. In *FCC* v. *Pacifica Foundation*, 438 U. S. 726, this Court found that the Commission's order banning George Carlin's "Filthy Words" monologue passed First Amendment scrutiny, but did not decide whether "an occasional expletive . . . would justify any sanction," *id.*, at 750. In the ensuing years, the Commission went from strictly observing the narrow circumstances of *Pacifica* to indicating that it would assess the full context of allegedly indecent broadcasts rather than limit its regulation to an index of indecent words or pictures. However, it continued to note the important difference between isolated and repeated broadcasts of indecent material. And in a 2001 policy statement, it even included, as one of the factors significant to the determination of what was patently offensive, "whether the material dwells on or repeats at length" the offending description or depiction.

It was against this regulatory background that the three incidents at issue took place. Two concern isolated utterances of obscene words during two live broadcasts aired by respondent Fox Television Stations, Inc. The third occurred during an episode of a television show broadcast by respondent ABC Television Network, when the nude buttocks of an adult female character were shown for approximately seven seconds and the side of her breast for a moment. After these incidents, but before the Commission issued notices of apparent liability to Fox and ABC, the Commission issued its *Golden Globes* Order, declaring for the first time that fleeting expletives could be actionable. It then concluded that the Fox and ABC broadcasts violated this new standard. It found the Fox broadcasts indecent, but declined to propose forfeitures. The Second Circuit reversed, finding the Commission's decision to modify its indecency enforcement regime to regulate fleeting expletives arbitrary and capricious. This Court reversed and remanded for

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*Together with *Federal Communications Commission* v. *ABC, Inc., et al.*, also on certiorari to the same court (see this Court's Rule 12.4).

Syllabus

the Second Circuit to address respondents' First Amendment challenges. *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502. On remand, the Second Circuit found the policy unconstitutionally vague and invalidated it in its entirety. In the ABC case, the Commission found the display actionably indecent, and imposed a $27,500 forfeiture on each of the 45 ABC-affiliated stations that aired the episode. The Second Circuit vacated the order in light of its *Fox* decision.

*Held:* Because the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague. Pp. 253–259.

(a) The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed, see, *e. g.*, *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391, is essential to the protections provided by the Fifth Amendment's Due Process Clause, see *United States* v. *Williams*, 553 U. S. 285, 304, which requires the invalidation of impermissibly vague laws. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. Pp. 253–254.

(b) These concerns are implicated here, where the broadcasters claim that the lengthy procedural history of their cases shows that they did not have fair notice of what was forbidden. Under the 2001 guidelines in force when the broadcasts occurred, a key consideration was "whether the material dwell[ed] on or repeat[ed] at length" the offending description or depiction, but in the 2004 *Golden Globes* Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. It then applied this new principle to these cases. Its lack of notice to Fox and ABC of its changed interpretation failed to give them "fair notice of what is prohibited." *Williams*, *supra*, at 304. Pp. 254–255.

(c) Neither of the Government's contrary arguments is persuasive. It claims that Fox cannot establish unconstitutional vagueness because the Commission declined to impose a forfeiture on Fox and said that it

would not consider the indecent broadcast in renewing station licenses or in other contexts. But the Commission has the statutory power to take into account "any history of prior offenses" when setting a forfeiture penalty, 47 U. S. C. § 503(b)(2)(E), and the due process protection against vague regulations "does not leave [regulated parties] . . . at the mercy of *noblesse oblige*," *United States* v. *Stevens*, 559 U. S. 460, 480. The challenged orders could also have an adverse impact on Fox's reputation with audiences and advertisers alike.

The Government argues that ABC had notice that its broadcast would be considered indecent. But an isolated statement in a 1960 Commission decision declaring that televising nudes might be contrary to § 1464 does not suffice for the fair notice required when the Government intends to impose over a $1 million fine for allegedly impermissible speech. Moreover, previous Commission decisions had declined to find isolated and brief moments of nudity actionably indecent. In light of these agency decisions, and the absence of any notice in the 2001 guidance that seven seconds of nude buttocks would be found indecent, ABC lacked constitutionally sufficient notice prior to being sanctioned. Pp. 255–258.

(d) It is necessary to make three observations about this decision's scope. First, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy or reconsider *Pacifica* at this time. Second, because the Court rules that Fox and ABC lacked notice at the time of their broadcasts that their material could be found actionably indecent under then-existing policies, the Court need not address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications. Third, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements and leaves courts free to review the current, or any modified, policy in light of its content and application. Pp. 258–259.

613 F. 3d 317 (first judgment) and 404 Fed. Appx. 530 (second judgment), vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 259. SOTOMAYOR, J., took no part in the consideration or decision of the cases.

*Solicitor General Verrilli* argued the cause for petitioners. With him on the briefs were *Assistant Attorney Gen-*

*eral West*, *Deputy Solicitor General Stewart*, *Joseph R. Palmore*, *Thomas M. Bondy*, *Anne Murphy*, *Austin C. Schlick*, *Peter Karanjia*, *Jacob M. Lewis*, and *Nandan M. Joshi*.

*Carter G. Phillips* argued the cause for respondents Fox Television Stations, Inc., et al. With him on the brief were *Mark D. Schneider*, *David S. Petron*, *Ryan C. Morris*, *Miguel A. Estrada*, *Susan Weiner*, *Robert Corn-Revere*, *Ronald G. London*, *Jonathan H. Anschell*, and *Susanna M. Lowy*. *Seth P. Waxman* argued the cause for respondents ABC, Inc., et al. With him on the brief were *Paul R. Q. Wolfson*, *Daniel S. Volchok*, and *John W. Zucker*. *Wade H. Hargrove*, *Mark J. Prak*, and *David Kushner* filed a brief for respondents ABC Television Affiliates Association et al. *Robert A. Long, Jr.*, *Jonathan D. Blake*, and *Jennifer A. Johnson* filed a brief for respondents CBS Television Network Affiliates Association et al. *Andrew Jay Schwartzman* filed a brief for respondents Center for Creative Voices in Media et al.†

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†Briefs of *amici curiae* urging reversal were filed for the American College of Pediatricians et al. by *Bryan H. Beauman;* for the Decency Enforcement Center for Television by *Thomas B. North;* for Focus on the Family et al. by *J. Robert Flores;* for Morality in Media, Inc., by *Patrick A. Trueman* and *Robert W. Peters;* and for National Religious Broadcasters by *Craig L. Parshall*, *Joseph C. Chautin III*, and *Elise M. Stubbe*.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by *Angela J. Campbell;* for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *Christopher A. Hansen;* for the Cato Institute et al. by *John P. Elwood*, *Ilya Shapiro*, *Thomas S. Leatherbury*, and *Harold Feld;* for the National Association of Broadcasters et al. by *Paul M. Smith*, *Elaine J. Goldenberg*, *Jessica Ring Amunson*, *Jane E. Mago*, and *Jerianne Timmerman;* for the Pennsylvania Center for the First Amendment et al. by *Robert D. Richards* and *Clay Calvert;* for the Public Broadcasting Service by *Ryan M. Christian* and *Daniel B. Levin;* for the Reporters Committee for Freedom of the Press et al. by *Lucy A. Dalglish*, *Gregg P. Leslie*, and *David M. Giles;* for the Student Press Law Center et al. by *Gregory Stuart Smith;* and for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler*.

Briefs of *amici curiae* were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter*

JUSTICE KENNEDY delivered the opinion of the Court.

In *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009) *(Fox I)*, the Court held that the Federal Communications Commission's decision to modify its indecency enforcement regime to regulate so-called fleeting expletives was neither arbitrary nor capricious. The Court then declined to address the constitutionality of the policy, however, because the United States Court of Appeals for the Second Circuit had yet to do so. On remand, the Court of Appeals found the policy was vague and, as a result, unconstitutional. 613 F. 3d 317 (2010). The case now returns to this Court for decision upon the constitutional question.

## I

In *Fox I*, the Court described both the regulatory framework through which the Commission regulates broadcast indecency and the long procedural history of this case. The Court need not repeat all that history, but some preliminary discussion is necessary to understand the constitutional issue the case now presents.

### A

Title 18 U. S. C. § 1464 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both." The Federal Communications Commission (Commission) has been instructed by Congress to enforce § 1464 between the hours of 6 a.m. and 10 p.m., see Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U. S. C. § 303, p. 113 (Broadcasting of Indecent Programming). And the Commission has applied

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*M. Weber;* for Former FCC Officials by *Henry Geller*, *Glen O. Robinson*, and *Newton N. Minow*, all *pro se*, and by *Timothy K. Lewis* and *Carl A. Solano;* for the Parents Television Council by *Robert R. Sparks, Jr.;* for the Yale Law School Information Society Project Scholars et al. by *Priscilla J. Smith;* and for Judith A. Reisman et al. by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister.*

its regulations to radio and television broadcasters alike, see *Fox I*, *supra*, at 505–506; see also 47 CFR § 73.3999 (2010) (Commission regulation prohibiting the broadcast of any obscene material or any indecent material between 6 a.m. and 10 p.m.). Although the Commission has had the authority to regulate indecent broadcasts under § 1464 since 1948 (and its predecessor commission, the Federal Radio Commission, since 1927), it did not begin to enforce § 1464 until the 1970's. See Campbell, *Pacifica* Reconsidered: Implications for the Current Controversy Over Broadcast Indecency, 63 Fed. Com. L. J. 195, 198 (2010).

This Court first reviewed the Commission's indecency policy in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). In *Pacifica*, the Commission determined that George Carlin's "Filthy Words" monologue was indecent. It contained "'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" *Id.*, at 732 (quoting 56 F. C. C. 2d 94, 98 (1975)). This Court upheld the Commission's ruling. The broadcaster's statutory challenge was rejected. The Court held the Commission was not engaged in impermissible censorship within the meaning of 47 U. S. C. § 326 (1976 ed.), see 438 U. S., at 735–739, and that § 1464's definition of indecency was not confined to speech with an appeal to the prurient interest, see *id.*, at 738–741. Finding no First Amendment violation, the decision explained the constitutional standard under which regulations of broadcasters are assessed. It observed that "broadcast media have established a uniquely pervasive presence in the lives of all Americans," *id.*, at 748, and that "broadcasting is uniquely accessible to children, even those too young to read," *id.*, at 749. In light of these considerations, "broadcasting . . . has received the most limited First Amendment protection." *Id.*, at 748. Under this standard the Commission's order

passed constitutional scrutiny. The Court did note the narrowness of its holding, explaining that it was not deciding whether "an occasional expletive . . . would justify any sanction." *Id.*, at 750; see also *id.*, at 760–761 (Powell, J., concurring in part and concurring in judgment) ("[C]ertainly the Court's holding . . . does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here").

From 1978 to 1987, the Commission did not go beyond the narrow circumstances of *Pacifica* and brought no indecency enforcement actions. See *In re Infinity Broadcasting Corp.*, 3 FCC Rcd. 930 (1987) (*Infinity* Order); see also *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d 1250, 1254 (1978) (Commission declaring it "intend[s] strictly to observe the narrowness of the *Pacifica* holding"). Recognizing that *Pacifica* provided "no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station," the Commission distinguished between the "repetitive occurrence of the 'indecent' words" (such as in the Carlin monologue) and an "isolated" or "occasional" expletive, that would not necessarily be actionable. 69 F. C. C. 2d, at 1254.

In 1987, the Commission determined it was applying the *Pacifica* standard in too narrow a way. It stated that in later cases its definition of indecent language would "appropriately includ[e] a broader range of material than the seven specific words at issue in [the Carlin monologue]." *In re Pacifica Foundation Inc.*, 2 FCC Rcd. 2698, 2699 (*Pacifica* Order). Thus, the Commission indicated it would use the "generic definition of indecency" articulated in its 1975 *Pacifica* order, *Infinity* Order, 3 FCC Rcd., at 930, and assess the full context of allegedly indecent broadcasts rather than limiting its regulation to a "comprehensive index . . . of indecent words or pictorial depictions," *id.*, at 932.

Even under this context based approach, the Commission continued to note the important difference between isolated and repeated broadcasts of indecent material. See *ibid.* (considering variables in determining whether material is patently offensive including "whether allegedly offensive material is isolated or fleeting"). In the context of expletives, the Commission determined "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Pacifica* Order, 2 FCC Rcd., at 2699. For speech "involving the description or depiction of sexual or excretory functions . . . [t]he mere fact that specific words or phrases are not repeated does not mandate a finding that material that is otherwise patently offensive . . . is not indecent." *Ibid.* (emphasis deleted).

In 2001, the Commission issued a policy statement intended "to provide guidance to the broadcast industry regarding [its] caselaw interpreting 18 U. S. C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on Commission's Case Law Interpreting 18 U. S. C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999. In that document the Commission restated that for material to be indecent it must depict sexual or excretory organs or activities and be patently offensive as measured by contemporary community standards for the broadcast medium. *Id.*, at 8002. Describing the framework of what it considered patently offensive, the Commission explained that three factors had proved significant:

> "(1) [T]he explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.*, at 8003 (emphasis deleted).

As regards the second of these factors, the Commission explained that "[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." *Id.*, at 8008. The Commission then gave examples of material that was not found indecent because it was fleeting and isolated, *id.*, at 8008–8009 (citing, *e. g.*, *L. M. Communications of South Carolina, Inc. (WYBB(FM))*, 7 FCC Rcd. 1595 (MMB 1992) (finding "a fleeting and isolated utterance" in the context of live and spontaneous programming not actionable)), and contrasted it with fleeting references that were found patently offensive in light of other factors, 16 FCC Rcd., at 8009 (citing, *e. g.*, *Tempe Radio, Inc. (KUPD–FM)*, 12 FCC Rcd. 21828 (MMB 1997) (finding fleeting language that clearly refers to sexual activity with a child to be patently offensive)).

B

It was against this regulatory background that the three incidents of alleged indecency at issue here took place. First, in the 2002 Billboard Music Awards, broadcast by respondent Fox Television Stations, Inc., the singer Cher exclaimed during an unscripted acceptance speech: "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em." App. to Pet. for Cert. 89a. Second, Fox broadcast the Billboard Music Awards again in 2003. There, a person named Nicole Richie made the following unscripted remark while presenting an award: "'Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.'" 613 F. 3d, at 323. The third incident involved an episode of NYPD Blue, a regular television show broadcast by respondent ABC Television Network. The episode broadcast on February 25, 2003, showed the nude buttocks of an adult female character for

approximately seven seconds and for a moment the side of her breast. During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend's son entered the bathroom. A moment of awkwardness followed. 404 Fed. Appx. 530, 533–534 (CA2 2011). The Commission received indecency complaints about all three broadcasts. See *Fox I*, 556 U. S., at 510; 404 Fed. Appx., at 534.

After these incidents, but before the Commission issued notices of apparent liability to Fox and ABC, the Commission issued a decision sanctioning NBC for a comment made by the singer Bono during the 2003 Golden Globe Awards. Upon winning the award for Best Original Song, Bono exclaimed: "'This is really, really, f***ing brilliant. Really, really great.'" *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4976, n. 4 (2004) (*Golden Globes* Order). Reversing a decision by its enforcement bureau, the Commission found the use of the F-word actionably indecent. *Id.*, at 4975–4976. The Commission held that the word was "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," and thus found "any use of that word or a variation, in any context, inherently has a sexual connotation." *Id.*, at 4978–4979. Turning to the isolated nature of the expletive, the Commission reversed prior rulings that had found fleeting expletives not indecent. The Commission held "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.*, at 4980; see also *id.*, at 4982 ("Just as the Court [in *Pacifica*] held that . . . the George Carlin routine 'could have enlarged a child's vocabulary in an instant,' we believe that even isolated broadcasts of the 'F-Word' in situations such as that here could do so as well").

C

Even though the incidents at issue in these cases took place before the *Golden Globes* Order, the Commission applied its new policy regarding fleeting expletives and fleeting nudity. It found the broadcasts by respondents Fox and ABC to be in violation of this standard.

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As to Fox, the Commission found the two Billboard Awards broadcasts indecent in *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 (2006). Numerous parties petitioned for a review of the order in the United States Court of Appeals for the Second Circuit. The Court of Appeals granted the Commission's request for a voluntary remand so that it could respond to the parties' objections. *Fox Television Stations, Inc.* v. *FCC*, 489 F. 3d 444, 453 (2007). In its remand order, the Commission applied its tripartite definition of patently offensive material from its 2001 order and found that both broadcasts fell well within its scope. See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299 (2006) (*Remand* Order); see also *Fox I*, *supra*, at 511–513 (discussing in detail the Commission's findings). As pertains to the constitutional issue in these cases, the Commission noted that under the policy clarified in the *Golden Globes* Order, "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement." *Remand* Order, 21 FCC Rcd., at 13308; see also *id.*, at 13325 ("[U]nder our *Golden Globe* precedent, the fact that Cher used the 'F-Word' once does not remove her comment from the realm of actionable indecency"). Though the Commission deemed Fox should have known Nicole Richie's comments were actionably indecent even prior to the *Golden*

*Globes* Order, 21 FCC Rcd., at 13307, it declined to propose a forfeiture in light of the limited nature of the Second Circuit's remand. *Id.*, at 13321. The Commission acknowledged that "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." And so, as in the Golden Globes case it imposed no penalty for that broadcast. *Id.*, at 13324, 13326.

Fox and various intervenors returned to the United States Court of Appeals for the Second Circuit, raising administrative, statutory, and constitutional challenges to the Commission's indecency regulations. See *Fox Television Stations, Inc.* v. *FCC*, 489 F. 3d 444. In a 2-to-1 decision, with Judge Leval dissenting, the Court of Appeals found the *Remand* Order arbitrary and capricious because "the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face." 489 F. 3d, at 455. While noting its skepticism as to whether the Commission's fleeting expletive regime "would pass constitutional muster," the Court of Appeals found it unnecessary to address the issue. *Id.*, at 462.

The case came here on certiorari. Citing the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, this Court noted that the Judiciary may set aside agency action that is arbitrary or capricious. In the context of a change in policy (such as the Commission's determination that fleeting expletives could be indecent), the decision held an agency, in the ordinary course, should acknowledge that it is in fact changing its position and "show that there are good reasons for the new policy." *Fox I*, 556 U. S., at 515. There is no need, however, for an agency to provide detailed justifications for every change or to show that the reasons for the new policy are better than the reasons for the old one. *Ibid.*

Judged under this standard, the Court in *Fox I* found the Commission's new indecency enforcement policy neither arbitrary nor capricious. *Id.*, at 517. The Court noted the Commission had acknowledged breaking new ground in rul-

ing that fleeting and nonliteral expletives could be indecent under the controlling standards; the Court concluded the agency's reasons for expanding the scope of its enforcement activity were rational. *Ibid.* Not only was it "certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words," *ibid.*, but the Court agreed that the Commission's decision to "look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach [approved] . . . in *Pacifica*," *ibid.* Given that "[e]ven isolated utterances can . . . constitute harmful 'first blow[s]' to children," the Court held that the Commission could "decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable." *Id.*, at 518. Having found the agency's action to be neither arbitrary nor capricious, the Court remanded for the Court of Appeals to address respondents' First Amendment challenges. *Id.*, at 529–530.

On remand from *Fox I*, the Court of Appeals held the Commission's indecency policy unconstitutionally vague and invalidated it in its entirety. 613 F. 3d, at 327. The Court of Appeals found the policy, as expressed in the 2001 guidance and subsequent Commission decisions, failed to give broadcasters sufficient notice of what would be considered indecent. Surveying a number of Commission adjudications, the court found the Commission was inconsistent as to which words it deemed patently offensive. See *id.*, at 330. It also determined that the Commission's presumptive prohibition on the F-word and the S-word was plagued by vagueness because the Commission had on occasion found the fleeting use of those words not indecent provided they occurred during a bona fide news interview or were "demonstrably essential to the nature of an artistic or educational work." *Id.*, at 331 (internal quotation marks omitted). The Commission's application of these exceptions, according to the Court of Appeals, left broadcasters guessing whether an expletive would

be deemed artistically integral to a program or whether a particular broadcast would be considered a bona fide news interview. The Court of Appeals found the vagueness inherent in the policy had forced broadcasters to "choose between not airing . . . controversial programs [or] risking massive fines or possibly even loss of their licenses." *Id.*, at 334. And the court found that there was "ample evidence in the record" that this harsh choice had led to a chill of protected speech. *Ibid.*

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The procedural history regarding ABC is more brief. On February 19, 2008, the Commission issued a forfeiture order finding the display of the woman's nude buttocks in NYPD Blue was actionably indecent. See *In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 FCC Rcd. 3147 (2008). The Commission determined that, regardless of medical definitions, displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was "widely associated with sexual arousal and closely associated by most people with excretory activities." *Id.*, at 3150. The scene was deemed patently offensive as measured by contemporary community standards, *ibid.;* and the Commission determined that "[t]he female actor's nudity is presented in a manner that clearly panders to and titillates the audience," *id.*, at 3153. Unlike in the Fox case, the Commission imposed a forfeiture of $27,500 on each of the 45 ABC-affiliated stations that aired the indecent episode. In a summary order the United States Court of Appeals for the Second Circuit vacated the forfeiture order, determining that it was bound by its *Fox* decision striking down the entirety of the Commission's indecency policy. See 404 Fed. Appx., at 533.

The Government sought review of both judgments, see Brief for Petitioners 1, and this Court granted certiorari, 564 U. S. 1036 (2011). These are the cases before us.

## II

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); alteration in original)). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States* v. *Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). When speech is involved, rigorous adherence to

those requirements is necessary to ensure that ambiguity does not chill protected speech.

These concerns are implicated here because, at the outset, the broadcasters claim they did not have, and do not have, sufficient notice of what is proscribed. And leaving aside any concerns about facial invalidity, they contend that the lengthy procedural history set forth above shows that the broadcasters did not have fair notice of what was forbidden. Under the 2001 guidelines in force when the broadcasts occurred, a key consideration was "'whether the material dwell[ed] on or repeat[ed] at length'" the offending description or depiction. 613 F. 3d, at 322. In the 2004 *Golden Globes* Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. *Fox I*, 556 U. S., at 512. In the challenged orders now under review the Commission applied the new principle promulgated in the *Golden Globes* Order and determined fleeting expletives and a brief moment of indecency were actionably indecent. This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation. The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited." *Williams*, *supra*, at 304. This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon "sensitive areas of basic First Amendment freedoms," *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); see also *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 871–872 (1997) ("The vagueness of [a content-based regulation of

speech] raises special First Amendment concerns because of its obvious chilling effect").

The Government raises two arguments in response, but neither is persuasive. As for the two fleeting expletives, the Government concedes that "Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent." Brief for Petitioners 28, n. 3. The Government argues, nonetheless, that Fox "cannot establish unconstitutional vagueness on that basis . . . because the Commission did not impose a sanction where Fox lacked such notice." *Ibid.* As the Court observed when the case was here three Terms ago, it is true that the Commission declined to impose any forfeiture on Fox, see 556 U. S., at 513, and in its order the Commission claimed that it would not consider the indecent broadcasts either when considering whether to renew stations' licenses or "in any other context," 21 FCC Rcd., at 13321, 13326. This "policy of forbearance," as the Government calls it, does not suffice to make the issue moot. Brief for Petitioners 31. Though the Commission claims it will not consider the prior indecent broadcasts "in any context," it has the statutory power to take into account "any history of prior offenses" when setting the level of a forfeiture penalty. See 47 U. S. C. § 503(b)(2)(E). Just as in the First Amendment context, the due process protection against vague regulations "does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U. S. 460, 480 (2010). Given that the Commission found it was "not inequitable to hold Fox responsible for [the 2003 broadcast]," 21 FCC Rcd., at 13314, and that it has the statutory authority to use its finding to increase any future penalties, the Government's assurance it will elect not to do so is insufficient to remedy the constitutional violation.

In addition, when combined with the legal consequence described above, reputational injury provides further reason for granting relief to Fox. Cf. *Paul* v. *Davis*, 424 U. S. 693,

708–709 (1976) (explaining that an "alteration of legal status . . . combined with the injury resulting from the defamation" justifies the invocation of procedural safeguards). As respondent CBS points out, findings of wrongdoing can result in harm to a broadcaster's "reputation with viewers and advertisers." Brief for Respondent CBS Television Network Affiliates Assn. et al. 17. This observation is hardly surprising given that the challenged orders, which are contained in the permanent Commission record, describe in strongly disapproving terms the indecent material broadcast by Fox, see, *e. g.*, 21 FCC Rcd., at 13310–13311, ¶30 (noting the "explicit, graphic, vulgar, and shocking nature of Ms. Richie's comments"), and Fox's efforts to protect children from being exposed to it, see *id.*, at 13311, ¶33 (finding Fox had failed to exercise "'reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid [a] patently offensive broadcas[t]'"). Commission sanctions on broadcasters for indecent material are widely publicized. See, *e. g.*, F. C. C. Fines Fox, N. Y. Times, Feb. 26, 2008, p. E2; FCC Plans Record Fine for CBS, Washington Post, Sept. 24, 2004, p. E1. The challenged orders could have an adverse impact on Fox's reputation that audiences and advertisers alike are entitled to take into account.

With respect to ABC, the Government with good reason does not argue no sanction was imposed. The fine against ABC and its network affiliates for the seven seconds of nudity was nearly $1.24 million. See Brief for Respondent ABC, Inc., et al. 7 (hereinafter ABC Brief). The Government argues instead that ABC had notice that the scene in NYPD Blue would be considered indecent in light of a 1960 decision where the Commission declared that the "televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. 1464." Brief for Petitioners 32 (quoting *Enbanc Programing Inquiry*, 44 FCC 2303, 2307; internal quotation marks omitted). This argument does not prevail. An isolated and ambiguous statement from a 1960

Commission decision does not suffice for the fair notice required when the Government intends to impose over a $1 million fine for allegedly impermissible speech. The Commission, furthermore, had released decisions before sanctioning ABC that declined to find isolated and brief moments of nudity actionably indecent. See, *e. g., In re Application of WGBH*, 69 F. C. C. 2d, at 1251, 1255 (declining to find broadcasts containing nudity to be indecent and emphasizing the difference between repeated and isolated expletives); *In re WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838, 1840 (2000) (finding full frontal nudity in Schindler's List not indecent). This is not to say, of course, that a graphic scene from Schindler's List involving nude concentration camp prisoners is the same as the shower scene from NYPD Blue. It does show, however, that the Government can point to nothing that would have given ABC affirmative notice that its broadcast would be considered actionably indecent. It is likewise not sufficient for the Commission to assert, as it did in its order, that though "the depiction [of nudity] here is not as lengthy or repeated" as in some cases, the shower scene nonetheless "does contain more shots or lengthier pictions of nudity" than in other broadcasts found not indecent. 23 FCC Rcd., at 3153. This broad language fails to demonstrate that ABC had fair notice that its broadcast could be found indecent. In fact, a Commission ruling prior to the airing of the NYPD Blue episode had deemed 30 seconds of nude buttocks "very brief" and not actionably indecent in the context of the broadcast. See Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999), in App. to Brief for Respondent ABC Television Affiliates Assn. et al. 1a; see also Letter from Edythe Wise to Susan Cavin, FCC File No. 91100738 (Aug. 13, 1992), *id.*, at 18a, 19a. In light of this record of agency decisions, and the absence of any notice in the 2001 guidance that seven seconds of nude buttocks would be found indecent, ABC lacked constitutionally sufficient notice prior to being sanctioned.

The Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent. Therefore, the Commission's standards as applied to these broadcasts were vague, and the Commission's orders must be set aside.

## III

It is necessary to make three observations about the scope of this decision. First, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy. It is argued that this Court's ruling in *Pacifica* (and the less rigorous standard of scrutiny it provided for the regulation of broadcasters, see 438 U. S. 726) should be overruled because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers. See, *e. g.*, ABC Brief 48–57; Brief for Respondent Fox Television Stations, Inc., et al. 15–26. The Government for its part maintains that when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards. See Brief for Petitioners 40–53. These arguments need not be addressed here. In light of the Court's holding that the Commission's policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.

This leads to a second observation. Here, the Court rules that Fox and ABC lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies. Given this disposition, it is unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications. The Court adheres to its normal practice of declining to decide cases not before it. See, *e. g.*, *Sweatt* v. *Painter*, 339 U. S. 629, 631 (1950) ("Broader issues have been

urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court").

Third, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.

* * *

The judgments of the United States Court of Appeals for the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with the principles set forth in this opinion.

*It is so ordered.*

JUSTICE SOTOMAYOR took no part in the consideration or decision of these cases.

JUSTICE GINSBURG, concurring in the judgment.

In my view, the Court's decision in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration. Cf. *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 532–535 (2009) (THOMAS, J., concurring).

Syllabus

# DORSEY *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11–5683. Argued April 17, 2012—Decided June 21, 2012*

Under the Anti-Drug Abuse Act (1986 Drug Act), the 5- and 10-year mandatory minimum prison terms for federal drug crimes reflected a 100-to-1 disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. Thus, the 5-year minimum was triggered by a conviction for possessing with intent to distribute 5 grams of crack cocaine but 500 grams of powder, and the 10-year minimum was triggered by a conviction for possessing with intent to distribute 50 grams of crack but 5,000 grams of powder. The United States Sentencing Commission—which is charged under the Sentencing Reform Act of 1984 with writing the Federal Sentencing Guidelines—incorporated the 1986 Drug Act's 100-to-1 disparity into the Guidelines because it believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic proportionality objective. The Fair Sentencing Act, which took effect on August 3, 2010, reduced the disparity to 18-to-1, lowering the mandatory minimums applicable to many crack offenders, by increasing the amount of crack needed to trigger the 5-year minimum from 5 to 28 grams and the amount for the 10-year minimum from 50 to 280 grams, while leaving the powder cocaine amounts intact. It also directed the Sentencing Commission to make conforming amendments to the Guidelines "as soon as practicable" (but no later than 90 days after the Fair Sentencing Act's effective date). The new amendments became effective on November 1, 2010.

In No. 11–5721, petitioner Hill unlawfully sold 53 grams of crack in 2007, but was not sentenced until December 2010. Sentencing him to the 10-year minimum mandated by the 1986 Drug Act, the District Judge ruled that the Fair Sentencing Act's 5-year minimum for selling that amount of crack did not apply to those whose offenses were committed before the Act's effective date. In No. 11–5683, petitioner Dorsey unlawfully sold 5.5 grams of crack in 2008. In September 2010, the District Judge sentenced him to the 1986 Drug Act's 10-year minimum, finding that it applied because Dorsey had a prior drug conviction and

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*Together with No. 11–5721, *Hill* v. *United States*, also on certiorari to the same court.

declining to apply the Fair Sentencing Act, under which there would be no mandated minimum term for an amount less than 28 grams, because Dorsey's offense predated that Act's effective date. The Seventh Circuit affirmed in both cases.

*Held:* The Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. Pp. 272–282.

(a) Language in different statutes argues in opposite directions. The general federal saving statute (1871 Act) provides that a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide." 1 U. S. C. § 109. The word "repeal" applies when a new statute simply diminishes the penalties that the older statute set forth, see *Warden* v. *Marrero*, 417 U. S. 653, 659–664, and penalties are "incurred" under the older statute when an offender becomes subject to them, *i. e.*, commits the underlying conduct that makes the offender liable, see *United States* v. *Reisinger*, 128 U. S. 398, 401. In contrast, the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable sentencing guidelines are the ones "in effect on the date the defendant is sentenced." 18 U. S. C. § 3553(a)(4)(A)(ii).

Six considerations, taken together, show that Congress intended the Fair Sentencing Act's more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date. First, the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. The 1871 Act creates what is in effect a less demanding interpretive requirement because the statute "cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465. Hence, this Court has treated the 1871 Act as setting forth an important background principle of interpretation that requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves by the "plain import" or "fair implication" of the new statute that ordinary interpretive considerations point clearly in that direction. Second, the Sentencing Reform Act sets forth a special and different background principle in § 3553(a)(4)(A)(ii), which applies unless *ex post facto* concerns are present. Thus, new, lower Guidelines amendments apply to offenders who committed an offense before the adoption of the amendments but are sentenced thereafter. Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act's special background principle here. Section 8

of the Fair Sentencing Act requires the Commission to promulgate conforming amendments to the Guidelines that "achieve consistency with other guideline provisions and applicable law." Read most naturally, "applicable law" refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. And consistency with "other guideline provisions" and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense before the new amendments' effective date but were sentenced thereafter. Fourth, applying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse by creating new anomalies—new sets of disproportionate sentences—not previously present. That is because sentencing courts must apply the new Guidelines (consistent with the Fair Sentencing Act's new minimums) to pre-Act offenders, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them. Application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would therefore produce a set of sentences at odds with Congress' basic efforts to create more uniform, more proportionate sentences. Sixth, this Court has found no strong countervailing considerations that would make a critical difference. Pp. 272–281.

(b) The new Act's lower minimums also apply to those who committed an offense prior to August 3 and were sentenced between that date and November 1, 2010, the effective date of the new Guidelines. The Act simply instructs the Commission to promulgate new Guidelines "as soon as practicable" (but no later than 90 days after the Act took effect), and thus as far as Congress was concerned, the Commission might have promulgated those Guidelines to be effective as early as August 3. In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums. Finally, applying the new minimums to all who are sentenced after August 3 makes it possible to foresee a reasonably smooth transition, and this Court has no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date. Pp. 281–282.

No. 11–5683, 635 F. 3d 336, and No. 11–5721, 417 Fed. Appx. 560, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dis-

senting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 288.

*Stephen E. Eberhardt*, by appointment of the Court, 565 U. S. 1154, argued the cause for petitioners in both cases. With him on the briefs for petitioner Hill in No. 11–5721 were *William H. Theis*, *Mark D. Harris*, *Richard L. Spinogatti*, *Anna G. Kaminska*, and *Douglas A. Berman*. *Jonathan E. Hawley* and *Daniel T. Hansmeier* filed briefs for petitioner Dorsey in No. 11–5683.

*Deputy Solicitor General Dreeben* argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, and *Mark R. Freeman*.

*Miguel A. Estrada*, by invitation of the Court, 565 U. S. 1077, argued the cause and filed a brief as *amicus curiae* in support of the judgments below. With him on the brief were *Scott P. Martin* and *Daniel L. Geyser*.†

JUSTICE BREYER delivered the opinion of the Court.

Federal statutes impose mandatory minimum prison sentences upon those convicted of federal drug crimes. These statutes typically base the length of a minimum prison term upon the kind and amount of the drug involved. Until 2010, the relevant statute imposed upon an offender who dealt in powder cocaine the same sentence it imposed upon an offender who dealt in one one-hundredth that amount of crack cocaine. It imposed, for example, the same 5-year minimum

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†Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Dennis D. Parker*, *Lisa M. Bornstein*, *Kim M. Keenan*, *Daniel N. Abrahamson*, *Mary Price*, and *Nkechi Taifa;* for the Center on the Administration of Criminal Law, New York University School of Law, by *Alexandra A. E. Shapiro* and *Rachel E. Barkow;* for the National Association of Criminal Defense Lawyers et al. by *Jeffrey T. Green*, *Peter Goldberger*, *Sarah O'Rourke Schrup*, and *Brett G. Sweitzer;* and for Former United States District Court Judge Paul G. Cassell et al. by *Nancy Gertner* and *Mr. Cassell*, both *pro se*.

term upon (1) an offender convicted of possessing with intent to distribute *500* grams of powder cocaine as upon (2) an offender convicted of possessing with intent to distribute *5* grams of crack.

In 2010, Congress enacted a new statute reducing the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1. Fair Sentencing Act, 124 Stat. 2372. The new statute took effect on August 3, 2010. The question here is whether the Act's more lenient penalty provisions apply to offenders who committed a crack cocaine crime before August 3, 2010, but were not sentenced until after August 3. We hold that the new, more lenient mandatory minimum provisions do apply to those pre-Act offenders.

## I

The underlying question before us is one of congressional intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives. Did Congress intend the Act's more lenient penalties to apply to pre-Act offenders sentenced after the Act took effect?

We recognize that, because of important background principles of interpretation, we must assume that Congress did *not* intend those penalties to apply unless it clearly indicated to the contrary. See *infra*, at 273–276. But we find that clear indication here. We rest our conclusion primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing. Indeed, seen from that perspective, a contrary determination would (in respect to relevant groups of drug offenders) produce sentences less uniform and more disproportionate than if Congress had not enacted the Fair Sentencing Act at all. See *infra*, at 276–279.

Because our conclusion rests upon an analysis of the Guidelines-based sentencing system Congress has established, we describe that system at the outset and include

an explanation of how the Guidelines interact with federal statutes setting forth specific terms of imprisonment.

## A

The Guidelines originate in the Sentencing Reform Act of 1984, 98 Stat. 1987. That statute created a federal Sentencing Commission instructed to write guidelines that judges would use to determine sentences imposed upon offenders convicted of committing federal crimes. 28 U. S. C. §§ 991, 994. Congress thereby sought to increase transparency, uniformity, and proportionality in sentencing. United States Sentencing Commission (USSC or Commission), Guidelines Manual § 1A1.3, p. 2 (Nov. 2011) (USSG); see 28 U. S. C. §§ 991(b)(1), 994(f).

The Sentencing Reform Act directed the Commission to create in the Guidelines categories of offense behavior (*e. g.*, " 'bank robbery/committed with a gun/$2500 taken' ") and offender characteristics (*e. g.*, "one prior conviction"). USSG § 1A1.2, at 1; see 28 U. S. C. §§ 994(a)–(e). A sentencing judge determines a Guidelines range by (1) finding the applicable offense level and offender category and then (2) consulting a table that lists proportionate sentencing ranges (*e. g.*, 18 to 24 months of imprisonment) at the intersections of rows (marking offense levels) and columns (marking offender categories). USSG ch. 5, pt. A, Sentencing Table, §§ 5E1.2, 7B1.4; see also § 1A1.4(h), at 11. The Guidelines, after telling the judge how to determine the applicable offense level and offender category, instruct the judge to apply the intersection's range in an ordinary case, but they leave the judge free to depart from that range in an unusual case. See 18 U. S. C. § 3553(b); USSG §§ 1A1.2, at 1–2, 1A1.4(b), at 6–7. This Court has held that the Guidelines are now advisory. *United States* v. *Booker*, 543 U. S. 220, 245, 264 (2005); see *Kimbrough* v. *United States*, 552 U. S. 85, 91 (2007).

The Guidelines determine most drug-crime offense levels in a special way. They set forth a "Drug Quantity Table"

(or Table) that lists amounts of various drugs and associates different amounts with different "Base Offense Levels" (to which a judge may add or subtract levels depending upon the "specific" characteristics of the offender's behavior). See USSG § 2D1.1. The Table, for example, associates 400 to 499 grams of powder cocaine with a base offense level of 24, a level that would mean for a first-time offender a prison term of 51 to 63 months. § 2D1.1(c).

In 1986, Congress enacted a more specific, drug-related sentencing statute, the Anti-Drug Abuse Act (1986 Drug Act), 100 Stat. 3207. That statute sets forth mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense. See 21 U. S. C. §§ 841(b)(1)(A)–(C) (2006 ed. and Supp. IV). The minimum applicable to an offender convicted of possessing with intent to distribute 500 grams or more of powder cocaine is 5 years, and for 5,000 grams or more of powder the minimum is 10 years. §§ 841(b)(1)(A)(ii), (B)(ii). The 1986 Drug Act, however, treated crack cocaine crimes as far more serious. It applied its 5-year minimum to an offender convicted of possessing with intent to distribute only 5 grams of crack (as compared to 500 grams of powder) and its 10-year minimum to one convicted of possessing with intent to distribute only 50 grams of crack (as compared to 5,000 grams of powder), thus producing a 100-to-1 crack-to-powder ratio. §§ 841(b)(1)(A)(iii), (B)(iii) (2006 ed.).

The 1986 Drug Act, like other federal sentencing statutes, interacts with the Guidelines in an important way. Like other sentencing statutes, it trumps the Guidelines. Thus, ordinarily no matter what the Guidelines provide, a judge cannot sentence an offender to a sentence beyond the maximum contained in the federal statute setting forth the crime of conviction. Similarly, ordinarily no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in

a statutory mandatory minimum. See 28 U. S. C. §§ 994(a), (b)(1); USSG § 5G1.1; *Neal* v. *United States*, 516 U. S. 284, 289–290, 295 (1996).

Not surprisingly, the Sentencing Commission incorporated the 1986 Drug Act's mandatory minimums into the first version of the Guidelines themselves. *Kimbrough*, *supra*, at 96–97. It did so by setting a base offense level for a first-time drug offender that corresponded to the lowest Guidelines range above the applicable mandatory minimum. USSC, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 53–54 (Oct. 2011) (2011 Report). Thus, the first Guidelines Drug Quantity Table associated 500 grams of powder cocaine with an offense level of 26, which for a first-time offender meant a sentencing range of 63 to 78 months (just above the 5-year minimum), and it associated 5,000 grams of powder cocaine with an offense level of 32, which for a first-time offender meant a sentencing range of 121 to 151 months (just above the 10-year minimum). USSG § 2D1.1 (Oct. 1987). Further reflecting the 1986 Drug Act's 100-to-1 crack-to-powder ratio, the Table associated an offense level of 26 with 5 grams of crack and an offense level of 32 with 50 grams of crack. *Ibid.*

In addition, the Drug Quantity Table set offense levels for small drug amounts that did not trigger the 1986 Drug Act's mandatory minimums so that the resulting Guidelines sentences would remain proportionate to the sentences for amounts that did trigger these minimums. 2011 Report 54. Thus, the Table associated 400 grams of powder cocaine (an amount that fell just below the amount triggering the 1986 Drug Act's 5-year minimum) with an offense level of 24, which for a first-time offender meant a sentencing range of 51 to 63 months (the range just below the 5-year minimum). USSG § 2D1.1 (Oct. 1987). Following the 100-to-1 crack-to-powder ratio, the Table associated four grams of crack (an amount that also fell just below the amount triggering the

1986 Drug Act's 5-year minimum) with an offense level of 24. *Ibid.*

The Commission did this not because it necessarily thought that those levels were most in keeping with past sentencing practice or would independently have reflected a fair set of sentences, but rather because the Commission believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic "proportionality" objective. See *Kimbrough*, 552 U. S., at 97; USSG § 1A1.3 (Nov. 2011); 2011 Report 53–54, 349, and n. 845. For this reason, the Commission derived the Drug Quantity Table's entire set of crack and powder cocaine offense levels by using the 1986 Drug Act's two (5- and 10-year) minimum amounts as reference points and then extrapolating from those two amounts upward and downward to set proportional offense levels for other drug amounts. *Ibid.*

B

During the next two decades, the Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100 to 1. The Commission issued four separate reports telling Congress that the ratio was too high and unjustified because, for example, research showed the relative harm between crack and powder cocaine less severe than 100 to 1, because sentences embodying that ratio could not achieve the Sentencing Reform Act's "uniformity" goal of treating like offenders alike, because they could not achieve the "proportionality" goal of treating different offenders (*e. g.*, major drug traffickers and low-level dealers) differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences. *Kimbrough*, *supra*, at 97–98; see, *e. g.*, USSC, Special Report to the Congress: Cocaine and Federal Sentencing Policy 197–198 (Feb. 1995) (1995 Report);

USSC, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (Apr. 1997) (1997 Report); USSC, Report to Congress: Cocaine and Federal Sentencing Policy 91, 103 (May 2002) (2002 Report); USSC, Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007) (2007 Report). The Commission also asked Congress for new legislation embodying a lower crack-to-powder ratio. 1995 Report 198–200; 1997 Report 9–10; 2002 Report 103–107; 2007 Report 6–9. And the Commission recommended that the legislation "include" an "emergency amendment" allowing "the Commission to incorporate the statutory changes" in the Guidelines while "minimiz[ing] the lag between any statutory and guideline modifications for cocaine offenders." *Id.*, at 9.

In 2010, Congress accepted the Commission's recommendations, see 2002 Report 104; 2007 Report 8–9, and n. 26, and enacted the Fair Sentencing Act into law. The Act increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the 10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively). § 2(a), 124 Stat. 2372. The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18 to 1. (The Act also eliminated the 5-year mandatory minimum for simple possession of crack. § 3, 124 Stat. 2372.)

Further, the Fair Sentencing Act instructed the Commission to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." § 8(2), *id.*, at 2374. And it directed the Commission to "promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days" after the new Act took effect. § 8(1), *ibid.*

The Fair Sentencing Act took effect on August 3, 2010. The Commission promulgated conforming emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66188 (2010). A permanent version of those Guidelines amendments took effect on November 1, 2011. See 76 *id.*, at 24960 (2011).

C

With this background in mind, we turn to the relevant facts of the cases before us. Corey Hill, one of the petitioners, unlawfully sold 53 grams of crack in March 2007, before the Fair Sentencing Act became law. App. in No. 11–5721, pp. 6, 83 (hereinafter Hill App.). Under the 1986 Drug Act, an offender who sold 53 grams of crack was subject to a 10-year mandatory minimum. 21 U. S. C. § 841(b)(1)(A)(iii) (2006 ed.). Hill was not sentenced, however, until December 2010, after the Fair Sentencing Act became law and after the new Guidelines amendments had become effective. Hill App. 83–94. Under the Fair Sentencing Act, an offender who sold 53 grams of crack was subject to a 5-year, not a 10-year, minimum. § 841(b)(1)(B)(iii) (2006 ed., Supp. IV). The sentencing judge stated that, if he thought that the Fair Sentencing Act applied, he would have sentenced Hill to that Act's 5-year minimum. *Id.*, at 69. But he concluded that the Fair Sentencing Act's lower minimums apply only to those who committed a drug crime after August 3, 2010—the Act's effective date. *Id.*, at 65, 68. That is to say, he concluded that the new Act's more lenient sentences did not apply to those who committed a crime before August 3, even if they were sentenced after that date. Hence, the judge sentenced Hill to 10 years of imprisonment. *Id.*, at 78. The Court of Appeals for the Seventh Circuit affirmed. 417 Fed. Appx. 560 (2011).

The second petitioner, Edward Dorsey (who had previously been convicted of a drug felony), unlawfully sold 5.5 grams of crack in August 2008, before the Fair Sentencing

Act took effect. App. in No. 11–5683, pp. 9, 48–49, 57–58 (hereinafter Dorsey App.). Under the 1986 Drug Act, an offender such as Dorsey with a prior drug felony who sold 5.5 grams of crack was subject to a 10-year minimum. § 841(b)(1)(B)(iii) (2006 ed.). Dorsey was not sentenced, however, until September 2010, after the new Fair Sentencing Act took effect. *Id.*, at 84–95. Under the Fair Sentencing Act, such an offender who sold 5.5 grams of crack was not subject to a mandatory minimum at all, for 5.5 grams is less than the 28 grams that triggers the new Act's mandatory minimum provisions. § 841(b)(1)(B)(iii) (2006 ed., Supp. IV). Dorsey asked the judge to apply the Fair Sentencing Act's more lenient statutory penalties. *Id.*, at 54–55.

Moreover, as of Dorsey's sentencing in September 2010, the unrevised Guidelines (reflecting the 1986 Drug Act's old minimums) were still in effect. The Commission had not yet finished revising the Guidelines to reflect the new, lower statutory minimums. And the basic sentencing statute, the Sentencing Reform Act, provides that a judge shall apply the Guidelines that "are in effect on the date the defendant is sentenced." 18 U. S. C. § 3553(a)(4)(A)(ii).

The sentencing judge, however, had the legal authority not to apply the Guidelines at all (for they are advisory). But he also knew that he could not ignore a minimum sentence contained in the applicable statute. Dorsey App. 67–68. The judge noted that, even though he was sentencing Dorsey after the effective date of the Fair Sentencing Act, Dorsey had committed the underlying crime prior to that date. *Id.*, at 69–70. And he concluded that the 1986 Drug Act's old minimums, not the new Fair Sentencing Act, applied in those circumstances. *Ibid.* He consequently sentenced Dorsey to the 1986 Drug Act's 10-year mandatory minimum term. *Id.*, at 80. The Court of Appeals for the Seventh Circuit affirmed, *United States* v. *Fisher*, 635 F. 3d 336 (2011), and denied rehearing en banc, 646 F. 3d 429 (2011) *(per curiam);* see also *United States* v. *Holcomb*, 657 F. 3d 445 (CA7 2011).

The Courts of Appeals have come to different conclusions as to whether the Fair Sentencing Act's more lenient mandatory minimums apply to offenders whose unlawful conduct took place before, but whose sentencing took place after, the date that Act took effect, namely, August 3, 2010. Compare *United States* v. *Douglas*, 644 F. 3d 39, 42–44 (CA1 2011) (Act applies), and *United States* v. *Dixon*, 648 F. 3d 195, 203 (CA3 2011) (same), with 635 F. 3d, at 339–340 (Act does not apply), *United States* v. *Sidney*, 648 F. 3d 904, 910 (CA8 2011) (same), and *United States* v. *Tickles*, 661 F. 3d 212, 215 (CA5 2011) *(per curiam)* (same). In light of that disagreement, we granted Hill's and Dorsey's petitions for certiorari. Since petitioners and the Government both take the position that the Fair Sentencing Act's new minimums do apply in these circumstances, we appointed as *amicus curiae* Miguel Estrada to argue the contrary position. He has ably discharged his responsibilities.

## II

### A

The timing issue before us is difficult in part because relevant language in different statutes argues in opposite directions. See Appendix A, *infra*. On the one hand, a federal saving statute, Act of Feb. 25, 1871 (1871 Act), § 4, 16 Stat. 432, phrased in general terms, provides that a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide." 1 U. S. C. § 109. Case law makes clear that the word "repeal" applies when a new statute simply diminishes the penalties that the older statute set forth. See *Warden* v. *Marrero*, 417 U. S. 653, 659–664 (1974); see also *United States* v. *Tynen*, 11 Wall. 88, 92 (1871). Case law also makes clear that penalties are "incurred" under the older statute when an offender becomes subject to them, *i. e.*, commits the underlying conduct that makes the offender liable. See *United States* v. *Reisinger*,

128 U. S. 398, 401 (1888); *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 464–470 (1908).

On the other hand, the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable Guidelines are the ones "in effect on the date the defendant is sentenced." 18 U. S. C. § 3553(a)(4)(A)(ii). And the Fair Sentencing Act requires the Commission to change the Guidelines in the wake of the Act's new minimums, making them consistent with "other guideline provisions and applicable law." § 8(2), 124 Stat. 2374.

Courts that have held that they must apply the old, higher 1986 Drug Act minimums to all pre-Act offenders, including those sentenced after the Fair Sentencing Act took effect, have emphasized that the 1871 Act requires that result unless the Fair Sentencing Act either expressly says or at least by fair implication implies the contrary. See 635 F. 3d, at 339–340; *Sidney*, *supra*, at 906–908; *Tickles*, *supra*, at 214–215; see also *Holcomb*, *supra*, at 446–448 (opinion of Easterbrook, J.). Courts that have concluded that the Fair Sentencing Act's more lenient penalties apply have found in that Act, together with the Sentencing Reform Act and other related circumstances, indicia of a clear congressional intent to apply the new Act's minimums. See *Douglas*, *supra*, at 42–44; *Dixon*, *supra*, at 199–203; see also *Holcomb*, 657 F. 3d, at 454–457 (Williams, J., dissenting from denial of rehearing en banc); *id.*, at 461–463 (Posner, J., dissenting from denial of rehearing en banc). We too take the latter view. Six considerations, taken together, convince us that Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.

First, *the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act.* It is true that the 1871 Act uses the words "expressly provide." 1 U. S. C. § 109. But the Court has long recognized that this saving

statute creates what is in effect a less demanding interpretive requirement. That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. See, *e. g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810); *Reichelderfer* v. *Quinn*, 287 U. S. 315, 318 (1932). And Congress remains free to express any such intention either expressly or by implication as it chooses.

Thus, the Court has said that the 1871 Act "cannot justify a disregard of the will of Congress as manifested either expressly or by *necessary implication* in a subsequent enactment." *Great Northern R. Co.*, *supra*, at 465 (emphasis added). And in a comparable context the Court has emphasized that the Administrative Procedure Act's use of the word "expressly" does not require Congress to use any "magical passwords" to exempt a later statute from the provision. *Marcello* v. *Bonds*, 349 U. S. 302, 310 (1955). Without requiring an "express" statement, the Court has described the necessary indicia of congressional intent by the terms "necessary implication," "clear implication," and "fair implication," phrases it has used interchangeably. *Great Northern R. Co.*, *supra*, at 465, 466; *Hertz* v. *Woodman*, 218 U. S. 205, 218 (1910); *Marrero*, *supra*, at 660, n. 10. One Member of the Court has said we should determine whether "the plain import of a later statute directly conflicts with an earlier statute," and, if so, "the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Lockhart* v. *United States*, 546 U. S. 142, 149 (2005) (SCALIA, J., concurring).

Hence, the Court has treated the 1871 Act as setting forth an important background principle of interpretation. The Court has also assumed Congress is well aware of the background principle when it enacts new criminal statutes.

*E. g.*, *Great Northern R. Co.*, *supra*, at 465; *Hertz*, *supra*, at 217; cf. *Marcello*, *supra*, at 310. And the principle requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves that ordinary interpretive considerations point clearly in that direction. Words such as "plain import," "fair implication," or the like reflect the need for that assurance. And it is that assurance, which we shall assume is conveyed by the phrases "plain import" or "fair implication," that we must look for here.

Second, *the Sentencing Reform Act sets forth a special and different background principle.* That statute says that when "determining the particular sentence to be imposed" in an initial sentencing, the sentencing court "shall consider," among other things, the "sentencing range" established by the Guidelines that are "*in effect on the date the defendant is sentenced.*" 18 U. S. C. § 3553(a)(4)(A)(ii) (emphasis added). Although the Constitution's *Ex Post Facto* Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties. See *Calder* v. *Bull*, 3 Dall. 386, 390–391 (1798); *Collins* v. *Youngblood*, 497 U. S. 37, 41–44 (1990). The Sentencing Commission has consequently instructed sentencing judges to "use the Guidelines Manual in effect on the date that the defendant is sentenced," regardless of when the defendant committed the offense, unless doing so "would violate the *ex post facto* clause." USSG § 1B1.11. And therefore when the Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter. Just as we assume Congress was aware of the 1871 Act's background norm, so we assume that Congress was aware of this different background sentencing principle.

Third, *language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act*

*background principle here.* A section of the Fair Sentencing Act entitled "Emergency Authority for United States Sentencing Commission" requires the Commission to promulgate "as soon as practicable" (and not later than 90 days after August 3, 2010) "conforming amendments" to the Guidelines that "achieve consistency with other guideline provisions and applicable law." §8, 124 Stat. 2374. Read most naturally, "applicable law" refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. §2(a), *id.*, at 2372. As the Commission understood this provision, achieving consistency with "other guideline provisions" means reducing the base offense levels for all crack amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions. 75 Fed. Reg. 66191. And consistency with "other guideline provisions" and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense prior to the new amendments' effective date but were sentenced thereafter. See USSG §1B1.11(a); *e. g.*, USSG App. C, amdts. 706, 711 (Supp. Nov. 2004–Nov. 2007); see also Memorandum from G. Schmitt, L. Reed, & K. Cohen, USSC, to Chair Hinojosa et al., Subject: Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive 23 (Oct. 3, 2007). Cf. USSG App. C, amdt. 571 (Nov. 1987–Nov. 1997) (amendment *increasing* restitution, which may present *ex post facto* and one-book-rule concerns, would apply only to defendants sentenced for postamendment offenses), discussed *post*, at 292 (SCALIA, J., dissenting).

Fourth, *applying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent.* Two individuals with the same number of prior offenses who each engaged in the same criminal con-

duct involving the same amount of crack and were sentenced at the same time would receive radically different sentences. For example, a first-time post-Act offender with five grams of crack, subject to a Guidelines range of 21 to 27 months, could receive two years of imprisonment, while an otherwise identical pre-Act offender would have to receive the 5-year mandatory minimum. Compare USSG § 2D1.1(c) (Nov. 2011) with 21 U. S. C. § 841(b)(1)(B) (2006 ed.). A first-time post-Act 50-gram offender would be subject to a Guidelines range of less than six years of imprisonment, while his otherwise identical pre-Act counterpart would have to receive the 10-year mandatory minimum. Compare USSG § 2D1.1(c) (Nov. 2011) with 21 U. S. C. § 841(b)(1)(A) (2006 ed.).

Moreover, unlike many prechange/postchange discrepancies, the imposition of these disparate sentences involves roughly contemporaneous sentencing, *i. e.*, the same time, the same place, and even the same judge, thereby highlighting a kind of unfairness that modern sentencing statutes typically seek to combat. See, *e. g.*, 28 U. S. C. § 991(b)(1)(B) (purposes of Guidelines-based sentencing include "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"); S. Rep. No. 98–223, p. 74 (1983) (explaining rationale for using same, current Guidelines for all roughly contemporaneous sentencings). Further, it would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long.

Finally, one cannot treat such problems as if they were minor ones. Given the 5-year statute of limitations for federal drug offenses, the 11-month median time between indictment and sentencing for those offenses, and the approximately 5,000 federal crack offenders convicted each year, many pre-Act offenders were not (and will not be) sentenced until after August 3, 2010, when the new, more lenient mandatory minimums took effect. See 18 U. S. C. § 3282(a);

Administrative Office of United States Courts, Judicial Business of the United States Courts, p. 272 (2010) (Table D–10); 2011 Report 191.

Fifth, *not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse.* It would create new anomalies—new sets of disproportionate sentences—not previously present. That is because sentencing courts must apply new Guidelines (consistent with the Fair Sentencing Act's new minimums) to pre-Act offenders, see *supra*, at 275, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them—say, pre-Act offenders who possessed crack in small amounts not directly the subject of mandatory minimums.

Consider, for example, a first-time offender convicted of possessing with intent to distribute four grams of crack. No mandatory sentence, under the 1986 Drug Act or the Fair Sentencing Act, applies to an offender possessing so small an amount. Yet under the old law, the Commission, charged with creating proportionate sentences, had created a Guidelines range of 41 to 51 months for such an offender, a sentence proportional to the 60 months that the 1986 Drug Act required for one who trafficked five grams of crack. See *supra*, at 266–268; USSG §2D1.1(c) (Nov. 2009).

The Fair Sentencing Act, however, requires the Commission to write new Guidelines consistent with the new law. The Commission therefore wrote new Guidelines that provide a sentencing range of 21 to 27 months—about two years—for the first-time, 4-gram offender. See USSG §2D1.1(c) (Nov. 2011). And the Sentencing Reform Act requires application of those new Guidelines to all offenders (including pre-Act offenders) who are sentenced once those new Guidelines take effect. See 18 U. S. C. §3553(a)(4)(A)(ii). Those new Guidelines must take effect and apply to a pre-Act 4-gram offender, for such an offender was never subject to a trumping statutory 1986 Drug Act mandatory

minimum. However, unless the Fair Sentencing Act's new, more lenient mandatory minimums apply to pre-Act offenders, an otherwise identical offender who possessed five grams would have to receive a 5-year sentence. See 21 U. S. C. § 841(b)(1)(B) (2006 ed., Supp. IV).

For example, imagine that on July 1, 2010, both Smith and Jones commit a crack crime identical but for the fact that Smith possesses with intent to distribute four grams of crack and Jones five grams. Both are sentenced on December 1, 2010, after the Fair Sentencing Act and the new Guidelines take effect. Smith's Guidelines sentence would be two years, but unless the Fair Sentencing Act applies, Jones' sentence would have to be five years. The difference of one gram would make a difference, not of only one year as it did before enactment of the Fair Sentencing Act, but instead of three years. Passage of the new Act, designed to have brought about fairer sentences, would here have created a new disparate sentencing "cliff."

Nor can one say that the new Act would produce disproportionalities like this in only a few cases. In fiscal year 2010, 17.8 percent of all crack offenders were convicted of offenses not subject to the 1986 Drug Act's minimums. 2011 Report 191. And since those minimums apply only to some drug offenders and they apply in different ways, one can find many similar examples of disproportionalities. See Appendix B, *infra*. Thus, application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would produce a crazy quilt of sentences, at odds with Congress' basic efforts to achieve more uniform, more proportionate sentences. Congress, when enacting the Fair Sentencing Act, could not have intended any such result.

Sixth, *we have found no strong countervailing consideration*. *Amicus* and the dissent argue that one might read much of the statutory language we have discussed as embodying exceptions, permitting the old 1986 Drug Act mini-

mums to apply to pre-Act offenders sentenced after August 3, 2010, when the Fair Sentencing Act took effect. The words "applicable law" in the new Act, for example, could, linguistically speaking, encompass the 1986 Drug Act minimums applied to those sentenced after August 3. *Post*, at 291–292 (SCALIA, J., dissenting). Moreover, Congress could have insisted that the Commission write new Guidelines with special speed to assure itself that new, post-August 3 offenders—but not old, pre-August 3 offenders—would receive the benefit of the new Act. *Post*, at 292–294. Further, *amicus* and the dissent note that to apply the new Act's minimums to the old, pre-August 3 offenders will create a new disparity—one between pre-Act offenders sentenced before August 3 and those sentenced after that date. *Post*, at 295.

We do not believe that these arguments make a critical difference. Even if the relevant statutory language can be read as *amicus* and the dissent suggest and even if Congress *might* have wanted Guidelines written speedily simply in order to apply them quickly to new offenders, there is scant indication that this is what Congress *did* mean by the language in question nor that such was in fact Congress' motivation. The considerations we have set forth, *supra*, at 276–279, strongly suggest the contrary.

We also recognize that application of the new minimums to pre-Act offenders sentenced after August 3 will create a new set of disparities. But those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends reopening sentencing proceedings concluded prior to a new law's effective date). We have explained how in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced. *Supra*, at 275; compare 18 U. S. C. § 3553(a)(4)(A)(ii) with § 3582(c). And we have explained how, here, continued application of the old 1986

Drug Act minimums to those pre-Act offenders sentenced after August 3 would make matters worse. *Supra*, at 276–279. We consequently conclude that this particular new disparity (between those pre-Act offenders already sentenced and those not yet sentenced as of August 3) cannot make a critical difference.

For these reasons considered as a whole, we conclude that Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act's "plain import" or "fair implication."

B

We add one final point. Several arguments we have discussed involve the language of statutes that determine how new *Guidelines* take effect. *Supra*, at 275–276. What about those who committed an offense prior to August 3 and were sentenced after August 3 but before November 1, 2010—a period *after* the new Act's effective date but *before* the new Guidelines first took effect? Do the Fair Sentencing Act's new mandatory minimums apply to them?

In our view, the new Act's lower minimums apply to them as well. Our reason is that the statute simply instructs the Commission to promulgate new Guidelines "as soon as practicable" (but no later than 90 days after the Act took effect). § 8(1), 124 Stat. 2374. As far as Congress was concerned, the Commission might have (having prepared new Guidelines in advance) promulgated those Guidelines within a few days—perhaps on August 3 itself. At the same time, the Commission possesses ample authority to permit appropriate adjustments to be made in the Guidelines sentences of those sentenced after August 3 but prior to the new Guidelines promulgation. See 28 U. S. C. § 994(u) (power to make Guidelines reductions retroactive); 76 Fed. Reg. 41333–41334 (2011) (amended 18-to-1 Guidelines made retroactive). In any event, courts, treating the Guidelines as advisory, pos-

sess authority to sentence in accordance with the new minimums.

For these reasons, if the Fair Sentencing Act's new minimums apply to all of those sentenced after August 3, 2010 (even if the new Guidelines were not yet ready), it is possible to foresee a reasonably smooth transition. On the other hand, it is difficult to foresee such a transition if the new Act's application is keyed to a later date, thereby leaving the courts unable to take the new Act fully into account, particularly when that circumstance might create additional disparities and uncertainties that courts and the Commission may be helpless to correct. We have no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date.

* * *

We vacate the Court of Appeals' judgments and remand these cases for further proceedings consistent with this opinion.

*It is so ordered.*

## APPENDIXES

### A

Act of Feb. 25, 1871, § 4, 16 Stat. 432, 1 U. S. C. § 109:

**"Repeal of statutes as affecting existing liabilities**

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Sentencing Reform Act of 1984, 18 U. S. C. § 3553(a)(4)(A)(ii):

**"Imposition of a sentence**

" . . . FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. . . . The court, in determining the particular sentence to be imposed, shall consider . . .

. . . . . .

"the kinds of sentence and sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .

. . . . . .

"that . . . are in effect on the date the defendant is sentenced . . . ."

Fair Sentencing Act of 2010, § 8, 124 Stat. 2374:

**"EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION**

"The United States Sentencing Commission shall—

"(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U. S. C. [§] 994 note), as though the authority under that Act had not expired; and

"(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law."

B

The following chart shows the sentencing scheme that would result for first-time pre-Act crack offenders if the 1986 Drug Act's old 100-to-1 mandatory minimums remain in effect after the Fair Sentencing Act's new 18-to-1 Guidelines

became effective. 21 U. S. C. §§ 841(b)(1)(A)–(C) (2006 ed.); USSG §§ 2D1.1(c), 5G1.1(b) (Nov. 2011).

*1986 Drug Act Minimums and Fair Sentencing Act Guidelines for Category I Offenders With No Prior Drug Felonies*

| *Drug Quantity* | *Mandatory Minimum* | *Guidelines Range* | *Sentence* |
|---|---|---|---|
| 1 g | 0 months | 10–16 | 10–16 |
| 2 g | 0 | 15–21 | 15–21 |
| 3 g | 0 | 21–27 | 21–27 |
| 4 g | 0 | 21–27 | 21–27 |
| 5 g | 60 | 21–27 | 60 |
| 10 g | 60 | 27–33 | 60 |
| 15 g | 60 | 33–41 | 60 |
| 20 g | 60 | 41–51 | 60 |
| 25 g | 60 | 51–63 | 60–63 |
| 35 g | 60 | 63–78 | 63–78 |
| 50 g | 120 | 63–78 | 120 |
| 100 g | 120 | 63–78 | 120 |
| 150 g | 120 | 78–97 | 120 |
| 200 g | 120 | 97–121 | 120–121 |
| 500 g | 120 | 121–151 | 121–151 |
| 1,500 g | 120 | 151–188 | 151–188 |

The chart illustrates the disproportionate sentences that such a scheme would create. See *supra*, at 278–279. For one thing, it would create sentencing "cliffs" at the 1986 Drug Act's old triggering amounts of 5 grams and 50 grams (where the old minimums would entirely trump the new Guidelines), resulting in radically different Guidelines sentences for small differences in quantity. For another, because of those "cliffs," the scheme would create similar Guidelines sen-

tences for offenders who dealt in radically different amounts of crack, *e. g.*, 50 grams versus 500 grams.

To be sure, as *amicus* points out, Congress has provided two mechanisms through which an offender may escape an otherwise applicable mandatory minimum, diminishing this problem for some offenders. First, an offender may escape a minimum by providing substantial assistance in the investigation or prosecution of another person. 18 U. S. C. § 3553(e); Fed. Rule Crim. Proc. 35(b); see also 28 U. S. C. § 994(n); USSG § 5K1.1. Second, under 18 U. S. C. § 3553(f), drug offenders who have little or no criminal history and who satisfy other requirements in the provision may obtain "safety valve" relief. See also USSG § 5C1.2. And because of these mechanisms a substantial portion of first-time offenders are relieved of application of a mandatory minimum. However, offenders with a criminal history category of II or higher are ineligible for "safety valve" relief; they escape application of a minimum at a much lower percentage. See 2011 Report 193 (Table 8–8).

*Crack Offender Categories by Application of 1986 Drug Act Mandatory Min. (FY 2010)*

| *Offender Category* | *Total Offenders* | *Total With Quantity Carrying Mandatory Min.* | *Percent With Quantity Carrying Mandatory Min.* | *Total Relieved of Mandatory Min. Appl.* | *Percent Relieved of Mandatory Min. Appl.* |
|---|---|---|---|---|---|
| I | 1,055 | 890 | 84.4% | 525 | 59.0% |
| II | 556 | 445 | 80.0% | 129 | 29.0% |
| III | 865 | 703 | 81.3% | 208 | 29.6% |
| IV | 556 | 469 | 84.4% | 124 | 26.4% |
| V | 380 | 308 | 81.1% | 89 | 28.9% |
| VI | 1,345 | 1,086 | 80.7% | 332 | 30.6% |
| All | 4,757 | 3,901 | 82.2% | 1,407 | 36.0% |

Yet similar sentencing anomalies would result for repeat offenders if the 1986 Drug Act's minimums remain in effect after the Fair Sentencing Act's Guidelines became effective. Take, for example, Category II offenders.

*1986 Drug Act Minimums and Fair Sentencing Act Guidelines for Category II Offenders With No Prior Drug Felonies*

| *Drug Quantity* | *Mandatory Minimum* | *Guidelines Range* | *Sentence* |
|---|---|---|---|
| 1 g | 0 months | 12–18 | 12–18 |
| 2 g | 0 | 18–24 | 18–24 |
| 3 g | 0 | 24–30 | 24–30 |
| 4 g | 0 | 24–30 | 24–30 |
| 5 g | 60 | 24–30 | 60 |
| 10 g | 60 | 30–37 | 60 |
| 15 g | 60 | 37–46 | 60 |
| 20 g | 60 | 46–57 | 60 |
| 25 g | 60 | 57–71 | 60–71 |
| 35 g | 60 | 70–87 | 70–87 |
| 50 g | 120 | 70–87 | 120 |
| 100 g | 120 | 70–87 | 120 |
| 150 g | 120 | 87–108 | 120 |
| 200 g | 120 | 108–135 | 120–135 |
| 500 g | 120 | 135–168 | 135–168 |
| 1,500 g | 120 | 168–210 | 168–210 |

As the chart illustrates, for Category II offenders accountable for 5 to 22 grams of crack or for 50 to 195 grams, the 100-to-1 minimums would entirely trump the 18-to-1 Guidelines,

producing the same anomalies—dissimilar sentences for similar quantities and similar sentences for dissimilar quantities—described above.

In contrast, a scheme with the Fair Sentencing Act's 18-to-1 minimums and new Guidelines produces the proportionality in sentencing that Congress intended in enacting the Sentencing Reform Act and the Fair Sentencing Act.

*Fair Sentencing Act Minimums and Guidelines for Category II Offenders With No Prior Drug Felonies*

| *Drug Quantity* | *Mandatory Minimum* | *Guidelines Range* | *Sentence* |
|---|---|---|---|
| 1 g | 0 months | 12–18 | 12–18 |
| 2 g | 0 | 18–24 | 18–24 |
| 3 g | 0 | 24–30 | 24–30 |
| 4 g | 0 | 24–30 | 24–30 |
| 5 g | 0 | 24–30 | 24–30 |
| 10 g | 0 | 30–37 | 30–37 |
| 15 g | 0 | 37–46 | 37–46 |
| 20 g | 0 | 46–57 | 46–57 |
| 25 g | 0 | 57–71 | 57–71 |
| 35 g | 60 | 70–87 | 70–87 |
| 50 g | 60 | 70–87 | 70–87 |
| 100 g | 60 | 70–87 | 70–87 |
| 150 g | 60 | 87–108 | 87–108 |
| 200 g | 60 | 108–135 | 108–135 |
| 500 g | 120 | 135–168 | 135–168 |
| 1,500 g | 120 | 168–210 | 168–210 |

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In the Fair Sentencing Act of 2010, 124 Stat. 2372, Congress increased the threshold quantities of crack cocaine required to trigger the 5- and 10-year mandatory minimum penalties associated with offenses involving the manufacture, distribution, or dispensation of the drug, and eliminated the 5-year mandatory minimum previously associated with simple possession of it. The Act is silent as to whether these changes apply to defendants who committed their offenses before, but whose sentencing proceedings occurred after, its August 3, 2010, effective date. In my view, the general saving statute, 1 U. S. C. § 109, dictates that the new, more lenient mandatory minimum provisions do not apply to such preenactment offenders.

I

The Court starts off on the right foot by acknowledging, *ante*, at 272–273, that the ameliorative amendments at issue here trigger application of the general saving statute. Enacted in 1871 to reverse the common-law rule that the repeal or amendment of a criminal statute would abate all nonfinal convictions under the repealed or amended statute, see *Warden* v. *Marrero*, 417 U. S. 653, 660 (1974), the saving statute provides in relevant part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." 1 U. S. C. § 109.

By reducing the statutory penalties for crack cocaine offenses, the Fair Sentencing Act "repeal[ed]" the former penalties; for defendants who committed their offenses (and

hence "incurred" the penalties) while the prior law was in force, § 109 directs that the prior law "shall be treated as still remaining in force."

Although § 109 purports to require that subsequent legislation opting out of its default rule must do so "expressly," the Court correctly observes, *ante*, at 274, that express-statement requirements of this sort are ineffective. See *Lockhart* v. *United States*, 546 U. S. 142, 147–150 (2005) (SCALIA, J., concurring). Because "one legislature cannot abridge the powers of a succeeding legislature," *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810), a statute is "alterable when the legislature shall please to alter it," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Consequently, the express-statement requirement of § 109 is itself subject to repeal on the same terms as any other statute, which is to say that a repeal may be accomplished by implication. See, *e. g.*, *Marrero*, *supra*, at 659–660, n. 10; *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465 (1908).

Understanding the interpretive problem posed by these cases as one of implied repeal helps to explain the Court's observation, *ante*, at 274–275, that what is required to override § 109's default rule is a clear demonstration of congressional intent to do so. Admittedly, our cases have not spoken with the utmost clarity on this point. In *Marrero*, for example, we suggested that a "fair implication" from a subsequently enacted statute would suffice, 417 U. S., at 660, n. 10, while in *Hertz* v. *Woodman*, 218 U. S. 205 (1910), we used the phrase "*clear* implication," *id.*, at 218 (emphasis added); see also *ibid.* ("plain implication"). In *Great Northern R. Co.*, we split the difference, stating at one point that § 109 controls unless Congress expresses a contrary intention "either expressly or by *necessary* implication in a subsequent enactment," 208 U. S., at 465 (emphasis added), but suggesting at another point that a "fair implication," *id.*, at 466, would do. In my view, the "fair implication" formulation understates the burden properly imposed on a defendant who would

claim an implicit exception from § 109's terms. Because the effect of such an exception is to work a *pro tanto* repeal of § 109's application to the defendant's case, the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals. See, *e. g.*, *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 381 (1996); *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Thus, we should conclude that Congress has deviated from § 109 (or any similar statute establishing a background interpretive principle) only when the "*plain* import of a later statute directly conflicts" with it. *Lockhart*, *supra*, at 149 (SCALIA, J., concurring) (emphasis added).

## II

### A

The considerations relied upon by the Court do not come close to satisfying the demanding standard for repeal by implication. As an initial matter, there is no persuasive force whatever to the Court's observation that continuing to apply the prior mandatory minimums to preenactment offenders would "involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long." *Ante*, at 277. That is true *whenever* Congress reduces a criminal penalty, and so is a consequence that Congress affirmatively *embraced* when it said in § 109 that ameliorative amendments to criminal statutes do not apply to preenactment conduct. Nor does it matter that Congress has instructed district courts, when applying the Federal Sentencing Guidelines, to apply the version in force on the date of sentencing, with the object of reducing disparities in sentences between similar defendants who are sentenced for the same conduct at the same time. See 18 U. S. C. § 3553(a)(4)(A)(ii). The presumption against implied repeals requires us to give effect, if possible, to both

§ 3553(a)(4)(A)(ii) and § 109. "The courts are not at liberty to pick and choose among congressional enactments, and when 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." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). We may readily do so here by holding that § 3553(a)(4)(A)(ii) applies to Guidelines amendments, and § 109 to statutory ones.

The Court also stresses that the Fair Sentencing Act instructs the Sentencing Commission to promulgate "as soon as practicable" (and not later than 90 days after August 3, 2010) "such conforming amendments" to the Sentencing Guidelines "as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." § 8, 124 Stat. 2374. The argument goes that, because the Commission implemented this directive by reducing the Guidelines ranges for crack cocaine offenses to track the 18-to-1 crack-to-powder ratio reflected in the new mandatory minimums, see 75 Fed. Reg. 66191 (2010), and because the general rule is that a sentencing court should apply the version of the Guidelines in effect at the time of sentencing, see 18 U. S. C. § 3553(a)(4)(A)(ii), Congress must have understood that the new mandatory minimums would apply immediately, since otherwise there would be a mismatch between the statutory penalties and Guidelines ranges.

That conclusion simply does not follow. For one thing, the argument begs the very question presented here: What is the "applicable law" relevant to preenactment offenders who are sentenced after enactment? The Commission could well have answered this question by concluding that, in light of § 109, the law applicable to such offenders is the pre-Act mandatory minimums. It might therefore have retained, as to those offenders, the existing Guidelines ranges reflecting a higher crack-to-powder ratio. Although rare, it is not unheard of for the Commission to establish Guidelines whose application turns on the date of commission of the defend-

ant's offense. See United States Sentencing Commission, Guidelines Manual § 5E1.1(g)(1) (Nov. 2011) (governing restitution for offenses committed on or after November 1, 1997, and providing that the prior version of the Guideline shall govern all other cases); *id.*, § 8B1.1(f)(1) (same for restitution obligations of organizational defendants). Of course, the Commission did not interpret the Fair Sentencing Act's directive in this manner. But the possibility that it *could* (not to mention the probability that it *should*) have done so illustrates the folly of basing inferences about what Congress intended when it passed the Fair Sentencing Act on decisions the Commission would not make until several months later.[1]

Moreover, even if one takes it as given that the Commission's new crack cocaine Guidelines would apply the lower 18-to-1 ratio to all defendants sentenced after the new Guidelines were put in place, it would not follow that Congress *necessarily* expected the new mandatory minimums to apply to preenactment offenders. The directive to update the Guidelines on an emergency basis is equally consistent with Congress's seeking to avoid a mismatch between the Guidelines and the statutory penalties for *postenactment* offenders sentenced shortly after the Act's effective date.

Petitioners and the Government discount this explanation, noting that because of the lags associated with investigating and prosecuting drug offenses, most of the defendants sentenced on the 91st day after the Fair Sentencing Act's enactment were sure to be pre-Act offenders. If Congress did not expect the new mandatory minimums to apply to such offenders, they say, there would have been no need to ensure

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[1] Congressional reliance on future Commission action might be plausible if the Commission had a settled practice of tying reductions in statutory mandatory minimums to immediately applicable reductions in Guidelines ranges, without any distinction based on the timing of the defendant's offense. But the Court does not cite any such settled practice, and I am not aware of any. Presumably there has been no occasion for a practice to develop either way, since congressional legislation reducing criminal penalties is, in this day and age, very rare.

that revised Guidelines were in place so quickly. But *most* is not *all*, and it would have been entirely sensible for Congress to worry that *some* post-Act offenders—offenders clearly subject to the new mandatory minimums—would nonetheless be sentenced under outdated Guidelines if the Guidelines were not revised in short order.

The 11-month median time between indictment and sentencing for non-marijuana federal drug offenses, see Administrative Office of United States Courts, Judicial Business of the United States Courts, p. 272 (2010) (Table D–10), does not establish that prompt issuance of new Guidelines for post-Act offenders could not have been a pressing concern. Because that is a *median* figure, it shows that half of all drug defendants are sentenced sooner than 11 months after being indicted. And it is only an *aggregate* figure. For drug possession offenses—relevant here because the Fair Sentencing Act eliminated the mandatory minimum sentence previously applicable to simple possession of crack cocaine, see § 3, 124 Stat. 2372—the equivalent figure was just 5.4 months from indictment to sentencing. The pace of criminal cases also varies considerably from district to district. In the Eastern District of Virginia, for instance, the median time from indictment to sentencing for all criminal cases was just 3.6 months. See Judicial Business, *supra*, at 252 (Table D–6). What is more, without the Fair Sentencing Act's emergency directive, amendments to the Guidelines to implement the Act likely would not have been put in place until more than a year after its passage.[2] In the interim, a great many post-

[2] In the ordinary course, the Commission may submit proposed Guidelines amendments to Congress "at or after the beginning of a regular session of Congress, but not later than the first day of May." 28 U. S. C. § 994(p). Unless disapproved by Congress, the proposed amendments "take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment . . . is submitted." *Ibid.* As a matter of practice, the Commission has adopted November 1 as the default effective date for its proposed amendments. See United States Sentencing Commission, Rules of Practice and Proce-

Act offenders might have been sentenced under the outdated Guidelines, even though they were clearly entitled to take advantage of the statutory amendments. Because the emergency authority conferred on the Commission can reasonably be understood as directed at *this* mismatch problem, it creates no clear implication that Congress expected the new statutory penalties to apply to preenactment offenders.

The Court's last argument is that continuing to apply the prior mandatory minimums to preenactment offenders would lead to anomalous, disproportionate sentencing results. It is true enough, as the Court notes, *ante*, at 278–279, that applying the prior mandatory minimums in tandem with the new Guidelines provisions—which track the new, more lenient mandatory minimums—leads to a series of "cliffs" at the mandatory minimum thresholds. But this does not establish that Congress clearly meant the new mandatory minimums to apply to preenactment offenders. As noted above, *supra*, at 291–293, there is no reason to take the Guidelines amendments ultimately promulgated by the Commission as a given when evaluating what Congress would have understood when the Fair Sentencing Act was enacted. The Commission could have promulgated amendments that ameliorated this problem by retaining the old Guidelines ranges for preenactment offenders.

Moreover, although the cliffs produced by the mismatch between Guidelines and statutory penalties are admittedly inconsistent with the premise of the Guidelines system that sentences should vary in proportion to the gravity of the offense and the culpability of the offender, see 18 U. S. C.

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dure, Rule 4.1 (amended Aug. 2007). Because the Fair Sentencing Act was enacted on August 3, 2010—after May 1—there would have been no opportunity for the Commission to submit proposed amendments to Congress until January 2011. Given the 180-day waiting period, the amendments could not have gone into force until the very end of June 2011 at the earliest. And in all likelihood, they would not have been effective until November 1, 2011.

§ 3553(a)(1), (a)(2)(A), the same objection can be lodged against *any* mandatory minimum that trumps an otherwise applicable Guidelines range. And it is not as though the results of continuing to apply the pre-Act statutory penalties are so senseless as to establish that Congress must not have intended them. Retaining the old mandatory minimums ensures at least rough equivalence in sentences for defendants who committed their crimes at the same time, but were sentenced at different times—even as it leads to disparities for defendants who are sentenced at the same time, but committed their offenses at different times. In light of this plausible basis for continuing to apply the prior law to preenactment offenders, there is no reason to conclude that Congress *necessarily* expected the new statutory penalties to apply.

B

Petitioners and the Government press a handful of additional arguments which require only brief discussion. They first contend that an intention to apply the new mandatory minimums to preenactment offenders can be inferred from § 10 of the Fair Sentencing Act, 124 Stat. 2375, which instructs the Commission to study the effects of the new law and make a report to Congress within five years. The suggestion is that, if the statutory penalties do not apply to preenactment offenders, then the Act would have no effect on many defendants sentenced during the study period, which would in turn undermine Congress's goal of compiling useful data. This is makeweight. Whether or not the new mandatory minimums are held applicable to preenactment offenders, they will be applied to many postenactment offenders during the study period, and the Commission will have the opportunity to collect useful data. The study provision simply has nothing to say about the question at issue here.

The Government also notes that the Senate bill that ultimately became the Fair Sentencing Act was based on an ear-

lier bill which contained a provision that would have delayed the Act's effective date until 180 days after passage, and specifically provided that "[t]here shall be no retroactive application of any portion of this Act." H. R. 265, 111th Cong., 1st Sess., § 11 (2009). Even if one is inclined to base inferences about statutory meaning on unenacted versions of the relevant bill, but see *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 668 (2006) (SCALIA, J., dissenting), this argument from drafting history is unpersuasive. That Congress considered and rejected a proposal that would have delayed application of the Act until 180 days after passage says nothing about whether the version finally enacted applies to defendants whose criminal conduct pre-dated the Act. Moreover, the same bill would have provided permissive authority for the Commission to promulgate amended Guidelines on an emergency basis, see § 8(a), notwithstanding its delayed effective date provision. This point undercuts the argument that emergency amendment authority and immediate application of the new statutory penalties go hand in hand.

Petitioners finally appeal to the rule of lenity and the canon of constitutional avoidance. But the rule of lenity has no application here, because the background principle supplied by § 109 serves to remove the ambiguity that is a necessary precondition to invocation of the rule. See *Deal* v. *United States*, 508 U. S. 129, 135 (1993). The canon of constitutional avoidance also has no application here. Although many observers viewed the 100-to-1 crack-to-powder ratio under the prior law as having a racially disparate impact, see, *e. g.*, United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (Apr. 1997), only *intentional* discrimination may violate the equal protection component of the Fifth Amendment's Due Process Clause. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 217 (1995). There is thus no constitutional doubt triggered

by application of the prior mandatory minimums, much less the sort of "serious constitutional doub[t]" required to invoke the avoidance canon. *Clark* v. *Martinez*, 543 U. S. 371, 381 (2005).

* * *

In the end, the mischief of the Court's opinion is not the result in these particular cases, but rather the unpredictability it injects into the law for the future. The Court's decision is based on "[s]ix considerations, taken together," *ante*, at 273, and we are not told whether any one of these considerations might have justified the Court's result in isolation, or even the relative importance of the various considerations. One of them (the Commission's emergency authority to issue conforming amendments to the Guidelines) is a particular feature of the statute at issue in these cases, but another (the fact that applying the prior statutory penalties alongside the new Guidelines leads to a mismatch) is a general feature of a sentencing scheme that calibrates Guidelines ranges to the statutory mandatory minimums for a given offense. Are we to conclude that, after the Sentencing Reform Act, § 109 has no further application to criminal penalties, at least when statutory amendments lead to modification of the Guidelines? Portions of the Court's opinion could be understood to suggest that result, but the Court leaves us in suspense.

That is most unfortunate, because the whole point of § 109, as well as other provisions of the Dictionary Act, see 1 U. S. C. §§ 1–8, and the definitional provisions of the federal criminal law, see 18 U. S. C. §§ 5–27 (2006 ed. and Supp. IV), is to provide a stable set of background principles that will promote effective communication between Congress and the courts. In this context, stability is ensured by a healthy respect for our presumption against implied repeals, which demands a clear showing before we conclude that Congress has deviated from one of these background interpretive principles. Because the Court's result cannot be reconciled with this approach, I respectfully dissent.

Syllabus

# KNOX ET AL. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000

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

No. 10–1121. Argued January 10, 2012—Decided June 21, 2012

California law permits public-sector employees in a bargaining unit to decide by majority vote to create an "agency shop" arrangement under which all the employees are represented by a union. Even employees who do not join the union must pay an annual fee for "chargeable expenses," *i. e.*, the cost of nonpolitical union services related to collective bargaining. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, a public-sector union can bill nonmembers for chargeable expenses but may not require them to fund its political or ideological projects. *Teachers* v. *Hudson*, 475 U. S. 292, 302–311, sets out requirements that a union must meet in order to collect regular fees from nonmembers without violating their rights.

In June 2005, respondent, a public-sector union (SEIU), sent to California employees its annual *Hudson* notice, setting and capping monthly dues and estimating that 56.35% of its total expenditures in the coming year would be chargeable expenses. A nonmember had 30 days to object to full payment of dues but would still have to pay the chargeable portion. The notice stated that the fee was subject to increase without further notice. That same month, the Governor called for a special election on, *inter alia*, two ballot propositions opposed by the SEIU. After the 30-day objection period ended, the SEIU sent a letter to unit employees announcing a temporary 25% increase in dues and a temporary elimination of the monthly dues cap, billing the move as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." The purpose of the fund was to help achieve the union's political objectives in the special election and in the upcoming November 2006 election. The union noted that the fund would be used "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." Nonunion employees were not given any choice as to whether they would pay into the fund.

Petitioners, on behalf of nonunion employees who paid into the fund, brought a class action against the SEIU alleging violation of their First Amendment rights. The Federal District Court granted petition-

ers summary judgment. Ruling that the special assessment was for entirely political purposes, it ordered the SEIU to send a new notice giving class members 45 days to object and to provide those who object a full refund of contributions to the fund. The Ninth Circuit reversed, concluding that *Hudson* prescribed a balancing test under which the proper inquiry is whether the SEIU's procedures reasonably accommodated the interests of the union, the employer, and the nonmember employees.

*Held:*

1. This case is not moot. Although the SEIU offered a full refund to all class members after certiorari was granted, a live controversy remains. The voluntary cessation of challenged conduct does not ordinarily render a case moot because that conduct could be resumed as soon as the case is dismissed. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289. Since the SEIU continues to defend the fund's legality, it would not necessarily refrain from collecting similar fees in the future. Even if concerns about voluntary cessation were inapplicable because petitioners did not seek prospective relief, there would still be a live controversy as to the adequacy of the refund notice the SEIU sent pursuant to the District Court's order. Pp. 307–308.

2. Under the First Amendment, when a union imposes a special assessment or dues increase levied to meet expenses that were not disclosed when the regular assessment was set, it must provide a fresh notice and may not exact any funds from nonmembers without their affirmative consent. Pp. 308–323.

(a) A close connection exists between this Nation's commitment to self-government and the rights protected by the First Amendment, see, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45, 52–53, which creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference, *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 202. The government may not prohibit the dissemination of ideas it disfavors, nor compel the endorsement of ideas that it approves. See, *e. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382. And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed. See, *e. g.*, *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623. Closely related to compelled speech and compelled association is compelled funding of the speech of private speakers or groups. Compulsory subsidies for private speech are thus subject to exacting First Amendment scrutiny and cannot be sustained unless, first, there is a comprehensive regulatory scheme involving a "mandated association" among those who are re-

quired to pay the subsidy, *United States* v. *United Foods, Inc.*, 533 U. S. 405, and, second, compulsory fees are levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association," *ibid.* Pp. 308–310.

(b) When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455. This form of compelled speech and association imposes a "significant impingement on First Amendment rights." *Ibid.* The justification for permitting a union to collect fees from nonmembers—to prevent them from free-riding on the union's efforts—is an anomaly. Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—rather than exempting them unless they opt in—represents a remarkable boon for unions, creating a risk that the fees nonmembers pay will be used to further political and ideological ends with which they do not agree. Thus, *Hudson*, far from calling for a balancing of rights or interests, made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights, 475 U. S., at 302–303, and it cited cases holding that measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest. Pp. 310–314.

(c) There is no justification for the SEIU's failure to provide a fresh *Hudson* notice. *Hudson* rests on the principle that nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having "a fair opportunity" to assess the impact of paying for nonchargeable union activities. 475 U. S., at 303. The SEIU's procedure cannot be considered to have met *Hudson*'s requirement that fee-collection procedures be carefully tailored to minimize impingement on First Amendment rights. The SEIU argues that nonmembers who objected to the special assessment but were not given the opportunity to opt out would have been given the chance to recover the funds by opting out when the next annual notice was sent, and that the amount of dues payable the following year by objecting nonmembers would decrease if the special assessment were found to be for nonchargeable purposes. But this decrease would not fully recompense nonmembers, who would not have paid to support the special assessment if given the choice. In any event, even a full refund would not undo the First Amendment violations, since the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full. Pp. 314–317.

Syllabus

(d) The SEIU's treatment of nonmembers who opted out when the initial *Hudson* notice was sent also ran afoul of the First Amendment. They were required to pay 56.35% of the special assessment even though all the money was slated for nonchargeable, electoral uses. And the SEIU's claim that the assessment was a windfall because chargeable expenses turned out to be 66.26% is unpersuasive. First, the SEIU's understanding of the breadth of chargeable expenses is so expansive that it is hard to place much reliance on its statistics. "Lobbying the electorate," which the SEIU claims is chargeable, is nothing more than another term for supporting political causes and candidates. Second, even if the SEIU's statistics are accurate, it does not follow that it was proper to charge objecting nonmembers any particular percentage of the special assessment. If, as the SEIU argues, it is not possible to accurately determine in advance the percentage of union funds that will be used for an upcoming year's chargeable purposes, there is a risk that unconsenting nonmembers will have paid too much or too little. That risk should be borne by the side whose constitutional rights are not at stake. If the nonmembers pay too much, their First Amendment rights are infringed. But, if they pay too little, no constitutional right of the union is violated because it has no constitutional right to receive any payment from those employees. Pp. 317–322.

628 F. 3d 1115, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 323. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 328.

*W. James Young* argued the cause for petitioners. With him on the briefs were *Milton L. Chappell*, *William L. Messenger*, *Neal Kumar Katyal*, and *Dominic F. Perella.*

*Jeremiah Collins* argued the cause for respondent. On the brief were *Jeffrey B. Demain* and *Scott A. Kronland.**

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**Deborah J. La Fetra*, *Harold E. Johnson*, *Timothy Sandefur*, *Ilya Shapiro*, *John C. Eastman*, *Anthony T. Caso*, and *J. Scott Detamore* filed a brief for the Pacific Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Laurence Gold;* and for the National Education Association by *Mr. Collins* and *Alice O'Brien.*

JUSTICE ALITO delivered the opinion of the Court.

In this case, we decide whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities.

## I

### A

Under California law, public-sector employees in a bargaining unit may decide by majority vote to create an "agency shop" arrangement under which all the employees are represented by a union selected by the majority. Cal. Govt. Code Ann. § 3502.5(a) (West 2010). While employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called chargeable expenses). See *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 524 (1991); *Machinists* v. *Street*, 367 U. S. 740, 760 (1961).

Our prior cases have recognized that such arrangements represent an "impingement" on the First Amendment rights of nonmembers. *Teachers* v. *Hudson*, 475 U. S. 292, 307, n. 20 (1986). See also *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181 (2007) ("[A]gency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); *Street*, *supra*, at 749 (union shop presents First Amendment "questions of the utmost gravity"). Thus, in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), we held that a public-sector union, while permitted to bill nonmembers for chargeable expenses, may not require nonmembers to fund its political and ideological projects. And in *Hudson*, we identified procedural requirements that a union must meet in order to collect fees from nonmembers without violating their rights. 475 U. S., at 302–311. The First Amendment, we held, does not permit

a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining. *Id.*, at 305. In the interest of administrative convenience, however, we concluded that a union "cannot be faulted" for calculating the fee that nonmembers must pay "on the basis of its expenses during the preceding year." *Id.*, at 307, n. 18.

*Hudson* concerned a union's regular annual fees. The present case, by contrast, concerns the First Amendment requirements applicable to a special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set.

B

In June 2005, respondent, the Service Employees International Union, Local 1000 (SEIU), sent out its regular *Hudson* notice informing employees what the agency fee would be for the year ahead. The notice set monthly dues at 1% of an employee's gross monthly salary but capped monthly dues at $45. Based on the most recently audited year, the SEIU estimated that 56.35% of its total expenditures in the coming year would be dedicated to chargeable collective-bargaining activities. Thus, if a nonunion employee objected within 30 days to payment of the full amount of union dues, the objecting employee was required to pay only 56.35% of total dues. The SEIU's notice also included a feature that was not present in *Hudson:* The notice stated that the agency fee was subject to increase at any time without further notice.

During this time, the citizens of the State of California were engaged in a wide-ranging political debate regarding state budget deficits, and in particular the budget consequences of growing compensation for public employees backed by powerful public-sector unions. On June 13, 2005, Governor Arnold Schwarzenegger called for a special election to be held in November 2005, where voters would

consider various ballot propositions aimed at state-level structural reforms. Two of the most controversial issues on the ballot were Propositions 75 and 76. Proposition 75 would have required unions to obtain employees' affirmative consent before charging them fees to be used for political purposes. Proposition 76 would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation. The SEIU joined a coalition of public-sector unions in vigorously opposing these measures. Calling itself the "Alliance for a Better California," the group would eventually raise "more than $10 million, with almost all of it coming from public employee unions, including $2.75 million from state worker unions, $4.7 million from the California Teachers Association, and $700,000 from school workers unions."[1]

On July 30, shortly after the end of the 30-day objection period for the June *Hudson* notice, the SEIU proposed a temporary 25% increase in employee fees, which it billed as an "Emergency Temporary Assessment to Build a Political Fight-Back Fund." App. 25. The proposal stated that the money was needed to achieve the union's political objectives, both in the special November 2005 election and in the November 2006 election. *Id.*, at 26. According to the proposal, money in the Fight-Back Fund would be used "for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California." *Ibid.* The proposal specifically stated that "[t]he Fund will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc." *Ibid.* It noted that "all other public worker unions are in the process of raising the extraordinary funds needed to defeat the Governor."

[1] Marinucci & Wildermuth, Schwarzenegger Adds Prop. 75 to His Agenda, San Francisco Chronicle, Sept. 18, 2005, p. A–17.

*Id.*, at 27. And it concluded: "Each of us must do our part to turn back these initiatives which would allow the Governor to destroy our wages and benefits and even our jobs, and threaten the well-being of all Californians." *Ibid.* On August 27, the SEIU's General Council voted to implement the proposal.

On August 31, the SEIU sent out a letter addressed to "Local 1000 Members and Fair Share Fee Payers," announcing that, for a limited period, their fees would be raised to 1.25% of gross monthly salary and the $45-per-month cap on regular dues would not apply. *Id.*, at 31. The letter explained that the union would use the fund to "defeat Proposition 76 and Proposition 75 on November 8," and to "defeat another attack on [its] pension plan" in June 2006. *Ibid.* The letter also informed employees that, in the following year, the money would help "to elect a governor and a legislature who support public employees and the services [they] provide." *Ibid.*

After receiving this letter, one of the plaintiffs in this case called the SEIU's offices to complain that the union was levying the special assessment for political purposes without giving employees a fair opportunity to object. An SEIU area manager responded that "even if [the employee] objected to the payment of the full agency fee, there was nothing he could do about the September increase for the Assessment." *Knox* v. *Westly*, No. 2:05–cv–02198, 2008 WL 850128, *3 (ED Cal., Mar. 28, 2008). "She also stated that 'we are in the fight of our lives,' that the Assessment was needed, and that there was nothing that could be done to stop the Union's expenditure of that Assessment for political purposes." *Ibid.* As a consolation, however, those employees who had filed timely objections after the regular June *Hudson* notice were required to pay only 56.35% of the temporary increase.

Petitioners filed this class-action suit on behalf of 28,000 nonunion employees who were forced to contribute money to the Political Fight-Back Fund. Some of the class members

had filed timely objections after receiving the regular *Hudson* notice in June, and others had not. Those who had objected argued that it was wrong to require them to pay 56.35% of the temporary assessment, which had been billed as intended for use in making political expenditures that they found objectionable. Those who had not objected after receiving the June *Hudson* notice contended that they should have received a new opportunity to object when the SEIU levied the special assessment for its Political Fight-Back Fund.

The District Court granted summary judgment for petitioners, finding that the union "fully intended to use the 12 million additional dollars it anticipated to raise for political purposes." 2008 WL 850128, *7. "Even if every cent of the assessment was not intended to be used for entirely political purposes," the court stated, "it is clear that the Union's intent was to depart drastically from its typical spending regime and to focus on activities that were political or ideological in nature." *Id.*, at *8. In light of this fact, the court held that it would be inappropriate for the union to rely on previous annual expenditures to estimate that 56.35% of the new fee would go toward chargeable expenses. The court ordered the SEIU to send out a new notice giving all class members 45 days to object and to provide those who objected with a full refund of their contributions to the Political Fight-Back Fund. *Id.*, at *12.

A divided panel of the Ninth Circuit reversed. *Knox* v. *California State Employees Assn., Local 1000*, 628 F. 3d 1115 (2010). According to the panel majority, *Hudson* prescribed the use of a balancing test. 628 F. 3d, at 1119–1120. The majority therefore inquired whether the procedure that the SEIU employed reasonably accommodated the interests of the union, the employer, and nonmember employees. *Id.*, at 1120–1123. Judge Wallace dissented, arguing that the majority had misinterpreted *Hudson* and sanctioned the

abridgment of the First Amendment rights of nonmembers. 628 F. 3d, at 1123–1139.

We granted certiorari. 564 U. S. 1035 (2011).

## II

The SEIU argues that we should dismiss this case as moot. In opposing the petition for certiorari, the SEIU defended the decision below on the merits. After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. See *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278, 283–284 (2001). The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed. See *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982). And here, since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.

The union argues that concerns about voluntary cessation are inapplicable in this case because petitioners do not seek any prospective relief. See Motion To Dismiss as Moot 11–12. But even if that is so, the union's mootness argument fails because there is still a live controversy as to the adequacy of the SEIU's refund notice. A case becomes moot only when it is impossible for a court to grant "'"any effectual relief whatever" to the prevailing party.'" *Erie* v. *Pap's A. M.*, 529 U. S. 277, 287 (2000) (quoting *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 12 (1992), in turn quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895)). "[A]s long as the parties have a concrete interest, however small,

in the outcome of the litigation, the case is not moot." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 442 (1984).

The District Court ordered the SEIU to send out a "proper" notice giving employees an adequate opportunity to receive a full refund. 2008 WL 850128, *12. Petitioners argue that the notice that the SEIU sent was improper because it includes a host of "conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund." Brief for Petitioners in Opposition to Motion To Dismiss 19. In particular, petitioners allege that the union has refused to accept refund requests by fax or e-mail and has made refunds conditional upon the provision of an original signature and a Social Security number. *Id.*, at 18–19. As this dispute illustrates, the nature of the notice may affect how many employees who object to the union's special assessment will be able to get their money back. The union is not entitled to dictate unilaterally the manner in which it advertises the availability of the refund.

For this reason, we conclude that a live controversy remains, and we proceed to the merits.

## III

### A

Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment. See, *e. g.*, *Brown* v. *Hartlage*, 456 U. S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed"); *Buckley* v. *Valeo*, 424 U. S. 1, 93, n. 127 (1976) *(per curiam)* ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish"); *Cox* v.

*Louisiana*, 379 U. S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy"); *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring); *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U. S. 454, 465 (1907) (Harlan, J., dissenting).

The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 208 (2008). See also *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 51 (1988); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966). The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–448 (1969) *(per curiam); West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943); *Wooley* v. *Maynard*, 430 U. S. 705, 713–715 (1977); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 797 (1988) (The First Amendment protects "the decision of both what to say and what not to say" (emphasis deleted)). And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–461 (1958).

Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups. See *Abood*, 431 U. S., at 222–223. In *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), we considered the constitutionality of a state scheme that compelled such funding. The subject of the speech at issue—promoting the sale of mushrooms—was not one that is likely to stir the passions of many, but the mundane commercial

nature of that speech only highlights the importance of our analysis and our holding.

The federal Mushroom Promotion, Research, and Consumer Information Act required that fresh mushroom handlers pay assessments used primarily to fund advertisements promoting mushroom sales. A large producer objected to subsidizing these generic ads, and even though we applied the less demanding standard used in prior cases to judge laws affecting commercial speech, we held that the challenged scheme violated the First Amendment. We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. *Id.*, at 414. Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, *supra*, at 623. Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association." *United Foods*, *supra*, at 414.

B

When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." *Ellis*, *supra*, at 455. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, see Tr. of Oral Arg. 48–49, the compulsory fees constitute a form of compelled speech and association that imposes a "significant

impingement on First Amendment rights." *Ellis*, 466 U. S., at 455. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.

"The primary purpose" of permitting unions to collect fees from nonmembers, we have said, is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U. S., at 181. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections. Consider the following examples:

> "If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs." [2]

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering "labor peace." *Hudson*, 475 U. S., at 303. But it is an anomaly nevertheless.

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[2] Summers, Book Review, Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory, 16 Comparative Labor L. J. 262, 268 (1995).

Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions. Courts "do not presume acquiescence in the loss of fundamental rights." *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 682 (1999) (internal quotation marks omitted). Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree. But a "[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Hudson*, *supra*, at 305 (internal quotation marks omitted).

Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.

The trail begins with dicta in *Street*, where we considered whether a federal collective-bargaining statute authorized a union to impose compulsory fees for political activities. 367 U. S., at 774. The plaintiffs were employees who had affirmatively objected to the way their fees were being used, and so we took that feature of the case for granted. We held

that the statute did not authorize the use of the objecting employees' fees for ideological purposes, and we stated in passing that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Ibid.* In making that offhand remark, we did not pause to consider the broader constitutional implications of an affirmative opt-out requirement. Nor did we explore the extent of First Amendment protection for employees who might not qualify as active "dissenters" but who would nonetheless prefer to keep their own money rather than subsidizing by default the political agenda of a state-favored union.

In later cases such as *Abood* and *Hudson*, we assumed without any focused analysis that the dicta from *Street* had authorized the opt-out requirement as a constitutional matter. Thus in *Hudson* we did not take issue with the union's practice of giving employees annual notice and an opportunity to object to expected political expenditures. At the same time, however, we made it clear that the procedures used by a union to collect money from nonmembers must satisfy a high standard.

Contrary to the view of the Ninth Circuit panel majority, we did not call for a balancing of the "right" of the union to collect an agency fee against the First Amendment rights of nonmembers. 628 F. 3d, at 1119–1120. As we noted in *Davenport*, "unions have no constitutional entitlement to the fees of nonmember-employees." 551 U. S., at 185. A union's "collection of fees from nonmembers is authorized by an act of legislative grace," 628 F. 3d, at 1126 (Wallace, J., dissenting)—one that we have termed "unusual" and "extraordinary," *Davenport*, *supra*, at 184, 187. Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. 475 U. S., at 303. And to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures bur-

dening the freedom of speech or association must serve a "compelling interest" and must not be significantly broader than necessary to serve that interest.[3]

## IV

By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate. The SEIU, however, asks us to go further. It asks us to approve a procedure under which (1) a special assessment billed for use in electoral campaigns was assessed without providing a new opportunity for nonmembers to decide whether they wished to contribute to this effort and (2) nonmembers who previously opted out were nevertheless required to pay more than half of the special assessment even though the union had said that the purpose of the fund was to mount a political campaign and that it would not be used for ordinary union expenses. This aggressive use of power by the SEIU to collect fees from nonmembers is indefensible.

### A

First, we see no justification for the union's failure to provide a fresh *Hudson* notice. *Hudson* rests on the principle that nonmembers should not be required to fund a union's

[3] The specific citation was as follows:

"See *Roberts* v. *United States Jaycees*, [468 U. S. 609, 623 (1984)] (Infringements on freedom of association 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms'); *Elrod* v. *Burns*, 427 U. S. 347, 363 (1976) (government means must be 'least restrictive of freedom of belief and association'); *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973) ('[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty'); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) ('Precision of regulation must be the touchstone' in the First Amendment context)." *Hudson*, 475 U. S., at 303, n. 11.

political and ideological projects unless they choose to do so after having "a fair opportunity" to assess the impact of paying for nonchargeable union activities. 475 U. S., at 303. Giving employees only one opportunity per year to make this choice is tolerable if employees are able at the time in question to make an informed choice. But a nonmember cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent. When a union levies a special assessment or raises dues as a result of unexpected developments, the factors influencing a nonmember's choice may change. In particular, a nonmember may take special exception to the uses for which the additional funds are sought.[4]

The present case provides a striking example. The special assessment in this case was billed for use in a broad electoral campaign designed to defeat two important and controversial ballot initiatives and to elect sympathetic candidates in the 2006 gubernatorial and legislative elections. There were undoubtedly nonmembers who, for one reason or another, chose not to opt out or neglected to do so when the standard *Hudson* notice was sent but who took strong exception to the SEIU's political objectives and did not want to subsidize those efforts. These nonmembers might have favored one or both of the ballot initiatives; they might have wished to support the reelection of the incumbent Governor; or they might not have wanted to delegate to the union the authority to decide which candidates in the 2006 elections would receive a share of their money.

The effect on nonmembers was particularly striking with respect to the union's campaign against Proposition 75 be-

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[4] The dissent suggests that the union gave fair notice because it announced at the beginning of the year that "'[d]ues are subject to change without further notice to fee payers.'" *Post*, at 339 (opinion of BREYER, J.). But a union cannot define the scope of its own notice obligations simply by promulgating a clause giving itself the power to increase fees at any time for any purpose without further notice.

cause that initiative would have bolstered nonmember rights. If Proposition 75 had passed, nonmembers would have been exempt from paying for the SEIU's extensive political projects unless they affirmatively consented. Thus, the effect of the SEIU's procedure was to force many nonmembers to subsidize a political effort designed to restrict their own rights.

As *Hudson* held, procedures for collecting fees from nonmembers must be carefully tailored to minimize impingement on First Amendment rights, and the procedure used in this case cannot possibly be considered to have met that standard. After the dues increase was adopted, the SEIU wrote to all employees in the relevant bargaining units to inform them of this development. It would have been a relatively simple matter for the union to cast this letter in the form of a new *Hudson* notice, so that nonmembers could decide whether they wanted to pay for the union's electoral project.

The SEIU argues that we should not be troubled by its failure to provide a new notice because nonmembers who objected to the special assessment but were nonetheless required to pay it would have been given the chance to recover the funds in question by opting out when the next annual notice was sent. If the special assessment was used entirely or in part for nonchargeable purposes, they suggest, the percentage of the union's annual expenditures for chargeable purposes would decrease, and therefore the amount of the dues payable by objecting nonmembers the following year would also decrease. This decrease, however, would not fully recompense nonmembers who did not opt out after receiving the regular notice but would have opted out if they had been permitted to do so when the special assessment was announced.[5] And in any event, even a full refund would

[5] These nonmembers, after paying the full amount of the special assessment, would be required during the subsequent year to pay at least as much as those nonmembers who did opt out when they received the initial *Hudson* notice.

not undo the violation of First Amendment rights. As we have recognized, the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full. See *Hudson*, 475 U. S., at 305; *Ellis*, 466 U. S., at 444. Here, for nonmembers who disagreed with the SEIU's electoral objectives, a refund provided after the union's objectives had already been achieved would be cold comfort.[6]

To respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out. Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all. Even if this burden can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.

B

1

The SEIU's treatment of nonmembers who opted out when the initial *Hudson* notice was sent also ran afoul of the First Amendment. The SEIU required these employees to pay

[6] JUSTICE SOTOMAYOR contends that a new *Hudson* notice should be required only when a special assessment is imposed for political purposes. *Post*, at 324 (opinion concurring in judgment). But as even the dissent acknowledges, *post*, at 334–335, such a rule would be unworkable. First, our cases have recognized that a union's money is fungible, so even if the new fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes. See *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, 753 (1963) (noting that particular fee earmarks are "of bookkeeping significance only rather than a matter of real substance"). And second, unless we can rely on unions to advertise the true purpose behind every special fee, it is not clear how a court could make a timely determination whether each new fee is political in nature. It would be practically impossible to require the parties to litigate the purpose of every fee merely to determine whether notice is required.

56.35% of the special assessment, just as they had been required to pay 56.35% of the regular annual dues. But the union proclaimed that the special assessment would be used to support an electoral campaign and would not be used for ordinary union expenses. Accordingly, there is no reason to suppose that 56.35% of the new assessment was used for properly chargeable expenses. On the contrary, if the union is to be taken at its word, virtually all of the money was slated for nonchargeable uses.

The procedure accepted in *Hudson* is designed for use when a union sends out its regular annual dues notices. The procedure is predicated on the assumption that a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next.[7] No such assumption is reasonable, however, when a union levies a special assessment or raises dues as a result of events that were not anticipated or disclosed at the time when a yearly *Hudson* notice was sent. Accordingly, use of figures based on an audit of the union's operations during an entire previous year makes no sense.

Nor would it be feasible to devise a new breakdown of chargeable and nonchargeable expenses for the special assessment. Determining that breakdown is problematic enough when it is done on a regular annual basis because auditors typically do not make a legal determination as to whether particular expenditures are chargeable. Instead, the auditors take the union's characterization for granted and perform the simple accounting function of "ensur[ing] that the expenditures which the union claims it made for

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[7] The SEIU contends that "[s]ignificant fluctuations in the chargeable and nonchargeable proportions of a union's spending are inevitable," Brief for Respondent 13, and the dissent appears to agree, *post*, at 337. But if the *Hudson* Court had proceeded on this assumption it is doubtful that it would have found it acceptable for a union to rely solely on the breakdown in the most recent year rather than computing the average breakdown over a longer period.

certain expenses were actually made for those expenses." *Andrews* v. *Education Assn. of Cheshire*, 829 F. 2d 335, 340 (CA2 1987). Thus, if a union takes a very broad view of what is chargeable—if, for example, it believes that supporting sympathetic political candidates is chargeable and bases its classification on that view—the auditors will classify these political expenditures as chargeable. Objecting employees may then contest the union's chargeability determinations, but the onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion.[8] See, *e. g.*, *Lehnert*, 500 U. S., at 513; *Jibson* v. *Michigan Ed. Assn.*, 30 F. 3d 723, 730 (CA6 1994). This is already a significant burden for employees to bear simply to avoid having their money taken to subsidize speech with which they disagree, and the burden would become insupportable if unions could impose a new assessment at any time, with a new chargeability determination to be challenged.

2

The SEIU argues that objecting nonmembers who were required to pay 56.35% of the special assessment, far from subsidizing the union's political campaign, actually received a windfall. According to the union's statistics, the actual percentage of regular dues and fees spent for chargeable purposes in 2005 turned out to be quite a bit higher (66.26%), and therefore, even if all of the money obtained through the special assessment is classified as nonchargeable, the union's total expenditures for 2005 were at least 66.26% chargeable. See Brief for Respondent 5, n. 6. This argument is unpersuasive for several reasons.

First, the SEIU's understanding of the breadth of chargeable expenses is so expansive that it is hard to place much

[8] The dissent is comforted by the fact that the union "has offered to pay for neutral arbitration of such disputes before the American Arbitration Association," *post*, at 337, but the painful burden of initiating and participating in such disputes cannot be so easily relieved.

reliance on its statistics. In its brief, the SEIU argues broadly that all funds spent on "lobbying . . . the electorate" are chargeable. See *id.*, at 51. But "lobbying . . . the electorate" is nothing but another term for supporting political causes and candidates, and we have never held that the First Amendment permits a union to compel nonmembers to support such political activities. On the contrary, as long ago as *Street*, we noted the important difference between a union's authority to engage in collective bargaining and related activities on behalf of nonmember employees in a bargaining unit and the union's use of nonmembers' money "to support candidates for public office" or "to support political causes which [they] oppos[e]." 367 U. S., at 768.

The sweep of the SEIU's argument is highlighted by its discussion of the use of fees paid by objecting nonmembers to defeat Proposition 76. According to the SEIU, these expenditures were "germane" to the implementation of its contracts because, if Proposition 76 had passed, it would have "effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements." Brief for Respondent 49–50 (internal quotation marks omitted).

If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities. Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers. If the concept of "germaneness" were as broad as the SEIU advocates, public-sector employees who do not endorse the unions' goals would be essentially unprotected against being

compelled to subsidize political and ideological activities to which they object.

Second, even if the SEIU's statistics are accurate, it does not follow that it was proper for the union to charge objecting nonmembers 56.35%—or any other particular percentage—of the special assessment. Unless it is possible to determine in advance with some degree of accuracy the percentage of union funds that will be used during an upcoming year for chargeable purposes—and the SEIU argues that this is not possible—there is at least a risk that, at the end of the year, unconsenting nonmembers will have paid either too much or too little. Which side should bear this risk?

The answer is obvious: the side whose constitutional rights are not at stake. "Given the existence of acceptable alternatives, [a] union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 466 U. S., at 444. Thus, if unconsenting nonmembers pay too much, their First Amendment rights are infringed. On the other hand, if unconsenting nonmembers pay less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees. See *Davenport*, 551 U. S., at 185. The union has simply lost for a few months the "extraordinary" benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund.

As we have noted, by allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers. In the new situation presented here, we see no justification for any further impingement. The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail.

Public-sector unions have the right under the First Amendment to express their views on political and social is-

sues without government interference. See, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010). But employees who choose not to join a union have the same rights. The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals. "First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors." *United Foods*, 533 U. S., at 411. Therefore, when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.[9]

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[9] Contrary to JUSTICE SOTOMAYOR's suggestion, our holding does not venture beyond the scope of the questions on which we granted review or the scope of the parties' dispute. The second question on which we granted review broadly asks us to determine the circumstances under which a State may deduct from the pay of nonunion employees money that is used by a union for general electioneering. See Pet. for Cert. (i) ("May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?"). Our holding—that this may be done only when the employee affirmatively consents—falls within that question.

Our holding also addresses the primary remaining dispute between the parties, namely, the particular procedures that must be followed on remand in order to provide adequate assurance that members of the class are not compelled to subsidize nonchargeable activities to which they object. See *supra*, at 307–308. Petitioners argue strenuously that these procedures must be narrowly tailored to minimize intrusion on their free speech rights. See Brief for Petitioners 11–17. We see no sensible way to address this dispute without confronting the question whether, in the particular context present here, an opt-out regime suffices.

JUSTICE SOTOMAYOR would apparently have us proceed on the *assumption* that an opt-out regime is permitted. She would then have us decide what sort of opt-out procedures would be sufficient if such a regime were allowed at all. But that is a question that simply cannot be answered. It would be like asking what sort of procedural requirements would be

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

*It is so ordered.*

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

When a public-sector union imposes a special assessment intended to fund solely political lobbying efforts, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds. I therefore concur in the Court's judgment.

I concur only in the judgment, however, because I cannot agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers.

## I

The Political Fight-Back Fund was to be used by Service Employees International Union, Local 1000 (SEIU), "specifically in the political arenas of California" to defeat perceived antiunion initiatives and to elect a sympathetic Governor and legislature. App. 25; see also *id.*, at 31. As the majority explains, such political efforts are not "ger-

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required if the government set out to do something else that the First Amendment flatly prohibits—for example, requiring prepublication approval of newspapers.

There is also no merit in JUSTICE SOTOMAYOR's and JUSTICE BREYER's comments about prior precedent. This case concerns the procedures that must be followed when a public-sector union announces a special assessment or midyear dues increase. No prior decision of this Court has addressed that question, and *Hudson* says not one word on the subject.

mane" to the union's function as a bargaining representative, and accordingly are not chargeable to objecting nonmembers. See *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519 (1991); see also *Locke* v. *Karass*, 555 U. S. 207, 211 (2009) ("[N]onchargeable union activities [include] political, public relations, or lobbying activities"). While the union is free to pursue its ideological goals in the political arena, it may not subsidize its efforts with objecting nonmembers' funds, lest the objector be used as "'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" *Lehnert*, 500 U. S., at 522 (plurality opinion) (quoting *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977)).

Accordingly, when a union levies a special assessment or dues increase to fund political activities, the union may not collect funds from nonmembers who earlier had objected to the payment of nonchargeable expenses, and may not collect funds from other nonmembers without providing a new *Hudson* notice and opportunity to opt out. See *Teachers* v. *Hudson*, 475 U. S. 292 (1986). Because SEIU failed to follow these procedures, it did not satisfy its constitutional obligations. That holding should end this case; it is all petitioners asked this Court to decide.[1]

## II

The majority agrees that SEIU's actions were at odds with the First Amendment. Yet it proceeds, quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued. Petitioners

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[1] See Pet. for Cert. (i) (questions presented); Brief for Petitioners (i) (same); *id.*, at 39 ("The Court should hold that . . . when a union imposes a forced-fee increase primarily or solely for political purposes between notices, it may not collect the increase from nonmembers who have already objected, and it must not collect the increase from other nonmembers until it has ascertained their wishes by providing them with a new notice about the increase's purpose and an opportunity to opt out"); see also App. 18–19 (complaint).

did not question the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution. See *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181, 185 (2007); *Hudson*, 475 U. S., at 306, n. 16; *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 238 (1977); see also *ante*, at 312–314. They did not argue that the Constitution requires an opt-in system of fee collection in the context of special assessments or dues increases or, indeed, in any context. Not surprisingly, respondent did not address such a prospect.

Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." "[W]e disregard [that rule] 'only in the most exceptional cases,' where reasons of urgency or economy suggest the need to address the unpresented question in the case under consideration." *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (quoting *Stone* v. *Powell*, 428 U. S. 465, 481, n. 15 (1976)). The majority does not claim any such exceptional circumstance here. Yet it reaches out to hold that "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and *may not exact any funds from nonmembers without their affirmative consent*." *Ante*, at 322 (emphasis added); see also *ante*, at 317 ("[T]he union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out"). The majority thus decides, for the very first time, that the First Amendment *does* require an opt-in system in some circumstances: the levying of a special assessment or dues increase. The majority announces its novel rule without any analysis of potential countervailing arguments and without any reflection on the reliance interests our old rules have engendered.

The majority's choice to reach an issue not presented by the parties, briefed, or argued, disregards our rules. See *Yee*, 503 U. S., at 535. And it ignores a fundamental premise

of our adversarial system: "'that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" *NASA* v. *Nelson*, 562 U. S. 134, 147, n. 10 (2011) (opinion for the Court by ALITO, J.) (quoting *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983) (opinion for the court by Scalia, J.)); see also *Jefferson* v. *Upton*, 560 U. S. 284, 301 (2010) (SCALIA, J., joined by THOMAS, J., dissenting) (The majority's "refusal to abide by standard rules of appellate practice is unfair to the . . . Circuit," which did not pass on this question, "and especially to the respondent here, who suffers a loss in this Court without *ever* having an opportunity to address the merits of the . . . question the Court decides"). The imperative of judicial restraint is at its zenith here, with respect to an issue of such constitutional magnitude, for "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Clinton* v. *Jones*, 520 U. S. 681, 690, n. 11 (1997) (internal quotation marks omitted).[2]

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[2] The majority contends that its holding "does not venture beyond the scope of the questions on which we granted review," pointing to the second question presented. *Ante*, at 322, n. 9. The majority is mistaken. That question concerns the chargeability of political and lobbying activities under *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 522 (1991), not the procedures by which a union may collect fees. See Pet. for Cert. (i); *id.*, at 20–27 (describing scope of second question presented); *id.*, at 23 ("There is a serious split, and confusion, among the circuits on the chargeability of union political and lobbying activities"). Indeed, it is only petitioners' first question presented that deals with fee-collection procedures. And in that question, petitioners ask this Court to hold that SEIU may not collect its special assessment without providing a *Hudson* notice that offers "an opportunity *to object to*" the deduction of fees for the assessment. Pet. for Cert. (i) (emphasis added).

The phrase "opt in" appears not once in petitioners' briefing. The majority protests that it cannot but hold that an opt-in regime is required, seeing as the opt-out regime the petitioners advocate is, in the majority's

To make matters worse, the majority's answer to its unasked constitutional question is not even clear. After today, must a union undertaking a special assessment or dues increase obtain affirmative consent to collect "*any funds*" or solely to collect funds for *nonchargeable* expenses? May a nonmember opt not to contribute to a special assessment, even if the assessment is levied to fund uncontestably chargeable activities? Does the majority's new rule allow for any distinction between nonmembers who had earlier objected to the payment of nonchargeable expenses and those who had not? What procedures govern this new world of fee collection?

Moreover, while the majority's novel rule is, on its face, limited to special assessments and dues increases, the majority strongly hints that this line may not long endure. The majority pronounces the Court's explicit holding in *Machinists* v. *Street*, 367 U. S. 740, 774 (1961)—that "dissent is not to be presumed[,] it must affirmatively be made known to the union by the dissenting employee"—nothing but an "offhand remark," made by Justices who did not "pause to consider the broader constitutional implications of an affirmative opt-out requirement," *ante*, at 313. The reader is told that our precedents' "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Ante*, at 312. And that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover non-

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view, unconstitutional. But if the Court was dissatisfied with the scope of the questions presented here it should not have granted certiorari in this case. Or having granted it, the Court should have asked for supplemental briefing on the question whether an opt-in regime is constitutionally required. What it should not have done—*cannot do* under our rules—is decide that question without having provided the parties and potential *amici* an opportunity to weigh in with their own considered views.

chargeable expenses, our prior decisions *approach, if they do not cross,* the limit of what the First Amendment can tolerate." *Ante*, at 314 (emphasis added); see also *ante*, at 321 ("[B]y allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers"); *ante*, at 312 ("Once it is recognized . . . that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers?").

To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence. To do so, as the majority does, on our own invitation and without adversarial presentation is both unfair and unwise. It deprives the parties and potential *amici* of the opportunity to brief and argue the question. It deprives us of the benefit of argument that the parties, with concrete interests in the question, are surely better positioned than we to set forth. See *NASA*, 562 U. S., at 147, n. 10 (opinion for the Court by ALITO, J.) ("It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential *amici* had little notice that the matter might be decided"). Not content with our task, prescribed by Article III, of answering constitutional questions, the majority today decides to ask them as well.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

In *Teachers* v. *Hudson*, 475 U. S. 292 (1986), this Court unanimously held that "the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Id.*, at 307, n. 18. That is precisely what the

union has done in this case. I see no reason to modify *Hudson*'s holding as here applied. I consequently dissent.

I

In *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), the Court held that nonunion public employees have a First Amendment right to prevent a union's spending a part of their compulsory fees on contributions to political candidates or on "express[ions of] political views unrelated to [the union's] duties as exclusive bargaining representative." *Id.*, at 234. A decade later in *Hudson*, the Court considered the constitutionality of procedures adopted to implement *Abood*. In particular, the Court considered the procedures adopted by a teachers union "to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn." 475 U. S., at 294.

The teachers union had calculated the fee it could charge nonmembers during a particular year on the basis of the expenditures the union actually made during the prior year. Those nonmembers who objected to the apportionment, believing their fee too high, could lodge an objection with the union, proceed through arbitration, and receive a rebate if they won. The Court found this procedure constitutionally inadequate. It thought that (1) a rebate "does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose," (2) the union had not provided the nonmembers in advance with "sufficient information to gauge the propriety of the union's fee," and (3) the union did not provide objectors with "a reasonably prompt decision by an impartial decisionmaker." *Id.*, at 305–307.

The Court then held that the Constitution requires that a union collecting a fee from nonmembers provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts

reasonably in dispute while such challenges are pending." *Id.*, at 310.

The Court added that it "recognize[d] that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'" *Id.*, at 307, n. 18 (quoting *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963)). It said that the union retains the burden of proving that a given expense is chargeable to nonmembers, the "nonmember's 'burden'" being simply that of making "his objection known." 475 U. S., at 306, n. 16. And it added that the union "cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Id.*, at 307, n. 18.

For the last 25 years unions and employers across the Nation have relied upon this Court's statements in *Hudson* in developing administratively workable systems that (1) allow unions to pay the costs of fulfilling their representational obligations to both members and nonmembers alike, while (2) simultaneously protecting the nonmembers' constitutional right not to support "'ideological causes not germane to [the union's] duties as collective-bargaining agent.'" *Id.*, at 294 (quoting *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984)). See also *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 17 (1990) (explaining that *Hudson* "outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement under *Abood*"). The Court, in my view, should not depart, or create an exception, from *Hudson*'s framework here.

## II

Because the administrative details of the fee collection process are critical, I shall begin by explaining how I understand that process to work. The union here followed a basic administrative system that ensures that the fee charged to objecting nonmembers matches their pro rata share of the union's chargeable expenditures, but it achieves that match only over a period of several years. At the end of 2004,

independent auditors determined the amount of chargeable (*e. g.*, collective-bargaining related) expenditures and the amount of nonchargeable (*e. g.*, nongermane political) expenditures that the union actually made during 2004. The union then used the resulting proportion (which was about 56% chargeable, 44% nonchargeable) as the basis for apportioning the next year's dues. Thus in June 2005, the union sent all represented employees a *Hudson* notice setting forth that (roughly) 56 to 44 figure. App. 96–106. It provided time for nonmembers to object or to challenge the figure or underlying data. *Id.*, at 98–104. And it then applied the resulting figure to determine the percentage of the total fee that objecting nonmembers would have to pay during the next fee-year, which ran from July 2005 to June 2006. *Id.*, at 102. At the end of 2005, auditors again examined the union's actual expenditures made during 2005. And the union then used those newly audited figures to determine the chargeable percentage for the fee-year 2006–2007. *Id.*, at 158. Since political expenditures during calendar year 2005 turned out to be lower than in 2004, the new chargeable share amounted to about 69% of the total fee bill. *Ibid.*

Simplifying further to illustrate, I shall describe the system as (1) using audited accounts for Year One to determine the proportion of the fee that objectors must pay during Year Two, and (2) using audited accounts for Year Two to determine the proportion of the fee that objectors must pay during Year Three. If Year One's chargeable share (as applied to Year Two) turns out to be too high, Year Two's audited accounts will reflect that fact, and the payable share for Year Three will be reduced accordingly.

This system does not put typical objectors to any disadvantage. If, say, in Year One total expenses were $1 million, collective-bargaining expenses amounted to $600,000, and political expenses amounted to $400,000, then the union cannot charge objecting nonmembers more than 60% of normal dues in Year Two. If in Year Two collective-bargaining ex-

penses turned out to be a lesser share of total expenses, say 30%, then the union cannot charge objecting nonmembers more than 30% of the total fee in Year Three. Normally, what the objecting nonmembers lose on the swings they will gain on the roundabouts.

This kind of basic administrative system is imperfect. The nature of a union's expenditures, including nonchargeable political expenditures, varies from year to year, for political needs differ at different stages of political cycles. Thus, last year's percentages will often fail to match this year's expenditures patterns. And the possibility that an objecting nonmember's funds will temporarily help the union pay for a nonchargeable political expenditure (say, in Year Two) is always present—though in this case that did not happen. See *infra*, at 334.

Nonetheless this kind of system enjoys an offsetting administrative virtue. It bases fees upon audited accounts, thereby avoiding the difficulties and disagreements that would surround an effort to determine the relevant proportions by trying to measure union expenditures as they occur or by trying to make predictions about the nature of future expenditures. It consequently gives workers reliable information. It gives workers advance notice of next year's payable charge. It gives nonmembers a "reasonably prompt" opportunity to object. *Hudson*, 475 U. S., at 310. And, where the chargeable share of next year's expenses (Year Two) turns out to be lower than last year's (Year One), it provides offsetting compensation in the form of a lower payable share for the following year (Year Three).

In any event, these features are characteristic of an administrative system that "calculat[es]" shares of a union's fee "on the basis of its expenses during the preceding year." *Id.*, at 307, n. 18. *Hudson* stated specifically that the "[u]nion cannot be faulted for calculating its fee" on that basis. *Ibid.* And no party here has challenged the constitutional validity of that basic administrative system. See Tr. of Oral Arg. 13.

## III

If the union's basic administrative system does not violate the Constitution, then how could its special assessment have done so? In my view, it did not violate the Constitution, and I shall explain my basis for thinking so by considering separately (1) those nonmembers who objected initially to the 2005 *Hudson* notice, and (2) those nonmembers who did not initially object.

### A

The special assessment as administered here has worked no constitutional harm upon those nonunion employees who raised a general objection at the beginning of the year. The union has honored their objections by subtracting from their special payments the same 44% that it subtracts from each of their ordinary monthly payments. App. 309. And we know that the special assessment here did not even work temporary constitutional harm. That is because audited figures showed that the union's total nonchargeable (*e. g.*, political) expenses for that year ended up as a *lower* percentage of total expenses than the previous year. Hence the objecting nonmembers ended up being charged too little, not too much, even with the special assessment thrown into the mix.

Let me put the point more specifically. The union's June 2005 *Hudson* notice said that the union would charge objecting nonmembers roughly 56% of the dues paid by union members. See App. 102. That 56% figure represented the chargeable portion of expenditures according to the audited figures from 2004. Thus, if the fee charged to a union member pursuant to the 2005 notice was $400, the fee charged to an objecting nonmember was $224. The union similarly prorated the special assessment charging objecting nonmembers 56% of the assessment it imposed upon members. Thus, if the special assessment amounted to $50 for a member, it amounted to $28 for an objecting nonmember. And

total dues in this example would have amounted to $450 for a member and $252 for a nonmember.

In the event, the union's chargeable expenses for 2005—including the funds raised pursuant to the special assessment—amounted to *more* than 56% of its total expenditures. The auditor's reports show that the union's total expenditures in 2005 amounted to $40,045,409. *Id.*, at 166. Chargeable expenses amounted to $27,552,746, which works out to 69% of the total budget. *Ibid.* Thus, a substantially larger portion of the union's 2005 spending was chargeable (69%) than it had been in 2004 (56%). Objecting nonmembers therefore paid 56% of normal fees, even though the chargeable share that year was 69%. That is to say, they paid less than what the Constitution considers to be their fair share. See *Abood*, 431 U. S., at 236–237.

Even were the underlying facts different, I can find no constitutional basis for charging an objecting nonmember *less* than the 56% that the preceding year's audit showed was appropriate. In general, any effort to send a new notice and then apply special percentages to a special midyear assessment fee runs into administrative difficulties that, as explained above, are avoided with a retrospective system. See *supra*, at 332. And, of course, requiring the use of some special proportion based on predicted expenditures would contradict *Hudson*'s determination that prior year, not present year, expenditures can form the basis for the determination of that proportion. See *Hudson*, *supra*, at 307, n. 18.

In the particular example before us these general problems are camouflaged by the fact that the union itself said that the assessment was to be used for political purposes. Hence it is tempting to say that 100% of the assessment is not chargeable. But future cases are most unlikely to be so clear; disputes will arise over union predictions (say, that only 20% of the special assessment will be used for political purposes); and the Court will then perhaps understand the wisdom of *Hudson*'s holding. In any event, we have made

clear in other cases that money is fungible. *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746, 753 (1963). Whether a particular expenditure was funded by regular dues or the special assessment is "of bookkeeping significance only rather than a matter of real substance." *Ibid.* And, the Court's focus on the announced purposes of the special assessment, rather than yearly expenditures taken as a whole, is beside the point.

The Court's response to these problems, particularly the administrative calculation problems, is apparently to depart yet further from the Court's earlier holdings. It seems to say that an objector can withhold 100%, not simply of a special assessment made for political purposes, but of *any special assessment whatsoever*, including an assessment made solely for the purpose of paying for extra chargeable costs, such as extended contract negotiations, pension plan experts, or newly assessed contributions to replenish a national union's collective-bargaining assistance funds. See *ante*, at 321–322. Although this rule is comparatively simple to administer, it cannot be reconciled with the Court's previous constitutional holdings. *Abood*, along with every related case the Court has ever decided, makes clear that the Constitution *allows* a union to assess nonmembers a pro rata share of fees insofar as they are used to pay for these kinds of collective-bargaining expenses. See 431 U. S., at 234–236; see also *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 524 (1991); *Machinists* v. *Street*, 367 U. S. 740, 760 (1961); *Ellis*, 466 U. S., at 447; *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 181 (2007); *Locke* v. *Karass*, 555 U. S. 207, 210 (2009). How could the majority now hold to the contrary?

If there are good reasons for requiring departure from the basic *Hudson*-approved administrative system, they are not the reasons the Court provides. It suggests that the basic *Hudson* administrative system gives the union the freedom to misclassify, arguing, for example, that the union has

adopted an overly broad definition of chargeability. See *ante*, at 320–321. The 2005 proportion, however, rested upon audited 2004 accounts. While petitioners argue in this Court that the union misclassified parts of the special assessment (which was not imposed until 2005), no brief filed in this case (and certainly no court below) has challenged the accuracy of the 2004 figures or the resulting chargeable/nonchargeable allocation. Indeed, the 2004 accounts were audited before the special assessment at the center of this case was even imposed. Compare App. 108 (reflecting that the audit of the 2004 budget was completed by April 25, 2005) with *id.*, at 25 (reflecting approval of the special assessment on July 30, 2005).

More specifically, the Court suggests that the Constitution prohibits the union's classification of money spent "'lobbying . . . the electorate'" as a chargeable expense. *Ante*, at 320. But California state law explicitly permits the union to classify some lobbying expenses as chargeable. See Cal. Govt. Code Ann. §3515.8 (West 2010) (a nonmember's fair share includes "the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration"); see also *Lillebo* v. *Davis*, 222 Cal. App. 3d 1421, 1442, 272 Cal. Rptr. 638, 651 (1990) (construing §3515.8 narrowly, but explaining that "[w]e cannot fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit . . . could not be considered to be part of its role as representative . . . "). No one has attacked the constitutionality of California's law; no brief argues the question; and this Court does not normally find state laws unconstitutional without, at least, giving those who favor the law an opportunity to argue the matter.

The Court further complains that the basic administrative system requires an objecting nonmember to "come up with the resources to mount" a "legal challenge" to the union's allocation "in a timely fashion." *Ante*, at 319. That concern

too is misplaced. The union has offered to pay for neutral arbitration of such disputes before the American Arbitration Association. App. 103–104. And, again, insofar as the Court casts doubt on the constitutional validity of the basic system, the Court does so without the benefit of argument.

Finally, the Court argues that (Step 1) *Hudson* is "predicated on the assumption that a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next," *ante*, at 318; that (Step 2) this assumption does not apply to midyear assessments; hence (Step 3) what appears binding precedent (namely, *Hudson*) does not bind the Court in its interpretation of the Constitution as applied to those assessments. *Ante*, at 318.

I must jump this logical ship, however, at Step 1. I cannot find in *Hudson* the "assumption" of uniform expenditures that the Court says underlies it. The assumption does not appear there explicitly. And it is hard to believe any such assumption could implicitly lurk within a case involving a union's political expenditures. Those expenditures inevitably vary from political season to season. They inevitably depend upon the number and kind of union-related matters currently visible on the political agenda. Cf., *e. g.*, App. 102, 158, 223 (union's chargeability proportion varies significantly over three years, from 56.35% in 2004, to 68.8% in 2005, to 60.3% in 2006). And it is hard to believe that the Members of this Court, when deciding *Abood*, were not fully aware of these obvious facts.

B

A stronger case can be made for allowing nonmember employees *who did not object* at the beginning of the dues year to object (for the first time) to a special assessment. That is because, unlike the nonmember who objected initially, the union will not permit that initially nonobjecting nonmember to withhold anything from the special assessment fee. Nonetheless, there are powerful reasons not to allow the nonmember who did not object initially to the annual fee

to object now for the first time to the midyear special assessment.

For one thing, insofar as a new objection permits the new objector to withhold only the portion of the fee that will pay for nonchargeable expenses (as the logic of the concurring Justices would suggest), the administrative problems that I earlier discussed apply. See *supra*, at 332. That is to say, unions, arbitrators, and courts will have to determine, on the basis of a prediction, *how much* of the special assessment the new objector can withhold. I concede that many administrative problems could be overcome were the new objector allowed to withhold only the same 44% of the fee that the union here permitted initial objectors to withhold (a figure based on 2004 audited accounts). But no Member of the Court takes that approach.

For another thing, as I have previously pointed out, the Court would permit nonmembers who did not object at the beginning of the year (like those who did then object) to object to (and to pay *none* of) *every* special assessment, including those made to raise money to pay additional *collective-bargaining expenses*. This approach may avoid the uncertainty and resulting disputes inherent in an effort to limit withholding to the nonchargeable portion of the fee. But the price of avoiding those disputes is to reduce the financial contribution the union will receive even when a special assessment pays only for unexpected but perfectly legitimate collective-bargaining expenses. See *supra*, at 335–337.

Moreover, to provide a new opportunity to object requires providing for explanations, potential challenges, the development of separate accounts, and additional administrative procedures. That means providing extra time and extra money. By definition, however, special assessments are special; time may matter; and unlike the annual dues payment, the union is unlikely to be able to provide what is here a 6-month delay (between the close of the 2004 audited year and the beginning of the next mid-2005 dues year) that can be used to

examine accounts and process objections. In a word, a new opportunity to object means time, effort, and funds set aside to deal with a new layer of administrative procedure.

I recognize that allowing objections only once a year is only one possible way to administer a fee-charging system. In principle, one might allow nonmembers to pose new objections to their dues payments biannually, or quarterly, or even once a month, as actual expenses do, or do not, correspond to initial union predictions. But for constitutional purposes the critical fact is that annual objection is at least one reasonably practical way to permit the principled objector to avoid paying for politics with which he disagrees. See *Hudson*, 475 U. S., at 307, n. 18. And that is so whether ordinary or special assessments are at stake.

Further, the nonmember who did not object initially is not likely to be a nonmember who strongly opposes the union's politics. That many unions take political positions and that they spend money seeking to advance those positions is not exactly a secret. All those whom this union represents know from history that it spends money each year for nonchargeable purposes. And any nonmember who has significant negative views about such matters is likely to have objected in advance. Those who did not object initially (but do so later) likely include many whose objection rests, not upon constitutionally protected political grounds, but simply upon a desire not to pay a higher fee. And those who withhold fees for that reason are not entitled to constitutional protection in doing so. Here, the nonobjector cannot even claim that an increase in the total fee (by the amount of the special assessment) took him by surprise, for in its initial *Hudson* notice the union said that "[d]ues are subject to change without further notice to fee payers." App. 98.

Finally, if the union will not let a nonmember object to a special assessment, that nonmember has an easy remedy. He or she can simply object the first time around. After all, the possibility of a special assessment is known in advance;

the possibility that some, or all of it, will help the union make political expenditures is known in advance; the fact that the union will spend a significant amount of ordinary dues upon political matters is known in advance. To obtain protection all a nonmember who believes he might object to some future political expenditure has to do is to object in advance. His or her fees will decline from the beginning. And, if the nonmember forgets to object, there is always next year—when the chargeable amount of the fee will be based on *this* year's actual expenditures.

Given these considerations, I do not believe the First Amendment requires giving a second objection opportunity to those nonmembers who did not object the first time.

## IV

The Court also holds that, "when a public-sector union imposes a special assessment or dues increase," it "may not exact any funds from nonmembers without their affirmative consent." *Ante*, at 322. In other words, the Court mandates an "opt-in" system in respect to the payment of special assessments.

JUSTICE SOTOMAYOR's concurring opinion explains why the Court is wrong to impose this requirement. See *ante*, at 324–328 (opinion concurring in judgment). It runs directly contrary to precedent. No party asked that we do so. The matter has not been fully argued in this Court or in the courts below. I agree with her about this matter.

The decision is particularly unfortunate given the fact that each reason the Court offers in support of its "opt-in" conclusion seems in logic to apply not just to special assessments but to ordinary yearly fee charges as well. At least, its opinion can be so read. And that fact virtually guarantees that the opinion will play a central role in an ongoing, intense political debate.

The debate is generally about whether, the extent to which, and the circumstances under which a union that rep-

resents nonmembers in collective bargaining can require those nonmembers to help pay for the union's (constitutionally chargeable) collective-bargaining expenses. Twenty-three States have enacted "right to work" laws, which, in effect, prevent unions from requiring nonmembers to pay any of those costs. See Dept. of Labor, Wage and Hour Division, State Right-to-Work Laws (Jan. 2009), online at http://www.dol.gov/whd/state/righttowork.htm (as visited June 18, 2012, and available in Clerk of Court's case file). Other States have rejected the "right to work" approach and permit unions to require contributions from nonmembers, while protecting those nonmembers' right to opt out of supporting the union's political activities. *E. g.*, Cal. Govt. Code Ann. §§3502.5(a), 3515.8. Still others have enacted compromise laws that assume a nonmember does not wish to pay the nonchargeable portion of the fee unless he or she affirmatively indicates a desire to do so. See Wash. Rev. Code §42.17A.500 (2010) (providing that a union cannot use a nonmember's agency fee for political purposes "unless affirmatively authorized by the individual"). The debate about public unions' collective-bargaining rights is currently intense.

The question of how a nonmember indicates a desire not to pay constitutes an important part of this debate. Must the union assume that the nonmember does not intend to pay unless he affirmatively indicates his desire to pay, by "opting in"? Or, may the union assume that the nonmember is willing to pay unless the nonmember indicates a desire not to pay, by "opting out"? Where, as here, nonchargeable political expenses are at issue, there may be a significant number of represented nonmembers who do not feel strongly enough about the union's politics to indicate a choice either way. That being so, an "opt-in" requirement can reduce union revenues significantly, a matter of considerable importance to the union, while the additional protection it provides primarily helps only those who are politically near neutral. See

generally Sunstein & Thaler, Libertarian Paternalism is not an Oxymoron, 70 U. Chi. L. Rev. 1159, 1161 (2003) (explaining that default rules play an important role when individuals do not have "well-defined preferences"). Consequently, the Court, which held recently that the Constitution *permits* a State to impose an opt-in requirement, see *Davenport*, 551 U. S., at 185, has never said that it *mandates* such a requirement. There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it.

Of course, principles of *stare decisis* are not absolute. But the Court cannot be right when it departs from those principles without benefit of argument in a matter of such importance.

For these reasons, with respect, I dissent.

Syllabus

# SOUTHERN UNION CO. *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 11–94. Argued March 19, 2012—Decided June 21, 2012

Petitioner Southern Union Company was convicted by a jury in federal court on one count of violating the Resource Conservation and Recovery Act of 1976 (RCRA) for having knowingly stored liquid mercury without a permit at a subsidiary's facility "on or about September 19, 2002 to October 19, 2004." Violations of the RCRA are punishable by, *inter alia*, a fine of not more than $50,000 for each day of violation. 42 U. S. C. § 6928(d). At sentencing, the probation office calculated a maximum fine of $38.1 million, on the basis that Southern Union violated the RCRA for each of the 762 days from September 19, 2002, through October 19, 2004. Southern Union argued that imposing any fine greater than the 1-day penalty of $50,000 would be unconstitutional under *Apprendi* v. *New Jersey*, 530 U. S. 466, which holds that the Sixth Amendment's jury trial guarantee requires that any fact (other than the fact of a prior conviction) that increases the maximum punishment authorized for a particular crime be proved to a jury beyond a reasonable doubt. Southern Union contended that, based on the jury verdict and the District Court's instructions, the only violation the jury necessarily found was for one day. The District Court held that *Apprendi* applies to criminal fines, but concluded from the "content and context of the verdict all together" that the jury found a 762-day violation. The court therefore set a maximum potential fine of $38.1 million, from which it imposed a fine of $6 million and a "community service obligation" of $12 million. On appeal, the First Circuit disagreed with the District Court that the jury necessarily found a violation of 762 days. But the First Circuit affirmed the sentence because it held that *Apprendi* does not apply to criminal fines.

*Held:* The rule of *Apprendi* applies to the imposition of criminal fines. Pp. 348–360.

(a) *Apprendi*'s rule is "rooted in longstanding common-law practice," *Cunningham* v. *California*, 549 U. S. 270, 281, and preserves the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt," *Oregon* v. *Ice*, 555 U. S. 160, 163. This Court has repeatedly affirmed *Apprendi*'s rule by applying it to a variety of sentencing schemes that allow judges to find facts that increase a defendant's maximum authorized sentence.

See *Cunningham*, 549 U. S., at 274–275; *United States* v. *Booker*, 543 U. S. 220, 226–227; *Blakely* v. *Washington*, 542 U. S. 296, 299–300; *Ring* v. *Arizona*, 536 U. S. 584, 588–589; *Apprendi*, 530 U. S., at 468–469. While the punishments at stake in these cases were imprisonment or a death sentence, there is no principled basis under *Apprendi* to treat criminal fines differently. *Apprendi*'s "core concern"—to reserve to the jury "the determination of facts that warrant punishment for a specific statutory offense," *Ice*, 555 U. S., at 170—applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America and they continue to be frequently imposed today. And, the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often determined by reference to particular facts. The Government argues that fines are less onerous than incarceration and the death sentence and therefore should be exempt from *Apprendi*. But where a fine is substantial enough to trigger the Sixth Amendment's jury trial guarantee, *Apprendi* applies in full. Pp. 348–352.

(b) The "historical role of the jury at common law," which informs the "scope of the constitutional jury right," *Ice*, 555 U. S., at 170, supports applying *Apprendi* to criminal fines. To be sure, judges in the Colonies and during the founding era had much discretion in determining whether to impose a fine and in what amount. But the exercise of such discretion is fully consistent with *Apprendi*, which permits courts to impose "judgment *within the range* prescribed by statute." 530 U. S., at 481 (emphasis in original). The more salient question is what role the jury played in prosecutions for offenses that pegged the amount of a fine to the determination of specified facts. A review of both state and federal decisions discloses that the predominant practice was for such facts to be alleged in the indictment and proved to the jury. The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based: First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" *Blakely*, 542 U. S., at 301. And second, "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and is no accusation in reason.'" *Id.*, at 301–302. Contrary to the Government's contentions, neither *United States* v. *Murphy*, 16 Pet. 203, nor *United States* v. *Tyler*, 7 Cranch 285, overcomes the ample historical evidence

that juries routinely found facts that set maximum criminal fines. Pp. 352–358.

(c) The Government's remaining arguments, echoed by the dissent, are unpersuasive. The Government claims that facts relevant to a fine's amount typically quantify the harm caused by the defendant's offense, and do not define a separate set of acts for punishment. The Government contends that only the latter determination implicates *Apprendi*'s concerns. But this argument rests on the rejected assumption that, in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an "element" of the offense and one that is a "sentencing factor." Further, the facts the District Court found in imposing a fine on Southern Union are not fairly characterized as merely quantifying the harm the company caused.

The Government also argues that applying *Apprendi* to criminal fines will prevent States and the Federal Government from enacting statutes that calibrate the amount of a fine to a defendant's culpability. But legislatures are free to enact such statutes, so long as the statutes are administered in conformance with the Sixth Amendment.

Finally, the Government contends that requiring juries to determine facts related to fines will cause confusion, prejudice defendants, or be impractical. These policy arguments rehearse those made by the dissents in our prior *Apprendi* cases. They must be rejected because the rule the Government espouses is unconstitutional. In addition, because *Apprendi* is now more than a decade old, the reliance interests underlying the Government's arguments are by this point attenuated. Pp. 358–360.

630 F. 3d 17, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, GINSBURG, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined, *post*, p. 360.

*Carter G. Phillips* argued the cause for petitioner. With him on the briefs were *Jeffrey T. Green*, *Jacqueline G. Cooper*, *Daniel R. Benson*, *Eric D. Herschmann*, *David E. Ross*, and *Seth B. Davis*.

*Deputy Solicitor General Dreeben* argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Moreno*, *Ni-*

*cole A. Saharsky, Andrew C. Mergen, Allen M. Brabender,* and *Nicholas A. DiMascio.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence. *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000); *Blakely* v. *Washington*, 542 U. S. 296 (2004). We have applied this principle in numerous cases where the sentence was imprisonment or death. The question here is whether the same rule applies to sentences of criminal fines. We hold that it does.

I

Petitioner Southern Union Company is a natural gas distributor. Its subsidiary stored liquid mercury, a hazardous substance, at a facility in Pawtucket, Rhode Island. In September 2004, youths from a nearby apartment complex broke into the facility, played with the mercury, and spread it around the facility and complex. The complex's residents were temporarily displaced during the cleanup and most underwent testing for mercury poisoning.

In 2007, a grand jury indicted Southern Union on multiple counts of violating federal environmental statutes. As relevant here, the first count alleged that the company knowingly stored liquid mercury without a permit at the Pawtucket facility "[f]rom on or about September 19, 2002 until on or about October 19, 2004," App. 104, in violation of the Resource Conservation and Recovery Act of 1976 (RCRA), see 90 Stat. 2812, as amended, 42 U. S. C. § 6928(d)(2)(A). A jury convicted Southern Union on this count following a trial in the District Court for the District of Rhode Island. The

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Benjamin C. Block, Jeffrey L. Fisher, Brian D. Ginsberg, Robin S. Conrad, Rachel Brand,* and *Sheldon Gilbert;* and for Criminal Procedure Scholars by *Harold J. Krent.*

verdict form stated that Southern Union was guilty of unlawfully storing liquid mercury "on or about September 19, 2002 to October 19, 2004." App. 140.

Violations of the RCRA are punishable by, *inter alia*, "a fine of not more than $50,000 for each day of violation." § 6928(d). At sentencing, the probation office set a maximum fine of $38.1 million, on the basis that Southern Union violated the RCRA for each of the 762 days from September 19, 2002, through October 19, 2004. Southern Union objected that this calculation violated *Apprendi* because the jury was not asked to determine the precise duration of the violation. The company noted that the verdict form listed only the violation's approximate start date (*i. e.*, "on or about"), and argued that the court's instructions permitted conviction if the jury found even a 1-day violation. Therefore, Southern Union maintained, the only violation the jury necessarily found was for one day, and imposing any fine greater than the single-day penalty of $50,000 would require factfinding by the court, in contravention of *Apprendi*.

The Government acknowledged the jury was not asked to specify the duration of the violation, but argued that *Apprendi* does not apply to criminal fines. The District Court disagreed and held that *Apprendi* applies. But the court concluded from the "content and context of the verdict all together" that the jury found a 762-day violation. App. to Pet. for Cert. 46a. The court therefore set a maximum potential fine of $38.1 million, from which it imposed a fine of $6 million and a "community service obligatio[n]" of $12 million. App. 154.

On appeal, the United States Court of Appeals for the First Circuit rejected the District Court's conclusion that the jury necessarily found a violation of 762 days. 630 F. 3d 17, 36 (2010). But the Court of Appeals affirmed the sentence because it also held, again in contrast to the District Court, that *Apprendi* does not apply to criminal fines. 630 F. 3d, at 33–36. Other Circuits have reached the opposite conclusion.

See *United States* v. *Pfaff*, 619 F. 3d 172 (CA2 2010) *(per curiam); United States* v. *LaGrou Distribution Sys., Inc.*, 466 F. 3d 585 (CA7 2006). We granted certiorari to resolve the conflict, 565 U. S. 1057 (2011), and now reverse.

## II

### A

This case requires us to consider the scope of the Sixth Amendment right of jury trial, as construed in *Apprendi*. Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U. S., at 303 (emphasis deleted). Thus, while judges may exercise discretion in sentencing, they may not "inflic[t] punishment that the jury's verdict alone does not allow." *Id.*, at 304.

*Apprendi*'s rule is "rooted in longstanding common-law practice." *Cunningham* v. *California*, 549 U. S. 270, 281 (2007). It preserves the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon* v. *Ice*, 555 U. S. 160, 163 (2009). We have repeatedly affirmed this rule by applying it to a variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence. See *Cunningham*, 549 U. S., at 274–275 (elevated "upper term" of imprisonment); *United States* v. *Booker*, 543 U. S. 220, 226–227, 233–234 (2005) (increased imprisonment range for defendant under then-mandatory Federal Sentencing Guidelines); *Blakely*, 542 U. S., at 299–300 (increased imprisonment above statutorily prescribed "standard range"); *Ring* v. *Arizona*, 536 U. S. 584, 588–589 (2002) (death penalty authorized upon finding exist-

ence of aggravating factors); *Apprendi*, 530 U. S., at 468–469 (extended term of imprisonment based on violation of a "hate crime" statute).

While the punishments at stake in those cases were imprisonment or a death sentence, we see no principled basis under *Apprendi* for treating criminal fines differently. *Apprendi*'s "core concern" is to reserve to the jury "the determination of facts that warrant punishment for a specific statutory offense." *Ice*, 555 U. S., at 170. That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America.[1] They are frequently imposed today, especially upon organizational defendants who cannot be imprisoned.[2] And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation;[3] under other statutes it is the amount

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[1] See Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 350 (1982) (hereinafter Preyer); see also Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, 82 N. C. L. Rev. 621, 640–641 (2004) (hereinafter Lillquist); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 290 (1989) (O'Connor, J., concurring in part and dissenting in part) (fines were "the preferred penal sanction" in England by the 17th century). "Imprisonment," in contrast, "although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time." Preyer 329; see also Lillquist 641–643.

[2] In 2011, a fine was imposed on 9% of individual defendants and on 70.6% of organizational defendants in the federal system. See United States Sentencing Commission, 2011 Annual Report, ch. 5, pp. 34, 40.

[3] See, *e. g.*, 12 U. S. C. § 1467a(i)(1); 15 U. S. C. § 717t(b); 16 U. S. C. § 825*o*(b); Cal. Health & Safety Code Ann. § 25515(a) (West Supp. 2012); Colo. Rev. Stat. Ann. §§ 25–7–122.1(1)(b) and (c) (2011); Mass. Gen. Laws, ch. 21, § 34C (West 2010); N. J. Stat. Ann. § 13:1E–99.89(f) (West Supp. 2012).

of the defendant's gain or the victim's loss, or some other factor.[4] In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s "animating principle": the "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Ice*, 555 U. S., at 168. In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal "sentence[s]," "penalties," or "punishment[s]"—terms that each undeniably embrace fines. *E. g.*, *Blakely*, 542 U. S., at 304; *Apprendi*, 530 U. S., at 490; *Ring*, 536 U. S., at 589.

The Government objects, however, that fines are less onerous than incarceration and the death sentence. The Government notes that *Apprendi* itself referred to the physical deprivation of liberty that imprisonment occasions, see 530 U. S., at 484, and that we have placed more weight on imprisonment than on fines when construing the scope of the Sixth Amendment rights to counsel and jury trial. See *Blanton* v. *North Las Vegas*, 489 U. S. 538, 542–543 (1989) (jury trial); *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979) (counsel). Therefore, the Government concludes, fines categorically "do not implicate" the "primary concerns motivating *Apprendi*." Brief for United States 23–25.

This argument fails because its conclusion does not follow from its premise. Where a fine is so insubstantial that the underlying offense is considered "petty," the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises. See, *e. g.*, *Muniz* v. *Hoffman*, 422 U. S. 454, 477

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[4] See, *e. g.*, 18 U. S. C. § 3571(d) (fine "not more than the greater of twice the gross gain or twice the gross loss"); Fla. Stat. § 775.083(1)(f) (2010) (same); Tex. Parks & Wild. Code Ann. § 12.410(c) (West 2002) (same); see also 18 U. S. C. § 645 (fine for embezzlement by officers of United States courts of up to twice the value of the money embezzled); § 201(b) (fine for bribery of public officials of up to three times the value of the bribe).

(1975) ($10,000 fine imposed on labor union does not entitle union to jury trial); see also *Blanton*, 489 U. S., at 541 (no jury trial right for "petty" offenses, as measured by the "severity of the maximum authorized penalty" (internal quotation marks omitted)). The same, of course, is true of offenses punishable by relatively brief terms of imprisonment—these, too, do not entitle a defendant to a jury trial. See *id.*, at 543 (establishing a rebuttable presumption that offenses punishable by six months' imprisonment or less are petty); *Duncan* v. *Louisiana*, 391 U. S. 145, 159–162 (1968).

But not all fines are insubstantial, and not all offenses punishable by fines are petty. See, *e. g.*, *Mine Workers* v. *Bagwell*, 512 U. S. 821, 838, n. 5 (1994) (criminal contempt fine of $52 million imposed on union "unquestionably is a serious contempt sanction" that triggers right of jury trial). The federal twice-the-gain-or-loss statute, in particular, see 18 U. S. C. § 3571(d), has been used to obtain substantial judgments against organizational defendants. See, *e. g.*, Amended Judgment in *United States* v. *LG Display Co., Ltd.*, No. 08–CR–803–SI (ND Cal.), pp. 1–2 ($400 million fine for conviction of single count of violating Sherman Antitrust Act); Judgment in *United States* v. *Siemens Aktiengesellschaft*, No. 08–CR–367–RJL (D DC), pp. 1–2, 5 ($448.5 million fine for two violations of Foreign Corrupt Practices Act); United States Sentencing Commission, 2010 Annual Report, ch. 5, p. 38 (noting fine of $1.195 billion imposed on pharmaceutical corporation for violations of food and drug laws). And, where the defendant is an individual, a large fine may "engender 'a significant infringement of personal freedom.'" *Blanton*, 489 U. S., at 542 (quoting *Frank* v. *United States*, 395 U. S. 147, 151 (1969)); see also 18 U. S. C. § 3572(a)(2) (requiring court to consider "the burden that the fine will impose upon the defendant" in determining whether to impose a fine and in what amount).

The Government thus asks the wrong question by comparing the severity of criminal fines to that of other punish-

ments. So far as *Apprendi* is concerned, the relevant question is the significance of the fine from the perspective of the Sixth Amendment's jury trial guarantee. Where a fine is substantial enough to trigger that right, *Apprendi* applies in full. As we said in *Cunningham*, "Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, . . . is the *very* inquiry *Apprendi*'s 'bright-line rule' was designed to exclude." 549 U. S., at 291.

This case is exemplary. The RCRA subjects Southern Union to a maximum fine of $50,000 for each day of violation. 42 U. S. C. § 6928(d). The Government does not deny that, in light of the seriousness of that punishment, the company was properly accorded a jury trial. And the Government now concedes the District Court made factual findings that increased both the "potential and actual" fine the court imposed. Brief for United States 28. This is exactly what *Apprendi* guards against: judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow.

B

In concluding that the rule of *Apprendi* does not apply to criminal fines, the Court of Appeals relied on our decision in *Ice*. *Ice* addressed the question whether, when a defendant is convicted of multiple offenses, *Apprendi* forbids judges to determine facts that authorize the imposition of consecutive sentences. 555 U. S., at 164. In holding that *Apprendi* does not, *Ice* emphasized that juries historically played no role in deciding whether sentences should run consecutively or concurrently. See 555 U. S., at 168–169. The Court of Appeals reasoned that juries were similarly uninvolved in setting criminal fines. 630 F. 3d, at 35.[5]

[5] *Ice* also stated in dicta that applying *Apprendi* to consecutive-versus-concurrent sentencing determinations might imperil a variety of sentencing decisions judges commonly make, including "the imposition of statuto-

The Court of Appeals was correct to examine the historical record, because "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Ice*, 555 U. S., at 170. See also, *e. g.*, *Blakely*, 542 U. S., at 301–302; *Apprendi*, 530 U. S., at 477–484. But in our view, the record supports applying *Apprendi* to criminal fines. To be sure, judges in the Colonies and during the founding era "possessed a great deal of discretion" in determining whether to impose a fine and in what amount. Lillquist 640–641; see also Preyer 350. Often, a fine's range "was apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid." *Ibid.* For some other offenses, the maximum fine was capped by statute. See, *e. g.*, *id.*, at 333 (robbery, larceny, burglary, and other offenses punishable in Massachusetts Bay Colony "by fines of up to £5"); Act of Feb. 28, 1803, ch. 9, § 7, 2 Stat. 205 (any consul who gives a false certificate shall "forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court"); K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (describing federal practice).

The exercise of such sentencing discretion is fully consistent with *Apprendi*, which permits courts to impose "judgment *within the range* prescribed by statute." 530 U. S., at 481 (emphasis in original). Nor, *a fortiori*, could there be an *Apprendi* violation where no maximum is prescribed. Indeed, in surveying the historical record that formed the basis of our holding in *Apprendi*, we specifically considered

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rily prescribed fines." 555 U. S., at 171. The Court of Appeals read this statement to mean that *Apprendi* does not apply to criminal fines. 630 F. 3d, at 34. We think the statement is at most ambiguous, and more likely refers to the routine practice of judges' imposing fines from within a range authorized by jury-found facts. Such a practice poses no problem under *Apprendi* because the penalty does not exceed what the jury's verdict permits. See 530 U. S., at 481. In any event, our statement in *Ice* was unnecessary to the judgment and is not binding. *Central Va. Community College* v. *Katz*, 546 U. S. 356, 363 (2006).

the English practice with respect to fines, which, as was true of many colonial offenses, made sentencing largely "dependent upon judicial discretion." See *id.*, at 480, n. 7; see also *Jones* v. *United States*, 526 U. S. 227, 244–245 (1999); 4 W. Blackstone, Commentaries on the Laws of England 372–373 (1769) (hereinafter Blackstone). And even then, as the dissent acknowledges, *post*, at 370–371 (opinion of BREYER, J.), there is authority suggesting that English juries were required to find facts that determined the authorized pecuniary punishment. See 1 T. Starkie, A Treatise on Criminal Pleading 187–188 (1814) (In cases "where the offence, or its defined measure of punishment, depends upon" property's specific value, the value "must be proved precisely as it is laid [in the indictment], and any variance will be fatal"); see also *id.*, at 188 ("[I]n the case of usury, where the judgment *depends upon the quantum taken*, the usurious contract must be averred according to the fact; and a variance from it, in evidence, would be fatal, because the penalty is apportioned to the value" (emphasis in original)); 2 W. Hawkins, A Treatise of the Pleas of the Crown, ch. 25, § 75, pp. 234–235 (3d ed. 1739) (doubting whether "it be needful to set forth the Value of the Goods in an Indictment of Trespass for any other Purpose than to aggravate the Fine").

In any event, the salient question here is what role the jury played in prosecutions for offenses that did peg the amount of a fine to the determination of specified facts—often, the value of damaged or stolen property. See *Apprendi*, 530 U. S., at 502, n. 2 (THOMAS, J., concurring). Our review of state and federal decisions discloses that the predominant practice was for such facts to be alleged in the indictment and proved to the jury. See, *e. g.*, *Commonwealth* v. *Smith*, 1 Mass. 245, 247 (1804) (declining to award judgment of treble damages for all stolen items in larceny prosecution when indictment alleged value of only some of the items); *Clark* v. *People*, 2 Ill. 117, 120–121 (1833) (arson indictment must allege value of destroyed building because

statute imposed "a fine equal in value to the property burned"); *State* v. *Garner*, 8 Port. 447, 448 (Ala. 1839) (same in malicious mischief prosecution where punishment was fine "not exceeding four fold the value of the property injured or destroyed"); *Ritchey* v. *State*, 7 Blackf. 168, 169 (Ind. 1844) (same in arson prosecution because, "[i]n addition to imprisonment in the penitentiary, the guilty person is liable to a fine not exceeding double the value of the property destroyed"); *Hope* v. *Commonwealth*, 50 Mass. 134, 137 (1845) (the "value of the property alleged to be stolen must be set forth in the indictment" in part because "[o]ur statutes . . . prescribe the punishment for larceny, with reference to the value of the property stolen"); *State* v. *Goodrich*, 46 N. H. 186, 188 (1865) ("It may also be suggested, that, in the case of simple larceny, the respondent may be sentenced to pay the owner of the goods stolen, treble the value thereof, which is an additional reason for requiring the [value of the stolen items] to be stated [in the indictment]"); *United States* v. *Woodruff*, 68 F. 536, 538 (Kan. 1895) ("[T]he defendant is entitled to his constitutional right of trial by jury" to ascertain "the exact sum for which a fine may be imposed").[6]

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[6] The dissent believes these decisions are inapposite because some of them arose in States that authorized juries, rather than judges, to impose sentence. See *post*, at 377–379. But this fact was not the basis of the decisions; rather, the courts required value to be alleged and proved to the jury because "the extent of the punishment . . . depend[s] upon the value of the property consumed or injured." *Ritchey*, 7 Blackf., at 169; see also, *e. g.*, *Clark*, 2 Ill., at 120–121 (same). And as Bishop explained, this requirement of proof originated not from a unique feature of jury sentencing, but from longstanding common-law principles—a point to which the dissent notably does not respond. 1 J. Bishop, Criminal Procedure §§ 81, 540 (2d ed. 1872). See *infra*, at 356.

Nor, for that matter, do larceny cases "presen[t] a special circumstance." *Post*, at 379. Such decisions invoked the same reasoning as the other cases just mentioned. See, *e. g.*, *Hope*, 50 Mass., at 137 (value must be proved because, among other things, "[o]ur statutes . . . prescribe the punishment for larceny . . . with reference to the value of the property stolen"); *Goodrich*, 46 N. H., at 188 (same). Bishop made this point explicit: "[Value]

The rule that juries must determine facts that set a fine's maximum amount is an application of the "two longstanding tenets of common-law criminal jurisprudence" on which *Apprendi* is based: First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" *Blakely*, 542 U. S., at 301 (quoting 4 Blackstone 343). And second, "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'" 542 U. S., at 301–302 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)). Indeed, Bishop's leading treatise on criminal procedure specifically identified cases involving fines as evidence of the proposition that "the indictment must, in order to inform the court what punishment to inflict, contain an averment of every particular thing which enters into the punishment." *Id.*, § 540, at 330 (discussing *Clark* and *Garner*). This principle, Bishop explained, "pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases." Criminal Procedure § 81, at 51. See also *Apprendi*, 530 U. S., at 510–511 (THOMAS, J., concurring) (explaining that Bishop grounded this principle in "well-established common-law practice . . . and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury").

As counterevidence that juries historically did not determine facts relevant to criminal fines, the Government points

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must be alleged wherever it is an element to be considered by the court in determining the punishment, *and it is immaterial whether the particular crime is larceny or any other crime.*" Criminal Procedure § 541, at 331 (emphasis added). At the end of the day, the only evidence the dissent musters that judges found fine-enhancing facts are *United States* v. *Tyler*, 7 Cranch 285 (1812), and one lower court decision restating *Tyler*'s holding. See *post*, at 374–376. We address *Tyler* below. See *infra*, at 357–358.

to two decisions from this Court. One is *United States* v. *Murphy*, 16 Pet. 203 (1842), which considered whether an interested witness was competent to testify in a larceny prosecution brought under a provision of the Crimes Act of 1790. *Murphy*'s only relevance to this case is that the Crimes Act authorized a fine of up to four times the value of the stolen property, and the Court remarked that "the fine is, as to its amount, purely in the discretion of the Court." *Id.*, at 209. But this statement is best read as permitting the court to select a fine from within the maximum authorized by jury-found facts—a practice, as noted, that accords with *Apprendi*. Such a reading is consistent with the fact that the indictment in *Murphy* alleged the value of the stolen items, see 16 Pet., at 207–208, and with the practice of contemporary courts addressing the same statute, see *United States* v. *Holland*, 26 F. Cas. 343, 345 (No. 15,378) (CC SDNY 1843) (trial court instructs jury "to assess the value of the property taken" in order to determine maximum fine); *Pye* v. *United States*, 20 F. Cas. 99 (No. 11,488) (CC DC 1842) (value of stolen items alleged in indictment).

The Government and dissent place greater reliance on *United States* v. *Tyler*, 7 Cranch 285 (1812). But like *Murphy*, this decision involved no constitutional question. Rather, it construed a federal embargo statute that imposed a fine of four times the value of the property intended to be exported. The indictment identified the property at issue as "*pearl-ashes*," but the jury's guilty verdict referred instead to "'*pot-ashes* [that] were worth two hundred and eighty dollars.'" *Tyler*, 7 Cranch, at 285.[7] The question was whether the discrepancy rendered the verdict "not suf-

[7] We will not keep the reader in suspense: Pot-ash and pearl-ash are alkaline salts of differing causticity that "for a long time [were] amongst the most valuable articles of manufacture and commerce" in parts of early America. D. Townsend, Principles and Observations Applied to the Manufacture and Inspection of Pot and Pearl Ashes 3 (1793). See also *Board of Trustees of Leland Stanford Junior Univ.* v. *Roche Molecular Systems, Inc.*, 563 U. S. 776, 785 (2011).

ficiently certain as to the value of the property charged in the indictment," *i. e.*, pearl-ashes. *Ibid.* The Court held that the discrepancy was immaterial, on the ground that "under this law, no valuation by the jury was necessary to enable the Circuit Court to impose the proper fine." *Ibid.* The Court's reasoning is somewhat opaque, but appears to rest on the text of the embargo statute, which directed that the defendant "shall, upon conviction, be . . . fined a sum by the Court." *Ibid.* In any event, nothing in the decision purports to construe the Sixth Amendment. And, insofar as *Tyler* reflects prevailing practice, it bears noting that both the indictment and verdict identified the value of the property at issue. See Tr. 2 in *Tyler*, 7 Cranch 285, reprinted in Appellate Case Files of the Supreme Court of the United States, 1792–1831, National Archives Microfilm Publications No. 214 (1962), roll 18 (indictment: "nineteen barrels of pearl-ashes, which were then and there of the value of six hundred dollars"). Whatever the precise meaning of this decision, it does not outweigh the ample historical evidence showing that juries routinely found facts that set the maximum amounts of fines.

## III

The Government's remaining arguments, echoed by the dissent (see *post*, at 381–386), are unpersuasive. The Government first submits that, when it comes to fines, "the judicially found facts typically involve only quantifying the harm caused by the defendant's offense"—for example, *how long* did the violation last, or *how much money* did the defendant gain (or the victim lose)?—"as opposed to defining a separate set of acts for punishment." Brief for United States 25. Only the latter determination, the Government contends, implicates *Apprendi*'s concerns.

This argument has two defects. First, it rests on an assumption that *Apprendi* and its progeny have uniformly rejected: that in determining the maximum punishment for an offense, there is a constitutionally significant difference

between a fact that is an "element" of the offense and one that is a "sentencing factor." See, *e. g.*, 530 U. S., at 478; *Ring*, 536 U. S., at 605. Second, we doubt the coherence of this distinction. This case proves the point. Under 42 U. S. C. § 6928(d), the fact that will ultimately determine the maximum fine Southern Union faces is the number of days the company violated the statute. Such a finding is not fairly characterized as merely "quantifying the harm" Southern Union caused. Rather, it is a determination that for each given day, the Government has proved that Southern Union committed all of the acts constituting the offense.

The Government next contends that applying *Apprendi* to fines will prevent States and the Federal Government from enacting statutes that, like § 6928(d), calibrate fines to a defendant's culpability, thus providing just punishment and reducing unwarranted sentencing disparity. But the Government presents a false choice. As was true in our prior *Apprendi* cases, and remains so here, legislatures are free to enact statutes that constrain judges' discretion in sentencing—*Apprendi* requires only that such provisions be administered in conformance with the Sixth Amendment.

Last, the Government argues that requiring juries to determine facts related to fines will cause confusion (because expert testimony might be needed to guide the inquiry); or prejudice the defendant (who might have to deny violating a statute while simultaneously arguing that any violation was minimal); or be impractical (at least when the relevant facts are unknown or unknowable until the trial is completed).[8] These arguments rehearse those made by the dissents in

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[8] In this vein, the dissent speculates that today's decision may "nudg[e] our [criminal justice] system" further in favor of plea bargains at the expense of jury trials. *Post*, at 386. But groups representing the interests of defendants—whom the dissent's rule purportedly favors—tell us the opposite is true. See Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 5 ("[E]xempting criminal fines from *Apprendi* makes innocent defendants more likely to plead guilty").

our prior *Apprendi* cases. See *Booker*, 543 U. S., at 329 (BREYER, J., dissenting in part); *Blakely*, 542 U. S., at 318–320 (O'Connor, J., dissenting); *id.*, at 330–340 (BREYER, J., dissenting); *Apprendi*, 530 U. S., at 555–559 (same). Here, as there, they must be rejected. For even if these predictions are accurate, the rule the Government espouses is unconstitutional. That "should be the end of the matter." *Blakely*, 542 U. S., at 313.

But here there is particular reason to doubt the strength of these policy concerns. *Apprendi* is now more than a decade old. The reliance interests that underlie many of the Government's arguments are by this point attenuated. Nor, in our view, does applying *Apprendi*'s rule to criminal fines mark an unexpected extension of the doctrine. Most Circuits to have addressed the issue already embrace this position, see *Pfaff*, 619 F. 3d, at 175–176; *LaGrou Distribution Sys.*, 466 F. 3d, at 594; *United States* v. *Yang*, 144 Fed. Appx. 521, 524 (CA6 2005), as did the Government prior to *Ice*, see Brief in Opposition 11, n. 2. In light of the reasons given in this opinion, the dramatic departure from precedent would be to hold criminal fines exempt from *Apprendi*.

* * *

We hold that the rule of *Apprendi* applies to the imposition of criminal fines. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE KENNEDY and JUSTICE ALITO join, dissenting.

Where a criminal fine is at issue, I believe the Sixth Amendment permits a sentencing judge to determine sentencing facts—facts that are not elements of the crime but are relevant only to the amount of the fine the judge will impose. Those who framed the Bill of Rights understood

that "the finding of a particular fact" of this kind was ordinarily a matter for a judge and not necessarily "within 'the domain of the jury.'" *Oregon* v. *Ice*, 555 U. S. 160, 168 (2009) (quoting *Harris* v. *United States*, 536 U. S. 545, 557 (2002) (plurality opinion)). The Court's contrary conclusion, I believe, is ahistorical and will lead to increased problems of unfairness in the administration of our criminal justice system.

I

Although this dissent does not depend upon the dissents in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and its progeny, summarizing those earlier dissents will help the reader understand this one. See *id.*, at 523–554 (O'Connor, J., dissenting); *id.*, at 555–556 (BREYER, J., dissenting); see also *United States* v. *Booker*, 543 U. S. 220, 327 (2005) (BREYER, J., dissenting in part) (citing cases); *Blakely* v. *Washington*, 542 U. S. 296, 329 (2004) (BREYER, J., dissenting) (same). The *Apprendi* dissenters argued that the law had long distinguished between (1) facts that constitute elements of the offense and (2) facts relevant only to sentencing. The term "elements of the offense" means "constituent parts of a crime . . . that the prosecution must prove to sustain a conviction." Black's Law Dictionary 597 (9th ed. 2009). The statute that creates the crime in question typically sets forth those constituent parts. And a jury must find the existence of each such element "beyond a reasonable doubt." See, *e. g.*, *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995); *In re Winship*, 397 U. S. 358, 364 (1970).

Thus, a bank robbery statute might prohibit an offender from (1) taking by force or by intimidation (2) in the presence of another person (3) a thing of value (4) belonging to, or in custody of, a bank. In that case, the jury can convict only if it finds the existence of each of these four factual "elements" beyond a reasonable doubt. But it need not find other facts beyond a reasonable doubt, for these four factual elements alone constitute the crime.

Other facts may be relevant to the length or kind of sentence the court will impose upon a convicted offender. These sentencing facts typically characterize the manner in which the offender carried out the crime or set forth relevant features characterizing the offender. For example, in respect to manner, an offender might have carried out a particular bank robbery

> "with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers . . . ." United States Sentencing Commission, Guidelines Manual §1A1.3, p. 3 (Nov. 2011) (USSG).

In respect to characteristics of the offender, a current bank robbery conviction might be that offender's first (or his fourth) criminal conviction.

Traditionally, sentencing facts help the sentencing judge determine where, within a broad statutory range of, say, up to 20 years of imprisonment, the particular bank robber's punishment should lie. The *Apprendi* dissenters concluded that the Constitution did not require the jury to find the existence of those facts beyond a reasonable doubt. Rather the law, through its rules, statutes, and the Constitution's Due Process Clause, would typically offer the defendant fact-finding protection. See, *e. g.*, Fed. Rule Crim. Proc. 32 (federal presentence report prepared by probation office sets forth facts, which defendant may contest at sentencing proceeding); *Almendarez-Torres* v. *United States*, 523 U. S. 224, 239–247 (1998) (constitutional inquiry).

The dispute in *Apprendi* and its line of cases arose after Congress and many States codified these sentencing facts during the sentencing reform movement of the 1970's and

1980's. Congress, for example, concluded that too many different judges were imposing too many different sentences upon too many similar offenders who had committed similar crimes in similar ways. It subsequently enacted the Sentencing Reform Act of 1984, creating a federal Sentencing Commission which would produce greater uniformity in sentencing through the promulgation of mandatory uniform Guidelines structuring how judges, in ordinary cases, should typically use sentencing facts to determine sentences. 28 U. S. C. §§ 991, 994 (2006 ed. and Supp. IV); see also 18 U. S. C. §§ 3553(b)(1), 3742(e). The *Apprendi*-line majority agreed that, where a statute set a higher maximum sentence, a Commission might structure how a judge found sentencing facts relevant to the sentence imposed below that otherwise applicable maximum, at least if the resulting guidelines were not mandatory. See *Booker*, *supra*, at 245. But the majority held that where a sentencing fact increased the otherwise applicable maximum penalty, that fact had to be found by a jury. *Apprendi*, *supra*, at 490.

As I have said, the dissenters thought that the Sixth Amendment did not require a jury to find any of these sentencing facts. Why, asked the dissenters, should Congress' or a State's desire for greater sentencing uniformity achieved through statutes seeking more uniform treatment (of similar offenders committing similar offenses in similar ways) suddenly produce new Sixth Amendment jury trial requirements?

Those requirements would work against greater sentencing fairness. To treat all sentencing facts (where so specified in a statute or rule) as if they were elements of the offense could lead Congress simply to set high maximum ranges for each crime, thereby avoiding *Apprendi*'s jury trial requirement. Alternatively, Congress might enact statutes that more specifically tied particular punishments to each crime (limiting or removing judicial discretion), for example, mandatory minimum statutes. But this system would

threaten disproportionality by insisting that similar punishments be applied to very different kinds of offense behavior or offenders. *Apprendi*'s jury trial requirements might also prove unworkable. Consider the difficulty of juries' having to find the different facts in the bank robbery example I have set forth above. Moreover, how is a defendant, arguing that he did not have a gun, alternatively to argue that, in any event, he did not fire the gun?

Finally, the dissenters took a different view of Sixth Amendment history. They believed that under the common law and at the time the Constitution was ratified, judges, not juries, often found sentencing facts, *i. e.*, facts relevant only to the determination of the offender's punishment. See, *e. g.*, *Booker*, 543 U. S., at 329 (BREYER, J., dissenting in part); *Apprendi*, 530 U. S., at 527–529 (O'Connor, J., dissenting).

The dissenters lost the argument. The Court in *Apprendi* held that (other than the fact of a prior conviction) "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490. But the dissenters' views help to explain why I continue to believe this Court should not extend *Apprendi*'s rule beyond "'the central sphere of [its] concern.'" *Ice*, 555 U. S., at 172 (quoting *Cunningham* v. *California*, 549 U. S. 270, 295 (2007) (KENNEDY, J., dissenting)). That is the Court's view, too, as set forth in *Ice*. And I base my dissent here primarily upon *Ice*.

## II

This case involves sentencing facts, not elements of a crime. The criminal statute at issue constitutes one part of the Resource Conservation and Recovery Act of 1976 (RCRA), which, among others things, authorizes the Environmental Protection Agency to create a list of hazardous wastes. 42 U. S. C. § 6921. The criminal statute says:

> "Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under

> [RCRA] . . . without [an RCRA-authorized] permit . . . shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed . . . five years . . . , or both." § 6928(d)(2)(A).

No one here denies that this statute creates a crime with four elements: (1) knowing treatment, storage, or disposal of a waste (2) that is hazardous, (3) without a permit, and (4) knowing that the waste has a substantial potential of causing harm to others or to the environment. App. 129–130; see Brief for Petitioner 30.

The number of "day[s] of each violation," however, is not an additional element of the crime. The statute says that the number of days becomes relevant only "upon conviction" of the crime as previously defined. Moreover, the number of days is relevant to application of only one of two kinds of punishment that the statute mentions (fine and imprisonment); one cannot easily read this statute as creating two separate crimes identical but for the punishment. Finally, Congress did not include here, as it sometimes has done, statutory words such as "each day of violation shall constitute a separate violation." *E. g.*, 47 U. S. C. § 223(b); see also 42 U. S. C. § 4910(b). Rather, as in many other similar statutes, the statute here sets forth the crime and kinds of punishments (fine and imprisonment), while separately specifying facts that determine the maximum punishment of one kind (fines).

In this particular case, the indictment set forth a violation period of 762 days (from "on or about September 19, 2002 until on or about October 19, 2004"). App. 104. The jury's guilty verdict did not specify the number of days on which the defendant committed the offense. *Id.*, at 141. But after the conviction and sentencing hearing, the judge found that, among other things, the "clear and essentially irrefutable" evidence at trial supported the conclusion set forth in the presentence report, namely, that the maximum fine available amounted to $50,000 per day for 762 days—or

$38.1 million. App. to Pet. for Cert. 47a–48a. The judge imposed a fine of $6 million along with a $12 million community service obligation. App. 162–163.

## III

*Apprendi* says that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. The number of days (beyond one) on which the defendant violated this criminal statute is such a fact. Nonetheless, like the majority, I believe that *Apprendi*'s rule does not automatically control the outcome in this case.

That is because this case concerns a fine, not, as in *Apprendi*, a term of imprisonment. And we made clear in *Oregon* v. *Ice*, 555 U. S. 160, that *Apprendi* does not encompass every kind of fact-related sentencing decision that increases the statutory maximum. In *Ice*, we considered *Apprendi*'s application to a sentencing decision about whether two prison sentences for conviction of two separate crimes (*e. g.*, illegal drug possession and illegal gun possession) would run concurrently or consecutively. 555 U. S., at 163. An Oregon statute required a concurrent sentence unless the sentencing judge found certain facts. *Id.*, at 165. Those facts could make a large difference in a term of imprisonment. Their presence could mean that a 5-year sentence for illegal drug possession and a 5-year sentence for illegal gun possession would amount to 10 years of imprisonment rather than 5 (indeed, in *Ice* itself, the judge's factfinding increased the sentence by 20 years, see *id.*, at 166, and n. 5). Thus, the presence of those "fact[s]" could "increas[e] the penalty" beyond what would otherwise be "the prescribed statutory maximum." *Id.*, at 167 (internal quotation marks omitted). Nonetheless, we held that the Sixth Amendment permitted a judge—it did not require a jury—to make that factual determination. *Id.*, at 164.

We consequently concluded that *Apprendi* does not encompass every kind of fact-related sentencing decision that increases the statutory maximum. In doing so, we wrote that the "animating principle" of *Apprendi*'s rule "is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." 555 U. S., at 168. And we refused to extend *Apprendi*'s rule to a new category of sentence-related facts for two basic reasons.

First, we considered a historical question, namely, whether "the finding of a particular fact was understood as within 'the domain of the jury . . . by those who framed the Bill of Rights.'" 555 U. S., at 168 (quoting *Harris*, 536 U. S., at 557). And we read the "historical record" as showing that "in England before the founding of our Nation, and in the early American States," the jury "played no role in the decision to impose sentences consecutively or concurrently." 555 U. S., at 168–169 (footnote omitted). Rather, that decision "rested exclusively with the judge." *Id.*, at 168.

Second, recognizing that "administration of a discrete criminal justice system is among the [States'] basic sovereign prerogatives," we considered the need to "respect . . . state sovereignty." *Ibid.* We expressed concern lest application of *Apprendi* to this kind of decision inhibit state legislative efforts to establish a fairer sentencing system by helping to bring about more uniform sentencing. *Ice*, 555 U. S., at 171. We concluded that "[n]either *Apprendi* nor our Sixth Amendment traditions compel straitjacketing the States" in this respect. *Ibid.*

This case presents another new category of fact-related sentencing decisions, namely, decisions about the amount of a fine. Thus, as the majority recognizes, we must begin with a historical question. *Ante*, at 352–353. Who—judge or jury—found the facts that determine the amount of a criminal fine "in England before the founding of our Nation, and in the early American States?" *Ice*, *supra*, at 169 (foot-

note omitted). Unlike the majority, I believe the answer to this question is that, in most instances, the judge made that determination.

## IV

### A

*Apprendi* relied heavily upon the fact that in "England before the founding of our Nation" the prescribed punishment for more serious crimes, *i. e.*, felonies, was typically fixed—indeed, fixed at death. 530 U. S., at 478–480; see J. Baker, An Introduction to English Legal History 512 (4th ed. 2007); J. Beattie, Crime and the Courts in England, 1660–1800, pp. 409, 450–451 (1986) (hereinafter Beattie); Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900, pp. 13, 16, 36–37 (A. Schioppa ed. 1987). The facts related to the application of that punishment were typically elements of the crime. And the jury, not the judge, determined the existence of those facts. See 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone); see also Baker, *supra*, at 512–518 (in practice, the jury or judge could ameliorate capital punishment through application of doctrines such as "pious perjury," "benefit of clergy," and reprieves, or the King could grant a royal pardon); Beattie 419–435 (same).

Punishment for lesser crimes, however, included fines. And under the common law, the judge, not the jury, determined the amount of the fine and the sentencing facts relevant to the setting of that amount. See Baker, *supra*, at 512; Beattie 459. Pertinent sentencing facts typically concerned the *manner* in which the offender committed the crime and the characteristics of that offender. See *id.*, at 456–460. Thus, in 1769, Blackstone wrote:

> "Our statute law has not therefore often ascertained the quantity of fines, *nor the common law ever;* it directing such an offence to be punished by fine, in general,

> without specifying the certain sum." Blackstone 372 (emphasis added).

That is because

> "[t]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be [a] matter of indifference to another's." *Id.*, at 371.

Moreover, the "quantum" of pecuniary fines

> "must frequently vary, from the aggravations or otherwise of the offence [*i. e.*, the *manner* in which the crime was committed], the quality and condition of the parties *[e. g.*, the *offender's characteristics]*, and from innumerable other circumstances." *Ibid.*

Similarly, the 18th-century statesman and treatise writer Baron Auckland pointed out that in 10th-century England pre-Norman law had attached a fixed financial penalty to each specific crime. Principles of Penal Law 69 (2d ed. 1771). That law, for example, imposed a penalty of 3 cows for perjury and 12 cows for the rape of a maid. *Ibid.* This system, Baron Auckland added, ignored variations in, for example, the differing value of a fixed fine, say a cow, over time and among individuals; it also ignored the manner in which the offense was committed and the characteristics of the offender. *Id.*, at 69–72. For those reasons, 18th-century English law ordinarily left "the quantum of the fine" to "the discretion of the Judges." *Id.*, at 68 (emphasis deleted).

> "[Because t]he enormity and tendency of the crime, the malice and wilfulness of the intention, the inconsiderateness and suddenness of the act, the age, faculties, and fortune of the offender, form a chain of complex questions; which can be resolved only by *the evidence of each separate charge*, and for which no human foresight can

> provide . . . then arises a necessary appeal *to the breast of the judge*." *Id.*, at 72 (emphasis added).

The only generally applicable limitations on the judge, when imposing the fine, were those contained in the English Bill of Rights and the Magna Carta. 1 W. & M., ch. 2, § 11, in 3 Eng. Stat. at Large 440 (forbidding "excessive Fines"); Magna Carta § 20, 9 Hen. III, § 14, in 1 Eng. Stat. at Large 5 (1225) (fine cannot deprive offender of means of livelihood); see Auckland, *supra*, at 73 (so interpreting Magna Carta); Blackstone 372–373 (same).

To be sure, the jury, not the judge, would determine the facts that made up the elements of the crime, even though those elements might be relevant to whether a fine could apply and, if so, the amount of the fine imposed as well. The common law, for example, defined larceny as the theft of goods that had some intrinsic value and divided the offense into grand larceny, which was theft of goods valued at more than a shilling, and petit larceny, which was theft of goods worth less than a shilling. *Id.*, at 229–234; Langbein, *supra*, at 16–17; see also Beattie 424 (whether "benefit of clergy" was available depended on value stolen). Consequently, the jury would determine the value of the goods in question. In doing so, the jury might "manipulate the sentence by valuing the goods at under a shilling and thereby spare the defendant the capital sanction." Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, 82 N. C. L. Rev. 621, 636 (2004). But otherwise "the jury could not influence what other penalties" like fines the defendant might face because in "non-capital criminal cases" the amount of punishment "was left solely in the hands of the justices." *Ibid.*

I cannot determine with any certainty the extent to which 18th-century law placed other relevant limitations upon the judges' authority to determine fine-related sentencing facts. I have found an 1814 English treatise on criminal pleading that says, unlike in cases "where to constitute the offence

the value must [only] be of a certain amount," in cases "where the offence, or its defined measure of punishment, depends upon the quantity of that excess . . . a variance from the amount averred . . . will be fatal." 1 T. Starkie, A Treatise on Criminal Pleading 187–188 (emphasis deleted). It then adds that "in the case of usury, where the judgment *depends upon the quantum taken*, the usurious contract must be averred according to the fact; and a variance from it, in evidence, would be fatal, because the penalty is apportioned to the value." *Id.*, at 188. And an 18th-century treatise says that it is questionable whether it is necessary "to set forth the Value of the Goods in an Indictment of Trespass *for any other Purpose than to aggravate the Fine.*" 2 W. Hawkins, A Treatise of the Pleas of the Crown, ch. 25, § 75, pp. 234–235 (3d ed. 1739) (emphasis added). One *might* read these statements as supporting the majority, for they *might* indicate that, where a statute sets forth facts that determine a pecuniary penalty, then a jury, not judge, would determine those facts.

But whether that is the correct reading is unclear. For one thing, prosecutions for economic crimes were usually brought by injured parties and the "fine" in such cases went in whole or in part to compensate that party for damages. See Beattie 35–36, 192. For example, immediately following the sentence I have just quoted, Hawkins wrote that it is questionable whether it is necessary "to set forth the Value of the Goods . . . in an Indictment of Larceny for any other Purpose than to sh[o]w that the Crime amounts to grand Larceny, and to ascertain the Goods, thereby the better to [e]ntitle *the Prosecutor* to a *Restitution.*" Hawkins, *supra*, at 234–235 (emphasis added; footnote omitted). Likewise, Blackstone dated English usury law back to a 1545 statute that provided as the penalty that the offending lender shall both "make f[i]ne . . . at the King's will and pleasure" and forfeit "treble value" of the money borrowed—with half to the King and the other half "*to him or them that will sue*

*for the same*." 37 Hen. VIII, ch. 9, in 3 Stat. of Realm 997 (emphasis added); see Blackstone 156; see also M. Ord, An Essay on the Law of Usury 122–123 (3d ed. 1809) (treble-value forfeitures recovered through information *qui tam* but discretionary fines recovered through criminal indictment). Thus, the statutes at issue were what American courts would later call quasi-civil statutes—part civil, part criminal; see also Beattie 457.

Parliament consequently would have had a special reason for requiring jury determinations of the amount of the pecuniary penalty. And Parliament had the authority to depart from the common law and to insist that juries determine sentencing facts without establishing a generally applicable principle. The relevant question here is how often and for what purposes Parliament did so. Blackstone himself wrote that such statutes fixing fines in amounts were both in derogation of the common law and uncommon. Blackstone 372. Finally, no one here argues that we adopt the rule actually suggested by the treatises. That rule is not that sentencing is to be done according to value found by the jury but instead that a discrepancy between the value alleged and value found by the jury might render the entire case fatal. See Starkie, *supra*, at 188.

Thus, I cannot place great weight upon these statutes. The parties did not refer to them in their briefs. And in any event, the historical sources taken together make clear that the predominant practice in 18th-century England was for a judge, not a jury, to find sentencing facts related to the imposition of a fine.

Indeed, the Court in *Apprendi* conceded the point. It distinguished 18th-century punishments for greater crimes (fixed punishments) from punishments for lesser crimes (included fines). 530 U. S., at 480, n. 7. And it wrote that "judges most commonly imposed *discretionary* 'sentences' of fines . . . upon misdemeanants." *Ibid.* (emphasis added).

Insofar as 18th-century English practice helps determine what the Framers would have thought about the scope of the Constitution's terms—here, the Sixth Amendment's right to trial by an impartial jury—that practice suggests they would *not* have expected that right to include determination of sentencing facts relevant only to the imposition of a fine.

B

Practice in the "early American States" is even less ambiguous. In the colonial era, judges would normally determine the amount of a fine (within an unlimited or otherwise broad range) while also determining related sentencing facts (say, about the manner in which the offender committed the crime and the offender's characteristics). Legal historians tell us that in the American Colonies a criminal fine was "overwhelmingly the most common of the non-capital punishments," that in most instances the range of the fine was "apparently without limit except insofar as it was within the expectation on the part of the court that it would be paid," that the judge established the precise amount of the fine, and that the amount was "tailored individually to the particular case." Preyer, Penal Measures in the American Colonies: An Overview, 26 Am. J. Legal Hist. 326, 350 (1982). "[C]olonial judges, like their English brethren, possessed a great deal of discretion" and could set the amount of fine "depending upon the nature of the defendant and the crime." Lillquist, 82 N. C. L. Rev., at 640–641.

Enactment of the Constitution and Bill of Rights did not change this practice. Some early American statutes specified that the judge has discretion to set the amount of the fine while saying nothing about amount. *E. g.*, Crimes Act of 1790, ch. 9, § 21, 1 Stat. 117 (any person who bribes a judge "on conviction thereof shall be fined and imprisoned at the discretion of the court"); § 28, *id.*, at 118 (any person who does violence to an ambassador or public minister, "on con-

viction, shall be imprisoned not exceeding three years, and fined at the discretion of the court"). Others set only a maximum limitation. *E. g.*, Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 208 (officer of inspection convicted of oppression or extortion "shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months, or both, at the discretion of the court"). In respect to these statutes, Justice Iredell wrote in 1795 that the "common law practice . . . must be adhered to; that is to say, the jury are to find whether the prisoner be guilty, and . . . the court must assess the fine." *United States* v. *Mundell*, 27 F. Cas. 23, 24 (No. 15,834) (CC Va.).

Still other statutes, as in England, specifically keyed the amount of the fine to a specific factual finding. A section of the Crimes Act of 1790, for example, said that any person who upon United States property or the high seas "shall take and carry away, with an intent to steal or purloin the personal goods of another . . . shall, on conviction, be fined not exceeding the fourfold value of the property so stolen." § 16, 1 Stat. 116. This crime has several elements: (1) taking and (2) carrying away (3) with intent to steal (4) personal goods (5) belonging to another (6) on United States property or the high seas. The jury must find the existence of these facts beyond a reasonable doubt to establish a conviction. But the statute also says that the fine cannot exceed "the fourfold value of the property so stolen." And it thereby requires the finding of a sentencing fact, namely, the value of the stolen property. Who would make this determination—judge or jury?

Unlike in 18th-century England, in the United States there is case law directly answering the question. In *United States* v. *Tyler*, 7 Cranch 285 (1812), this Court considered a federal embargo statute making it a crime to "put" certain "goods" on board a ship with intent to "export" them outside of the United States. See Act of Jan. 9, 1809, ch. 5, § 1, 2 Stat. 506. The statute also provided that an offender's

"goods" and ship "shall be forfeited," and the offender "shall, upon conviction," be "fined a sum, by the court before which the conviction is had, equal to four times the value of such specie, goods, wares and merchandise." *Ibid.* The statute thereby required determination of a sentencing fact, namely, "the value of such . . . goods." Was the finding of this sentencing fact for the judge or for the jury?

In *Tyler*, the defendant had been indicted for attempting to export 19 barrels of pearl-ashes, valued at $600. *Ante*, at 357–358. The jury convicted the defendant, but when doing so, it said that it found the defendant guilty of having tried to export "'pot-ashes . . . worth two hundred and eighty dollars.'" 7 Cranch, at 285 (emphasis deleted). The defendant appealed, claiming a difference between the jury's basis for conviction and the crime as charged in the indictment. The difference between the words "pearl-ashes" and "pot-ashes" is unlikely to have mattered, for pearl-ash is simply a refined grade of pot-ash (potassium carbonate). See T. Barker, R. Dickinson, & D. Hardie, Origins of the Synthetic Alkali Industry in Britain, 23 Economica 158, 163 (1956). Thus, the defendant did not focus upon that difference. Rather, he claimed that the jury's verdict "was not sufficiently certain as to the *value* of the property charged in the indictment." *Tyler*, 7 Cranch, at 285 (emphasis added). Because $280 differs from $600, the jury had not found him guilty of the crime charged.

The Supreme Court, however, found that the jury's finding as to valuation was not *relevant*. It upheld the conviction because it was "of [the] opinion that, under this law, *no valuation by the jury was necessary to enable the Circuit Court to impose the proper fine*." *Ibid.* (emphasis added). The Court did not say explicitly that the Sixth Amendment permitted the judge to find the relevant sentencing fact. See *ante*, at 358. But it seems unlikely that a Court that included Chief Justice John Marshall, Justice Joseph Story, and others familiar with both the common law and the Constitu-

tion would have interpreted a federal statute as they did if *either* contemporary legal practice *or* the Constitution suggested or required a different interpretation.

Nor can we say that the Court did not fully consider the matter. Justice Story later authoritatively interpreted *Tyler*. Sitting as a Circuit Justice in *United States* v. *Mann*, 26 F. Cas. 1153 (No. 15,717) (CCNH 1812), he considered the same judge/jury question in respect to the same embargo statute. His court wrote that in "*Tyler*, 7 Cranch 285, in a prosecution on this same clause, *the court held that the fine and quadruple value must be assessed and adjudged by the court*, and not by the jury." *Ibid.* (emphasis added); see also 26 F. Cas. 1153, 1155 (No. 15,718) (CCNH 1812) (Story, J.) (noting that the Supreme Court would not have reached its result unless satisfied "that the fine was to be imposed by the court, and not found by the jury").

Thus, nothing in early American practice suggests that the Framers thought that the Sixth Amendment jury trial right encompassed a right to have a jury determine fine-related sentencing facts. But, to the contrary, there is a Supreme Court opinion, namely, *Tyler*, that holds, or at least strongly indicates, the opposite.

C

The majority reaches a different conclusion. But the majority does not pose what I believe to be the relevant historical question, namely, whether traditionally "in England before the founding of our Nation, and in the early American States," see *Ice*, 555 U. S., at 169 (footnote omitted), judges, not juries, normally determined fine-related sentencing facts. Instead, it asks whether a jury, rather than the judge, found those facts in that subclass of cases where a statute "peg[ged] the amount of a fine to the determination of specified facts." *Ante*, at 354. It concludes that "the predominant practice was for such facts to be alleged in the indictment and proved to the jury." *Ibid.*

Putting the question this way invites a circular response. As is true of the English usury cases, nothing prohibits a

legislature from requiring a jury to find a sentencing fact in a particular subset of cases. And obviously when a State does so, the jury will indeed have to find those facts. Thus, if, say, 10 States decide to make juries find facts that will set the fine for, say, simple larceny, then jury practice in those States (during, say, the 19th century) will include the jury's finding of those sentencing facts. But that circumstance tells us only that in those 10 States for those specific statutes the legislatures so required. It tells us little, if anything, about practices in most States, and it tells us nothing at all about traditional practice in England or 18th-century America. Nor does a discovery that, say, 10 state legislatures once required juries, rather than judges, generally to set fines tell us about the scope of the Sixth Amendment's constitutional right to trial by jury. The matter is important because the majority rests its conclusion almost exclusively upon reports of mid-19th-century jury trials in a handful of States, namely, Alabama, Illinois, Indiana, Massachusetts, and New Hampshire, and a treatise that bases its statements upon those cases. *Ante,* at 354–356.

Scholars tell us that in fact there were about 10 States—including Alabama, Illinois, and Indiana—that (after ratification of the Sixth Amendment) enacted statutes that required juries, not judges, to determine a defendant's punishment, including not only the length of a prison term but also the amount of a fine. See Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311, 317 (2003); King, Origins of Felony Jury Sentencing in the United States, 78 Chi.-Kent L. Rev. 937, 963 (2003). The courts that considered this practice, however, did not believe that the constitutional right to jury trial compelled it.

Alabama's Supreme Court, for example, explained that its State's jury-sentencing system, which allowed the jury "to determine both the fine and imprisonment," was in derogation of, and created "an innovation upon[,] the rules of the common law, so far as it transfers [those] powers from the court to the jury." *Hawkins* v. *State,* 3 Stew. & P. 63 (1832).

Thus, in *State* v. *Garner*, 8 Port. 447 (1839), see *ante*, at 355, the malicious mischief statute at issue said that the offender would "'be fined in such sum as *the jury trying the same may assess*, not exceeding four fold the value of the property injured or destroyed.'" 8 Port., at 448 (emphasis added). The statute, in other words, transferred all sentencing facts to the jury and was not illustrative of 18th-century practice. Further, the statute said that the "'fine shall be paid to the party injured.'" *Ibid.* The court held that it was consequently proper to allege the amount of the property's value in the indictment, not because the State's constitution required any such thing, but because "the fine thus assessed, is for the benefit of the injured party"; the case "is, therefore, a *quasi* civil proceeding"; and for that reason "it would be more consonant to the rules of pleading, and to the principles which govern analogous cases, that the indictment should contain an averment of the value of the property." *Ibid.;* Ord, Law of Usury, at 122–123 (usury as quasi-civil proceeding).

Illinois law was similar. Illinois became a jury-sentencing State in 1831. See Iontcheva, *supra*, at 317, n. 28 (citing Act of Feb. 15, 1831, § 42, 1830 Ill. Laws 103, 113). The Illinois Supreme Court subsequently wrote that, even though "at common law . . . juries . . . never were invested with the power of determining the character or extent of the punishment . . . , we are to be governed entirely by the provisions and enactments of our code of criminal jurisprudence." *Blevings* v. *People*, 2 Ill. 172, 173 (1835). And in *Clark* v. *People*, 2 Ill. 117 (1833), see *ante*, at 354–355, the court made clear that the arson statute at issue

> "ha[d] changed the common law . . . [that the] fine equal in value to the property burne[d] is imposed as part of the punishment[; hence,] [t]he indictment . . . should have charged the value of the property destroyed, [for] otherwise it could not properly have been inquired into by the jury." 2 Ill., at 120–121.

Indiana was another jury-sentencing State. Iontcheva, *supra*, at 317, n. 28; King, *supra*, at 937. Indiana case law decided before Indiana changed its system indicates that the judge could decide certain facts required to set the applicable maximum fine. *E. g.*, *Morris* v. *State*, 1 Blackf. 37 (1819). But after Indiana became a jury-sentencing State, its courts held, not surprisingly, that under Indiana law the jury must determine sentencing facts. See *Ritchey* v. *State*, 7 Blackf. 168, 169 (1844); *ante*, at 355.

Massachusetts presents a special circumstance. The two Massachusetts cases that the majority cites, *ante*, at 354–355, are larceny cases. Value traditionally was an element of the crime of larceny—both because larceny was theft of goods that had some intrinsic value and because value distinguished grand larceny from petit larceny—and thus juries traditionally had to determine at least some facts about the value of the property stolen. See Blackstone 229, 234. Massachusetts had abolished the distinction between grand and petit larceny before its courts decided the two cases the majority cites. See *Commonwealth* v. *Smith*, 1 Mass. 245, 246 (1804). But those decisions nonetheless rest in significant part upon the jury's traditional larceny factfinding role. In *Hope* v. *Commonwealth*, 50 Mass. 134 (1845), for example, the Massachusetts Supreme Judicial Court wrote:

> "The well settled practice, familiar to us all, has been that of stating in the indictment the value of the article alleged to have been stolen. . . . The reason for requiring this allegation and finding of value may have been, originally, that a distinction might appear between the offences of grand and petit larceny . . . . Our statutes . . . prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment." *Id.*, at 136–137.

The "long established practice" to which the court refers is *larceny* case practice, not practice in all criminal cases.

The New Hampshire case to which the majority refers, *State* v. *Goodrich*, 46 N. H. 186 (1865), *ante*, at 355, is also a larceny case that relied on the "established" larceny case practice. The court explained:

> "The indictment ought to state the value of the articles stolen that it may appear whether the offence be grand or petit larceny, and such we believe is the settled practice. . . . It has been held in some jurisdictions, that, in case no value is alleged, the offence charged may be regarded as simple larceny, and a conviction be had accordingly . . . but we think it best to adhere to the well established doctrine in such cases . . . . It may also be suggested, that, in the case of simple larceny, the respondent may be sentenced to pay the owner of the goods stolen, treble the value thereof, which is an additional reason for requiring the character of the offence to be stated." 46 N. H., at 187–188.

The court wrote nothing to suggest that its holding rested on generally applicable constitutional grounds. And it was in the *New Hampshire* Federal Circuit Court a half century earlier when Justice Story had indicated that the Federal Constitution did *not* impose any such requirement. See *Mann*, 26 F. Cas., at 1155 (No. 15,718).

That leaves the majority's puzzling 1895 Federal District Court case from Kansas. *United States* v. *Woodruff*, 68 F. 536; *ante*, at 355. The circumstances of this case are highly unusual, and the District Court's reasoning as to why no fine could be set seems to have rested on a combination of statutory construction and constitutional principle. See *Woodruff* v. *United States*, 58 F. 766, 767–768 (CC Kan. 1893); *Woodruff*, 68 F., at 538–539. Still, I concede this case to the majority—as the lone swallow that cannot make the majority's summer.

Taken together, the 19th-century cases upon which the majority rests its holding do not show anything about practice in the vast majority of States. They concede that common-law practice was to the contrary. And they tell us little about the meaning of the Sixth Amendment. Even were that not so, I do not understand why these mid-19th-century cases should tell us more about the Constitution's meaning than, say, the common 20th-century practice of leaving sentencing fact determinations to the judge. This Court apparently once approved the latter practice as constitutional. *E. g.*, *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986); *Almendarez-Torres*, 523 U. S. 224. And these cases seem more closely related to the present topic.

D

The upshot is that both 18th-century English common law and 18th-century American law typically provided judges with broad discretion to assess fines. The judge, not the jury, would normally determine fine-related sentencing facts. In this respect, ordinary 18th-century sentencing practice related to fines was unlike sentencing practice in respect to felonies. In the latter case, in *Apprendi*'s view, punishment was normally "fixed" and the judge's sentencing role was consequently minimal. 530 U. S., at 478–480. In the former case, namely, fines, the judge's role was not normally minimal, but the opposite. For these reasons, I believe that allowing a judge to determine sentencing facts related to imposition of a fine does not invade the historic province of the jury. The historical test that we set forth in *Ice* is satisfied.

V

In *Ice*, we also took account of the practical extent to which extending *Apprendi*'s rule beyond the "'central sphere of [its] concern'" would "diminish" the States' "role" in "devising solutions to difficult legal problems . . . absent impelling reason to do so." 555 U. S., at 171–172. In partic-

ular, we feared that insisting that juries determine the relevant sentencing facts (concerning concurrent, as opposed to consecutive, punishment) would unjustifiably interfere with a State's legislative efforts "to rein in the discretion judges possessed at common law to impose consecutive sentences at will." *Id.*, at 171. It would inhibit (indeed "straightjacke[t]") States seeking to make "concurrent sentences the rule, and consecutive sentences the exception." *Ibid.* We said that we were "unclear how many other state initiatives would fall" if *Apprendi* were extended, and that expansion would be "difficult for States to administer." 555 U. S., at 171–172. We believed that these considerations argued strongly against any such "expansion."

Here, the same kinds of considerations similarly argue against "expansion" of *Apprendi*'s rule. Today's decision applies to the States. In the 1950's and thereafter, States as well as the Federal Government recognized a serious problem in respect to the sentencing of corporations. Fines, imposed as a punishment upon corporate offenders, were both nonuniform (treating identical offenders differently) *and* too often they were set too low. Judges would frequently fine corporations in amounts that failed to approximate the harm a corporation had caused or the gain that it had obtained through its illegal activity, both because often the statutory maximums were low and because often the fines imposed tended to be substantially lower than those maximums. See Gruner, Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform, 36 Ariz. L. Rev. 407, 408 (1994); Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 435, n. 55 (1963); Nagel & Swenson, Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future, 71 Wash. U. L. Q. 205, 215 (1993).

Consequently, the authors of the Model Penal Code adopted a model provision stating that, in respect to offenses involving financial gain, a court could impose an alternative "higher" fine "equal to double the pecuniary gain derived from the offense by the offender." Model Penal Code § 6.03(5), 10A U. L. A. 259 (2001). New York soon thereafter adopted such a provision. N. Y. Penal Law Ann. § 80.10(2)(b) (West 2009). And other States followed New York's example with similar provisions permitting judges to set fines equal to twice the gain to the offender or twice the loss to the victim, thereby helping to diminish disparity while helping potential victims by increasing deterrence. *E. g.*, Conn. Gen. Stat. § 53a–44 (2011); Fla. Stat. § 775.083(1)(f) (2010). Many of these statutes say in particular that the "court" shall make the finding of gain or loss, in a separate hearing if necessary. *E. g.*, N. Y. Penal Law Ann. § 80.00(3) (West 2009); N. J. Stat. Ann. § 2C:43–3(e) (West 2005).

The Federal Government followed suit. In some instances, such as RCRA, where environmental harm likely varies with the length of the violation period, Congress advanced its uniformity and deterrence goals by tying a dollar-limited fine to the length of time during which that violation took place. 42 U. S. C. § 6928(d)(2)(A). In other instances, it did so through a new general gain-or-loss provision, applying to all offenses, including such crimes as corporate fraud, antitrust violations, and environmental pollution. That provision says:

> "ALTERNATIVE FINE BASED ON GAIN OR LOSS.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection

> would unduly complicate or prolong the sentencing process." 18 U. S. C. § 3571(d).

To apply *Apprendi*'s rule to the fines set forth in such statutes, no less than in *Ice*, would weaken or destroy the States' and Federal Government's efforts "to rein in the discretion judges possessed at common law," *Ice*, 555 U. S., at 171, over fines. Congress, in enacting such statutes, expected judges, not juries, to determine fine-related sentencing facts because doing so will often involve highly complex determinations. Where, say, major fraud is at issue, the full extent of the loss (or gain) may be unknown at the time of indictment or at any other time prior to the conclusion of the trial. And in an antitrust or an environmental pollution case, the jury may have particular difficulty assessing different estimates of resulting losses.

The consequence of the majority's holding, insisting that juries make such determinations, is likely to diminish the fairness of the criminal trial process. A defendant will not find it easy to show the jury at trial that (1) he committed no environmental crime, but (2) in any event, he committed the crime only on 20 days, not 30. Moreover, the majority's holding will sometimes permit prosecutors to introduce newly relevant evidence that would otherwise have been kept from the jury on the ground that it was cumulative or unduly prejudicial. If victims' losses are relevant, the prosecutor may be able to produce witness after witness testifying only about the amount of life savings lost to the fraud. The defendant in this case, for example, thought the introduction of evidence about the discovery of mercury and remediation and evacuation of a nearby apartment complex was unduly prejudicial. Brief for United States 51 (citing App. 15 (defendant's motion *in limine* to exclude such evidence)). But even if that were so, that evidence might now be admitted as showing the amount of harm caused or the number of days upon which the defendant's unlawful activity took place.

Administrative problems here may prove more serious than where, as in *Apprendi*, prison terms were at stake. In part, that is because corporate criminal cases often focus upon complex frauds, criminal price fixing, extended environmental pollution, food-and-drug safety violations, and the like. Both Congress and the Sentencing Commission have recognized as much. The federal criminal fine statute to which I earlier referred specifically creates an exception where assessing total loss or gain "would unduly complicate or prolong the sentencing process." 18 U. S. C. § 3571(d). Similarly, Sentencing Guidelines applicable to corporations exclude fine provisions for environmental crimes (along with most crimes involving export violations, food-and-drug safety, agricultural-and-consumer products, and Racketeer Influenced and Corrupt Organizations Act violations) because of the "potential difficulty . . . of defining and computing loss." Nagel & Swenson, 71 Wash. U. L. Q., at 256; see USSG § 8C2.1, and comment., § 8C2.10. Where the defendant is a human being, the Government can avoid problems of proof simply by abandoning any effort to obtain a fine; instead, perhaps to the individual defendant's dismay, the prosecution can seek a longer prison term. Where the criminal defendant is a corporation, however, no such possibility exists.

If, as seems likely, it becomes too difficult to prove fine-related sentencing facts to a jury, legislatures will have to change their statutes. Some may choose to return to highly discretionary sentencing, with its related risks of nonuniformity. Others may link conviction with fines specified in amount, rather like the 10th-century pre-Norman system of three cows for perjury or more modern mandatory minimum penalties. As Blackstone pointed out, those systems produce sentences that are not proportionate; they tend to treat alike offenders who committed the same crime in very different ways. See 4 Blackstone 371–372.

The majority believes that 10 years of experience with *Apprendi* "attenuate[s]" any legal claim of reliance on a differ-

ent rule of constitutional law here. *Ante,* at 360. Perhaps so. Perhaps that experience shows that *Apprendi*'s jury trial requirement is workable. But there is another less optimistic possibility.

Perhaps that experience, like the canary in a mine shaft, tells us only that our criminal justice system is no longer the jury-trial-based adversarial system that it once was. We have noted that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri* v. *Frye*, 566 U. S. 134, 143 (2012). We have added that today "'plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" *Id.*, at 144 (quoting Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992)). And in such a system, complex jury trial requirements may affect the strength of a party's bargaining position rather than the conduct of many actual trials.

At the same time, the prosecutor in such a system, perhaps armed with statutes providing for mandatory minimum sentences, can become the ultimate adjudicator. The prosecutor/adjudicator plays an important role in many "European inquisitorial" systems. But those prosecutors, unlike ours, typically are trained formally to be more like neutral adjudicators than advocates. Cf. Langbein & Weinreb, Continental Criminal Procedure: "Myth" and Reality, 87 Yale L. J. 1549, 1559 (1978); see, *e. g.*, Ecole Nationale de la Magistrature. Today's holding, by unnecessarily complicating the trial process, may prove workable only because it nudges our system slightly further in this direction. I see no virtue in doing so.

For these reasons, with respect, I dissent.

Syllabus

# ARIZONA ET AL. *v.* UNITED STATES

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

No. 11–182. Argued April 25, 2012—Decided June 25, 2012

An Arizona statute known as S. B. 1070 was enacted in 2010 to address pressing issues related to the large number of unlawful aliens in the State. The United States sought to enjoin the law as pre-empted. The District Court issued a preliminary injunction preventing four of its provisions from taking effect. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor; § 5(C) makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; § 6 authorizes state and local officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States"; and § 2(B) requires officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the Federal Government. The Ninth Circuit affirmed, agreeing that the United States had established a likelihood of success on its pre-emption claims.

*Held:*

1. The Federal Government's broad, undoubted power over immigration and alien status rests, in part, on its constitutional power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, and on its inherent sovereign power to control and conduct foreign relations, see *Toll* v. *Moreno*, 458 U. S. 1, 10. Federal governance is extensive and complex. Among other things, federal law specifies categories of aliens who are ineligible to be admitted to the United States, 8 U. S. C. § 1182; requires aliens to register with the Federal Government and to carry proof of status, §§ 1304(e), 1306(a); imposes sanctions on employers who hire unauthorized workers, § 1324a; and specifies which aliens may be removed and the procedures for doing so, see § 1227. Removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens. It also operates the Law Enforcement Support Center, which provides immigration status information to federal, state, and local officials around the clock. Pp. 394–398.

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2. The Supremacy Clause gives Congress the power to pre-empt state law. A statute may contain an express pre-emption provision, see, *e. g.*, *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 592, but state law must also give way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 115. Intent can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230. Second, state laws are pre-empted when they conflict with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Pp. 398–400.

3. Sections 3, 5(C), and 6 of S. B. 1070 are pre-empted by federal law. Pp. 400–410.

(a) Section 3 intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. In *Hines*, a state alien-registration program was struck down on the ground that Congress intended its "complete" federal registration plan to be a "single integrated and all-embracing system." 312 U. S., at 70, 74. That scheme did not allow the States to "curtail or complement" federal law or "enforce additional or auxiliary regulations." *Id.*, at 66–67. The federal registration framework remains comprehensive. Because Congress has occupied the field, even complementary state regulation is impermissible. Pp. 400–403.

(b) Section 5(C)'s criminal penalty stands as an obstacle to the federal regulatory system. The Immigration Reform and Control Act of 1986 (IRCA), a comprehensive framework for "combating the employment of illegal aliens," *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147, makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers, 8 U. S. C. §§ 1324a(a)(1)(A), (a)(2), and requires employers to verify prospective employees' employment authorization status, §§ 1324a(a)(1)(B), (b). It imposes criminal and civil penalties on employers, §§ 1324a(e)(4), (f), but only civil penalties on aliens who seek, or engage in, unauthorized employment, *e. g.*, §§ 1255(c)(2), (c)(8). IRCA's express pre-emption provision, though silent about whether additional penalties may be imposed against employees, "does *not* bar the ordinary working of conflict pre-emption principles" or impose a "'special burden'" making it more difficult to establish the pre-emption of laws falling outside the clause.

*Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869–872. The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on unauthorized employees. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. Pp. 403–407.

(c) By authorizing state and local officers to make warrantless arrests of certain aliens suspected of being removable, § 6 too creates an obstacle to federal law. As a general rule, it is not a crime for a removable alien to remain in the United States. The federal scheme instructs when it is appropriate to arrest an alien during the removal process. The Attorney General in some circumstances will issue a warrant for trained federal immigration officers to execute. If no federal warrant has been issued, these officers have more limited authority. They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." § 1357(a)(2). Section 6 attempts to provide state officers with even greater arrest authority, which they could exercise with no instruction from the Federal Government. This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform an immigration officer's functions. This includes instances where the Attorney General has granted that authority in a formal agreement with a state or local government. See, *e. g.*, § 1357(g)(1). Although federal law permits state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," § 1357(g)(10)(B), this does not encompass the unilateral decision to detain authorized by § 6. Pp. 407–410.

4. It was improper to enjoin § 2(B) before the state courts had an opportunity to construe it and without some showing that § 2(B)'s enforcement in fact conflicts with federal immigration law and its objectives. Pp. 411–416.

(a) The state provision has three limitations: A detainee is presumed not to be an illegal alien if he or she provides a valid Arizona driver's license or similar identification; officers may not consider race, color, or national origin "except to the extent permitted by the United States [and] Arizona Constitution[s]"; and § 2(B) must be "implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." P. 411.

(b) This Court finds unpersuasive the argument that, even with those limits, § 2(B) must be held pre-empted at this stage. Pp. 411–415.

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(1) The mandatory nature of the status checks does not interfere with the federal immigration scheme. Consultation between federal and state officials is an important feature of the immigration system. In fact, Congress has encouraged the sharing of information about possible immigration violations. See §§ 1357(g)(10)(A), 1373(c). The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, *supra*, at 609–610. Pp. 411–413.

(2) It is not clear at this stage and on this record that § 2(B), in practice, will require state officers to delay the release of detainees for no reason other than to verify their immigration status. This would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. But § 2(B) could be read to avoid these concerns. If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive pre-emption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. Without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that conflicts with federal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277. This opinion does not foreclose other pre-emption and constitutional challenges to the law as interpreted and applied after it goes into effect. Pp. 413–415.

641 F. 3d 339, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., *post*, p. 416, THOMAS, J., *post*, p. 437, and ALITO, J., *post*, p. 440, filed opinions concurring in part and dissenting in part. KAGAN, J., took no part in the consideration or decision of the case.

*Paul D. Clement* argued the cause for petitioners. With him on the briefs were *Viet D. Dinh*, *H. Christopher Bartolomucci*, *Joseph Sciarrotta, Jr.*, *John J. Bouma*, *Robert A. Henry*, and *Kelly Kszywienski.*

*Solicitor General Verrilli* argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *William*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Mark G. Sands*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Jon Bruning* of Nebraska, *E. Scott Pruitt* of Oklahoma, *Linda L. Kelly* of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Kenneth T. Cuccinelli II* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, and *Gregory A. Phillips* of Wyoming; for the American Civil Rights Union by *Peter Ferrara;* for the American Unity Legal Defense Fund by *Barnaby W. Zall* and *John J. Park, Jr.;* for the Arizona Legislature by *Peter A. Gentala* and *Gregrey G. Jernigan;* for the Center for Constitutional Jurisprudence et al. by *John C. Eastman*, *Anthony T. Caso*, *Edwin Meese III*, and *Manuel S. Klausner;* for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph;* for the Landmark Legal Foundation by *Richard P. Hutchison;* for the Liberty Legal Foundation by *Van R. Irion;* for Members of Congress et al. by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May, Laura B. Hernandez*, and *Michael M. Hethmon;* for the Minuteman Civil Defense Corps et al. by *Gary G. Kreep;* for the Mountain States Legal Foundation by *J. Scott Detamore;* for the Secure States Initiative by *Kris W. Kobach;* for State Legislators for Legal Immigration et al. by *Paul J. Orfanedes;* for the Thomas More Law Center et al. by *Robert J. Muise*, *David Yerushalmi*, and *Richard Thompson;* for Joseph M. Arpaio by *Thomas P. Liddy* and *Peter Muthig;* for Lawrence J. Joyce by *Mr. Joyce*, *pro se;* for State Senator Russell Pearce by *James F. Peterson* and *Geoffrey S. Kercsmar;* and for United States Representative Lamar Smith et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Kristen Clarke*, *Cecelia C. Chang*, Deputy Solicitor General, and *Steven C. Wu*, Assistant Solicitor General, by *Kamala D. Harris*, Attorney General of California, *Manuel M. Medeiros*, Solicitor General, *Louis Verdugo*, Senior Assistant Attorney General, and *Antonette Cordero* and *Jose Zelidon-Zepeda*, Deputy Attorneys General, and by the Attorneys General for their respective States as

JUSTICE KENNEDY delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to

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follows: *George Jepsen* of Connecticut, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *John R. Kroger* of Oregon, *Peter F. Kilmartin* of Rhode Island, and *William H. Sorrell* of Vermont; for the American Bar Association by *William T. Robinson III* and *Douglas W. Baruch;* for the American Civil Liberties Union et al. by *Jennifer Chang Newell*, *Cecillia D. Wang*, *Thomas A. Saenz*, *Linton Joaquin*, *Karen C. Tumlin*, *Nora A. Preciado*, *Nina Perales*, *Daniel J. Pochoda*, *Steven R. Shapiro*, *Lee Gelernt*, *Omar C. Jadwat*, *Andre I. Segura*, *Nicholás Espíritu*, *Chris Newman*, *Bradley S. Phillips*, and *Paul J. Watford;* for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Matthew J. Ginsburg;* for the Anti-Defamation League by *David J. Bodney*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for the Government of Argentina et al. by *Henry L. Solano;* for Arizona Attorneys for Criminal Justice et al. by *David J. Euchner;* for Arizona Employers for Immigration Reform et al. by *Daryl M. Williams* and *Craig M. LaChance;* for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans;* for the County of Santa Clara, California, et al. by *Greta S. Hansen*, *George A. Nilson*, *William R. Phelan, Jr.*, *Zach Cowan*, *Michael B. Brough*, *Charlton deSaussure, Jr.*, *Kenneth E. Gaines*, *Dana M. Thye*, *Craig Watkins*, *Irvin B. Nathan*, Attorney General of the District of Columbia, *Patrick W. Baker*, *Marion Joseph Radson*, *V. Lynn Whitfield*, *Gerald Masahiro Sato*, *Michael P. May*, *Jenny M. Morf*, *Victor A. Bolden*, *Michael A. Cardozo*, *Leonard J. Koerner*, *Harry Auerbach*, *Sara Grewing*, *Gerald T. Hendrickson*, *Edwin P. Rutan II*, *Martha S. Stonebrook*, *Dennis J. Herrera*, *Jayne W. Williams*, *Peter S. Holmes*, *Jean M. Boler*, *John B. Schochet*, *Michael W. L. McCrory*, and *John Daniel Reaves;* for Terry Goddard et al. by *Carmine D. Boccuzzi* and *Jorge G. Tenreiro;* for Former Commissioners of the United States Immigration and Naturalization Service by *E. Joshua Rosenkranz*, *Jessica S. Pers*, and *Michael K. Gottlieb;* for the Greater Houston Partnership by *John P. Elwood* and *Alberto P. Cardenas, Jr.;* for the Leadership Conference on Civil and Human Rights et al. by *Nancy Morawetz*, *Wade Henderson*, and *Lisa Bornstein;* for Members of Congress by *Michael B. de Leeuw* and *Jennifer L. Colyer;* for the National Council of La Raza et al. by *Clifford M. Sloan*, *Charles F. Walker*, and *Juan Cartagena;* for the National Immigrant Justice Center et al. by *Lindsay C. Harrison*, *Julie M. Carpenter*, *Charles Roth*, *Vik-*

be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the State Senate. See also H. B. 2162, 49th Leg., 2d Reg. Sess. (2010) (amending S. B. 1070). Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." Note following Ariz. Rev. Stat. Ann. § 11–1051 (West 2012). The law's provisions establish an official state policy of "attrition through enforcement." *Ibid.* The question before the Court is whether federal law pre-empts and renders invalid four separate provisions of the state law.

## I

The United States filed this suit against Arizona, seeking to enjoin S. B. 1070 as pre-empted. Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Ariz. Rev. Stat. Ann. § 13–1509 (West Supp. 2011). Section 5, in relevant part,

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*ram K. Badrinath*, and *Stephen W. Manning;* for the Republic of Haiti by *Mr. Solano;* for The Rutherford Institute by *John W. Whitehead* and *Rita Dunaway;* for the Service Employees International Union et al. by *Stephen P. Berzon*, *Jonathan Weissglass*, *Judith A. Scott*, *Orrin Baird*, *Nicholas W. Clark*, *Bradley T. Raymond*, and *Patrick J. Szymanski;* for State and Local Law Enforcement Officials by *Andrew J. Pincus*, *Charles A. Rothfeld*, and *Jeffrey A. Meyer;* for the United Mexican States by *Mr. Solano;* for the United States Conference of Catholic Bishops et al. by *Brian J. Murray*, *Anthony R. Picarello, Jr.*, and *Jeffrey Hunter Moon;* and for Madeleine K. Albright et al. by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Shirley Cassin Woodward*, and *Michael D. Gottesman.*

Briefs of *amici curiae* were filed for the Association of the Bar of the City of New York by *Mark R. von Sternberg;* for Larry A. Dever by *Brian Bergin* and *Kenneth Frakes;* for EarthRights International by *Richard L. Herz* and *Marco B. Simons;* for Freedom Watch by *Larry Klayman;* and for U. S. Border Control et al. by *Herbert W. Titus*, *William J. Olson*, and *John S. Miles.*

makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as § 5(C). See § 13–2928(C). Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." § 13–3883(A)(5). Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government. See § 11–1051(B) (West 2012).

The United States District Court for the District of Arizona issued a preliminary injunction preventing the four provisions at issue from taking effect. 703 F. Supp. 2d 980, 1008 (2010). The Court of Appeals for the Ninth Circuit affirmed. 641 F. 3d 339, 366 (2011). It agreed that the United States had established a likelihood of success on its pre-emption claims. The Court of Appeals was unanimous in its conclusion that §§ 3 and 5(C) were likely pre-empted. Judge Bea dissented from the decision to uphold the preliminary injunction against §§ 2(B) and 6. This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status. 565 U. S. 1092 (2011).

## II

### A

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. See *Toll* v. *Moreno*, 458 U. S. 1, 10 (1982); see generally S. Legomsky & C. Rodríguez, Immigration and Refugee Law and Policy 115–132 (5th ed. 2009). This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturaliza-

tion," Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations, see *Toll*, *supra*, at 10 (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936)).

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. See, *e. g.*, Brief for United Mexican States as *Amicus Curiae;* see also *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952). Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. See Brief for Madeleine K. Albright et al. as *Amici Curiae* 24–30.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. See *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280 (1876); see also The Federalist No. 3, p. 39 (C. Rossiter ed. 2003) (J. Jay) (observing that federal power would be necessary in part because "bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury" might take action that would undermine foreign relations). This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines* v. *Davidowitz*, 312 U. S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. See 8 U. S. C. § 1182. Unlawful entry and unlawful reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government

and to carry proof of status on their person. See §§ 1301–1306. Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a). Federal law also authorizes States to deny noncitizens a range of public benefits, § 1622; and it imposes sanctions on employers who hire unauthorized workers, § 1324a.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. See § 1227. Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* 8–13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See § 1229a(c)(4); see also, *e. g.*, §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a

real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Agencies in the Department of Homeland Security play a major role in enforcing the country's immigration laws. United States Customs and Border Protection (CBP) is responsible for determining the admissibility of aliens and securing the country's borders. See Dept. of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2010, p. 1 (2011). In 2010, CBP's Border Patrol apprehended almost half a million people. *Id.*, at 3. Immigration and Customs Enforcement (ICE), a second agency, "conducts criminal investigations involving the enforcement of immigration-related statutes." *Id.*, at 2. ICE also operates the Law Enforcement Support Center. LESC, as the Center is known, provides immigration status information to federal, state, and local officials around the clock. See App. 91. ICE officers are responsible "for the identification, apprehension, and removal of illegal aliens from the United States." Immigration Enforcement Actions, at 2. Hundreds of thousands of aliens are removed by the Federal Government every year. See *id.*, at 4 (reporting there were 387,242 removals, and 476,405 returns without a removal order, in 2010).

B

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Dept. of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 93 (2011) (Table 35). Unauthorized aliens who remain in the State constitute, by one estimate, almost 6% of the population. See J. Passel & D. Cohn, Pew Hispanic Center,

U. S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade 3 (2010). And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime. See, *e. g.*, S. Camarota & J. Vaughan, Center for Immigration Studies, Immigration and Crime: Assessing a Conflicted Issue 16 (2009) (Table 3) (estimating that unauthorized aliens constitute 8.9% of the population and are responsible for 21.8% of the felonies in Maricopa County, which includes Phoenix).

Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. Brief for Petitioners 6. Phoenix is a major city of the United States, yet signs along an interstate highway 30 miles to the south warn the public to stay away. One reads, "DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED / Active Drug and Human Smuggling Area / Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed." App. 170 (punctuation altered); see also Brief for Petitioners 5–6. The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal analysis that follows. The issue is whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.

## III

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. See *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring). From the existence of two sovereigns fol-

lows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to pre-empt state law. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372 (2000); *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–211 (1824). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision. See, *e. g.*, *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 592 (2011).

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. See *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 115 (1992) (Souter, J., dissenting). The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see *English* v. *General Elec. Co.*, 496 U. S. 72, 79 (1990).

Second, state laws are pre-empted when they conflict with federal law. *Crosby*, *supra*, at 372. This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U. S., at 67; see also

*Crosby*, *supra*, at 373 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). In pre-emption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." *Rice*, *supra*, at 230; see *Wyeth* v. *Levine*, 555 U. S. 555, 565 (2009).

The four challenged provisions of the state law each must be examined under these pre-emption principles.

## IV

## A

### *Section 3*

Section 3 of S. B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code § 1304(e) or 1306(a)." Ariz. Rev. Stat. Ann. § 13–1509(A). In effect, § 3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. See Brief for United States 27, 31.

The Court discussed federal alien-registration requirements in *Hines*, *supra*. In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." *Id.*, at 70. The new federal law struck a careful balance. It punished an alien's willful failure to register but did not require aliens to carry identification cards. There were also limits on the sharing of registration records and fingerprints. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." *Id.*, at 74. Because this "complete scheme . . . for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce

additional or auxiliary regulations." *Id.*, at 66–67. As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program. See *id.*, at 59, 74.

The present regime of federal regulation is not identical to the statutory framework considered in *Hines*, but it remains comprehensive. Federal law now includes a requirement that aliens carry proof of registration. 8 U. S. C. § 1304(e). Other aspects, however, have stayed the same. Aliens who remain in the country for more than 30 days must apply for registration and be fingerprinted. Compare § 1302(a) with § 452(a) (1940 ed.). Detailed information is required, and any change of address has to be reported to the Federal Government. Compare §§ 1304(a), 1305(a) (2006 ed.) with §§ 455(a), 456 (1940 ed.). The statute continues to provide penalties for the willful failure to register. Compare § 1306(a) (2006 ed.) with § 457 (1940 ed.).

The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration. See *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 419, n. 11 (2003) (characterizing *Hines* as a field pre-emption case); *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 (1956) (same); see also Dinh, Reassessing the Law of Preemption, 88 Geo. L. J. 2085, 2098–2099, 2107 (2000) (same). The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a "'harmonious whole.'" *Hines*, *supra*, at 72. Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field pre-emption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 249 (1984).

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of

aliens within the Nation's borders. If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 288–289 (1986). Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law. See *California* v. *Zook*, 336 U. S. 725, 730–731, 733 (1949); see also *In re Loney*, 134 U. S. 372, 375–376 (1890) (States may not impose their own punishment for perjury in federal courts).

Arizona contends that § 3 can survive pre-emption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field pre-emption—that States may not enter, in any respect, an area the Federal Government has reserved for itself—but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Cf. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341, 347–348 (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wisconsin Dept.*, *supra*, at 288 (States may not impose their own punishment for repeat violations of the National Labor Relations Act). Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

There is a further intrusion upon the federal scheme. Even where federal authorities believe prosecution is appropriate, there is an inconsistency between § 3 and federal law

with respect to penalties. Under federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation. See 8 U. S. C. § 1304(e) (2006 ed.); 18 U. S. C. § 3561. State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon). See Ariz. Rev. Stat. Ann. § 13–1509(D). This state framework of sanctions creates a conflict with the plan Congress put in place. See *Wisconsin Dept.*, *supra*, at 286 ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity" (internal quotation marks omitted)).

These specific conflicts between state and federal law simply underscore the reason for field pre-emption. As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." 312 U. S., at 66–67. Section 3 is pre-empted by federal law.

## B

### *Section 5(C)*

Unlike § 3, which replicates federal statutory requirements, § 5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Ariz. Rev. Stat. Ann. § 13–2928(C). Violations can be punished by a $2,500 fine and incarceration for up to six months. See § 13–2928(F); see also §§ 13–707(A)(1) (West 2010); 13–802(A); 13–902(A)(5) (West Supp. 2011). The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be pre-empted as an obstacle to the federal plan of regulation and control.

When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 1971 Cal. Stats. ch. 1442, § 1(a). The law was upheld against a pre-emption challenge in *De Canas* v. *Bica*, 424 U. S. 351 (1976). *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.*, at 356. At that point, however, the Federal Government had expressed no more than "a peripheral concern with [the] employment of illegal entrants." *Id.*, at 360; see *Whiting*, 563 U. S., at 588.

Current federal law is substantially different from the regime that prevailed when *De Canas* was decided. Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 147 (2002). The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. See 8 U. S. C. §§ 1324a(a)(1)(A), (a)(2). It also requires every employer to verify the employment authorization status of prospective employees. See §§ 1324a(a)(1)(B), (b); 8 CFR § 274a.2(b) (2012). These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. See 8 U. S. C. §§ 1324a(e)(4), (f); 8 CFR § 274a.10.

This comprehensive framework does not impose federal criminal sanctions on the employee side (*i. e.*, penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead. With certain exceptions, aliens who accept unlawful employment

are not eligible to have their status adjusted to that of a lawful permanent resident. See 8 U. S. C. §§ 1255(c)(2), (c)(8). Aliens also may be removed from the country for having engaged in unauthorized work. See § 1227(a)(1)(C)(i); 8 CFR § 214.1(e). In addition to specifying these civil consequences, federal law makes it a crime for unauthorized workers to obtain employment through fraudulent means. See 18 U. S. C. § 1546(b). Congress has made clear, however, that any information employees submit to indicate their work status "may not be used" for purposes other than prosecution under specified federal criminal statutes for fraud, perjury, and related conduct. See 8 U. S. C. §§ 1324a(b)(5), (d)(2)(F)–(G).

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." U. S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by Commissioners 65–66 (1981); see § 4, 92 Stat. 907. Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. See Brief for Service Employees International Union et al. as *Amici Curiae* 9–12. But Congress rejected them. See, *e. g.*, 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. See, *e. g.*, Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., pt. 3, pp. 919–920 (1972) (statement of

Rep. Rodino, the eventual sponsor of IRCA in the House of Representatives).

IRCA's express pre-emption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. See 8 U. S. C. § 1324a(h)(2); *Whiting*, *supra*, at 587–588. But the existence of an "express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles" or impose a "'special burden'" that would make it more difficult to establish the pre-emption of laws falling outside the clause. *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869–872 (2000); see *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 65 (2002).

The ordinary principles of pre-emption include the well-settled proposition that a state law is pre-empted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U. S., at 67. Under § 5(C) of S. B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 287 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. See *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then*

the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action"). Section 5(C) is pre-empted by federal law.

C

*Section 6*

Section 6 of S. B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." Ariz. Rev. Stat. Ann. § 13–3883(A)(5). The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. See *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984). If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a "Notice to Appear." See 8 U. S. C. § 1229(a); 8 CFR § 239.1(a). The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. See 8 U. S. C. § 1229(a)(1). If an alien fails to appear, an *in absentia* order may direct removal. § 1229a(b)(5)(A).

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." § 1226(a); see Memorandum from John Morton, Director, ICE, to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17,

2011) (hereinafter 2011 ICE Memorandum) (describing factors informing this and related decisions). And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. See 8 CFR § 241.2(a)(1). In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law. See §§ 241.2(b), 287.5(e)(3). If no federal warrant has been issued, those officers have more limited authority. See 8 U. S. C. § 1357(a). They may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained." § 1357(a)(2).

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) who federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government. See § 1357(g)(1); see also § 1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens arriving off the coast of the United

States"); § 1252c (authority to arrest in specific circumstance after consultation with the Federal Government); § 1324(c) (authority to arrest for bringing in and harboring certain aliens). Officers covered by these agreements are subject to the Attorney General's direction and supervision. § 1357(g)(3). There are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. See *Padilla* v. *Kentucky*, 559 U. S. 356, 379–380 (2010) (ALITO, J., concurring in judgment). As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer. See § 1357(g)(2); cf. 8 CFR §§ 287.5(c) (arrest power contingent on training), 287.1(g) (defining the training).

By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. See, *e. g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 483–484 (1999); see also Brief for Former INS Commissioners 8–13. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. See *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances" (internal quotation marks omitted)); see also *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . "); *Truax* v. *Raich*, 239 U. S. 33, 42 (1915) ("The authority to control immigration—to

admit or exclude aliens—is vested solely in the Federal Government").

In defense of § 6, Arizona notes a federal statute permitting state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U. S. C. § 1357(g)(10)(B). There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. The Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. See Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 13–14 (2011), online at http://www.dhs.gov/files/resources/immigration.shtm (all Internet materials as visited June 21, 2012, and available in Clerk of Court's case file). State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody. See § 1357(d). But the unilateral state action to detain authorized by § 6 goes far beyond these measures, defeating any need for real cooperation.

Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress. See *Hines*, 312 U. S., at 67. Section 6 is pre-empted by federal law.

D

*Section 2(B)*

Section 2(B) of S. B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. §11–1051(B). The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Ibid.* The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." *Ibid.* Third, the provision must be "implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." §11–1051(L).

The United States and its *amici* contend that, even with these limits, the State's verification requirements pose an obstacle to the framework Congress put in place. The first concern is the mandatory nature of the status checks. The second is the possibility of prolonged detention while the checks are being performed.

1

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with

the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." 8 U. S. C. § 1357(g)(10)(A). And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See § 1373(c); see also § 1226(d)(1)(A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens). ICE's Law Enforcement Support Center operates "24 hours a day, seven days a week, 365 days a year" and provides, among other things, "immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies." ICE, Fact Sheet: Law Enforcement Support Center (May 29, 2012), online at http://www.ice.gov/news/library/factsheets/lesc.htm. LESC responded to more than 1 million requests for information in 2009 alone. App. 93.

The United States argues that making status verification mandatory interferes with the federal immigration scheme. It is true that § 2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. See Brief for United States 47–50. In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed. This might be the case, for example, when an alien is an elderly veteran with significant and longstanding ties to the community. See 2011 ICE Memorandum 4–5 (mentioning these factors as relevant).

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U. S. C. § 1357(g)(10)(A). A federal statute regulating the public benefits provided to qualified aliens in fact instructs that "no State or local government entity may be prohibited, or in any way

restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." § 1644. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, 563 U. S., at 609–610 (rejecting argument that federal law pre-empted Arizona's requirement that employers determine whether employees were eligible to work through the federal E-Verify system where the Federal Government had encouraged its use).

2

Some who support the challenge to § 2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. See, *e. g.*, Brief for Former Arizona Attorney General Terry Goddard et al. as *Amici Curiae* 37, n. 49. Detaining individuals solely to verify their immigration status would raise constitutional concerns. See, *e. g.*, *Arizona* v. *Johnson*, 555 U. S. 323, 333 (2009); *Illinois* v. *Caballes*, 543 U. S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission"). And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. Cf. Part IV–C, *supra* (concluding that Arizona may not authorize warrantless arrests on the basis of removability). The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

But § 2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of § 2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States

is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry. See Reply Brief 12, n. 4 ("[Section 2(B)] does not require the verification be completed during the stop or detention if that is not reasonable or practicable"); cf. *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (finding no Fourth Amendment violation where questioning about immigration status did not prolong a stop).

To take another example, a person might be held pending release on a charge of driving under the influence of alcohol. As this goes beyond a mere stop, the arrestee (unlike the jaywalker) would appear to be subject to the categorical requirement in the second sentence of § 2(B) that "[a]ny person who is arrested shall have the person's immigration status determined before [he] is released." State courts may read this as an instruction to initiate a status check every time someone is arrested, or in some subset of those cases, rather than as a command to hold the person until the check is complete no matter the circumstances. Even if the law is read as an instruction to complete a check while the person is in custody, moreover, it is not clear at this stage and on this record that the verification process would result in prolonged detention.

However the law is interpreted, if § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive pre-emption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be pre-empted by federal law. See, *e. g.*, *United States* v. *Di Re*, 332 U. S. 581, 589 (1948) (authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law); *Gonzales* v. *Peo-*

*ria*, 722 F. 2d 468, 475–476 (CA9 1983) (concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law), overruled on other grounds in *Hodgers-Durgin* v. *de la Vina*, 199 F. 3d 1037 (CA9 1999).

The nature and timing of this case counsel caution in evaluating the validity of § 2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts" (citation omitted)). As a result, the United States cannot prevail in its current challenge. See *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960) ("To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists"). This opinion does not foreclose other pre-emption and constitutional challenges to the law as interpreted and applied after it goes into effect.

## V

Immigration policy shapes the destiny of the Nation. On May 24, 2012, at one of this Nation's most distinguished museums of history, a dozen immigrants stood before the tattered flag that inspired Francis Scott Key to write the National Anthem. There they took the oath to become American citizens. The Smithsonian, News Release, Smithsonian Citizenship Ceremony Welcomes a Dozen New Americans (May 24, 2012), online at http://newsdesk.si.edu/releases. These naturalization ceremonies bring together

men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. 8 CFR § 337.1(a). The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

* * *

The United States has established that §§ 3, 5(C), and 6 of S. B. 1070 are pre-empted. It was improper, however, to enjoin § 2(B) before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.

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

*It is so ordered.*

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

JUSTICE SCALIA, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 104 (1938). Today's opinion, approv-

ing virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

## I

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty. Emer de Vattel's seminal 1758 treatise on the Law of Nations stated:

> "The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this, that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual." The Law of Nations, bk. II, ch. VII, § 94, p. 309 (B. Kapossy & R. Whatmore eds. 2008).

See also 1 R. Phillimore, Commentaries Upon International Law, pt. III, ch. X, *233 ("It is a received maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country").[1]

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[1] Many of the 17th-, 18th-, and 19th-century commentators maintained that States should exclude foreigners only for good reason. Pufendorf, for example, maintained that States are generally expected to grant "permanent settlement to strangers who have been driven from their former home," though acknowledging that, when faced with the prospect of mass immigration, "every state may decide after its own custom what privilege should be granted in such a situation." 2 Of the Law of Nature and Na-

There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." *Mayor of New York* v. *Miln*, 11 Pet. 102, 132–133 (1837). And the Constitution did not strip the States of that authority. To the contrary, two of the Constitution's provisions were designed to enable the States to prevent "the intrusion of obnoxious aliens through other States." Letter from James Madison to Edmund Randolph (Aug. 27, 1782), in 1 Writings of James Madison 226 (G. Hunt ed. 1900); accord, The Federalist No. 42, pp. 269–271 (C. Rossiter ed. 1961) (J. Madison). The Articles of Confederation had provided that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States." Art. IV. This meant that an unwelcome alien could obtain all the rights of a citizen of one State simply by first becoming an *inhabitant* of another. To remedy this, the Constitution's Privileges and Immunities Clause provided that "[t]he *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, § 2, cl. 1 (emphasis added). But if one State had particularly lax citizenship standards, it might still serve as a gateway for the entry of "obnoxious aliens" into other States. This problem was solved "by authorizing the general government to establish a uniform rule of naturalization throughout the United States." The Federalist No. 42, *supra*, at 271; see Art. I, § 8, cl. 4. In other words, the naturalization power was given to Congress not to abrogate States' power to exclude those they did not want, but to vindicate it.

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tions, bk. III, ch. III, § 10, p. 366 (C. Oldfather & W. Oldfather eds. 1934). See generally Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Texas L. Rev. 1, 83–87 (2002). But the authority to exclude was universally accepted as inherent in sovereignty, whatever prudential limitations there might be on its exercise.

Two other provisions of the Constitution are an acknowledgment of the States' sovereign interest in protecting their borders. Article I provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing it's inspection Laws*." § 10, cl. 2 (emphasis added). This assumed what everyone assumed: that the States could exclude from their territory dangerous or unwholesome goods. A later portion of the same section provides that "[n]o State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*." Cl. 3 (emphasis added). This limits the States' sovereignty (in a way not relevant here) but leaves intact their inherent power to protect their territory.

Notwithstanding "[t]he myth of an era of unrestricted immigration" in the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in Southern States) freed blacks. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 Colum. L. Rev. 1833, 1835, 1841–1880 (1993). State laws not only provided for the removal of unwanted immigrants but also imposed penalties on unlawfully present aliens and those who aided their immigration.[2] *Id.*, at 1883.

In fact, the controversy surrounding the Alien and Sedition Acts involved a debate over whether, under the Constitution, the States had *exclusive* authority to enact such immigration laws. Criticism of the Sedition Act has become a prominent feature of our First Amendment jurisprudence, see, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 273–

[2] *E. g.*, Va. Code, Tit. 54, ch. 198, § 39 (1849) ("If a master of a vessel or other person, knowingly, import or bring into this state, from any place out of the *United States*, any person convicted of crime . . . he shall be confined in jail for three months, and be fined one hundred dollars").

276 (1964), but one of the Alien Acts[3] also aroused controversy at the time:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . . ." An Act concerning Aliens, 1 Stat. 570–571.

The Kentucky and Virginia Resolutions, written in denunciation of these Acts, insisted that the power to exclude unwanted aliens rested solely in the States. Jefferson's Kentucky Resolutions insisted "that alien friends are under the jurisdiction and protection of the laws of the state wherein they are [and] that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct from their power over citizens." Kentucky Resolutions of 1798, reprinted in J. Powell, Languages of Power: A Sourcebook of Early American Constitutional History 131 (1991). Madison's Virginia Resolutions likewise contended that the Alien Act purported to give the President "a power nowhere delegated to the federal government." Virginia Resolutions of 1798, in *id.*, at 134 (emphasis deleted). Notably, moreover, the Federalist proponents of the Act defended it primarily on the ground that "[t]he removal of aliens is the usual preliminary of hostility" and could therefore be justified in exercise of the Federal Government's war powers. Massachusetts Resolutions in Reply to Virginia, in *id.*, at 136.

In *Mayor of New York* v. *Miln*, this Court considered a New York statute that required the commander of any ship

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[3] There were two Alien Acts, one of which dealt only with enemy aliens. An Act respecting Alien Enemies, ch. 66, 1 Stat. 577.

arriving in New York from abroad to disclose "the name, place of birth, and last legal settlement, age and occupation . . . of all passengers . . . with the intention of proceeding to the said city." 11 Pet., at 130–131. After discussing the sovereign authority to regulate the entrance of foreigners described by De Vattel, the Court said:

> "The power . . . of New York to pass this law having undeniably existed at the formation of the constitution, the simple inquiry is, whether by that instrument it was taken from the states, and granted to congress; for if it were not, it yet remains with them." *Id.*, at 132.

And the Court held that it remains. *Id.*, at 139.

## II

One would conclude from the foregoing that after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so. Since the founding era (though not immediately), doubt about the Federal Government's power has disappeared. Indeed, primary responsibility for immigration policy has shifted from the States to the Federal Government. Congress exercised its power "[t]o establish an uniform Rule of Naturalization," Art. I, §8, cl. 4, very early on, see An Act to establish an uniform Rule of Naturalization, ch. 3, 1 Stat. 103. But with the fleeting exception of the Alien Act, Congress did not enact any legislation regulating *immigration* for the better part of a century. In 1862, Congress passed "An Act to prohibit the 'Coolie Trade' by American Citizens in American Vessels," which prohibited "procuring [Chinese nationals] . . . to be disposed of, or sold, or transferred, for any term of years or for any time whatever, as servants or apprentices, or to be held to service or labor." Ch. 27, 12 Stat. 340. Then, in 1875, Congress amended that Act to bar admission to Chinese, Japanese, and other Asian immigrants who had

"entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes." An act supplementary to the acts in relation to immigration, ch. 141, 18 Stat. 477. And in 1882, Congress enacted the first general immigration statute. See An act to regulate Immigration, 22 Stat. 214. Of course, it hardly bears mention that federal immigration law is now extensive.

I accept that as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States. As this Court has said, it is an "'accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.'" *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 (1893) (quoting *Ekiu* v. *United States*, 142 U. S. 651, 659 (1892)). That is why there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in Art. I, § 9, which provided that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ."

In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so. I accept as a given that state regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: There is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area—and the so-called field pre-emption arising from that action, upon which the Court's opinion so heavily relies, *ante*, at 401–403—cannot be regarded as such a prohibition. We are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the *core* of state sovereignty: the power to exclude. Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that "Congress . . . unequivocally expres[s] its intent to abrogate," *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55 (1996) (internal quotation marks omitted). Implicit "field pre-emption" will not do.

Nor can federal power over illegal immigration be deemed exclusive because of what the Court's opinion solicitously calls "foreign countries[']  concern[s] about the status, safety, and security of their nationals in the United States," *ante*, at 395. The Constitution gives all those on our shores the protections of the Bill of Rights—but just as those rights are not expanded for foreign nationals because of their countries' views (some countries, for example, have recently discovered the death penalty to be barbaric), neither are the fundamental sovereign powers of the States abridged to accommodate foreign countries' views. Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. This is not the first time it has found that a nuisance and a bother in the conduct of foreign policy. Four years ago, for example, the Government importuned us to interfere with thoroughly constitutional state judicial procedures in the criminal trial of foreign nationals because

the international community, and even an opinion of the International Court of Justice, disapproved them. See *Medellín* v. *Texas*, 552 U. S. 491 (2008). We rejected that request, as we should reject the Executive's invocation of foreign-affairs considerations here. Though it may upset foreign powers—and even when the Federal Government desperately wants to avoid upsetting foreign powers—the States have the right to protect their borders against foreign nationals, just as they have the right to execute foreign nationals for murder.

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority. I proceed to consider the challenged provisions in detail.

§ 2(B)

> "For any lawful stop, detention or arrest made by a law enforcement official . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. . . . " S. B. 1070, § 2(B), as amended, Ariz. Rev. Stat. Ann. § 11–1051(B) (West 2012).

The Government has conceded that "even before Section 2 was enacted, state and local officers had state-law authority to inquire of DHS [the Department of Homeland Security]

about a suspect's unlawful status and otherwise cooperate with federal immigration officers." Brief for United States 47 (citing App. 62, 82); see also Brief for United States 48–49. That concession, in my view, obviates the need for further inquiry. The Government's conflict-pre-emption claim calls on us "to determine whether, *under the circumstances of this particular case*, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) (emphasis added). It is impossible to make such a finding without a factual record concerning the manner in which Arizona is implementing these provisions—something the Government's preenforcement challenge has pretermitted. "The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). And on its face, § 2(B) merely tells state officials that they are authorized to do something that they were, by the Government's concession, already authorized to do.

The Court therefore properly rejects the Government's challenge, recognizing that, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law." *Ante*, at 415. Before reaching that conclusion, however, the Court goes to great length to assuage fears that "state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status." *Ante*, at 413. Of course, any investigatory detention, including one under § 2(B), may become an "unreasonable . . . seizur[e]," U. S. Const., Amdt. 4, if it lasts too long. See *Illinois* v. *Caballes*, 543 U. S. 405, 407 (2005). But that has nothing to do with this case, in which the Government claims that § 2(B) is preempted by federal immigration law, not that anyone's Fourth

Amendment rights have been violated. And I know of no reason why a protracted detention that does not violate the Fourth Amendment would contradict or conflict with any federal immigration law.

§ 6

> "A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . .
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> . . . . .
>
> [t]he person to be arrested has committed any public offense that makes the person removable from the United States." S. B. 1070, § 6(A)(5), Ariz. Rev. Stat. Ann. § 13–3883(A)(5) (West Supp. 2011).

This provision of S. B. 1070 expands the statutory list of offenses for which an Arizona police officer may make an arrest without a warrant. See § 13–3883. If an officer has probable cause to believe that an individual is "removable" by reason of a public offense, then a warrant is not required to make an arrest. The Government's primary contention is that § 6 is pre-empted by federal immigration law because it allows state officials to make arrests "without regard to federal priorities." Brief for United States 53. The Court's opinion focuses on limits that Congress has placed on *federal* officials' authority to arrest removable aliens and the possibility that state officials will make arrests "to achieve [Arizona's] own immigration policy" and "without any input from the Federal Government." *Ante*, at 408.

Of course on this preenforcement record there is no reason to assume that Arizona officials will ignore federal immigration policy (unless it be the questionable policy of not wanting to identify illegal aliens who have committed offenses that make them removable). As Arizona points out, federal law expressly provides that state officers may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U. S. C. § 1357(g)(10)(B); and "cooperat[ion]" requires neither identical efforts nor prior federal ap-

proval. It is consistent with the Arizona statute, and with the "cooperat[ive]" system that Congress has created, for state officials to arrest a removable alien, contact federal immigration authorities, and follow their lead on what to do next. And it is an assault on logic to say that identifying a removable alien and holding him for federal determination whether he should be removed "violates the principle that the removal process is entrusted to the discretion of the Federal Government," *ante*, at 409. The State's detention does not represent commencement of the removal process unless the Federal Government makes it so.

But that is not the most important point. The most important point is that, as we have discussed, Arizona is *entitled* to have "its own immigration policy"—including a more rigorous enforcement policy—so long as that does not conflict with federal law. The Court says, as though the point is utterly dispositive, that "it is not a crime for a removable alien to remain present in the United States," *ante*, at 407. It is not a federal crime, to be sure. But there is no reason Arizona cannot make it a state crime for a removable alien (or any illegal alien, for that matter) to remain present in Arizona.

The Court quotes § 1226(a), which provides that, "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Section 1357(a)(2) also provides that a federal immigration official "shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any [federal immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." But statutory limitations upon the actions of federal officers in enforcing the United States' power to protect its borders do not on their face apply to the actions of state officers in enforcing the State's power to protect its borders. There is no more reason to read these provisions as implying that state offi-

cials are subject to similar limitations than there is to read them as implying that only federal officials may arrest removable aliens. And in any event *neither* implication would constitute the sort of clear elimination of the States' sovereign power that our cases demand.

The Court raises concerns about "unnecessary harassment of some aliens . . . who federal officials determine should not be removed." *Ante*, at 408. But we have no license to assume, without any support in the record, that Arizona officials would use their arrest authority under § 6 to harass anyone. And it makes no difference that federal officials might "determine [that some unlawfully present aliens] should not be removed," *ibid.* They may well determine not to remove from the United States aliens who have no right to be here; but unless and until these aliens have been given the right to remain, Arizona is entitled to arrest them and *at least* bring them to federal officials' attention, which is all that § 6 necessarily entails. (In my view, the State can go further than this, and punish them for their unlawful entry and presence in Arizona.)

The Government complains that state officials might not heed "federal priorities." Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

§ 3

> "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8

> [U. S. C.] § 1304(e) or 1306(a)." S. B. 1070, § 3(A), as amended, Ariz. Rev. Stat. Ann. § 13–1509(A).

It is beyond question that a State may make violation of federal law a violation of state law as well. We have held that to be so even when the interest protected is a distinctively federal interest, such as protection of the dignity of the national flag, see *Halter* v. *Nebraska*, 205 U. S. 34 (1907), or protection of the Federal Government's ability to recruit soldiers, *Gilbert* v. *Minnesota*, 254 U. S. 325 (1920). "[T]he State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes." *Id.*, at 331 (internal quotation marks omitted). Much more is that so when, as here, the State is protecting its *own* interest, the integrity of its borders. And we have said that explicitly with regard to illegal immigration: "Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Plyler* v. *Doe*, 457 U. S. 202, 228, n. 23 (1982).

The Court's opinion relies upon *Hines* v. *Davidowitz*, 312 U. S. 52. *Ante*, at 401. But that case did not, as the Court believes, establish a "field pre-emption" that implicitly eliminates the States' sovereign power to exclude those whom federal law excludes. It held that the States are not permitted to establish "additional or auxiliary" registration requirements for aliens. 312 U. S., at 66–67. But § 3 does not establish additional or auxiliary registration requirements. It merely makes a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law. *Hines* does not prevent the State from relying on the federal registration system as "an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitutional validity

has not been questioned." *Id.*, at 75–76 (Stone, J., dissenting). One such statute is Arizona's law forbidding illegal aliens to collect unemployment benefits, Ariz. Rev. Stat. Ann. §23–781(B) (West 2012). To enforce that and other laws that validly turn on alien status, Arizona has, in Justice Stone's words, an interest in knowing "the number and whereabouts of aliens within the state" and in having "a means of their identification," 312 U. S., at 75. And it can punish the aliens' failure to comply with the provisions of federal law that make that knowledge and identification possible.

In some areas of uniquely federal concern—*e. g.*, fraud in a federal administrative process (*Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U. S. 341 (2001)) or perjury in violation of a federally required oath (*In re Loney*, 134 U. S. 372 (1890))—this Court has held that a State has no legitimate interest in enforcing a federal scheme. But the federal alien registration system is certainly not of uniquely federal interest. States, private entities, and individuals rely on the federal registration system (including the E-Verify program) on a regular basis. Arizona's legitimate interest in protecting (among other things) its unemployment-benefits system is an entirely adequate basis for making the violation of federal registration and carry requirements a violation of state law as well.

The Court points out, however, *ante*, at 402–403, that in some respects the state law exceeds the punishments prescribed by federal law: It rules out probation and pardon, which are available under federal law. The answer is that it makes no difference. Illegal immigrants who violate §3 violate *Arizona* law. It is one thing to say that the Supremacy Clause prevents Arizona law from excluding those whom federal law admits. It is quite something else to say that a violation of Arizona law cannot be punished more severely than a violation of federal law. Especially where (as here) the State is defending its own sovereign interests, there is no precedent for such a limitation. The sale of illegal drugs, for example, ordinarily violates state law as well as federal

law, and no one thinks that the state penalties cannot exceed the federal. As I have discussed, moreover, "field preemption" cannot establish a prohibition of additional state penalties in the area of immigration.

Finally, the Government also suggests that § 3 poses an obstacle to the administration of federal immigration law, see Brief for United States 31–33, but "there is no conflict in terms, and no possibility of such conflict, [if] the state statute makes federal law its own," *California* v. *Zook*, 336 U. S. 725, 735 (1949).

It holds no fear for me, as it does for the Court, that "[w]ere § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Ante*, at 402. That seems to me entirely appropriate when the State uses the federal law (as it must) as the criterion for the exercise of *its own power*, and the implementation of *its own policies* of excluding those who do not belong there. What I do fear—and what Arizona and the States that support it fear—is that "federal policies" of nonenforcement will leave the States helpless before those evil effects of illegal immigration that the Court's opinion dutifully recites in its prologue (*ante*, at 397–398) but leaves unremedied in its disposition.

§ 5(C)

> "It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." S. B. 1070, § 5(C), as amended, Ariz. Rev. Stat. Ann. § 13–2928(C) (West Supp. 2011).

Here, the Court rightly starts with *De Canas* v. *Bica*, 424 U. S. 351 (1976), which involved a California law providing that "'[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if

such employment would have an adverse effect on lawful resident workers.'" *Id.*, at 352 (quoting Cal. Lab. Code Ann. §2805(a)). This Court concluded that the California law was not pre-empted, as Congress had neither occupied the field of "regulation of employment of illegal aliens" nor expressed "the clear and manifest purpose" of displacing such state regulation. 424 U. S., at 356–357 (internal quotation marks omitted). Thus, at the time *De Canas* was decided, §5(C) would have been indubitably lawful.

The only relevant change is that Congress has since enacted its own restrictions on employers who hire illegal aliens, 8 U. S. C. §1324a, in legislation that also includes some civil (but no criminal) penalties on illegal aliens who accept unlawful employment. The Court concludes from this (reasonably enough) "that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment," *ante*, at 405. But that is not the same as a deliberate choice to prohibit the States from imposing criminal penalties. Congress's intent with regard to exclusion of state law need not be guessed at, but is found in the law's express pre-emption provision, which excludes "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon *those who employ, or recruit or refer for a fee for employment,* unauthorized aliens," §1324a(h)(2) (emphasis added). Common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of pre-emption for laws punishing "those who employ" implies the lack of pre-emption for other laws, including laws punishing "those who seek or accept employment."

The Court has no credible response to this. It quotes our jurisprudence to the effect that an "express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles." *Ante*, at 406 (quoting *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869 (2000) (internal quotation marks omitted)). True enough—*conflict* pre-emption

principles. It then goes on to say that since "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment," "[i]t follows that a state law to the contrary is an obstacle to the regulatory system Congress chose." *Ante*, at 406. For "'[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn.'" *Ante*, at 406–407 (quoting *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988)). All that is a classic description not of *conflict* pre-emption but of *field* pre-emption, which (concededly) does not occur beyond the terms of an express pre-emption provision.

The Court concludes that § 5(C) "would interfere with the careful balance struck by Congress," *ante*, at 406 (another field pre-emption notion, by the way), but that is easy to say and impossible to demonstrate. The Court relies primarily on the fact that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting [the Immigration Reform and Control Act of 1986 (IRCA)]," "[b]ut Congress rejected them." *Ante*, at 405. There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States. To tell the truth, it was most likely expressive of what inaction ordinarily expresses: nothing at all. It is a "naïve assumption that the failure of a bill to make it out of committee, or to be adopted when reported to the floor, is the same as a congressional rejection of what the bill contained." *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 389 (2000) (SCALIA, J., concurring in judgment) (internal quotation marks and brackets omitted).

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The brief for the Government in this case asserted that "the Executive Branch's ability to exercise discretion and set

priorities is particularly important because of the need to allocate scarce enforcement resources wisely." Brief for United States 21. Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift. Despite Congress's prescription that "the immigration laws of the United States should be enforced vigorously and uniformly," IRCA § 115, 100 Stat. 3384, Arizona asserts without contradiction and with supporting citations:

> "[I]n the last decade federal enforcement efforts have focused primarily on areas in California and Texas, leaving Arizona's border to suffer from comparative neglect. The result has been the funneling of an increasing tide of illegal border crossings into Arizona. Indeed, over the past decade, over a third of the Nation's illegal border crossings occurred in Arizona." Brief for Petitioners 2–3 (footnote omitted).

Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive's unwise targeting of that funding?

But leave that aside. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate "scarce enforcement resources"—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30.[4] If an individual unlawfully present in the United States

> "• came to the United States under the age of sixteen;
> "• has continuously resided in the United States for at least five years . . . ;

[4] Preston & Cushman, Obama To Permit Young Migrants To Remain in U. S., N. Y. Times, June 16, 2012, pp. A1, A16.

"• is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran . . . ;
"• has not been convicted of a [serious crime]; and
"• is not above the age of thirty,"[5]

then U. S. immigration officials have been directed to "defe[r] action" against such individual "for a period of two years, subject to renewal."[6] The husbanding of scarce enforcement resources can hardly be the justification for this, since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement. The President said at a news conference that the new program is "the right thing to do" in light of Congress's failure to pass the administration's proposed revision of the Immigration Act.[7] Perhaps it is, though Arizona may not think so. But to say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind.

The Court opinion's looming specter of inutterable horror—"[i]f § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations," *ante*, at 402—seems to me not so horrible and even less looming. But there has come to pass, and is with us today, the specter that Arizona and the States

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[5] Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U. S. Customs and Border Protection; Alejandro Mayorkas, Director, U. S. Citizenship and Immigration Services; and John Morton, Director, U. S. Immigration and Customs Enforcement, p. 1 (June 15, 2012), online at http://www.dhs.gov (all Internet materials as visited June 22, 2012, and available in Clerk of Court's case file).

[6] *Id.*, at 2.

[7] Remarks by the President on Immigration (June 15, 2012), online at http://www.whitehouse.gov.

that support it predicted: a Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Today's judgment surely fails that test. At the Constitutional Convention of 1787, the delegates contended with "the jealousy of the states with regard to their sovereignty." 1 Records of the Federal Convention 19 (M. Farrand ed. 1911) (statement of Edmund Randolph). Through ratification of the fundamental charter that the Convention produced, the States ceded much of their sovereignty to the Federal Government. But much of it remained jealously guarded—as reflected in the innumerable proposals that never left Independence Hall. Now, imagine a provision—perhaps inserted right after Art. I, §8, cl. 4, the Naturalization Clause—which included among the enumerated powers of Congress "To establish Limitations upon Immigration that will be exclusive and that will be enforced only to the extent the President deems appropriate." The delegates to the Grand Convention would have rushed to the exits.

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona's estimated 400,000 illegal immigrants—including not just children but men and women under 30—are

now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.

Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with JUSTICE SCALIA that federal immigration law does not pre-empt any of the challenged provisions of S. B. 1070. I reach that conclusion, however, for the simple reason that there is no conflict between the "ordinary meanin[g]" of the relevant federal laws and that of the four provisions of Arizona law at issue here. *Wyeth* v. *Levine*, 555 U. S. 555, 588 (2009) (THOMAS, J., concurring in judgment) ("Pre-emption analysis should not be a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict" (brackets and internal quotation marks omitted)).

Section 2(B) of S. B. 1070 provides that, when Arizona law enforcement officers reasonably suspect that a person they have lawfully stopped, detained, or arrested is unlawfully present, "a reasonable attempt shall be made, when practicable, to determine the immigration status of the person" pursuant to the verification procedure established by Congress in 8 U. S. C. § 1373(c). Ariz. Rev. Stat. Ann. § 11–1051(B) (West 2012). Nothing in the text of that or any other federal statute prohibits Arizona from directing its officers to make immigration-related inquiries in these situations. To the contrary, federal law expressly states that "no State or local government entity may be prohibited, or in any way

restricted, from sending to or receiving from" federal officials "information regarding the immigration status" of an alien. 8 U. S. C. § 1644. And, federal law imposes an affirmative obligation on federal officials to respond to a State's immigration-related inquiries. § 1373(c).

Section 6 of S. B. 1070 authorizes Arizona law enforcement officers to make warrantless arrests when there is probable cause to believe that an arrestee has committed a public offense that renders him removable under federal immigration law. States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority. See *United States* v. *Di Re*, 332 U. S. 581, 589 (1948) (holding that state law determines the validity of a warrantless arrest for a violation of federal law "in [the] absence of an applicable federal statute"). Here, no federal statute purports to withdraw that authority. As JUSTICE SCALIA notes, *ante*, at 426 (opinion concurring in part and dissenting in part), federal law does limit the authority of *federal* officials to arrest removable aliens, but those statutes do not apply to *state* officers. And, federal law expressly recognizes that state officers may "cooperate with the Attorney General" in the "apprehension" and "detention" of "aliens not lawfully present in the United States." § 1357(g)(10)(B). Nothing in that statute indicates that such cooperation requires a prior "request, approval, or other instruction from the Federal Government." *Ante,* at 410 (majority opinion).

Section 3 of S. B. 1070 makes it a crime under Arizona law for an unlawfully present alien to willfully fail to complete or carry an alien registration document in violation of 8 U. S. C. §§ 1304(e) and 1306(a). Section 3 simply incorporates federal registration standards. Unlike the Court, I would not hold that Congress pre-empted the field of enforcing those standards. "[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc.*

v. *Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting); see, *e. g.*, *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 415 (1973). Here, nothing in the text of the relevant federal statutes indicates that Congress intended enforcement of its registration requirements to be exclusively the province of the Federal Government. That Congress created a "full set of standards governing alien registration," *ante*, at 401 (majority opinion), merely indicates that it intended the scheme to be capable of working on its own, not that it wanted to preclude the States from enforcing the federal standards. *Hines* v. *Davidowitz*, 312 U. S. 52 (1941), is not to the contrary. As JUSTICE SCALIA explains, *ante*, at 429, *Hines* at most holds that federal law pre-empts the States from creating additional registration requirements. But here, Arizona is merely seeking to enforce the very registration requirements that Congress created.

Section 5(C) of S. B. 1070 prohibits unlawfully present aliens from knowingly applying for, soliciting, or performing work in Arizona. Section 5(C) operates only on individuals whom Congress has already declared ineligible to work in the United States. Nothing in the text of the federal immigration laws prohibits States from imposing their own criminal penalties on such individuals. Federal law expressly pre-empts States from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon *those who employ*, or recruit or refer for a fee for employment, unauthorized aliens." 8 U. S. C. § 1324a(h)(2) (emphasis added). But it leaves States free to impose criminal sanctions on the employees themselves.

Despite the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, *supra*, at 67.

I have explained that the "purposes and objectives" theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. See *Wyeth*, 555 U. S., at 604 (opinion concurring in judgment); see also *Williamson* v. *Mazda Motor of America, Inc.*, 562 U. S. 323, 340–341 (2011) (opinion concurring in judgment); *Haywood* v. *Drown*, 556 U. S. 729, 767 (2009) (dissenting opinion). Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes. See *Wyeth*, *supra*, at 604 (THOMAS, J., concurring in judgment). Thus, even assuming the existence of some tension between Arizona's law and the supposed "purposes and objectives" of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

JUSTICE ALITO, concurring in part and dissenting in part.

This case concerns four provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, S. B. 1070. Section 2(B) requires Arizona law enforcement officers to make a "reasonable attempt," "when practicable," to ascertain the immigration status of any person who an officer lawfully stops, detains, or arrests "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. § 11–1051(B) (West 2012). Section 3 provides that an alien who willfully fails "to complete or carry an alien registration document" in violation of 8 U. S. C. § 1304(e) or § 1306(a) is guilty of a misdemeanor. Ariz. Rev. Stat. Ann. § 13–1509(A) (West Supp. 2011). Section 5(C) makes it a misdemeanor for an unauthorized alien who is unlawfully present in the United States "to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." Ariz. Rev. Stat. Ann. § 13–2928(C). And § 6 au-

thorizes Arizona law enforcement officers to arrest without a warrant any person who an officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Ariz. Rev. Stat. Ann. § 13–3883(A)(5).

I agree with the Court that § 2(B) is not pre-empted. That provision does not authorize or require Arizona law enforcement officers to do anything they are not already allowed to do under existing federal law. The United States' argument that § 2(B) is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.

I also agree with the Court that § 3 is pre-empted by virtue of our decision in *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). Our conclusion in that case that Congress had enacted an "all-embracing system" of alien registration and that States cannot "enforce additional or auxiliary regulations," *id.*, at 66–67, 74, forecloses Arizona's attempt here to impose additional, state-law penalties for violations of the federal registration scheme.

While I agree with the Court on §§ 2(B) and 3, I part ways on §§ 5(C) and 6. The Court's holding on § 5(C) is inconsistent with *De Canas* v. *Bica*, 424 U. S. 351 (1976), which held that employment regulation, even of aliens unlawfully present in the country, is an area of traditional state concern. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest. I do not believe Congress has spoken with the requisite clarity to justify invalidation of § 5(C). Nor do I believe that § 6 is invalid. Like § 2(B), § 6 adds virtually nothing to the authority that Arizona law enforcement officers already exercise. And whatever little authority they have gained is consistent with federal law.

*Section 2(B)*

A

Although § 2(B) of the Arizona law has occasioned much controversy, it adds nothing to the authority that Arizona law enforcement officers, like officers in all other States, already possess under federal law. For that reason, I agree with the Court that § 2(B) is not pre-empted.

Section 2(B) quite clearly does not expand the authority of Arizona officers to make stops or arrests. It is triggered only when a "lawful stop, detention or arrest [is] made . . . in the enforcement of *any other [state or local] law or ordinance*." Ariz. Rev. Stat. Ann. § 11–1051(B) (emphasis added). Section 2(B) thus comes into play only when an officer has reasonable suspicion or probable cause to believe that a person has committed a nonimmigration offense. Arizona officers plainly possessed this authority before § 2(B) took effect.

Section 2(B) also does not expand the authority of Arizona officers to inquire about the immigration status of persons who are lawfully detained. When a person is stopped or arrested and "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," § 2(B) instructs Arizona officers to make a "reasonable attempt," "when practicable," to ascertain that person's immigration status. Ariz. Rev. Stat. Ann. § 11–1051(B). Even before the Arizona Legislature enacted § 2(B), federal law permitted state and local officers to make such inquiries. In 8 U. S. C. § 1357(g)(10)(A), Congress has made clear that state and local governments need not enter into formal agreements with the Federal Government in order "to communicate with the [Federal Government] regarding the immigration status of any individual." In addition, Congress has mandated that neither the Federal Government nor any state or local government may "prohibit, or in any way restrict, any government entity or official from sending

to, or receiving from, [the Federal Government] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." § 1373(a); see also § 1644 (providing that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [the Federal Government] information regarding the immigration status, lawful or unlawful, of an alien in the United States"). And while these provisions preserve the authority of state and local officers to seek immigration-status information from the Federal Government, another federal statute, § 1373(c), requires that the Federal Government respond to any such inquiries "by providing the requested verification or status information." It comes as no surprise, therefore, that many States and localities permit their law enforcement officers to make the kinds of inquiries that § 2(B) prescribes. See App. 294–298 (reporting that officers in 59 surveyed state and local jurisdictions "generally" ask arrestees about their immigration status while 34 do not and that officers in 78 jurisdictions "generally" inform Immigration and Customs Enforcement (ICE) when they believe an arrestee to be an undocumented alien while only 17 do not). Congress has invited state and local governments to make immigration-related inquiries and has even obligated the Federal Government to respond. Through § 2(B), Arizona has taken Congress up on that invitation.

The United States does not deny that officers may, *at their own discretion*, inquire about the immigration status of persons whom they lawfully detain. Instead, the United States argues that § 2(B) is pre-empted because it impedes federal-state cooperation by *mandating* that officers verify the immigration status of every detained person if there is reason to believe that the person is unlawfully present in the country. The United States claims that § 2(B)'s mandate runs contrary to federal law in that it "precludes officers from taking [the Federal Government's] priorities and discretion

into account." Brief for United States 50. "[B]y interposing a mandatory state law between state and local officers and their federal counterparts," writes the United States, § 2(B) "stands as an obstacle to the accomplishment of the federal requirement of cooperation and the full effectuation of the enforcement judgment and discretion Congress has vested in the Executive Branch." *Ibid.* (internal quotation marks and citation omitted).

The underlying premise of the United States' argument seems to be that state and local officers, when left to their own devices, generally take federal enforcement priorities into account. But there is no reason to think that this premise is true. And even if it were, it would not follow that § 2(B)'s blanket mandate is at odds with federal law. Nothing in the relevant federal statutes *requires* state and local officers to consider the Federal Government's priorities before requesting verification of a person's immigration status. Neither 8 U. S. C. § 1357(g)(10) nor § 1373(a) conditions the right of state and local officers to communicate with the Federal Government on their first taking account of its priorities. Nor does § 1373(c) condition the Federal Government's obligation to answer requests for information on the sensitivity of state and local officers to its enforcement discretion. In fact, § 1373(c) dictates that the Federal Government "shall respond" to any inquiry seeking verification of immigration status, and that command applies whether or not the requesting officer has bothered to consider federal priorities. Because no federal statute requires such consideration, § 2(B) does not conflict with federal law.

In any event, it is hard to see how state and local officers could proceed in conformity with the Federal Government's enforcement priorities without making an inquiry into a suspected alien's immigration status. For example, one of the Federal Government's highest priorities is the apprehension and removal of aliens who have failed to comply with a final order of removal. See App. 108. How can an officer iden-

tify those persons without first inquiring about their status? At bottom, the discretion that ultimately matters is not whether to verify a person's immigration status but whether to act once the person's status is known. For that reason, § 2(B)'s verification requirement is not contrary to federal law because the Federal Government retains the discretion that matters most—that is, the discretion to enforce the law in particular cases. If an Arizona officer contacts the Federal Government to verify a person's immigration status and federal records reveal that the person is in the country unlawfully, the Federal Government decides, presumably based on its enforcement priorities, whether to have the person released or transferred to federal custody. Enforcement discretion thus lies with the Federal Government, not with Arizona. Nothing in § 2(B) suggests otherwise.

The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. Cf. *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 330 (1994) (holding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional" an "otherwise valid, congressionally condoned" state law). If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?

Like most law enforcement agencies, ICE does not set out inflexible rules for its officers to follow. To the contrary, it provides a list of factors to guide its officers' enforcement discretion on a case-by-case basis. See Memorandum from John Morton, Director, ICE, to All Field Office Directors

et al., Exercising Prosecutorial Discretion Consistent With the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4 (June 17, 2011) ("This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities"). Among those factors is "the agency's civil immigration enforcement priorities," *ibid.*, which change from administration to administration. If accepted, the United States' pre-emption argument would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations. This argument, to say the least, is fundamentally at odds with our federal system.

B

It has been suggested that § 2(B) will cause some persons who are lawfully stopped to be detained in violation of their constitutional rights while a prolonged investigation of their immigration status is undertaken. But nothing on the face of the law suggests that it will be enforced in a way that violates the Fourth Amendment or any other provision of the Constitution. The law instructs officers to make a "reasonable attempt" to investigate immigration status, and this language is best understood as incorporating the Fourth Amendment's standard of reasonableness. Indeed, the Arizona Legislature has directed that § 2(B) "shall be implemented in a manner consistent with federal laws . . . protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." Ariz. Rev. Stat. Ann. § 11–1051(L).

In the situations that seem most likely to occur, enforcement of § 2(B) will present familiar Fourth Amendment ques-

tions. To take a common situation, suppose that a car is stopped for speeding, a nonimmigration offense. (Recall that § 2(B) comes into play only where a stop or arrest is made for a nonimmigration offense.) Suppose also that the officer who makes the stop subsequently acquires reasonable suspicion to believe that the driver entered the country illegally, which is a federal crime. See 8 U. S. C. § 1325(a).

It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws. See, *e. g.*, *Miller* v. *United States*, 357 U. S. 301, 305 (1958); *United States* v. *Di Re*, 332 U. S. 581, 589 (1948). I see no reason why this principle should not apply to immigration crimes as well. Lower courts have so held. See, *e. g.*, *Estrada* v. *Rhode Island*, 594 F. 3d 56, 65 (CA1 2010) (upholding the lawfulness of a detention because the officer had an objectively reasonable belief that the arrestees "had committed immigration violations"); *United States* v. *Vasquez-Alvarez*, 176 F. 3d 1294, 1296 (CA10 1999) (noting that "state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws"); *Gonzales* v. *Peoria*, 722 F. 2d 468, 475 (CA9 1983), overruled on other grounds, *Hodgers-Durgin* v. *de la Vina*, 199 F. 3d 1037 (1999) (en banc) (holding that "federal law does not preclude local enforcement of the criminal provisions" of federal immigration law). And the United States, consistent with the position long taken by the Office of Legal Counsel (OLC) in the Department of Justice, does not contend otherwise. See Brief for United States 55, n. 33; see also Memorandum from OLC to the Attorney General (Apr. 3, 2002), App. 268–273; Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26 (1996).

More importantly, no federal statute casts doubt on this authority. To be sure, there are a handful of statutes that purport to authorize state and local officers to make immigration-related arrests in *certain* situations. See, *e. g.*,

8 U. S. C. § 1103(a)(10) (providing for the extension of "any" immigration enforcement authority to state and local officers in the event of an "actual or imminent mass influx of aliens arriving off the coast"); § 1252c(a) (providing authority to arrest criminal aliens who had illegally reentered the country but only after consultation with the Federal Government); § 1324(c) (providing authority to make arrests for transporting and harboring certain aliens). But a grant of federal arrest authority in some cases does not manifest a clear congressional intent to displace the States' police powers in all other cases. Without more, such an inference is too weak to overcome our presumption against pre-emption where traditional state police powers are at stake. Accordingly, in our hypothetical case, the Arizona officer may arrest the driver for violating § 1325(a) if the officer has probable cause. And if the officer has reasonable suspicion, the officer may detain the driver, to the extent permitted by the Fourth Amendment, while the question of illegal entry is investigated.

We have held that a detention based on reasonable suspicion that the detainee committed a particular crime "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois* v. *Caballes*, 543 U. S. 405, 407 (2005). But if during the course of a stop an officer acquires suspicion that a detainee committed a different crime, the detention may be extended for a reasonable time to verify or dispel that suspicion. Cf. *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (holding that "no additional Fourth Amendment justification" was required because any questioning concerning immigration status did not prolong the detention). In our hypothetical case, therefore, if the officer, after initially stopping the car for speeding, has a reasonable suspicion that the driver entered the country illegally, the officer may investigate for evidence of illegal entry. But the length and nature of this investigation must remain within the limits set out in our Fourth Amendment cases.

An investigative stop, if prolonged, can become an arrest and thus require probable cause. See *Caballes*, *supra*, at 407. Similarly, if a person is moved from the site of the stop, probable cause will likely be required. See *Hayes* v. *Florida*, 470 U. S. 811, 816 (1985) (holding that the line between detention and arrest is crossed "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes").

If properly implemented, § 2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of § 2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up. These civil-liberty concerns, I take it, are at the heart of most objections to § 2(B). Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped for some other reason entered the country illegally, and there is a risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained. To mitigate this risk, Arizona could issue guidance to officers detailing the circumstances that typically give rise to reasonable suspicion of unlawful presence. And in the spirit of the federal-state cooperation that the United States champions, the Federal Government could share its own guidelines. Arizona could also provide officers with a nonexclusive list containing forms of identification sufficient under § 2(B) to dispel any suspicion of unlawful presence. If Arizona accepts licenses from most States as proof of legal status, the problem of roadside detentions will be greatly mitigated.[1]

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[1] When the REAL ID Act of 2005 takes effect, the Federal Government will no longer accept state forms of identification that fail to meet certain federal requirements. § 202(a)(1), 119 Stat. 312. One requirement is that any identification be issued only on proof that the applicant is lawfully

*Section 3*

I agree that § 3 is pre-empted because, like the Court, I read the opinion in *Hines* to require that result. Although there is some ambiguity in *Hines*, the Court largely spoke in the language of field pre-emption. The Court explained that where Congress "has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U. S., at 66–67. In finding the Pennsylvania alien-registration law pre-empted, the Court observed that Congress had "provided a standard for alien registration in a single integrated and all-embracing system" and that its intent was "to protect the personal liberties of law-abiding aliens through one uniform national registration system." *Id.*, at 74. If we credit our holding in *Hines* that Congress has enacted "a single integrated and all-embracing system" of alien registration and that States cannot "complement" that system or "enforce additional or auxiliary regulations," *id.*, at 66–67, 74, then Arizona's attempt to impose additional, state-law penalties for violations of federal registration requirements must be invalidated.

*Section 5(C)*

While I agree that § 3 is pre-empted, I disagree with the Court's decision to strike down § 5(C). I do so in large measure because the Court fails to give the same solicitude to our decision in *De Canas*, 424 U. S. 351, as it is willing to give our decision in *Hines*. In *De Canas*, the Court upheld against a pre-emption challenge a state law imposing fines on employers that hired aliens who were unlawfully present in the

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present in the United States. § 202(c)(2)(B), *id.*, at 313. I anticipate that most, if not all, States will eventually issue forms of identification that suffice to establish lawful presence under § 2(B).

United States. The Court explained that the mere fact that "aliens are the subject of a state statute does not render it a regulation of immigration." 424 U. S., at 355. The Court emphasized instead that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.*, at 356. In light of that broad authority, the Court declared that "[o]nly a demonstration that complete ouster of state power . . . was 'the clear and manifest purpose of Congress' would justify" the conclusion that "state regulation designed to protect vital state interests must give way to paramount federal legislation." *Id.*, at 357 (some internal quotation marks omitted); see also *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 449 (2005) ("In areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest' " (some internal quotation marks omitted)).

The Court now tells us that times have changed. Since *De Canas*, Congress has enacted "a comprehensive framework for combating the employment of illegal aliens," and even though aliens who seek or obtain unauthorized work are not subject to criminal sanctions, they can suffer civil penalties. *Ante*, at 404 (internal quotation marks omitted). Undoubtedly, federal regulation in this area is more pervasive today. But our task remains unchanged: to determine whether the federal scheme discloses a clear and manifest congressional intent to displace state law.

The Court gives short shrift to our presumption *against* pre-emption. Having no express statement of congressional intent to support its analysis, the Court infers from stale legislative history and from the comprehensiveness of the federal scheme that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Ante*, at 405. Because § 5(C) imposes such penalties, the Court concludes that it stands

as an obstacle to the method of enforcement chosen by Congress. *Ante*, at 406–407.

The one thing that is clear from the federal scheme is that Congress chose not to impose *federal* criminal penalties on aliens who seek or obtain unauthorized work. But that does not mean that Congress also chose to pre-empt *state* criminal penalties. The inference is plausible, but far from necessary. As we have said before, the "decision not to adopt a regulation" is not "the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 65 (2002). With any statutory scheme, Congress chooses to do some things and not others. If that alone were enough to demonstrate pre-emptive intent, there would be little left over for the States to regulate, especially now that federal authority reaches so far and wide. States would occupy tiny islands in a sea of federal power. This explains why state laws implicating traditional state powers are not pre-empted unless there is a "clear and manifest" congressional intention to do so.

Not only is there little evidence that Congress intended to pre-empt state laws like § 5(C), there is some evidence that Congress intended the opposite result. In making it unlawful for employers to hire unauthorized aliens, see 8 U. S. C. § 1324a(a), Congress made it clear that "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" upon employers was pre-empted, § 1324a(h)(2). Noticeably absent is any similar directive pre-empting state or local laws targeting aliens who seek or obtain unauthorized employment. Given that Congress expressly pre-empted certain state and local laws pertaining to employers but remained silent about laws pertaining to employees, one could infer that Congress intended to preserve state and local authority to regulate the employee side of the equation. At the very least, it raises serious

doubts about whether Congress intended to pre-empt such authority.

The Court dismisses any inferences that might be drawn from the express pre-emption provision. See *ante*, at 406. But even though the existence of that provision "does *not* bar the ordinary working of conflict pre-emption principles" or impose a "'special burden'" against pre-emption, *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869–870 (2000), it is still probative of congressional intent. And it is the intent of Congress that is the "ultimate touchstone." *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963).

The Court infers from Congress' decision not to impose *federal* criminal penalties that Congress intended to pre-empt *state* criminal penalties. But given that the express pre-emption provision covers only state and local laws regulating *employers*, one could just as well infer that Congress did not intend to pre-empt state or local laws aimed at alien *employees* who unlawfully seek or obtain work. Surely Congress' decision not to extend its express pre-emption provision to state or local laws like § 5(C) is more probative of its intent on the subject of pre-emption than its decision not to impose federal criminal penalties for unauthorized work. In any event, the point I wish to emphasize is that inferences can be drawn either way. There are no necessary inferences that point decisively for or against pre-emption. Therefore, if we take seriously that state employment regulation is a traditional state concern and can be pre-empted only on a showing of "clear and manifest" congressional intent as required by *De Canas*, then § 5(C) must survive. "Our precedents establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 607 (2011) (plurality opinion) (internal quotation marks omitted). I do not believe the United States has surmounted that barrier here.

*Section 6*

I also disagree with the Court's decision that § 6 is preempted. This provision adds little to the authority that Arizona officers already possess, and whatever additional authority it confers is consistent with federal law. Section 6 amended an Arizona statute that authorizes warrantless arrests. See Ariz. Rev. Stat. Ann. § 13–3883 (West 2010). Before § 6 was added, that statute already permitted arrests without a warrant for felonies, misdemeanors committed in the arresting officer's presence, petty offenses, and certain traffic-related criminal violations. See §§ 13–3883(A)(1)–(4). Largely duplicating the authority already conferred by these prior subsections, § 6 added a new subsection, § 13–3883(A)(5) (West Supp. 2011), that authorizes officers to make warrantless arrests on probable cause that the arrestee has committed a "public offense" for which the arrestee is removable from the United States. A "public offense" is defined as conduct that is punishable by imprisonment or a fine according to the law of the State where the conduct occurred and that would be punishable under Arizona law had the conduct occurred in Arizona. See § 13–105(27).

In what way, if any, does § 6 enlarge the arrest authority of Arizona officers? It has been suggested that § 6 confers new authority in the following three circumstances: (1) where the arrestee committed but has not been charged with committing an offense in another State; (2) where the officer has probable cause to believe the arrestee committed an offense for which he was previously arrested but not prosecuted; and (3) where the arrestee committed but has already served the sentence for a removable offense. 641 F. 3d 339, 361 (CA9 2011). These are exceedingly narrow categories, involving circumstances that will rarely arise. But such cases are possible, and therefore we must decide whether there are circumstances under which federal law precludes a state officer from making an arrest based on probable cause that the arrestee committed a removable offense.

A

The idea that state and local officers may carry out arrests in the service of federal law is not unprecedented. As previously noted, our cases establish that state and local officers may make warrantless arrests for violations of federal law and that in the "absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *Di Re*, 332 U. S., at 589; see also *Miller*, 357 U. S., at 305 (stating that, where a state officer makes an arrest based on federal law, "the lawfulness of the arrest without warrant is to be determined by reference to state law"). Therefore, given the premise, which I understand both the United States and the Court to accept, that state and local officers do have inherent authority to make arrests in aid of federal law, we must ask whether Congress has done anything to curtail or pre-empt that authority in this particular case.

Neither the United States nor the Court goes so far as to say that state and local officers have no power to arrest criminal aliens based on their removability. To do so would fly in the face of 8 U. S. C. § 1357(g)(10). Under §§ 1357(g)(1)–(9), the Federal Government may enter into formal agreements with States and municipalities under which their officers may perform certain duties of a federal immigration officer. But § 1357(g)(10)(B) makes clear that States and municipalities need not enter into those agreements "otherwise to cooperate . . . in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." It goes without saying that state and local officers could not provide meaningful cooperation in the apprehension, detention, and ultimate removal of criminal aliens without some power to make arrests.

Although § 1357(g)(10) contemplates state and local authority to apprehend criminal aliens for the purpose of removal, the Court rejects out of hand any possibility that officers could exercise that authority without federal direction.

Despite acknowledging that there is "ambiguity as to what constitutes cooperation," the Court says that "no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Ante*, at 410. The Court adopts an unnecessarily stunted view of cooperation. No one would say that a state or local officer has failed to cooperate by making an on-the-spot arrest to enforce federal law. Unsolicited aid is not necessarily uncooperative.

To be sure, were an officer to persist in making an arrest that the officer knows is unwanted, such conduct would not count as cooperation. But nothing in the relevant federal statutes suggests that Congress does not want aliens who have committed removable offenses to be arrested.[2] To the contrary, § 1226(c)(1) commands that the Executive "shall take into custody any alien" who is deportable for having committed a specified offense. And § 1226(c)(2) substantially limits the circumstances under which the Executive has discretion to release aliens held in custody under paragraph (1). So if an officer arrests an alien who is removable for having committed one of the crimes listed in § 1226(c)(1), the Federal Government is obligated to take the alien into custody.

That Congress generally requires the Executive to take custody of criminal aliens casts considerable doubt on the Court's concern that § 6 is an obstacle to the Federal Government's exercise of discretion. The Court claims that the authority conferred by § 6 "could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case" and that this "would allow the State to achieve its own immigration policy," resulting in the "unnecessary harassment of some aliens . . . who federal officials determine should not be removed." *Ante*, at 408. But § 1226(c)(1) belies the Court's fear. In many, if not most,

[2] That goes for the Executive Branch as well, which has made the apprehension and removal of criminal aliens a priority. See App. 108.

cases involving aliens who are removable for having committed criminal offenses, Congress has left the Executive no discretion but to take the alien into custody. State and local officers do not frustrate the removal process by arresting criminal aliens. The Executive retains complete discretion over whether those aliens are ultimately removed. And once the Federal Government makes a determination that a particular criminal alien will not be removed, then Arizona officers are presumably no longer authorized under § 6 to arrest the alien.

To be sure, not all offenses for which officers have authority to arrest under § 6 are covered by § 1226(c)(1). As for aliens who have committed those offenses, Congress has given the Executive discretion under § 1226(a) over whether to arrest and detain them pending a decision on removal. But the mere fact that the Executive has enforcement discretion cannot mean that the exercise of state police powers in support of federal law is automatically pre-empted. If that were true, then state and local officers could never make arrests to enforce any federal statute because the Executive always has at least some general discretion over the enforcement of federal law as a practical matter. But even assuming that the express statutory grant of discretion in § 1226(a) somehow indicates a congressional desire to pre-empt unilateral state and local authority to arrest criminal aliens covered by that provision, § 6 is not pre-empted on its face given its substantial overlap with § 1226(c)(1).

It bears emphasizing that § 6 does not mandate the warrantless apprehension of all aliens who have committed crimes for which they are removable. Instead, it only grants state and local officers permission to make such arrests. The trouble with this premature, facial challenge is that it affords Arizona no opportunity to implement its law in a way that would avoid any potential conflicts with federal law. For example, Arizona could promulgate guidelines or regulations limiting the arrest authority conferred by § 6 to

the crimes specified in § 1226(c)(1). And to the extent § 1226(c)(1) is unclear about which exact crimes are covered,[3] Arizona could go even further and identify specific crimes for which there is no doubt an alien would be removable. The point is that there are plenty of permissible applications of § 6, and the Court should not invalidate the statute at this point without at least some indication that Arizona has implemented it in a manner at odds with Congress' clear and manifest intent. We have said that a facial challenge to a statute is "the most difficult challenge to mount successfully" because "the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987); see also *Anderson* v. *Edwards*, 514 U. S. 143, 155, n. 6 (1995) (applying the *Salerno* standard in a pre-emption case). As to § 6, I do not believe the United States has carried that heavy burden.

B

Finally, the Court tells us that § 6 conflicts with federal law because it provides state and local officers with "even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." *Ante*, at 408. The Court points to 8 U. S. C. § 1357(a)(2), which empowers "authorized" officers and employees of ICE to make arrests without a federal warrant if "the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." Because § 6 would allow Arizona officers to make arrests "regardless of whether a federal warrant has issued or the alien is likely to escape," *ante*, at 408, the Court concludes that § 6 is an obstacle to the accomplishment of Congress' objectives.

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[3] I readily admit that it can be difficult to determine whether a particular conviction will necessarily make an alien removable. See *Padilla* v. *Kentucky*, 559 U. S. 356, 377–378 (2010) (ALITO, J., concurring in judgment).

But § 6 is an obstacle only to the extent it conflicts with Congress' clear and manifest intent to preclude state and local officers from making arrests except where a federal warrant has issued or the arrestee is likely to escape. By granting warrantless arrest authority to *federal officers*, Congress has not manifested an unmistakable intent to strip *state and local officers* of their warrantless arrest authority under state law.

Likewise, limitations on federal arrest authority do not mean that the arrest authority of state and local officers must be similarly limited. Our opinion in *Miller*, 357 U. S. 301, is instructive. In that case, a District of Columbia officer, accompanied by a federal officer, made an arrest based on a suspected federal narcotics offense. *Id.*, at 303–304. The federal officer did not have statutory authorization to arrest without a warrant, but the local officer did. *Id.*, at 305. We held that District of Columbia law dictated the lawfulness of the arrest. *Id.*, at 305–306. Where a state or local officer makes a warrantless arrest to enforce federal law, we said that "the lawfulness of the arrest without warrant is to be determined by reference to state law." *Id.*, at 305. Under § 6, an Arizona officer may be authorized to make an arrest that a federal officer may not be authorized to make under § 1357(a)(2). As *Miller* makes clear, that fact alone does not render arrests by state or local officers pursuant to § 6 unlawful. Nor does it manifest a clear congressional intent to displace the exercise of state police powers that are brought to bear in aid of federal law.

Syllabus

# MILLER *v.* ALABAMA

## CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

No. 10–9646. Argued March 20, 2012—Decided June 25, 2012*

In each of these cases, a 14-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. In No. 10–9647, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14-year-old violates the Eighth Amendment. Disagreeing, the court granted the State's motion to dismiss. The Arkansas Supreme Court affirmed.

In No. 10–9646, petitioner Miller, along with a friend, beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole. The Alabama Court of Criminal Appeals affirmed, holding that Miller's sentence was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the Eighth Amendment.

*Held:* The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Pp. 469–489.

(a) The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper* v. *Simmons*, 543 U. S. 551, 560. That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Ibid.*

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*Together with No. 10–9647, *Jackson* v. *Hobbs, Director, Arkansas Department of Correction*, on certiorari to the Supreme Court of Arkansas.

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Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See, *e. g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407. Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* v. *Simmons* held that the Eighth Amendment bars capital punishment for children, and *Graham* v. *Florida*, 560 U. S. 48, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

As to the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes. Their "'lack of maturity'" and "'underdeveloped sense of responsibility'" lead to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U. S., at 569. They "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham*'s flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe pen-

alties on juvenile offenders cannot proceed as though they were not children.

*Graham* also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U. S., at 69. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of *Graham*'s reasoning, these decisions also show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Pp. 469–480.

(b) The counterarguments of Alabama and Arkansas are unpersuasive. Pp. 480–489.

(1) The States first contend that *Harmelin* v. *Michigan*, 501 U. S. 957, forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. *Harmelin* declined to extend the individualized sentencing requirement to noncapital cases "because of the qualitative difference between death and all other penalties." *Id.*, at 1006 (KENNEDY, J., concurring in part and concurring in judgment). But *Harmelin* had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since *Harmelin*, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See *Roper*, 543 U. S. 551; *Graham*, 560 U. S. 48.

The States next contend that mandatory life-without-parole terms for juveniles cannot be unconstitutional because 29 jurisdictions impose them on at least some children convicted of murder. In considering categorical bars to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, *e. g.*, *Sumner* v. *Schuman*, 483 U. S. 66.

In any event, the "objective indicia of society's standards," *Graham*, 560 U. S., at 61, that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-

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parole for nonhomicide offenders) that this Court invalidated in *Graham*. And as *Graham* and *Thompson* v. *Oklahoma*, 487 U. S. 815, explain, simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed the transfer of certain juvenile offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. Pp. 480–487.

(2) The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing. Pp. 487–489.

No. 10–9646, 63 So. 3d 676, and No. 10–9647, 2011 Ark. 49, 378 S. W. 3d 103, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. BREYER, J., filed a concurring opinion, in which SOTOMAYOR, J., joined, *post*, p. 489. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 493. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 502. ALITO, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 509.

*Bryan A. Stevenson* argued the cause for petitioners in both cases. With him on the briefs were *Randall S. Susskind*, *Alicia A. D'Addario*, and *Aaryn M. Urell*.

*John C. Neiman, Jr.*, Solicitor General of Alabama, argued the cause for respondent in No. 10–9646. With him on the brief were *Luther Strange*, Attorney General, *Prim F. Escalona* and *Andrew L. Brasher*, Deputy Solicitors General, and *John Porter*, *Clay Crenshaw*, *Henry Johnson*, *Stephanie*

Counsel

*Reiland*, and *Jess R. Nix*, Assistant Attorneys General. *Kent G. Holt*, Assistant Attorney General of Arkansas, argued the cause for respondent in No. 10–9647. With him on the brief were *Dustin McDaniel*, Attorney General, *Kelly Fields*, Senior Assistant Attorney General, and *Vada Berger* and *Kathryn Henry*, Assistant Attorneys General.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Bar Association by *William T. Robinson III* and *Lawrence A. Wojcik;* for the American Psychological Association et al. by *David W. Ogden*, *Danielle Spinelli*, *Eric F. Citron*, *Nathalie F. P. Gilfoyle*, *Aaron M. Panner*, and *Carolyn I. Polowy;* for Amnesty International et al. by *Constance de la Vega* and *Neil A. F. Popović;* for Former Juvenile Court Judges by *Jonathan D. Hacker* and *Brianne J. Gorod;* for J. Lawrence Aber et al. by *Stephen M. Nickelsburg;* and for Jeffrey Fagan et al. by *Carl Micarelli.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Leonardo M. Rapadas* of Guam, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *Gary K. King* of New Mexico, *E. Scott Pruitt* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Rob McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; for the National District Attorneys Association by *Christopher Landau;* and for the National Organization of Victims of Juvenile Lifers by *Thomas R. McCarthy* and *William S. Consovoy.*

Briefs of *amici curiae* were filed in both cases for the American Medical Association et al. by *E. Joshua Rosenkranz;* for the American Probation and Parole Association et al. by *Clifford M. Sloan* and *Judith S. Kaye;* for Certain Family Members of Victims Killed by Youths by *Angela C. Vigil*, *William Lynch Schaller*, and *Adam Dougherty;* for the Juvenile Law Center et al. by *Marsha L. Levick*, *Emily C. Keller*, *Jeffery J. Pokorak*, and *Steven A. Drizin;* for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Vincent M. Southerland*, *John Payton*, *Debo P. Adegbile*, *Christina A. Swarns*, and *Jin Hee Lee;* and for Professor of Law et al. from Moritz College of Law, Ohio State University, by *Douglas A. Berman*, *pro se.*

JUSTICE KAGAN delivered the opinion of the Court.

The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham* v. *Florida*, 560 U. S. 48, 68, 74 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

## I

### A

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." *Jackson* v. *State*, 359 Ark. 87, 89, 194 S. W. 3d 757, 759 (2004) (internal quotation marks omitted). Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin'." *Id.*, at 91, 194 S. W. 3d, at 760 (internal

quotation marks omitted). When Troup threatened to call the police, Shields shot and killed her. The three boys fled emptyhanded. See *id.*, at 89–92, 194 S. W. 3d, at 758–760.

Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses. See Ark. Code Ann. § 9–27–318(c) (1998). The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. See *Jackson* v. *State*, No. 02–535, 2003 WL 193412, *1 (Ark. App., Jan. 29, 2003); §§ 9–27–318(d), (e). A jury later convicted Jackson of both crimes. Noting that "in view of [the] verdict, there's only one possible punishment," the judge sentenced Jackson to life without parole. App. in No. 10–9647, p. 55 (hereinafter Jackson App.); see Ark. Code Ann. § 5–4–104(b) (1997) ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole").[1] Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions. See 359 Ark. 87, 194 S. W. 3d 757.

Following *Roper* v. *Simmons*, 543 U. S. 551 (2005), in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on *Roper*'s reasoning, that a mandatory sentence of life without parole for a 14-year-old also violates the Eighth Amendment. The circuit court rejected that argument and granted the State's motion to dismiss. See Jackson App. 72–76. While that ruling was on appeal, this Court held in *Graham* v. *Florida*

[1] Jackson was ineligible for the death penalty under *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (plurality opinion), which held that capital punishment of offenders under the age of 16 violates the Eighth Amendment.

that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. After the parties filed briefs addressing that decision, the Arkansas Supreme Court affirmed the dismissal of Jackson's petition. See *Jackson* v. *Norris*, 2011 Ark. 49, 378 S. W. 3d 103. The majority found that *Roper* and *Graham* were "narrowly tailored" to their contexts: "death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile." 2011 Ark., at 5, 378 S. W. 3d, at 106. Two justices dissented. They noted that Jackson was not the shooter and that "any evidence of intent to kill was severely lacking." *Id.*, at 10, 378 S. W. 3d, at 109 (Danielson, J., dissenting). And they argued that Jackson's mandatory sentence ran afoul of *Graham*'s admonition that "'[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" 2011 Ark., at 10–11, 378 S. W. 3d, at 109 (quoting *Graham*, 560 U. S., at 76).[2]

B

Like Jackson, petitioner Evan Miller was 14 years old at the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old. See

[2] For the first time in this Court, Arkansas contends that Jackson's sentence was not mandatory. On its view, state law then in effect allowed the trial judge to suspend the life-without-parole sentence and commit Jackson to the Department of Human Services for a "training-school program," at the end of which he could be placed on probation. Brief for Respondent in No. 10–9647, pp. 36–37 (hereinafter Arkansas Brief) (citing Ark. Code Ann. §12–28–403(b)(2) (1999)). But Arkansas never raised that objection in the state courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law. See, *e. g.*, *Mullaney* v. *Wilbur*, 421 U. S. 684, 690–691 (1975).

*E. J. M.* v. *State*, 928 So. 2d 1077, 1081 (Ala. Crim. App. 2004) (Cobb, J., concurring in result); App. in No. 10–9646, pp. 26–28 (hereinafter Miller App.).

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. See 6 Record in No. 10–9646, p. 1004. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him "'I am God, I've come to take your life,'" and delivered one more blow. 63 So. 3d 676, 689 (Ala. Crim. App. 2010). The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation. See *id.*, at 683–685, 689.

Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. See Ala. Code § 12–15–34 (1977). The D. A. did so, and the juvenile court agreed to the transfer after a hearing. Citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses (truancy and "criminal mischief"), the Alabama Court of Criminal Appeals affirmed. *E. J. M.* v. *State*, No. CR–03–0915, pp. 5–7 (Aug. 27, 2004) (unpublished memorandum).[3] The State

[3] The Court of Criminal Appeals also affirmed the juvenile court's denial of Miller's request for funds to hire his own mental expert for the transfer hearing. The court pointed out that under governing Alabama Supreme Court precedent, "the procedural requirements of a trial do not ordinarily apply" to those hearings. *E. J. M.* v. *State*, 928 So. 2d 1077 (2004) (Cobb, J., concurring in result) (internal quotation marks omitted). In a separate

accordingly charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. See Ala. Code §§ 13A–5–40(a)(9), 13A–6–2(c) (1982).

Relying in significant part on testimony from Smith, who had pleaded to a lesser offense, a jury found Miller guilty. He was therefore sentenced to life without the possibility of parole. The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was "not overly harsh when compared to the crime" and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment. 63 So. 3d, at 690; see *id.*, at 686–691. The Alabama Supreme Court denied review.

We granted certiorari in both cases, see 565 U. S. 1013 (2011), and now reverse.

## II

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U. S., at 560. That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Ibid.* (quoting *Weems* v. *United States*, 217 U. S. 349, 367 (1910)). As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U. S., at 59. And we view that concept less through a historical prism than according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Es-*

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opinion, Judge Cobb agreed on the reigning precedent, but urged the State Supreme Court to revisit the question in light of transfer hearings' importance. See *id.*, at 1081 ("[A]lthough later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late").

*telle* v. *Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)).

The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See *Graham*, 560 U. S., at 60–61 (listing cases). So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. See *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008); *Atkins* v. *Virginia*, 536 U. S. 304 (2002). Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. See *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion); *Lockett* v. *Ohio*, 438 U. S. 586 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.[4]

[4] The three dissenting opinions here each take issue with some or all of those precedents. See *post*, at 497–498 (opinion of ROBERTS, C. J.); *post*, at 502–507 (opinion of THOMAS, J.); *post*, at 510–513 (opinion of ALITO, J.). That is not surprising: Their authors (and joiner) each dissented from some or all of those precedents. See, *e. g.*, *Kennedy*, 554 U. S., at 447 (ALITO, J., joined by ROBERTS, C. J., and SCALIA and THOMAS, JJ., dissenting); *Roper*, 543 U. S., at 607 (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Atkins*, 536 U. S., at 337 (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Thompson*, 487 U. S., at 859 (SCALIA, J., dissenting); *Graham*

To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham*, 560 U. S., at 68. Those cases relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U. S., at 569. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570.

Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. *Id.*, at 569. In *Roper*, we cited studies showing that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" *Id.*, at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences be-

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v. *Collins*, 506 U. S. 461, 487 (1993) (THOMAS, J., concurring) (contending that *Woodson* was wrongly decided). In particular, each disagreed with the majority's reasoning in *Graham*, which is the foundation stone of our analysis. See *Graham*, 560 U. S., at 86 (ROBERTS, C. J., concurring in judgment); *id.*, at 97 (THOMAS, J., joined by SCALIA and ALITO, JJ., dissenting); *id.*, at 124 (ALITO, J., dissenting). While the dissents seek to relitigate old Eighth Amendment battles, repeating many arguments this Court has previously (and often) rejected, we apply the logic of *Roper*, *Graham*, and our individualized sentencing decisions to these two cases.

tween juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 560 U. S., at 68.[5] We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'" *Ibid.* (quoting *Roper*, 543 U. S., at 570).

*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 560 U. S., at 71 (quoting *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987); *Roper*, 543 U. S., at 571). Nor can deterrence do the work in this context, because "'the same characteristics that render juveniles less culpable than adults'"—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Graham*, 560 U. S., at 72 (quoting *Roper*, 543 U. S., at 571). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would

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[5] The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger. See, *e. g.*, Brief for American Psychological Association et al. as *Amici Curiae* 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.*, at 4 ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance"); Brief for J. Lawrence Aber et al. as *Amici Curiae* 12–28 (discussing post-*Graham* studies); *id.*, at 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency" (footnote omitted)).

require "mak[ing] a judgment that [he] is incorrigible"—but "'incorrigibility is inconsistent with youth.'" 560 U. S., at 72–73 (quoting *Workman* v. *Commonwealth*, 429 S. W. 2d 374, 378 (Ky. App. 1968)). And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." *Graham*, 560 U. S., at 74. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. *Ibid.*

*Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. See *id.*, at 69. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. Cf. *id.*, at 71–74 (generally doubting the penological justifications for imposing life without parole on juveniles). "An offender's age," we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all

would be flawed." *Id.*, at 76. THE CHIEF JUSTICE, concurring in the judgment, made a similar point. Although rejecting a categorical bar on life-without-parole sentences for juveniles, he acknowledged "*Roper*'s conclusion that juveniles are typically less culpable than adults," and accordingly wrote that "an offender's juvenile status can play a central role" in considering a sentence's proportionality. *Id.*, at 90; see *id.*, at 96 (Graham's "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive").[6]

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

And *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by no other sentences." 560 U. S., at 69. Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture

[6] In discussing *Graham*, the dissents essentially ignore all of this reasoning. See *post*, at 495–498 (opinion of ROBERTS, C. J.); *post*, at 512–513 (opinion of ALITO, J.). Indeed, THE CHIEF JUSTICE ignores the points made in his own concurring opinion. The only part of *Graham* that the dissents see fit to note is the distinction it drew between homicide and nonhomicide offenses. See *post*, at 499–500 (opinion of ROBERTS, C. J.); *post*, at 512–513 (opinion of ALITO, J.). But contrary to the dissents' charge, our decision today retains that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

that is irrevocable." *Ibid.* (citing *Solem* v. *Helm*, 463 U. S. 277, 300–301 (1983)). And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U. S., at 70. The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." *Ibid.* All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. See *id.*, at 60; *id.*, at 102 (THOMAS, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone"). And the bar we adopted mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals. See *Kennedy*, 554 U. S. 407; *Coker* v. *Georgia*, 433 U. S. 584 (1977).

That correspondence—*Graham*'s "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," 560 U. S., at 89 (ROBERTS, C. J., concurring in judgment)—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In *Woodson*, 428 U. S. 280, we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors." *Id.*, at 304. Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or

jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. See, *e. g.*, *Sumner* v. *Shuman*, 483 U. S. 66, 74–76 (1987); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett*, 438 U. S., at 597–609 (plurality opinion).

Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth." *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. As we observed, "youth is more than a chronological fact." *Eddings*, 455 U. S., at 115. It is a time of immaturity, irresponsibility, "impetuousness[,] and recklessness." *Johnson*, 509 U. S., at 368. It is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings*, 455 U. S., at 115. And its "signature qualities" are all "transient." *Johnson*, 509 U. S., at 368. *Eddings* is especially on point. There, a 16-year-old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence "particularly relevant"—more so than it would have been in the case of an adult offender. 455 U. S., at 115. We held: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. *Id.*, at 116.

In light of *Graham*'s reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes,

every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.[7] In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers

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[7] Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence. See, *e. g.*, Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006—Statistical Tables, p. 28 (Table 4.4) (rev. Nov. 22, 2010). So in practice, the sentencing schemes at issue here result in juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.

or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. See, *e. g.*, *Graham*, 560 U. S., at 78 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B.* v. *North Carolina*, 564 U. S. 261, 269 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Both cases before us illustrate the problem. Take Jackson's first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that "[w]e ain't playin'," rather than told his friends that "I thought you all was playin'." See 359 Ark., at 90–92, 194 S. W. 3d, at 759–760; *supra*, at 465. To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. See *Graham*, 560 U. S., at 69 ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"). And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. See Record in No. 10–9647, pp. 80–82. At the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have

contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. See 928 So. 2d, at 1081 (Cobb, J., concurring in result); Miller App. 26–28; *supra*, at 467–468. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of "second-degree criminal mischief." No. CR–03–0915, at 6 (unpublished memorandum). That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U. S., at 75 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irrepara-

ble corruption." *Roper*, 543 U. S., at 573; *Graham*, 560 U. S., at 68. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[8]

## III

Alabama and Arkansas offer two kinds of arguments against requiring individualized consideration before sentencing a juvenile to life imprisonment without possibility of parole. The States (along with the dissents) first contend that the rule we adopt conflicts with aspects of our Eighth Amendment caselaw. And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the States are wrong on both counts.

### A

The States (along with JUSTICE THOMAS) first claim that *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), precludes our holding. The defendant in *Harmelin* was sentenced to a mandatory life-without-parole term for possessing more than 650 grams of cocaine. The Court upheld that penalty, rea-

[8] Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17-year-olds who have committed the "most heinous" offenses, and their comparison of those defendants to the 14-year-olds here. See *post*, at 494 (opinion of ROBERTS, C. J.) (noting the "17-year-old [who] is convicted of deliberately murdering an innocent victim"); *post*, at 495 ("the most heinous murders"); *post*, at 499 ("the worst types of murder"); *post*, at 513 (opinion of ALITO, J.) (warning the reader not to be "confused by the particulars" of these two cases); *post*, at 510 (discussing the "17½-year-old who sets off a bomb in a crowded mall"). Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors.

soning that "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is 'mandatory.'" *Id.*, at 995. We recognized that a different rule, requiring individualized sentencing, applied in the death penalty context. But we refused to extend that command to noncapital cases "because of the qualitative difference between death and all other penalties." *Ibid.*; see *id.*, at 1006 (KENNEDY, J., concurring in part and concurring in judgment). According to Alabama, invalidating the mandatory imposition of life-without-parole terms on juveniles "would effectively overrule *Harmelin*." Brief for Respondent in No. 10–9646, p. 59 (hereinafter Alabama Brief); see Arkansas Brief 39.

We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children. See *Roper*, 543 U. S. 551; *Thompson*, 487 U. S. 815. So too, life without parole is permissible for nonhomicide offenses—except, once again, for children. See *Graham*, 560 U. S., at 75. Nor are these sentencing decisions an oddity in the law. To the contrary, "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J. D. B.*, 564 U. S., at 274 (quoting *Eddings*, 455 U. S., at 115–116, citing examples from criminal, property, contract, and tort law). So if (as *Harmelin* recognized) "death is different," children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction. Cf. *Graham*, 560 U. S., at 91 (ROBERTS, C. J., concurring in judgment) ("Graham's age

places him in a significantly different category from the defendan[t] in . . . *Harmelin*"). Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*.

Alabama and Arkansas (along with THE CHIEF JUSTICE and JUSTICE ALITO) next contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional. In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether "'objective indicia of society's standards, as expressed in legislative enactments and state practice,'" show a "national consensus" against a sentence for a particular class of offenders. *Graham*, 560 U. S., at 61 (quoting *Roper*, 543 U. S., at 563). By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court.[9] The States argue that this number precludes our holding.

We do not agree; indeed, we think the States' argument on this score *weaker* than the one we rejected in *Graham*.

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[9] The States note that 26 States and the Federal Government make life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds (with many applying it to even younger defendants). See Alabama Brief 17–18. In addition, life without parole is mandatory for older juveniles in Louisiana (age 15 and up) and Texas (age 17). See La. Child. Code Ann., Arts. 857(A), (B) (West Supp. 2012); La. Rev. Stat. Ann. §§ 14:30(C), 14:30.1(B) (West Supp. 2012); Tex. Fam. Code Ann. §§ 51.02(2)(A), 54.02(a)(2)(A) (West Supp. 2011); Tex. Penal Code Ann. § 12.31(a) (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder. That distinction makes no difference to our analysis. We have consistently held that limiting a mandatory death penalty law to particular kinds of murder cannot cure the law's "constitutional vice" of disregarding the "circumstances of the particular offense and the character and propensities of the offender." *Roberts* v. *Louisiana*, 428 U. S. 325, 333 (1976) (plurality opinion); see *Sumner* v. *Shuman*, 483 U. S. 66 (1987). The same analysis applies here, for the same reasons.

For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. See, *e. g.*, *Sumner* v. *Shuman*, 483 U. S. 66 (relying on *Woodson*'s logic to prohibit the mandatory death penalty for murderers already serving life without parole); *Lockett*, 438 U. S., at 602–608 (plurality opinion) (applying *Woodson* to require that judges and juries consider all mitigating evidence); *Eddings*, 455 U. S., at 110–117 (similar). We see no difference here.

In any event, the "objective indicia" that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. See 560 U. S., at 62. That is 10 *more* than impose life without parole on juveniles on a mandatory basis.[10] And in *Atkins*, *Roper*, and *Thomp-*

[10] In assessing indicia of societal standards, *Graham* discussed "[a]ctual sentencing practices" in addition to legislative enactments, noting how infrequently sentencers imposed the statutorily available penalty. 560 U. S., at 62. Here, we consider the constitutionality of mandatory-sentencing schemes—which by definition remove a judge's or jury's discretion—so no comparable gap between legislation and practice can exist. Rather than showing whether sentencers consider life without parole for juvenile homicide offenders appropriate, the number of juveniles serving this sentence, see *post*, at 493–494, 495–496 (ROBERTS, C. J., dissenting),

*son*, we similarly banned the death penalty in circumstances in which "less than half" of the "States that permit[ted] capital punishment (for whom the issue exist[ed])" had previously chosen to do so. *Atkins*, 536 U. S., at 342 (SCALIA, J., dissenting) (emphasis deleted); see *id.*, at 313–315 (majority opinion); *Roper*, 543 U. S., at 564–565; *Thompson*, 487 U. S.,

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merely reflects the number who have committed homicide in mandatory-sentencing jurisdictions. For the same reason, THE CHIEF JUSTICE's comparison of ratios in these cases and *Graham* carries little weight. He contrasts the number of mandatory life-without-parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, with "the corresponding number" of sentences in *Graham* (*i. e.*, the number of life-without-parole sentences for juveniles who committed serious nonhomicide crimes, as compared to arrests for those crimes). *Post*, at 496. But because the mandatory nature of the sentences here necessarily makes them more common, THE CHIEF JUSTICE's figures do not "correspon[d]" at all. The higher ratio is mostly a function of removing the sentencer's discretion.

Where mandatory sentencing does not itself account for the number of juveniles serving life-without-parole terms, the evidence we have of practice supports our holding. Fifteen jurisdictions make life without parole discretionary for juveniles. See Alabama Brief 25 (listing 12 States); Cal. Penal Code Ann. § 190.5(b) (West 2008); Ind. Code § 35–50–2–3(b) (2011); N. M. Stat. Ann. §§ 31–18–13(B), 31–18–14, 31–18–15.2 (2010). According to available data, only about 15% of all juvenile life-without-parole sentences come from those 15 jurisdictions, while 85% come from the 29 mandatory ones. See Tr. of Oral Arg. in No. 10–9646, p. 19; Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP) (Oct. 2, 2009), online at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (as visited June 21, 2012, and available in Clerk of Court's case file). That figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely. And contrary to THE CHIEF JUSTICE's argument, see *post*, at 497, n. 2, we have held that when judges and juries do not often choose to impose a sentence, it at least should not be mandatory. See *Woodson* v. *North Carolina*, 428 U. S. 280, 295–296 (1976) (plurality opinion) (relying on the infrequency with which juries imposed the death penalty when given discretion to hold that its mandatory imposition violates the Eighth Amendment).

at 826–827 (plurality opinion). So we are breaking no new ground in these cases.[11]

*Graham* and *Thompson* provide special guidance, because they considered the same kind of statutes we do and explained why simply counting them would present a distorted view. Most jurisdictions authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there. We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). In *Thompson*, we found that the statutes "t[old] us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but t[old] us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders." 487 U. S., at 826, n. 24 (plurality opinion) (emphasis deleted); see also *id.*, at 850 (O'Connor, J., concurring in judgment); *Roper*, 543 U. S., at 596, n. (O'Connor, J., dissenting). And *Graham* echoed that reasoning: Although the confluence of state laws "ma[de] life without parole possible for some juvenile nonhomicide offenders," it did not "justify a judgment" that many States

[11] In response, THE CHIEF JUSTICE complains: "To say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head." *Post*, at 497. To be clear: That description in no way resembles our opinion. We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental principles of *Roper*, *Graham*, and our individualized sentencing cases. We then show why the number of States imposing this punishment does not preclude our holding, and note how its mandatory nature (in however many States adopt it) makes use of actual sentencing numbers unilluminating.

actually "intended to subject such offenders" to those sentences. 560 U. S., at 67.[12]

All that is just as true here. Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. See Dept. of Justice, H. Snyder & M. Sickmund, Juvenile Offenders and Victims: 2006 National Report 110–114 (hereinafter 2006 National Report). But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age.[13] And indeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6.[14] As in *Graham*, we think that "underscores that the

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[12] THE CHIEF JUSTICE attempts to distinguish *Graham* on this point, arguing that there "the extreme rarity with which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed." *Post*, at 497–498. But neither *Graham* nor *Thompson* suggested such reasoning, presumably because the timeframe makes it difficult to comprehend. Those cases considered what legislators intended when they enacted, at different moments, separate juvenile-transfer and life-without-parole provisions—by definition, before they knew or could know how many juvenile life-without-parole sentences would result.

[13] See Ala. Code §§ 13A–5–45(f), 13A–6–2(c) (2005 and Cum. Supp. 2011); Ariz. Rev. Stat. Ann. § 13–752 (West 2010), § 41–1604.09(I) (West 2011); Conn. Gen. Stat. § 53a–35a(1) (2011); Del. Code Ann., Tit. 11, § 4209(a) (2007); Fla. Stat. § 775.082(1) (2010); Haw. Rev. Stat. § 706–656(1) (1993); Idaho Code § 18–4004 (Lexis 2004); Mich. Comp. Laws Ann. § 791.234(6)(a) (West Cum. Supp. 2012); Minn. Stat. Ann. § 609.106, subd. 2 (West 2009); Neb. Rev. Stat. § 29–2522 (2008); N. H. Rev. Stat. Ann. § 630:1–a (West 2007); 18 Pa. Cons. Stat. §§ 1102(a), (b), 61 Pa. Cons. Stat. § 6137(a)(1) (Cum. Supp. 2012); S. D. Codified Laws § 22-6-1(1) (2006), § 24–15–4 (2004); Vt. Stat. Ann., Tit. 13, § 2311(c) (2009); Wash. Rev. Code § 10.95.030(1) (2010).

[14] See Del. Code Ann., Tit. 10, § 1010 (1999 and Cum. Supp. 2010), Tit. 11, § 4209(a) (2007); Fla. Stat. §§ 985.56, 775.082(1) (2010); Haw. Rev. Stat. §§ 571–22(d), 706–656(1) (1993); Idaho Code §§ 20–508, 20–509 (Lexis

statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." 560 U. S., at 67. That Alabama and Arkansas can count to 29 by including these possibly (or probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment.

B

Nor does the presence of discretion in some jurisdictions' transfer statutes aid the States here. Alabama and Arkansas initially ignore that many States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court.[15] Moreover, several States at times lodge this decision exclusively in the

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Cum. Supp. 2012), § 18–4004; Mich. Comp. Laws Ann. § 712A.2d (West 2009), § 791.234(6)(a); Neb. Rev. Stat. §§ 43–247, 29–2522 (2008); 42 Pa. Cons. Stat. § 6355(e) (2000), 18 Pa. Cons. Stat. § 1102. Other States set ages between 8 and 10 as the minimum for transfer, thus exposing those young children to mandatory life without parole. See S. D. Codified Laws §§ 26–8C–2, 26–11–4 (2004), § 22–6–1 (age 10); Vt. Stat. Ann., Tit. 33, § 5204 (2011 Cum. Supp.), Tit. 13, § 2311(a) (2009) (age 10); Wash. Rev. Code §§ 9A.04.050, 13.40.110, 10.95.030 (2010) (age 8).

[15] See Ala. Code § 12–15–204(a) (Cum. Supp. 2011); Ariz. Rev. Stat. Ann. § 13–501(A) (West Cum. Supp. 2011); Conn. Gen. Stat. § 46b–127 (2011); Ill. Comp. Stat., ch. 705, §§ 405/5–130(1)(a), (4)(a) (West 2010); La. Child. Code Ann., Art. 305(A) (West Cum. Supp. 2012); Mass. Gen. Laws, ch. 119, § 74 (West 2010); Mich. Comp. Laws Ann. § 712A.2(a) (West 2002); Minn. Stat. Ann. § 260B.007, subd. 6(b) (West Cum. Supp. 2011), § 260B.101, subd. 2 (West 2007); Mo. Rev. Stat. §§ 211.021(1), (2) (2011); N. H. Rev. Stat. Ann. § 169–B:2(IV) (West Cum. Supp. 2011), § 169–B:3 (West 2010); N. C. Gen. Stat. Ann. §§ 7B–1501(7), 7B–1601(a), 7B–2200 (Lexis 2011); Ohio Rev. Code Ann. § 2152.12(A)(1)(a) (Lexis 2011); Tex. Fam. Code Ann. § 51.02(2); Va. Code Ann. §§ 16.1–241(A), 16.1–269.1(B), (D) (Lexis 2010).

hands of prosecutors, again with no statutory mechanism for judicial reevaluation.[16] And those "prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking." Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, P. Griffin, S. Addie, B. Adams, & K. Firestine, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting 5 (2011).

Even when States give transfer-stage discretion to judges, it has limited utility. First, the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. Miller's case provides an example. As noted earlier, see n. 3, *supra*, the juvenile court denied Miller's request for his own mental-health expert at the transfer hearing, and the appeals court affirmed on the ground that Miller was not then entitled to the protections and services he would receive at trial. See No. CR–03–0915, at 3–4 (unpublished memorandum). But by then, of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

Second and still more important, the question at transfer hearings may differ dramatically from the issue at a posttrial sentencing. Because many juvenile systems require that the offender be released at a particular age or after a certain number of years, transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). In many States, for example, a child convicted in juvenile court must be released from custody by the age of 21. See,

[16] Fla. Stat. Ann. § 985.557(1) (West Supp. 2012); Mich. Comp. Laws Ann. § 712A.2(a)(1); Va. Code Ann. §§ 16.1–241(A), 16.1–269.1(C), (D).

*e. g.*, Ala. Code § 12–15–117(a) (Cum. Supp. 2011); see generally 2006 National Report 103 (noting limitations on the length of juvenile court sanctions). Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

## IV

*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR joins, concurring.

I join the Court's opinion in full. I add that, if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determi-

nation whether Jackson "kill[ed] or intend[ed] to kill" the robbery victim. *Graham* v. *Florida*, 560 U. S. 48, 69 (2010). In my view, without such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law.

In *Graham* we said that "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability." *Ibid.* (emphasis added). For one thing, "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Id.*, at 68 (internal quotation marks omitted). See also *ibid.* ("[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds," making their actions "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults" (quoting *Roper* v. *Simmons*, 543 U. S. 551, 570 (2005))); *ante*, at 471–472. For another thing, *Graham* recognized that lack of intent normally diminishes the "moral culpability" that attaches to the crime in question, making those that do not intend to kill "categorically less deserving of the most serious forms of punishment than are murderers." 560 U. S., at 69 (citing *Kennedy* v. *Louisiana*, 554 U. S. 407, 434–435 (2008); *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Tison* v. *Arizona*, 481 U. S. 137 (1987)). And we concluded that, because of this "twice diminished moral culpability," the Eighth Amendment forbids the imposition upon juveniles of a sentence of life without parole for nonhomicide cases. *Graham*, *supra*, at 69, 82.

Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kill the victim, he lacks "twice di-

minished" responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. THE CHIEF JUSTICE's dissent itself here would permit life without parole for "juveniles who commit the worst types of murder," *post*, at 499, but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

I recognize that in the context of felony-murder cases, the question of intent is a complicated one. The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. See 2 W. LaFave, Substantive Criminal Law §§ 14.5(a) and (c) (2d ed. 2003). This rule has been based on the idea of "transferred intent"; the defendant's intent to commit the felony satisfies the intent to kill required for murder. See S. Kadish, S. Schulhofer, & C. Steiker, Criminal Law and Its Processes 439 (8th ed. 2007); 2 C. Torcia, Wharton's Criminal Law § 147 (15th ed. 1994).

But in my opinion, this type of "transferred intent" is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole. As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment. We do not rely on transferred intent in determining if an adult may receive the death penalty. Thus, the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was "in the car by the side of the road . . . , waiting to help the robbers escape." *Enmund*, *supra*, at 788. Cf. *Tison*, *supra*, at 157–158 (capital punishment permissible for aider and abettor where kidnaping led to death because he was "actively involved" in every aspect of the kidnaping and his behavior showed "a reckless disregard for human life"). Given *Graham*, this holding applies to juvenile sentences of life without

parole *a fortiori*. See *ante*, at 475–476. Indeed, even juveniles who meet the *Tison* standard of "reckless disregard" may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who "kill or intend to kill." 560 U. S., at 69.

Moreover, regardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. See 2 LaFave, *supra*, § 14.5(c). Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively. *Ante*, at 471–472. Justice Frankfurter cautioned, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children." *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion). To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile to life without parole would involve such "fallacious reasoning." *Ibid.*

This is, as far as I can tell, precisely the situation present in Kuntrell Jackson's case. Jackson simply went along with older boys to rob a video store. On the way, he became aware that a confederate had a gun. He initially stayed outside the store, and went in briefly, saying something like "We ain't playin'" or "'I thought you all was playin,'" before an older confederate shot and killed the store clerk. *Jackson* v. *State*, 359 Ark. 87, 91, 194 S. W. 3d 757, 760 (2004). Crucially, the jury found him guilty of first-degree murder under a statute that permitted them to convict if Jackson

"attempted to commit or committed an aggravated robbery, and, in the course of that offense, he, or an accomplice, caused [the clerk's] death under circumstance manifesting extreme indifference to the value of human life." *Ibid.* See Ark. Code Ann. §5–10–101(a)(1) (1997); *ante*, at 478. Thus, to be found guilty, Jackson did not need to kill the clerk (it is conceded he did not), nor did he need to have intent to kill or even "extreme indifference." As long as one of the teenage accomplices in the robbery acted with extreme indifference to the value of human life, Jackson could be convicted of capital murder. *Ibid.*

The upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. See *Jackson* v. *Norris*, 2011 Ark. 49, at 10, 378 S. W. 3d 103, 109 (Danielson, J., dissenting) ("[A]ny evidence of [Jackson's] intent to kill was severely lacking"). In that case, the Eighth Amendment simply forbids imposition of a life term without the possibility of parole. If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well. *Ante*, at 479.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions. The pertinent law here is the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishments." Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. I therefore dissent.

The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for

murders they committed before the age of 18. Brief for Petitioner in No. 10–9647, p. 62, n. 80 (Jackson Brief); Brief for Respondent in No. 10–9646, p. 30 (Alabama Brief). The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature. *Ante*, at 483, n. 10. And it recognizes that the Federal Government and most States impose such mandatory sentences. *Ante*, at 482. Put simply, if a 17-year-old is convicted of deliberately murdering an innocent victim, it is not "unusual" for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the Eighth Amendment.

Our precedent supports this conclusion. When determining whether a punishment is cruel and unusual, this Court typically begins with "'objective indicia of society's standards, as expressed in legislative enactments and state practice.'" *Graham* v. *Florida*, 560 U. S. 48, 61 (2010); see also, *e. g.*, *Kennedy* v. *Louisiana*, 554 U. S. 407, 422 (2008); *Roper* v. *Simmons*, 543 U. S. 551, 564 (2005). We look to these "objective indicia" to ensure that we are not simply following our own subjective values or beliefs. *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Such tangible evidence of societal standards enables us to determine whether there is a "consensus against" a given sentencing practice. *Graham*, *supra*, at 61. If there is, the punishment may be regarded as "unusual." But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.

Our Eighth Amendment cases have also said that we should take guidance from "evolving standards of decency that mark the progress of a maturing society." *Ante*, at 469 (quoting *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976); internal quotation marks omitted). Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh

punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.

In this case, there is little doubt about the direction of society's evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980's, outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes. See, *e. g.*, Alschuler, The Changing Purposes of Criminal Punishment, 70 U. Chi. L. Rev. 1, 1–13 (2003); see generally Crime and Public Policy (J. Wilson & J. Petersilia eds. 2011). Statutes establishing life without parole sentences in particular became more common in the past quarter century. See *Baze* v. *Rees*, 553 U. S. 35, 78, and n. 10 (2008) (Stevens, J., concurring in judgment). And the parties agree that most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole. Jackson Brief 54–55; Alabama Brief 4–5.

The Court attempts to avoid the import of the fact that so many jurisdictions have embraced the sentencing practice at issue by comparing these cases to the Court's prior Eighth Amendment cases. The Court notes that *Graham* found a punishment authorized in 39 jurisdictions unconstitutional, whereas the punishment it bans today is mandated in 10 fewer. *Ante*, at 483. But *Graham* went to considerable lengths to show that although theoretically allowed in many

States, the sentence at issue in that case was "exceedingly rare" in practice. 560 U. S., at 67. The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles, with more than half in a single State. It contrasted that with statistics showing nearly 400,000 juveniles were arrested for serious nonhomicide offenses in a single year. Based on the sentence's rarity despite the many opportunities to impose it, *Graham* concluded that there was a national consensus against life without parole for juvenile nonhomicide crimes. *Id.*, at 64–67.

Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over 5,000 times higher than the corresponding number in *Graham*. There is thus nothing in these cases like the evidence of national consensus in *Graham*.[1]

The Court disregards these numbers, claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition. *Ante*, at 484, n. 10. True enough. The sentence at issue is statutorily mandated life without parole. Such a sentence can only result from statutes requiring its imposition. In *Graham* the Court relied on the low number of actual sentences to explain why the high number of statutes allowing such sentences was not dispositive. Here, the Court excuses the high number of actual sentences by citing the high number of statutes impos-

[1] *Graham* stated that 123 prisoners were serving life without parole for nonhomicide offenses committed as juveniles, while in 2007 alone 380,480 juveniles were arrested for serious nonhomicide crimes. 560 U. S., at 64–65. I use 2,000 as the number of prisoners serving mandatory life without parole sentences for murders committed as juveniles, because all seem to accept that the number is at least that high. And the same source *Graham* used reports that 1,170 juveniles were arrested for murder and nonnegligent homicide in 2009. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, C. Puzzanchera & B. Adams, Juvenile Arrests 2009, p. 465 (Dec. 2011).

ing it. To say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head.[2]

The Court also advances another reason for discounting the laws enacted by Congress and most state legislatures. Some of the jurisdictions that impose mandatory life without parole on juvenile murderers do so as a result of two statutes: one providing that juveniles charged with serious crimes may be tried as adults, and another generally mandating that those convicted of murder be imprisoned for life. According to the Court, our cases suggest that where the sentence results from the interaction of two such statutes, the legislature can be considered to have imposed the resulting sentences "inadvertent[ly]." *Ante*, at 485–487. The Court relies on *Graham* and *Thompson* v. *Oklahoma*, 487 U. S. 815, 826, n. 24 (1988) (plurality opinion), for the proposition that these laws are therefore not valid evidence of society's views on the punishment at issue.

It is a fair question whether this Court should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact with each other, especially on an issue of such importance as the one before us. But in *Graham* and *Thompson* it was at least plausible as a practical matter. In *Graham*, the extreme rarity with

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[2] The Court's reference to discretionary sentencing practices is a distraction. See *ante*, at 483–484, n. 10. The premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones. So under the Court's own logic, whether discretionary sentences are common or uncommon has nothing to do with whether mandatory sentences are unusual. In any event, if analysis of discretionary sentences were relevant, it would not provide objective support for today's decision. The Court states that "about 15% of all juvenile life-without-parole sentences"—meaning nearly 400 sentences—were imposed at the discretion of a judge or jury. *Ante*, at 484, n. 10. Thus the number of discretionary life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is about 1,000 times higher than the corresponding number in *Graham*.

which the sentence in question was imposed could suggest that legislatures did not really intend the inevitable result of the laws they passed. See 560 U. S., at 66–67. In *Thompson*, the sentencing practice was even rarer—only 20 defendants had received it in the last century. 487 U. S., at 832 (plurality opinion). Perhaps under those facts it could be argued that the legislature was not fully aware that a teenager could receive the particular sentence in question. But here the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance.[3]

Nor do we display our usual respect for elected officials by asserting that legislators have *accidentally* required 2,000 teenagers to spend the rest of their lives in jail. This is particularly true given that our well-publicized decision in *Graham* alerted legislatures to the possibility that teenagers were subject to life with parole only because of legislative inadvertence. I am aware of no effort in the wake of *Graham* to correct any supposed legislative oversight. Indeed, in amending its laws in response to *Graham* one legislature made especially clear that it *does* intend juveniles who commit first-degree murder to receive mandatory life without parole. See Iowa Code Ann. § 902.1 (West Cum. Supp. 2012).

In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent "leads to" today's decision, primarily relying on *Graham* and *Roper*. *Ante,* at 470. Petitioners argue that the reasoning of those cases "compels" finding in their favor. Jackson Brief 34. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is

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[3] The Court claims that I "take issue with some or all of these precedents" and "seek to relitigate" them. *Ante,* at 470–471, n. 4. Not so: Applying this Court's cases exactly as they stand, I do not believe they support the Court's decision in these cases.

not easily led to such a result. See, *e. g.*, *United States* v. *Harris*, 106 U. S. 629, 635 (1883) (courts must presume an Act of Congress is constitutional "unless the lack of constitutional authority . . . is clearly demonstrated"). Because the Court does not rely on the Eighth Amendment's text or objective evidence of society's standards, its analysis of precedent alone must bear the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg*, 428 U. S., at 175. If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision.

In any event, the Court's holding does not follow from *Roper* and *Graham*. Those cases undoubtedly stand for the proposition that teenagers are less mature, less responsible, and less fixed in their ways than adults—not that a Supreme Court case was needed to establish that. What they do not stand for, and do not even suggest, is that legislators—who also know that teenagers are different from adults—may not require life without parole for juveniles who commit the worst types of murder.

That *Graham* does not imply today's result could not be clearer. In barring life without parole for juvenile nonhomicide offenders, *Graham* stated that "[t]here is a line 'between homicide and other serious violent offenses against the individual.'" 560 U. S., at 69 (quoting *Kennedy*, 554 U. S., at 438). The whole point of drawing a line between one issue and another is to say that they are different and should be treated differently. In other words, the two are in different categories. Which *Graham* also said: "defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers." 560 U. S., at 69 (emphasis added). Of course, to be especially clear that what is said about one issue does not apply to another, one could say that the two issues cannot be compared. *Graham* said that too: "Serious nonhomicide crimes . . . cannot be compared to mur-

der." *Ibid.* (internal quotation marks omitted). A case that expressly puts an issue in a different category from its own subject, draws a line between the two, and states that the two should not be compared, cannot fairly be said to control that issue.

*Roper* provides even less support for the Court's holding. In that case, the Court held that the death penalty could not be imposed for offenses committed by juveniles, no matter how serious their crimes. In doing so, *Roper* also set itself in a different category than these cases, by expressly invoking "special" Eighth Amendment analysis for death penalty cases. 543 U. S., at 568–569. But more importantly, *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because "life imprisonment without the possibility of parole" was available. *Id.*, at 572. In a classic bait and switch, the Court now tells state legislatures that—*Roper*'s promise notwithstanding—they do not have power to guarantee that once someone commits a heinous murder, he will never do so again. It would be enough if today's decision proved JUSTICE SCALIA's prescience in writing that *Roper*'s "reassurance . . . gives little comfort." *Id.*, at 623 (dissenting opinion). To claim that *Roper* actually "leads to" revoking its own reassurance surely goes too far.

Today's decision does not offer *Roper* and *Graham*'s false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime. The Court's analysis focuses on the mandatory nature of the sentences in these cases. See *ante*, at 474–480. But then—although doing so is entirely unnecessary to the rule it announces—the Court states that even when a life without parole sentence is not mandatory, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ante*, at 479. Today's holding may be limited to mandatory sentences, but the Court has already announced that discre-

tionary life without parole for juveniles should be "uncommon"—or, to use a common synonym, "unusual."

Indeed, the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become "uncommon," the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.

This process has no discernible end point—or at least none consistent with our Nation's legal traditions. *Roper* and *Graham* attempted to limit their reasoning to the circumstances they addressed—*Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, "none of what [*Graham*] said about children . . . is crime-specific." *Ante,* at 473. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante,* at 476–480. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an Amendment that bars only "unusual" punishments requires the abolition of this uniformly established practice would be startling indeed.

* * *

It is a great tragedy when a juvenile commits murder—most of all for the innocent victims. But also for the murderer, whose life has gone so wrong so early. And for society as well, which has lost one or more of its members to deliberate violence, and must harshly punish another. In recent years, our society has moved toward requiring that the

murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice. Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. See *ante*, at 471–474. But that is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole. I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Today, the Court holds that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Ante*, at 465. To reach that result, the Court relies on two lines of precedent. The first involves the categorical prohibition of certain punishments for specified classes of offenders. The second requires individualized sentencing in the capital punishment context. Neither line is consistent with the original understanding of the Cruel and Unusual Punishments Clause. The Court compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built. Because the Court upsets the legislatively enacted sentencing regimes of 29 jurisdictions without constitutional warrant, I respectfully dissent.[1]

## I

The Court first relies on its cases "adopt[ing] categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Ante*, at 470. Of these categorical proportional-

[1] I join THE CHIEF JUSTICE's opinion because it accurately explains that, even accepting the Court's precedents, the Court's holding in today's cases is unsupportable.

ity cases, the Court places particular emphasis on *Roper* v. *Simmons*, 543 U. S. 551 (2005), and *Graham* v. *Florida*, 560 U. S. 48 (2010). In *Roper*, the Court held that the Constitution prohibits the execution of an offender who was under 18 at the time of his offense. 543 U. S., at 578. The *Roper* Court looked to, among other things, its own sense of parental intuition and "scientific and sociological studies" to conclude that offenders under the age of 18 "cannot with reliability be classified among the worst offenders." *Id.*, at 569. In *Graham*, the Court relied on similar considerations to conclude that the Constitution prohibits a life-without-parole sentence for a nonhomicide offender who was under the age of 18 at the time of his offense. 560 U. S., at 74.

The Court now concludes that *mandatory* life-without-parole sentences for duly convicted juvenile murderers "contraven[e] *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Ante*, at 474. But neither *Roper* nor *Graham* held that specific procedural rules are required for sentencing juvenile homicide offenders. And, the logic of those cases should not be extended to create such a requirement.

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." As I have previously explained, "the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous *methods* of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Graham*, *supra*, at 99 (dissenting opinion) (internal quotation marks and citations omitted).[2] The Clause does not contain a "proportionality

[2] Neither the Court nor petitioners argue that petitioners' sentences would have been among "the 'modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" *Graham*, 560 U. S., at 106, n. 3 (THOMAS, J., dissenting) (quot-

principle." *Ewing* v. *California*, 538 U. S. 11, 32 (2003) (THOMAS, J., concurring in judgment); see generally *Harmelin* v. *Michigan*, 501 U. S. 957, 975–985 (1991) (opinion of SCALIA, J.). In short, it does not authorize courts to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders. Instead, the Clause "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty." *Graham*, *supra*, at 101 (THOMAS, J., dissenting).

The legislatures of Arkansas and Alabama, like those of 27 other jurisdictions, *ante*, at 482, have determined that all offenders convicted of specified homicide offenses, whether juveniles or not, deserve a sentence of life in prison without the possibility of parole. Nothing in our Constitution authorizes this Court to supplant that choice.

## II

To invalidate mandatory life-without-parole sentences for juveniles, the Court also relies on its cases "prohibit[ing] mandatory imposition of capital punishment." *Ante*, at 470. The Court reasons that, because *Graham* compared juvenile life-without-parole sentences to the death penalty, the "distinctive set of legal rules" that this Court has imposed in the capital punishment context, including the requirement of individualized sentencing, is "relevant" here. *Ante*, at 475. But even accepting an analogy between capital and juvenile life-without-parole sentences, this Court's cases pro-

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ing *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986)). Nor could they. Petitioners were 14 years old at the time they committed their crimes. When the Bill of Rights was ratified, 14-year-olds were subject to trial and punishment as adult offenders. See *Roper* v. *Simmons*, 543 U. S. 551, 609, n. 1 (2005) (SCALIA, J., dissenting). Further, mandatory death sentences were common at that time. See *Harmelin* v. *Michigan*, 501 U. S. 957, 994–995 (1991). It is therefore implausible that a 14-year-old's mandatory prison sentence—of any length, with or without parole—would have been viewed as cruel and unusual.

hibiting mandatory capital sentencing schemes have no basis in the original understanding of the Eighth Amendment, and, thus, cannot justify a prohibition of sentencing schemes that mandate life-without-parole sentences for juveniles.

A

In a line of cases following *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, this Court prohibited the mandatory imposition of the death penalty. See *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (same); *Sumner* v. *Shuman*, 483 U. S. 66 (1987). *Furman* first announced the principle that States may not permit sentencers to exercise unguided discretion in imposing the death penalty. See generally 408 U. S. 238. In response to *Furman*, many States passed new laws that made the death penalty mandatory following conviction of specified crimes, thereby eliminating the offending discretion. See *Gregg* v. *Georgia*, 428 U. S. 153, 180–181 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court invalidated those statutes in *Woodson*, *Roberts*, and *Sumner*. The Court reasoned that mandatory capital sentencing schemes were problematic, because they failed "to allow the particularized consideration" of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *Woodson*, *supra*, at 303–304 (plurality opinion).[3]

[3] The Court later extended *Woodson*, requiring that capital defendants be permitted to present, and sentencers in capital cases be permitted to consider, any relevant mitigating evidence, including the age of the defendant. See, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 597–608 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Skipper* v. *South Carolina*, 476 U. S. 1, 4–5 (1986); *Johnson* v. *Texas*, 509 U. S. 350, 361–368 (1993). Whatever the validity of the requirement that sentencers be permitted to consider all mitigating evidence when deciding whether to impose a *nonmandatory* capital sentence, the Court certainly was wrong to prohibit *mandatory* capital sentences. See *Graham* v. *Collins*, 506 U. S. 461, 488–500 (1993) (THOMAS, J., concurring).

In my view, *Woodson* and its progeny were wrongly decided. As discussed above, the Cruel and Unusual Punishments Clause, as originally understood, prohibits "torturous *methods* of punishment." See *Graham*, 560 U. S., at 99 (THOMAS, J., dissenting) (internal quotation marks omitted). It is not concerned with whether a particular lawful method of punishment—whether capital or noncapital—is imposed pursuant to a mandatory or discretionary sentencing regime. See *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed"). In fact, "[i]n the early days of the Republic," each crime generally had a defined punishment "prescribed with specificity by the legislature." *United States* v. *Grayson*, 438 U. S. 41, 45 (1978). Capital sentences, to which the Court analogizes, were treated no differently. "[M]andatory death sentences abounded in our first Penal Code" and were "common in the several States—both at the time of the founding and throughout the 19th century." *Harmelin*, *supra*, at 994–995; see also *Woodson*, *supra*, at 289 (plurality opinion) ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses"). Accordingly, the idea that the mandatory imposition of an otherwise-constitutional sentence renders that sentence cruel and unusual finds "no support in the text and history of the Eighth Amendment." *Harmelin*, *supra*, at 994.

Moreover, mandatory death penalty schemes were "a perfectly reasonable legislative response to the concerns expressed in *Furman*" regarding unguided sentencing discretion, in that they "eliminat[ed] explicit jury discretion and treat[ed] all defendants equally." *Graham* v. *Collins*, 506 U. S. 461, 487 (1993) (THOMAS, J., concurring). And, as Justice White explained more than 30 years ago, "a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that a criminal's char-

acter is such that he deserves death." *Roberts*, *supra*, at 358 (dissenting opinion). Thus, there is no basis for concluding that a mandatory capital sentencing scheme is unconstitutional. Because the Court's cases requiring individualized sentencing in the capital context are wrongly decided, they cannot serve as a valid foundation for the novel rule regarding mandatory life-without-parole sentences for juveniles that the Court announces today.

B

In any event, this Court has already declined to extend its individualized-sentencing rule beyond the death penalty context. In *Harmelin*, the defendant was convicted of possessing a large quantity of drugs. 501 U. S., at 961 (opinion of SCALIA, J.). In accordance with Michigan law, he was sentenced to a mandatory term of life in prison without the possibility of parole. *Ibid.* Citing the same line of death penalty precedents on which the Court relies today, the defendant argued that his sentence, due to its mandatory nature, violated the Cruel and Unusual Punishments Clause. *Id.*, at 994–995 (opinion of the Court).

The Court rejected that argument, explaining that "[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" *Id.*, at 995. In so doing, the Court refused to analogize to its death penalty cases. The Court noted that those cases had "repeatedly suggested that there is no comparable [individualized-sentencing] requirement outside the capital context, because of the qualitative difference between death and all other penalties." *Ibid.* The Court observed that, "even where the difference" between a sentence of life without parole and other sentences of imprisonment "is the greatest," such a sentence "cannot be compared with death." *Id.*, at 996. Therefore, the Court concluded that the line of cases requiring individualized sentencing had been drawn at capital cases, and that there was "no basis for extending it further." *Ibid.*

*Harmelin*'s reasoning logically extends to these cases. Obviously, the younger the defendant, "the great[er]" the difference between a sentence of life without parole and other terms of imprisonment. *Ibid.* But under *Harmelin*'s rationale, the defendant's age is immaterial to the Eighth Amendment analysis. Thus, the result in today's cases should be the same as that in *Harmelin*. Petitioners, like the defendant in *Harmelin*, were not sentenced to death. Accordingly, this Court's cases "creating and clarifying the individualized capital sentencing doctrine" do not apply. *Id.*, at 995 (internal quotation marks omitted). Nothing about our Constitution, or about the qualitative difference between any term of imprisonment and death, has changed since *Harmelin* was decided 21 years ago. What *has* changed (or, better yet, "evolved") is this Court's ever-expanding line of categorical proportionality cases. The Court now uses *Roper* and *Graham* to jettison *Harmelin*'s clear distinction between capital and noncapital cases and to apply the former to noncapital juvenile offenders.[4] The Court's decision to do so is even less supportable than the precedents used to reach it.

## III

As THE CHIEF JUSTICE notes, *ante*, at 500 (dissenting opinion), the Court lays the groundwork for future incursions on the States' authority to sentence criminals. In its categorical proportionality cases, the Court has considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether

[4] In support of its decision not to apply *Harmelin* to juvenile offenders, the Court also observes that "'[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.'" *Ante*, at 481 (quoting *J. D. B.* v. *North Carolina*, 564 U. S. 261, 274 (2011); some internal quotation marks omitted). That is no doubt true as a general matter, but it does not justify usurping authority that rightfully belongs to the people by imposing a constitutional rule where none exists.

there is a national consensus against the sentencing practice at issue." *Graham*, 560 U. S., at 61 (quoting *Roper*, 543 U. S., at 563). In *Graham*, for example, the Court looked to "[a]ctual sentencing practices" to conclude that there was a national consensus against life-without-parole sentences for juvenile nonhomicide offenders. 560 U. S., at 62–65; see also *Roper*, *supra*, at 564–565; *Atkins* v. *Virginia*, 536 U. S. 304, 316 (2002).

Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, it "think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon." *Ante*, at 479. That statement may well cause trial judges to shy away from imposing life-without-parole sentences and embolden appellate judges to set them aside when they are imposed. And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by these cases. The Court has, thus, gone from "merely" divining the societal consensus of today to shaping the societal consensus of tomorrow.

* * *

Today's decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court's belief that "its own sense of morality . . . pre-empts that of the people and their representatives." *Graham*, *supra*, at 124 (THOMAS, J., dissenting). Because nothing in the Constitution grants the Court the authority it exercises today, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, dissenting.

The Court now holds that Congress and the legislatures of the 50 States are prohibited by the Constitution from identi-

fying any category of murderers under the age of 18 who must be sentenced to life imprisonment without parole. Even a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a "child" and must be given a chance to persuade a judge to permit his release into society. Nothing in the Constitution supports this arrogation of legislative authority.

The Court long ago abandoned the original meaning of the Eighth Amendment, holding instead that the prohibition of "cruel and unusual punishment" embodies the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); see also *Graham* v. *Florida*, 560 U. S. 48, 58 (2010); *Kennedy* v. *Louisiana*, 554 U. S. 407, 419 (2008); *Roper* v. *Simmons*, 543 U. S. 551, 560–561 (2005); *Atkins* v. *Virginia*, 536 U. S. 304, 311–312 (2002); *Hudson* v. *McMillian*, 503 U. S. 1, 8 (1992); *Ford* v. *Wainwright*, 477 U. S. 399, 406 (1986); *Rhodes* v. *Chapman*, 452 U. S. 337, 346 (1981); *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976). Both the provenance and philosophical basis for this standard were problematic from the start. (Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren't elected representatives more likely than unaccountable judges to reflect changing societal standards?) But at least at the start, the Court insisted that these "evolving standards" represented something other than the personal views of five Justices. See *Rummel* v. *Estelle*, 445 U. S. 263, 275 (1980) (explaining that "the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices"). Instead, the Court looked for objective indicia of our society's moral standards and the trajectory of our moral "evolution." See *id.*, at 274–275 (emphasizing that "'judgment should be informed by objective factors to the maximum possible extent'" (quoting

*Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion))).

In this search for objective indicia, the Court toyed with the use of public opinion polls, see *Atkins*, *supra*, at 316, n. 21, and occasionally relied on foreign law, see *Roper* v. *Simmons*, *supra*, at 575; *Enmund* v. *Florida*, 458 U. S. 782, 796, n. 22 (1982); *Thompson* v. *Oklahoma*, 487 U. S. 815, 830–831 (1988); *Coker*, 433 U. S., at 596, n. 10 (plurality opinion).

In the main, however, the staple of this inquiry was the tallying of the positions taken by state legislatures. Thus, in *Coker*, which held that the Eighth Amendment prohibits the imposition of the death penalty for the rape of an adult woman, the Court noted that only one State permitted that practice. *Id.*, at 595–596. In *Enmund*, where the Court held that the Eighth Amendment forbids capital punishment for ordinary felony murder, both federal law and the law of 28 of the 36 States that authorized the death penalty at the time rejected that punishment. 458 U. S., at 789.

While the tally in these early cases may be characterized as evidence of a national consensus, the evidence became weaker and weaker in later cases. In *Atkins*, which held that low-IQ defendants may not be sentenced to death, the Court found an anti-death-penalty consensus even though more than half of the States that allowed capital punishment permitted the practice. See 536 U. S., at 342 (SCALIA, J., dissenting) (observing that less than half of the 38 States that permit capital punishment have enacted legislation barring execution of the mentally retarded). The Court attempted to get around this problem by noting that there was a pronounced trend against this punishment. See *id.*, at 313–315 (listing 18 States that had amended their laws since 1986 to prohibit the execution of mentally retarded persons).

The importance of trend evidence, however, was not long lived. In *Roper*, which outlawed capital punishment for defendants between the ages of 16 and 18, the lineup of the

States was the same as in *Atkins*, but the trend in favor of abolition—five States during the past 15 years—was less impressive. *Roper*, 543 U. S., at 564–565. Nevertheless, the Court held that the absence of a strong trend in support of abolition did not matter. See *id.*, at 566 ("Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change").

In *Kennedy* v. *Louisiana*, the Court went further. Holding that the Eighth Amendment prohibits capital punishment for the brutal rape of a 12-year-old girl, the Court disregarded a nascent legislative trend *in favor of permitting capital punishment* for this narrowly defined and heinous crime. See 554 U. S., at 433 (explaining that, although "the total number of States to have made child rape a capital offense . . . is six," "[t]his is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*"). The Court felt no need to see whether this trend developed further—perhaps because true moral evolution can lead in only one direction. And despite the argument that the rape of a young child may involve greater depravity than some murders, the Court proclaimed that homicide is categorically different from all (or maybe almost all) other offenses. See *id.*, at 438 (stating that nonhomicide crimes, including child rape, "may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability" (internal quotation marks omitted)). As the Court had previously put it, "death is different." *Ford*, *supra*, at 411 (plurality opinion).

Two years after *Kennedy*, in *Graham* v. *Florida*, any pretense of heeding a legislative consensus was discarded. In *Graham*, federal law and the law of 37 States and the District of Columbia permitted a minor to be sentenced to life imprisonment without parole for nonhomicide crimes, but

despite this unmistakable evidence of a national consensus, the Court held that the practice violates the Eighth Amendment. See 560 U. S., at 97 (THOMAS, J., dissenting). The Court, however, drew a distinction between minors who murder and minors who commit other heinous offenses, so at least in that sense the principle that death is different lived on.

Today, that principle is entirely put to rest, for here we are concerned with the imposition of a term of imprisonment on offenders who kill. The two (carefully selected) cases before us concern very young defendants, and despite the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14-year-old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Christopher Simmons, who committed a brutal thrill-killing just seven months shy of his 18th birthday. *Roper*, *supra*, at 556.

Seventeen-year-olds commit a significant number of murders every year,[1] and some of these crimes are incredibly brutal. Many of these murderers are at least as mature as the average 18-year-old. See *Thompson*, *supra*, at 854 (O'Connor, J., concurring in judgment) (noting that maturity may "vary widely among different individuals of the same age"). Congress and the legislatures of 43 States have concluded that at least some of these murderers should be sentenced to prison without parole, and 28 States and the

[1] Between 2002 and 2010, 17-year-olds committed an average combined total of 424 murders and nonnegligent homicides per year. See Dept. of Justice, Bureau of Justice Statistics, § 4, Arrests, Age of persons arrested (Table 4.7).

Federal Government have decided that for some of these offenders life without parole should be mandatory. See *ante*, at 482–483, and nn. 9–10. The majority of this Court now overrules these legislative judgments.[2]

It is true that, at least for now, the Court apparently permits a trial judge to make an individualized decision that a particular minor convicted of murder should be sentenced to life without parole, but do not expect this possibility to last very long. The majority goes out of its way to express the view that the imposition of a sentence of life without parole on a "child" (*i. e.*, a murderer under the age of 18) should be uncommon. Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder. We will see.

What today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking. After entirely disregarding objec-

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[2] As the Court noted in *Mistretta* v. *United States*, 488 U. S. 361, 366 (1989), Congress passed the Sentencing Reform Act of 1984 to eliminate discretionary sentencing and parole because it concluded that these practices had led to gross abuses. The Senate Report for the 1984 bill rejected what it called the "outmoded rehabilitation model" for federal criminal sentencing. S. Rep. No. 98–225, p. 38 (1983). According to the Report, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Ibid.* The Report also "observed that the indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences. The first was the great variation among sentences imposed by the different judges upon similarly situated offenders. The second was uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system." *Mistretta*, *supra*, at 366 (quoting S. Rep. No. 98–225, at 38, 65 (citation omitted)).

tive indicia of our society's standards in *Graham*, the Court now extrapolates from *Graham*. Future cases may extrapolate from today's holding, and this process may continue until the majority brings sentencing practices into line with whatever the majority views as truly evolved standards of decency.

The Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures—and with good reason. Determining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests. If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world. When a legislature prescribes that a category of killers must be sentenced to life imprisonment, the legislature, which presumably reflects the views of the electorate, is taking the position that the risk that these offenders will kill again outweighs any countervailing consideration, including reduced culpability due to immaturity or the possibility of rehabilitation. When the majority of this Court countermands that democratic decision, what the majority is saying is that members of society must be exposed to the risk that these convicted murderers, if released from custody, will murder again.

Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.

Per Curiam

# AMERICAN TRADITION PARTNERSHIP, INC., FKA WESTERN TRADITION PARTNERSHIP, INC., ET AL. *v.* BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL.

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 11–1179. Decided June 25, 2012

Montana law prohibits corporations from making expenditures "in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Mont. Code Ann. § 13–35–227(1). The Montana Supreme Court rejected petitioners' claim that this statute violates the First Amendment.

*Held:* The holding of *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, striking down a similar federal law, applies to Montana's law. The State's arguments in support of the judgment below either were already rejected in *Citizens United* or fail to meaningfully distinguish that case.

Certiorari granted; 2011 MT 328, 363 Mont. 220, 271 P. 3d 1, reversed.

PER CURIAM.

A Montana state law provides that a "corporation may not make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." Mont. Code Ann. § 13–35–227(1) (2011). The Montana Supreme Court rejected petitioners' claim that this statute violates the First Amendment. 2011 MT 328, 363 Mont. 220, 271 P. 3d 1. In *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), this Court struck down a similar federal law, holding that "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.*, at 342 (internal quotation marks omitted). The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. See U. S. Const., Art. VI, cl. 2. Montana's arguments in

support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case. The petition for certiorari is granted. The judgment of the Supreme Court of Montana is reversed.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), the Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id.*, at 357. I disagree with the Court's holding for the reasons expressed in Justice Stevens' opinion in that case. As Justice Stevens explained, "technically independent expenditures can be corrupting in much the same way as direct contributions." *Id.*, at 458 (opinion concurring in part and dissenting in part). Indeed, Justice Stevens recounted a "substantial body of evidence" suggesting that "[m]any corporate independent expenditures . . . had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements." *Id.*, at 454–455.

Moreover, even if I were to accept *Citizens United*, this Court's legal conclusion should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by corporations. 2011 MT 328, ¶¶ 36–37, 363 Mont. 220, 235–236, 271 P. 3d 1, 11. Thus, Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.

Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case. But given the Court's *per curiam* disposition, I do not see a significant possibility of reconsideration. Consequently, I vote instead to deny the petition.

Syllabus

# NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

No. 11–393. Argued March 26, 27, 28, 2012—Decided June 28, 2012*

In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. § 5000A. For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. § 5000A(b)(1). The Act provides that this "penalty" will be paid to the Internal Revenue Service (IRS) with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties. §§ 5000A(c), (g)(1).

Another key provision of the Act is the Medicaid expansion. The current Medicaid program offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. 42 U. S. C. § 1396d(a). The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage. § 1396d(y)(1). But if a State does not comply with the Act's new coverage requirements, it may lose

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*Together with No. 11–398, *Department of Health and Human Services et al.* v. *Florida et al.*, and No. 11–400, *Florida et al.* v. *Department of Health and Human Services et al.*, also on certiorari to the same court.

not only the federal funding for those requirements, but all of its federal Medicaid funds. § 1396c.

Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked authority to enact the individual mandate. Finding the mandate severable from the Act's other provisions, the Eleventh Circuit left the rest of the Act intact.

*Held:* The judgment is affirmed in part and reversed in part.

648 F. 3d 1235, affirmed in part and reversed in part.

1. CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Part II, concluding that the Anti-Injunction Act does not bar this suit.

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," 26 U. S. C. § 7421(a), so that those subject to a tax must first pay it and then sue for a refund. The present challenge seeks to restrain the collection of the shared responsibility payment from those who do not comply with the individual mandate. But Congress did not intend the payment to be treated as a "tax" for purposes of the Anti-Injunction Act. The Affordable Care Act describes the payment as a "penalty," not a "tax." That label cannot control whether the payment is a tax for purposes of the Constitution, but it does determine the application of the Anti-Injunction Act. The Anti-Injunction Act therefore does not bar this suit. Pp. 543–546.

2. CHIEF JUSTICE ROBERTS concluded in Part III–A that the individual mandate is not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. Pp. 547–561.

(a) The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. This Court's precedent reflects this understanding: As expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching "activity." *E. g., United States* v. *Lopez*, 514 U. S. 549, 560. The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.

Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and

potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to *regulate* commerce, not to *compel* it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to "regulate Commerce." Pp. 547–558.

(b) Nor can the individual mandate be sustained under the Necessary and Proper Clause as an integral part of the Affordable Care Act's other reforms. Each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. *E. g., United States* v. *Comstock*, 560 U. S. 126. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is "necessary" to the Affordable Care Act's other reforms, such an expansion of federal power is not a "proper" means for making those reforms effective. Pp. 558–561.

3. CHIEF JUSTICE ROBERTS concluded in Part III–B that the individual mandate must be construed as imposing a tax on those who do not have health insurance, if such a construction is reasonable.

The most straightforward reading of the individual mandate is that it commands individuals to purchase insurance. But, for the reasons explained, the Commerce Clause does not give Congress that power. It is therefore necessary to turn to the Government's alternative argument: that the mandate may be upheld as within Congress's power to "lay and collect Taxes." Art. I, § 8, cl. 1. In pressing its taxing power argument, the Government asks the Court to view the mandate as imposing a tax on those who do not buy that product. Because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper* v. *California*, 155 U. S. 648, 657, the question is whether it is "fairly possible" to interpret the mandate as imposing such a tax, *Crowell* v. *Benson*, 285 U. S. 22, 62. Pp. 561–563.

4. CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Part III–C, concluding that the individual mandate may be upheld as within Congress's power under the Taxing Clause. Pp. 563–574.

(a) The Affordable Care Act describes the "[s]hared responsibility payment" as a "penalty," not a "tax." That label is fatal to the applica-

tion of the Anti-Injunction Act. It does not, however, control whether an exaction is within Congress's power to tax. In answering that constitutional question, this Court follows a functional approach, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States* v. *Constantine*, 296 U. S. 287, 294. Pp. 563–565.

(b) Such an analysis suggests that the shared responsibility payment may for constitutional purposes be considered a tax. The payment is not so high that there is really no choice but to buy health insurance; the payment is not limited to willful violations, as penalties for unlawful acts often are; and the payment is collected solely by the IRS through the normal means of taxation. Cf. *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20, 36–37. None of this is to say that payment is not intended to induce the purchase of health insurance. But the mandate need not be read to declare that failing to do so is unlawful. Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. And Congress's choice of language—stating that individuals "shall" obtain insurance or pay a "penalty"—does not require reading § 5000A as punishing unlawful conduct. It may also be read as imposing a tax on those who go without insurance. See *New York* v. *United States*, 505 U. S. 144, 169–174. Pp. 565–570.

(c) Even if the mandate may reasonably be characterized as a tax, it must still comply with the Direct Tax Clause, which provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Art. I, § 9, cl. 4. A tax on going without health insurance is not like a capitation or other direct tax under this Court's precedents. It therefore need not be apportioned so that each State pays in proportion to its population. Pp. 570–571.

5. CHIEF JUSTICE ROBERTS, joined by JUSTICE BREYER and JUSTICE KAGAN, concluded in Part IV that the Medicaid expansion violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 575–588.

(a) The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, § 8, cl. 1. Congress may use this power to establish cooperative state-federal Spending Clause programs. The legitimacy of Spending Clause legislation, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17. "[T]he Constitution simply does not give Congress the authority to require the States to

regulate." *New York*, *supra*, at 178. When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation's system of federalism. Cf. *South Dakota* v. *Dole*, 483 U. S. 203, 211. Pp. 575–581.

(b) Section 1396c gives the Secretary of Health and Human Services the authority to penalize States that choose not to participate in the Medicaid expansion by taking away their existing Medicaid funding. 42 U. S. C. § 1396c. The threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. The Government claims that the expansion is properly viewed as only a modification of the existing program, and that this modification is permissible because Congress reserved the "right to alter, amend, or repeal any provision" of Medicaid. § 1304. But the expansion accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for particular categories of vulnerable individuals. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically. The Medicaid expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion. Pp. 581–585.

(c) The constitutional violation is fully remedied by precluding the Secretary from applying § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. See § 1303. The other provisions of the Affordable Care Act are not affected. Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the Medicaid expansion. Pp. 585–588.

6. JUSTICE GINSBURG, joined by JUSTICE SOTOMAYOR, is of the view that the Spending Clause does not preclude the Secretary from withholding Medicaid funds based on a State's refusal to comply with the expanded Medicaid program. But given the majority view, she agrees with THE CHIEF JUSTICE's conclusion in Part IV–B that the Medicaid Act's severability clause, 42 U. S. C. § 1303, determines the appropriate remedy. Because THE CHIEF JUSTICE finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate. Even absent § 1303's command, the Court would have no warrant to invalidate the funding offered by the

Medicaid expansion, and surely no basis to tear down the Affordable Care Act in its entirety. When a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislation. See, *e. g.*, *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–330. Pp. 645–646.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV, *post*, p. 589. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion, *post*, p. 646. THOMAS, J., filed a dissenting opinion, *post*, p. 707.

*Robert A. Long, Jr.*, by invitation of the Court, 565 U. S. 1048, argued the cause in No. 11–398 (Anti-Injunction Act) as *amicus curiae* in support of vacatur. With him on the briefs were *Emin Toro*, *Mark W. Mosier*, and *Henry B. Liu*.

*Solicitor General Verrilli* argued the cause for petitioners in No. 11–398 (Anti-Injunction Act). With him on the briefs were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Principal Deputy Assistant Attorney General DiCicco*, *Deputy Assistant Attorney General Brinkmann*, *Leondra R. Kruger*, *Mark B. Stern*, *Alisa B. Klein*, *Joel McElvain*, *M. Patricia Smith*, *William B. Schultz*, and *Kenneth Y. Choe*.

*Gregory G. Katsas* argued the cause for respondents in No. 11–398 (Anti-Injunction Act). With him on the briefs for private respondents were *Michael A. Carvin*, *C. Kevin Marshall*, *Hashim M. Mooppan*, *Karen R. Harned*, and *Randy E. Barnett*. On the briefs for state respondents were *Paul D. Clement*, *Erin E. Murphy*, *Conor B. Dugan*, *Erin M. Hawley*, *Pamela Jo Bondi*, Attorney General of Florida, *Scott D. Makar*, Solicitor General, and *Louis F. Hubener*, *Timothy D. Osterhaus*, and *Blaine H. Winship*, *Luther Strange*, Attorney General of Alabama, *Michael C. Geraghty*,

Counsel

Attorney General of Alaska, *Janice K. Brewer*, Governor of Arizona, and *Tom Horne*, Attorney General, *John W. Suthers*, Attorney General of Colorado, *Samuel S. Olens*, Attorney General of Georgia, *Lawrence G. Wasden*, Attorney General of Idaho, *Gregory F. Zoeller*, Attorney General of Indiana, *Terry Branstad*, Governor of Iowa, *Derek Schmidt*, Attorney General of Kansas, *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *William J. Schneider*, Attorney General of Maine, *Bill Schuette*, Attorney General of Michigan, *Michael B. Wallace*, by and through *Phil Bryant*, Governor of Mississippi, *Jon Bruning*, Attorney General of Nebraska, and *Katherine J. Spohn*, *Brian Sandoval*, Governor of Nevada, *Wayne Stenehjem*, Attorney General of North Dakota, *Michael DeWine*, Attorney General of Ohio, and *David B. Rivkin* and *Lee A. Casey*, *Thomas W. Corbett, Jr.*, Governor of Pennsylvania, and *Linda L. Kelly*, Attorney General, *Alan Wilson*, Attorney General of South Carolina, *Marty J. Jackley*, Attorney General of South Dakota, *Greg Abbott*, Attorney General of Texas, and *Bill Cobb*, Deputy Attorney General, *Mark L. Shurtleff*, Attorney General of Utah, *Robert M. McKenna*, Attorney General of Washington, *J. B. Van Hollen*, Attorney General of Wisconsin, and *Matthew Mead*, Governor of Wyoming.

*Solicitor General Verrilli* argued the cause for petitioners in No. 11–398 (Minimum Coverage Provision). With him on the briefs were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Joseph R. Palmore*, *Mr. Stern*, *Ms. Klein*, *Ms. Smith*, *Mr. Schultz*, and *Mr. Choe*.

*Mr. Clement* argued the cause for state respondents in No. 11–398 (Minimum Coverage Provision). With him on the brief for respondents Florida et al. were *Ms. Murphy*, *Ms. Bondi*, Attorney General of Florida, *Mr. Makar*, Solicitor General, and *Mr. Hubener*, *Mr. Osterhaus*, and *Mr. Winship*, *Mr. Strange*, Attorney General of Alabama, *Mr. Geraghty*, Attorney General of Alaska, *Ms. Brewer*, Governor of Ari-

zona, and *Mr. Horne*, Attorney General, *Mr. Suthers*, Attorney General of Colorado, *Mr. Olens*, Attorney General of Georgia, *Mr. Wasden*, Attorney General of Idaho, *Mr. Zoeller*, Attorney General of Indiana, *Mr. Branstad*, Governor of Iowa, *Mr. Schmidt*, Attorney General of Kansas, *Mr. Caldwell*, Attorney General of Louisiana, *Mr. Schneider*, Attorney General of Maine, *Mr. Schuette*, Attorney General of Michigan, *Mr. Wallace*, by and through *Mr. Bryant*, Governor of Mississippi, *Mr. Bruning*, Attorney General of Nebraska, and *Ms. Spohn*, *Mr. Sandoval*, Governor of Nevada, *Mr. Stenehjem*, Attorney General of North Dakota, *Mr. DeWine*, Attorney General of Ohio, and *Mr. Rivkin* and *Mr. Casey*, *Mr. Corbett*, Governor of Pennsylvania, and *Ms. Kelly*, Attorney General, *Mr. Wilson*, Attorney General of South Carolina, *Mr. Jackley*, Attorney General of South Dakota, *Mr. Abbott*, Attorney General of Texas, and *Mr. Cobb*, Deputy Attorney General, *Mr. Shurtleff*, Attorney General of Utah, *Mr. McKenna*, Attorney General of Washington, *Mr. Van Hollen*, Attorney General of Wisconsin, and *Mr. Mead*, Governor of Wyoming. *Mr. Carvin* argued the cause for private respondents in No. 11–398 (Minimum Coverage Provision). With him on the brief were *Mr. Katsas*, *Mr. Marshall*, *Mr. Mooppan*, *Ms. Harned*, and *Mr. Barnett.*

*Mr. Clement* argued the cause and filed briefs for petitioners in Nos. 11–393 and 11–400 (Severability). With him on the briefs for state petitioners were *Ms. Murphy*, *Ms. Bondi*, Attorney General of Florida, *Mr. Makar*, Solicitor General, and *Mr. Hubener*, *Mr. Osterhaus*, and *Mr. Winship*, *Mr. Strange*, Attorney General of Alabama, *Mr. Geraghty*, Attorney General of Alaska, and *Richard Svobodny*, Acting Attorney General, *Ms. Brewer*, Governor of Arizona, and *Mr. Horne*, Attorney General, *Mr. Suthers*, Attorney General of Colorado, *Mr. Olens*, Attorney General of Georgia, *Mr. Wasden*, Attorney General of Idaho, *Mr. Zoeller*, Attorney General of Indiana, *Mr. Branstad*, Governor of Iowa, *Mr. Schmidt*, Attorney General of Kansas, *Mr. Caldwell*, At-

torney General of Louisiana, *Mr. Schneider*, Attorney General of Maine, *Mr. Schuette*, Attorney General of Michigan, *Mr. Wallace*, by and through *Mr. Bryant*, Governor of Mississippi, *Mr. Bruning*, Attorney General of Nebraska, and *Ms. Spohn*, *Mr. Sandoval*, Governor of Nevada, *Mr. Stenehjem*, Attorney General of North Dakota, *Mr. DeWine*, Attorney General of Ohio, and *Mr. Rivkin* and *Mr. Casey*, *Mr. Corbett*, Governor of Pennsylvania, and *Ms. Kelly*, Attorney General, *Mr. Wilson*, Attorney General of South Carolina, *Mr. Jackley*, Attorney General of South Dakota, *Mr. Abbott*, Attorney General of Texas, and *Mr. Cobb*, Deputy Attorney General, *Mr. Shurtleff*, Attorney General of Utah, *Mr. McKenna*, Attorney General of Washington, *Mr. Van Hollen*, Attorney General of Wisconsin, and *Mr. Mead*, Governor of Wyoming. *Mr. Carvin*, *Mr. Katsas*, *Mr. Marshall*, *Mr. Mooppan*, *Ms. Harned*, and *Mr. Barnett* filed briefs for private petitioners.

*Deputy Solicitor General Kneedler* argued the cause for respondents in Nos. 11–393 and 11–400 (Severability). With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Assistant Attorney General Brinkmann*, *Mr. Palmore*, *Mr. Stern*, *Ms. Klein*, *Ms. Smith*, *Mr. Schultz*, and *Mr. Choe*.

*H. Bartow Farr III*, by invitation of the Court, 565 U. S. 1048, argued the cause in Nos. 11–393 and 11–400 (Severability) and filed a brief as *amicus curiae* in support of the judgment below.

*Mr. Clement* argued the cause for petitioners in No. 11–400 (Medicaid). With him on the briefs were *Ms. Murphy*, *Ms. Bondi*, Attorney General of Florida, and *Mr. Makar*, Solicitor General, and *Mr. Hubener*, *Mr. Osterhaus*, and *Mr. Winship*, *Mr. Strange*, Attorney General of Alabama, *Mr. Svobodny*, Acting Attorney General of Alaska, *Ms. Brewer*, Governor of Arizona, and *Mr. Horne*, Attorney General, *Mr. Suthers*, Attorney General of Colorado, *Mr. Olens*, Attorney General of Georgia, *Mr. Wasden*, Attorney Gen-

eral of Idaho, *Mr. Zoeller*, Attorney General of Indiana, *Mr. Branstad*, Governor of Iowa, *Mr. Schmidt*, Attorney General of Kansas, *Mr. Caldwell*, Attorney General of Louisiana, *Mr. Schneider*, Attorney General of Maine, *Mr. Schuette*, Attorney General of Michigan, *Mr. Bruning*, Attorney General of Nebraska, and *Ms. Spohn*, *Mr. Sandoval*, Governor of Nevada, *Mr. Stenehjem*, Attorney General of North Dakota, *Mr. DeWine*, Attorney General of Ohio, and *Mr. Rivkin* and *Mr. Casey*, *Mr. Corbett*, Governor of Pennsylvania, and *Ms. Kelly*, Attorney General, *Mr. Wilson*, Attorney General of South Carolina, *Mr. Jackley*, Attorney General of South Dakota, *Mr. Abbott*, Attorney General of Texas, and *Mr. Cobb*, Deputy Attorney General, *Mr. Shurtleff*, Attorney General of Utah, *Mr. McKenna*, Attorney General of Washington, *Mr. Van Hollen*, Attorney General of Wisconsin, and *Mr. Mead*, Governor of Wyoming.

*Solicitor General Verrilli* argued the cause for respondents in No. 11–400 (Medicaid). With him on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Ms. Kruger*, *Mr. Stern*, *Ms. Klein*, *Ms. Smith*, *Mr. Schultz*, and *Mr. Choe*.†

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†Briefs of *amici curiae* were filed in No. 11–398 (Anti-Injunction Act) for the American Center for Law & Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson, Sr.*, *Walter M. Weber*, *Edward L. White III*, and *Erik M. Zimmerman;* for the Cato Institute by *Ilya Shapiro;* for the Center for the Fair Administration of Taxes by *A. Lavar Taylor;* for Liberty University, Inc., et al. by *Mathew D. Staver*, *Anita L. Staver*, *Stephen M. Crampton*, and *Mary E. McAlister;* for the State Chambers of Commerce et al. by *William V. Custer;* for Tax Law Professors by *Michael B. de Leeuw;* and for Mortimer Caplin et al. by *Alan B. Morrison* and *Brian Wolfman*.

Briefs of *amici curiae* urging reversal in No. 11–398 (Minimum Coverage Provision) were filed for the State of Maryland et al. by *Douglas F. Gansler*, Attorney General of Maryland, *John B. Howard, Jr.*, Deputy Attorney General, *William F. Brockman*, Acting Solicitor General, and *Joshua N. Auerbach*, *Stephen M. Ruckman*, and *Sarah W. Rice*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which JUSTICE BREYER and JUSTICE KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.

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Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *John R. Kroger* of Oregon, *William H. Sorrell* of Vermont, and *Vincent F. Frazer* of the Virgin Islands; for AARP by *Thomas C. Goldstein*, *Kevin K. Russell*, *Stuart R. Cohen*, *Stacy Canan*, and *Michael Schuster;* for Advocacy for Patients with Chronic Illness, Inc., by *Jennifer C. Jaff;* for the American Association of People with Disabilities et al. by *Rochelle Bobroff* and *Simon Lazarus;* for the American Cancer Society et al. by *Mary P. Rouvelas* and *F. Sheffield Hale;* for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Laurence Stephen Gold;* for the American Nurses Association et al. by *Ian Millhiser;* for the California Endowment by *Kathleen M. Sullivan*, *William B. Adams*, and *Crystal Nix Hines;* for the California Public Employees' Retirement System by *Peter H. Mixon;* for Constitutional Law Scholars by *Andrew J. Pincus*, *Gillian E. Metzger*, and *Trevor W. Morrison;* for Health Care for All, Inc., et al. by *Wendy E. Parmet* and *Lorianne M. Sainsbury-Wong;* for Health Care Policy History Scholars by *Geoffrey F. Aronow;* for the Jewish Alliance for Law & Social Action et al. by *Andrew M. Fischer;* for the Lambda Legal Defense and Education Fund, Inc., et al. by *Douglas Hallward-Driemeier*, *Susan L. Sommer*, *Hayley J. Gorenberg*, and *Jon W. Davidson;* for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John Payton*, *Debo P. Adegbile*, *Elise C. Boddie*, *ReNika C. Moore*, *Joshua Civin*, *Steven R. Shapiro*, and *Lisa M. Bornstein;* for the National Women's Law Center et al. by *Melissa Hart*, *Marcia D. Greenberger*, and *Judith G. Waxman;* for Prescription Policy Choices et al. by *Michael Kevin Outterson;* for the Service Employees International Union et al. by *Scott A. Kronland*, *Jonathan Weissglass*, *P. Casey Pitts*, *Judith A. Scott*, *Walter Kamiat*, *Mark Schneider*, and *Patrick J. Szymanski;* for the Small Business Majority Foundation, Inc., et al. by *Douglas L. McSwain;* for State Legislators from all Fifty States et al. by *Douglas T. Kendall* and *Elizabeth B. Wydra;* and for Senate Majority Leader Harry Reid et al. by *Walter Dellinger*, *Christopher J. Wright*, and *Timothy J. Simeone.*

Briefs of *amici curiae* urging affirmance in No. 11–398 (Minimum Coverage Provision) were filed for the State of Oklahoma by *E. Scott Pruitt*, Attorney General of Oklahoma, and *Patrick R. Wyrick*, Solicitor General;

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum

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for the Commonwealth of Virginia *ex rel.* Kenneth T. Cuccinelli II by *Mr. Cuccinelli*, Attorney General of Virginia, *pro se*, *E. Duncan Getchell, Jr.*, Solicitor General, *Charles E. James, Jr.*, Chief Deputy Attorney General, and *Wesley G. Russell, Jr.*, Deputy Attorney General; for Missouri Attorney General Chris Koster by *Mr. Koster*, *pro se*, and *Jeremiah J. Morgan*, Deputy Solicitor General; for the American Catholic Lawyers Association, Inc., by *Bertram P. Goltz, Jr.;* for the American Center for Law & Justice et al. by *Mr. Sekulow*, *Mr. Roth*, *Mr. May*, *Mr. Henderson*, *Mr. Weber*, *Mr. White*, and *Mr. Zimmerman;* for the American College of Pediatricians et al. by *Nikolas T. Nikas*, *Dorinda C. Bordlee*, *Mark L. Rienzi*, *Mailee R. Smith*, *Denise M. Burke*, *Steven H. Aden*, *Matthew S. Bowman*, and *Catherine W. Short;* for the American Legislative Exchange Council by *John P. Elwood* and *Seth L. Cooper;* for the Association of American Physicians and Surgeons, Inc., et al. by *David P. Felsher* and *Andrew L. Schlafly;* for the Authors of The Origins of the Necessary and Proper Clause et al. by *David B. Kopel;* for Blue Cross and Blue Shield of Massachusetts, Inc., by *Dean Richlin*, *Robert E. Toone*, and *Joseph Halpern;* for the Catholic Vote et al. by *Patrick T. Gillen;* for the Cato Institute et al. by *Robert A. Levy*, *Ilya Shapiro*, and *Timothy Sandefur;* for the Caesar Rodney Institute by *Grant M. Lally;* for the Center for Constitutional Jurisprudence et al. by *Christopher R. J. Pace*, *John C. Eastman*, *Anthony T. Caso*, *Edwin Meese III*, *Todd F. Gaziano*, *Brian C. Baker*, *Carrie Severino*, and *Manuel S. Klausner;* for Docs4PatientCare by *Erik S. Jaffe* and *John Hoff;* for Economists by *Steven G. Bradbury*, *Steven A. Engel*, and *Michael H. Park;* for the Employer Solutions Staffing Group LLC by *Rebecca J. Levine;* for the HSA Coalition, Inc., et al. by *Ed R. Haden;* for the Independent Women's Forum by *Kevin J. Hasson;* for Judicial Watch, Inc., by *Paul J. Orfanedes;* for Members of the United States Senate by *Ms. Severino;* for the Mountain States Legal Foundation by *James M. Manley* and *Steven J. Lechner;* for the Montana Shooting Sports Association, Inc., by *Quentin M. Rhoades;* for Single Payer Action et al. by *Oliver B. Hall;* for the Tax Foundation by *Joseph D. Henchman;* for the Washington Legal Foundation et al. by *Ilya Somin*, *Daniel J. Popeo*, and *Cory L. Andrews;* for the 1851 Center for Constitutional Law by *Christopher P. Finney* and *Curt C. Hartman;* for Speaker of the House John Boehner by *Ms. Severino;* for Virginia Delegate Bob

level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act em-

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Marshall et al. by *William J. Olson*, *Herbert W. Titus*, *John S. Miles*, and *Gary G. Kreep;* for Sen. Rand Paul by *Bridget Maloney Bush;* and for Stephen M. Trattner by *Mr. Trattner*, *pro se.*

Briefs of *amici curiae* were filed in No. 11–398 (Minimum Coverage Provision) for the Commonwealth of Massachusetts by *Martha Coakley*, Attorney General, and *Thomas M. O'Brien*, *Daniel J. Hammond*, and *Emiliano Mazlen*, Assistant Attorneys General; for the Governor of Washington Christine Gregoire by *Kristin Houser*, *Adam J. Berger*, *Rebecca J. Roe*, and *William Rutzick;* for the American Civil Rights Union et al. by *Peter Ferrara;* for the American Hospital Association et al. by *Sheree R. Kanner*, *Catherine E. Stetson*, *Dominic F. Perella*, *Lisa Gilden*, and *Frank R. Trinity;* for the American Life League by *Robert L. Sassone;* for Child Advocacy Organizations by *Jeffrey O. Bramlett*, *Emmet J. Bondurant*, and *Barbara B. Woodhouse;* for Citizens and Legislators in the Fourteen Health Care Freedom States by *Nicholas C. Dranias*, *Clint D. Bolick*, and *Linda W. Knight;* for the Citizens' Council for Health Freedom by *John Remington Graham;* for Constitutional Law and Economics Professors by *Wilson R. Huhn;* for Economic Scholars by *Richard L. Rosen* and *Michael D. Thorpe;* for Former United States Department of Justice Officials by *Theodore B. Olson*, *Amir C. Tayrani*, *Joshua S. Lipshutz*, *Terence J. Pell*, and *Michael E. Rosman;* for the Foundation for Moral Law, Inc., by *John A. Eidsmoe* and *Benjamin D. DuPré;* for the Health Foundation of Greater Cincinnati by *James A. Feldman;* for the Institute for Justice by *William H. Mellor*, *Dana Berliner*, *Steven M. Simpson*, and *Elizabeth Price Foley;* for the Landmark Legal Foundation by *Richard P. Hutchison;* for the Liberty Legal Foundation by *Van R. Irion;* for Liberty University, Inc., et al. by *Mr. Staver*, *Ms. Staver*, *Mr. Crampton*, and *Mr. McAlister;* for the Partnership for America by *Charles J. Cooper*, *David H. Thompson*, *Howard C. Nielson, Jr.*, and *Brian S. Koukoutchos;* for Project Liberty by *Allan E. Parker*, *R. Clayton Trotter*, *Kathleen Cassidy Goodman*, and *Steven W. Fitschen;* for The Rutherford Institute by *Alfred W. Putnam, Jr.*, *Jason P. Gosselin*, *D. Alicia Hickok*, and *John W. Whitehead;* for the Thomas More Law Center et al. by *Robert J. Muise*, *David Yerushalmi*, and *Richard Thompson;* for Young Invincibles by *Paolo Annino;* for Barry Friedman et al. by *Jeffrey A. Lamken*, *Robert K. Kry*, *Martin V. Totaro*, and *Mr. Friedman*, *pro se;* for Egon Mittelmann

bodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

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by *Mr. Mittelmann, pro se;* and for David R. Riemer et al. by *Dean A. Strang.*

Briefs of *amici curiae* urging reversal in Nos. 11–393 and 11–400 (Severability) were filed for the American Center for Law & Justice et al. by *Mr. Sekulow, Mr. Roth, Mr. May, Mr. Henderson, Mr. Weber, Mr. White,* and *Mr. Zimmerman;* for the American Civil Rights Union by *Mr. Ferrara;* for America's Health Insurance Plans et al. by *Patricia A. Millett, Orly Degani, James E. Tysse,* and *Roger G. Wilson;* for the Chamber of Commerce of the United States of America by *K. Lee Blalack II, Brian D. Boyle, Anton Metlitsky, Robin S. Conrad, Shane B. Kawka,* and *Kathryn Comerford Todd;* for Economists by *Mr. Bradbury, Mr. Engel,* and *Mr. Park;* for the Family Research Council et al. by *Nelson Lund;* and for the National Restaurant Association by *Leon R. Sequeira, David M. Weiner,* and *Jennifer A. Kraft.*

Briefs of *amici curiae* urging affirmance in Nos. 11–393 and 11–400 (Severability) were filed for Missouri Attorney General Chris Koster by *Mr. Koster, pro se,* and *Mr. Morgan,* Deputy Solicitor General; for Michigan Legal Services, Inc., by *Gary A. Benjamin;* and for the Washington and Lee University School of Law Black Lung Clinic by *Timothy C. MacDonnell.*

Briefs of *amici curiae* were filed in Nos. 11–393 and 11–400 (Severability) for the State of California et al. by *Ms. Harris,* Attorney General of California, *Travis LeBlanc,* Special Assistant Attorney General, *Manuel M. Medeiros,* State Solicitor General, and *Daniel J. Powell,* Deputy Attorney General, by *Christine O. Gregoire,* Governor of Washington, and by the Attorneys General for their respective jurisdictions as follows: *Mr. Jepsen* of Connecticut, *Mr. Biden* of Delaware, *Mr. Nathan* of the District of Columbia, *Mr. Louie* of Hawaii, *Ms. Madigan* of Illinois, *Mr. Miller* of Iowa, *Mr. Gansler* of Maryland, *Mr. King* of New Mexico, *Mr. Schneiderman* of New York, *Mr. Kroger* of Oregon, and *Mr. Sorrell* of Vermont; for AARP et al. by *Ms. Bobroff, Mr. Cohen, Ms. Canan, Bruce Vignery,* and *Mr. Schuster;* for the American Academy of Actuaries by *Kannon K. Shanmugam* and *Mary E. Downs;* for the American Benefits Council by *James R. Napoli, Mark D. Harris, Charles S. Sims,* and *Kathryn M. Wilber;* for the American Hospital Association et al. by *Ms. Kanner, Ms. Stetson, Mr. Perella,* and *Mr. Trinity;* for the American Medical Student Association et al. by *Mr. Millhiser;* for the American Public

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of

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Health Association et al. by *Martha Jane Perkins* and *Corey S. Davis;* for the Asian & Pacific Islander American Health Forum et al. by *Mark A. Packman*, *Jonathan M. Cohen*, and *Priscilla Huang;* for the Association of American Physicians and Surgeons et al. by *Mr. Felsher* and *Mr. Schlafly;* for the Competitive Enterprise Institute et al. by *Thomas M. Christina*, *Jeffrey P. Dunlaevy*, *Sam Kazman*, and *Hans Bader;* for Freedom Watch by *Larry Klayman;* for the Justice and Freedom Fund by *Deborah J. Dewart* and *James L. Hirsen;* for Members of the United States Senate by *James F. Bennett* and *Ms. Severino;* for the National Indian Health Board et al. by *Geoffrey D. Strommer*, *Carol L. Barbero*, *Elliott Milhollin*, and *William R. Norman;* for the Texas Public Policy Foundation et al. by *Mario Loyola*, *Richard Epstein*, and *Ilya Shapiro;* for David R. Riemer et al. by *Mr. Strang;* and for Joella Swan et al. by *Thomas E. Johnson* and *Grant Crandall.* *Mr. Kreep* filed a brief for the Western Center for Journalism as *amicus curiae* in No. 11–393.

Briefs of *amici curiae* urging reversal were filed in No. 11–400 (Medicaid) for the American Civil Rights Union et al. by *Mr. Ferrara;* for Economists by *Mr. Bradbury*, *Mr. Engel*, and *Mr. Park;* for the Independence Institute by *Mr. Kopel;* for the Texas Public Policy Foundation et al. by *Mr. Loyola* and *Mr. Epstein;* and for James F. Blumstein by *Mr. Blumstein*, *pro se.*

Briefs of *amici curiae* urging affirmance were filed in No. 11–400 (Medicaid) for the State of Oregon et al. by *Mr. Kroger*, Attorney General of Oregon, *Anna M. Joyce*, Solicitor General, and *Keith Dubanevich*, by *Mr. Sorrell*, Attorney General of Vermont, and *Bridget C. Asay*, Assistant Attorney General, by *Ms. Gregoire*, Governor of Washington, and *Mr. Berger*, Special Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Ms. Harris* of California, *Mr. Jepsen* of Connecticut, *Mr. Biden* of Delaware, *Mr. Louie* of Hawaii, *Ms. Madigan* of Illinois, *Mr. Miller* of Iowa, *Mr. Gansler* of Maryland, *Ms. Coakley* of Massachusetts, *Mr. King* of New Mexico, and *Mr. Schneiderman* of New York; for the American Hospital Association et al. by *Ms. Kanner*, *Ms. Stetson*, *Mr. Perella*, *Mr. Trinity,* and *Ms. Gilden;* for Catholic Sisters by *David J. Burman;* for the Disability Rights Legal Center by *Chris M. Amantea;* for Faithful Reform in Health Care et al. by *Thomas W. Coons*, *Charles M. English*, and *Wendy M. Yoviene;* for Health Law & Policy Scholars et al. by *Mr. Outterson;* for the Leadership Confer-

the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exer-

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ence on Civil and Human Rights et al. by *Martha F. Davis* and *Risa E. Kaufman;* for the National Health Law Program et al. by *Ms. Perkins;* for the National Minority AIDS Council et al. by *Deanne E. Maynard* and *Marc A. Hearron;* for the Service Employees International Union et al. by *Stephen P. Berzon*, *Mr. Kronland*, *Ms. Scott*, *Mr. Kamiat*, *Mr. Schneider*, and *Mr. Szymanski;* for State Legislators from the Fifty States et al. by *Mr. Kendall* and *Ms. Wydra;* for Senate Majority Leader Harry Reid et al. by *Mr. Wright*, *Mr. Simeone*, *Mark D. Davis*, and *Mr. Dellinger;* for David R. Riemer et al. by *Mr. Strang;* and for David Satcher, M. D., et al. by *Samuel R. Bagenstos*, *Ira A. Burnim*, and *Jennifer Mathis.*

Briefs of *amici curiae* were filed in No. 11–400 (Medicaid) for the Association of American Physicians and Surgeons et al. by *Mr. Felsher* and *Mr. Schlafly;* for the Center for Constitutional Jurisprudence et al. by *Mr. Eastman*, *Mr. Caso*, *Mr. Meese*, *Mr. Sandefur*, and *Ilya Shapiro;* for Freedom Watch by *Mr. Klayman;* for Indiana State Legislators et al. by *Asheesh Agarwal* and *Mr. Christina;* and for Michigan Legal Services, Inc., by *Mr. Benjamin.*

cise only the powers granted to it." *McCulloch*, *supra*, at 405.

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, *e. g.*, *United States* v. *Comstock*, 560 U. S. 126 (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does

not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, *e. g.*, *United States* v. *Morrison*, 529 U. S. 598, 618–619 (2000).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U. S. 144, 181 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 564 U. S. 211, 222 (2011).

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*, *supra*, at 609 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to

authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *Perez* v. *United States*, 402 U. S. 146 (1971).

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U. S. Const., Art. I, § 8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, *e. g.*, *License Tax Cases*, 5 Wall. 462, 471 (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, *e. g.*, *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 686 (1999). These offers may well induce the States to adopt policies that the Federal Government itself could not impose. See, *e. g.*, *South Dakota* v. *Dole*, 483 U. S. 203, 205–206 (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, § 8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 4 Wheat., at 421.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Na-

tion's elected leaders. "Proper respect for a co-ordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States* v. *Harris*, 106 U. S. 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall's Defense of *McCulloch* v. *Maryland* 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury* v. *Madison*, *supra*, at 175–176.

The questions before us must be considered against the background of these basic principles.

## I

In 2010, Congress enacted the Patient Protection and Affordable Care Act, 124 Stat. 119. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch

over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion.

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. § 5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. § 5000A(d). Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. See § 5000A(f). But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. § 5000A(b)(1). That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. § 5000A(c). In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that covers 60 percent of the cost of 10 specified services (*e. g.*, prescription drugs and hospitalization). *Ibid.*; 42 U. S. C. § 18022. The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U. S. C. § 5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. § 5000A(g)(2). And some individuals who are subject to the mandate are nonetheless exempt

from the penalty—for example, those with income below a certain threshold and members of Indian tribes. § 5000A(e).

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs—who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. The District Court agreed, holding that Congress lacked constitutional power to enact the individual mandate. 780 F. Supp. 2d 1256 (ND Fla. 2011). The District Court determined that the individual mandate could not be severed from the remainder of the Act, and therefore struck down the Act in its entirety. *Id.*, at 1305–1306.

The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part. The court affirmed the District Court's holding that the individual mandate exceeds Congress's power. 648 F. 3d 1235 (2011). The panel unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress's power to "lay and collect Taxes." U. S. Const., Art. I, § 8, cl. 1. A majority also held that the individual mandate was not supported by Congress's power to "regulate Commerce . . . among the several States." *Id.*, cl. 3. According to the majority, the Commerce Clause does not empower the Federal Government to order individuals to engage in commerce, and the Government's efforts to cast the individual mandate in a different light were unpersuasive. Judge Marcus dissented, reasoning that the individual mandate regulates economic activity that has a clear effect on interstate commerce.

Having held the individual mandate to be unconstitutional, the majority examined whether that provision could be severed from the remainder of the Act. The majority deter-

mined that, contrary to the District Court's view, it could. The court thus struck down only the individual mandate, leaving the Act's other provisions intact. 648 F. 3d, at 1328.

Other Courts of Appeals have also heard challenges to the individual mandate. The Sixth Circuit and the D. C. Circuit upheld the mandate as a valid exercise of Congress's commerce power. See *Thomas More Law Center* v. *Obama*, 651 F. 3d 529 (CA6 2011); *Seven-Sky* v. *Holder*, 661 F. 3d 1 (CADC 2011). The Fourth Circuit determined that the Anti-Injunction Act prevents courts from considering the merits of that question. See *Liberty Univ., Inc.* v. *Geithner*, 671 F. 3d 391 (2011). That statute bars suits "for the purpose of restraining the assessment or collection of any tax." 26 U. S. C. § 7421(a). A majority of the Fourth Circuit panel reasoned that the individual mandate's penalty is a tax within the meaning of the Anti-Injunction Act, because it is a financial assessment collected by the IRS through the normal means of taxation. The majority therefore determined that the plaintiffs could not challenge the individual mandate until after they paid the penalty.[1]

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. See 42 U. S. C. § 1396a(a)(10). In order to receive that funding, States must comply with federal criteria governing matters such as who

[1] The Eleventh Circuit did not consider whether the Anti-Injunction Act bars challenges to the individual mandate. The District Court had determined that it did not, and neither side challenged that holding on appeal. The same was true in the Fourth Circuit, but that court examined the question *sua sponte* because it viewed the Anti-Injunction Act as a limit on its subject matter jurisdiction. See *Liberty Univ.*, 671 F. 3d, at 400–401. The Sixth Circuit and the D. C. Circuit considered the question but determined that the Anti-Injunction Act did not apply. See *Thomas More*, 651 F. 3d, at 539–540 (CA6); *Seven-Sky*, 661 F. 3d, at 5–14 (CADC).

receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. See § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. § 1396d(y)(1). If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. See § 1396c.

Along with their challenge to the individual mandate, the state plaintiffs in the Eleventh Circuit argued that the Medicaid expansion exceeds Congress's constitutional powers. The Court of Appeals unanimously held that the Medicaid expansion is a valid exercise of Congress's power under the Spending Clause. U. S. Const., Art. I, § 8, cl. 1. And the court rejected the States' claim that the threatened loss of all federal Medicaid funding violates the Tenth Amendment by coercing them into complying with the Medicaid expansion. 648 F. 3d, at 1264, 1268.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. 565 U. S. 1033–1034 (2011). Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an *amicus curiae* to defend that aspect of the judgment below. And because there is a reason-

able argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an *amicus curiae* to advance it.[2]

## II

Before turning to the merits, we need to be sure we have the authority to do so. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U. S. C. § 7421(a). This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund. See *Enochs* v. *Williams Packing & Nav. Co.*, 370 U. S. 1, 7–8 (1962).

The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty's future collection. *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.

The text of the pertinent statutes suggests otherwise. The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any *tax*." § 7421(a) (emphasis added). Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty." §§ 5000A(b), (g)(2). There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."

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[2] We appointed H. Bartow Farr III to brief and argue in support of the Eleventh Circuit's judgment with respect to severability, and Robert A. Long to brief and argue the proposition that the Anti-Injunction Act bars the current challenges to the individual mandate. 565 U. S. 1048 (2011). Both *amici* have ably discharged their assigned responsibilities.

Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." See *Thomas More*, 651 F. 3d, at 551. Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

*Amicus* argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act because it functions like a tax. It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax." See *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20, 36–37 (1922); *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S. 767, 779 (1994).

The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. We have thus applied the Anti-Injunction Act to statutorily described "taxes" even where that label was inaccurate. See *Bailey* v. *George*, 259 U. S. 16 (1922) (Anti-Injunction Act applies to "Child Labor Tax" struck down as exceeding Congress's taxing power in *Drexel Furniture*).

Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act. For example, 26 U. S. C. § 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" Subchapter 68B of the Internal Revenue Code. Penalties in Subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-

Injunction Act. The individual mandate, however, is not in Subchapter 68B of the Code. Nor does any other provision state that references to taxes in Title 26 shall also be "deemed" to apply to the individual mandate.

*Amicus* attempts to show that Congress did render the Anti-Injunction Act applicable to the individual mandate, albeit by a more circuitous route. Section 5000A(g)(1) specifies that the penalty for not complying with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." Assessable penalties in Subchapter 68B, in turn, "shall be assessed and collected in the same manner as taxes." § 6671(a). According to *amicus*, by directing that the penalty be "assessed and collected in the same manner as taxes," § 5000A(g)(1) made the Anti-Injunction Act applicable to this penalty.

The Government disagrees. It argues that § 5000A(g)(1) does not direct courts to apply the Anti-Injunction Act, because § 5000A(g) is a directive only to the Secretary of the Treasury to use the same "'methodology and procedures'" to collect the penalty that he uses to collect taxes. Brief for United States 32–33 (quoting *Seven-Sky*, 661 F. 3d, at 11).

We think the Government has the better reading. As it observes, "Assessment" and "Collection" are chapters of the Internal Revenue Code providing the Secretary authority to assess and collect taxes, and generally specifying the means by which he shall do so. See § 6201 (assessment authority); § 6301 (collection authority). Section 5000A(g)(1)'s command that the penalty be "assessed and collected in the same manner" as taxes is best read as referring to those chapters and giving the Secretary the same authority and guidance with respect to the penalty. That interpretation is consistent with the remainder of § 5000A(g), which instructs the Secretary on the tools he may use to collect the penalty. See § 5000A(g)(2)(A) (barring criminal prosecutions); § 5000A(g)(2)(B) (prohibiting the Secretary from using notices of lien and levies). The Anti-Injunction Act, by con-

trast, says nothing about the procedures to be used in assessing and collecting taxes.

*Amicus* argues in the alternative that a different section of the Internal Revenue Code requires courts to treat the penalty as a tax under the Anti-Injunction Act. Section 6201(a) authorizes the Secretary to make "assessments of all taxes (including interest, additional amounts, additions to the tax, and *assessable penalties*)." (Emphasis added.) *Amicus* contends that the penalty must be a tax, because it is an assessable penalty and § 6201(a) says that taxes include assessable penalties.

That argument has force only if § 6201(a) is read in isolation. The Code contains many provisions treating taxes and assessable penalties as distinct terms. See, *e. g.*, §§ 860(h)(1), 6324A(a), 6601(e)(1)–(2), 6602, 7122(b). There would, for example, be no need for § 6671(a) to deem "tax" to refer to certain assessable penalties if the Code already included all such penalties in the term "tax." Indeed, *amicus*'s earlier observation that the Code requires assessable penalties to be assessed and collected "in the same manner as taxes" makes little sense if assessable penalties are themselves taxes. In light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: Section 6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes.

The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.

## III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the indi-

vidual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, see, *e. g.*, 42 U. S. C. § 1395dd; Fla. Stat. § 395.1041 (2010), hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year. 42 U. S. C. § 18091(2)(F).

In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of pre-existing conditions or other health issues. It did

so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. See §§ 300gg, 300gg–1, 300gg–3, 300gg–4.

The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone. See Brief for America's Health Insurance Plans et al. as *Amici Curiae* in No. 11–393 etc. 8–9.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on inter-

state commerce" by creating the cost-shifting problem. Brief for United States 34. The path of our Commerce Clause decisions has not always run smooth, see *United States* v. *Lopez*, 514 U. S. 549, 552–559 (1995), but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." *United States* v. *Darby*, 312 U. S. 100, 118–119 (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*, 317 U. S., at 127–128.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.[3] Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) (internal quotation marks omit-

[3] The examples of other congressional mandates cited by JUSTICE GINSBURG, *post*, at 621, n. 10 (opinion concurring in part, concurring in judgment in part, and dissenting in part), are not to the contrary. Each of those mandates—to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return—are based on constitutional provisions other than the Commerce Clause. See Art. I, § 8, cl. 9 (to "constitute Tribunals inferior to the supreme Court"); *id.*, cl. 12 (to "raise and support Armies"); *id.*, cl. 16 (to "provide for organizing, arming, and disciplining, the Militia"); *id.*, cl. 5 (to "coin Money"); *id.*, cl. 1 (to "lay and collect Taxes").

ted). At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power. *Lopez*, *supra*, at 564.

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, § 8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." *Id.*, cl. 5. And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." *Id.*, cls. 12–14. If the power to regulate the Armed Forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons*, 9 Wheat., at 188 ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").[4]

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[4] JUSTICE GINSBURG suggests that "at the time the Constitution was framed, to 'regulate' meant, among other things, to require action." *Post*, at 610 (citing *Seven-Sky* v. *Holder*, 661 F. 3d 1, 16 (CADC 2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by JUSTICE GINSBURG relied on a dictionary in which "[t]o order; to command" was the fifth-alternative definition of "to direct," which was itself the second-alternative definition of "to regulate." See *id.*, at 16 (citing S. Johnson, Dictionary of the English Language (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the word "regulate." Far more commonly, "[t]o regulate" meant "[t]o adjust by rule or method," which

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. See, *e. g.*, *Lopez*, *supra*, at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez*, 402 U. S., at 154 ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class" (emphasis in original; internal quotation marks omitted)); *Wickard*, *supra*, at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control"); see also *post*, at 602, 611–613, 614–615, 618 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part).[5]

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presupposes something to adjust. 2 *id.*, at 1619; see also *Gibbons*, 9 Wheat., at 196 (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed").

[5] JUSTICE GINSBURG cites two eminent domain cases from the 1890s to support the proposition that our case law does not "toe the activity versus inactivity line." *Post*, at 611 (citing *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 335–337 (1893), and *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657–659 (1890)). The fact that the Fifth Amendment requires the payment of just compensation when the Government exercises its power of eminent domain does not turn the taking into a commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard* v. *Filburn* shows how far that logic would carry us from the notion of a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. 317 U. S., at 114–115, 128–129. That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat. *Id.*, at 127–129.

*Wickard* has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U. S., at 560, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for

wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. See *Seven-Sky*, 661 F. 3d, at 14–15 (noting the Government's inability to "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under its theory of the commerce power). To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. See, *e. g.*, Dept. of Agriculture and Dept. of Health and Human Services, Dietary Guidelines for Americans 1 (2010). The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. See, *e. g.*, Finkelstein, Trogdon, Cohen, & Dietz, Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates, 28 Health Affairs w822 (2009) (detailing the "undeniable link between rising rates of obesity and rising medical spending," and estimating that "the annual medical burden of obesity has risen to almost 10 percent of all medical spending and could amount to $147 billion per year in 2008"). Those increased

costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. See Center for Applied Ethics, Voluntary Health Risks: Who Should Pay? 6 Issues in Ethics 6 (1993) (noting "overwhelming evidence that individuals with unhealthy habits pay only a fraction of the costs associated with their behaviors; most of the expense is borne by the rest of society in the form of higher insurance premiums, government expenditures for health care, and disability benefits"). Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables. See Dietary Guidelines, *supra*, at 19 ("Improved nutrition, appropriate eating behaviors, and increased physical activity have tremendous potential to . . . reduce health care costs").

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland* v. *Wirtz*, 392 U. S. 183, 196 (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist

No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.[6]

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 673 (1980) (Rehnquist, J., concurring in judgment). As we have explained, "the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina* v. *United States*, 199 U. S. 437, 449 (1905). The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." Brief

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[6] In an attempt to recast the individual mandate as a regulation of commercial activity, JUSTICE GINSBURG suggests that "[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance." *Post*, at 612. But "self-insurance" is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more "activ[e] in the self-insurance market" when they fail to purchase insurance, *post*, at 613, than they are active in the "rest" market when doing nothing.

for United States 50. The individual mandate "merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others." *Ibid.*

The Government repeats the phrase "active in the market for health care" throughout its brief, see *id.*, at 7, 18, 34, 50, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not "active in the car market" in any pertinent sense. The phrase "active in the market" cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to "regulate the uninsured as a class." *Id.*, at 42. Our precedents recognize Congress's power to regulate "class[es] of *activities*," *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005) (emphasis added), not classes of *individuals*, apart from any activity in which they are engaged, see, *e. g.*, *Perez*, 402 U. S., at 153 ("Petitioner is clearly a member of the class which engages in 'extortionate credit transactions' . . . " (emphasis deleted)).

The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. See 42 U. S. C. § 18091(2)(I) (recognizing that the mandate would "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction. Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because "[e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance." Tr. of Oral Arg. 111 (Mar. 27, 2012).

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the *effects* on commerce of an economic activity. See, *e. g.*, *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197 (1938) (regulating the labor practices of utility companies); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (prohibiting discrimination by hotel operators); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964) (prohibiting discrimination by restaurant owners). But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by JUSTICE GINSBURG, *post*, at 606–607, involved preexisting economic activity. See, *e. g.*, *Wickard*, 317 U. S., at 127–129 (producing wheat); *Raich*, *supra*, at 25 (growing marijuana).

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because

health insurance is a unique product. According to the Government, upholding the individual mandate would not justify mandatory purchases of items such as cars or broccoli because, as the Government puts it, "[h]ealth insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks." Reply Brief for United States 19. But cars and broccoli are no more purchased for their "own sake" than health insurance. They are purchased to cover the need for transportation and food.

The Government says that health insurance and health care financing are "inherently integrated." Brief for United States 41. But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how "inherently integrated" health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. Brief for United States 24. Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; it is enough that Congress

regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, Art. I, § 8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*, 4 Wheat., at 418. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id.*, at 411, 421. Instead, the Clause is "'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.'" *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234, 247 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are "'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 560 U. S., at 133–134 (quoting *McCulloch*, *supra*, at 413, 418). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch*, *supra*, at 421, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Printz* v. *United States*, 521 U. S. 898, 924 (1997) (quoting The Federalist No. 33, at 204 (A. Hamilton); alteration omitted); see also *New York*, 505 U. S., at 177; *Comstock*, *supra*, at 153 (KENNEDY, J., concurring in judg-

ment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . . ").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*, *supra*, at 129; criminalizing bribes involving organizations *receiving federal funds*, *Sabri* v. *United States*, 541 U. S. 600, 602, 605 (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks* v. *Richland County*, 538 U. S. 456, 459, 462 (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock*, *supra*, at 148, or "incidental" to the exercise of the commerce power, *McCulloch*, *supra*, at 418. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some pre-existing activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales* v. *Raich*. In *Raich*, we considered "comprehensive legis-

lation to regulate the interstate market" in marijuana. 545 U. S., at 22. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. *Id.*, at 19. Accordingly, we recognized that "Congress was acting well within its authority" under the Necessary and Proper Clause even though its "regulation ensnare[d] some purely intrastate activity." *Id.*, at 22; see also *Perez*, 402 U. S., at 154. *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch*, *supra*, at 411, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich*, *supra*, at 23 (emphasis added).

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate. Accord, *post*, at 649–660 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

## B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, § 8, cl. 1.

The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argu-

ment, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads "no vehicles in the park" might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830). Justice Holmes made the same point a century later: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (concurring opinion).

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. 26 U. S. C. § 5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make

an additional payment to the IRS when he pays his taxes. See § 5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U. S. 648, 657 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

## C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. 26 U. S. C. § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. § 5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—

must assess and collect it "in the same manner as taxes." *Supra*, at 545–546. This process yields the essential feature of any tax: It produces at least some revenue for the Government. *United States* v. *Kahriger*, 345 U. S. 22, 28, n. 4 (1953). Indeed, the payment is expected to raise about $4 billion per year by 2017. Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (rev. Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009–2010, p. 71 (2010).

It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the Anti-Injunction Act, *supra*, at 544–545, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

Our precedent reflects this: In 1922, we decided two challenges to the "Child Labor Tax" on the same day. In the first, we held that a suit to enjoin collection of the so-called tax was barred by the Anti-Injunction Act. *George*, 259 U. S., at 20. Congress knew that suits to obstruct taxes had to await payment under the Anti-Injunction Act; Congress called the child labor tax a tax; Congress therefore intended the Anti-Injunction Act to apply. In the second case, however, we held that the same exaction, although labeled a tax, was not in fact authorized by Congress's taxing power. *Drexel Furniture*, 259 U. S., at 38. That constitutional question was not controlled by Congress's choice of label.

We have similarly held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the li-

censee had to pay a fee—could be sustained as exercises of the taxing power. 5 Wall., at 471. And in *New York* v. *United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. 505 U. S., at 171. We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States* v. *Constantine*, 296 U. S. 287, 294 (1935); cf. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 310 (1992) ("[M]agic words or labels" should not "disable an otherwise constitutional levy" (internal quotation marks omitted)); *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363 (1941) ("In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it" (internal quotation marks omitted)); *United States* v. *Sotelo*, 436 U. S. 268, 275 (1978) ("That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes").[7]

Our cases confirm this functional approach. For example, in *Drexel Furniture*, we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the "tax" was actually a penalty. First, the tax imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage

[7] *Sotelo*, in particular, would seem to refute the joint dissent's contention that we have "never" treated an exaction as a tax if it was denominated a penalty. *Post*, at 664. We are not persuaded by the dissent's attempt to distinguish *Sotelo* as a statutory construction case from the bankruptcy context. *Post*, at 661, n. 5. The dissent itself treats the question here as one of statutory interpretation, and indeed also relies on a statutory interpretation case from the bankruptcy context. *Post*, at 667 (citing *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996)).

laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue. 259 U. S., at 36–37; see also, *e. g.*, *Kurth Ranch*, 511 U. S., at 780–782 (considering, *inter alia*, the amount of the exaction, and the fact that it was imposed for violation of a separate criminal law); *Constantine*, *supra*, at 295 (same).

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more.[8] It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. 259 U. S., at 37. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. See § 5000A(g)(2). The reasons the Court in *Drexel Furniture* held that what was called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.[9]

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[8] In 2016, for example, individuals making $35,000 a year are expected to owe the IRS about $60 for any month in which they do not have health insurance. Someone with an annual income of $100,000 a year would likely owe about $200. The price of a qualifying insurance policy is projected to be around $400 per month. See D. Newman, CRS Report for Congress, Individual Mandate and Related Information Requirements Under PPACA 7, and n. 25 (2011).

[9] We do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power. See *post*, at 667–668 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting). Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS rather than

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. See W. Brownlee, Federal Taxation in America 22 (2d ed. 2004); cf. 2 J. Story, Commentaries on the Constitution of the United States § 962, p. 434 (1833) ("the taxing power is often, very often, applied for other purposes, than revenue"). Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States* v. *Sanchez*, 340 U. S. 42, 44–45 (1950); *Sonzinsky* v. *United States*, 300 U. S. 506, 513 (1937). Indeed, "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Ibid.* That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996); see also *United States* v. *La Franca*, 282 U. S. 568, 572 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be

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the FBI. But the fact the exaction here is paid like a tax, to the agency that collects taxes—rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance—suggests that this exaction may be viewed as a tax.

read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law. Brief for United States 60–61; Tr. of Oral Arg. 49–50 (Mar. 26, 2012).

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, Payments of Penalties, at 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

The plaintiffs contend that Congress's choice of language—stating that individuals "shall" obtain insurance or pay a "penalty"—requires reading § 5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional. We have rejected a similar argument before. In *New York* v. *United States* we examined a statute providing that "'[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste.'" 505 U. S., at 169 (quoting 42 U. S. C. § 2021c(a)(1)(A)). A State that shipped its waste to another State was exposed to surcharges by the receiving State, a portion of which would be paid over to the Federal Government. And a State that did not adhere to the statutory scheme faced "[p]enalties for failure to comply," including increases in the surcharge. § 2021e(e)(2); *New York*, 505 U. S., at 152–153. New York urged us to read the statute as a federal command that the state legislature enact legislation to dispose of its waste, which would have violated the Constitution. To

avoid that outcome, we interpreted the statute to impose only "a series of incentives" for the State to take responsibility for its waste. *Id.*, at 170. We then sustained the charge paid to the Federal Government as an exercise of the taxing power. *Id.*, at 169–174. We see no insurmountable obstacle to a similar approach here.[10]

The joint dissenters argue that we cannot uphold § 5000A as a tax because Congress did not "frame" it as such. *Post*, at 662. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax

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[10] The joint dissent attempts to distinguish *New York* v. *United States* on the ground that the seemingly imperative language in that case was in an "introductory provision" that had "no legal consequences." *Post*, at 663. We did not rely on that reasoning in *New York*. See 505 U. S., at 169–170. Nor could we have. While the Court quoted only the broad statement that "[e]ach State shall be responsible" for its waste, that language was implemented through operative provisions that also use the words on which the dissent relies. See 42 U. S. C. § 2021e(e)(1) (entitled "Requirements for non-sited compact regions and non-member States" and directing that those entities "shall comply with the following requirements"); § 2021e(e)(2) (describing "Penalties for failure to comply"). The Court upheld those provisions not as lawful commands, but as "incentives." See 505 U. S., at 152–153, 171–173.

would hardly "[i]mpos[e] a tax through judicial legislation." *Post*, at 669. Rather, it would give practical effect to the Legislature's enactment.

Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138, 144 (1948).

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, § 9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. See *Springer* v. *United States*, 102 U. S. 586, 596–598 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. *Id.*, at 597. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton* v. *United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.).

The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. See *id.*, at 175; *id.*, at 177 (opinion of Paterson, J.); *id.*, at 183 (opinion of Iredell, J.).

That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer*, *supra*, at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner* v. *Macomber*, 252 U. S. 189, 218–219 (1920).

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." *Hylton*, *supra*, at 175 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under § 5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce,

perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789), in 10 Works of Benjamin Franklin 410 (1944) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes").

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. See 26 U. S. C. §§ 163(h), 25A. Sustaining the mandate as a tax depends only on whether Congress *has* properly exercised its taxing power to encourage purchasing health insurance, not whether it *can*. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, *e. g.*, *United States* v. *Butler*, 297 U. S. 1 (1936); *Drexel Furniture*,

259 U. S. 20. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. See *Kahriger*, 345 U. S., at 27–31 (collecting cases). We have nonetheless maintained that "'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Kurth Ranch*, 511 U. S., at 779 (quoting *Drexel Furniture*, *supra*, at 38).

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. *Supra*, at 567–568. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the "'power to tax is not the power to destroy while this Court sits.'" *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 364 (1949) (quoting *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting)).

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.[11]

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.

## D

JUSTICE GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power. *Post*, at 623. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax.

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[11] Of course, individuals do not have a lawful choice not to pay a tax due, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U. S. C. § 5000A(g)(2)). But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.

The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

## IV

### A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U. S., at 188.

There is no doubt that the Act dramatically increases state obligations under Medicaid. The current Medicaid program requires States to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled. 42 U. S. C. § 1396a(a)(10). There is no mandatory coverage for most childless adults, and the States typically do not offer any such coverage. The States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families. § 1396a(a)(10)(A)(ii). On average States cover only those unemployed parents who make less than 37 percent of the federal poverty level, and only those employed parents who make less than 63 percent of the poverty line. Kaiser Comm'n on Medicaid and the Uninsured, Performing Under Pressure 11, and fig. 11 (2012).

The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. § 1396a(a)(10)(A)(i)(VIII). The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate. §§ 1396a(k)(1), 1396u–7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. § 1396d(y)(1). In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. *Ibid.* In light of the expansion in coverage mandated by the Act, the Federal Government estimates that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, p. 14 (Mar. 30, 2011) (Table 2).

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." U. S. Const., Art. I, § 8, cl. 1. We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." *College Savings Bank*, 527 U. S., at 686. Such measures "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York*, *supra*, at 166. The conditions imposed by Congress ensure that the funds are used by the States to "provide for the . . . general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly

characterized . . . Spending Clause legislation as 'much in the nature of a *contract.*'" *Barnes* v. *Gorman*, 536 U. S. 181, 186 (2002) (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*, at 17. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond*, 564 U. S., at 220–221 (quoting *Alden* v. *Maine*, 527 U. S. 706, 758 (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, *supra*, at 162. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. See, *e. g.*, *Printz*, 521 U. S., at 933 (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York*, *supra*, at 174–175 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations). It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid.*, the legislation runs contrary to our

system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 505 U. S., at 178. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.*, at 169. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.

We addressed such concerns in *Steward Machine*. That case involved a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." 301 U. S., at 587. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. *Id.*, at 590. But we observed

that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Id.*, at 591. We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*

In rejecting the argument that the federal law was a "weapon[ ] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." *Id.*, at 586, 590. Indeed, the State itself did "not offer a suggestion that in passing the unemployment law she was affected by duress." *Id.*, at 589.

As our decision in *Steward Machine* confirms, Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. *Massachusetts* v. *Mellon*, 262 U. S. 447, 482 (1923). The States are separate and independent sovereigns. Sometimes they have to act like it.

The States, however, argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," *New York*, *supra*, at 175, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing

Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota* v. *Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." 483 U. S., at 208. At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.*, at 211 (quoting *Steward Machine*, *supra*, at 590). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*, 483 U. S., at 211. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable

minimum drinking age is 5%" of her highway funds. *Ibid.* In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. See Nat. Assn. of State Budget Officers, The State Expenditure Report 59 (1987); *South Dakota* v. *Dole*, 791 F. 2d 628, 630 (CA8 1986). In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power." *Dole*, 483 U. S., at 212. Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact." *Id.*, at 211–212.

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U. S. C. § 1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. *Dole*, *supra*, at 211. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. See Nat. Assn. of State Budget Officers, Fiscal Year 2010 State Expenditure Report, p. 11 (2011) (Table 5); 42 U. S. C. § 1396d(b). The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of *pre*-expansion Medicaid. Brief for United States 10, n. 6. In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 483 U. S., at 211–212.

The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.[12]

JUSTICE GINSBURG claims that *Dole* is distinguishable because here "Congress has not threatened to withhold funds earmarked for any other program." *Post*, at 633. But that begs the question: The States contend that the expansion is in reality a new program and that Congress is forcing them to accept it by threatening the funds for the existing Medicaid program. We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because "Congress styled" them as such. *Post*, at 635. If the expansion is not properly viewed as a modification of the existing Medicaid program, Congress's decision to so title it is irrelevant.[13]

Here, the Government claims that the Medicaid expansion is properly viewed merely as a modification of the exist-

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[12] JUSTICE GINSBURG observes that state Medicaid spending will increase by only 0.8 percent after the expansion. *Post*, at 628. That not only ignores increased state administrative expenses, but also assumes that the Federal Government will continue to fund the expansion at the current statutorily specified levels. It is not unheard of, however, for the Federal Government to increase requirements in such a manner as to impose unfunded mandates on the States. More importantly, the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or $500.

[13] Nor, of course, can the number of pages the amendment occupies, or the extent to which the change preserves and works within the existing program, be dispositive. Cf. *post*, at 635 (opinion of GINSBURG, J.). Take, for example, the following hypothetical amendment: "All of a State's citizens are now eligible for Medicaid." That change would take up a single line and would not alter any "operational aspect[ ] of the program" beyond the eligibility requirements. *Post*, at 634. Yet it could hardly be argued that such an amendment was a permissible modification of Medicaid, rather than an attempt to foist an entirely new health care system upon the States.

ing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place. The Government observes that the Social Security Act, which includes the original Medicaid provisions, contains a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute. 42 U. S. C. § 1304. So it does. But "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U. S., at 17. A State confronted with statutory language reserving the right to "alter" or "amend" the pertinent provisions of the Social Security Act might reasonably assume that Congress was entitled to make adjustments to the Medicaid program as it developed. Congress has in fact done so, sometimes conditioning only the new funding, other times both old and new. See, *e. g.*, Social Security Amendments of 1972, 86 Stat. 1381–1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166 (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U. S. C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.[14]

[14] JUSTICE GINSBURG suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and,] [t]hereafter, . . . could have enacted Medicaid II, a new program

Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, § 1396d(b), once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons, § 1396d(y)(1). The conditions on use of the different funds are also distinct. Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package. § 1396a(k)(1); see Brief for United States 9.

As we have explained, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or 'retroactive' conditions." *Pennhurst*, *supra*, at 25. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically.

JUSTICE GINSBURG claims that in fact this expansion is no different from the previous changes to Medicaid, such that "a State would be hard put to complain that it lacked fair notice." *Post*, at 641. But the prior change she discusses—presumably the most dramatic alteration she could find—does not come close to working the transformation the

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combining the pre-2010 coverage with the expanded coverage required by the ACA." *Post*, at 636–637; see also *post*, at 624. But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic." *Ibid.* The same is true of JUSTICE GINSBURG's suggestion that Congress could establish Medicaid as an exclusively federal program. *Post*, at 630.

expansion accomplishes. She highlights an amendment requiring States to cover pregnant women and increasing the number of eligible children. *Ibid.* But this modification can hardly be described as a major change in a program that—from its inception—provided health care for "families with dependent children." Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 301 U. S., at 591. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply "conscript state [agencies] into the national bureaucratic army," *FERC* v. *Mississippi*, 456 U. S. 742, 775 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), and that is what it is attempting to do with the Medicaid expansion.

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* "further [Medicaid] payments . . . to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U. S. C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further. That clause specifies that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." § 1303. Today's holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.

This is not to say, as the joint dissent suggests, that we are "rewriting the Medicaid Expansion." *Post*, at 691. Instead, we determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion. We then follow Congress's explicit textual instruction to leave unaffected "the remainder of the chapter, and the application of [the challenged] provision to other persons or circumstances." § 1303. When we invalidate an application of a statute because that application is unconstitutional, we are not "rewriting" the statute; we are merely enforcing the Constitution.

The question remains whether today's holding affects other provisions of the Affordable Care Act. In considering that question, "[w]e seek to determine what Congress would have intended in light of the Court's constitutional holding." *United States* v. *Booker*, 543 U. S. 220, 246 (2005) (internal quotation marks omitted). Our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 330 (2006) (internal quotation marks omitted).

The question here is whether Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is "evident" that the answer is no, we must leave the rest of the Act intact. *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932).

We are confident that Congress would have wanted to preserve the rest of the Act. It is fair to say that Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so. The States contend that Congress enacted the rest of the Act with such full participation in mind; they point out that Congress made Medicaid a means for satisfying the mandate, 26 U. S. C. § 5000A(f)(1)(A)(ii), and enacted no other plan for providing coverage to many low-income individuals. According to the States, this means that the entire Act must fall.

We disagree. The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will. Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion. Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.

We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain "fully operative as a law," *Champlin*, *supra*, at 234, and will still function in a

way "consistent with Congress' basic objectives in enacting the statute," *Booker*, *supra*, at 259. Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding.

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with THE CHIEF JUSTICE that the Anti-Injunction Act does not bar the Court's consideration of these cases, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III–C of THE CHIEF JUSTICE's opinion. Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to THE CHIEF JUSTICE, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States* v. *Darby*, 312 U. S. 100, 115 (1941) (overruling *Hammer* v. *Dagenhart*, 247 U. S.

251 (1918), and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." (internal quotation marks omitted)). THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, *e. g.*, *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 362, 368 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. 42 U. S. C. § 18091(2)(B) (2006 ed., Supp. IV). Within the next decade, it is anticipated, spending on health care will nearly double. *Ibid.*

The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U. S. Adults: National Health In-

terview Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37) (Over 99.5% of adults above 65 have visited a health-care professional.). Most people will do so repeatedly. See *id.*, at 115 (Table 34) (In 2009 alone, 64% of adults made two or more visits to a doctor's office.).

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses. Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, Historic National Health Expenditure Data, National Health Expenditures: Selected Calendar Years 1960–2010 (Table 1). Over a lifetime, costs mount to hundreds of thousands of dollars. See Alemayehu & Warner, The Lifetime Distribution of Health Care Costs, in 39 Health Services Research 627, 635 (June 2004). When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of $10,000. See Dept. of Health and Human Services, Office of Health Policy, ASPE Research Brief: The Value of Health Insurance 5 (May 2011). Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum. Brief for Economic Scholars as *Amici Curiae* in No. 11–398, p. 10 (citing a study indicating that, in 1998, the cost of treating a heart attack for the first 90 days exceeded $20,000, while the annual cost of treating certain cancers was more than $50,000).

Although every U. S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. An accident, a heart attack, or a cancer diagnosis commonly occurs without warning. Inescapably, we are all at peril of needing medical care without a moment's notice. See, *e. g.*, Campbell, Down the Insurance Rabbit Hole, N. Y. Times, Apr. 5, 2012, p. A23 (telling of an uninsured 32-year-old woman who, healthy one day, became a quadriplegic the next due to an auto accident).

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. Many (approximately 170 million in 2009) are insured by private insurance companies. Others, including those over 65 and certain poor and disabled persons, rely on government-funded insurance programs, notably Medicare and Medicaid. Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U. S. residents. See Congressional Budget Office, CBO's 2011 Long-Term Budget Outlook 37 (June 2011).

Not all U. S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. See Dept. of Commerce, Census Bureau, C. DeNavas-Walt, B. Proctor, & J. Smith, Income, Poverty, and Health Insurance Coverage in the United States: 2009, p. 23 (Sept. 2010) (Table 8). As a group, uninsured individuals annually consume more than $100 billion in health-care services, nearly 5% of the Nation's total. Hidden Health Tax: Americans Pay a Premium 2 (2009), available at http://www.familiesusa.org (all Internet materials as visited June 25, 2012, and included in Clerk of Court's case file). Over 60% of those without insurance visit a doctor's office or emergency room in a given year. See Dept. of Health and Human Services, National Center for Health Statistics, Health—United States—2010, p. 282 (Feb. 2011) (Table 79).

## B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U. S. C. § 18091(2). As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to

pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. See, *e. g.*, 42 U. S. C. § 1395dd; Fla. Stat. § 395.1041(3)(f) (2010); Tex. Health & Safety Code Ann. § 311.022(a) and (b) (West 2010); American Medical Association, Council on Ethical and Judicial Affairs, Code of Medical Ethics, Current Opinions: Opinion 8.11—Neglect of Patient, p. 70 (1998–1999 ed.).

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for $43 billion worth of the $116 billion in care they administered to those without insurance. 42 U. S. C. § 18091(2)(F) (2006 ed., Supp. IV).

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably: the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured "free ride" on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost shifting just described "increases family [insurance] premiums by on average over $1,000 a year." *Ibid.* Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost shifting.

And it is hardly just the currently sick or injured among the uninsured who prompt elevation of the price of health care and health insurance. Insurance companies and health-

care providers know that some percentage of healthy, uninsured people will suffer sickness or injury each year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. See Institute of Medicine, National Academies, Insuring America's Health: Principles and Recommendations 43 (2004). When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. *Id.*, at 43–44. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance. See Kliff, High Uninsured Rates Can Kill You—Even if You Have Coverage, Washington Post (May 7, 2012) (describing a study of California's health-care market which found that, when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly), available at http://www.washingtonpost.com/blogs/ezra-klein/post/highuninsured-rates-can-kill-you-even-if-you-have-coverage/2012/05/07/gIQALNHN8T_print.html.

C

States cannot resolve the problem of the uninsured on their own. Like Social Security benefits, a universal health-care system, if adopted by an individual State, would be "bait

to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Helvering* v. *Davis*, 301 U. S. 619, 644 (1937). See also Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, p. 15 (noting that, in 2009, Massachusetts' emergency rooms served thousands of uninsured, out-of-state residents). An influx of unhealthy individuals into a State with universal health care would result in increased spending on medical services. To cover the increased costs, a State would have to raise taxes, and private health-insurance companies would have to increase premiums. Higher taxes and increased insurance costs would, in turn, encourage businesses and healthy individuals to leave the State.

States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." *Davis*, 301 U. S., at 644. See also Brief for Health Care for All, Inc., et al. as *Amici Curiae* in No. 11–398, p. 4 ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States' best interests. Congress' intervention was needed to overcome this collective-action impasse.

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insur-

ers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health-insurance coverage. See 26 U. S. C. § 5000A (2006 ed., Supp. IV) (the minimum coverage provision). As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

A central aim of the ACA is to reduce the number of uninsured U. S. residents. See 42 U. S. C. § 18091(2)(C) and (I) (2006 ed., Supp. IV). The minimum coverage provision advances this objective by giving potential recipients of health care a financial incentive to acquire insurance. Per the minimum coverage provision, an individual must either obtain insurance or pay a toll constructed as a tax penalty. See 26 U. S. C. § 5000A.

The minimum coverage provision serves a further purpose vital to Congress' plan to reduce the number of uninsured. Congress knew that encouraging individuals to purchase insurance would not suffice to solve the problem, because most of the uninsured are not uninsured by choice.[1] Of particular concern to Congress were people who, though desperately in need of insurance, often cannot acquire it: persons who suffer from preexisting medical conditions.

Before the ACA's enactment, private insurance companies took an applicant's medical history into account when setting insurance rates or deciding whether to insure an individual. Because individuals with preexisting medical conditions cost

[1] According to one study conducted by the National Center for Health Statistics, the high cost of insurance is the most common reason why individuals lack coverage, followed by loss of one's job, an employer's unwillingness to offer insurance or an insurers' unwillingness to cover those with preexisting medical conditions, and loss of Medicaid coverage. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for the U. S. Population: National Health Interview Survey—2009, Ser. 10, No. 248, p. 71 (Dec. 2010) (Table 25). "[D]id not want or need coverage" received too few responses to warrant its own category. See *ibid.*, n. 2.

insurance companies significantly more than those without such conditions, insurers routinely refused to insure these individuals, charged them substantially higher premiums, or offered only limited coverage that did not include the preexisting illness. See Dept. of Health and Human Services, Coverage Denied: How the Current Health Insurance System Leaves Millions Behind 1 (2009) (Over the past three years, 12.6 million nonelderly adults were denied insurance coverage or charged higher premiums due to a preexisting condition.).

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. See 42 U. S. C. §§ 300gg–1, 300gg–3, 300gg–4(a) (2006 ed., Supp. IV). Second, Congress required insurers to use "community rating" to price their insurance policies. See § 300gg. Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance. See Hearing before the House Ways and Means Committee, 111th Cong., 1st Sess., 10, 13 (2009) (statement of Uwe Reinhardt) ("[I]mposition of *community-rated premiums* and *guaranteed* issue on a market of competing private health insurers will inexorably drive that market into extinction, unless these two features are coupled with . . . a *mandate on individual[s] to be insured*." (emphasis in original)).

In the 1990's, several States—including New York, New Jersey, Washington, Kentucky, Maine, New Hampshire, and Vermont—enacted guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage. The results were disastrous. "All seven states

suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." Brief for American Association of People with Disabilities et al. as *Amici Curiae* in No. 11–398, p. 9 (hereinafter AAPD Brief). See also Brief for Governor of Washington Christine Gregoire as *Amicus Curiae* in No. 11–398, pp. 11–14 (describing the "death spiral" in the insurance market Washington experienced when the State passed a law requiring coverage for preexisting conditions).

Congress comprehended that guaranteed-issue and community-rating laws alone will not work. When insurance companies are required to insure the sick at affordable prices, individuals can wait until they become ill to buy insurance. Pretty soon, those in need of immediate medical care—*i. e.*, those who cost insurers the most—become the insurance companies' main customers. This "adverse selection" problem leaves insurers with two choices: They can either raise premiums dramatically to cover their ever-increasing costs or they can exit the market. In the seven States that tried guaranteed-issue and community-rating requirements without a minimum coverage provision, that is precisely what insurance companies did. See, *e. g.*, AAPD Brief 10 ("[In Maine,] [m]any insurance providers doubled their premiums in just three years or less."); *id.*, at 12 ("Like New York, Vermont saw substantial increases in premiums after its . . . insurance reform measures took effect in 1993."); Hall, An Evaluation of New York's Reform Law, 25 J. Health Pol. Pol'y & L. 71, 91–92 (2000) (Guaranteed-issue and community-rating laws resulted in a "dramatic exodus of indemnity insurers from New York's individual [insurance] market."); Brief for Barry Friedman et al. as *Amici Curiae* in No. 11–398, p. 17 ("In Kentucky, all but two insurers (one State-run) abandoned the State.").

Massachusetts, Congress was told, cracked the adverse-selection problem. By requiring most residents to obtain insurance, see Mass. Gen. Laws, ch. 111M, § 2 (West 2011),

the Commonwealth ensured that insurers would not be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. See Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, at 3 (noting that the Commonwealth's reforms reduced the number of uninsured residents to less than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third); 42 U. S. C. § 18091(2)(D) (2006 ed., Supp. IV) (noting the success of Massachusetts' reforms).[2] In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.

* * *

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U. S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

## II

### A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." *EEOC* v. *Wyoming*, 460 U. S. 226, 244, 245, n. 1 (1983) (Stevens, J., concurring) (citing sources). Under the Articles of Confederation, the Consti-

[2] Despite its success, Massachusetts' medical-care providers still administer substantial amounts of uncompensated care, much of that to uninsured patients from out of State. See *supra*, at 595.

tution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See Vices of the Political System of the United States, in James Madison: Writings 69, 71, ¶5 (J. Rakove ed. 1999) (As a result of the "want of concert in matters where common interest requires it," the "national dignity, interest, and revenue [have] suffered.").[3]

What was needed was a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary." See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Papers of James Madison 368, 370 (R. Rutland ed. 1975). See also Letter from George Washington to James Madison (Nov. 30, 1785), in 8 *id.*, at 428, 429 ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 Records of the Federal Convention of 1787, pp. 131–132, ¶8 (M. Farrand rev. 1966). See also *North American Co.* v. *SEC*, 327 U. S. 686, 705 (1946) ("[The commerce power] is an affirmative power commensurate with the national needs.").

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[3] Alexander Hamilton described the problem this way: "[Often] it would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental . . . to attempt it without the concurrence of the rest." The Continentalist No. V, in 3 Papers of Alexander Hamilton 75, 78 (H. Syrett ed. 1962). Because the concurrence of all States was exceedingly difficult to obtain, Hamilton observed, "the experiment would probably be left untried." *Ibid.*

The Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case," Letter from James Madison to N. P. Trist (Dec. 1831), in 9 Writings of James Madison 471, 475 (G. Hunt ed. 1910). "Nothing . . . can be more fallacious," Alexander Hamilton emphasized, "than to infer the extent of any power, proper to be lodged in the national government, from . . . its immediate necessities. There ought to be a CAPACITY to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Federalist No. 34, pp. 205, 206 (John Harvard Library ed. 2009). See also *McCulloch*, 4 Wheat., at 415 (The Necessary and Proper Clause is lodged "in a constitution[,] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.").

B

Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp.*, 301 U. S., at 41–42; see *Wickard* v. *Filburn*, 317 U. S. 111, 122 (1942); *United States* v. *Lopez*, 514 U. S. 549, 573 (1995) (KENNEDY, J., concurring) (emphasizing "the Court's definitive commitment to the practical conception of the commerce power"). See also *North American Co.*, 327 U. S., at 705 ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities." (citation omitted)). We afford Congress the leeway "to undertake to solve national

problems directly and realistically." *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 103 (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See *ibid.* See also *Wickard*, 317 U. S., at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce." (emphasis added)); *Jones & Laughlin Steel Corp.*, 301 U. S., at 37.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*, 545 U. S., at 17. See also *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 729 (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel* v. *Indiana*, 452 U. S. 314, 326 (1981) ("This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." (internal quotation marks omitted)). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323–324. See also *Raich*, 545 U. S., at 22; *Lopez*, 514 U. S., at 557; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 277 (1981); *Katzenbach* v. *McClung*, 379 U. S. 294, 303 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964); *United States* v.

*Carolene Products Co.*, 304 U. S. 144, 152–153 (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States* v. *Morrison*, 529 U. S. 598, 607 (2000).

C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. See *supra*, at 592. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. See *supra*, at 594–595.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. See *supra*, at 593–594. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing," *ante*, at 552; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. See *supra*, at 601–602 and this page. See also *Wickard*, 317 U. S., at 128 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. See *supra*, at 593–594. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop. See *supra*, at 597–598. See also Brief for State of Maryland et al. as *Amici Curiae* in No. 11–398, p. 28 (hereinafter Maryland Brief) ("No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes.").

"[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach*, 379 U. S., at 303–304. Congress' enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

## D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our

precedents, THE CHIEF JUSTICE relies on a newly minted constitutional doctrine. The commerce power does not, THE CHIEF JUSTICE announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product." *Ante,* at 552 (emphasis deleted).

1

a

THE CHIEF JUSTICE's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. See *infra*, at 609–613. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," *ante,* at 549, such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. See *supra,* at 590–591. Thus, if THE CHIEF JUSTICE is correct that an insurance-purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill.

THE CHIEF JUSTICE does not dispute that all U. S. residents participate in the market for health services over the course of their lives. See *ante,* at 547 ("Everyone will eventually need health care at a time and to an extent they cannot predict."). But, THE CHIEF JUSTICE insists, the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking." *Ante,* at 558.

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. See *supra,* at 592. Nearly 90% will within five years.[4] An uninsured's consumption of health care is thus

[4] See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U. S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37).

quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide. See *Perez* v. *United States*, 402 U. S. 146, 154 (1971) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." (internal quotation marks omitted)).[5]

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. THE CHIEF JUSTICE defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see *supra*, at 605 and this page, not just those occurring here and now.

Third, contrary to THE CHIEF JUSTICE's contention, our precedent does indeed support "[t]he proposition that Con-

[5] Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who "have no intention of purchasing [medical care]" and are too far "removed from the [health-care] market." See *post*, at 652, 656. This criticism ignores the reality that a healthy young person may be a day away from needing health care. See *supra*, at 591. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

gress may dictate the conduct of an individual today because of prophesied future activity." *Ante*, at 557. In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). 317 U. S., at 114–115. He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. *Id.*, at 119. The Court rejected this argument. *Id.*, at 127–129. Wheat intended for home consumption, the Court noted, "overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA]." *Id.*, at 128.

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. 545 U. S., at 19. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market." *Ibid.*

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational here, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

Maintaining that the uninsured are not active in the health-care market, THE CHIEF JUSTICE draws an analogy to the car market. An individual "is not 'active in the car market,'" THE CHIEF JUSTICE observes, simply because he or she may someday buy a car. *Ante*, at 556. The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided

when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. See *Thomas More Law Center* v. *Obama*, 651 F. 3d 529, 565 (CA6 2011) (Sutton, J., concurring in part) ("Regulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life."). Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," *ante*, at 549, or "suite of products," *post*, at 656, n. 2 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.).

If unwanted today, medical service secured by insurance may be desperately needed tomorrow. Virtually everyone, I reiterate, consumes health care at some point in his or her life. See *supra*, at 590–591. Health insurance is a means of paying for this care, nothing more. In requiring individuals to obtain insurance, Congress is therefore not mandating the purchase of a discrete, unwanted product. Rather, Congress is merely defining the terms on which individuals pay for an interstate good they consume: Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket). Establishing payment terms for goods in or

affecting interstate commerce is quintessential economic regulation well within Congress' domain. See, *e. g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118 (1942). Cf. *post*, at 657 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (recognizing that "the Federal Government can prescribe [a commodity's] quality . . . and even [its price]").

THE CHIEF JUSTICE also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. See *ante*, at 548, 556–557. This complaint, too, is spurious. Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. See *supra*, at 592–593. Those who have insurance bear the cost of this guarantee. See *ibid.* By requiring the healthy uninsured to obtain insurance or pay a penalty structured as a tax, the minimum coverage provision ends the free ride these individuals currently enjoy.

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

b

In any event, THE CHIEF JUSTICE's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or

our decisions. Article I, § 8, of the Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. Indeed, as the D. C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action." See *Seven-Sky* v. *Holder*, 661 F. 3d 1, 16 (2011).

Arguing to the contrary, THE CHIEF JUSTICE notes that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,'" and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.'" *Ante*, at 550 (citing Art. I, § 8, cls. 5, 12–14). In separating the power to regulate from the power to bring the subject of the regulation into existence, THE CHIEF JUSTICE asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated." *Ante*, at 550.

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard*, 317 U. S., at 128 ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."). Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision.[6]

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[6] THE CHIEF JUSTICE's reliance on the quoted passages of the Constitution, see *ante*, at 550, is also dubious on other grounds. The power to "regulate the Value" of the national currency presumably includes the power to increase the currency's worth—*i. e.*, to create value where none previously existed. And if the power to "[r]egulat[e] . . . the land and

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. *Id.*, at 127–129. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce. *Id.*, at 128–129. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an "inactive" landholder to submit to an unwanted sale. See *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 335–337 (1893) ("[U]pon *the [great] power to regulate commerce*[,]" Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway. (emphasis added)); *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657–659 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, THE CHIEF JUSTICE views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*, 317 U. S., at 122 (internal quotation marks omitted). See also *supra*, at 601–604. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." See, *e. g.*, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12

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naval Forces" presupposes "there is already [in existence] something to be regulated," *i. e.*, an Army and a Navy, does Congress lack authority to create an Air Force?

(1895) ("Commerce succeeds to manufacture, and is not a part of it."); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."). The Court also sought to distinguish activities having a "direct" effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an "indirect" effect, and therefore not amenable to federal control. See, *e. g.*, *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548 (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one.").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." 317 U. S., at 120. See also *Morrison*, 529 U. S., at 641–644 (Souter, J., dissenting) (recounting the Court's "nearly disastrous experiment" with formalistic limits on Congress' commerce power). Failing to learn from this history, THE CHIEF JUSTICE plows ahead with his formalistic distinction between those who are "active in commerce," *ante*, at 552, and those who are not.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate "activity" from those that regulate "inactivity." As Judge Easterbrook noted, "it is possible to restate most actions as corresponding inactions with the same effect." *Archie* v. *Racine*, 847 F. 2d 1211, 1213 (CA7 1988) (en banc). Take the instant litigation as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. See *Thomas More Law Center*, 651 F. 3d, at 561 (Sutton, J.,

concurring in part) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk."). The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.[7] *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter. See 317 U. S., at 127–129.

At bottom, THE CHIEF JUSTICE's and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments." *Seven-Sky*, 661 F. 3d, at 19. See also *Troxel* v. *Granville*, 530 U. S. 57, 65 (2000) (plurality opinion) ("The [Due Process] Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (internal quotation marks omitted)). Plaintiffs have abandoned any argument pinned to substantive due process, however, see 648 F. 3d 1235, 1291, n. 93 (CA11 2011), and now concede that the provisions here at issue do not offend the Due Process Clause.[8]

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[7] THE CHIEF JUSTICE's characterization of individuals who choose not to purchase private insurance as "doing nothing," *ante*, at 552, is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market. See *supra*, at 592–594, 604.

[8] Some adherents to the joint dissent have questioned the existence of substantive due process rights. See *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring) (The notion that the Due Process Clause "could define the substance of th[e] righ[t to liberty] strains credulity."); *Albright* v. *Oliver*, 510 U. S. 266, 275 (1994) (SCALIA, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain

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Underlying THE CHIEF JUSTICE's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. See, *e. g.*, *ante*, at 554 (Allowing Congress to compel an individual not engaged in commerce to purchase a product would "permi[t] Congress to reach beyond the natural extent of its authority, everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." (internal quotation marks omitted)). The joint dissenters express a similar apprehension. See *post*, at 653 (If the minimum coverage provision is upheld under the commerce power then "the Commerce Clause becomes a font of unlimited power, . . . the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." (internal quotation marks omitted)). This concern is unfounded.

First, THE CHIEF JUSTICE could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets. See *supra*, at 590–594, 603–606, 608–609.

Nor would the commerce power be unbridled, absent THE CHIEF JUSTICE's "activity" limitation. Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*, 514 U. S., at 567; *Morrison*, 529 U. S., at 617–619. In *Lopez*, for example, the Court held that the Federal Government lacked power, under the Commerce Clause, to criminalize the possession of a gun in a

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(unspecified) liberties."). Given these Justices' reluctance to interpret the Due Process Clause as guaranteeing liberty interests, their willingness to plant such protections in the Commerce Clause is striking.

local school zone. Possessing a gun near a school, the Court reasoned, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U. S., at 567; *ibid.* (noting that the Court would have "to pile inference upon inference" to conclude that gun possession has a substantial effect on commerce). Relying on similar logic, the Court concluded in *Morrison* that Congress could not regulate gender-motivated violence, which the Court deemed to have too "attenuated [an] effect upon interstate commerce." 529 U. S., at 615.

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. See *supra*, at 603–604. Other choices individuals make are unlikely to fit the same or similar description. As an example of the type of regulation he fears, THE CHIEF JUSTICE cites a Government mandate to purchase green vegetables. *Ante*, at 553–554. One could call this concern "the broccoli horrible." Congress, THE CHIEF JUSTICE posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others. See *ibid.*

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet.[9] Such "pil[ing of] infer-

[9] The failure to purchase vegetables in THE CHIEF JUSTICE's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. See *ante*, at

ence upon inference" is just what the Court refused to do in *Lopez* and *Morrison*.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause.

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. See *Raich*, 545 U. S., at 33; *Wickard*, 317 U. S., at 120 (repeating Chief Justice Marshall's "warning that effective restraints on [the commerce power's] exercise must proceed from political rather than judicial processes" (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824))). As the controversy surrounding the passage of the ACA attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so. See Hall, Commerce Clause Challenges to Health Care Reform, 159 U. Pa. L. Rev. 1825, 1838 (2011).

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Cf. *Raich*, 545 U. S., at 9; *Wickard*, 317 U. S., at 127–129. Yet no one would offer the "hypothetical and unreal possibilit[y]," *Pullman Co.* v. *Knott*, 235 U. S. 23, 26 (1914), of a vegetarian state as a credi-

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553–554. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost shifting Congress sought to address through the ACA. See *supra*, at 592–594. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

ble reason to deny Congress the authority ever to ban the possession and sale of goods. THE CHIEF JUSTICE accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). But see, *e. g.*, *post*, at 648 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (asserting, outlandishly, that if the minimum coverage provision is sustained, then Congress could make "breathing in and out the basis for federal prescription").

3

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, THE CHIEF JUSTICE emphasizes the provision's novelty. See *ante*, at 549 (asserting that "sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action" (internal quotation marks omitted)). While an insurance-purchase mandate may be novel, THE CHIEF JUSTICE's argument certainly is not. "[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack." *Hoke* v. *United States*, 227 U. S. 308, 320 (1913). See, *e. g.*, Brief for Petitioner in *Perez* v. *United States*, O. T. 1970, No. 600, p. 5 ("unprecedented exercise of power"); Supplemental Brief for Appellees in *Katzenbach* v. *McClung*, O. T. 1964, No. 543, p. 40 ("novel assertion of federal power"); Brief for Appellee in *Wickard* v. *Filburn*, O. T. 1941, No. 59, p. 6 ("complete departure"). For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities." See *supra*, at 601. Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constric-

tion of the Commerce Clause will not endure. See *supra*, at 612–613.

## III

### A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See Part II, *supra*. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich*, 545 U. S., at 39 (SCALIA, J., concurring in judgment). Hence, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Indiana*, 452 U. S., at 329, n. 17. "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Ibid.* (collecting cases). See also *Raich*, 545 U. S., at 24–25 (A challenged statutory provision fits within Congress' commerce authority if it is an "essential par[t] of a larger regulation of economic activity," such that, in the absence of the provision, "the regulatory scheme could be undercut." (quoting *Lopez*, 514 U. S., at 561)); *Raich*, 545 U. S., at 37 (SCALIA, J., concurring in judgment) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." (citation omitted)).

Recall that one of Congress' goals in enacting the ACA was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. See *supra*, at 596–597.

The commerce power allows Congress to ban this practice, a point no one disputes. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 545, 552–553 (1944) (Congress may regulate "the methods by which interstate insurance companies do business.").

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. See *supra*, at 597–598. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. See *supra*, at 598–599. The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*, 545 U. S., at 24–25 (internal quotation marks omitted). Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is "'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account. See *id.*, at 37 (SCALIA, J., concurring in judgment).

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, THE CHIEF JUSTICE focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, THE CHIEF JUSTICE urges, because the command "undermine[s] the structure of government established by the Constitu-

tion." *Ante,* at 559. If long on rhetoric, THE CHIEF JUSTICE's argument is short on substance.

THE CHIEF JUSTICE cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz* v. *United States*, 521 U. S. 898 (1997), and *New York* v. *United States*, 505 U. S. 144 (1992). See *ante,* at 559. The statutes at issue in both cases, however, compelled *state officials* to act on the Federal Government's behalf. *Printz*, 521 U. S., at 925–933 (holding unconstitutional a statute obligating state law enforcement officers to implement a federal gun-control law); *New York*, 505 U. S., at 176–177 (striking down a statute requiring state legislators to pass regulations pursuant to Congress' instructions). "[Federal] laws conscripting state officers," the Court reasoned, "violate state sovereignty and are thus not in accord with the Constitution." *Printz,* 521 U. S., at 925, 935; *New York*, 505 U. S., at 176.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*, 505 U. S., at 164. The provision is thus entirely consistent with the Constitution's design. See *Printz*, 521 U. S., at 920 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." (internal quotation marks omitted)).

Lacking case law support for his holding, THE CHIEF JUSTICE nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause. *Ante,* at 560 (citing *United States* v. *Comstock*, 560 U. S. 126 (2010); *Sabri* v. *United States*, 541 U. S. 600 (2004); *Jinks* v. *Richland County*, 538 U. S. 456 (2003)). THE CHIEF JUSTICE's reliance on cases in which this Court has *affirmed* Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause, *Comstock*, 560 U. S., at 133, is underwhelming.

Nor does THE CHIEF JUSTICE pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, see, *e. g.*, *United States* v. *Fox*, 95 U. S. 670, 672 (1878); the power to imprison, including civil imprisonment, see, *e. g.*, *Comstock*, 560 U. S., at 129–130; and the power to create a national bank, see *McCulloch*, 4 Wheat., at 425. See also *Jinks*, 538 U. S., at 463 (affirming Congress' power to alter the way a state law is applied in state court, where the alteration "promotes fair and efficient operation of the federal courts").[10]

In failing to explain why the individual mandate threatens our constitutional order, THE CHIEF JUSTICE disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," *ante*, at 559, or merely a "derivative" one, *ante*, at 560? Whether the power used is "substantive," *ante*, at 561, or just "incidental," *ante*, at 560? The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it when you see it.

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on "essential attributes of state sovereignty." *Ibid.* (internal quotation marks omitted). First, the ACA does not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U. S., at 564.

[10] Indeed, Congress regularly and uncontroversially requires individuals who are "doing nothing," see *ante*, at 552, to take action. Examples include federal requirements to report for jury duty, 28 U. S. C. § 1866(g) (2006 ed., Supp. IV); to register for selective service, 50 U. S. C. App. § 453; to purchase firearms and gear in anticipation of service in the Militia, 1 Stat. 271 (Uniform Militia Act of 1792); to turn gold currency over to the Federal Government in exchange for paper currency, see *Nortz* v. *United States*, 294 U. S. 317, 328 (1935); and to file a tax return, 26 U. S. C. § 6012 (2006 ed., Supp. IV).

As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974, and the Health Insurance Portability and Accountability Act of 1996, the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. See *supra*, at 599–602. The crisis created by the large number of U. S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. See *supra*, at 594–595, 600. See also Maryland Brief 15–26 (describing "the impediments to effective state policymaking that flow from the interconnectedness of each state's healthcare economy" and emphasizing that "state-level reforms cannot fully address the problems associated with uncompensated care"). Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.*, at 31–36 (explaining and illustrating how the ACA affords States wide latitude in implementing key elements of the Act's reforms).[11]

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[11] In a separate argument, the joint dissenters contend that the minimum coverage provision is not necessary and proper because it was not the "only . . . way" Congress could have made the guaranteed-issue and community-rating reforms work. *Post*, at 654. Congress could also have avoided an insurance-market death spiral, the dissenters maintain, by imposing a surcharge on those who did not previously purchase insurance when those individuals eventually enter the health-insurance system. *Ibid.* Or Congress could "den[y] a full income tax credit" to those who do not purchase insurance. *Post*, at 654–655.

Neither a surcharge on those who purchase insurance nor the denial of a tax credit to those who do not would solve the problem created by

## IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. See, *e. g.*, *Carter Coal Co.*, 298 U. S., at 303–304, 309–310; *Dagenhart*, 247 U. S., at 276–277; *Lochner* v. *New York*, 198 U. S. 45, 64 (1905). THE CHIEF JUSTICE's Commerce Clause opinion, and even more so the joint dissenters' reasoning, see *post*, at 649–660, bear a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend "for the . . . general Welfare of the United States." Art. I, § 8, cl. 1; *ante*, at 573–574. I concur in that determination, which makes THE CHIEF JUSTICE's Commerce Clause essay all the more puzzling. Why should THE CHIEF JUSTICE strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy? I find no satisfying response to that question in his opinion.[12]

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guaranteed-issue and community-rating requirements. Neither would prompt the purchase of insurance before sickness or injury occurred.

But even assuming there were "practicable" alternatives to the minimum coverage provision, "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power." *Jinks* v. *Richland County*, 538 U. S. 456, 462 (2003) (quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 414–415 (1819)). Rather, the statutory provision at issue need only be "conducive" and "[reasonably] adapted" to the goal Congress seeks to achieve. *Jinks*, 538 U. S., at 462 (internal quotation marks omitted). The minimum coverage provision meets this requirement. See *supra*, at 619–620.

[12] THE CHIEF JUSTICE states that he must evaluate the constitutionality of the minimum coverage provision under the Commerce Clause because the provision "reads more naturally as a command to buy insurance than as a tax." *Ante*, at 574. THE CHIEF JUSTICE ultimately concludes, however, that interpreting the provision as a tax is a "fairly possible" con-

V

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. To receive federal Medicaid funds, States must provide health benefits to specified categories of needy persons, including pregnant women, children, parents, and adults with disabilities. Guaranteed eligibility varies by category: for some it is tied to the federal poverty level (incomes up to 100% or 133%); for others it depends on criteria such as eligibility for designated state or federal assistance programs. The ACA enlarges the population of needy people States must cover to include adults under age 65 with incomes up to 133% of the federal poverty level. The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. See, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

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struction. *Ante*, at 563 (internal quotation marks omitted). That being so, I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.

Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating States must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. 42 U. S. C. § 1304. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. See 42 CFR § 430.12(c)(i) (2011). And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

THE CHIEF JUSTICE acknowledges that Congress may "condition the receipt of [federal] funds on the States' complying with restrictions on the use of those funds," *ante*, at 580, but nevertheless concludes that the 2010 expansion is unduly coercive. His conclusion rests on three premises, each of them essential to his theory. First, the Medicaid expansion is, in THE CHIEF JUSTICE's view, a new grant program, not an addition to the Medicaid program existing before the ACA's enactment. Congress, THE CHIEF JUSTICE maintains, has threatened States with the loss of funds from an old program in an effort to get them to adopt a new one. Second, the expansion was unforeseeable by the States when they first signed on to Medicaid. Third, the threatened loss of funding is so large that the States have no real choice but to participate in the Medicaid expansion. THE CHIEF JUSTICE therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive.

Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it. Given past expansions, plus express

statutory warning that Congress may change the requirements participating States must meet, there can be no tenable claim that the ACA fails for lack of notice. Moreover, States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress' terms. Future Congresses are not bound by their predecessors' dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as THE CHIEF JUSTICE charges, threatening States with the loss of "existing" funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.

A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress' spending power. Given that holding, I entirely agree with THE CHIEF JUSTICE as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether, see *post,* at 689–691. The dissenters' view that the ACA must fall in its entirety is a radical departure from the Court's normal course. When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation. See, *e. g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985) (Court's normal course is to declare a statute invalid "to the extent that it reaches too far, but otherwise [to leave the statute] intact"). That course is plainly in order where, as here, Congress has expressly instructed courts to leave untouched every provision not found invalid. See 42 U. S. C. § 1303. Because THE CHIEF JUSTICE finds the withholding—not the granting—of federal funds incompatible with the Spending Clause, Congress' extension of Medicaid remains available to any State that affirms its willingness to participate.

A

Expansion has been characteristic of the Medicaid program. Akin to the ACA in 2010, the Medicaid Act as passed in 1965 augmented existing federal grant programs jointly administered with the States.[13] States were not required to participate in Medicaid. But if they did, the Federal Government paid at least half the costs. To qualify for these grants, States had to offer a minimum level of health coverage to beneficiaries of four federally funded, state-administered welfare programs: Aid to Families with Dependent Children; Old Age Assistance; Aid to the Blind; and Aid to the Permanently and Totally Disabled. See Social Security Amendments of 1965, § 121(a), 79 Stat. 343; *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37 (1981). At their option, States could enroll additional "medically needy" individuals; these costs, too, were partially borne by the Federal Government at the same, at least 50%, rate. *Ibid.*

Since 1965, Congress has amended the Medicaid program on more than 50 occasions, sometimes quite sizably. Most relevant here, between 1988 and 1990, Congress required participating States to include among their beneficiaries pregnant women with family incomes up to 133% of the federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. See 42 U. S. C.

[13] Medicaid was "plainly an extension of the existing Kerr-Mills" grant program. Huberfeld, Federalizing Medicaid, 14 U. Pa. J. Const. L. 431, 444–445 (2011). Indeed, the "section of the Senate report dealing with Title XIX"—the title establishing Medicaid—"was entitled, 'Improvement and Extension of Kerr-Mills Medical Assistance Program.'" R. Stevens & R. Stevens, Welfare Medicine in America 51 (1974) (quoting S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965)). Setting the pattern for Medicaid, Kerr-Mills reimbursed States for a portion of the cost of health care provided to welfare recipients if States met conditions specified in the federal law, *e. g.*, participating States were obliged to offer minimum coverage for hospitalization and physician services. See Huberfeld, *supra*, at 443–444.

§§ 1396a(a)(10)(A)(i), 1396a(*l*); Medicare Catastrophic Coverage Act of 1988, § 302, 102 Stat. 750; Omnibus Budget Reconciliation Act of 1989, § 6401, 103 Stat. 2258; Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166. These amendments added millions to the Medicaid-eligible population. Dubay & Kenney, Lessons From the Medicaid Expansions for Children and Pregnant Women 5 (Apr. 1997).

Between 1966 and 1990, annual federal Medicaid spending grew from $631.6 million to $42.6 billion; state spending rose to $31 billion over the same period. See Dept. of Health and Human Services, National Health Expenditures by Type of Service and Source of Funds: Calendar Years 1960 to 2010 (Table).[14] And between 1990 and 2010, federal spending increased to $269.5 billion. *Ibid.* Enlargement of the population and services covered by Medicaid, in short, has been the trend.

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. 42 U. S. C. § 1396d(y) (2006 ed., Supp. IV). By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008. § 1396d(b) (2006 ed., Supp. IV); Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, C. Truffer et al., 2010 Actuarial Report on the Financial Outlook for Medicaid, p. 20.

Nor will the expansion exorbitantly increase state Medicaid spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. See CBO, Spending & Enrollment Detail for CBO's March 2009 Baseline. But see *ante*, at 575

[14] Available online at http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html.

("[T]he Act dramatically increases state obligations under Medicaid."); *post,* at 688 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) ("[A]cceptance of the [ACA expansion] will impose very substantial costs on participating States."). Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding.[15]

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from "conscript[ing] state agencies into the national bureaucratic army," *ante,* at 585 (citing *FERC* v. *Mississippi*, 456 U. S. 742, 775 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part); some brackets and internal quotation marks omitted), Medicaid "is designed to advance cooperative federalism," *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534 U. S. 473, 495 (2002) (citing *Harris* v. *McRae*, 448 U. S. 297, 308 (1980)). Subject to its basic requirements, the Medicaid Act empowers States to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." Ruger, Of Icebergs and Glaciers, 75 Law & Contemp. Prob. 215, 233 (2012) (footnote omitted). The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

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[15] Even the study on which plaintiffs rely, see Brief for Petitioners in No. 11–400, p. 10, concludes that "[w]hile most states will experience some increase in spending, this is quite small relative to the federal matching payments and low relative to the costs of uncompensated care that [the States] would bear if the[re] were no health reform." See Kaiser Commission on Medicaid & the Uninsured, Medicaid Coverage & Spending in Health Reform 16 (May 2010). Thus there can be no objection to the ACA's expansion of Medicaid as an "unfunded mandate." Quite the contrary, the program is impressively well funded.

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization.[16] In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. See Caminker, State Sovereignty and Subordinacy, 95 Colum. L. Rev. 1001, 1002–1003 (1995) (cooperative federalism can preserve "a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role"); Rose-Ackerman, Cooperative Federalism and Co-optation, 92 Yale L. J. 1344, 1346 (1983) ("If the federal government begins to take full responsibility for social welfare spending and preempts the states, the result is likely to be weaker . . . state governments.").[17]

Although Congress "has no obligation to use its Spending Clause power to disburse funds to the States," *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense*

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[16] In 1972, for example, Congress ended the federal cash-assistance program for the aged, blind, and disabled. That program previously had been operated jointly by the Federal and State Governments, as is the case with Medicaid today. Congress replaced the cooperative federal program with the nationalized Supplemental Security Income program. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 38 (1981).

[17] THE CHIEF JUSTICE and the joint dissenters perceive in cooperative federalism a "threa[t]" to "political accountability." *Ante*, at 578; see *post*, at 678. By that, they mean voter confusion: Citizens upset by unpopular government action, they posit, may ascribe to state officials blame more appropriately laid at Congress' door. But no such confusion is apparent in this case: Medicaid's status as a federally funded, state-administered program is hardly hidden from view.

*Bd.*, 527 U. S. 666, 686 (1999), it has provided Medicaid grants notable for their generosity and flexibility. "[S]uch funds," we once observed, "are gifts," *id.*, at 686–687, and so they have remained through decades of expansion in their size and scope.

B

The Spending Clause authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." Art. I, § 8, cl. 1. To ensure that federal funds granted to the States are spent "to 'provide for the . . . general Welfare' in the manner Congress intended," *ante*, at 576, Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. See, *e. g.*, *Pennhurst*, 451 U. S., at 17 ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."). In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program. See, *e. g.*, *Harris*, 448 U. S., at 301 ("[O]nce a State elects to participate [in Medicaid], it must comply with the requirements of [the Medicaid Act]."); *Arkansas Dept. of Health and Human Servs.* v. *Ahlborn*, 547 U. S. 268, 275 (2006); *Frew* v. *Hawkins*, 540 U. S. 431, 433 (2004); *Atkins* v. *Rivera*, 477 U. S. 154, 156–157 (1986).

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The Legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. See *infra*, at 639 (describing *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 659–660 (1985) (enforcing restriction added five years after adoption of educational program)).

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision

in this area, *South Dakota* v. *Dole*, 483 U. S. 203 (1987), the Court identified four criteria. The conditions placed on federal grants to States must (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional." *Id.*, at 207–208, 210 (internal quotation marks omitted).[18]

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.*, at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 590 (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

*Dole* involved the National Minimum Drinking Age Act, 23 U. S. C. § 158, enacted in 1984. That Act directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to a State if the State permitted purchase of alcoholic beverages by persons less than 21 years old. Drinking age was not within the authority of Congress to regulate, South Dakota argued, because the Twenty-First Amendment gave the States exclusive power to control the manufacture, transportation, and consumption of alcoholic beverages. The small percentage of highway-construction funds South Dakota stood to lose by adhering to 19 as the age of eligibility to purchase 3.2% beer, however, was not enough to qualify as coercion, the Court concluded.

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[18] Although plaintiffs, in the proceedings below, did not contest the ACA's satisfaction of these criteria, see 648 F. 3d 1235, 1263 (CA11 2011), THE CHIEF JUSTICE appears to rely heavily on the second criterion. Compare *ante*, at 582, 584, with *infra*, at 639–641.

This litigation does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition—set 21 as the minimum drinking age—did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty-First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care. See *supra*, at 630.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare.

## C

THE CHIEF JUSTICE asserts that the Medicaid expansion creates a "new health care program." *Ante*, at 584. Moreover, States could "hardly anticipate" that Congress would "transform [the program] so dramatically." *Ibid.* Therefore, THE CHIEF JUSTICE maintains, Congress' threat to withhold "old" Medicaid funds based on a State's refusal to participate in the "new" program is a "threa[t] to terminate [an]other . . . independent gran[t]." *Ante*, at 579–580, 584. And because the threat to withhold a large amount of funds

from one program "leaves the States with no real option but to acquiesce [in a newly created program]," THE CHIEF JUSTICE concludes, the Medicaid expansion is unconstitutionally coercive. *Ante*, at 582.

1

The starting premise on which THE CHIEF JUSTICE's coercion analysis rests is that the ACA did not really "extend" Medicaid; instead, Congress created an entirely new program to coexist with the old. THE CHIEF JUSTICE calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.

Medicaid was created to enable States to provide medical assistance to "needy persons." See S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965). See also § 121(a), 79 Stat. 343 (The purpose of Medicaid is to enable States "to furnish . . . medical assistance on behalf of [certain persons] whose income and resources are insufficient to meet the costs of necessary medical services."). By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim.

The Medicaid Act contains hundreds of provisions governing operation of the program, setting conditions ranging from "Limitation on payments to States for expenditures attributable to taxes," 42 U. S. C. § 1396a(t) (2006 ed.), to "Medical assistance to aliens not lawfully admitted for permanent residence," § 1396b(v) (2006 ed. and Supp. IV). The Medicaid expansion leaves unchanged the vast majority of these provisions; it adds beneficiaries to the existing program and specifies the rate at which States will be reimbursed for services provided to the added beneficiaries. See ACA § 2001(a)(1), (3), 124 Stat. 271–272. The ACA does not describe operational aspects of the program for these newly eligible persons; for that information, one must read the existing Medicaid Act. See 42 U. S. C. §§ 1396–1396v(b) (2006 ed. and Supp. IV).

Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a "new" health-care program. To the four categories of beneficiaries for whom coverage became mandatory in 1965, and the three mandatory classes added in the late 1980's, see *supra*, at 627–628, the ACA adds an eighth: individuals under 65 with incomes not exceeding 133% of the federal poverty level. The expansion is effectuated by § 2001 of the ACA, aptly titled: "Medicaid Coverage for the Lowest Income Populations." 124 Stat. 271. That section amends Title 42, Chapter 7, Subchapter XIX: Grants to States for Medical Assistance Programs. Commonly known as the Medicaid Act, Subchapter XIX filled some 278 pages in 2006. Section 2001 of the ACA would add approximately three pages.[19]

Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of "the general Welfare." *Helvering* v. *Davis*, 301 U. S. 619, 640–641 (1937). Courts owe a large measure of respect to Congress' characterization of the grant programs it establishes. See *Steward Machine*, 301 U. S., at 594. Even if courts were inclined to second-guess Congress' conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it "transforms" the basic law?

Endeavoring to show that Congress created a new program, THE CHIEF JUSTICE cites three aspects of the expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not "care for the neediest among us." *Ante*, at 583. What makes that so?

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[19] Compare Subchapter XIX, 42 U. S. C. §§ 1396–1396v(b) (2006 ed. and Supp. IV), with §§ 1396a(a)(10)(A)(i)(VIII) (2006 ed. and Supp. IV), 1396a(a)(10)(A)(ii)(XX), 1396a(a)(75), 1396a(k), 1396a(gg) to (hh), 1396d(y), 1396r–1(e), 1396u–7(b)(5) to (6).

Single adults earning no more than $14,856 per year—133% of the current federal poverty level—surely rank among the Nation's poor.

Second, according to THE CHIEF JUSTICE, "Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package." *Ante*, at 584. That less comprehensive benefit package, however, is not an innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries.[20] The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

Third, THE CHIEF JUSTICE correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. *Ibid.* But the rate differs only in its generosity to participating States. Under pre-ACA Medicaid, the Federal Government pays up to 83% of the costs of coverage for current enrollees, § 1396d(b) (2006 ed. and Supp. IV); under the ACA, the federal contribution starts at 100% and will eventually settle at 90%, § 1396d(y). Even if one agreed that a change of as little as 7 percentage points carries constitutional significance, is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States *less* money to carry out the same obligations?

Consider also that Congress could have repealed Medicaid. See *supra*, at 624–625 (citing 42 U. S. C. § 1304); Brief for Petitioners in No. 11–400, p. 41. Thereafter, Congress could have enacted Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the

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[20] The Deficit Reduction Act of 2005 authorized States to provide "benchmark coverage" or "benchmark equivalent coverage" to certain Medicaid populations. See § 6044, 120 Stat. 88, 42 U. S. C. § 1396u–7 (2006 ed. and Supp. IV). States may offer the same level of coverage to persons newly eligible under the ACA. See § 1396a(k).

ACA. By what right does a court stop Congress from building up without first tearing down?

2

THE CHIEF JUSTICE finds the Medicaid expansion vulnerable because it took participating States by surprise. *Ante*, at 584. "A State could hardly anticipate that Congres[s]" would endeavor to "transform [the Medicaid program] so dramatically," he states. *Ibid.* For the notion that States must be able to foresee, when they sign up, alterations Congress might make later on, THE CHIEF JUSTICE cites only one case: *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1.

In *Pennhurst*, residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act. 451 U. S., at 5–6. We held that the State was not answerable in damages for violating conditions it did not "voluntarily and knowingly accep[t]." *Id.*, at 17, 27. Inspecting the statutory language and legislative history, we found that the Act did not "unambiguously" impose the requirement on which plaintiffs relied: that they receive appropriate treatment in the least restrictive environment. *Id.*, at 17–18. Satisfied that Congress had not clearly conditioned the States' receipt of federal funds on the States' provision of such treatment, we declined to read such a requirement into the Act. Congress' spending power, we concluded, "does not include surprising participating States with postacceptance or 'retroactive' conditions." *Id.*, at 24–25.

*Pennhurst* thus instructs that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Ante*, at 583 (quoting *Pennhurst*, 451 U. S., at 17). That requirement is met here. Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after

that date: They must extend eligibility to adults with incomes no more than 133% of the federal poverty line. See 42 U. S. C. § 1396a(a)(10)(A)(i)(VIII) (2006 ed. and Supp. IV).

THE CHIEF JUSTICE appears to find in *Pennhurst* a requirement that, when spending legislation is first passed, or when States first enlist in the federal program, Congress must provide clear notice of conditions it might later impose. If I understand his point correctly, it was incumbent on Congress, in 1965, to warn the States clearly of the size and shape potential changes to Medicaid might take. And absent such notice, sizable changes could not be made mandatory. Our decisions do not support such a requirement.[21]

In *Bennett* v. *New Jersey*, 470 U. S. 632 (1985), the Secretary of Education sought to recoup Title I funds[22] based on the State's noncompliance, from 1970 to 1972, with a 1978 amendment to Title I. Relying on *Pennhurst*, we rejected the Secretary's attempt to recover funds based on the States' alleged violation of a rule that did not exist when the State accepted and spent the funds. See 470 U. S., at 640 ("New Jersey[,] when it applied for and received Title I funds for the years 1970–1972[,] had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect *at the time*." (citing *Pennhurst*, 451 U. S., at 17, 24–25; emphasis added)).

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[21] THE CHIEF JUSTICE observes that "Spending Clause legislation [i]s much in the nature of a *contract*." *Ante*, at 577 (internal quotation marks omitted). See also *post*, at 676 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) (same). But the Court previously has recognized that "[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 669 (1985).

[22] Title I of the Elementary and Secondary Education Act of 1965 provided federal grants to finance supplemental educational programs in school districts with high concentrations of children from low-income families. See *Bennett* v. *New Jersey*, 470 U. S. 632, 634–635 (1985) (citing Pub. L. 89–10, 79 Stat. 27).

When amendment of an existing grant program has no such retroactive effect, however, we have upheld Congress' instruction. In *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656 (1985), the Secretary sued to recapture Title I funds based on the Commonwealth's 1974 violation of a spending condition Congress added to Title I in 1970. Rejecting Kentucky's argument pinned to *Pennhurst*, we held that the Commonwealth suffered no surprise after accepting the federal funds. Kentucky was therefore obliged to return the money. 470 U. S., at 665–666, 673–674. The conditions imposed were to be assessed as of 1974, in light of "the legal requirements in place when the grants were made," *id.*, at 670, not as of 1965, when Title I was originally enacted.

As these decisions show, *Pennhurst*'s rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program. See also *Dole*, 483 U. S., at 208 (finding *Pennhurst* satisfied based on the clarity of the Federal Aid Highway Act as amended in 1984, without looking back to 1956, the year of the Act's adoption).

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." 42 U. S. C. § 1304. The "effect of these few simple words" has long been settled. See *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 467–468, n. 22 (1985) (citing *Sinking Fund Cases*, 99 U. S. 700, 720 (1879)). By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain . . . full and complete power to make such alterations and amendments . . . as come within the just scope of legislative power." *Id.*, at 720.

Our decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U. S. 41, 51–52 (1986), is

guiding here. As enacted in 1935, the Social Security Act did not cover state employees. *Id.*, at 44. In response to pressure from States that wanted coverage for their employees, Congress, in 1950, amended the Act to allow States to opt into the program. *Id.*, at 45. The statutory provision giving States this option expressly permitted them to withdraw from the program. *Ibid.*

Beginning in the late 1970's, States increasingly exercised the option to withdraw. *Id.*, at 46. Concerned that withdrawals were threatening the integrity of Social Security, Congress repealed the termination provision. Congress thereby changed Social Security from a program voluntary for the States to one from which they could not escape. *Id.*, at 48. California objected, arguing that the change impermissibly deprived it of a right to withdraw from Social Security. *Id.*, at 49–50. We unanimously rejected California's argument. *Id.*, at 51–53. By including in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act," we held, Congress put States on notice that the Act "created no contractual rights." *Id.*, at 51–52 (some internal quotation marks omitted). The States therefore had no law-based ground on which to complain about the amendment, despite the significant character of the change.

THE CHIEF JUSTICE nevertheless would rewrite § 1304 to countenance only the "right to alter *somewhat*," or "amend, *but not too much*." Congress, however, did not so qualify § 1304. Indeed, Congress retained discretion to "repeal" Medicaid, wiping it out entirely. Cf. *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 368 (1981) (Rehnquist, J., dissenting) (invoking "the common-sense maxim that the greater includes the lesser"). As *Bowen* indicates, no State could reasonably have read § 1304 as reserving to Congress authority to make adjustments only if modestly sized.

In fact, no State proceeded on that understanding. In compliance with Medicaid regulations, each State expressly

undertook to abide by future Medicaid changes. See 42 CFR § 430.12(c)(1) (2011) ("The [state Medicaid] plan must provide that it will be amended whenever necessary to reflect . . . [c]hanges in Federal law, regulations, policy interpretations, or court decisions."). Whenever a State notifies the Federal Government of a change in its own Medicaid program, the State certifies both that it knows the federally set terms of participation may change, and that it will abide by those changes as a condition of continued participation. See, *e. g.*, Florida Agency for Health Care Admin., State Plan Under Title XIX of the Social Security Act Medical Assistance Program § 7.1, p. 86 (Oct. 6, 1992).

THE CHIEF JUSTICE insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." *Ante*, at 583. But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? See *supra*, at 627–628. Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. But see *ante*, at 583–585. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. See Brief for National Health Law Program et al. as *Amici Curiae* 16–18. In short, given § 1304, this Court's construction of § 1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965,[23] a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

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[23] Note, in this regard, the extension of Social Security, which began in 1935 as an old-age pension program, then expanded to include survivor benefits in 1939 and disability benefits in 1956. See Social Security Act, ch. 531, 49 Stat. 622–625; Social Security Act Amendments of 1939, 53 Stat. 1364–1365; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815–816.

3

THE CHIEF JUSTICE ultimately asks whether "the financial inducement offered by Congress . . . pass[ed] the point at which pressure turns into compulsion." *Ante*, at 580 (internal quotation marks omitted). The financial inducement Congress employed here, he concludes, crosses that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce. *Ante*, at 579–580, 581 (citing 42 U. S. C. § 1396c).[24]

THE CHIEF JUSTICE sees no need to "fix the outermost line," *Steward Machine*, 301 U. S., at 591, "where persuasion gives way to coercion," *ante*, at 585. Neither do the joint dissenters. See *post*, at 679, 681.[25] Notably, the decision on

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[24] The joint dissenters, for their part, would make this the entire inquiry. "[I]f States really have no choice other than to accept the package," they assert, "the offer is coercive." *Post*, at 679. THE CHIEF JUSTICE recognizes Congress' authority to construct a single federal program and "condition the receipt of funds on the States' complying with restrictions on the use of those funds." *Ante*, at 580. For the joint dissenters, however, all that matters, it appears, is whether States can resist the temptation of a given federal grant. *Post*, at 678–679. On this logic, any federal spending program, sufficiently large and well funded, would be unconstitutional. The joint dissenters point to smaller programs States might have the will to refuse. See *post*, at 683–684 (elementary and secondary education). But how is a court to judge whether "only 6.6% of all state expenditures," *post*, at 683, is an amount States could or would do without?

Speculations of this genre are characteristic of the joint dissent. See, *e. g.*, *post*, at 678 ("it *may* be state officials who will bear the brunt of public disapproval" for joint federal-state endeavors); *ibid.* ("federal officials . . . *may* remain insulated from the electoral ramifications of their decision"); *post*, at 680 ("a heavy federal tax . . . levied to support a federal program that offers large grants to the States . . . *may*, as a practical matter, [leave States] unable to refuse to participate"); *ibid.* (withdrawal from a federal program "would *likely* force the State to impose a huge tax increase"); *post*, at 688 (state share of ACA expansion costs "*may* increase in the future" (all emphasis added; some internal quotation marks omitted)). The joint dissenters are long on conjecture and short on real-world examples.

[25] The joint dissenters also rely heavily on Congress' perceived intent to coerce the States. *Post*, at 685–689; see, *e. g.*, *post*, at 685 ("In crafting the ACA, Congress clearly expressed its informed view that no State

which they rely, *Steward Machine*, found the statute at issue inside the line, "wherever the line may be." 301 U. S., at 591.

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? *Ante*, at 578. Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative: the lead plaintiff, all challenging States (26 in this litigation, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue?[26]

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could possibly refuse the offer that the ACA extends."). We should not lightly ascribe to Congress an intent to violate the Constitution (at least as my colleagues read it). This is particularly true when the ACA could just as well be comprehended as demonstrating Congress' mere expectation, in light of the uniformity of past participation and the generosity of the federal contribution, that States would not withdraw. Cf. *South Dakota* v. *Dole*, 483 U. S. 203, 211 (1987) ("We cannot conclude . . . that a conditional grant of federal money . . . is unconstitutional simply by reason of its success in achieving the congressional objective.").

[26] Federal taxation of a State's citizens, according to the joint dissenters, may diminish a State's ability to raise new revenue. This, in turn, could limit a State's capacity to replace a federal program with an "equivalent" state-funded analog. *Post*, at 681. But it cannot be true that "the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion." *Post*, at 680. When the United States Government taxes United States citizens, it taxes them "in their individual capacities" as "the people of America"—not as residents of a particular State. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 839 (1995) (KENNEDY, J., concurring) (internal quotation marks omitted). That is because the "Framers split the atom of sovereignty[,] . . . establishing two orders of government"—"one state and one federal"—"each with its own direct relationship" to the people. *Id.*, at 838.

A State therefore has no claim on the money its residents pay in federal taxes, and federal "spending programs need not help people in all states

Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Even commentators sympathetic to robust enforcement of *Dole*'s limitations, see *supra*, at 631–632, have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially administrable." Baker & Berman, Getting Off the *Dole*, 78 Ind. L. J. 459, 521, 522, n. 307 (2003) (citing, *e. g.*, Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)).

At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 110th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. But see *ante*, at 581–582; *post*, at 689–691 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.). For, in fact, there are no such funds. There is only money States *anticipate* receiving from future Congresses.

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in the same measure." See Brief for David Satcher et al. as *Amici Curiae* 19. In 2004, for example, New Jersey received 55 cents in federal spending for every dollar its residents paid to the Federal Government in taxes, while Mississippi received $1.77 per tax dollar paid. C. Dubay, Tax Foundation, Federal Tax Burdens and Expenditures by State: Which States Gain Most From Federal Fiscal Operations? 2 (Mar. 2006). Thus no constitutional problem was created when Arizona declined for 16 years to participate in Medicaid, even though its residents' tax dollars financed Medicaid programs in every other State.

D

Congress has delegated to the Secretary of Health and Human Services the authority to withhold, in whole or in part, federal Medicaid funds from States that fail to comply with the Medicaid Act as originally composed and as subsequently amended. 42 U. S. C. § 1396c.[27] THE CHIEF JUSTICE, however, holds that the Constitution precludes the Secretary from withholding "existing" Medicaid funds based on States' refusal to comply with the expanded Medicaid program. *Ante*, at 585. For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. Accordingly, I would affirm the decision of the Court of Appeals for the Eleventh Circuit in this regard.

But in view of THE CHIEF JUSTICE's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. That clause provides that "[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U. S. C. § 1303.

The Court does not strike down any provision of the ACA. It prohibits only the "application" of the Secretary's authority to withhold Medicaid funds from States that decline to conform their Medicaid plans to the ACA's requirements. Thus the ACA's authorization of funds to finance the expan-

[27] As THE CHIEF JUSTICE observes, the Secretary is authorized to withhold all of a State's Medicaid funding. See *ante*, at 581. But total withdrawal is what the Secretary *may*, not must, do. She has discretion to withhold only a portion of the Medicaid funds otherwise due a noncompliant State. See § 1396c; cf. 45 CFR § 80.10(f) (2011) (The Secretary may enforce Title VI's nondiscrimination requirement through "refusal to grant or continue Federal financial assistance, *in whole or in part*." (emphasis added)). The Secretary, it is worth noting, may herself experience political pressures, which would make her all the more reluctant to cut off funds Congress has appropriated for a State's needy citizens.

sion remains intact, and the Secretary's authority to withhold funds for reasons other than noncompliance with the expansion remains unaffected.

Even absent § 1303's command, we would have no warrant to invalidate the Medicaid expansion, contra *post*, at 689–691 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.), not to mention the entire ACA, *post*, at 691–706 (same). For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective. See, *e. g.*, *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–330 (2006). In this instance, that objective was to increase access to health care for the poor by increasing the States' access to federal funds. THE CHIEF JUSTICE is undoubtedly right to conclude that Congress may offer States funds "to expand the availability of health care, and requir[e] that States accepting such funds comply with the conditions on their use." *Ante*, at 585. I therefore concur in the judgment with respect to Part IV–B of THE CHIEF JUSTICE's opinion.

* * *

For the reasons stated, I agree with THE CHIEF JUSTICE that, as to the validity of the minimum coverage provision, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed. In my view, the provision encounters no constitutional obstruction. Further, I would uphold the Eleventh Circuit's decision that the Medicaid expansion is within Congress' spending power.

JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and

provisions of the Patient Protection and Affordable Care Act (Affordable Care Act, Act, or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: It presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second question is whether the congressional power to tax and spend, U. S. Const., Art. I, § 8, cl. 1, permits the conditioning of a State's continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard* v. *Filburn*, 317 U. S. 111 (1942), which held that the economic activity of growing wheat, even for one's

own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the *ne plus ultra* of expansive Commerce Clause jurisprudence. To go beyond that, and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers, see *United States* v. *Butler*, 297 U. S. 1, 65–66 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without

them. In our view it must follow that the entire statute is inoperative.

I

**The Individual Mandate**

Article I, § 8, of the Constitution gives Congress the power to "regulate Commerce . . . among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." 26 U. S. C. § 5000A(a) (2006 ed., Supp. IV). If this provision "regulates" anything, it is the *failure* to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, *purchasing* insurance *is* "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824), Chief Justice Marshall wrote that the power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." That understanding is consistent with the original meaning of "regulate" at the time of the Constitution's ratification, when "to regulate" meant "[t]o adjust by rule, method or established mode," 2 N. Webster, An American Dictionary of the English Language (1828); "[t]o adjust by rule or method," 2 S. Johnson, A Dictionary of the English Language (7th ed. 1785); "[t]o adjust, to direct according to rule," 2 J. Ash, New and Complete Dictionary of the English Language (1775); "to put in order, set to rights, govern or keep in order," T. Dyche & W. Pardon, A New General English Dictionary (16th ed. 1777).[1] It can mean to direct the

[1] The most authoritative legal dictionaries of the founding era lack any definition for "regulate" or "regulation," suggesting that the term bears its ordinary meaning (rather than some specialized legal meaning) in the

manner of something but not to direct that something come into being. There is no instance in which this Court or Congress (or anyone else, to our knowledge) has used "regulate" in that peculiar fashion. If the word bore that meaning, Congress' authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, § 8, cl. 14, would have made superfluous the later provision for authority "[t]o raise and support Armies," *id.*, § 8, cl. 12, and "[t]o provide and maintain a Navy," *id.*, § 8, cl. 13.

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method," Johnson, *supra,* or "direct-[ing] according to rule," Ash, *supra;* it directs the creation of commerce.

In response, the Government offers two theories as to why the Individual Mandate is nevertheless constitutional. Neither theory suffices to sustain its validity.

A

First, the Government submits that § 5000A is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms." Brief for Petitioners in No. 11–398 (Minimum Coverage Provision) 24 (hereinafter Petitioners' Minimum Coverage Brief). Congress included a "finding" to similar effect in the Act itself. See 42 U. S. C. § 18091(2)(H) (2006 ed., Supp. IV).

As discussed in more detail in Part V, *infra*, the Act contains numerous health insurance reforms, but most notable for present purposes are the "guaranteed issue" and "community rating" provisions, §§ 300gg to 300gg–4. The former provides that, with a few exceptions, "each health insurance

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constitutional text. See 2 R. Burn, A New Law Dictionary 281 (1792); G. Jacob, A New Law Dictionary (10th ed. 1782); 2 T. Cunningham, A New and Complete Law Dictionary (2d ed. 1771).

issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage." § 300gg–1(a). That is, an insurer may not deny coverage on the basis of, among other things, any pre-existing medical condition that the applicant may have, and the resulting insurance must cover that condition. See § 300gg–3.

Under ordinary circumstances, of course, insurers would respond by charging high premiums to individuals with pre-existing conditions. The Act seeks to prevent this through the community-rating provision. Simply put, the community-rating provision requires insurers to calculate an individual's insurance premium based on only four factors: (i) whether the individual's plan covers just the individual or his family also, (ii) the "rating area" in which the individual lives, (iii) the individual's age, and (iv) whether the individual uses tobacco. § 300gg(a)(1)(A). Aside from the rough proxies of age and tobacco use (and possibly rating area), the Act does not allow an insurer to factor the individual's health characteristics into the price of his insurance premium. This creates a new incentive for young and healthy individuals without pre-existing conditions. The insurance premiums for those in this group will not reflect their own low actuarial risks but will subsidize insurance for others in the pool. Many of them may decide that purchasing health insurance is not an economically sound decision—especially since the guaranteed-issue provision will enable them to purchase it at the same cost in later years and even if they have developed a pre-existing condition. But without the contribution of above-risk premiums from the young and healthy, the community-rating provision will not enable insurers to take on high-risk individuals without a massive increase in premiums.

The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be

carefully balanced. Congress has imposed an extensive set of regulations on the health insurance industry, and compliance with those regulations will likely cost the industry a great deal. If the industry does not respond by increasing premiums, it is not likely to survive. And if the industry does increase premiums, then there is a serious risk that its products—insurance plans—will become economically undesirable for many and prohibitively expensive for the rest.

This is not a dilemma unique to regulation of the health insurance industry. Government regulation typically imposes costs on the regulated industry—especially regulation that prohibits economic behavior in which most market participants are already engaging, such as "piecing out" the market by selling the product to different classes of people at different prices (in the present context, providing much lower insurance rates to young and healthy buyers). And many industries so regulated face the reality that, without an artificial increase in demand, they cannot continue on. When Congress is regulating these industries directly, it enjoys the broad power to enact "'all appropriate legislation'" to "'protec[t]'" and "'advanc[e]'" commerce, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36–37 (1937) (quoting *The Daniel Ball*, 10 Wall. 557, 564 (1871)). Thus, Congress might protect the imperiled industry by prohibiting low-cost competition, or by according it preferential tax treatment, or even by granting it a direct subsidy.

Here, however, Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress' desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the mar-

ket, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, "the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane." The Federalist No. 33, p. 202 (C. Rossiter ed. 1961).

At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants. In *New York* v. *United States*, 505 U. S. 144 (1992), we held that Congress could not, in an effort to regulate the disposal of radioactive waste produced in several different industries, order the States to take title to that waste. *Id.*, at 174–177. In *Printz* v. *United States*, 521 U. S. 898 (1997), we held that Congress could not, in an effort to regulate the distribution of firearms in the interstate market, compel state law enforcement officials to perform background checks. *Id.*, at 933–935. In *United States* v. *Lopez*, 514 U. S. 549 (1995), we held that Congress could not, as a means of fostering an educated interstate labor market through the protection of schools, ban the possession of a firearm within a school zone. *Id.*, at 559–563. And in *United States* v. *Morrison*, 529 U. S. 598 (2000), we held that Congress could not, in an effort to ensure the full participation of women in the interstate economy, subject private individuals and companies to suit for gender-motivated violent torts. *Id.*, at 609–619. The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And the last two of these cases show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and

Proper Clause is *Gonzales* v. *Raich*, 545 U. S. 1 (2005). That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Id.*, at 15–22. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing (cf. *Wickard*, 317 U. S. 111), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819).

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. 545 U. S., at 22. See also *Shreveport Rate Cases*, 234 U. S. 342 (1914) (Necessary and Proper Clause allows regulations of intrastate transactions if necessary to the regulation of an interstate market). Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards—which made it necessary and proper to prohibit the sale of all such trophies, see *Andrus* v. *Allard*, 444 U. S. 51 (1979).

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied

a full income tax credit given to those who do purchase the insurance.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. See Tr. of Oral Arg. 27–30, 43–45 (Mar. 27, 2012). It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept. See *Lopez*, 514 U. S., at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Section 5000A is defeated by that proposition.

B

The Government's second theory in support of the Individual Mandate is that § 5000A is valid because it is actually a "regulat[ion of] activities having a substantial relation to interstate commerce, . . . *i. e.*, . . . activities that substantially affect interstate commerce." *Id.*, at 558–559. See also *Shreveport Rate Cases*, *supra*. This argument takes a few different forms, but the basic idea is that § 5000A regulates "the way in which individuals finance their participation in the health *care* market." Petitioners' Minimum Coverage Brief 33 (emphasis added). That is, the provision directs the manner in which individuals purchase health care services and related goods (directing that they be purchased through insurance) and is therefore a straightforward exercise of the commerce power.

The primary problem with this argument is that § 5000A does not apply only to persons who purchase all, or most, or even any, of the health care services or goods that the mandated insurance covers. Indeed, the main objection many

have to the Mandate is that they have no intention of purchasing most or even any of such goods or services and thus no need to buy insurance for those purchases. The Government responds that the health care market involves "essentially universal participation," *id.*, at 35. The principal difficulty with this response is that it is, in the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase.* They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.[2] Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to forego health insurance coverage and [to] attempt to self-insure," 42 U. S. C. § 18091(2)(A), since those decisions have

[2] JUSTICE GINSBURG is therefore right to note that Congress is "not mandating the purchase of a discrete, unwanted product." *Ante,* at 608 (opinion concurring in part, concurring in judgment in part, and dissenting in part). Instead, it is mandating the purchase of an unwanted suite of products—*e. g.,* physician office visits, emergency room visits, hospital room and board, physical therapy, durable medical equipment, mental health care, and substance abuse detoxification. See Selected Medical Benefits: A Report From the Dept. of Labor to the Dept. of Health and Human Services (Apr. 15, 2011) (reporting that over two-thirds of private industry health plans cover these goods and services), online at http://www.bls.gov/ncs/ebs/sp/selmedbensreport.pdf (all Internet materials as visited June 26, 2012, and available in Clerk of Court's case file).

"a substantial and deleterious effect on interstate commerce," Petitioners' Minimum Coverage Brief 34. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part of it, even if not by choice. But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.

*Wickard* v. *Filburn* has been regarded as the most expansive assertion of the commerce power in our history. A close second is *Perez* v. *United States*, 402 U. S. 146 (1971), which upheld a statute criminalizing the eminently local activity of loan sharking. Both of those cases, however, involved commercial *activity*. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the "market" for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

## C

A few respectful responses to JUSTICE GINSBURG's dissent on the issue of the Mandate are in order. That dissent duly recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a "'rational basis' for concluding that the *regulated activity* substantially af-

fects interstate commerce," *ante*, at 602 (emphasis added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything. Ultimately the dissent is driven to saying that there is really no difference between action and inaction, *ante*, at 612–613, a proposition that has never recommended itself, neither to the law nor to common sense. To say, for example, that the inaction here consists of activity in "the self-insurance market," *ante*, at 613, seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." *Ante*, at 621. But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include "the power to enact criminal laws, . . . the power to imprison, . . . and the power to create a national bank," *ibid.* Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, *ante*, at 589, is quite beside the point. The issue here is whether the Federal Government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce.[3] The dissent treats the Constitution as though it is an enumeration of those problems that the Federal Government can address—among which, it finds, is "the Nation's course in the economic and social welfare realm," *ibid.*, and more specifically "the problem of the uninsured," *ante*, at 595. The Constitution is not that. It enumerates not federally soluble *problems*, but federally available *powers*. The Federal Government can address

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[3] In its effort to show the contrary, JUSTICE GINSBURG's dissent comes up with nothing more than two condemnation cases, which it says demonstrate "Congress' authority under the commerce power to compel an 'inactive' landholder to submit to an unwanted sale." *Ante*, at 611. Wrong on both scores. As its name suggests, the condemnation power does not "compel" anyone to do anything. It acts *in rem*, against the property that is condemned, and is effective with or without a transfer of title from the former owner. More important, the power to condemn for public use is a separate sovereign power, explicitly acknowledged in the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation."

Thus, the power to condemn tends to refute rather than support the power to compel purchase of unwanted goods at a prescribed price: The latter is rather like the power to condemn cash for public use. If it existed, why would it not (like the condemnation power) be accompanied by a requirement of fair compensation for the portion of the exacted price that exceeds the goods' fair market value (here, the difference between what the free market would charge for a health insurance policy on a young, healthy person with no pre-existing conditions, and the government-exacted community-rated premium)?

whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

The dissent dismisses the conclusion that the power to compel entry into the health insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, "will be obliged to pay at the counter before receiving the vehicle or nourishment," whereas those refusing to purchase health insurance will ultimately get treated anyway, at others' expense. *Ante*, at 608. "[T]he unique attributes of the health-care market . . . give rise to a significant free-riding problem that does not occur in other markets." *Ante*, at 614. And "a vegetable-purchase mandate" (or a car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. *Ante*, at 615. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health care costs that are a burden on the rest of us—in which case, under the theory of JUSTICE GINSBURG's dissent, moving against those inactivities will also come within the Federal Government's unenumerated problem-solving powers.)

II

**The Taxing Power**

As far as § 5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority,[4] and § 5000A is therefore invalid. The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." Petitioners' Minimum Coverage Brief 52. The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: a penalty for constitutional purposes that is *also* a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both.[5] The two are mutually exclusive. Thus, what the Government's caption should have read was "ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITH-PENALTY BUT A TAX." It is important to bear this in mind in evaluating the tax argument of the Government and of

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[4] No one seriously contends that any of Congress' other enumerated powers gives it the authority to enact § 5000A *as a regulation*.

[5] Of course it can be both for statutory purposes, since Congress can define "tax" and "penalty" in its enactments any way it wishes. That is why *United States* v. *Sotelo*, 436 U. S. 268 (1978), does not disprove our statement. That case held that a "penalty" for willful failure to pay one's taxes was included among the "taxes" made nondischargeable under the Bankruptcy Code. *Id.*, at 273–275. Whether the "penalty" was a "tax" within the meaning of the Bankruptcy Code had absolutely no bearing on whether it escaped the constitutional limitations on penalties.

those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so.

In answering that question we must, if "fairly possible," *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional *(ut res magis valeat quam pereat)*. But we cannot rewrite the statute to be what it is not. "'"[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . " or judicially rewriting it.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986) (quoting *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964), in turn quoting *Scales* v. *United States*, 367 U. S. 203, 211 (1961)). In this case, there is simply no way, "without doing violence to the fair meaning of the words used," *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, 269 (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: "'[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996) (quoting *United States* v. *La Franca*, 282 U. S. 568, 572 (1931)). In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an Act "adopt[s] the criteria of wrong-

doing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case*, 259 U. S. 20, 38 (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum coverage provision is found in 26 U. S. C. § 5000A, entitled "*Requirement* to maintain minimum essential coverage." (Emphasis added.) It commands that every "applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage." *Ibid.* (emphasis added). And the immediately following provision states that, "[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty*." § 5000A(b) (emphasis added). And several of Congress' legislative "findings" with regard to § 5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See 42 U. S. C. § 18091(2)(A) ("The requirement regulates activity . . . "); § 18091(2)(C) ("The requirement . . . will add millions of new consumers to the health insurance market . . . "); § 18091(2)(D) ("The requirement achieves near-universal coverage"); § 18091(2)(H) ("The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market"); § 18091(3) ("[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation").

The Government and those who support its view on the tax point rely on *New York* v. *United States*, 505 U. S. 144, to justify reading "shall" to mean "may." The "shall" in that case was contained in an introductory provision—a recital that provided for no legal consequences—which said that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 42 U. S. C. § 2021c(a)(1)(A). The Court did not hold that "shall" could

be construed to mean "may," but rather that this preliminary provision could not impose upon the operative provisions of the Act a mandate that they did not contain: "We . . . decline petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act." *New York*, 505 U. S., at 170. Our opinion then proceeded to "consider each [of the three operative provisions] in turn." *Ibid.* Here the mandate—the "shall"—is contained not in an inoperative preliminary recital, but in the dispositive operative provision itself. *New York* provides no support for reading it to be permissive.

Quite separately, the fact that Congress (in its own words) "imposed . . . a penalty," 26 U. S. C. § 5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an act makes it unlawful: "[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act." *Powhatan Steamboat Co.* v. *Appomattox R. Co.*, 24 How. 247, 252 (1861). Or in the words of Chancellor Kent: "If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute." 1 J. Kent, Commentaries on American Law 436 (1826).

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty—such as "license" (*License Tax Cases*, 5 Wall. 462 (1867)) or "surcharge" *(New York* v. *United States*, *supra.)*. But we have never—*never*—treated as a tax an exaction which faces up

to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in § 5000A itself and elsewhere throughout the Act, Congress called the exaction in § 5000A(b) a "penalty."

That § 5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of "applicable individual" subject to the minimum coverage requirement: those with religious objections or who participate in a "health care sharing ministry," § 5000A(d)(2); those who are "not lawfully present" in the United States, § 5000A(d)(3); and those who are incarcerated, § 5000A(d)(4). Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: those who cannot afford coverage, § 5000A(e)(1); who earn too little income to require filing a tax return, § 5000A(e)(2); who are members of an Indian tribe, § 5000A(e)(3); who experience only short gaps in coverage, § 5000A(e)(4); and who, in the judgment of the Secretary of Health and Human Services, "have suffered a hardship with respect to the capability to obtain coverage," § 5000A(e)(5). If § 5000A were a tax, these two classes of exemption would make no sense; there being no requirement, *all* the exemptions would attach to the penalty (renamed tax) alone.

In the face of all these indications of a regulatory requirement accompanied by a penalty, the Solicitor General assures us that "neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation," Petitioners' Minimum Coverage Brief 61, and that "[i]f [those subject to the Act] pay the tax penalty, they're in compliance with the law," Tr. of Oral Arg. 50 (Mar. 26, 2012). These self-serving litigating

positions are entitled to no weight. What counts is what the statute says, and that is entirely clear. It is worth noting, moreover, that these assurances contradict the Government's position in related litigation. Shortly before the Affordable Care Act was passed, the Commonwealth of Virginia enacted Va. Code Ann. §38.2–3430.1:1 (Lexis Supp. 2011), which states, "No resident of [the] Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services . . . ." In opposing Virginia's assertion of standing to challenge §5000A based on this statute, the Government said that "if the minimum coverage provision is unconstitutional, the [Virginia] statute is unnecessary, and if the minimum coverage provision is upheld, the state statute is void under the Supremacy Clause." Brief for Appellant in No. 11–1057 etc. (CA4), p. 29. But it would be void under the Supremacy Clause only if it was contradicted by a federal "require[ment] to obtain or maintain a policy of individual insurance coverage."

Against the mountain of evidence that the minimum coverage requirement is what the statute calls it—a requirement—and that the penalty for its violation is what the statute calls it—a penalty—the Government brings forward the flimsiest of indications to the contrary. It notes that "[t]he minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual . . . will owe a monetary penalty, in addition to the income tax itself," and that "[t]he [Internal Revenue Service (IRS)] will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code." Petitioners' Minimum Coverage Brief 53. The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard of or rare. It is not. See, *e. g.*, 26 U. S. C. §527(j) (IRS-collectible penalty for failure to make campaign-finance disclosures); §5761(c) (IRS-collectible penalty for domestic sales of tobacco products labeled for export); §9707 (IRS-

collectible penalty for failure to make required health insurance premium payments on behalf of mining employees). In *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, we held that an exaction not only *enforced* by the Commissioner of Internal Revenue but even *called* a "tax" was in fact a penalty. "[I]f the concept of penalty means anything," we said, "it means punishment for an unlawful act or omission." *Id.*, at 224. See also *Lipke* v. *Lederer*, 259 U. S. 557 (1922) (same). Moreover, while the penalty is assessed and collected by the IRS, § 5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veterans Affairs), see §§ 5000A(e)(1)(D), (e)(5), (f)(1)(A)(v), (f)(1)(E) (2006 ed., Supp. IV), which is responsible for defining its substantive scope—a feature that would be quite extraordinary for taxes.

The Government points out that "[t]he amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and [a] ca[p]," and that individuals who earn so little money that they "are not required to file income tax returns for the taxable year are not subject to the penalty" (though they are, as we discussed earlier, subject to the mandate). Petitioners' Minimum Coverage Brief 12, 53. But varying a penalty according to ability to pay is an utterly familiar practice. See, *e. g.*, 33 U. S. C. § 1319(d) (2006 ed.) ("In determining the amount of a civil penalty the court shall consider . . . the economic impact of the penalty on the violator"); see also 6 U. S. C. § 488e(c) (2006 ed., Supp. IV); 7 U. S. C. §§ 7734(b)(2), 8313(b)(2) (2006 ed.); 12 U. S. C. §§ 1701q–1(d)(3), 1723i(c)(3), 1735f–14(c)(3), 1735f–15(d)(3), 4585(c)(2) (2006 ed. and Supp. IV); 15 U. S. C. §§ 45(m)(1)(C), 77h–1(g)(3), 78u–2(d), 80a–9(d)(4), 80b–3(i)(4), 1681s(a)(2)(B), 1717a(b)(3), 1825(b)(1), 2615(a)(2)(B), 5408(b)(2) (2006 ed. and Supp. IV); 33 U. S. C. § 2716a(a) (2006 ed.).

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute

repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The *presence* of such a requirement suggests a penalty—though one can imagine a tax imposed only on willful action; but the *absence* of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. And where a statute is silent as to scienter, we traditionally presume a *mens rea* requirement if the statute imposes a "severe penalty." *Staples* v. *United States*, 511 U. S. 600, 618 (1994). Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act's "Revenue Provisions." In sum, "the terms of [the] act rende[r] it unavoidable," *Parsons* v. *Bedford*, 3 Pet. 433, 448 (1830), that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, *e. g.*, Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." *United States* v. *Munoz-Flores*, 495 U. S. 385, 395 (1990). We have no doubt that Congress knew precisely what it was

doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H. R. 3962, 111th Cong., 1st Sess., § 501 (2009); America's Healthy Future Act of 2009, S. 1796, 111th Cong., 1st Sess., § 1301. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that § 5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. Petitioners' Minimum Coverage Reply Brief 25. At oral argument, the most prolonged statement about the issue was just over 50 words. Tr. of Oral Arg. 79 (Mar. 27, 2012). One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.

## III

## The Anti-Injunction Act

There is another point related to the Individual Mandate that we must discuss—a point that logically should have been discussed first: whether jurisdiction over the challenges to the minimum-coverage provision is precluded by the Anti-

Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," 26 U. S. C. § 7421(a) (2006 ed.).

We have left the question to this point because it seemed to us that the dispositive question whether the minimum-coverage provision is a tax is more appropriately addressed in the significant constitutional context of whether it is an exercise of Congress' taxing power. Having found that it is not, we have no difficulty in deciding that these suits do not have "the purpose of restraining the assessment or collection of any tax."[6]

The Government and those who support its position on this point make the remarkable argument that § 5000A is not

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[6] The *amicus* appointed to defend the proposition that the Anti-Injunction Act deprives us of jurisdiction stresses that the penalty for failing to comply with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," 26 U. S. C. § 5000A(g)(1) (2006 ed., Supp. IV), and that such penalties "shall be assessed and collected in the same manner as taxes," § 6671(a) (2006 ed.). But that point seems to us to confirm the *inapplicability* of the Anti-Injunction Act. That the penalty is to be "assessed and collected *in the same manner as* taxes" refutes the proposition that it *is* a tax for all statutory purposes, including with respect to the Anti-Injunction Act. Moreover, elsewhere in the Internal Revenue Code, Congress has provided *both* that a particular payment shall be "assessed and collected" in the same manner as a tax *and* that no suit shall be maintained to restrain the assessment or collection of the payment. See, *e. g.*, §§ 7421(b)(1), 6901(a); §§ 6305(a), (b). The latter directive would be superfluous if the former invoked the Anti-Injunction Act.

*Amicus* also suggests that the penalty should be treated as a tax because it is an assessable penalty, and the Code's assessment provision authorizes the Secretary of the Treasury to assess "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." § 6201(a) (2006 ed., Supp. IV). But the fact that such items are included as "taxes" for purposes of assessment does not establish that they are included as "taxes" for purposes of other sections of the Code, such as the Anti-Injunction Act, that do not contain similar "including" language.

a tax for purposes of the Anti-Injunction Act, see Brief for Petitioners in No. 11–398 (Anti-Injunction Act), but is a tax for constitutional purposes, see Petitioners' Minimum Coverage Brief 52–62. The rhetorical device that tries to cloak this argument in superficial plausibility is the same device employed in arguing that for constitutional purposes the minimum-coverage provision is a tax: confusing the question of what Congress *did* with the question of what Congress *could have done.* What qualifies as a tax for purposes of the Anti-Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress. Compare *Bailey* v. *George*, 259 U. S. 16, 20 (1922) (Anti-Injunction Act barred suit to restrain collections under the Child Labor Tax Law), with *Child Labor Tax Case*, 259 U. S., at 36–41 (holding the same law unconstitutional as exceeding Congress' taxing power). Congress could have defined "tax" for purposes of that statute in such fashion as to exclude some exactions that in fact are "taxes." It might have prescribed, for example, that a particular exercise of the taxing power "shall not be regarded as a tax for purposes of the Anti-Injunction Act." But there is no such prescription here. What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.

## IV

## The Medicaid Expansion

We now consider respondents' second challenge to the constitutionality of the ACA, namely, that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.

The ACA does not legally compel the States to participate in the expanded Medicaid program, but the Act authorizes a severe sanction for any State that refuses to go along: termi-

nation of all the State's Medicaid funding. For the average State, the annual federal Medicaid subsidy is equal to more than one-fifth of the State's expenditures.[7] A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.

The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all. As proof of this, they point to the goal and the structure of the ACA. The goal of the Act is to provide near-universal medical coverage, 42 U. S. C. § 18091(2)(D), and without 100% state participation in the Medicaid program, attainment of this goal would be thwarted. Even if States could elect to remain in the old Medicaid program, while declining to participate in the Expansion, there would be a gaping hole in coverage. And if a substantial number of States were entirely expelled from the program, the number of persons without coverage would be even higher.

In light of the ACA's goal of near-universal coverage, petitioners argue, if Congress had thought that anything less than 100% state participation was a realistic possibility, Congress would have provided a backup scheme. But no such scheme is to be found anywhere in the more than 900 pages of the Act. This shows, they maintain, that Congress was certain that the ACA's Medicaid offer was one that no State could refuse.

In response to this argument, the Government contends that any congressional assumption about uniform state par-

[7] "State expenditures" is used here to mean annual expenditures from the States' own funding sources, and it excludes federal grants unless otherwise noted.

ticipation was based on the simple fact that the offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted to the States.

## A

No one has ever doubted that the Constitution authorizes the Federal Government to spend money, but for many years the scope of this power was unsettled. The Constitution grants Congress the power to collect taxes "to . . . provide for the . . . general Welfare of the United States," Art. I, § 8, cl. 1, and from "the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase" "the general welfare." *Butler*, 297 U. S., at 65. Madison, it has been said, thought that the phrase "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," while Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them." *Ibid.*

The Court resolved this dispute in *Butler*. Writing for the Court, Justice Roberts opined that the Madisonian view would make Article I's grant of the spending power a "mere tautology." *Ibid.* To avoid that, he adopted Hamilton's approach and found that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Id.*, at 66. Instead, he wrote, the spending power's "confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress." *Ibid.;* see also *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 586–587 (1937); *Helvering* v. *Davis*, 301 U. S. 619, 640 (1937).

The power to make any expenditure that furthers "the general welfare" is obviously very broad, and shortly after *Butler* was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies. See *Helvering*, 301 U. S., at 640–641. "The discretion belongs to Congress," the Court wrote, "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.*, at 640. Since that time, the Court has never held that a federal expenditure was not for "the general welfare."

B

One way in which Congress may spend to promote the general welfare is by making grants to the States. Monetary grants, so-called grants-in-aid, became more frequent during the 1930's, G. Stephens & N. Wikstrom, American Intergovernmental Relations—A Fragmented Federal Polity 83 (2007), and by 1950 they had reached $20 billion[8] or 11.6% of state and local government expenditures from their own sources.[9] By 1970 this number had grown to $123.7 billion[10] or 29.1% of state and local government expenditures from their own sources.[11] As of 2010, federal outlays to state and local governments came to over $608 billion or 37.5% of state and local government expenditures.[12]

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[8] This number is expressed in billions of Fiscal Year 2005 dollars.

[9] See Office of Management and Budget, Historical Tables, Budget of the U. S. Government, Fiscal Year 2013, Table 12.1—Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940–2017 (hereinafter Table 12.1), http://www.whitehouse.gov/omb/budget/Historicals; *id.*, Table 15.2—Total Government Expenditures: 1948–2011 (hereinafter Table 15.2).

[10] This number is expressed in billions of Fiscal Year 2005 dollars.

[11] See Table 12.1; Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2001, p. 262 (Table 419, Federal Grants-in-Aid Summary: 1970 to 2001).

[12] See Statistical Abstract of the United States: 2012, p. 268 (Table 431, Federal Grants-in-Aid to State and Local Governments: 1990 to 2011).

When Congress makes grants to the States, it customarily attaches conditions, and this Court has long held that the Constitution generally permits Congress to do this. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981); *South Dakota* v. *Dole*, 483 U. S. 203, 206 (1987); *Fullilove* v. *Klutznick*, 448 U. S. 448, 474 (1980) (opinion of Burger, C. J.); *Steward Machine*, *supra*, at 593.

C

This practice of attaching conditions to federal funds greatly increases federal power. "[O]bjectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Dole*, *supra*, at 207 (internal quotation marks and citation omitted); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 686 (1999) (by attaching conditions to federal funds, Congress may induce the States to "tak[e] certain actions that Congress could not require them to take").

This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution. If Congress' "Spending Clause power to pursue objectives outside of Article I's enumerated legislative fields," *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 654 (1999) (KENNEDY, J., dissenting) (internal quotation marks omitted), is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,'" *Dole*, *supra*, at 217 (O'Connor, J., dissenting) (quoting *Butler*, *supra*, at 78). "[T]he Spending Clause power, if wielded without concern for the federal bal-

ance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis*, *supra*, at 654–655 (KENNEDY, J., dissenting).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. See, *e. g.*, *Dole*, 483 U. S., at 207–208; *id.*, at 207 (spending power is "subject to several general restrictions articulated in our cases"). For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst*, *supra*, at 17. Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts* v. *United States*, 435 U. S. 444, 461 (1978) (plurality opinion), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole*, *supra*, at 210; see *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 269–270 (1985). Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine*, 301 U. S., at 590. Accord, *College Savings Bank*, *supra*, at 687; *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 285 (1991) (White, J., dissenting); *Dole*, *supra*, at 211.

When federal legislation gives the States a real choice whether to accept or decline a federal aid package, the federal-state relationship is in the nature of a contractual relationship. See *Barnes* v. *Gorman*, 536 U. S. 181, 186 (2002); *Pennhurst*, 451 U. S., at 17. And just as a contract is voidable if coerced, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of

the 'contract.'" *Ibid.* (emphasis added). If a federal spending program coerces participation the States have not "exercise[d] their choice"—let alone made an "informed choice." *Id.*, at 17, 25.

Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis*, *supra*, at 685 (KENNEDY, J., dissenting). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U. S., at 162. Congress may not "simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, at 161 (internal quotation marks and brackets omitted). Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory.

Where all Congress has done is to "encourag[e] state regulation rather than compe[l] it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.*, at 168.

*Amici* who support the Government argue that forcing state employees to implement a federal program is more respectful of federalism than using federal workers to implement that program. See, *e. g.*, Brief for Service Employees International Union et al. as *Amici Curiae* in No. 11–398, pp. 25–26. They note that Congress, instead of expanding Medicaid, could have established an entirely federal program to provide coverage for the same group of people. By choosing to structure Medicaid as a cooperative federal-state program, they contend, Congress allows for more state control. *Ibid.*

This argument reflects a view of federalism that our cases have rejected—and with good reason. When Congress compels the States to do its bidding, it blurs the lines of political accountability. If the Federal Government makes a controversial decision while acting on its own, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U. S., at 168. But when the Federal Government compels the States to take unpopular actions, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.*, at 169; see *Printz*, 521 U. S., at 930. For this reason, federal officeholders may view this "departur[e] from the federal structure to be in their personal interests . . . as a means of shifting responsibility for the eventual decision." *New York*, 505 U. S., at 182–183. And even state officials may favor such a "departure from the constitutional plan," since uncertainty concerning responsibility may also permit them to escape accountability. *Id.*, at 182. If a program is popular, state officials may claim credit; if it is unpopular, they may protest that they were merely responding to a federal directive.

Once it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA's expanded Medicaid coverage coercive? We now turn to those questions.

## D

### 1

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package.

Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power. And as our decision in *South Dakota* v. *Dole* makes clear, theoretical voluntariness is not enough.

In *South Dakota* v. *Dole*, we considered whether the spending power permitted Congress to condition 5% of the State's federal highway funds on the State's adoption of a minimum drinking age of 21 years. South Dakota argued that the program was impermissibly coercive, but we disagreed, reasoning that "Congress ha[d] directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds." 483 U. S., at 211. Because "all South Dakota would lose if she adhere[d] to her chosen course as to a suitable minimum drinking age [was] 5% of the funds otherwise obtainable under specified highway grant programs," we found that "Congress ha[d] offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Ibid.* Thus, the decision whether to comply with the federal condition "remain[ed] the prerogative of the States *not merely in theory but in fact*," and so the program at issue did not exceed Congress' power. *Id.*, at 211–212 (emphasis added).

The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly "crossed the line distinguishing encouragement from coercion," *New York*, *supra*, at 175, a federal program that coopts the States' political processes must be declared unconstitutional. "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene." *Lopez*, 514 U. S., at 578 (KENNEDY, J., concurring).

2

The Federal Government's argument in this case at best pays lipservice to the anticoercion principle. The Federal

Government suggests that it is sufficient if States are "free, *as a matter of law*, to turn down" federal funds. Brief for Respondents in No. 11–400, p. 17 (emphasis added); see also *id.*, at 25. According to the Federal Government, neither the amount of the offered federal funds nor the amount of the federal taxes extracted from the taxpayers of a State to pay for the program in question is relevant in determining whether there is impermissible coercion. *Id.*, at 41–46.

This argument ignores reality. When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.[13]

Acceptance of the Federal Government's interpretation of the anticoercion rule would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level. Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and

[13] JUSTICE GINSBURG argues that "[a] State . . . has no claim on the money its residents pay in federal taxes." *Ante*, at 643, n. 26. This is true as a formal matter. "When the United States Government taxes United States citizens, it taxes them 'in their individual capacities' as 'the people of America'—not as residents of a particular State." *Ibid.* (quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 839 (1995) (KENNEDY, J., concurring); some internal quotation marks omitted). But unless JUSTICE GINSBURG thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes.

hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education. Asked at oral argument whether such a law would be allowed under the spending power, the Solicitor General responded that it would. Tr. of Oral Arg. in No. 11–400, pp. 44–45 (Mar. 28, 2012).

E

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anti-coercion rule does not apply in this case, then there is no such rule.

1

The dimensions of the Medicaid program lend strong support to the petitioner States' argument that refusing to accede to the conditions set out in the ACA is not a realistic option. Before the ACA's enactment, Medicaid funded medical care for pregnant women, families with dependents, children, the blind, the elderly, and the disabled. See 42 U. S. C. § 1396a(a)(10) (2006 ed. and Supp. IV). The ACA greatly expands the program's reach, making new funds available to States that agree to extend coverage to all individuals who are under age 65 and have incomes below 133% of the federal poverty line. See § 1396a(a)(10)(A)(i)(VIII) (2006 ed., Supp.

IV). Any State that refuses to expand its Medicaid programs in this way is threatened with a severe sanction: the loss of all its federal Medicaid funds. See § 1396c (2006 ed.).

Medicaid has long been the largest federal program of grants to the States. See Brief for Respondents in No. 11–400, at 37. In 2010, the Federal Government directed more than $552 billion in federal funds to the States. See Nat. Assn. of State Budget Officers, 2010 State Expenditure Report: Examining Fiscal 2009–2011 State Spending, p. 7 (2011) (NASBO Report). Of this, more than $233 billion went to pre-expansion Medicaid. See *id.*, at 47.[14] *This amount equals nearly 22% of all state expenditures combined.* See *id.*, at 7.

The States devote a larger percentage of their budgets to Medicaid than to any other item. *Id.*, at 5. Federal funds account for anywhere from 50% to 83% of each State's total Medicaid expenditures, see § 1396d(b) (2006 ed., Supp. IV); most States receive more than $1 billion in federal Medicaid funding; and a quarter receive more than $5 billion, NASBO Report 47. These federal dollars total nearly two thirds—64.6%—of all Medicaid expenditures nationwide.[15] *Id.*, at 46.

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[14] The Federal Government has a higher number for federal spending on Medicaid. According to the Office of Management and Budget, federal grants to the States for Medicaid amounted to nearly $273 billion in Fiscal Year 2010. See Office of Management and Budget, Historical Tables, Budget of the U. S. Government, Fiscal Year 2013, Table 12.3—Total Outlays for Grants to State and Local Governments by Function, Agency, and Program: 1940–2013, http://www.whitehouse.gov/omb/budget/Historicals. In that fiscal year, total federal outlays for grants to state and local governments amounted to over $608 billion, see Table 12.1, and state and local government expenditures from their own sources amounted to $1.6 trillion, see Table 15.2. Using these numbers, 44.8% of all federal outlays to both state and local governments was allocated to Medicaid, amounting to 16.8% of all state and local expenditures from their own sources.

[15] The Federal Government reports a higher percentage. According to Medicaid.gov, in Fiscal Year 2010, the Federal Government made Medicaid payments in the amount of nearly $260 billion, representing 67.79% of total

The Court of Appeals concluded that the States failed to establish coercion in this case in part because the "states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not like Congress's terms." 648 F. 3d 1235, 1268 (CA11 2011); see Brief for Sen. Harry Reid et al. as *Amici Curiae* in No. 11–400, p. 21 ("States may always choose to decrease expenditures on other programs or to raise revenues"). But the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue. Arizona, for example, commits 12% of its state expenditures to Medicaid, and relies on the Federal Government to provide the rest: $5.6 billion, equaling roughly one-third of Arizona's annual state expenditures of $17 billion. See NASBO Report 7, 47. Therefore, if Arizona lost federal Medicaid funding, the State would have to commit an additional 33% of all its state expenditures to fund an equivalent state program along the lines of pre-expansion Medicaid. This means that the State would have to allocate 45% of its annual expenditures for that one purpose. See *ibid.*

The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, see *id.*, at 7, 16, and equals only 6.6% of all state expenditures combined. See *ibid.* In Arizona, for example, although federal Medicaid expenditures are equal to 33% of all state expenditures, federal education funds amount to only 9.8% of all state expenditures. See *ibid.* And even in States with less than average federal Medicaid funding, that funding is at least twice the size of federal education

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Medicaid payments of $383 billion. See www.medicaid.gov/Medicaid-CHIP-Program-Information/By-State/By-State.html.

funding as a percentage of state expenditures. *Id.*, at 7, 16, 47.

A State forced out of the Medicaid program would face burdens in addition to the loss of federal Medicaid funding. For example, a nonparticipating State might be found to be ineligible for other major federal funding sources, such as Temporary Assistance for Needy Families (TANF), which is premised on the expectation that States will participate in Medicaid. See 42 U. S. C. § 602(a)(3) (requiring that certain beneficiaries of TANF funds be "eligible for medical assistance under the State['s Medicaid] plan"). And withdrawal or expulsion from the Medicaid program would not relieve a State's hospitals of their obligation under federal law to provide care for patients who are unable to pay for medical services. The Emergency Medical Treatment and Active Labor Act, § 1395dd, requires hospitals that receive any federal funding to provide stabilization care for indigent patients but does not offer federal funding to assist facilities in carrying out its mandate. Many of these patients are now covered by Medicaid. If providers could not look to the Medicaid program to pay for this care, they would find it exceedingly difficult to comply with federal law unless they were given substantial state support. See, *e. g.*, Brief for Economists as *Amici Curiae* in No. 11–400, p. 11.

For these reasons, the offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending-power case. In *South Dakota* v. *Dole*, the total amount that the States would have lost if every single State had refused to comply with the 21-year-old drinking age was approximately $614.7 million—or about 0.19% of all state expenditures combined. See Nat. Assn. of State Budget Officers, 1989 (Fiscal Years 1987–1989 Data) State Expenditure Report 10, 84 (1989), http://www.nasbo.org/publications-data/state-expenditure-report/archives. South Dakota stood to lose, at most, fund-

ing that amounted to less than 1% of its annual state expenditures. See *ibid.* Under the ACA, by contrast, the Federal Government has threatened to withhold 42.3% of all federal outlays to the States, or approximately $233 billion. See NASBO Report 7, 10, 47. South Dakota stands to lose federal funding equaling 28.9% of its annual state expenditures. See *id.*, at 7, 47. Withholding $614.7 million, equaling only 0.19% of all state expenditures combined, is aptly characterized as "relatively mild encouragement," but threatening to withhold $233 billion, equaling 21.86% of all state expenditures combined, is a different matter.

2

What the statistics suggest is confirmed by the goal and structure of the ACA. In crafting the ACA, Congress clearly expressed its informed view that no State could possibly refuse the offer that the ACA extends.

The stated goal of the ACA is near-universal health care coverage. To achieve this goal, the ACA mandates that every person obtain a minimum level of coverage. It attempts to reach this goal in several different ways. The guaranteed-issue and community-rating provisions are designed to make qualifying insurance available and affordable for persons with medical conditions that may require expensive care. Other ACA provisions seek to make such policies more affordable for people of modest means. Finally, for low-income individuals who are simply not able to obtain insurance, Congress expanded Medicaid, transforming it from a program covering only members of a limited list of vulnerable groups into a program that provides at least the requisite minimum level of coverage for the poor. See 42 U. S. C. §§ 1396a(a)(10)(A)(i)(VIII) (2006 ed. and Supp. IV), 1396u–7(a), (b)(5), 18022(a). This design was intended to provide at least a specified minimum level of coverage for all Americans, but the achievement of that goal obviously depends on participation by every single State. If any State—not to

mention all of the 26 States that brought this suit—chose to decline the federal offer, there would be a gaping hole in the ACA's coverage.

It is true that some persons who are eligible for Medicaid coverage under the ACA may be able to secure private insurance, either through their employers or by obtaining subsidized insurance through an exchange. See 26 U. S. C. § 36B(a) (2006 ed., Supp. IV); Brief for Respondents in No. 11–400, at 12. But the new federal subsidies are not available to those whose income is below the federal poverty level, and the ACA provides no means, other than Medicaid, for these individuals to obtain coverage and comply with the Mandate. The Government counters that these people will not have to pay the penalty, see, *e. g.*, Tr. of Oral Arg. in No. 11–400, p. 68 (Mar. 28, 2012); Brief for Respondents in No. 11–400, at 49–50, but that argument misses the point: Without Medicaid, these individuals will not have coverage and the ACA's goal of near-universal coverage will be severely frustrated.

If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold. But nowhere in the over 900-page Act is such a scheme to be found. By contrast, because Congress thought that some States might decline federal funding for the operation of a "health benefit exchange," Congress provided a backup scheme; if a State declines to participate in the operation of an exchange, the Federal Government will step in and operate an exchange in that State. See 42 U. S. C. § 18041(c)(1) (2006 ed., Supp. IV). Likewise, knowing that States would not necessarily provide affordable health insurance for aliens lawfully present in the United States—because Medicaid does not require States to provide such coverage—Congress extended the availability of the new federal insurance subsidies to all aliens. See 26

U. S. C. § 36B(c)(1)(B)(ii) (excepting from the income limit individuals who are "not eligible for the medicaid program . . . by reason of [their] alien status"). Congress did not make these subsidies available for citizens with incomes below the poverty level because Congress obviously assumed that they would be covered by Medicaid. If Congress had contemplated that some of these citizens would be left without Medicaid coverage as a result of a State's withdrawal or expulsion from the program, Congress surely would have made them eligible for the tax subsidies provided for low-income aliens.

These features of the ACA convey an unmistakable message: Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option.

The Federal Government does not dispute the inference that Congress anticipated 100% state participation, but it argues that this assumption was based on the fact that ACA's offer was an "exceedingly generous" gift. Brief for Respondents in No. 11–400, at 50. As the Federal Government sees things, Congress is like the generous benefactor who offers $1 million with few strings attached to 50 randomly selected individuals. Just as this benefactor might assume that all of these 50 individuals would snap up his offer, so Congress assumed that every State would gratefully accept the federal funds (and conditions) to go with the expansion of Medicaid.

This characterization of the ACA's offer raises obvious questions. If that offer is "exceedingly generous," as the Federal Government maintains, why have more than half the States brought this lawsuit, contending that the offer is coercive? And why did Congress find it necessary to threaten that any State refusing to accept this "exceedingly generous" gift would risk losing all Medicaid funds? Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid

Expansion. Congress took such an approach in some earlier amendments to Medicaid, separating new coverage requirements and funding from the rest of the program so that only new funding was conditioned on new eligibility extensions. See, *e. g.*, Social Security Amendments of 1972, 86 Stat. 1465.

Congress' decision to do otherwise here reflects its understanding that the ACA offer is not an "exceedingly generous" gift that no State in its right mind would decline. Instead, acceptance of the offer will impose very substantial costs on participating States. It is true that the Federal Government will bear most of the initial costs associated with the Medicaid Expansion, first paying 100% of the costs of covering newly eligible individuals between 2014 and 2016. 42 U. S. C. § 1396d(y). But that is just part of the picture. Participating States will be forced to shoulder substantial costs as well, because after 2019 the Federal Government will cover only 90% of the costs associated with the Expansion, see *ibid.*, with state spending projected to increase by at least $20 billion by 2020 as a consequence. Statement of Douglas W. Elmendorf, CBO's Analysis of the Major Health Care Legislation Enacted in March 2010, p. 24 (Mar. 30, 2011); see also R. Bovbjerg, B. Ormond, & V. Chen, Kaiser Commission on Medicaid and the Uninsured, State Budgets Under Federal Health Reform: The Extent and Causes of Variations in Estimated Impacts 4, n. 27 (Feb. 2011) (estimating new state spending at $43.2 billion through 2019). After 2019, state spending is expected to increase at a faster rate; the Congressional Budget Office estimates new state spending at $60 billion through 2021. Statement of Douglas W. Elmendorf, *supra*, at 24. And these costs may increase in the future because of the very real possibility that the Federal Government will change funding terms and reduce the percentage of funds it will cover. This would leave the States to bear an increasingly large percentage of the bill. See Tr. of Oral Arg. in No. 11–400, pp. 74–76 (Mar. 28, 2012). Finally, after 2015, the States will have to pick up the tab

for 50% of all administrative costs associated with implementing the new program, see §§ 1396b(a)(2)–(5), (7) (2006 ed. and Supp. IV), costs that could approach $12 billion between fiscal years 2014 and 2020, see Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, 2010 Actuarial Report on the Financial Outlook for Medicaid 30.

In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.

F

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. See Parts IV–A to IV–E, *supra;* Part IV–A, *ante,* at 575–585 (opinion of ROBERTS, C. J., joined by BREYER and KAGAN, JJ.). Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes—in two cursory sentences at the very end of its brief—preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their preexisting Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance

industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design "'would be to make a new law, not to enforce an old one. This is no part of our duty.'" *Trade-Mark Cases*, 100 U. S. 82, 99 (1879).

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there.

The Government cites a severability clause codified with Medicaid in Chapter 7 of the United States Code stating that if "any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U. S. C. § 1303. But that clause tells us only that other provisions in Chapter 7 should not be invalidated if § 1396c, the authorization for the cutoff of all Medicaid funds, is unconstitutional. It does not tell us that § 1396c can be judicially revised, to say what it does not say. Such a judicial power would not be called the doctrine of severability but perhaps the doctrine of amendatory invalidation—similar to the amendatory veto that permits the Governors of some States to reduce the amounts appropriated in legislation. The proof that such a power does not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the cutoff of only incremental Medicaid funding, but it might just as well have permitted, say, the cutoff of funds that repre-

sent no more than $x$ percent of the State's budget. The Court severs nothing, but simply revises § 1396c to read as the Court would desire.

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

## V

## Severability

The Affordable Care Act seeks to achieve "near-universal" health insurance coverage. § 18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the Act is, and this is all the more reason why it is judicial usurpation to impose an entirely new mechanism for withdrawal of Medicaid funding, see Part IV–F, *supra*, which is one of many examples of how rewriting the Act alters its dynamics.

### A

When an unconstitutional provision is but a part of a more comprehensive statute, the question arises as to the validity of the remaining provisions. The Court's authority to declare a statute partially unconstitutional has been well established since *Marbury* v. *Madison*, 1 Cranch 137 (1803), when the Court severed an unconstitutional provision from the Ju-

diciary Act of 1789. And while the Court has sometimes applied "at least a modest presumption in favor of . . . severability," C. Nelson, Statutory Interpretation 144 (2011), it has not always done so, see, *e. g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 190–195 (1999).

An automatic or too cursory severance of statutory provisions risks "rewrit[ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 362 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

The Court has applied a two-part guide as the framework for severability analysis. The test has been deemed "well established." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. See *id.*, at 685. In *Alaska Airlines*, the Court clarified that this first inquiry requires more than asking whether "the balance of the legislation is incapable of functioning independently." *Id.*, at 684. Even if the remaining provisions will operate in some coherent way, that alone does not save the statute. The question is whether the provisions will work as Congress intended. The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.*, at 685 (emphasis in original). See also *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509 (2010) (the Act "remains fully operative as a law with these tenure

restrictions excised" (internal quotation marks omitted)); *United States* v. *Booker*, 543 U. S. 220, 227 (2005) ("[T]wo provisions . . . must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); *Mille Lacs*, *supra*, at 194 ("[E]mbodying as it did one coherent policy, [the entire order] is inseverable").

Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated. See *Alaska Airlines*, *supra*, at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); see also *Free Enterprise Fund*, *supra*, at 509 ("[N]othing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will"); *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 330 (2006) ("Would the legislature have preferred what is left of its statute to no statute at all"); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767 (1996) (plurality opinion) ("Would Congress still have passed § 10(a) had it known that the remaining provisions were invalid" (internal quotation marks and brackets omitted)).

The two inquiries—whether the remaining provisions will operate as Congress designed them, and whether Congress would have enacted the remaining provisions standing alone—often are interrelated. In the ordinary course, if the remaining provisions cannot operate according to the congressional design (the first inquiry), it almost necessarily follows that Congress would not have enacted them (the second inquiry). This close interaction may explain why the Court has not always been precise in distinguishing between the

two. There are, however, occasions in which the severability standard's first inquiry (statutory functionality) is not a proxy for the second inquiry (whether the Legislature intended the remaining provisions to stand alone).

B

The Act was passed to enable affordable, "near-universal" health insurance coverage. 42 U. S. C. § 18091(2)(D). The resulting, complex statute consists of mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others. Under the severability test set out above, it must be determined if those provisions function in a coherent way and as Congress would have intended, even when the major provisions establishing the Individual Mandate and Medicaid Expansion are themselves invalid.

Congress did not intend to establish the goal of near-universal coverage without regard to fiscal consequences. See, *e. g.*, ACA § 1563, 124 Stat. 270 ("[T]his Act will reduce the Federal deficit between 2010 and 2019"). And it did not intend to impose the inevitable costs on any one industry or group of individuals. The whole design of the Act is to balance the costs and benefits affecting each set of regulated parties. Thus, individuals are required to obtain health insurance. See 26 U. S. C. § 5000A(a). Insurance companies are required to sell them insurance regardless of patients' pre-existing conditions and to comply with a host of other regulations. And the companies must pay new taxes. See § 4980I (high-cost insurance plans); 42 U. S. C. §§ 300gg(a)(1), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue); § 300gg–11 (elimination of coverage limits); § 300gg–14(a) (dependent children up to age 26); ACA §§ 9010, 10905, 124 Stat. 865, 1017 (excise tax); Health Care and Education Reconciliation Act of 2010 (HCERA) § 1401, 124 Stat. 1059 (excise tax). States are expected to expand Medicaid eligibility and to create regulated marketplaces

called exchanges where individuals can purchase insurance. See 42 U. S. C. §§ 1396a(a)(10)(A)(i)(VIII) (2006 ed., Supp. IV) (Medicaid Expansion), 18031 (exchanges). Some persons who cannot afford insurance are provided it through the Medicaid Expansion, and others are aided in their purchase of insurance through federal subsidies available on health insurance exchanges. See 26 U. S. C. § 36B (2006 ed., Supp. IV), 42 U. S. C. § 18071 (2006 ed., Supp. IV) (federal subsidies). The Federal Government's increased spending is offset by new taxes and cuts in other federal expenditures, including reductions in Medicare and in federal payments to hospitals. See, *e. g.*, § 1395ww(r) (Medicare cuts); ACA Title IX, Subtitle A, 124 Stat. 847 ("Revenue Offset Provisions"). Employers with at least 50 employees must either provide employees with adequate health benefits or pay a financial exaction if an employee who qualifies for federal subsidies purchases insurance through an exchange. See 26 U. S. C. § 4980H (2006 ed., Supp. IV).

In short, the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group. For example, the Federal Government bears the burden of paying billions for the new entitlements mandated by the Medicaid Expansion and federal subsidies for insurance purchases on the exchanges; but it benefits from reductions in the reimbursements it pays to hospitals. Hospitals lose those reimbursements; but they benefit from the decrease in uncompensated care, for under the insurance regulations it is easier for individuals with pre-existing conditions to purchase coverage that increases payments to hospitals. Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including "guaranteed issue" and "community rating" requirements to give coverage regardless of the insured's pre-existing conditions; but the insurers benefit from the

new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product and from the new low-income Medicaid recipients who will enroll in insurance companies' Medicaid-funded managed care programs. In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending. So, the Act's major provisions are interdependent.

The Act then refers to these interdependencies as "shared responsibility." See ACA Subtitle F, Part I, 124 Stat. 242 ("Shared Responsibility"); ACA § 1501, *ibid.* (same); ACA § 1513, *id.*, at 253 (same); ACA § 4980H, *ibid.* (same). In at least six places, the Act describes the Individual Mandate as working "together with the other provisions of this Act." 42 U. S. C. § 18091(2)(C) (2006 ed., Supp. IV) (working "together" to "add millions of new consumers to the health insurance market"); § 18091(2)(E) (working "together" to "significantly reduce" the economic cost of the poorer health and shorter lifespan of the uninsured); § 18091(2)(F) (working "together" to "lower health insurance premiums"); § 18091(2)(G) (working "together" to "improve financial security for families"); § 18091(2)(I) (working "together" to minimize "adverse selection and broaden the health insurance risk pool to include healthy individuals"); § 18091(2)(J) (working "together" to "significantly reduce administrative costs and lower health insurance premiums"). The Act calls the Individual Mandate "an essential part" of federal regulation of health insurance and warns that "the absence of the requirement would undercut Federal regulation of the health insurance market." § 18091(2)(H).

C

One preliminary point should be noted before applying severability principles to the Act. To be sure, an argument can be made that those portions of the Act that none of the

parties has standing to challenge cannot be held nonseverable. The response to this argument is that our cases do not support it. See, *e. g.*, *Williams* v. *Standard Oil Co. of La.*, 278 U. S. 235, 242–244 (1929) (holding nonseverable statutory provisions that did not burden the parties). It would be particularly destructive of sound government to apply such a rule with regard to a multifaceted piece of legislation like the ACA. It would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing. The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails.

The opinion now explains in Part V–C–1, *infra*, why the Act's major provisions are not severable from the Mandate and Medicaid Expansion. It proceeds from the insurance regulations and taxes (C–1–a), to the reductions in reimbursements to hospitals and other Medicare reductions (C–1–b), the exchanges and their federal subsidies (C–1–c), and the employer-responsibility assessment (C–1–d). Part V–C–2, *infra*, explains why the Act's minor provisions also are not severable.

1

**The Act's Major Provisions**

Major provisions of the Affordable Care Act—*i. e.*, the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer-responsibility assessment—cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion. Absent the invalid portions, the other major provisions could impose enormous risks of unexpected burdens on patients, the

health care community, and the federal budget. That consequence would be in absolute conflict with the ACA's design of "shared responsibility," and would pose a threat to the Nation that Congress did not intend.

a

***Insurance Regulations and Taxes***

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act's insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure. Those risks would undermine Congress' scheme of "shared responsibility." See 26 U. S. C. § 4980I (2006 ed., Supp. IV) (high-cost insurance plans); 42 U. S. C. §§ 300gg(a)(1) (2006 ed., Supp. IV), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue); § 300gg–11 (elimination of coverage limits); § 300gg–14(a) (dependent children up to age 26); ACA §§ 9010, 10905, 124 Stat. 865, 1017 (excise tax); HCERA § 1401, 124 Stat. 1059 (excise tax).

The Court has been informed by distinguished economists that the Act's Individual Mandate and Medicaid Expansion would each increase revenues to the insurance industry by about $350 billion over 10 years; that this combined figure of $700 billion is necessary to offset the approximately $700 billion in new costs to the insurance industry imposed by the Act's insurance regulations and taxes; and that the new $700-billion burden would otherwise dwarf the industry's current profit margin. See Brief for Economists as *Amici Curiae* in No. 11–393 etc. (Severability), pp. 9–16, 10a.

If that analysis is correct, the regulations and taxes will mean higher costs for insurance companies. Higher costs may mean higher premiums for consumers, despite the Act's goal of "lower[ing] health insurance premiums." 42 U. S. C. § 18091(2)(F) (2006 ed., Supp. IV). Higher costs also could threaten the survival of health insurance companies, despite

the Act's goal of "effective health insurance markets." § 18091(2)(J).

The actual cost of the regulations and taxes may be more or less than predicted. What is known, however, is that severing other provisions from the Individual Mandate and Medicaid Expansion necessarily would impose significant risks and real uncertainties on insurance companies, their customers, all other major actors in the system, and the government treasury. And what also is known is this: Unnecessary risks and avoidable uncertainties are hostile to economic progress and fiscal stability and thus to the safety and welfare of the Nation and the Nation's freedom. If those risks and uncertainties are to be imposed, it must not be by the Judiciary.

b

***Reductions in Reimbursements to Hospitals and Other Reductions in Medicare Expenditures***

The Affordable Care Act reduces payments by the Federal Government to hospitals by more than $200 billion over 10 years. See 42 U. S. C. §§ 1395ww(b)(3)(B)(xi)–(xii) (2006 ed., Supp. IV); § 1395ww(q); § 1395ww(r); § 1396r–4(f)(7).

The concept is straightforward: Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals. Responsibility will be shared, as burdens and benefits balance each other. This is typical of the whole dynamic of the Act.

Invalidating the key mechanisms for expanding insurance coverage, such as community rating and the Medicaid Expansion, without invalidating the reductions in Medicare and Medicaid, distorts the ACA's design of "shared responsibility." Some hospitals may be forced to raise the cost of care in order to offset the reductions in reimbursements, which could raise the cost of insurance premiums, in contravention of the Act's goal of "lower[ing] health insurance premiums."

42 U. S. C. § 18091(2)(F) (2006 ed., Supp. IV). See also § 18091(2)(I) (goal of "lower[ing] health insurance premiums"); § 18091(2)(J) (same). Other hospitals, particularly safety-net hospitals that serve a large number of uninsured patients, may be forced to shut down. Cf. Nat. Assn. of Public Hospitals, 2009 Annual Survey: Safety Net Hospitals and Health Systems Fulfill Mission in Uncertain Times 5–6 (Feb. 2011). Like the effect of preserving the insurance regulations and taxes, the precise degree of risk to hospitals is unknowable. It is not the proper role of the Court, by severing part of a statute and allowing the rest to stand, to impose unknowable risks that Congress could neither measure nor predict. And Congress could not have intended that result in any event.

There is a second, independent reason why the reductions in reimbursements to hospitals and the ACA's other Medicare cuts must be invalidated. The ACA's $455 billion in Medicare and Medicaid savings offset the $434-billion cost of the Medicaid Expansion. See CBO Estimate, Table 2 (Mar. 20, 2010). The reductions allowed Congress to find that the ACA "will reduce the Federal deficit between 2010 and 2019" and "will continue to reduce budget deficits after 2019." ACA §§ 1563(a)(1), (2), 124 Stat. 270.

That finding was critical to the ACA. The Act's "shared responsibility" concept extends to the federal budget. Congress chose to offset new federal expenditures with budget cuts and tax increases. That is why the United States has explained in the course of this litigation that "[w]hen Congress passed the ACA, it was careful to ensure that any increased spending, including on Medicaid, was offset by other revenue-raising and cost-saving provisions." Memorandum in Support of Government's Motion for Summary Judgment in No. 3–10–cv–91 (DC ND Fla.), p. 41.

If the Medicare and Medicaid reductions would no longer be needed to offset the costs of the Medicaid Expansion, the reductions would no longer operate in the manner Congress

intended. They would lose their justification and foundation. In addition, to preserve them would be "to eliminate a significant *quid pro quo* of the legislative compromise" and create a statute Congress did not enact. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 561 (2001) (SCALIA, J., dissenting). It is no secret that cutting Medicare is unpopular; and it is most improbable Congress would have done so without at least the assurance that it would render the ACA deficit neutral. See ACA §§ 1563(a)(1), (2), 124 Stat. 270.

c

***Health Insurance Exchanges and Their Federal Subsidies***

The ACA requires each State to establish a health insurance "exchange." Each exchange is a one-stop marketplace for individuals and small businesses to compare community-rated health insurance and purchase the policy of their choice. The exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force.

The Act's design is to allocate billions of federal dollars to subsidize individuals' purchases on the exchanges. Individuals with incomes between 100% and 400% of the poverty level receive tax credits to offset the cost of insurance to the individual purchaser. 26 U. S. C. § 36B (2006 ed., Supp. IV); 42 U. S. C. § 18071 (2006 ed., Supp. IV). By 2019, 20 million of the 24 million people who will obtain insurance through an exchange are expected to receive an average federal subsidy of $6,460 per person. See CBO, Analysis of the Major Health Care Legislation Enacted in March 2010, pp. 18–19 (Mar. 30, 2011). Without the community-rating insurance regulation, however, the average federal subsidy could be much higher; for community rating greatly lowers the enormous premiums unhealthy individuals would otherwise pay. Federal subsidies would make up much of the difference.

The result would be an unintended boon to insurance companies, an unintended harm to the federal fisc, and a corresponding breakdown of the "shared responsibility" between the industry and the federal budget that Congress intended. Thus, the federal subsidies must be invalidated.

In the absence of federal subsidies to purchasers, insurance companies will have little incentive to sell insurance on the exchanges. Under the ACA's scheme, few, if any, individuals would want to buy individual insurance policies outside of an exchange, because federal subsidies would be unavailable outside of an exchange. Difficulty in attracting individuals outside of the exchange would in turn motivate insurers to enter exchanges, despite the exchanges' onerous regulations. See 42 U. S. C. § 18031. That system of incentives collapses if the federal subsidies are invalidated. Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all.

There is a second reason why, if community rating is invalidated by the Mandate and Medicaid Expansion's invalidity, exchanges cannot be implemented in a manner consistent with the Act's design. A key purpose of an exchange is to provide a marketplace of insurance options where prices are standardized regardless of the buyer's pre-existing conditions. See *ibid.* An individual who shops for insurance through an exchange will evaluate different insurance products. The products will offer different benefits and prices. Congress designed the exchanges so the shopper can compare benefits and prices. But the comparison cannot be made in the way Congress designed if the prices depend on the shopper's pre-existing health conditions. The prices would vary from person to person. So without community rating—which prohibits insurers from basing the price of in-

surance on pre-existing conditions—the exchanges cannot operate in the manner Congress intended.

d

***Employer-Responsibility Assessment***

The employer-responsibility assessment provides an incentive for employers with at least 50 employees to provide their employees with health insurance options that meet minimum criteria. See 26 U. S. C. § 4980H (2006 ed., Supp. IV). Unlike the Individual Mandate, the employer-responsibility assessment does not require employers to provide an insurance option. Instead, it requires them to make a payment to the Federal Government if they do not offer insurance to employees and if insurance is bought on an exchange by an employee who qualifies for the exchange's federal subsidies. See *ibid.*

For two reasons, the employer-responsibility assessment must be invalidated. First, the ACA makes a direct link between the employer-responsibility assessment and the exchanges. The financial assessment against employers occurs only under certain conditions. One of them is the purchase of insurance by an employee on an exchange. With no exchanges, there are no purchases on the exchanges; and with no purchases on the exchanges, there is nothing to trigger the employer-responsibility assessment.

Second, after the invalidation of burdens on individuals (the Individual Mandate), insurers (the insurance regulations and taxes), States (the Medicaid Expansion), the Federal Government (the federal subsidies for exchanges and for the Medicaid Expansion), and hospitals (the reductions in reimbursements), the preservation of the employer-responsibility assessment would upset the ACA's design of "shared responsibility." It would leave employers as the only parties bearing any significant responsibility. That was not the congressional intent.

2

**The Act's Minor Provisions**

The next question is whether the invalidation of the ACA's major provisions requires the Court to invalidate the ACA's other provisions. It does.

The ACA is over 900 pages long. Its regulations include requirements ranging from a break time and secluded place at work for nursing mothers, see 29 U. S. C. § 207(r)(1) (2006 ed., Supp. IV), to displays of nutritional content at chain restaurants, see 21 U. S. C. § 343(q)(5)(H) (2006 ed., Supp. IV). The Act raises billions of dollars in taxes and fees, including exactions imposed on high-income taxpayers, see ACA §§ 9015, 10906, 124 Stat. 870, 1020; HCERA § 1402, 124 Stat. 1060, medical devices, see 26 U. S. C. § 4191 (2006 ed., Supp. IV), and tanning booths, see § 5000B. It spends government money on, among other things, the study of how to spend less government money. 42 U. S. C. § 1315a (2006 ed., Supp. IV). And it includes a number of provisions that provide benefits to the State of a particular legislator. For example, § 10323, 124 Stat. 954, extends Medicare coverage to individuals exposed to asbestos from a mine in Libby, Montana. Another provision, § 2006, *id.*, at 284, increases Medicaid payments only in Louisiana.

Such provisions validate the Senate Majority Leader's statement, "'I don't know if there is a senator that doesn't have something in this bill that was important to them. . . . [And] if they don't have something in it important to them, then it doesn't speak well of them. That's what this legislation is all about: It's the art of compromise.'" Pear, In Health Bill for Everyone, Provisions for a Few, N. Y. Times, Jan. 4, 2010, p. A10 (quoting Sen. Reid). Often, a minor provision will be the price paid for support of a major provision. So, if the major provision were unconstitutional, Congress would not have passed the minor one.

Without the ACA's major provisions, many of these minor provisions will not operate in the manner Congress intended. For example, the tax increases are "Revenue Offset Provisions" designed to help offset the cost to the Federal Government of programs like the Medicaid Expansion and the exchanges' federal subsidies. See Title IX, Subtitle A—Revenue Offset Provisions, 124 Stat. 847. With the Medicaid Expansion and the exchanges invalidated, the tax increases no longer operate to offset costs, and they no longer serve the purpose in the Act's scheme of "shared responsibility" that Congress intended.

Some provisions, such as requiring chain restaurants to display nutritional content, appear likely to operate as Congress intended, but they fail the second test for severability. There is no reason to believe that Congress would have enacted them independently. The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary to its central provisions but also many that are entirely unrelated—hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the *quid pro quo* for their needed support. When we are confronted with such a so-called "Christmas tree," a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner "'would be to make a new law, not to enforce an old one. This is not part of our duty.'" *Trade-Mark Cases*, 100 U. S., at 99.

This Court must not impose risks unintended by Congress or produce legislation Congress may have lacked the support

to enact. For those reasons, the unconstitutionality of both the Individual Mandate and the Medicaid Expansion requires the invalidation of the Affordable Care Act's other provisions.

* * *

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cutoff of Medicaid funds to a supposedly noncoercive cutoff of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is

to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

JUSTICE THOMAS, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and THE CHIEF JUSTICE correctly apply

our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate "economic activity [that] substantially affects interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 560 (1995). I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States* v. *Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring); see also *Lopez*, *supra*, at 584–602 (same); *Gonzales* v. *Raich*, 545 U. S. 1, 67–69 (2005) (THOMAS, J., dissenting). As I have explained, the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*, *supra*, at 627. The Government's unprecedented claim in this suit that it may regulate not only economic activity but also *inactivity* that substantially affects interstate commerce is a case in point.

Syllabus

# UNITED STATES *v.* ALVAREZ

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

No. 11–210. Argued February 22, 2012—Decided June 28, 2012

The Stolen Valor Act makes it a crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved. 18 U. S. C. §§ 704(b), (c). Respondent pleaded guilty to a charge of falsely claiming that he had received the Medal of Honor, but reserved his right to appeal his claim that the Act is unconstitutional. The Ninth Circuit reversed, finding the Act invalid under the First Amendment.

*Held:* The judgment is affirmed.

617 F. 3d 1198, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR, concluded that the Act infringes upon speech protected by the First Amendment. Pp. 715–730.

(a) The Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 660.

Content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.

Absent from these few categories is any general exception for false statements. The Government argues that cases such as *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 52, support its claim that false statements have no value and hence no First Amendment protection. But all the Government's quotations derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement. In those decisions the falsity of the speech at issue was not irrelevant to the Court's analysis, but neither was it determinative. These prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation or fraud, the Court has instructed that falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood. See *New York Times Co.* v. *Sullivan*, 376 U. S.

254, 280. Here, the Government seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression.

The Government's three examples of false-speech regulation that courts generally have found permissible do not establish a principle that all proscriptions of false statements are exempt from rigorous First Amendment scrutiny. The criminal prohibition of a false statement made to Government officials in communications concerning official matters, 18 U. S. C. § 1001, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context. As for perjury statutes, perjured statements lack First Amendment protection not simply because they are false, but because perjury undermines the function and province of the law and threatens the integrity of judgments. Finally, there are statutes that prohibit falsely representing that one is speaking on behalf of the Government, or prohibit impersonating a Government officer. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here.

While there may exist "some categories of speech that have been historically unprotected," but that the Court has not yet specifically identified or discussed, *United States* v. *Stevens*, 559 U. S. 460, 472, the Government has not demonstrated that false statements should constitute a new category. Pp. 715–722.

(b) The Act seeks to control and suppress all false statements on this one subject in almost limitless times and settings without regard to whether the lie was made for the purpose of material gain. Permitting the Government to decree this speech to be a criminal offense would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Pp. 722–723.

(c) The Court applies the "most exacting scrutiny" in assessing content-based restrictions on protected speech. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642. The Act does not satisfy that scrutiny. While the Government's interest in protecting the integrity of the Medal of Honor is beyond question, the First Amendment requires that there be a direct causal link between the restriction imposed and the injury to be prevented. Here, that link has not been shown. The Government points to no evidence supporting its claim that the public's general perception of military awards is diluted by false claims such as those made by respondent. And it has not shown, and cannot show, why counterspeech, such as the ridicule respondent received online and in the press, would not suffice to achieve its interest.

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In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *Ashcroft*, *supra*, at 666. Here, the Government could likely protect the integrity of the military awards system by creating a database of medal recipients accessible and searchable on the Internet, as some private individuals have already done. Pp. 724–729.

JUSTICE BREYER, joined by JUSTICE KAGAN, concluded that because the Stolen Valor Act, as presently drafted, works disproportionate constitutional harm, it fails intermediate scrutiny, and thus violates the First Amendment. Pp. 730–739.

(a) In determining whether a statute violates the First Amendment, the Court has often found it appropriate to examine the fit between statutory ends and means, taking into account the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the statute will tend to achieve those objectives, and whether there are other, less restrictive alternatives. "Intermediate scrutiny" describes this approach. Since false factual statements are less likely than true factual statements to make a valuable contribution to the marketplace of ideas, and the government often has good reason to prohibit such false speech, but its regulation can threaten speech-related harm, such an approach is applied here. Pp. 730–732.

(b) The Act should be read as criminalizing only false factual statements made with knowledge of their falsity and with intent that they be taken as true. Although the Court has frequently said or implied that false factual statements enjoy little First Amendment protection, see, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, those statements cannot be read to mean "no protection at all." False factual statements serve useful human objectives in many contexts. Moreover, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart. See *id.*, at 340–341. And the pervasiveness of false factual statements provides a weapon to a government broadly empowered to prosecute falsity without more. Those who are unpopular may fear that the government will use that weapon selectively against them.

Although there are many statutes and common-law doctrines making the utterance of certain kinds of false statements unlawful, they tend to be narrower than the Act, in that they limit the scope of their application in various ways, for example, by requiring proof of specific harm to identifiable victims. The Act lacks any such limiting features. Although it prohibits only knowing and intentional falsehoods about readily verifiable facts within the personal knowledge of the speaker, it

otherwise ranges broadly, and that breadth means that it creates a significant risk of First Amendment harm. Pp. 732–737.

(c) The Act nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. P. 737.

(d) It may, however, be possible substantially to achieve the Government's objective in less burdensome ways. The First Amendment risks flowing from the Act's breadth of coverage could be diminished or eliminated by a more finely tailored statute, for example, a statute that requires a showing that the false statement caused specific harm or is focused on lies more likely to be harmful or on contexts where such lies are likely to cause harm. Pp. 737–739.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and GINSBURG and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which KAGAN, J., joined, *post,* p. 730. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 739.

*Solicitor General Verrilli* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Ginger D. Anders.*

*Jonathan D. Libby* argued the cause for respondent. With him on the brief were *Sean K. Kennedy* and *Brianna J. Fuller.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Arthur C. D'Andrea*, Assistant Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Bill Cobb*, Deputy Attorney General, and *Jonathan F. Mitchell*, Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Gary K. King* of New Mexico, *E. Scott Pruitt* of Oklahoma, *Linda L. Kelly* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper* of Tennessee, *Mark L. Shurtleff* of Utah, and *Darrell V. McGraw, Jr.*, of West Virginia; for the Legion of Valor of the United States

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join.

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor (or Medal), respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. § 704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board.

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et al. by *Kent S. Scheidegger;* and for Veterans of Foreign Wars of the United States et al. by *Gene C. Schaerr*, *Geoffrey P. Eaton*, *Michael T. Morley*, and *Linda T. Coberly.* A brief of *amicus curiae* urging vacatur was filed for the Congressional Medal of Honor Foundation by *Kevin N. Ainsworth.*

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger*, *Richard M. Zuckerman*, and *Jonathan Bloom;* for the American Civil Liberties Union et al. by *Jameel Jaffer*, *Steven R. Shapiro*, and *Peter J. Eliasberg;* for the National Association of Criminal Defense Lawyers by *Michael V Schafler* and *Jeffrey L. Fisher;* for the Reporters Committee for Freedom of the Press et al. by *Robert Corn-Revere*, *Ronald G. London*, *John R. Eastburg*, *Lucy A. Dalglish*, *Gregg P. Leslie*, *Richard A. Bernstein*, *Kevin M. Goldberg*, *David M. Giles*, *James Cregan*, *Charles D. Tobin*, *Mickey H. Osterreicher*, *George Freeman*, *Barbara L. Camens*, *Jonathan D. Hart*, *Richard J. Tofel*, *Bruce W. Sanford*, *Bruce D. Brown*, *Laurie A. Babinski*, *Karlene W. Goller*, and *Eric N. Lieberman;* for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler*, *Bruce D. Brown*, and *Katayoun A. Donnelly;* and for Jonathan D. Varat by *Mr. Varat*, *pro se*, and *Cary B. Lerman.*

Briefs of *amici curiae* were filed for the American Legion by *Aaron M. Streett* and *Philip B. Onderdonk;* for the First Amendment Coalition by *Gary L. Bostwick* and *Jean-Paul Jassy;* for the First Amendment Lawyers Association by *Reed Lee* and *Allen Lichtenstein;* for the Intellectual Property Amicus Brief Clinic of the University of New Hampshire School of Law by *John M. Greabe* and *Keith M. Harrison;* and for Eugene Volokh et al. by *Mr. Volokh*, *pro se.*

The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "'I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.'" 617 F. 3d 1198, 1200 (CA9 2010). None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. *Id.*, at 1218. With further opinions on the issue, and over a dissent by seven judges, rehearing en banc was denied. 638 F. 3d 666 (2011). This Court granted certiorari. 565 U. S. 962 (2011).

After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States* v. *Strandlof*, 667 F. 3d 1146 (2012). So there is now a conflict in the Courts of Appeals on the question of the Act's validity.

This is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle. See *Snyder* v. *Phelps*, 562 U. S. 443 (2011) (hateful protests directed at the funeral of a serviceman who died in

Iraq). Here the statement that the speaker held the Medal was an intended, undoubted lie.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," *Selective Draft Law Cases*, 245 U. S. 366, 390 (1918), have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

## I

Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning. On this premise, respondent violated § 704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

> "(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been

> awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.
>
> "(c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—
>
> "(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both."

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements "have no First Amendment value in themselves," and thus "are protected only to the extent needed to avoid chilling fully protected speech." Brief for United States 18, 20. Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example, speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.

## II

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). As a result, the Constitution "demands that content-based restrictions on

speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 660 (2004).

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." *United States* v. *Stevens*, 559 U. S. 460, 470 (2010). Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few " 'historic and traditional categories [of expression] long familiar to the bar.' " *Id.*, at 468 (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring in judgment)). Among these categories are advocacy intended, and likely, to incite imminent lawless action, see *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam);* obscenity, see, *e. g., Miller* v. *California*, 413 U. S. 15 (1973); defamation, see, *e. g., New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) (providing substantial protection for speech about public figures); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, see, *e. g., Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); so-called "fighting words," see *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); child pornography, see *New York* v. *Ferber*, 458 U. S. 747 (1982); fraud, see *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976); true threats, see *Watts* v. *United States*, 394 U. S. 705 (1969) *(per curiam);* and speech presenting some grave and imminent threat the government has the power to prevent, see *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931), although a restriction under the last category is most difficult to sustain, see *New York Times Co.* v. *United States*, 403 U. S. 713

(1971) *(per curiam)*. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. See *Sullivan*, *supra*, at 271 ("Th[e] erroneous statement is inevitable in free debate").

The Government disagrees with this proposition. It cites language from some of this Court's precedents to support its contention that false statements have no value and hence no First Amendment protection. See also Brief for Eugene Volokh et al. as *Amici Curiae* 2–11. These isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection. That conclusion would take the quoted language far from its proper context. For instance, the Court has stated "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas," *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 52 (1988), and that false statements "are not protected by the First Amendment in the same manner as truthful statements," *Brown* v. *Hartlage*, 456 U. S. 45, 60–61 (1982). See also, *e. g.*, *Virginia Bd. of Pharmacy*, *supra*, at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Herbert* v. *Lando*, 441 U. S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Gertz*, *supra*, at 340 ("[T]here is no constitutional value in false statements of fact"); *Garrison* v. *Louisiana*,

379 U. S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. See Brief for United States 18–19. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood. See *Sullivan*, *supra*, at 280 (prohibiting recovery of damages for a defamatory falsehood made about a public official unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"); see also *Garrison*, *supra*, at 73 ("[E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood"); *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 620 (2003) ("False statement alone does not subject a fundraiser to fraud liability").

The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a

knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official, 18 U. S. C. § 1001; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government, see, *e. g.*, § 912; § 709. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials punishes "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government . . . makes any materially false, fictitious, or fraudulent statement or representation." § 1001. Section 1001's prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about what the Court has confirmed is the "unquestioned constitutionality of perjury statutes," both the federal statute, § 1623, and its state-law equivalents. *United States* v. *Grayson*, 438 U. S. 41, 54 (1978). See also *Konigsberg* v. *State Bar of Cal.*, 366 U. S. 36, 49–50, n. 10 (1961). It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth." *In re Michael*, 326 U. S. 224, 227 (1945). Perjury undermines the function and province of the law and threat-

ens the integrity of judgments that are the basis of the legal system. See *United States* v. *Dunnigan*, 507 U. S. 87, 97 (1993) ("To uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned"). Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech. Title 18 U. S. C. § 912, for example, prohibits impersonating an officer or employee of the United States. Even if that statute may not require proving an "actual financial or property loss" resulting from the deception, the statute is itself confined to "maintain[ing] the general good repute and dignity of . . . government . . . service itself." *United States* v. *Lepowitch*, 318 U. S. 702, 704 (1943) (internal quotation marks and alteration omitted). The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation (FBI) in a manner calculated to convey that the communication is approved, see § 709, or using words such as "Federal" or "United States" in the collection of private debts in order to convey that the communication has official authorization, see § 712. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here.

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnera-

ble. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.

Although the First Amendment stands against any "free-wheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, 559 U. S., at 473, the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." *Ibid.* Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

## III

The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the law's distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. See *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 20 (1990) (recognizing that some statements nominally purporting to contain false facts in reality "cannot reasonably be interpreted as stating actual facts about an individual" (internal quotation marks and brackets omitted)). Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false

statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 539–540 (1987) (prohibiting a nonprofit corporation from exploiting the "commercial magnetism" of the word "Olympic" when organizing an athletic competition (internal quotation marks omitted)).

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. See, *e. g.*, *Virginia Bd. of Pharmacy*, 425 U. S., at 771 (noting that fraudulent speech generally falls outside the protections of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

## IV

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a freewheeling approach, see *Stevens*, *supra*, at 470 ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"), but rather has applied the "most exacting scrutiny," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642 (1994). Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also " 'foste[r] morale, mission accomplishment and esprit de corps' among service members." Brief for United States 37, 38. General George Washington observed that an award for valor would "cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit." General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783 (Aug. 7, 1782), p. 30 (E. Boynton ed. 1883). Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. Although millions have served with brave resolve, the Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. Established in 1861, the Medal is reserved for those

who have distinguished themselves "conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty." 10 U. S. C. §§3741 (Army), 6241 (Navy and Marine Corps), 8741 (Air Force), 14 U. S. C. §491 (Coast Guard). The stories of those who earned the Medal inspire and fascinate, from Dakota Meyer who in 2009 drove five times into the midst of a Taliban ambush to save 36 lives, see Curtis, President Obama Awards Medal of Honor to Dakota Meyer, The White House Blog (Sept. 15, 2011) (all Internet materials as visited June 25, 2012, and available in Clerk of Court's case file); to Desmond Doss who served as an army medic on Okinawa and on June 5, 1945, rescued 75 fellow soldiers, and who, after being wounded, gave up his own place on a stretcher so others could be taken to safety, see America's Heroes 88–90 (J. Willbanks ed. 2011); to William Carney who sustained multiple gunshot wounds to the head, chest, legs, and arm, and yet carried the flag to ensure it did not touch the ground during the Union army's assault on Fort Wagner in July 1863, *id.*, at 44–45. The rare acts of courage the Medal celebrates led President Truman to say he would "rather have that medal round my neck than . . . be president of the United States." Truman Gives No. 1 Medal to 15 Army Heroes, Washington Post, Oct. 13, 1945, p. 5. The Government's interest in protecting the integrity of the Medal of Honor is beyond question.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. *Entertainment Merchants Assn.*, 564 U. S., at 799. There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid.* The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that "an isolated misrepresen-

tation by itself would not tarnish the meaning of military honors," the Government asserts it is "common sense that false representations have the tendency to dilute the value and meaning of military awards," Brief for United States 49, 54. It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000). The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. Cf. *Entertainment Merchants Assn.*, *supra*, at 799–800 (analyzing and rejecting the findings of research psychologists demonstrating the causal link between violent video games and harmful effects on children). As one of the Government's *amici* notes, "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal recipients'] honor." Brief for Veterans of Foreign Wars of the United States et al. as *Amici Curiae* 1. This general proposition is sound, even if true holders of the Medal might experience anger and frustration.

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.

Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony," 617 F. 3d, at 1211. Once the lie was made public, he was ridiculed online, see Brief for Respondent 3, his actions were reported in the press, see Ortega, Alvarez Again Denies Claim, Ontario, Cal., Inland Valley Daily Bulletin (Sept. 27, 2007), and a fellow board member called for his resignation, see, *e. g.*, Bigham, Water District Rep Requests Alvarez Resign in Wake of False Medal Claim, San Bernardino Cty., Cal., The Sun (May 21, 2008). There is good reason to believe that a similar fate would befall other false claimants. See Brief for Reporters Committee for Freedom of the Press et al. as *Amici Curiae* 30–33 (listing numerous examples of public exposure of false claimants). Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right. See, *e. g.*, Well Done, Washington Post, Feb. 5, 1943, p. 8 (reporting on President Roosevelt's awarding the Congressional Medal of Honor to Maj. Gen. Alexander Vandegrift); Devroy, Medal of Honor Given to 2 Killed in Somalia, Washington Post, May 24, 1994, p. A6 (reporting on President Clinton's awarding the Congressional Medal of Honor to two special forces soldiers killed during operations in Somalia).

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the proc-

esses of education, the remedy to be applied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Expressing its concern that counterspeech is insufficient, the Government responds that because "some military records have been lost . . . some claims [are] unverifiable," Brief for United States 50. This proves little, however; for without verifiable records, successful criminal prosecution under the Act would be more difficult in any event. So, in cases where public refutation will not serve the Government's interest, the Act will not either. In addition, the Government claims that "many [false claims] will remain unchallenged." *Id.*, at 55. The Government provides no support for the contention. And in any event, in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its awards system. This showing has not been made.

It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The same can be said for the Government's interest. The American people do not need the assistance of a government

prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *Ashcroft*, 542 U. S., at 666. There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor recipients. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, see Brief for Respondent 25, and at least one database of past recipients is online and fully searchable, see Congressional Medal of Honor Society, Full Archive, http://www.cmohs.org/recipient-archive.php. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insufficiently comprehensive." Brief for United States 55. Without more explanation, it is difficult to assess the Government's claim, especially when at least one database of Congressional Medal of Honor recipients already exists.

The Government may have responses to some of these criticisms, but there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny.

* * *

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to

make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

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

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. *Ante,* at 717–722. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.

## I

In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

Sometimes the Court has referred to this approach as "intermediate scrutiny," sometimes as "proportionality" review, sometimes as an examination of "fit," and sometimes it has avoided the application of any label at all. See, *e. g., Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 641–652 (1994) (intermediate scrutiny); *Randall* v. *Sorrell,* 548 U. S.

230, 249 (2006) (plurality opinion) (proportionality); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989) (requiring a "fit" between means and ends that is " 'in proportion to the interest served' "); *In re R. M. J.*, 455 U. S. 191, 203 (1982) ("[I]nterference with speech must be in proportion to the [substantial governmental] interest served"); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968).

Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as "strict scrutiny" implies) nor near-automatic approval (as is implicit in "rational basis" review). See, *e. g.*, *Turner Broadcasting System, Inc.*, *supra*, at 641–652 ("must-carry" cable regulations); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 566 (1980) (nonmisleading commercial speech); *Burdick* v. *Takushi*, 504 U. S. 428, 433–434 (1992) (election regulation); *Pickering*, *supra*, at 568 (government employee speech); *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968) (application of generally applicable laws to expressive conduct). I have used the term "proportionality" to describe this approach. *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 388 (2002) (dissenting opinion); see also *Bartnicki* v. *Vopper*, 532 U. S. 514, 536 (2001) (concurring opinion); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402–403 (2000) (concurring opinion). But in this case, the Court's term "intermediate scrutiny" describes what I think we should do.

As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Post*, at 751 (opinion of ALITO, J.). Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise

such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech. See *infra*, at 734–736 (listing examples of statutes and doctrines regulating false factual speech). But its regulation can nonetheless threaten speech-related harms. Those circumstances lead me to apply what the Court has termed "intermediate scrutiny" here.

## II

### A

The Stolen Valor Act makes it a crime "falsely" to "represen[t]" oneself "to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U. S. C. § 704(b). I would read the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true. See *Staples* v. *United States*, 511 U. S. 600, 605 (1994) (courts construe statutes "in light of the background rules of the common law, . . . in which the requirement of some *mens rea* for a crime is firmly embedded"); cf. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964) (First Amendment allows a public official to recover for defamation only upon a showing of " 'actual malice' "). As so interpreted the statute covers only lies. But although this interpretation diminishes the extent to which the statute endangers First Amendment values, it does not eliminate the threat.

I must concede, as the Government points out, that this Court has frequently said or implied that false factual state-

ments enjoy little First Amendment protection. See, *e. g.*, *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 52 (1988) ("False statements of fact are particularly valueless"); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974) ("[T]he erroneous statement of fact is not worthy of constitutional protection").

But these judicial statements cannot be read to mean "no protection at all." False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth. See, *e. g.*, 638 F. 3d 666, 673–675 (CA9 2011) (Kozinski, J., concurring in denial of rehearing en banc) (providing numerous examples); S. Bok, Lying: Moral Choice in Public and Private Life (1999) (same); *New York Times Co.*, *supra*, at 279, n. 19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error'" (quoting J. Mill, On Liberty 15 (Blackwell ed. 1947))).

Moreover, as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart. See, *e. g.*, *Gertz*, *supra*, at 340–341. Hence, the Court emphasizes *mens rea* requirements that provide "breathing room" for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking.

Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

I also must concede that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.

Fraud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury. See Restatement (Second) of Torts § 525 (1976). Defamation statutes focus upon statements of a kind that harm the reputation of another or deter third parties from association or dealing with the victim. See *id.*, §§ 558, 559. Torts involving the intentional infliction of emotional distress (like torts involving placing a victim in a false light) concern falsehoods that tend to cause harm to a specific victim of an emotional-, dignitary-, or privacy-related kind. See *id.*, § 652E.

Perjury statutes prohibit a particular set of false statements—those made under oath—while requiring a showing of materiality. See, *e. g.*, 18 U. S. C. § 1621. Statutes forbidding lying to a government official (not under oath) are typically limited to circumstances where a lie is likely to work

particular and specific harm by interfering with the functioning of a government department, and those statutes also require a showing of materiality. See, *e. g.*, § 1001.

Statutes prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes, require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm. See, *e. g.*, 47 CFR § 73.1217 (2011) (requiring showing of foreseeability and actual substantial harm); 18 U. S. C. § 1038(a)(1) (prohibiting knowing false statements claiming that terrorist attacks have taken, are taking, or will take, place).

Statutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing that, for example, someone was deceived into following a "course [of action] he would not have pursued but for the deceitful conduct." *United States* v. *Lepowitch*, 318 U. S. 702, 704 (1943); see, *e. g.*, § 912 (liability attaches to "[w]hoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . and *acts as such*" (emphasis added)).

Statutes prohibiting trademark infringement present, perhaps, the closest analogy to the present statute. Trademarks identify the source of a good; and infringement causes harm by causing confusion among potential customers (about the source) and thereby diluting the value of the mark to its owner, to consumers, and to the economy. Similarly, a false claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country. But trademark statutes are focused upon commercial and promotional activities that are likely to dilute the value of a mark. Indeed, they typically require a showing of likely confusion, a showing that tends to ensure that the feared harm will in fact take place. See 15 U. S. C. § 1114(1)(a); *KP Permanent Make-Up, Inc.* v. *Lasting Im-*

*pression I, Inc.*, 543 U. S. 111, 117 (2004); see also *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 539–540, 548 (1987) (upholding statute giving the United States Olympic Committee the right to prohibit certain *commercial and promotional uses* of the word "Olympic").

While this list is not exhaustive, it is sufficient to show that few statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, in virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.

The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. *Supra*, at 732–733. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm. As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. Further, given the potential haziness of individual memory along with the large number of military awards covered (ranging from medals for rifle marksmanship to the Congressional Medal of Honor), there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the

prohibition may be applied where it should not be applied, for example, to barstool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.

B

Like both the plurality and the dissent, I believe the statute nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country. The statute serves this interest by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the Nation cannot fully honor those who have sacrificed so much for their country's honor unless those who claim to have received its military awards tell the truth. Thus, the statute risks harming protected interests but only in order to achieve a substantial countervailing objective.

C

We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is "yes." Some potential First Amendment threats can be alleviated by interpreting the statute to require knowledge of falsity, etc. *Supra,* at 732–733. But other First Amendment risks, primarily risks flowing from breadth of coverage, remain. *Supra,* at 733–734, 736 and this page. As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, *supra,* at 734–736, it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute. For example, not all military awards are alike. Congress might determine that some warrant greater pro-

tection than others. And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker), but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, *e. g.*, *United We Stand America, Inc.* v. *United We Stand, America New York, Inc.*, 128 F. 3d 86, 93 (CA2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco* v. *Fox*, 150 Mich. App. 617, 389 N. W. 2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. See *ante*, at 729. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.

The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective. That being so, I find the statute as presently drafted works disproportionate constitutional harm. It consequently fails intermediate scrutiny, and so violates the First Amendment.

For these reasons, I concur in the Court's judgment.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.

Building on earlier efforts to protect the military awards system, Congress responded to this problem by crafting a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

## I

The Stolen Valor Act makes it a misdemeanor to "falsely represen[t]" oneself as having been awarded a medal, decoration, or badge for service in the Armed Forces of the United States. 18 U. S. C. § 704(b). Properly construed, this statute is limited in five significant respects. First, the Act applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty. Second, the Act concerns facts that are squarely within the speaker's personal knowledge. Third, as the Government maintains, see Brief for United States 15–17, and both the plurality, see *ante*, at 719, and the concurrence, see *ante*, at 732 (BREYER, J., concurring in judgment), seemingly accept, a conviction under the Act requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false.[1] Fourth, the Act applies only to statements that could reasonably be interpreted as communicating actual facts; it does not reach dramatic performances, satire, parody, hyperbole, or the like.[2] Finally, the Act is strictly viewpoint neutral. The

[1] Although the Act does not use the term "knowing" or "knowingly," we have explained that criminal statutes must be construed "in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples* v. *United States*, 511 U. S. 600, 605 (1994). The Act's use of the phrase "falsely represents," moreover, connotes a knowledge requirement. See Black's Law Dictionary 1022 (8th ed. 2004) (defining a "misrepresentation" or "false representation" to mean "[t]he act of making a false or misleading assertion about something, usu. with the *intent to deceive*" (emphasis added)).

[2] See *id.*, at 1327 (defining "representation" to mean a "presentation of fact"); see also *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 20 (1990) (explaining that the Court has protected "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" so that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation" (quoting *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 50 (1988); alteration in original)).

false statements proscribed by the Act are highly unlikely to be tied to any particular political or ideological message. In the rare cases where that is not so, the Act applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors.

The Stolen Valor Act follows a long tradition of efforts to protect our country's system of military honors. When George Washington, as the commander of the Continental Army, created the very first "honorary badges of distinction" for service in our country's military, he established a rigorous system to ensure that these awards would be received and worn by only the truly deserving. See General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783, p. 35 (E. Boynton ed. 1883) (reprint 1973) (requiring the submission of "incontestible proof" of "singularly meritorious action" to the Commander in Chief). Washington warned that anyone with the "insolence to assume" a badge that had not actually been earned would be "severely punished." *Id.*, at 34.

Building on this tradition, Congress long ago made it a federal offense for anyone to wear, manufacture, or sell certain military decorations without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286 (codified as amended at 18 U. S. C. § 704(a)). Although this Court has never opined on the constitutionality of that particular provision, we have said that § 702, which makes it a crime to wear a United States military uniform without authorization, is "a valid statute on its face." *Schacht* v. *United States*, 398 U. S. 58, 61 (1970).

Congress passed the Stolen Valor Act in response to a proliferation of false claims concerning the receipt of military awards. For example, in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of

Honor.[3] An investigation of the 333 people listed in the online edition of Who's Who as having received a top military award revealed that fully a third of the claims could not be substantiated.[4] When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award.[5] The same was true of 32 individuals who claimed to have been awarded the Distinguished Service Cross and 14 who claimed to have won the Navy Cross.[6] Notorious cases brought to Congress' attention included the case of a judge who falsely claimed to have been awarded *two* Medals of Honor and displayed counterfeit medals in his courtroom;[7] a television network's military consultant who falsely claimed that he had received the Silver Star;[8] and a former judge advocate in the Marine Corps who lied about receiving the Bronze Star and a Purple Heart.[9]

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the

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[3] Colimore, Pinning Crime on Fake Heroes: N. J. Agent Helps Expose and Convict Those With Bogus U. S. Medals, Philadelphia Inquirer, Feb. 11, 2004, http://articles.philly.com/2004-02-11/news/25374213_1_medals-military-imposters-distinguished-flying-cross (all Internet materials as visited June 25, 2012, and available in Clerk of Court's case file).

[4] Crewdson, Claims of Medals Amount to Stolen Valor, Chicago Tribune, Oct. 26, 2008, http://www.chicagotribune.com/news/local/chi-valor-oct25,0,4301227.story?page=1.

[5] Half of MOH Entries in Oral History Project Are Incorrect, Marine Corps Times, Oct. 1, 2007, 2007 WLNR 27917486.

[6] *Ibid.*

[7] Young, His Honor Didn't Get Medal of Honor, Chicago Tribune, Oct. 21, 1994, http://articles.chicagotribune.com/1994-10-21/news/9410210318_1_congressional-medal-highest-fritz.

[8] Rutenberg, At Fox News, the Colonel Who Wasn't, N. Y. Times, Apr. 29, 2002, http://www.nytimes.com/2002/04/29/business/at-fox-news-the-colonel-who-wasn-t.html?pagewanted=all&src=pm.

[9] B. Burkett & G. Whitley, Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History 179 (1998).

harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits.[10] An investigation of false claims in a single region of the United States, for example, revealed that 12 men had defrauded the Department of Veterans Affairs out of more than $1.4 million in veteran's benefits.[11] In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. See Stolen Valor Act of 2005, §2, 120 Stat. 3266, note following 18 U. S. C. §704 (finding that "[f]raudulent claims surrounding the receipt of [military decorations and medals] damage the reputation and meaning of such decorations and medals"). And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed. One Medal of Honor recipient described the feeling as a "'slap in the face of veterans who have paid the price and earned their medals.'"[12]

It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the "'signal' given out by the purchasers of the originals." Landes & Posner, Trademark Law: An Economic Perspective, 30 J. Law & Econ. 265, 308 (1987). In much the same way, the

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[10] Indeed, the first person to be prosecuted under the Stolen Valor Act apparently "parlayed his medals into lucrative security consulting contracts." Zambito, War Crime: FBI Targets Fake Heroes, New York Daily News, May 6, 2007, http://www.nydailynews.com/news/crime/war-crime-fbi-targets-fake-heroes-article-1.249168.

[11] Dept. of Justice, Northwest Crackdown on Fake Veterans in "Operation Stolen Valor," Sept. 21, 2007, http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html.

[12] Cato, High Court Tussles With False Heroics: Free Speech or Felony? Pittsburgh Tribune Review, Feb. 23, 2012, http://triblive.com/usworld/nation/1034434-85/court-military-law-false-medals-supreme-valor-act-federal-free.

proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps. Surely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 539–541 (1987) (rejecting First Amendment challenge to law prohibiting certain unauthorized uses of the word "Olympic" and recognizing that such uses harm the U. S. Olympic Committee by "lessening the distinctiveness" of the term).

Both the plurality and JUSTICE BREYER argue that Congress could have preserved the integrity of military honors by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate. The chief alternative that is recommended is the compilation and release of a comprehensive list or database of actual medal recipients. If the public could readily access such a resource, it is argued, imposters would be quickly and easily exposed, and the proliferation of lies about military honors would come to an end.

This remedy, unfortunately, will not work. The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001. See Office of Undersecretary of Defense, Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database 4–5 (2009).[13]

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[13] In addition, since the Department may not disclose the Social Security numbers or birthdates of recipients, this database would be of limited use in ascertaining the veracity of a claim involving a person with a common name. Office of Undersecretary of Defense, Report, at 3–4.

Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls "counterspeech." *Ante,* at 726. Without the requisite database, many efforts to refute false claims may be thwarted, and some legitimate award recipients may be erroneously attacked. In addition, a steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent.

The plurality and the concurrence also suggest that Congress could protect the system of military honors by enacting a narrower statute. The plurality recommends a law that would apply only to lies that are intended to "secure moneys or other valuable considerations." *Ante*, at 723. In a similar vein, the concurrence comments that "a more finely tailored statute might . . . insist upon a showing that the false statement caused specific harm." *Ante,* at 738 (opinion of BREYER, J.). But much damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

JUSTICE BREYER also proposes narrowing the statute so that it covers a shorter list of military awards, *ante,* at 737–738 (opinion concurring in judgment), but he does not provide a hint about where he thinks the line must be drawn. Perhaps he expects Congress to keep trying until it eventually passes a law that draws the line in just the right place.

## II

### A

Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value. See *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech"); *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective"); *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact' " (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974))); *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech"); *Brown* v. *Hartlage*, 456 U. S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements"); *Herbert* v. *Lando*, 441 U. S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Gertz*, *supra*, at 340 ("[T]he erroneous statement of fact is not worthy of constitutional protection"); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function"); *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964) ("[T]he

knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

Consistent with this recognition, many kinds of false factual statements have long been proscribed without "'rais[ing] any Constitutional problem.'" *United States* v. *Stevens*, 559 U. S. 460, 469 (2010) (quoting *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942)). Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question. See, *e. g.*, *Donaldson* v. *Read Magazine, Inc.*, 333 U. S. 178, 190 (1948) (explaining that the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *United States* v. *Dunnigan*, 507 U. S. 87, 97 (1993) (observing that "the constitutionality of perjury statutes is unquestioned"); *Beauharnais* v. *Illinois*, 343 U. S. 250, 256 (1952) (noting that the "prevention and punishment" of libel "have never been thought to raise any Constitutional problem").

We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption. The right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, see *Falwell*, *supra*, at 56, even though that tort did not enter our law until the late 19th century, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 12, p. 60, and n. 47. (5th ed. 1984) (hereinafter Prosser and Keeton). And in *Hill*, *supra*, at 390, the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy, see Prosser and Keeton § 117, at 863.

In line with these holdings, it has long been assumed that the First Amendment is not offended by prominent criminal

statutes with no close common-law analog. The most well known of these is probably 18 U. S. C. § 1001, which makes it a crime to "knowingly and willfully" make any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Unlike perjury, § 1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of "pecuniary or property loss to the government." *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941). Instead, the statute is based on the need to protect "agencies from the perversion which *might* result from the deceptive practices described." *Ibid.* (emphasis added).

Still other statutes make it a crime to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government. See, *e. g.*, 18 U. S. C. § 912 (making it a crime to falsely impersonate a federal officer); § 709 (making it a crime to knowingly use, without authorization, the names of enumerated federal agencies, such as "Federal Bureau of Investigation," in a manner reasonably calculated to convey the impression that a communication is approved or authorized by the agency). We have recognized that § 912, like § 1001, does not require a showing of pecuniary or property loss and that its purpose is to "'maintain the general good repute and dignity'" of Government service. *United States* v. *Lepowitch*, 318 U. S. 702, 704 (1943) (quoting *United States* v. *Barnow*, 239 U. S. 74, 80 (1915)). All told, there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern. See *United States* v. *Wells*, 519 U. S. 482, 505–507, and nn. 8–10 (1997) (Stevens, J., dissenting) (citing "at least 100 federal false statement statutes" in the United States Code).

These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own

right.[14] It is true, as JUSTICE BREYER notes, that many in our society either approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called "white lies." See *ante*, at 733. But respondent's false claim to have received the Medal of Honor did not fall into any of these categories. His lie did not "prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence." *Ibid.* Nor did his lie "stop a panic or otherwise preserve calm in the face of danger" or further philosophical or scientific debate. *Ibid.*

[14] The plurality rejects this rule. Although we have made clear that "[u]ntruthful speech . . . has never been protected for its own sake," *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976), the most the plurality is willing to concede is that "the falsity of speech bears upon whether it is protected," *ante*, at 721. This represents a dramatic—and entirely unjustified—departure from the sound approach taken in past cases.

Respondent and his supporting *amici* attempt to limit this rule to certain subsets of false statements, see, *e. g.*, Brief for Respondent 53 (asserting that, at most, only falsity that is proved to cause specific harm is stripped of its First Amendment protection), but the examples described above belie that attempt. These examples show that the rule at least applies to (1) specific types of false statements that were neither illegal nor tortious in 1791 (the torts of intentional infliction of emotional distress and false-light invasion of privacy did not exist when the First Amendment was adopted); (2) false speech that does not cause pecuniary harm (the harm remedied by the torts of defamation, intentional infliction of emotional distress, and false-light invasion of privacy is often nonpecuniary in nature, as is the harm inflicted by statements that are illegal under §§ 912 and 1001); (3) false speech that does not cause detrimental reliance (neither perjury laws nor many of the federal false statement statutes require that anyone actually rely on the false statement); (4) particular false statements that are not shown in court to have caused specific harm (damages can be presumed in defamation actions involving knowing or reckless falsehoods, and no showing of specific harm is required in prosecutions under many of the federal false statement statutes); and (5) false speech that does not cause harm to a specific individual (the purpose of many of the federal false statement statutes is to protect government processes).

Respondent's claim, like all those covered by the Stolen Valor Act, served no valid purpose.

Respondent and others who join him in attacking the Stolen Valor Act take a different view. Respondent's brief features a veritable paean to lying. According to respondent, his lie about the Medal of Honor was nothing out of the ordinary for 21st-century Americans. "Everyone lies," he says. Brief for Respondent 10. "We lie all the time." *Ibid.* "[H]uman beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception." *Id.*, at 39. An academic *amicus* tells us that the First Amendment protects the right to construct "self-aggrandizing fabrications such as having been awarded a military decoration." Brief for Jonathan D. Varat as *Amicus Curiae* 5.

This radical interpretation of the First Amendment is not supported by any precedent of this Court. The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope. I now turn to that question.

B

While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to "exten[d] a measure of strategic protection" to these statements in order to ensure sufficient "'breathing space'" for protected speech. *Gertz*, 418 U. S., at 342 (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). Thus, in order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity. See *New York Times Co.* v.

*Sullivan*, 376 U. S. 254, 279–280 (1964) (civil liability); *Garrison*, 379 U. S., at 74–75 (criminal liability). This same requirement applies when public officials and figures seek to recover for the tort of intentional infliction of emotional distress. See *Falwell*, 485 U. S., at 55–56. And we have imposed "[e]xacting proof requirements" in other contexts as well when necessary to ensure that truthful speech is not chilled. *Madigan*, 538 U. S., at 620 (complainant in a fraud action must show that the defendant made a knowingly false statement of material fact with the intent to mislead the listener and that he succeeded in doing so); see also *BE&K Constr.*, 536 U. S., at 531 (regulation of baseless lawsuits limited to those that are both "objectively baseless *and* subjectively motivated by an unlawful purpose"); *Hartlage*, 456 U. S., at 61 (sustaining as-applied First Amendment challenge to law prohibiting certain "factual misstatements in the course of political debate" where there had been no showing that the disputed statement was made "other than in good faith and without knowledge of its falsity, or . . . with reckless disregard as to whether it was false or not"). All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.

These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. On the contrary, there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather

that it is perilous to permit the state to be the arbiter of truth.

Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Sullivan*, *supra*, at 279, n. 19 (quoting J. Mill, On Liberty 15 (R. McCallum ed. 1947)).

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 384–390 (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech), the potential for abuse of power in these areas is simply too great.

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect. Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent's counsel conceded that the answer is none. Tr. of Oral Arg. 36.

C

Neither of the two opinions endorsed by Justices in the majority claims that the false statements covered by the Stolen Valor Act possess either intrinsic or instrumental value. Instead, those opinions appear to be based on the distinct concern that the Act suffers from overbreadth. See *ante*, at 722 (plurality opinion) (the Act applies to "personal, whispered conversations within a home"); *ante*, at 736 (BREYER, J., concurring in judgment) (the Act "applies in family, social, or other private contexts" and in "political contexts"). But to strike down a statute on the basis that it is overbroad, it is necessary to show that the statute's "overbreadth [is] *substantial*, not only in an absolute sense, but also relative to [its] plainly legitimate sweep." *United States* v. *Williams*, 553 U. S. 285, 292 (2008); see also *ibid.* (noting that this requirement has been "vigorously enforced"). The plurality and the concurrence do not even attempt to make this showing.

The plurality additionally worries that a decision sustaining the Stolen Valor Act might prompt Congress and the state legislatures to enact laws criminalizing lies about "an endless list of subjects." *Ante*, at 723. The plurality apparently fears that we will see laws making it a crime to lie about civilian awards such as college degrees or certificates of achievement in the arts and sports.

This concern is likely unfounded. With very good reason, military honors have traditionally been regarded as quite different from civilian awards. Nearly a century ago, Congress made it a crime to wear a military medal without authorization; we have no comparable tradition regarding such things as Super Bowl rings, Oscars, or Phi Beta Kappa keys.

In any event, if the plurality's concern is not entirely fanciful, it falls outside the purview of the First Amendment. The problem that the plurality foresees—that legislative bodies will enact unnecessary and overly intrusive criminal

laws—applies regardless of whether the laws in question involve speech or nonexpressive conduct. If there is a problem with, let us say, a law making it a criminal offense to falsely claim to have been a high school valedictorian, the problem is not the suppression of speech but the misuse of the criminal law, which should be reserved for conduct that inflicts or threatens truly serious societal harm. The objection to this hypothetical law would be the same as the objection to a law making it a crime to eat potato chips during the graduation ceremony at which the high school valedictorian is recognized. The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional.

The Stolen Valor Act represents the judgment of the people's elected representatives that false statements about military awards are very different from false statements about civilian awards. Certainly this is true with respect to the high honor that respondent misappropriated. Respondent claimed that he was awarded the Medal of Honor in 1987 for bravery during the Iran hostage crisis. This singular award, however, is bestowed only on those members of the Armed Forces who "distinguis[h] [themselves] conspicuously by gallantry and intrepidity at the risk of [their lives] above and beyond the call of duty." 10 U. S. C. § 3741; see also §§ 6241, 8741. More than half of the heroic individuals to have been awarded the Medal of Honor after World War I received it posthumously.[15] Congress was entitled to conclude that falsely claiming to have won the Medal of Honor is qualitatively different from even the most prestigious civilian awards and that the misappropriation of that honor warrants criminal sanction.

* * *

[15] See U. S. Army Center of Military History, Medal of Honor Statistics, http://www.history.army.mil/html/moh/mohstats.html.

The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression. I would sustain the constitutionality of the Act, and I therefore respectfully dissent.

Syllabus

# FIRST AMERICAN FINANCIAL CORP., SUCCESSOR IN INTEREST TO FIRST AMERICAN CORP., ET AL. *v.* EDWARDS

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

No. 10–708. Argued November 28, 2011—Decided June 28, 2012
Certiorari dismissed. Reported below: 610 F. 3d 514.

*Aaron M. Panner* argued the cause for petitioners. With him on the briefs were *Michael K. Kellogg*, *Gregory G. Rapawy*, *Brendan J. Crimmins*, *Charles A. Newman*, and *Michael J. Duvall*.

*Jeffrey A. Lamken* argued the cause for respondent. With him on the brief were *Cyril V. Smith*, *David A. Reiser*, *Edward Kramer*, *Robert K. Kry*, *Martin V. Totaro*, *Richard S. Gordon*, *Martin E. Wolf*, and *James W. Spertus*.

*Anthony A. Yang* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Michael Jay Singer*, *Christine N. Kohl*, *David M. Gossett*, and *Deepak Gupta*.*

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*Briefs of *amici curiae* urging reversal were filed for ACA International by *Tomio B. Narita* and *Jeffrey A. Topor;* for the American Bankers Association et al. by *Thomas M. Hefferon* and *William F. Sheehan;* for the American Land Title Association by *Roy T. Englert, Jr.*, and *Ariel N. Lavinbuk;* for the Association of Global Automakers, Inc., et al. by *Donald M. Falk;* for the Consumer Data Industry Association by *Anne P. Fortney;* for DRI–The Voice of the Defense Bar et al. by *R. Matthew Cairns*, *Mary Massaron Ross*, and *Hilary A. Ballentine;* for Experian Information Solutions, Inc., by *Meir Feder* and *Daniel J. McLoon;* for Facebook, Inc., et al. by *Patrick J. Carome;* for the International Association of Defense Counsel by *Mary-Christine Sungaila* and *J. Mitchell Smith;* for the National Association of Home Builders et al. by *Christopher M. Whitcomb*, *Thomas J. Ward*, and *Nick Cammarota;* for the National Association of Retail Collection Attorneys by *David M. Schultz*, *Joel D. Bertocchi*, and *Stephen*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

*It is so ordered.*

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*R. Swofford;* for the New England Legal Foundation et al. by *Benjamin G. Robbins*, *Martin J. Newhouse*, *Robin S. Conrad*, and *Kathryn Comerford Todd;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra*, *John C. Eastman*, and *Anthony T. Caso;* for the Real Estate Services Providers Council, Inc., by *Jay N. Varon* and *Michael D. Leffel;* and for the Stewart Information Services Corp. et al. by *Peter D. Keisler*, *Jonathan F. Cohn*, *Matthew D. Krueger*, and *Christine R. Milton.*

Briefs of *amici curiae* urging affirmance were filed for the State of Missouri et al. by *Chris Koster*, Attorney General of Missouri, and *James R. Layton*, Solicitor General, and by the Attorneys General for their respective States as follows: *John J. Burns* of Alaska, *Kamala D. Harris* of California, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jim Hood* of Mississippi, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Robert M. McKenna* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for AARP et al. by *Scott L. Nelson* and *Allison M. Zieve;* for the Electronic Privacy Information Center by *Marc Rotenberg;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Janell M. Byrd*, *Jon M. Greenbaum*, *Stephen M. Dane*, *John Payton*, *Debo P. Adegbile*, *Elise C. Boddie*, and *Leslie Proll;* for the National Association of Independent Land Title Agents by *Gregory W. Happ;* for Public Law Professors by *Jonathan S. Massey;* for the Reporter and Advisers to Restatement (Third) of Restitution and Unjust Enrichment by *Douglas Laycock;* and for Erick Carter et al. by *John T. Murray.*

Briefs of *amici curiae* were filed for the Toyota Economic-Loss Plaintiffs by *Steve W. Berman*, *Marc M. Seltzer*, and *Frank M. Pitre;* for Trust Law and ERISA Law Professors by *Melanie B. Leslie;* and for Birny Birnbaum et al. by *Shelley R. Sadin.*

Syllabus

# TENNANT, WEST VIRGINIA SECRETARY OF STATE, ET AL. *v.* JEFFERSON COUNTY COMMISSION ET AL.

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 11–1184. Decided September 25, 2012

Following the 2010 decennial United States census, West Virginia began redistricting to comply with the "one person, one vote" principle embodied in Article I, § 2, of the United States Constitution. After several plans were proposed and considered, S. B. 1008 was adopted by the state legislature and signed into law by the Governor. S. B. 1008 did not split county lines, redistrict incumbents into the same district, or require dramatic shifts in the population of the current districts. In fact, it made the smallest shift in population of any of the proposed plans, a chief selling point. However, with a population variance of 0.79%—*i. e.*, the population difference between the largest and smallest districts equals 0.79% of the population of the average district—S. B. 1008 had the second highest variance of the plans considered. On that basis, the Jefferson County Commission and two of its county commissioners sued to enjoin the State from implementing the plan, arguing that it violated Article I, § 2, and, separately, the West Virginia Constitution. The State conceded that it could have adopted a plan with lower population variations but argued that legitimate state policies justified the slightly higher variance. The District Court nonetheless granted the injunction, holding that the State's asserted objectives did not justify the variance.

*Held:* West Virginia's redistricting plan does not violate the United States Constitution. *Karcher* v. *Daggett*, 462 U. S. 725, sets out the applicable two-prong test: The challenging parties must prove the existence of population differences that "could practicably be avoided," *id.*, at 734, and if they do so, the State must "show with some specificity" that the population differences "were necessary to achieve some legitimate state objective," *id.*, at 741, 740. The State's burden is "flexible" and "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.*, at 741. Here, the District Court failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment. None of the State's alternative plans came close to vindicating all three of its

legitimate objectives while achieving a lower variance. The District Court is left to address in the first instance whether the plan violates the West Virginia Constitution.

Reversed and remanded.

PER CURIAM.

Plaintiffs in this case claim that West Virginia's 2011 congressional redistricting plan violates the "one person, one vote" principle that we have held to be embodied in Article I, § 2, of the United States Constitution. A three-judge District Court for the Southern District of West Virginia agreed, declaring the plan "null and void" and enjoining West Virginia's secretary of state from implementing it. App. to Juris. Statement 4. The state defendants appealed directly to this Court. See 28 U. S. C. § 1253. Because the District Court misapplied the standard for evaluating such challenges set out in *Karcher* v. *Daggett*, 462 U. S. 725 (1983), and failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment, we reverse.

* * *

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States . . . according to their respective Numbers" and "chosen every second Year by the People of the several States." In *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), we held that these commands require that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7–8. We have since explained that the "as nearly as is practicable" standard does not require that congressional districts be drawn with "precise mathematical equality," but instead that the State justify population differences between districts that could have been avoided by "a good-faith effort to achieve absolute equality." *Karcher*, *supra*, at 730 (quoting *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 530–531 (1969); internal quotation marks omitted).

*Karcher* set out a two-prong test to determine whether a State's congressional redistricting plan meets this standard. First, the parties challenging the plan bear the burden of proving the existence of population differences that "could practicably be avoided." 462 U. S., at 734. If they do so, the burden shifts to the State to "show with some specificity" that the population differences "were necessary to achieve some legitimate state objective." *Id.*, at 741, 740. This burden is a "flexible" one, which "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.*, at 741. As we recently reaffirmed, redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry* v. *Perez*, 565 U. S. 388, 393 (2012) *(per curiam)*. "[W]e are willing to defer to [such] state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher*, *supra*, at 740.

In this case, plaintiffs claim that West Virginia's redistricting plan, adopted following the 2010 decennial United States census, violates Article I, § 2, of the United States Constitution and, separately, the West Virginia Constitution. The 2010 census did not alter West Virginia's allocation of three congressional seats. But due to population shifts within the State, West Virginia nonetheless began redistricting to comply with the requirements in our precedents.

In August 2011, the West Virginia Legislature convened an extraordinary session, and the State Senate formed a 17-member Select Committee on Redistricting. The committee first considered a redistricting plan championed by its chair, Majority Leader John Unger, and dubbed "the Perfect Plan" because it achieved a population difference of a single person

between the largest and smallest districts. That appears, however, to have been the only perfect aspect of the Perfect Plan. State legislators expressed concern that the plan contravened the State's longstanding rule against splitting counties, placed two incumbents' residences in the same district, and moved one-third of the State's population from one district to another.

The following day, members of the Redistricting Committee introduced seven additional plans. The committee eventually reported to the full Senate the eighth proposal, referred to as S. B. 1008. The full Senate rejected a ninth proposal offered as an amendment on the floor and adopted S. B. 1008 by a vote of 27 to 4. The House of Delegates approved the bill without debate by a vote of 90 to 5. Governor Earl Tomblin signed the bill into law on August 18, 2011.

S. B. 1008, codified at W. Va. Code Ann. § 1–2–3 (Lexis 2012 Supp.), does not split county lines, redistrict incumbents into the same district, or require dramatic shifts in the population of the current districts. Indeed, S. B. 1008's chief selling point was that it required very little change to the existing districts: It moved just one county, representing 1.5% of the State's population, from one district to another. This was the smallest shift of any plan considered by the legislature. S. B. 1008, however, has a population variance of 0.79%, the second highest variance of the plans the legislature considered. That is, the population difference between the largest and smallest districts in S. B. 1008 equals 0.79% of the population of the average district.

The Jefferson County Commission and two of its county commissioners sued to enjoin the State from implementing S. B. 1008. At trial, the State conceded that it could have adopted a plan with lower population variations. The State argued, however, that legitimate state policies justified the slightly higher variances in S. B. 1008, citing this Court's statement from *Karcher* that "[a]ny number of consistently

applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." 462 U. S., at 740. The State noted *Karcher*'s approving reference to a District Court opinion upholding a previous West Virginia redistricting plan with a population variance of 0.78%—virtually identical to the variance in S. B. 1008. See *id.*, at 740–741 (citing *West Virginia Civil Liberties Union* v. *Rockefeller*, 336 F. Supp. 395 (SD W. Va. 1972)).

The District Court nonetheless granted the injunction, holding that the State's asserted objectives did not justify the population variance. With respect to the objective of not splitting counties, the District Court acknowledged that West Virginia had never in its history divided a county between two or more congressional districts. The court speculated, however, that the practice of *other* States dividing counties between districts "may portend the eventual deletion" of respecting such boundaries as a potentially legitimate justification for population variances. App. to Juris. Statement 15, n. 6. The court also faulted the West Virginia Legislature for failing "to create a contemporaneous record sufficient to show that S. B. 1008's entire 4,871-person variance—or even a discrete, numerically precise portion thereof—was attributable" to the State's interest in respecting county boundaries and noted that several other plans under consideration also did not split counties. *Id.*, at 15, 16.

The court further questioned the State's assertion that S. B. 1008 best preserved the core of existing districts. Preserving the core of a district, the court reasoned, involved respecting the " '[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area,' " *id.*, at 17 (quoting *Graham* v. *Thornburgh*, 207 F. Supp. 2d 1280, 1286 (Kan. 2002)), not a "dogged insistence that change be minimized for the benefit of the delicate citizenry," App. to Juris.

Statement 20. The District Court concluded that although acclimating to a new congressional district and Congressperson "may give rise to a modicum of anxiety and inconvenience, avoiding constituent discomfort at the margins is not among those policies recognized in *Karcher* as capable of legitimizing a variance." *Ibid.*

With respect to preventing contests between incumbents, the District Court again faulted the legislature for failing to build a record "linking all or a specific part of the variance" to that asserted interest. *Id.*, at 22. And the District Court found that although 0.79% was a minor variation when *Karcher* was decided, the feasibility of achieving smaller variances due to improved technology meant that the same variance must now be considered major. Because the District Court concluded that the redistricting plan was unconstitutional under Article I, § 2, it did not reach plaintiffs' challenges under the West Virginia Constitution.

Chief Judge Bailey dissented. He argued that the record demonstrated the legitimacy of the State's concerns, and that no other plan satisfied all those concerns as well as S. B. 1008. He also took issue with the majority's disregard for *Karcher*'s characterization of 0.78% as an acceptable disparity. App. to Juris. Statement 39.

We stayed the District Court's order pending appeal to this Court, 565 U. S. 1175 (2012), and now reverse.

Given the State's concession that it could achieve smaller population variations, the remaining question under *Karcher* is whether the State can demonstrate that "the population deviations in its plan were necessary to achieve some legitimate state objective." 462 U. S., at 740. Considering, as *Karcher* instructs, "the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests," *id.*, at 741, it is clear that West Virginia has carried its burden.

As an initial matter, the District Court erred in concluding that improved technology has converted a "minor" variation in *Karcher* into a "major" variation today. Nothing about technological advances in redistricting and mapping software has, for example, decreased population variations between a State's counties. See *id.*, at 733, n. 5. Thus, if a State wishes to maintain whole counties, it will inevitably have population variations between districts reflecting the fact that its districts are composed of unevenly populated counties. Despite technological advances, a variance of 0.79% results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives.

Moreover, our cases leave little doubt that avoiding contests between incumbents and not splitting political subdivisions are valid, neutral state districting policies. See, *e. g.*, *id.*, at 740. The majority cited no precedent for requiring legislative findings on the "discrete, numerically precise portion" of the variance attributable to each factor, and we are aware of none.

The District Court dismissed the State's interest in limiting the shift of population between old and new districts as "ham-handed," App. to Juris. Statement 19, because the State considered only "discrete bounds of geography," rather than "'[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area.'" *Id.*, at 17 (quoting *Graham* v. *Thornburgh*, *supra*, at 1286). According to the District Court, that did not qualify as "preserving the cores of prior districts" under *Karcher*, 462 U. S., at 740–741.

Regardless of how to read that language from *Karcher*, however, our opinion made clear that its list of possible justifications for population variations was not exclusive. See *id.*, at 740 ("Any number of consistently applied legislative policies might justify some variance, including, for instance, . . . "). The desire to minimize population shifts between districts is clearly a valid, neutral state policy. See,

*e. g.*, *Turner* v. *Arkansas*, 784 F. Supp. 585, 588–589 (ED Ark. 1991), summarily aff'd, 504 U. S. 952 (1992). S. B. 1008 achieves significantly lower population shifts than the alternative plans—more than 4 times lower than the closest alternative, and more than 25 times lower than others.

None of the alternative plans came close to vindicating all three of the State's legitimate objectives while achieving a lower variance. All other plans failed to serve at least one objective as well as S. B. 1008 does; several were worse with respect to two objectives; and the Perfect Plan failed as to all three of the State's objectives. See App. to Juris. Statement 43–45. This is not to say that anytime a State must choose between serving an additional legitimate objective and achieving a lower variance, it may choose the former. But here, given the small "size of the deviations," as balanced against "the importance of the State's interests, the consistency with which the plan as a whole reflects those interests," and the lack of available "alternatives that might substantially vindicate those interests yet approximate population equality more closely," *Karcher*, *supra*, at 741, S. B. 1008 is justified by the State's legitimate objectives.

Because the District Court did not reach plaintiffs' claims under the West Virginia Constitution and the issue has not been briefed by the parties, we leave it to the District Court to address the remaining claims in the first instance. The judgment of the United States District Court for the Southern District of West Virginia is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## Reporter's Note

The next page is purposely numbered 901. The numbers between 765 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 11 THROUGH
SEPTEMBER 25, 2012

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JUNE 11, 2012

*Certiorari Granted—Vacated and Remanded*

No. 11–836. HARTMAN ET AL. *v.* MOORE. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reichle* v. *Howards*, 566 U. S. 658 (2012). JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 644 F. 3d 415.

No. 11–1011. HOWES, WARDEN *v.* WALKER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Parker* v. *Matthews*, *ante*, p. 37 *(per curiam)*. Reported below: 656 F. 3d 311.

*Certiorari Granted—Reversed and Remanded.* (See No. 11–845, *ante*, p. 37.)

*Certiorari Dismissed*

No. 11–9684. WOOLRIDGE *v.* FAKHOURY, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–9766. BURNLEY *v.* NORWOOD ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 455 Fed. Appx. 358.

No. 11–9939. LABOY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 2011 IL App (1st) 093096–U.

*Miscellaneous Orders*

No. D–2614. IN RE DISBARMENT OF CREEL. Disbarment entered. [For earlier order herein, see 565 U. S. 1053.]

No. D–2625. IN RE DISBARMENT OF KLINE. Disbarment entered. [For earlier order herein, see 566 U. S. 917.]

No. D–2626. IN RE DISBARMENT OF FULLER. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2627. IN RE DISBARMENT OF BURKENROAD. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2628. IN RE DISBARMENT OF WELLS. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2629. IN RE DISBARMENT OF DAY. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2630. IN RE DISBARMENT OF MEADE. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2631. IN RE DISBARMENT OF MINOR. Disbarment entered. [For earlier order herein, see 566 U. S. 918.]

No. D–2633. IN RE DISBARMENT OF BAGNELL. Disbarment entered. [For earlier order herein, see 566 U. S. 919.]

No. D–2634. IN RE DISBARMENT OF KLINGSMITH. Disbarment entered. [For earlier order herein, see 566 U. S. 919.]

No. D–2639. IN RE DISBARMENT OF PEEL. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2640. IN RE DISBARMENT OF MARDIROSIAN. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2641. IN RE DISBARMENT OF FROHLING. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2642. IN RE DISBARMENT OF NEEDLE. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2643. IN RE DISBARMENT OF DORNY. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2645. IN RE DISBARMENT OF KATZ. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2646. IN RE DISBARMENT OF GOLD. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2647. In re Disbarment of White. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2649. In re Disbarment of Nunnery. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2650. In re Disbarment of Howell. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2651. In re Disbarment of Clifford. Disbarment entered. [For earlier order herein, see 566 U. S. 933.]

No. D–2652. In re Disbarment of Holmes. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2654. In re Disbarment of Wilson. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2655. In re Disbarment of Nwadike. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2656. In re Disbarment of Needleman. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2659. In re Disbarment of Douglas. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2722. In re Discipline of DeJong. Pieter J. De Jong, of Long Valley, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2723. In re Discipline of Bennett. Jeffrey Alan Bennett, of Doylestown, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2724. In re Discipline of Mahoney. Anthony M. Mahoney, of Woodbridge, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2725. In re Discipline of Jean-Baptiste. Constant Jean-Baptiste, Jr., of Brooklyn, N. Y., is suspended from the prac-

tice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11M114. CREWS *v.* UNITED STATES COURT OF FEDERAL CLAIMS. Motion for leave to proceed as a veteran denied.

No. 11M115. GALVEZ *v.* INTERNAL REVENUE SERVICE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 10–930. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* VALENCIA GONZALES. C. A. 9th Cir. [Certiorari granted, 565 U. S. 1259.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 11–393. NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.;

No. 11–398. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* FLORIDA ET AL.; and

No. 11–400. FLORIDA ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 11th Cir. [Certiorari granted, 565 U. S. 1033 and 1034.] Motions of David Boyle for reconsideration of motions for leave to intervene denied.

No. 11–1025. CLAPPER, DIRECTOR OF NATIONAL INTELLIGENCE, ET AL. *v.* AMNESTY INTERNATIONAL USA ET AL. C. A. 2d Cir. [Certiorari granted, 566 U. S. 1009.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 11–9696. LEWELLYN ET VIR, ON BEHALF OF J. L. ET AL. *v.* SARASOTA COUNTY SCHOOL BOARD. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 2, 2012, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 11–10296. IN RE ANDERSON. Petition for writ of habeas corpus denied.

No. 11–10417. IN RE HELTON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 11–1246. IN RE PANGHAT. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 11–1327. EVANS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari granted. Reported below: 491 Mich. 1, 810 N. W. 2d 535.

No. 11–1085. AMGEN INC. ET AL. *v.* CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS. C. A. 9th Cir. Certiorari granted. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 660 F. 3d 1170.

*Certiorari Denied*

No. 10–1383. AL-BIHANI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 11–413. UTHMAN *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 637 F. 3d 400.

No. 11–683. ALMERFEDI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 654 F. 3d 1.

No. 11–804. MORGAN ET AL. *v.* SWANSON ET AL.; and
No. 11–941. SWANSON ET AL. *v.* MORGAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 3d 359.

No. 11–959. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 3d 1071.

No. 11–963. BLAIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 661 F. 3d 755.

No. 11–1039. TAPPEN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 75 So. 3d 274.

No. 11–1054. AL KANDARI ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 462 Fed. Appx. 1.

No. 11–1097. ESTATE OF HENSON, DECEASED, ET AL. *v.* KRAJCA. C. A. 5th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 341.

No. 11–1110. FELICIANO-HERNANDEZ *v.* PEREIRA-CASTILLO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 3d 527.

No. 11–1207. SIMMSPARRIS *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 208 N. J. 349, 28 A. 3d 1240.

No. 11–1211. PUESCHEL *v.* NATIONAL AIR TRAFFIC CONTROLLERS ASSN. C. A. D. C. Cir. Certiorari denied.

No. 11–1214. ST. ANGELO *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 952 N. E. 2d 885.

No. 11–1225. KEYES ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 664 F. 3d 774.

No. 11–1241. BOURNE *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 3d 411.

No. 11–1247. NORTH HUDSON REGIONAL FIRE & RESCUE ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 665 F. 3d 464.

No. 11–1248. PANGHAT *v.* NEW YORK DOWNTOWN HOSPITAL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 3d 473, 925 N. Y. S. 2d 445.

No. 11–1277. LEBRON ET AL. *v.* RUMSFELD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 670 F. 3d 540.

No. 11–1295. TATAR *v.* UNITED STATES;
No. 11–1308. DUKA *v.* UNITED STATES;
No. 11–10192. DUKA *v.* UNITED STATES;
No. 11–10205. DUKA *v.* UNITED STATES; and
No. 11–10235. SHNEWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 671 F. 3d 329.

No. 11–1316. FLORIDA EX REL. GRUPP ET AL. *v.* DHL EXPRESS (USA), INC., ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 60 So. 3d 426.

No. 11–1345. HENDRICKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 516.

No. 11–1364. GEISE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–7020. AL-MADHWANI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 642 F. 3d 1071.

No. 11–7700. AL ALWI *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 653 F. 3d 11.

No. 11–7854. AKAPO *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 377 Fed. Appx. 901.

No. 11–8885. ARMSTRONG *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 73 So. 3d 155.

No. 11–9101. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 493.

No. 11–9153. MORGAN *v.* COLUMBIA COUNTY DEPARTMENT OF SOCIAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 11–9513. LEZDEY ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 893.

No. 11–9680. KEARNS *v.* HOKE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 110.

No. 11–9681. LAPORTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 11–9683. TIMM *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2011 IL App (4th) 100255–U.

No. 11–9693. COLLICK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 160 Wash. App. 1048.

No. 11–9697. KING *v.* HUMPHREY, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 11–9698. WHITLEY *v.* HAAS, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9700. WAKELAND *v.* NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS ET AL. Ct. App. N. M. Certiorari denied. Reported below: 2012–NMCA–021, 274 P. 3d 766.

No. 11–9707. CARR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9710. BARRETO *v.* LATTIMORE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9720. WILLIAMS *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 459 Fed. Appx. 87.

No. 11–9725. BUTLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1152, 2 N. E. 3d 663.

No. 11–9728. TAYLOR *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9729. VAUGHN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2011 IL App (1st) 092263–U.

No. 11–9734. STARR *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9735. RICHARDS *v.* NASSAU COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 11–9737. MEDLEY *v.* PRIMEFORECLOSURES.COM ET AL. Ct. App. Ariz. Certiorari denied.

No. 11–9741. MCCLURE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9746. MICHAEL *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 476 Fed. Appx. 277.

No. 11–9748. JONES *v.* IGBINOSA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 604.

No. 11–9750. KERN *v.* WOODS ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9759. VARNER *v.* SISTO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9760. DWORNICZAK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9763. DOSS *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 11–9769. BOONE *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9773. WHITLEY *v.* SCISM, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 355.

No. 11–9778. BROWN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9807. BUTLER *v.* MITCHELL, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 3d 514.

No. 11–9815. COOKE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 355.

No. 11–9816. TIPPENS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–9821. MARTIN *v.* HARTLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9827. EBEH *v.* MEADOW BURKE PRODUCTS ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 80 So. 3d 1024.

No. 11–9851. KING *v.* FLORIDA PAROLE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9852. JAMIL *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9855. NOBLE *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9858. MCCUNE *v.* LUDWICK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9864. HUYNH *v.* EXECUTIVE COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 11–9866. ALSTON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 11–9872. ALLEN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–9887. SHEPPARD *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 3d 338.

No. 11–9899. DAVIS *v.* AKIN'S ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 739.

No. 11–9923. WOODS *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 480.

No. 11–9931. CHANDLER *v.* RONCOLI. C. A. 5th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 379.

No. 11–9943. SPANO *v.* SCHULSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 950.

No. 11–9966. THOMAS *v.* MCCOY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 467 Fed. Appx. 94.

No. 11–9969. COULTER *v.* RODDY. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 610.

No. 11–9971. CALDWELL *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9980. BETSKOFF *v.* MARTIN GROFF CONSTRUCTION CO., INC. Ct. Sp. App. Md. Certiorari denied. Reported below: 199 Md. App. 704 and 708.

No. 11–10011. HICKMAN *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–10031. ANDERSON *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–10036. HAMM *v.* SOUTH CAROLINA. Ct. Common Pleas of Berkeley County, S. C. Certiorari denied.

No. 11–10042. EVERETT *v.* BERGH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 325.

No. 11–10126. Evans *v.* Phelps, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 468 Fed. Appx. 112.

No. 11–10154. Reaid *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 926.

No. 11–10206. Chavez-Trevino *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 461.

No. 11–10207. Caparotta *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 676 F. 3d 213.

No. 11–10208. Clark *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 512.

No. 11–10209. Zakrzewski *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 421.

No. 11–10210. Whitley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 472.

No. 11–10217. Myers *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 666 F. 3d 402.

No. 11–10218. Mercer *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 11–10219. Jimenez-Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 469 Fed. Appx. 581.

No. 11–10225. Mott *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 30 A. 3d 809.

No. 11–10226. McKnight *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 3d 786.

No. 11–10229. Williams *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 11–10233. Suscal-Ramon *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 11–10234. Saucedo-Munoz, aka Saucedo, aka Sauceda-Munoz, aka Miranda *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 461.

No. 11–10237. Scott *v.* Internal Revenue Service. C. A. 8th Cir. Certiorari denied.

No. 11–10241. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10246. MCREYNOLDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 749.

No. 11–10248. ANDUJAR *v.* PFISTER. C. A. 7th Cir. Certiorari denied.

No. 11–10258. ARRIOLA-PEREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 762.

No. 11–10260. OLMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 316.

No. 11–10265. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 33 A. 3d 924.

No. 11–10272. MARE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 668 F. 3d 35.

No. 11–10279. SELDON ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 735.

No. 11–10280. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 462 Fed. Appx. 58.

No. 11–10284. DEERING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–10286. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 669.

No. 11–10288. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 351.

No. 11–10289. MARIONI-MELENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 336.

No. 11–10291. PRITCHARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 846.

No. 11–10292. GRIMALDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 669 F. 3d 619.

No. 11–10294. ANAYA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 11–10298. ONEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 729.

No. 11–10299. BRAVO-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 679.

No. 11–10303. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 258.

No. 11–10306. LALOUDAKIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 254.

No. 11–10315. FAUNCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 674.

No. 11–10322. MASSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 3d 852.

No. 11–10328. CARRUTHERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 811.

No. 11–10330. HERNANDEZ-SERVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 674.

No. 11–10335. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 232.

No. 11–10340. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–10349. XUYEN BAO VO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–1024. CITY OF NEW HAVEN, CONNECTICUT *v.* BRISCOE. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 654 F. 3d 200.

No. 11–1027. LATIF *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of respondents for leave to file a brief in opposition under seal granted. Motion of petitioner for leave to file a reply brief under seal granted. Certiorari denied. Reported below: 666 F. 3d 746.

No. 11–1255. SUFFOLK COUNTY, NEW YORK, ET AL. *v.* FIELD DAY, LLC, FKA NEW YORK MUSIC FESTIVAL, LLC, ET AL. C. A.

2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 11–1262. WHITE, WARDEN *v.* RICE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 660 F. 3d 242.

No. 11–10263. BAXTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 469 Fed. Appx. 803.

No. 11–10304. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10309. CORBETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10772 (11A1167). LEAVITT *v.* ARAVE, WARDEN. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 682 F. 3d 1138.

*Rehearing Denied*

No. 10–1018. FILARSKY *v.* DELIA, 566 U. S. 377;

No. 11–1002. WEBER, FKA SALL *v.* SALL, 566 U. S. 938;

No. 11–1076. CLENDENIN *v.* ILLINOIS, 566 U. S. 963;

No. 11–1098. LOMAX *v.* UNITED STATES SENATE ARMED SERVICES COMMITTEE ET AL., 566 U. S. 963;

No. 11–8477. BILAL *v.* WILKINS, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, ET AL., 566 U. S. 910;

No. 11–8516. FEIGER *v.* HICKMAN ET AL., 566 U. S. 911;

No. 11–8586. LOGAN *v.* SOCIAL SECURITY ADMINISTRATION, 566 U. S. 912;

No. 11–8680. WATSON *v.* LEWIS ET AL., 565 U. S. 1270;

No. 11–8772. GREENE *v.* DEPARTMENT OF LABOR, 566 U. S. 944;

No. 11–8872. JONES *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL FACILITY, 566 U. S. 947;

No. 11–8886. THOMAS *v.* CALIFORNIA (two judgments), 566 U. S. 947;

No. 11–8889. Clark *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 566 U. S. 964;

No. 11–8912. Abascal *v.* Bellamy et al., 566 U. S. 947; and

No. 11–9130. Draganov *v.* Washington, 566 U. S. 950. Petitions for rehearing denied.

No. 09–10382. Williams *v.* Hobbs, Director, Arkansas Department of Correction, 562 U. S. 1097. Motion for leave to file petition for rehearing denied.

## June 12, 2012

*Certiorari Denied*

No. 11–10781 (11A1175). Brawner *v.* Mississippi. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 166 So. 3d 22.

## June 18, 2012

*Miscellaneous Orders*

No. D–2658. In re Disbarment of Joseph. Disbarment entered. [For earlier order herein, see 566 U. S. 934.]

No. D–2674. In re Discipline of Seto. Robert M. M. Seto, of Virginia Beach, Va., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on April 30, 2012 [566 U. S. 973], is discharged.

No. 11–702. Moncrieffe *v.* Holder, Attorney General. C. A. 5th Cir. [Certiorari granted, 566 U. S. 920.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 11–1155. Blue Cross & Blue Shield of Montana, Inc. *v.* Fossen et al. C. A. 9th Cir.; and

No. 11–1221. Hillman *v.* Maretta. Sup. Ct. Va. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 11–9810. Simmons *v.* Braverman. Ct. App. Mich. Motion of petitioner for leave to proceed *in forma pauperis* de-

nied. Petitioner is allowed until July 9, 2012, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 11–10489. IN RE HILL. Petition for writ of habeas corpus denied.

No. 11–9785. IN RE PARKHURST; and
No. 11–10236. IN RE SHIELDS. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 11–8976. SMITH ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question II presented by the petition. Reported below: 651 F. 3d 30.

*Certiorari Denied*

No. 11–882. MCCALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 515.

No. 11–1101. TIMBERRIDGE PRESBYTERIAN CHURCH, INC., ET AL. *v.* PRESBYTERY OF GREATER ATLANTA, INC. Sup. Ct. Ga. Certiorari denied. Reported below: 290 Ga. 272, 719 S. E. 2d 446.

No. 11–1119. RUI YANG *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 580.

No. 11–1135. DOE, BY AND THROUGH HIS PARENTS DOE ET AL., ET AL. *v.* LOWER MERION SCHOOL DISTRICT. C. A. 3d Cir. Certiorari denied. Reported below: 665 F. 3d 524.

No. 11–1173. BROWN *v.* CALAMOS, TRUSTEE OF CALAMOS CONVERTIBLE OPPORTUNITIES AND INCOME FUND, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 664 F. 3d 123.

No. 11–1219. GJERDE *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 11–1227. SNELLING *v.* HAYNES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 695.

No. 11–1228. BURNETT *v.* CAMPBELL (two judgments). Ct. App. Kan. Certiorari denied. Reported below: 44 Kan. App. 2d

xiii, 240 P. 3d 986 (first judgment); 45 Kan. App. 2d xxx, 253 P. 3d 385 (second judgment).

No. 11–1230. Delander *v.* Hubbard, Warden. C. A. 9th Cir. Certiorari denied.

No. 11–1233. Torain *v.* Deutsche Bank National Trust Co. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 405 Ill. App. 3d 1208, 997 N. E. 2d 1013.

No. 11–1239. Telasco *v.* 7320 Biscayne, LLC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 90 So. 3d 296.

No. 11–1242. Zorn et ux. *v.* Demetri et al. Sup. Ct. N. H. Certiorari denied.

No. 11–1264. Hearts Bluff Game Ranch, Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 669 F. 3d 1326.

No. 11–1267. Lahrichi *v.* Lumera Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 433 Fed. Appx. 519.

No. 11–1280. Fossen et al. *v.* Blue Cross & Blue Shield of Montana, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 3d 1102.

No. 11–1299. Calabrese *v.* Sebelius, Secretary of Health and Human Services (Reported below: 446 Fed. Appx. 38); Calabrese *v.* Sebelius, Secretary of Health and Human Services (446 Fed. Appx. 1); Calabrese *v.* Department of Health and Human Services et al. (446 Fed. Appx. 50); Calabrese *v.* Sebelius, Secretary of Health and Human Services (446 Fed. Appx. 33); Calabrese *v.* Sebelius, Secretary of Health and Human Services (446 Fed. Appx. 34); and Calabrese *v.* Department of Health and Human Services (446 Fed. Appx. 47). C. A. 9th Cir. Certiorari denied.

No. 11–1303. Groves et al. *v.* City of Darlington, South Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 230.

No. 11–1330. Irvin *v.* Ray. Ct. App. Ariz. Certiorari denied.

No. 11–1349. Weitz Co., LLC *v.* MacKenzie House, LLC, et al. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 3d 970.

No. 11–1353. GOLDINGS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 451 Fed. Appx. 953.

No. 11–1354. DEE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2012 ME 26, 39 A. 3d 42.

No. 11–1360. CLARK *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2011 UT App 344, 263 P. 3d 1222.

No. 11–1372. HOOK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 714.

No. 11–7711. PENDLETON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 658 F. 3d 299.

No. 11–8334. MYERS *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 420 Fed. Appx. 924.

No. 11–8335. PIERRE ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 432 Fed. Appx. 845.

No. 11–8474. BOYD *v.* JACKSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 11–8648. FERGUSON *v.* AVELO MORTGAGE, LLC. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 11–8978. MOORE ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 651 F. 3d 30.

No. 11–9056. FERGUSON *v.* AVELO MORTGAGE, LLC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9259. ROSE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 289 Mich. App. 499, 808 N. W. 2d 301.

No. 11–9263. SWEET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 711.

No. 11–9330. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 3d 114.

No. 11–9357. SMITH *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 353 S. W. 3d 1.

No. 11–9433. NUNNERY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 749, 263 P. 3d 235.

No. 11–9761. STRONG *v.* MERRILL LYNCH. C. A. 9th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 672.

No. 11–9776. AZIZ *v.* BENNETT ET AL. C. A. 8th Cir. Certiorari denied.

No. 11–9780. STOUT *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 200.

No. 11–9783. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 11–9787. BANKS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 11–9796. MUHAMMAD *v.* MARIN COUNTY, CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–9798. PROPES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–9801. DOWDY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–9802. CHAPMAN *v.* MCEWEN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9803. MOORE *v.* MARICOPA COUNTY SHERIFF'S OFFICE. C. A. 9th Cir. Certiorari denied. Reported below: 657 F. 3d 890.

No. 11–9806. ROBERTS *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9814. POLEDORE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9823. WILEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2011 IL App (1st) 101047–U.

No. 11–9829. FONNER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 955 N. E. 2d 241.

No. 11–9838. ANDERSON *v.* PRUITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 229.

No. 11–9844. JACKSON *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL.; and

No. 11–9845. JOHNSON *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9847. LIRA *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 78 So. 3d 552.

No. 11–9856. POOLE *v.* CARTERET COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 232.

No. 11–9868. ANDREW D., A MINOR *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 11–9870. BLACKMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 962 N. E. 2d 649.

No. 11–9879. BROOKS *v.* WHIRLPOOL CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9932. COLEMAN *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 291.

No. 11–9989. PETWAY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 685.

No. 11–9991. BRAXTON *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–10015. RUELAS *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–10029. QUINTON *v.* CLAY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–10054. BUCKMAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 461 Mass. 24, 957 N. E. 2d 1089.

No. 11–10085. MARQUEZ *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 80 Mass. App. 1115, 956 N. E. 2d 1265.

No. 11–10103. Baker *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 86 So. 3d 1208.

No. 11–10108. Lopez *v.* Phelps, Warden, et al. C. A. 3d Cir. Certiorari denied.

No. 11–10122. Munoz *v.* Cate, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 11–10155. Sanchez *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 200 Cal. App. 4th 70, 132 Cal. Rptr. 3d 537.

No. 11–10197. Hernandez *v.* California (two judgments). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–10212. Zeyon *v.* Burns, Acting Superintendent, State Correctional Institution at Laurel Highlands. C. A. 3d Cir. Certiorari denied.

No. 11–10224. Bush *v.* City of Philadelphia, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 395.

No. 11–10232. Barbarin *v.* Scribner, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 11–10274. Alexander *v.* Folino, Superintendent, State Correctional Institution at Greene. C. A. 3d Cir. Certiorari denied.

No. 11–10313. Smith *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 11–10317. Searcy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 984.

No. 11–10319. Soto *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 11–10323. Butts *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 105.

No. 11–10331. Smith *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 11–10351. PIPKIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 168.

No. 11–10353. AMARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–10357. CHAVEZ-CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 978.

No. 11–10361. MYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 290.

No. 11–10364. TORRES-LARANEGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 839.

No. 11–10365. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 219.

No. 11–10374. LACSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–10375. MALDONADO-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 310.

No. 11–10378. BRYANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 589.

No. 11–10380. CANADA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 512.

No. 11–10381. CARMICHAEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–10382. COULTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 763.

No. 11–10383. DEVO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 908.

No. 11–10385. SOUTHERLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 371.

No. 11–10387. KOUFOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 666 F. 3d 1243.

No. 11–10388. OLIVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 457.

No. 11–10390. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 407.

No. 11–10392. HERBST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 387.

No. 11–10393. FREERKSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 769.

No. 11–10394. GILLESPIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 692.

No. 11–10396. FORDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 3d 1219.

No. 11–10397. HAYMOND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 672 F. 3d 948.

No. 11–10398. GERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10399. GREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 Fed. Appx. 96.

No. 11–10402. HERNANDEZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 410.

No. 11–10414. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10422. FORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 652.

No. 11–10426. UNDER SEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 280.

No. 11–10428. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 451.

No. 11–10430. GERHOLDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 430.

No. 11–10435. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 384.

No. 11–10438. ROUNDSTONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 707.

No. 11–10441. ALVERA-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 245.

No. 11–10443. PORCELLI, AKA JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 870.

No. 11–10444. WILLIAMS *v.* TAMEZ, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 6.

No. 11–10456. DHALIWAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 666.

No. 11–1066. LUTZER *v.* DUNCAN. App. Ct. Ill., 2d Dist. Motion of Alliance Defense Fund for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 408 Ill. App. 3d 911, 947 N. E. 2d 305.

No. 11–1139. GAUSS ET AL. *v.* EPISCOPAL CHURCH IN THE DIOCESE OF CONNECTICUT ET AL. Sup. Ct. Conn. Motion of St. James Anglican Church et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 302 Conn. 408, 28 A. 3d 302.

No. 11–1234. REDEVELOPMENT AUTHORITY OF MONTGOMERY COUNTY, PENNSYLVANIA, ET AL. *v.* R&J HOLDING CO. ET AL. C. A. 3d Cir. Motion of National League of Cities et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 670 F. 3d 420.

No. 11–1236. NELSON, CHAIRMAN, PUBLIC UTILITY COMMISSION OF TEXAS, ET AL. *v.* TIME WARNER CABLE INC. ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 667 F. 3d 630.

No. 11–7185. FAIREY *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 160.

JUSTICE SOTOMAYOR, dissenting.

Petitioner William Fairey was tried *in absentia* and without counsel on state felony charges. Although Fairey had not received actual notice of his trial date, the state court concluded that he had waived his right to be present when he failed to

appear in court on the scheduled trial date. The State tried Fairey in his absence and, without having heard any defense, the jury found Fairey guilty. The court sentenced him to eight years' imprisonment and $25,000 in restitution. Fairey sought relief on the ground that his trial *in absentia* violated the Sixth and Fourteenth Amendments. After exhausting state remedies, he filed a federal petition for writ of habeas corpus. The District Court denied relief. Both the District Court and the United States Court of Appeals for the Fourth Circuit denied a certificate of appealability (COA).

I believe a COA should have issued; at the very least, "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El* v. *Cockrell*, 537 U. S. 322, 327 (2003). An accused's right to be present at his own trial is among the most fundamental rights our Constitution secures. In view of the importance of the right involved and the obvious error here, I would grant the petition for a writ of certiorari and summarily reverse the judgment below.

I

In early 1998, South Carolina served Fairey with an arrest warrant for obtaining goods and moneys under false pretenses, a state felony. Fairey was released on his personal recognizance, and the State dismissed the warrant. Some time later, Fairey moved from South Carolina to Sarasota, Florida. In 2001, South Carolina indicted Fairey for the charge underlying the warrant. Fairey proceeded *pro se* and defended himself actively. He filed motions, sought the discovery of documents, and corresponded with the court. Twice he traveled from Florida to South Carolina for proceedings.

In the fall of 2002, Fairey informed the state solicitor (hereinafter Solicitor) and the trial court of his new address in Castiac, California. Several months later, Fairey moved to quash his indictment. In that submission, he listed both the California and Florida addresses, the latter now denoted as a "temporary address." Record in No. 4:09–cv–01610–RMG (D SC), Doc. 19, p. 160 (Exh. 10). Fairey explained: "Beginning February 23, I have been living temporarily in Sarasota, Florida, awaiting my next [work] assignment and my return to California." *Id.*, at 171. He attended the hearing on his motion in March, and there submitted a motion to dismiss and an accompanying affidavit. Both listed only his Florida address. The trial court denied

Fairey's motion to quash and sent notice of its ruling to the Florida address alone. The Solicitor subsequently sent at least one letter to that address. Some 15 months later, the trial court denied Fairey's motion to dismiss. Notice again was sent only to Florida.

In June 2004, the Solicitor subpoenaed Fairey to appear for trial in South Carolina the following month. Although Fairey's most recent filing had listed only his Florida address, and both the trial court and Solicitor most recently had sent correspondence to that address alone, the Solicitor mailed the subpoena to two different addresses: the California address, and a South Carolina address listed on Fairey's 1998 personal recognizance bond form. It is undisputed that Fairey did not receive the subpoena. Unaware of his trial date, he did not appear at trial. The State tried him in his absence, and the jury found him guilty after less than 30 minutes of deliberation.

When it came time to arrest Fairey, the State had no trouble locating him in Florida. After he was incarcerated, Fairey moved for a new trial. The trial court denied the motion, and the South Carolina Court of Appeals affirmed. The court acknowledged that the Sixth Amendment guarantees the right of an accused to be present at every stage of his trial. 374 S. C. 92, 98–99, 646 S. E. 2d 445, 448 (2007). But the court concluded that Fairey had waived this right because (1) notice of his trial date was sent to his California address, which was the "permanent address for service of notice" in the record; and (2) Fairey had been warned on his 1998 personal recognizance bond form that trial would proceed in his absence if he did not attend. *Id.*, at 99–103, 646 S. E. 2d, at 448–450. After exhausting his state remedies, Fairey petitioned the United States District Court for the District of South Carolina for a writ of habeas corpus. The District Court denied relief, largely adopting the reasoning of the State Court of Appeals. The District Court and United States Court of Appeals for the Fourth Circuit denied a COA. See 441 Fed. Appx. 160 (2011). Fairey, proceeding *pro se*, petitioned for a writ of certiorari.

## II

It is a basic premise of our justice system that "in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his

opportunity to defend against the charge." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105–106 (1934). This longstanding right reflects the "notion that a fair trial [can] take place only if the jurors me[e]t the defendant face-to-face and only if those testifying against the defendant [do] so in his presence." *Crosby* v. *United States*, 506 U. S. 255, 259 (1993); see also *ibid.* ("'It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony'" (quoting W. Mikell, Clark's Criminal Procedure 492 (2d ed. 1918) (hereinafter Mikell))); *Diaz* v. *United States*, 223 U. S. 442, 455 (1912) (right to be present is "scarcely less important to the accused than the right of trial itself"). Thus in general, "if [the defendant] is absent [from trial], . . . a conviction will be set aside." *Crosby*, 506 U. S., at 259 (quoting Mikell 492).

The Court has acknowledged only two exceptions to this general rule. First, at least in noncapital trials, a defendant may waive his right to be present "'if, *after the trial has begun in his presence*, he voluntarily absents himself.'" *Crosby*, 506 U. S., at 260 (quoting *Diaz*, 223 U. S., at 455). Second, "a defendant can lose his right to be present at trial if, after being warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois* v. *Allen*, 397 U. S. 337, 343 (1970). This case, of course, does not fall within either exception. Rather, the state court conceived an additional exception, one never recognized by this Court: waiver on the basis of a defendant's actions *prior* to the start of trial. And the state court went on to conclude that Fairey's actions established such waiver on the basis of two facts: The Solicitor mailed a subpoena to Fairey's California address and Fairey acknowledged in his 1998 personal recognizance bond form that trial could proceed in his absence if he failed to attend.

Whether the Constitution permits the trial *in absentia* of a defendant who is not present at the start of trial is a serious question. It is one we expressly left open in *Crosby*, though not without noting that there are good reasons for distinguishing in this context between a defendant who was present at the start of trial and one who was not present at all. We observed that "the defendant's initial presence serves to assure that any waiver [of the right to be present] is indeed knowing." 506 U. S., at 261–

262. And we noted that "the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun," and so "[i]f a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw that line." *Id.*, at 261.

Even assuming that a waiver of the right to be present at trial could ever be found when the defendant was not initially present, the facts here do not remotely demonstrate such a waiver. Our cases clearly establish that "waiver is the intentional relinquishment or abandonment of a known right." *United States* v. *Olano*, 507 U. S. 725, 733 (1993) (internal quotation marks omitted). A defendant's waiver of a fundamental constitutional right is not to be lightly presumed; rather, a court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Carnley* v. *Cochran*, 369 U. S. 506, 514 (1962) (internal quotation marks omitted). It was not reasonable for the state court to conclude that Fairey intentionally abandoned his right to be present.

As a *pro se* litigant, Fairey represented himself actively in pretrial proceedings; he made two interstate trips to do so and demonstrated every intention of mounting a vigorous defense at trial. To be sure, he did not appear in court on his scheduled trial date. And he was informed on his bail recognizance form that trial could proceed in his absence if he was not present. But the form did not specify his trial date, and Fairey had no knowledge of that date as he did not receive the Solicitor's notice, which was sent to California and not to Fairey's most recent address in Florida. There is no suggestion, moreover, that Fairey was derelict in his duty to monitor the docket or to keep the State informed of his whereabouts. His most recent motion to the court provided only his Florida address. An affidavit submitted two weeks earlier stated that he was presently living in Florida. And Fairey had been contacted at his Florida address by both the Solicitor and court after that date. Until he informed the court that he had returned to California or moved elsewhere, he was justified in believing the State would continue to contact him at his Florida address. In short, while Fairey failed to appear in court on the date of his scheduled trial, his failure to do so was wholly inadvertent. Consequently, his absence does not demon-

strate the intent necessary to establish waiver under our established case law.

I believe a COA should have issued and that our intervention is warranted. A trial conducted without actual notice to a defendant and in his absence makes a mockery of fair process and the constitutional right to be present at trial. That is particularly true where, as here, the defendant participated actively in his defense and kept the State informed of his whereabouts. I would grant the petition and summarily reverse the judgment below.

No. 11–9344. EL FALESTENY *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of respondents for leave to file a brief in opposition under seal granted. Motion of petitioner for leave to file a reply brief under seal granted. Certiorari denied.

No. 11–9768. BLACKMON *v.* DOUGLAS, WARDEN. C. A. 11th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 11–9797. MILLER *v.* MARSHALL. C. A. 7th Cir. Certiorari before judgment denied.

No. 11–9865. HOUSTON *v.* QUALITY HOME LOANS ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 11–10389. BASCIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 465 Fed. Appx. 9.

*Rehearing Denied*

No. 11–1072. COHEN *v.* ALFRED & ADELE DAVIS ACADEMY, INC., 566 U. S. 974;

No. 11–1095. GRAVES *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 572 ET AL., 566 U. S. 987;

No. 11–8257. WINSTON *v.* TEGELS, WARDEN, 566 U. S. 976;

No. 11–8485. PANDEY *v.* RUSSELL ET AL., 565 U. S. 1269;

No. 11–8900. WILKINSON *v.* CALIFORNIA, 566 U. S. 964;

No. 11–8953. VINSON *v.* UNITED STATES MARSHALS SERVICE ET AL., 566 U. S. 948;

No. 11–8986. ROBINSON *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL., 566 U. S. 948;

No. 11–8995. WALKER *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 566 U. S. 977;

No. 11–9040. IN RE BALZAROTTI, 566 U. S. 973;

No. 11–9084. MARQUARDT *v.* VAN RYBROEK, 566 U. S. 949;

No. 11–9214. MCCARTHY *v.* SOSNICK ET AL., 566 U. S. 966; and

No. 11–9839. BUSH *v.* UNITED STATES, 566 U. S. 1004. Petitions for rehearing denied.

No. 11–1063. BLYE ET AL. *v.* KOZINSKI, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL., 566 U. S. 970. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 11–7106. CURTIS-JOSEPH *v.* RICHARDSON ET AL., 565 U. S. 1123. Motion for leave to file petition for rehearing denied.

## JUNE 20, 2012

*Miscellaneous Order*

No. 11A1224. SIMMONS *v.* MISSISSIPPI. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

## JUNE 25, 2012

*Affirmed on Appeal*

No. 11–1178. FLETCHER ET AL. *v.* LAMONE ET AL. Affirmed on appeal from D. C. Md. Reported below: 831 F. Supp. 2d 887.

*Certiorari Granted—Vacated and Remanded*

No. 11–83. ARCTIC SLOPE NATIVE ASSN., LTD. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Salazar* v. *Ramah Navajo Chapter*, *ante*, p. 182. Reported below: 629 F. 3d 1296.

*Certiorari Granted—Reversed.* (See No. 11–1179, *ante*, p. 516.)

*Certiorari Dismissed*

No. 11–9896. JONES *v.* LIBERTY BANK & TRUST CO. ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma*

*pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 461 Fed. Appx. 407.

No. 11–9936. JONES *v.* COMMONWEALTH LAND TITLE INSURANCE CO. 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: 459 Fed. Appx. 808.

*Miscellaneous Orders*

No. D–2662. IN RE DISBARMENT OF BARLEY. Disbarment entered. [For earlier order herein, see 566 U. S. 959.]

No. D–2664. IN RE DISBARMENT OF RICHARDSON. Disbarment entered. [For earlier order herein, see 566 U. S. 959.]

No. D–2666. IN RE DISBARMENT OF SNYDER. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2667. IN RE DISBARMENT OF SHIMER. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2668. IN RE DISBARMENT OF SINDACO. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2669. IN RE DISBARMENT OF SINKO. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2670. IN RE DISBARMENT OF WEXLER. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2671. IN RE DISBARMENT OF LEONARD. Disbarment entered. [For earlier order herein, see 566 U. S. 960.]

No. D–2672. IN RE DISBARMENT OF HACKETT. Disbarment entered. [For earlier order herein, see 566 U. S. 961.]

No. D–2679. IN RE DISCIPLINE OF WEBER. Erin Marie Weber, of Falls Church, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 11M116. GIUNTA *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY;

No. 11M118. DAVIS *v.* CAIN, WARDEN;

No. 11M119. BLACKARD *v.* TEXAS; and

No. 11M120. LOMAX *v.* NUNEZ ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11M117. EMMETT *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 11M121. UNDER SEAL *v.* UNDER SEAL ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 11M122. ROE ET AL. *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted on condition that petitioners provide a redacted motion and petition that remove any appended item containing a party's true name and any reference to such item within 30 days.

No. 11–1078. GLAXOSMITHKLINE *v.* CLASSEN IMMUNOTHERAPIES, INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 11–9281. IN RE DOYLE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [566 U. S. 986] denied.

No. 11–9925. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.;

No. 11–10026. POSTOLACHE *v.* POSTOLACHE. Sup. Jud. Ct. Me.; and

No. 11–10480. TRIVEDI *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 16, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9882. IN RE ALSTON; and

No. 11–10487. IN RE HIGDON. Petitions for writs of mandamus denied.

No. 11–1261. IN RE VEY; and

No. 11–9885. IN RE MODELIST. Petitions for writs of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 11–556. VANCE *v.* BALL STATE UNIVERSITY ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 646 F. 3d 461.

No. 11–982. ALREADY, LLC, DBA YUMS *v.* NIKE, INC. C. A. 2d Cir. Certiorari granted. Reported below: 663 F. 3d 89.

No. 11–1160. FEDERAL TRADE COMMISSION *v.* PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 663 F. 3d 1369.

No. 11–1231. SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AUBURN REGIONAL MEDICAL CENTER ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 642 F. 3d 1145.

No. 11–1285. US AIRWAYS, INC., FIDUCIARY AND PLAN ADMINISTRATOR OF THE US AIRWAYS, INC. EMPLOYEE BENEFITS PLAN *v.* MCCUTCHEN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 663 F. 3d 671.

No. 11–338. DECKER, OREGON STATE FORESTER, ET AL. *v.* NORTHWEST ENVIRONMENTAL DEFENSE CENTER; and

No. 11–347. GEORGIA-PACIFIC WEST, INC., ET AL. *v.* NORTHWEST ENVIRONMENTAL DEFENSE CENTER. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 640 F. 3d 1063.

No. 11–460. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 673 F. 3d 880.

No. 11–864. COMCAST CORP. ET AL. *v.* BEHREND ET AL. C. A. 3d Cir. Certiorari granted limited to the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." Reported below: 655 F. 3d 182.

No. 11–1059. GENESIS HEALTHCARE CORP. ET AL. *v.* SYMCZYK. C. A. 3d Cir. Motions of Chamber of Commerce of the United

States of America et al. and DRI–The Voice of the Defense Bar for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 656 F. 3d 189.

No. 11–9307. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 646 F. 3d 223.

*Certiorari Denied*

No. 10–947. BANK MELLI IRAN NEW YORK REPRESENTATIVE OFFICE *v.* WEINSTEIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 3d 43.

No. 10–1139. FACULTY SENATE OF FLORIDA INTERNATIONAL UNIVERSITY ET AL. *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 616 F. 3d 1206.

No. 10–1322. DIRECTV, INC., ET AL. *v.* TESTA, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 128 Ohio St. 3d 68, 2010-Ohio-6279, 941 N. E. 2d 1187.

No. 10–1377. COOK ET AL. *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 3d 1127.

No. 10–1555. PACIFIC MERCHANT SHIPPING ASSN. *v.* GOLDSTENE, EXECUTIVE OFFICER, CALIFORNIA AIR RESOURCES BOARD, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 3d 1154.

No. 11–71. COTRONEO ET AL. *v.* SHAW ENVIRONMENTAL & INFRASTRUCTURE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 3d 186.

No. 11–969. RYAN ET AL. *v.* PICARD ET AL.; and
No. 11–986. VELVEL *v.* PICARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 654 F. 3d 229.

No. 11–1009. PUBLIC CITIZEN, INC., ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 910.

No. 11–1026. M. H. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 3d 1067.

No. 11–1056. TORRES-RENDON *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 3d 456.

No. 11–1062. MICCI *v.* ALEMAN. C. A. 7th Cir. Certiorari denied. Reported below: 662 F. 3d 897.

No. 11–1089. DEFEO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–1153. OGNIBENE ET AL. *v.* PARKES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 3d 174.

No. 11–1158. HERRING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 76 So. 3d 891.

No. 11–1161. CAHILL *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 659 F. 3d 1.

No. 11–1177. RHODES *v.* JUDISCAK. C. A. 10th Cir. Certiorari denied. Reported below: 676 F. 3d 931.

No. 11–1215. ABDUR'RAHMAN *v.* COLSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 649 F. 3d 468.

No. 11–1229. MICHIGAN WORKERS' COMPENSATION INSURANCE AGENCY ET AL. *v.* ACE AMERICAN INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 448 Fed. Appx. 134.

No. 11–1243. DEEP *v.* CLINTON CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 453 Fed. Appx. 49.

No. 11–1252. LOUISIANA CITIZENS PROPERTY INSURANCE CORP., DBA LOUISIANA CITIZENS FAIR PLAN *v.* OUBRE ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Sup. Ct. La. Certiorari denied. Reported below: 2011–0097 (La. 12/16/11), 79 So. 3d 987.

No. 11–1257. KIA MOTORS AMERICA, INC. *v.* SAMUEL-BASSETT ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 613 Pa. 371, 34 A. 3d 1.

No. 11–1258. KIVISTO *v.* SOIFER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 923.

No. 11–1260. WILSON *v.* BIRNBERG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 3d 591.

No. 11–1270. AABDOLLAH *v.* AABDOLLAH. Super. Ct. N. J., App. Div. Certiorari denied.

No. 11–1271. TRUSTEE OF NORTEL NETWORKS UK PENSION PLAN ET AL. *v.* NORTEL NETWORKS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 669 F. 3d 128.

No. 11–1272. JACKSON *v.* MECOSTA COUNTY MEDICAL CENTER ET AL. Ct. App. Mich. Certiorari denied.

No. 11–1273. WIECKIEWICZ *v.* EDUCATIONAL CREDIT MANAGEMENT CORP. C. A. 11th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 449.

No. 11–1276. MIKEL, INDIVIDUALLY AND AS FATHER AND NEXT FRIEND OF MIKEL *v.* SCHOOL BOARD OF SPOTSYLVANIA COUNTY. Sup. Ct. Va. Certiorari denied.

No. 11–1279. JOHNSON *v.* BARTOS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–1283. RODRIGUEZ *v.* SEA SEARCH ARMADA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 11–1294. REPUBLIC OF IRAQ *v.* WYE OAK TECHNOLOGY, INC. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 3d 205.

No. 11–1296. KATZ-PUESCHEL *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 441 Fed. Appx. 771.

No. 11–1297. M. H. R., A CHILD *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 61 So. 3d 483.

No. 11–1311. DUNG PHAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 3d 448.

No. 11–1315. FRANKLIN *v.* ESTATE OF OVERBEY, DECEASED, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 361 S. W. 3d 364.

No. 11–1339. Lovaas *v.* Montana et al. Sup. Ct. Mont. Certiorari denied. Reported below: 363 Mont. 413.

No. 11–1340. Bey et al. *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 454 Fed. Appx. 1.

No. 11–1341. Bosch *v.* Certain Underwriters at Lloyd's London. C. A. 5th Cir. Certiorari denied.

No. 11–1357. Sharp *v.* Johnson et al. C. A. 3d Cir. Certiorari denied. Reported below: 669 F. 3d 144.

No. 11–1380. Williams et ux. *v.* JP Morgan Mortgage Acquisition Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 705.

No. 11–1387. Mr. S. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 662 F. 3d 65.

No. 11–1394. Ballan *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 71 M. J. 28.

No. 11–7501. Smith *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 609 Pa. 605, 17 A. 3d 873.

No. 11–8101. Carter *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 652 F. 3d 894.

No. 11–8733. Trujillo *v.* Tally et al. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 561.

No. 11–8966. Rebollo-Andino *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 11–9013. Brown *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 11–9023. Saghir *v.* Grievance Committee for the 2d, 11th, and 13th Judicial Districts. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 86 App. Div. 3d 121, 925 N. Y. S. 2d 99.

No. 11–9125. Hutchison *v.* Colson, Warden. C. A. 6th Cir. Certiorari denied.

No. 11–9452. Bravo Flores *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 1022.

No. 11–9453. Giannini *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 500.

No. 11–9492. Sandoval *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 3d 865.

No. 11–9672. Padilla *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 657 F. 3d 1085.

No. 11–9830. Dozier *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 128 Nev. 893.

No. 11–9861. Sampson *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 88 So. 3d 209.

No. 11–9862. Rivera *v.* Horne, Attorney General of Arizona, et al. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 807.

No. 11–9863. Smith *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 11–9874. Bailey *v.* Tucker, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 11–9876. Lomax *v.* Regalado, Mayor, City of Miami, Florida, et al. C. A. 11th Cir. Certiorari denied.

No. 11–9877. Smith *v.* Sandor, Warden. C. A. 9th Cir. Certiorari denied.

No. 11–9889. McMorris *v.* Sherfield et al. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 257.

No. 11–9892. Nunn *v.* Cooper, Attorney General of North Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 324.

No. 11–9895. Brown *v.* Mitchell, Superintendent, Old Colony Correctional Center. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 3d 818.

No. 11–9902. ROJAS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9906. CARAVEO *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 11–9914. PENA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2011 IL App (1st) 092610–U.

No. 11–9921. MAYES *v.* ROWLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 358.

No. 11–9924. WALKER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9928. BRUCE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9933. COLEMAN *v.* COX, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9934. LAVENDER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9935. NOWILL *v.* FRAZIER, WARDEN. Super. Ct. Washington County, Ga. Certiorari denied.

No. 11–9940. KIDD *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 311.

No. 11–9949. MOXLEY *v.* NEVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9952. BRIST *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 812 N. W. 2d 51.

No. 11–9957. AMAKER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9959. MAYES *v.* GRAPHIC PACKAGING INTERNATIONAL. C. A. 4th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 316.

No. 11–9963. MENDIOLA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9964. MORRIS *v.* MALFI, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 686.

No. 11–9965. TURNER *v.* HERRICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 250.

No. 11–9968. CABA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9973. LAZAROV *v.* KIMMEL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 873.

No. 11–9976. MCCARTHY *v.* SOSNICK ET AL. (two judgments). Sup. Ct. Mich. Certiorari denied.

No. 11–9978. APPLEWHITE *v.* OUTLAW, SUPERINTENDENT, EASTERN CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 219.

No. 11–9979. BRANCO *v.* ESPINDA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9995. STURDIVANT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 408 Ill. App. 3d 1126.

No. 11–10032. BAILEY *v.* EMS VENTURES, INC., DBA RURAL/METRO AMBULANCE. Ct. App. Ga. Certiorari denied. Reported below: 308 Ga. App. XXII.

No. 11–10055. KULA *v.* WEST VIRGINIA DEPARTMENT OF TRANSPORTATION MOTOR VEHICLE ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 302.

No. 11–10127. MALAM ET UX. *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 141.

No. 11–10132. LIZOTTE *v.* LEBLANC ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 511.

No. 11–10164. DILWORTH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 11–10183. LEONARD *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 1154, 373 P. 3d 935.

No. 11–10187. SMITH *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 703.

No. 11–10230. THOMAS *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–10239. LYONS *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–10254. HALBERT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–10256. ESPINOZA *v.* VIRGA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–10269. RODRIGUEZ *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–10302. LOGGINS *v.* HANNIGAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 712.

No. 11–10336. FRAZIER *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 11–10339. WEBSTER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 80 So. 3d 1041.

No. 11–10341. NEVAREZ IBARRA *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 11–10342. PRATER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 859.

No. 11–10345. LARSEN *v.* UNITED STATES; and
No. 11–10346. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 461.

No. 11–10395. HODGE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 11–10445. WOODSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 266.

No. 11–10447. VOGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 439.

No. 11–10449. THOMPSON *v.* WILLIAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–10452. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 190.

No. 11–10457. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 832.

No. 11–10458. MOORE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 11–10459. ARELLANO MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 251.

No. 11–10469. RIVERA-PINON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 157.

No. 11–10474. HARPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 662 F. 3d 958.

No. 11–10475. GARCIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–10478. STANLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 11–10482. FALLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 273.

No. 11–10484. FRAZIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 Fed. Appx. 195.

No. 11–10485. GONZALEZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 434.

No. 11–10493. CORBRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 679.

No. 11–10496. AGUILAR-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 551.

No. 11–10498. BURGEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–10500. CAMPOS-CABRERA, AKA CAMPOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 240.

No. 11–10501. CAZAREZ *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 287.

No. 11–10508. ROBERTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 187.

No. 11–10513. POWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 387.

No. 11–10524. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 820.

No. 11–10525. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10528. TORRES-VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 780.

No. 11–10529. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 647.

No. 11–10530. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 670 F. 3d 222.

No. 11–10531. PHOUMMANY *v.* SANDERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–10532. HUDGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 120 F. 3d 483.

No. 11–10533. COUSINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 591.

No. 11–10534. COLVIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 181.

No. 11–10537. BERGTHOLD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–431. RUBIN ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE SCALIA and JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 637 F. 3d 783.

No. 11–604. EM LTD. ET AL. *v.* REPUBLIC OF ARGENTINA ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 652 F. 3d 172.

No. 11–762. SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* SOUTHERN UTE INDIAN TRIBE. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 657 F. 3d 1071.

No. 11–998. MOUNT SOLEDAD MEMORIAL ASSN. *v.* TRUNK ET AL.; and

No. 11–1115. UNITED STATES ET AL. *v.* TRUNK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 3d 1099.

Statement of JUSTICE ALITO respecting the denial of the petitions for writs of certiorari.

A large white cross has stood atop Mount Soledad in San Diego, California, since 1954 as a memorial to our Nation's war veterans. The city of San Diego was previously enjoined under the California Constitution from displaying the cross or transferring, for the purpose of protecting the cross, the property on which the Mount Soledad Veterans Memorial stands. See *Trunk* v. *San Diego*, 629 F. 3d 1099, 1103–1104 (CA9 2011) (describing prior litigation); see also *San Diegans for Mt. Soledad Nat. War Memorial* v. *Paulson*, 548 U. S. 1301, 1302 (2006) (KENNEDY, J., in chambers) (same). In 2006, Congress exercised its power of eminent domain and took title to the property in order to "preserve a historically significant war memorial." Act of Aug. 14, § 2(a), 120 Stat. 770. After the Federal Government took possession, the Ninth Circuit held in the decision below that "the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause." 629 F. 3d, at 1125.

This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity, see *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994 (2011) (THOMAS, J., dissenting from denial of certiorari), and the constitutionality of the Mount

Soledad Veterans Memorial is a question of substantial importance. We considered a related question two Terms ago in *Salazar* v. *Buono*, 559 U. S. 700 (2010), which concerned a large white cross that was originally erected on public land. Although "[t]he cross is of course the preeminent symbol of Christianity," *id.*, at 725 (ALITO, J., concurring in part and concurring in judgment), we noted that "[t]he goal of avoiding governmental endorsement [of religion] does not require eradication of all religious symbols in the public realm. . . . The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society," *id.*, at 718–719 (plurality opinion of KENNEDY, J., joined in full by ROBERTS, C. J., and in part by ALITO, J.). The demolition of the cross at issue in that case would have been "interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Id.*, at 726 (opinion of ALITO, J.).

In that case, we were not required to decide whether the Establishment Clause would have required the demolition of the cross if the land on which it was built had remained in government hands. Instead, Congress was ultimately able to devise a solution that was "true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance." *Id.*, at 723.

The current petitions come to us in an interlocutory posture. The Court of Appeals remanded the case to the District Court to fashion an appropriate remedy, and, in doing so, the Court of Appeals emphasized that its decision "d[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial]." 629 F. 3d, at 1125. Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari. See, *e. g., Locomotive Firemen* v. *Bangor & Aroostook R. Co.*, 389 U. S. 327, 328 (1967) *(per curiam)* (denying petition for certiorari because "the Court of Appeals [had] remanded the case" and thus it was "not yet ripe for review by this Court"); see also E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 280 (9th ed. 2007) (hereinafter Stern & Gressman). Our denial, of course, does not amount to a ruling on the merits, and the Federal Government is

free to raise the same issue in a later petition following entry of a final judgment. See, *e. g.*, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 365–366, n. 1 (1973); see also Stern & Gressman 283.

No. 11–999. FLORIDA ET AL. *v.* GEORGIA ET AL.;

No. 11–1006. ALABAMA ET AL. *v.* GEORGIA ET AL.; and

No. 11–1007. SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC. *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions. Reported below: 644 F. 3d 1160.

No. 11–1034. GABAYZADEH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 428 Fed. Appx. 43.

No. 11–1194. JAYYOUSI *v.* UNITED STATES; and

No. 11–1198. HASSOUN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions. Reported below: 657 F. 3d 1085.

No. 11–1259. HARTSEL ET AL., INDIVIDUALLY, DERIVATIVELY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* VANGUARD GROUP, INC., ET AL. Sup. Ct. Del. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 38 A. 3d 1254.

No. 11–9960. PINDER *v.* ARKANSAS. Sup. Ct. Ark. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 2011 Ark. 401.

No. 11–10476. MOJICA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10477. SETTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 11–1013. SALESSI *v.* WACHOVIA MORTGAGE, FSB, ET AL., 566 U. S. 962;

No. 11–1014. HARMAN ET VIR *v.* DATTE ET AL., 566 U. S. 962;
No. 11–1064. JACKSON *v.* FUJI PHOTO FILM, INC., ET AL., 566 U. S. 974;
No. 11–5843. WRIGHT *v.* OLD CASTLE GLASS INC. ET AL., 565 U. S. 965;
No. 11–8899. VIRAY *v.* SMITH, WARDEN, ET AL., 566 U. S. 947;
No. 11–8916. WINGO *v.* CITY OF SOUTH BEND, INDIANA, 566 U. S. 965;
No. 11–8983. ARAFAT *v.* IBRAHIM, 566 U. S. 976;
No. 11–9014. BOLGAR *v.* GLEN DONALD APARTMENTS, INC., 566 U. S. 977;
No. 11–9091. IN RE HIEN ANH DAO, 566 U. S. 985;
No. 11–9233. BEASLEY *v.* UNITED STATES, 566 U. S. 952;
No. 11–9276. BEST *v.* UNITED STATES, 566 U. S. 953; and
No. 11–9592. JONES *v.* UNITED STATES, 566 U. S. 980. Petitions for rehearing denied.

No. 11–7468. DAVIS *v.* CAIN, WARDEN, 565 U. S. 1167. Motion for leave to file petition for rehearing denied.

## JUNE 26, 2012

*Certiorari Denied*

No. 11–10820 (11A1193). VILLEGAS LOPEZ *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 678 F. 3d 1131.

## JUNE 28, 2012

*Miscellaneous Order*

No. 11A1189. ARIZONA ET AL. *v.* ABEYTIA ET AL. C. A. 9th Cir. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Order heretofore entered by JUSTICE KENNEDY is vacated. JUSTICE ALITO would grant the application for stay.

## JUNE 29, 2012

*Certiorari Granted—Vacated and Remanded*

No. 09–10231. TURNER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 591 F. 3d 928;

No. 10–8835. GREINEDER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Reported below: 458 Mass. 207, 936 N. E. 2d 372;

No. 10–9303. WILLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist.;

No. 10–9789. PABLO *v.* UNITED STATES. C. A. 10th Cir. Reported below: 625 F. 3d 1285;

No. 10–10923. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist.;

No. 10–10936. SUEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.;

No. 11–5832. KWON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.; and

No. 11–7972. MERCADO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Williams* v. *Illinois*, *ante*, p. 50.

No. 11–694. MARYLAND *v.* DERR. Ct. App. Md. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *Illinois*, *ante*, p. 50. Reported below: 422 Md. 211, 29 A. 3d 533.

No. 11–799. BLAKE *v.* UNITED STATES. C. A. 7th Cir.; and

No. 11–883. JAIMES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 446 Fed. Appx. 713. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Dorsey* v. *United States*, *ante*, p. 260.

No. 11–5323. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Reported below: 422 Fed. Appx. 544;

No. 11–5842. ROBINSON *v.* UNITED STATES. C. A. 8th Cir.;

No. 11–5950. BRAZELL *v.* UNITED STATES. C. A. 7th Cir. Reported below: 415 Fed. Appx. 727;

No. 11–6364. HYDE *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–6464. LEWIS *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–6602. HERNANDEZ *v.* UNITED STATES. C. A. 7th Cir. Reported below: 426 Fed. Appx. 458;

No. 11–6716. COX *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–6847. MERRIMAN *v.* UNITED STATES; and WRIGHT *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–6876. GRIFFIN *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–7029. KING *v.* UNITED STATES. C. A. 7th Cir. Reported below: 426 Fed. Appx. 467;

No. 11–7043. CAIN *v.* UNITED STATES. C. A. 7th Cir. Reported below: 422 Fed. Appx. 544;

No. 11–7328. NEWCOMB *v.* UNITED STATES. C. A. 7th Cir. Reported below: 423 Fed. Appx. 647;

No. 11–7500. PARKER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 437 Fed. Appx. 500;

No. 11–7505. HOLCOMB ET AL. *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–7558. MOORE *v.* UNITED STATES. C. A. 8th Cir. Reported below: 461 Fed. Appx. 517;

No. 11–7650. RICKMON *v.* UNITED STATES. C. A. 7th Cir. Reported below: 436 Fed. Appx. 708;

No. 11–7689. BAGU *v.* UNITED STATES. C. A. 3d Cir.;

No. 11–7728. MOSES *v.* UNITED STATES. C. A. 7th Cir. Reported below: 434 Fed. Appx. 563;

No. 11–7879. VANCE *v.* UNITED STATES (Reported below: 659 F. 3d 613); BROWN *v.* UNITED STATES (662 F. 3d 457); SMITH *v.* UNITED STATES; and TOWNSEND *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–8023. TICKLES, AKA TICKLESS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 661 F. 3d 212;

No. 11–8026. WALKER *v.* UNITED STATES. C. A. 3d Cir. Reported below: 471 Fed. Appx. 92;

No. 11–8063. WILKS *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–8134. SIDNEY *v.* UNITED STATES. C. A. 8th Cir. Reported below: 648 F. 3d 904;

No. 11–8146. LEWIS *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–8244. JONES *v.* UNITED STATES. C. A. 7th Cir. Reported below: 444 Fed. Appx. 908;

No. 11–8268. GIBSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 661 F. 3d 212;

No. 11–8355. WATSON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 434 Fed. Appx. 569;

No. 11–8413. STROWDER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 449 Fed. Appx. 506;

No. 11–8476. BRITO *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–8551. DOUGLAS *v.* UNITED STATES. C. A. 8th Cir.;

No. 11–8737. BOOMER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 453 Fed. Appx. 334;

No. 11–8778. GIBBS *v.* UNITED STATES. C. A. 4th Cir.;

No. 11–8894. RAYSOR *v.* UNITED STATES. C. A. 8th Cir. Reported below: 661 F. 3d 987;

No. 11–9016. JORDAN *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–9028. AKIWOWO *v.* UNITED STATES. C. A. 7th Cir.;

No. 11–9029. BAXTER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Reported below: 440 Fed. Appx. 508;

No. 11–9142. BENITEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 456 Fed. Appx. 446;

No. 11–9604. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 445 Fed. Appx. 642;

No. 11–9711. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Reported below: 664 F. 3d 997;

No. 11–9938. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 466 Fed. Appx. 383; and

No. 11–9961. OWENS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 466 Fed. Appx. 388. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Dorsey* v. *United States*, *ante*, p. 260.

No. 11–7979. WHITESIDE *v.* ARKANSAS. Sup. Ct. Ark. Reported below: 2011 Ark. 371, 383 S. W. 3d 859; and

No. 11–8655. VARGAS GUILLEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Miller* v. *Alabama*, *ante*, p. 460.

*Miscellaneous Orders*

No. 11A1238. PRELESNIK *v.* BALLINGER. C. A. 6th Cir. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied. THE CHIEF JUSTICE, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO would grant the application for stay.

No. 11–681. HARRIS ET AL. *v.* QUINN, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir.; and

No. 11–1154. RETRACTABLE TECHNOLOGIES, INC., ET AL. *v.* BECTON, DICKINSON & CO. C. A. Fed. Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 11–1327. EVANS *v.* MICHIGAN. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 905.] Motion of petitioner to dispense with printing the joint appendix granted.

*Certiorari Denied*

No. 10–7405. MITCHELL *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2010 ME 73, 4 A. 3d 478.

No. 10–10180. MILLS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 62 So. 3d 574.

No. 10–10642. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 406 Ill. App. 3d 805, 941 N. E. 2d 242.

No. 11–117. THOMAS MORE LAW CENTER ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 651 F. 3d 529.

No. 11–420. VIRGINIA EX REL. CUCCINELLI, ATTORNEY GENERAL OF VIRGINIA *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 656 F. 3d 253.

No. 11–438. LIBERTY UNIVERSITY ET AL. *v.* GEITHNER, SECRETARY OF THE TREASURY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 671 F. 3d 391.

No. 11–535. ARNESON, COUNTY ATTORNEY, BLUE EARTH COUNTY, MINNESOTA, ET AL. *v.* 281 CARE COMMITTEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 638 F. 3d 621.

No. 11–679. SEVEN-SKY, AKA SEVENSKY, ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 661 F. 3d 1.

No. 11–691. MEDIA GENERAL, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 11–696. TRIBUNE CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 11–698. NATIONAL ASSOCIATION OF BROADCASTERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 652 F. 3d 431.

No. 11–5759. MOSCOE *v.* CALIFORNIA; and

No. 11–5796. ESPINOZA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–6217. SISOLAK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–6494. NINHAM *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2011 WI 33, 333 Wis. 2d 335, 797 N. W. 2d 451.

No. 11–6870. HALEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 289 Ga. 515, 712 S. E. 2d 838.

No. 11–7424. RIGO RAMIREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–7756. CASTILLO *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–7882. WILLIAMS *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 637 F. 3d 195.

No. 11–8675. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 274.

No. 11–9072. FOUST *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 34 A. 3d 217.

No. 11–10190. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 Fed. Appx. 79.

No. 11–336. CORBOY ET AL. *v.* LOUIE, ATTORNEY GENERAL OF HAWAII, ET AL. Sup. Ct. Haw. Motion of Center for Equal Opportunity for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 128 Haw. 89, 283 P. 3d 695.

No. 11–614. WARNER, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS *v.* OCAMPO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 649 F. 3d 1098.

No. 11–975. HENRY FORD HEALTH SYSTEM, DBA HENRY FORD HOSPITAL *v.* DEPARTMENT OF HEALTH AND HUMAN SERV-

ices. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 654 F. 3d 660.

No. 11–1240. Federal Communications Commission et al. *v.* CBS Corp. et al. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 3d 122.

Chief Justice Roberts, concurring.

During the finale of the Super Bowl XXXVIII halftime show, entertainers Justin Timberlake and Janet Jackson performed a song and dance routine to Timberlake's song "Rock Your Body." As Timberlake ended the duet by singing "gonna have you naked by the end of this song," he tore away a portion of Jackson's bustier, momentarily revealing her breast. The performers subsequently strained the credulity of the public by terming the episode a "wardrobe malfunction."

The Federal Communications Commission issued an order fining CBS $550,000 for broadcasting the nudity. The agency explained that the incident violated the FCC policy against broadcasting indecent material, such as nudity and expletives, during the hours when children are most likely to watch television. The Third Circuit vacated the order, finding that it violated the Administrative Procedure Act as "arbitrary and capricious" agency action. The court held that the FCC's order represented an unexplained departure from the agency's longstanding policy of excusing the broadcast of fleeting moments of indecency. 663 F. 3d 122 (2011).

I am not so sure. As we recently explained in *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502 (2009), the FCC's general policy is to conduct a context-specific examination of each allegedly indecent broadcast in order to determine whether it should be censured. *Id.*, at 508. Until 2004, the FCC made a limited exception to this general policy for fleeting *expletives*. *Ibid.* But the agency never stated that the exception applied to fleeting *images* as well, and there was good reason to believe that it did not. As every schoolchild knows, a picture is worth a thousand words, and CBS broadcast this particular picture to millions of impressionable children.

I nonetheless concur in the Court's denial of certiorari. Even if the Third Circuit is wrong that sanctioning the Super Bowl

broadcast constituted an unexplained departure from the FCC's prior indecency policy, that error has been rendered moot going forward. The FCC has made clear that it has abandoned its exception for fleeting expletives. *Id.*, at 509–510. Looking ahead, it makes no difference as a matter of administrative law whether the FCC's fleeting expletive policy applies to allegedly fleeting images, because the FCC no longer adheres to the fleeting expletive policy. It is now clear that the brevity of an indecent broadcast—be it word or image—cannot immunize it from FCC censure. See, *e. g.*, *In re Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004) (censuring a broadcast despite the "fleeting" nature of the nudity involved). Any future "wardrobe malfunctions" will not be protected on the ground relied on by the court below.

JUSTICE GINSBURG, concurring.

The Court's remand in *FCC* v. *Fox Television Stations, Inc.*, *ante*, p. 239, affords the Federal Communications Commission an opportunity to reconsider its indecency policy in light of technological advances and the Commission's uncertain course since this Court's ruling in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

*Rehearing Denied*

No. 09–10755. SMITH *v.* FLORIDA, 564 U. S. 1052. Petition for rehearing denied.

JULY 18, 2012

*Certiorari Denied*

No. 11–10944 (11A1225). HEARN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 669 F. 3d 265.

No. 12–5260 (12A55). HEARN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 23, 2012

*Miscellaneous Orders*

No. D–2680. IN RE DISCIPLINE OF HALL. Michael Anthony Hall, of Peoria, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2681. IN RE DISCIPLINE OF HENNESSEY. James J. Hennessey, Jr., of Albany, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2682. IN RE DISCIPLINE OF QUINN. Brian S. Quinn, of Havertown, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2683. IN RE DISCIPLINE OF SMALLENBERG. Robert H. Smallenberg, of Ashland, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2684. IN RE DISCIPLINE OF GARGANO. Paul A. Gargano, of Cambridge, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11–564. FLORIDA *v.* JARDINES. Sup. Ct. Fla. [Certiorari granted, 565 U. S. 1104.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–820. CHAIDEZ *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 566 U. S. 974.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 11–1231. SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AUBURN REGIONAL MEDICAL CENTER ET AL. C. A.

D. C. Cir. [Certiorari granted, *ante*, p. 933.] John F. Manning, Esq., of Cambridge, Mass., is invited to brief and argue this case as *amicus curiae* in support of the position that the 180-day statutory time limit for filing an appeal with the Provider Reimbursement Review Board from a final Medicare payment determination made by a fiscal intermediary, 42 U. S. C. § 1395*oo*(a)(3), may not be extended for any period.

*Rehearing Denied*

No. 11–915. Lara et al. *v.* Office of Personnel Management, 566 U. S. 974;

No. 11–1053. Coleman, Superintendent, State Correctional Institution at Fayette, et al. *v.* Johnson, 566 U. S. 650;

No. 11–1091. MacKinnon *v.* City of New York Human Resources Administration, 566 U. S. 987;

No. 11–1104. Doal *v.* Department of Defense et al., 566 U. S. 988;

No. 11–7928. Bridges *v.* United States, 566 U. S. 1011;

No. 11–8273. Greer *v.* Oklahoma, 565 U. S. 1266;

No. 11–8361. Sims *v.* United States et al., 565 U. S. 1268;

No. 11–8708. Solis *v.* Harrison, Warden, 566 U. S. 942;

No. 11–8798. Lepre *v.* United States District Court for the Western District of Pennsylvania, 566 U. S. 945;

No. 11–8857. Pyatt *v.* South Carolina, 566 U. S. 946;

No. 11–8952. Stone *v.* Missouri Department of Corrections et al., 566 U. S. 976;

No. 11–8959. Bobo *v.* Fresno County Dependency Court, 566 U. S. 976;

No. 11–8963. Propes *v.* District Attorney Office et al., 566 U. S. 976;

No. 11–9017. Massey *v.* Tucker, Secretary, Florida Department of Corrections, et al., 566 U. S. 977;

No. 11–9042. Owens *v.* Bush et al., 566 U. S. 966;

No. 11–9054. Adams *v.* Tyson Foods, Inc., 566 U. S. 991;

No. 11–9077. Ponce *v.* Texas, 566 U. S. 991;

No. 11–9102. Macon *v.* Davis, Warden, 566 U. S. 992;

No. 11–9107. McDonald *v.* Lipov et al., 566 U. S. 992;

No. 11–9121. Hunter *v.* Bowden et al., 566 U. S. 993;

No. 11–9177. GERMAN *v.* BROWARD COUNTY SHERIFF'S OFFICE ET AL., 566 U. S. 994;

No. 11–9216. CARICO *v.* WOODS, WARDEN, 566 U. S. 995;

No. 11–9220. ELLISON *v.* ILLINOIS, 566 U. S. 995;

No. 11–9256. BLAKELY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, 566 U. S. 996;

No. 11–9257. KEMPPAINEN *v.* ARANSAS COUNTY DETENTION CENTER, 566 U. S. 996;

No. 11–9338. WHITMORE *v.* LOUISIANA, 566 U. S. 1012;

No. 11–9378. DUMA *v.* FANNIE MAE ET AL., 566 U. S. 967;

No. 11–9397. BETANCOURT *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 566 U. S. 1013;

No. 11–9403. WRIGHT *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 566 U. S. 979;

No. 11–9408. PHERNETTON *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY, 566 U. S. 998;

No. 11–9418. WILSON *v.* FLORIDA, 566 U. S. 998;

No. 11–9442. GORBATOVA *v.* SOCIAL SECURITY ADMINISTRATION, 566 U. S. 998;

No. 11–9443. GORBATOVA *v.* SOCIAL SECURITY ADMINISTRATION, 566 U. S. 998;

No. 11–9469. RAI *v.* BARCLAYS CAPITAL, INC., 566 U. S. 979;

No. 11–9479. STRICKLAND *v.* SMALL, WARDEN, 566 U. S. 1024;

No. 11–9605. COX *v.* MADIGAN, ATTORNEY GENERAL OF ILLINOIS, ET AL., 566 U. S. 1000;

No. 11–9614. LAND *v.* FLORIDA, 566 U. S. 1015;

No. 11–9659. HELLER *v.* OFFICE OF PERSONNEL MANAGEMENT, 566 U. S. 1026;

No. 11–9709. BLACKWELL *v.* UNITED STATES, 566 U. S. 1001;

No. 11–9762. DEERE *v.* PALMER, WARDEN, ET AL., 566 U. S. 1027;

No. 11–9817. WILLIAMS *v.* UNITED STATES, 566 U. S. 1004; and

No. 11–9828. DESCAMPS *v.* BUSH ET AL., 566 U. S. 1015. Petitions for rehearing denied.

No. 11–10188. WYATT *v.* UNITED STATES, 566 U. S. 1043. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

## August 1, 2012

*Dismissal Under Rule 46*

No. 11–11114. Dupree *v.* United States. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 472 Fed. Appx. 108.

## August 7, 2012

*Certiorari Denied*

No. 12–5349 (12A128). Wilson *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 450 Fed. Appx. 369.

## August 8, 2012

*Certiorari Denied*

No. 12–5585 (12A123). Cook *v.* Ryan, Director, Arizona Department of Corrections. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Certiorari denied. Reported below: 688 F. 3d 598.

## August 13, 2012

*Miscellaneous Orders*

No. 11A857. Rewanwar *v.* Wisconsin Supreme Court et al. C. A. 7th Cir. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. 11A900. Johnson *v.* Mississippi. Application for certificate of appealability, addressed to Justice Sotomayor and referred to the Court, denied.

No. 11A952 (11–10740). Holston *v.* Tucker, Secretary, Florida Department of Corrections. C. A. 11th Cir. Application for bail, addressed to Justice Kagan and referred to the Court, denied.

No. 11A1155. Cox *v.* Gilson, Warden. Application for certificate of appealability, addressed to Justice Sotomayor and referred to the Court, denied.

No. 12A15 (12–20). Coulter *v.* Kelly, Attorney General of Pennsylvania, et al. C. A. 3d Cir. Application for bail, addressed to Justice Ginsburg and referred to the Court, denied.

No. D–2635. In re Disbarment of McAllister. Disbarment entered. [For earlier order herein, see 566 U. S. 931.]

No. D–2636. In re Disbarment of Guffey. Disbarment entered. [For earlier order herein, see 566 U. S. 931.]

No. D–2644. In re Disbarment of Abramowitz. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. D–2660. In re Disbarment of Burke. Disbarment entered. [For earlier order herein, see 566 U. S. 959.]

No. D–2661. In re Disbarment of Newman. Disbarment entered. [For earlier order herein, see 566 U. S. 959.]

No. D–2665. In re Discipline of House. Juliette Alane House, of Crestwood, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2675. In re Disbarment of Matthews. Disbarment entered. [For earlier order herein, see 566 U. S. 973.]

No. D–2685. In re Discipline of Conour. William F. Conour, of Indianapolis, Ind., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2686. In re Discipline of Mahler. Trent William Mahler, of Milnor, N. D., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2687. IN RE DISCIPLINE OF SIEGELMAN. Don Eugene Siegelman, of Birmingham, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2688. IN RE DISCIPLINE OF LAWRENCE. Gary S. Lawrence, of Southport, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2689. IN RE DISCIPLINE OF INGRAM. Jesse H. Ingram, of Columbia, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 10–930. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* VALENCIA GONZALES. C. A. 9th Cir. [Certiorari granted, 565 U. S. 1259.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–218. TIBBALS, WARDEN *v.* CARTER. C. A. 6th Cir. [Certiorari granted, 565 U. S. 1259.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–626. LOZMAN *v.* CITY OF RIVIERA BEACH, FLORIDA. C. A. 11th Cir. [Certiorari granted, 565 U. S. 1195.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–1085. AMGEN INC. ET AL. *v.* CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 905.] Motion of petitioners to dispense with printing the joint appendix granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

*Certiorari Granted*

No. 11–1347. CHAFIN *v.* CHAFIN. C. A. 11th Cir. Certiorari granted.

*Rehearing Denied*

No. 11–1205. Bush et ux. *v.* Slagh et al., 566 U. S. 1022;

No. 11–1238. Petters *v.* United States, 566 U. S. 990;

No. 11–1299. Calabrese *v.* Sebelius, Secretary of Health and Human Services; Calabrese *v.* Sebelius, Secretary of Health and Human Services; Calabrese *v.* Department of Health and Human Services et al.; Calabrese *v.* Sebelius, Secretary of Health and Human Services; Calabrese *v.* Sebelius, Secretary of Health and Human Services; and Calabrese *v.* Department of Health and Human Services, *ante*, p. 917;

No. 11–1345. Hendrickson *v.* United States, *ante*, p. 906;

No. 11–1354. Dee *v.* Maine, *ante*, p. 918;

No. 11–1356. Memorylink Corp. *v.* Motorola, Inc., et al., 566 U. S. 1035;

No. 11–8335. Pierre et al. *v.* Holder, Attorney General, *ante*, p. 918;

No. 11–8630. Miranda *v.* Horel, Warden, 566 U. S. 926;

No. 11–8780. Francis *v.* Standifird, Warden, 566 U. S. 944;

No. 11–9085. Qazza *v.* City of Orange, California, et al., 566 U. S. 992;

No. 11–9150. Pointer *v.* Dormire, Superintendent, Jefferson City Correctional Center, 566 U. S. 993;

No. 11–9156. Walters *v.* Kids Are Us Learning Centers, Inc., 566 U. S. 994;

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No. 11–9269. Honesto *v.* Brown, Governor of California, et al., 566 U. S. 997;

No. 11–9274. Byrd *v.* Florida Department of Corrections et al., 566 U. S. 997;

No. 11–9327. In re Durschmidt, 566 U. S. 985;

No. 11–9365. Laroche *v.* Maryland Department of Labor, Licensing and Regulation, et al., 566 U. S. 1013;

No. 11–9379. Fennell *v.* California Republican Party et al., 566 U. S. 1013;

No. 11–9451. Hill *v.* Muwwakkil, 566 U. S. 1023;

No. 11–9477. Satterfield *v.* Johnson et al., 566 U. S. 1024;

No. 11–9508. Kendrick *v.* Union Baptist Church et al., 566 U. S. 1024;

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No. 11–9655. DENNIS *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL., 566 U. S. 1038;

No. 11–9676. IN RE JONES, 566 U. S. 973;

No. 11–9721. TRZECIAK *v.* STATE FARM FIRE & CASUALTY CO., 566 U. S. 1039;

No. 11–9746. MICHAEL *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 908;

No. 11–9778. BROWN *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL., *ante*, p. 909;

No. 11–9851. KING *v.* FLORIDA PAROLE COMMISSION ET AL., *ante*, p. 909;

No. 11–9871. BALLARD *v.* UNITED STATES, 566 U. S. 1015;

No. 11–10035. GORBATOVA *v.* GAETA ET AL., 566 U. S. 1029;

No. 11–10075. THUAN HUY HA *v.* UNITED STATES, 566 U. S. 1030; and

No. 11–10226. MCKNIGHT *v.* UNITED STATES, *ante*, p. 911. Petitions for rehearing denied.

## AUGUST 14, 2012

*Miscellaneous Order*

No. 11–626. LOZMAN *v.* CITY OF RIVIERA BEACH, FLORIDA. C. A. 11th Cir. [Certiorari granted, 565 U. S. 1195.] Parties are directed, and the Solicitor General is invited, to file letter briefs addressing the following question: "The res in this putative *in rem* admiralty proceeding was sold at a judicial auction in execution of the District Court's judgment on a maritime lien and a maritime trespass claim, App. to Brief for Petitioner 9a–10a, and subsequently destroyed, Brief for Petitioner 10–11. Does either the judicial auction or the subsequent destruction of the res render this case moot?" Briefs, limited to 10 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Tuesday, August 28, 2012.

*Certiorari Denied*

No. 12–5710 (12A148). HOOPER *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir.

Application for stay of execution of sentence of death, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 491 Fed. Appx. 928.

AUGUST 22, 2012

*Dismissal Under Rule 46*

No. 11–10563. HIX *v.* UNITED STATES. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 458 Fed. Appx. 775.

*Miscellaneous Order*

No. 12–5906 (12A173). BALENTINE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, this stay shall terminate upon the sending down of the judgment of this Court.

AUGUST 31, 2012

*Miscellaneous Orders*

No. 11A1029. LAWRENCE *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 12A141 (12–5375). CORNICK *v.* BYONG YU. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 12A145. KWASNIK *v.* MAINE. Sup. Jud. Ct. Me. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2682. IN RE QUINN. Brian S. Quinn, of Havertown, Pa., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The

rule to show cause, issued on July 23, 2012 [*ante*, p. 955], is discharged.

No. D–2690. IN RE DISCIPLINE OF MITCHELL. Robert Vincent Mitchell, of Pittsburgh, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2691. IN RE DISCIPLINE OF GITOMER. Mark Lawrence Gitomer, of Reisterstown, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

*Certiorari Granted*

No. 11–1450. STANDARD FIRE INSURANCE CO. *v.* KNOWLES. C. A. 8th Cir. Certiorari granted.

No. 11–9540. DESCAMPS *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 466 Fed. Appx. 563.

*Rehearing Denied*

No. 10–10180. MILLS *v.* ALABAMA, *ante*, p. 951;

No. 11–1156. BERNAL *v.* CHERRY ET AL., 566 U. S. 989;

No. 11–1215. ABDUR'RAHMAN *v.* COLSON, WARDEN, *ante*, p. 935;

No. 11–1233. TORAIN *v.* DEUTSCHE BANK NATIONAL TRUST CO., *ante*, p. 917;

No. 11–1270. AABDOLLAH *v.* AABDOLLAH, *ante*, p. 936;

No. 11–1297. M. H. R., A CHILD *v.* FLORIDA, *ante*, p. 936;

No. 11–7424. RIGO RAMIREZ *v.* CALIFORNIA, *ante*, p. 952;

No. 11–7857. JOHNSON *v.* UNITED STATES, 566 U. S. 940;

No. 11–7979. WHITESIDE *v.* ARKANSAS, *ante*, p. 950;

No. 11–9104. PELLETIER *v.* UNITED STATES, 566 U. S. 1023;

No. 11–9318. ROSS *v.* CHAPMAN, WARDEN, 566 U. S. 1012;

No. 11–9337. SURABIAN ET AL. *v.* RESIDENTIAL FUNDING CO., LLC, FKA RESIDENTIAL FUNDING CORP., 566 U. S. 1012;

No. 11–9430. SIMPSON *v.* INTERSCOPE GEFFEN A&M RECORDS, 566 U. S. 1014;

No. 11–9472. GEMAS *v.* HENEKS ET AL., 566 U. S. 1023;
No. 11–9507. IN RE SEKENDUR, 566 U. S. 1021;
No. 11–9664. GRAVES *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., 566 U. S. 1038;
No. 11–9671. BABIKER *v.* CITY OF NEW ORLEANS, LOUISIANA, ET AL., 566 U. S. 1039;
No. 11–9750. KERN *v.* WOODS ET AL., *ante*, p. 908;
No. 11–9773. WHITLEY *v.* SCISM, WARDEN, *ante*, p. 909;
No. 11–9801. DOWDY *v.* VIRGINIA, *ante*, p. 919;
No. 11–9863. SMITH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 938;
No. 11–9864. HUYNH *v.* EXECUTIVE COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, *ante*, p. 909;
No. 11–9882. IN RE ALSTON, *ante*, p. 932;
No. 11–9973. LAZAROV *v.* KIMMEL ET AL., *ante*, p. 940;
No. 11–10002. RABB *v.* MCBRIDE, WARDEN, 566 U. S. 1040;
No. 11–10028. SCANLAN *v.* UNITED STATES, 566 U. S. 1029;
No. 11–10109. HILL *v.* HUMPHREY, WARDEN, 566 U. S. 1041;
No. 11–10135. ACEVEDO SANCHEZ *v.* UNITED STATES, 566 U. S. 1041;
No. 11–10239. LYONS *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL., *ante*, p. 941;
No. 11–10303. JONES *v.* UNITED STATES, *ante*, p. 913;
No. 11–10444. WILLIAMS *v.* TAMEZ, WARDEN, *ante*, p. 924;
No. 11–10447. VOGEL *v.* UNITED STATES, *ante*, p. 942; and
No. 11–10487. IN RE HIGDON, *ante*, p. 932. Petitions for rehearing denied.

No. 11–10263. BAXTER *v.* UNITED STATES, *ante*, p. 914. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 09–594. DE LA ROSA *v.* HOLDER, ATTORNEY GENERAL, 560 U. S. 903. Motion for leave to file petition for rehearing denied.

SEPTEMBER 10, 2012

*Dismissal Under Rule 46*

No. 11–1538. ECKSTEIN MARINE SERVICE, L. L. C., NKA MARQUETTE TRANSPORTATION COMPANY GULF-INLAND, L. L. C. *v.*

JACKSON. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 672 F. 3d 310.

## SEPTEMBER 13, 2012

*Dismissal Under Rule 46*

No. 12–55. FISHER, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO DECEDENT FISHER, ET AL. *v.* HALLIBURTON ET AL. C. A. 5th Cir. Certiorari dismissed as to petitioners James Blackwood and Joann Blackwood under this Court's Rule 46.2. Reported below: 667 F. 3d 602.

## SEPTEMBER 19, 2012

*Miscellaneous Orders*

No. 12A234. LEAGUE OF UNITED LATIN AMERICAN CITIZENS *v.* PERRY, GOVERNOR OF TEXAS, ET AL. D. C. W. D. Tex. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 12A260. LIBERTARIAN PARTY OF MICHIGAN ET AL. *v.* JOHNSON, SECRETARY OF STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Application for stay and injunction, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

## SEPTEMBER 20, 2012

*Dismissal Under Rule 46*

No. 11–10337. WILLIAMS ET AL. *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 658 F. 3d 842.

*Certiorari Denied*

No. 12–5009 (12A5). HARRIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 464 Fed. Appx. 301.

No. 12–6197 (12A247). HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 21, 2012

*Dismissal Under Rule 46*

No. 11–1182. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* STAR SCIENTIFIC, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 655 F. 3d 1364.

SEPTEMBER 25, 2012

*Certiorari Granted—Reversed and Remanded.* (See No. 11–1184, *ante*, p. 758.)

*Miscellaneous Orders*

No. 12A266. VOTING FOR AMERICA, INC., ET AL. *v.* ANDRADE, SECRETARY OF STATE OF TEXAS. Application to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on September 6, 2012, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE SOTOMAYOR would grant the application in part.

No. 10–1491. KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND KIOBEL, ET AL. *v.* ROYAL DUTCH PETROLEUM CO. ET AL. C. A. 2d Cir. [Certiorari granted, 565 U. S. 961.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–345. FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL. C. A. 5th Cir. [Certiorari granted, 565 U. S. 1195.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 11–597. ARKANSAS GAME AND FISH COMMISSION *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 566 U. S. 920.] Motion of professors of law teaching in the property law and water rights fields for leave to file a brief as *amici curiae*

granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 11–817. FLORIDA *v.* HARRIS. Sup. Ct. Fla. [Certiorari granted, 566 U. S. 904.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

*Certiorari Granted*

No. 11–1274. GABELLI ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari granted. Reported below: 653 F. 3d 49.

No. 11–1351. LEVIN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 663 F. 3d 1059.

No. 11–1425. MISSOURI *v.* MCNEELY. Sup. Ct. Mo. Certiorari granted. Reported below: 358 S. W. 3d 65.

No. 11–10362. MILLBROOK *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether 28 U. S. C. §§ 1346(b) and 2680(h) waive the sovereign immunity of the United States for the intentional torts of prison guards when they are acting within the scope of their employment but are not exercising authority to 'execute searches, to seize evidence, or to make arrests for violations of Federal law.'" Reported below: 477 Fed. Appx. 4.

No. 12–25. MARACICH ET AL. *v.* SPEARS ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 675 F. 3d 281.

No. 12–98. DELIA, SECRETARY, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES *v.* E. M. A., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM JOHNSON, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 674 F. 3d 290.

*Certiorari Denied*

No. 12–6373 (12A283). FOSTER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE GINS-

BURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution. Reported below: 481 Fed. Appx. 229.

## Reporter's Note

The next page is purposely numbered 1301. The numbers between 969 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

## MARYLAND *v.* KING

ON APPLICATION FOR STAY

No. 12A48. Decided July 30, 2012

The State of Maryland's application to stay the judgment of the Maryland Court of Appeals—overturning the first-degree rape conviction of Alonzo Jay King, Jr., on the ground that the collection of his DNA pursuant to the State's DNA Collection Act violated the Fourth Amendment—is granted. Because that judgment conflicts with the decisions of other courts upholding similar statutes and implicates an important law enforcement practice in approximately half the States and the Federal Government, there is "a reasonable probability" that this Court will grant certiorari. *Conkright* v. *Frommert*, 556 U. S. 1401, 1402. Given the considered analysis of courts on the other side of the split, there is also "a fair prospect" that this Court will reverse that decision. *Ibid.* Finally, there is a "likelihood" that Maryland will suffer "irreparable harm," *ibid.*, if it is unable to give effect to a statute "enacted by representatives of its people," *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U. S. 1345, 1351. There is also ongoing and concrete harm to Maryland's law enforcement and public safety interests resulting from the State's not being allowed to employ a duly enacted statute for investigating unsolved crimes and helping remove violent offenders from the general population.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. §2–501 *et seq.* (Lexis 2011), authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched

DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. 425 Md. 550, 42 A. 3d 549 (2012). Maryland now applies for a stay of that judgment pending this Court's disposition of its petition for a writ of certiorari.

To warrant that relief, Maryland must demonstrate (1) "a reasonable probability" that this Court will grant certiorari, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright* v. *Frommert*, 556 U. S. 1401, 1402 (2009) (GINSBURG, J., in chambers) (internal quotation marks omitted).

To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U. S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States* v. *Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 565 U. S. 1275 (2012); *Haskell* v. *Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 686 F. 3d 1121 (2012); *Anderson* v. *Commonwealth*, 274 Va. 469, 650 S. E. 2d 702 (2007), cert. denied, 553 U. S. 1054 (2008); see also *Mario W.* v. *Kaipio*, 230 Ariz. 122, 281 P. 3d 476 (2012) (holding that seizure of a juvenile's buccal cells does not violate the Fourth Amendment but that extracting a DNA profile before the juvenile is convicted does).

The split implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government. Reply to Memorandum in Opposition 3; see 114 Stat. 2728, as amended, 42 U. S. C. § 14135a(a)(1)(A) (authorizing the Attorney General to "collect DNA samples from individuals who are arrested, facing charges,

or convicted"). Indeed, the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the Federal Bureau of Investigation's national DNA database, the decision renders the database less effective for other States and the Federal Government. These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.

Finally, the decision below subjects Maryland to ongoing irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U. S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here there is, in addition, an ongoing and concrete harm to Maryland's law enforcement and public safety interests. According to Maryland, from 2009—the year Maryland began collecting samples from arrestees—to 2011, "matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions." Application 16. Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm.

King responds that Maryland's eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer than half led to a conviction). Memorandum in Opposition 11. These are sound points. Nonetheless, in

the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months—a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

Accordingly, the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

*It is so ordered.*

## STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2009, 2010, AND 2011

| | ORIGINAL | | | PAID | | | IN FORMA PAUPERIS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **2009** | **2010** | **2011** | **2009** | **2010** | **2011** | **2009** | **2010** | **2011** | **2009** | **2010** | **2011** |
| Number of cases on dockets | 6 | 4 | 3 | 1,908 | 1,895 | 1,867 | 7,388 | 7,167 | 7,082 | 9,302 | 9,066 | 8,952 |
| Number disposed of during term | 2 | 2 | 1 | 1,572 | 1,580 | 1,564 | 6,520 | 6,245 | 6,090 | 8,093 | 7,827 | 7.655 |
| Number remaining on dockets | 4 | 2 | 2 | 337 | 315 | 303 | 868 | 922 | 992 | 1,209 | 1,239 | 1,297 |

| | TERMS | | |
|---|---|---|---|
| | **2009** | **2010** | **2011** |
| Cases argued during term | [1] 82 | 86 | [2] 79 |
| Number disposed of by full opinions | 77 | 83 | 73 |
| Number disposed of by per curiam opinions | 4 | 3 | 5 |
| Number set for reargument | 0 | 0 | 1 |
| Cases granted review this term | 77 | 90 | 66 |
| Cases reviewed and decided without oral argument | 95 | 84 | 137 |
| Total cases to be available for argument at outset of following term | 40 | 43 | 31 |

[1] Includes No. 08–205 which was reargued on September 9, 2009.

[2] Affordable Care Act cases counted as four cases for argument.

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**CONTRACT SUPPORT COSTS.** See **Indian Self-Determination and Education Assistance Act.**

**CORPORATE EXPENDITURES ON POLITICAL SPEECH**. See **Constitutional Law**, VI, 1.

**CRACK-COCAINE SENTENCING GUIDELINES.** See **Fair Sentencing Act of 2010.**

**CRIMINAL FINES.** See **Constitutional Law,** VII.

**CRIMINAL LAW.** See **Constitutional Law,** III; **Fair Sentencing Act of 2010; Habeas Corpus.**

**CRUEL AND UNUSUAL PUNISHMENT**. See **Constitutional Law,** III.

**DNA EVIDENCE**. See **Supreme Court.**

**DUE PROCESS.** See **Constitutional Law,** IV; **Habeas Corpus.**

**DUES PAYMENTS TO LABOR UNIONS.** See **Constitutional Law,** V.

**EIGHTH AMENDMENT**. See **Constitutional Law,** III.

**EMPLOYERS AND EMPLOYEES.** See **Civil Service Reform Act of 1978; Fair Labor Standards Act of 1938.**

**EXPERT WITNESSES.** See **Constitutional Law,** II.

**EXPLETIVES IN BROADCASTING.** See **Constitutional Law,** IV.

**FAIR LABOR STANDARDS ACT OF 1938.**

*Overtime pay—"Outside salesman" exemption—Pharmaceutical sales representatives.*—Petitioner pharmaceutical sales representatives are

**FAIR LABOR STANDARDS ACT OF 1938**—Continued.
"outside salesmen" exempt from overtime pay requirements of Act. Christopher v. SmithKline Beecham Corp., p. 142.

**FAIR NOTICE.** See **Constitutional Law,** IV.

**FAIR SENTENCING ACT OF 2010.**

*Lower mandatory minimum sentences for crack cocaine offenses—Post-Act sentencing of pre-Act offenders.*—Act's lower mandatory minimum sentences for crack cocaine offenses apply to those who committed their offenses before Act's August 3, 2010, effective date but were sentenced after that date. Dorsey v. United States, p. 260.

**FEDERAL EMPLOYER AND EMPLOYEES.** See **Civil Service Reform Act of 1978.**

**FEDERAL SENTENCING GUIDELINES.** See **Fair Sentencing Act of 2010.**

**FEDERAL-STATE RELATIONS**. See **Constitutional Law,** VIII; **Patient Protection and Affordable Care Act.**

**FIRST AMENDMENT.** See **Constitutional Law,** V; VI.

**FORENSIC TESTS.** See **Constitutional Law,** II.

**FOURTH AMENDMENT**. See **Supreme Court.**

**FREEDOM OF ASSOCIATION.** See **Constitutional Law,** V.

**FREEDOM OF SPEECH.** See **Constitutional Law,** VI.

**HABEAS CORPUS.**

*Grounds for federal habeas relief—Burden of proving extreme emotional disturbance.*—Neither of Sixth Circuit's grounds for granting respondent habeas relief—(1) that Kentucky Supreme Court impermissibly shifted to him burden of proving extreme emotional disturbance and Commonwealth failed to prove absence of such disturbance beyond a reasonable doubt, and (2) that certain remarks during prosecutor's closing argument constituted a denial of due process—is valid under Antiterrorism and Effective Death Penalty Act of 1996. Parker v. Matthews, p. 37.

**HEALTH CARE LAW**. See **Patient Protection and Affordable Care Act.**

**HOMICIDE**. See **Constitutional Law,** III.

**IMMIGRATION STATUS**. See **Constitutional Law,** VIII.

**IMMUNITY FROM SUIT.** See **Indian Reorganization Act of 1934.**

**INDECENT BROADCASTS.** See **Constitutional Law,** IV.

**INDIAN REORGANIZATION ACT OF 1934.**

*Interior Secretary's authority to take land into trust for Indian Tribe—Administrative Procedure Act challenge—Sovereign immunity—Prudential standing.*—Federal Government does not have sovereign immunity by virtue of Quiet Title Act from respondent's APA suit challenging Secretary's acquisition of property in trust for petitioner Tribe; respondent has prudential standing to challenge that acquisition because it presents a question of land use that falls within "zone of interests" regulated by IRA. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, p. 209.

**INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.**

*Self-determination contracts—Contract support costs—Insufficient congressional appropriations.*—Consistent with well-established Government contracting law principles, Government must pay in full each respondent Tribe's contract support costs incurred in relation to contracts entered into by Secretary of Interior and Tribes pursuant to Act, even where congressional appropriations are insufficient to pay total amount due all tribal contractors collectively. Salazar v. Ramah Navajo Chapter, p. 182.

**JURY DETERMINATIONS.** See **Constitutional Law,** VII.

**JUVENILE OFFENDERS**. See **Constitutional Law,** III.

**KENTUCKY.** See **Habeas Corpus.**

**LABOR LAW.** See **Constitutional Law,** V**; Fair Labor Standards Act of 1938.**

**LAND USE.** See **Indian Reorganization Act of 1934.**

**LIFE-IMPRISONMENT SENTENCES**. See **Constitutional Law,** III.

**MARYLAND**. See **Supreme Court.**

**MEDICAID ACT**. See **Patient Protection and Affordable Care Act.**

**MILITARY MEDALS AND DECORATIONS**. See **Constitutional Law,** VI, 2.

**MONTANA**. See **Constitutional Law**, VI, 1.

**NONUNION PUBLIC EMPLOYEES.** See **Constitutional Law,** V.

**NUDITY.** See **Constitutional Law,** IV.

**ONE-PERSON, ONE-VOTE PRINCIPLE**. See **Constitutional Law,** I.

**OVERTIME PAY.** See **Fair Labor Standards Act of 1938.**

**PATIENT PROTECTION AND AFFORDABLE CARE ACT.**

*Challenge to Act—Anti-Injunction Act—Individual mandate—Congress' Taxing Clause power—Medicaid severability clause—Withholding of funds from States refusing to comply with expanded Medicaid program.*—Challenge to provisions of Act is not barred by Anti-Injunction Act; Act's individual mandate—requiring that persons pay a "penalty" to Federal Government for noncompliance—is within Congress' power under Taxing Clause; Medicaid Act's severability clause applies to a provision permitting Secretary to withhold all federal Medicaid funds from States that refuse to comply with expanded Medicaid program. National Federation of Independent Business v. Sebelius, p. 519.

**POLITICAL SPEECH**. See **Constitutional Law,** VI, 1.

**PRE-EMPTION OF STATE LAW**. See **Constitutional Law,** VIII.

**PRUDENTIAL STANDING.** See **Indian Reorganization Act of 1934.**

**QUIET TITLE ACT.** See **Indian Reorganization Act of 1934.**

**REDISTRICTING**. See **Constitutional Law,** I.

**SALES REPRESENTATIVES.** See **Fair Labor Standards Act of 1938.**

**SEARCHES AND SEIZURES**. See **Supreme Court.**

**SENTENCES.** See **Fair Sentencing Act of 2010.**

**SIXTH AMENDMENT.** See **Constitutional Law,** VII.

**SOVEREIGN IMMUNITY.** See **Indian Reorganization Act of 1934.**

**STANDING.** See **Indian Reorganization Act of 1934.**

**STAYS**. See **Supreme Court.**

**STOLEN VALOR ACT**. See **Constitutional Law,** VI, 2.

**SUPREMACY CLAUSE**. See **Constitutional Law,** VIII.

**SUPREME COURT.**

1. Term statistics, p. 1305.

2. *Stays—Pending certiorari petition.*—Maryland Court of Appeals' judgment overturning respondent's first-degree rape conviction on ground that collection of his DNA pursuant to Maryland's DNA Collection Act violated Fourth Amendment is stayed pending a decision on State's certiorari petition. Maryland v. King, (ROBERTS, C. J., in chambers), p. 1301.

**TAXING CLAUSE**. See **Patient Protection and Affordable Care Act.**

**TELEVISION BROADCASTING.** See **Constitutional Law,** IV.

**UNITED STATES SENTENCING GUIDELINES.** See **Fair Sentencing Act of 2010.**

**VOID FOR VAGUENESS.** See **Constitutional Law,** IV.

**WEST VIRGINIA.** See **Constitutional Law,** I.

**WORDS AND PHRASES.**

"*[O]utside salesman.*" Fair Labor Standards Act of 1938, 29 U. S. C. § 213(a)(1). Christopher v. SmithKline Beecham Corp., p. 142.

**ZONE OF INTERESTS.** See **Indian Reorganization Act of 1934.**